

BEFORE THE EXPERT PANEL

IN THE MATTER of the Fast-track Approvals Act 2024 (**FTAA**)

AND

IN THE MATTER of an application by Matakanui Gold Limited under section 42 of the FTAA for the Bendigo-Ophir Gold Project

APPLICATION NO. FTAA-2507-1089

Legal Submissions for Director-General of Conservation
– in response to Applicant’s legal submissions and conditions dated 14 September 2026
Dated 21 September 2026

Barrister instructed: Dean van Mierlo; dean@environmentalbarrister.co.nz

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May it please the Expert Panel (Panel),

The following matters are submitted on behalf of the Director-General of Conservation (DG):

Introduction

1. In Minute 48 the Panel granted leave for any party to file comments in response to Matakanui Gold Limited's (the Applicant) legal submissions and final proposed sets of conditions.
2. These legal submissions respond to the following matters:
 - a. Aspects of the Applicant's legal submissions regarding lizards
 - b. Aspects of the Applicant's proposed resource consent conditions as they relate to terrestrial ecological values
 - c. The Applicant's proposed Wildlife Act Approval and the proposed conditions of that approval
 - d. Minute 51 and the Applicant's response re Ardgour Rise and State Highway 8.

Applicant's Legal Submissions regarding lizards.

Purpose of the Wildlife Act 1953

3. The Applicant agrees with DOC that the purpose of the Wildlife Act is the protection of wild animals, but disagrees that the project can be characterised as failing to give effect to that protective purpose.¹
4. In support of its position, the Applicant refers to sections 53A – 53C of the Wildlife Act, as inserted by the Wildlife (Authorisations) Amendment Act 2025. These provisions are focussed on the authorisation of 'incidental killing', being the killing of wildlife that is incidental to a lawful activity.
5. Section 53A(2) defines incidental in this context.
 - (2) Killing of wildlife is **incidental** if it is not directly intended but is unavoidable and foreseeable as a consequence of carrying out the lawful activity.
6. In the context of the BOGP, DOC agrees that the killing of hundreds of thousands of lizards is foreseeable. However, DOC does not agree that this scale of mortality is 'not directly

¹ Closing legal submissions on behalf of Matakanui Gold Ltd, at [102]

intended’ or is ‘unavoidable’. The applicant’s own evidence confirms that the deaths of many thousands of lizards could be avoided, and that the mortality envisaged is directly intended as a consequence of the BOGP proceeding.

7. Sections 53B and 53C provide further detail regarding when it is appropriate to authorise incidental killing of protected wildlife under the Wildlife Act, and the types of conditions that may be imposed in the context of applications considered by the Director-General of Conservation.
8. Specifically, authorisation under s 53A for ‘incidental kill’ may only be granted if consistent with the protection of wildlife,² and s 53B(2) further requires that
 - [an] authority is to be treated as consistent with the protection of wildlife if, in granting it, the Director-General is satisfied that its overall effect would be consistent with the protection of—
 - (a) populations of wildlife; and
 - (b) individual wildlife.
9. While sections 53A – 53C are directed at processing of wildlife authorisations under business-as-usual processes, by the Director-General, it is submitted that contrary to the Applicant’s submission, these provisions support the view that the killing of 590,000 absolutely protected lizards in the course of developing the BOGP would not be consistent with the purpose of the Wildlife Act.

Biodiversity and Heritage Enhancement Fund - Lizards

10. The Applicant’s legal submissions disagree with DOC’s submission that there is no *certainty* that the BHEF will be spent on lizard work.
11. To clarify, we acknowledge that the purpose of the fund is stated as “including lizards”. However, the purpose of the fund is wider than that, and the expenditure of the fund on a year to year basis would be a discretionary decision for the trustees. There is no requirement that in any year, or over the lifetime of the project, funds are expended on lizard related work. They may be, but that is not certain. And nor is there any certainty as to what, if any, benefits from this fund would accrue to lizards. In DOC’s submission, the BHEF cannot be relied on by the Panel as a benefit to lizards that offsets or compensates

² Wildlife Act 1953, s 53B(1).

or lessens the adverse impacts of the BOGP on lizards. In this respect, any benefits are too uncertain.

12. At paragraph 110 of the Applicant's closing legal submissions, it is stated that to date DOC has not agreed to the option of assuming responsibility, potentially in conjunction with Kā Rūnaka, of managing the Fund and determining how the funds are spent.
13. In DOC's response to RFI 11 and the applicant's draft conditions dated 7 September 2026, DOC set out its preferred condition wording and provided its comments and reasoning on D.03 common conditions for CODC and ORC condition C135.³ In its comments and reasoning, DOC outlined it supports a governance group for the Fund made up of representatives from the applicant, DOC, Kā Rūnaka, and Heritage New Zealand Pouhere taonga and proposed that the purpose of the Fund should be to:
 - a) enhance heritage and cultural values within Central Otago and adjacent areas; and
 - (b) protect and enhance threatened and at-risk species and ecosystems, in accordance with mātauranga Māori, within the Dunstan, Lindis and Pisa Ecological Districts (within the Central Otago Ecological Region)
 by providing funding, project management and administrative support to suitable projects as agreed by the governance group from year to year during the existence of the BHEF.
14. DOC's proposed revised condition wording together with the comment and reasoning set out DOC's current position in relation to the Fund and its governance.

Resource consent conditions re management of impacts on terrestrial ecological values

Adaptive Management

15. The Applicant's proposed resource consent conditions purport to rely extensively on adaptive management for managing the adverse effects of the BOGP on terrestrial ecological values, including spring annuals and lizards.
16. Examples of references to adaptive management, in the CODC and ORC common conditions set include at C27, C28, C77, C120, C121, C122, C158
17. We submit there is a striking discrepancy in the way the Applicant has approached adaptive management in its proposed conditions.

³ DOC's [Comments for the Panel on draft conditions dated 7 September 2026.pdf](#).

18. In relation to water related consents, the Applicant's closing legal submissions highlight and emphasise the commonly recognised and applied legal tests for when it is appropriate to rely on adaptive management, and the requirements for valid and enforceable adaptive management conditions.
19. As the applicant notes, the well- established requirements for adaptive management are identified in the Supreme Court's decision of *Sustain our Sounds v New Zealand King Salmon Co Ltd*.⁴ DOC agrees with the Applicant's summation of the relevant legal requirements for adaptive management at [42] of the Applicant's closing legal submissions.
20. While DOC defers to ORC as to the adequacy of the Applicant's proposed conditions regarding water management (including in relation to adaptive management), DOC submits that the Applicant has taken a quite different approach in relation to adaptive management of impacts of the BOGP on terrestrial ecological values.
21. Specifically, the Applicant's proposed resource consent conditions⁵ repeatedly refer to and rely on the ability to undertake 'adaptive management or contingency measures', however the conditions do not set out what those measures will be, or what the thresholds or triggers for when those measures will be implemented are. For terrestrial values, while adaptive management is proposed, the details are left to be developed in subsequent, future management plans.

Wildlife Approval

22. The Applicant has filed a proposed Wildlife Approval with its closing legal submissions.⁶ Unfortunately, this proposed Approval has not been updated to reflect the Applicant's revised approach to lizard management which it provided in its response to RFI 11. Nor does the Approval proposed show any indication of consideration of DOC's response (including Dr Tocher's further advice statement) filed on 7 September.⁷
23. In DOC's submission, this is extremely disappointing. The Wildlife Approval is a key environmental authorisation required to enable the BOGP, if it is to proceed. Since the Applicant's response to RFI 11 was provided, and with it a new approach to lizard

⁴ See Applicant's closing legal submissions, at [39] –[42].

⁵ See paragraph 16 for example condition number references.

⁶ Filed 14 September 2026 D.11

⁷ Minute 48 provided that MGL was to file a final set of conditions and management plans *following consideration of the feedback received from the parties on 7 September 2026*.

management, DOC has been anticipating and awaiting an updated draft Wildlife Approval that reflects that new approach.

24. The Wildlife Approval provided by the Applicant with closing legal submissions continues to refer to the Ardgour Sanctuary Area, which is no longer proposed. It makes no mention of the Battery Hill pest exclusion area, which is now the cornerstone of the Applicant's lizard management response. The Wildlife Approval also makes no mention of the numbers of lizards, and species, to be salvaged or relocated, despite the fact that this activity cannot lawfully occur unless authorised by a Wildlife Approval.
25. The Applicant's proposed Wildlife Approval is now inconsistent with its own evidence on how it intends to manage the effects of the BOGP on lizards. The responses provided by Dr Baber, Dr Ussher and Mr Barber in support of the reduced salvage effort, and relocation to the Battery Hill and Bendigo pest exclusion areas⁸ are not reflected in the Wildlife Approval and conditions being sought by the Applicant.
26. The Department has numerous other concerns with this proposed Wildlife Approval. Many of these are summarised in the further expert advice of Dr Tocher.⁹ Unfortunately, the Applicant does not appear to have considered or reflected any of Dr Tocher's advice (or indeed the advice of its own experts) into its proposed Wildlife Approval.
27. The Department has engaged extensively, and consistently, with the Applicant on these issues throughout this process, including in recent workshops. Regrettably, the Department's experience has been that the Wildlife Approval has consistently been treated, at best, as an afterthought by the Applicant. As a consequence, the Wildlife Approval filed by the Applicant with its closing legal submissions no longer reflects the Applicant's own proposal, and, in our submission, is not fit for purpose.
28. DOC continues to be available to engage with the Applicant on Wildlife Act issues, but considers that the starting point for any such further engagement would need to be an updated Wildlife Approval document that reflects both the Applicant's revised intentions regarding lizard management (as reflected in its RF1 11 response) and considers and responds to the 13 gaps identified in Dr Tocher's further advice of 7 September.

⁸ Response to Comments on the Applicants Response to RFI 11. Baber, Ussher, Barber. 14 September 2026.

⁹ Further statement of advice of Dr M Tocher, dated 7 September.

Applicant's response to Minute 51 re easements for Ardgour Rise and State Highway 8

29. Minute 51 referred to DOC's comments on condition C.69 re future land vesting of Ardgour Rise and the State Highway 8 intersection. The Applicant's response¹⁰ is to revert to the 30 year terms originally sought for the easement concessions – including the fibre-optic cable.
30. DOC's concern with condition C.69 as per the applicant's 28 August 2026 wording, was that this assumed that following survey and subdivision, all processes to vest Ardgour Rise would be completed within a 3 month period. There was also no provision for similar processes for the State Highway 8 intersection concessions.
31. Vesting these parts of the conservation areas as roads is carried out under the Public Works Act 1981. It would be ambitious to expect these processes to be completed within a 3 month timeframe, and 18 months is more realistic.
32. As the District Council is not part of the Crown, the right of first refusal process must be followed, prior to any vesting in the Council, for the portions of Ardgour Rise and Ardgour Road at the intersection with State Highway 8 which are conservation areas in accordance with Part 9 of the Ngāi Tahu Claims Settlement Act 1998. This does not apply to the NZTA portion of State Highway 8, as NZTA is a Crown entity and Crown to Crown transfers are excepted.¹¹
33. DOC does not support 30 year terms for the easement concessions as proposed by the applicant. DOC does not want to be put in the position of administering parts of the road network through concessions for any longer than necessary. DOC considers that 5 years should be sufficient time for the relevant processes, including the right of first refusal to Ngāi Tahu, to be completed for vesting the roads.
34. DOC's 7 September versions of the easement concessions provided for new concessions to be sought, and the continuation of existing concessions in the interim, should the vesting process take longer than anticipated.



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¹⁰ See Applicant's closing legal submissions, at [124] – [138].

¹¹ Ngāi Tahu Claims Settlement Act 1998, s50(a).