

BEFORE THE EXPERT PANEL

IN THE MATTER	of the Fast-track Approvals Act 2024 (FTAA)
AND	
IN THE MATTER	of an application for approvals under the FTAA for the Bendigo-Ophir Gold Project FTAA-2507-1089

**MEMORANDUM OF COUNSEL FOR ENVIRONMENTAL DEFENCE SOCIETY INC IN
RESPONSE TO MINUTE 56**

09 October 2026

Environmental Defence Society Inc
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Introduction

1. This memorandum is filed by the Environmental Defence Society Inc. (**EDS**) in response to Minute 56 which reserved leave to any party/invitee to comment on the proposed alternative access to Ardgour Rise:

“..which MGL has identified on a contingent basis if, within 25 years of consent being granted, a permanent and sufficiently certain outcome is not achieved in respect of access across the Conservation Estate at the top of the proposed Ardgour Rise alignment..”

2. As noted by the Panel:
 - (a) Vesting of the section of Ardgour Rise that traverses the Ardgour Conservation Area will trigger rights of first refusal in favour of Te Rūnanga o Ngāi Tahu;
 - (b) There is no certainty that vesting will occur within the 30-year concession term; and
 - (c) The Panel cannot condition an approval contingent on future exercise of a discretion by the Department of Conservation to grant a concession beyond the 30-year concession sought under the FTAA application.
3. The current (and certain) public access via Thomson Gorge Road is to be substituted for Ardgour Rise, which (as the Panel has noted) is a concession in the nature of an easement for a 25-year term, leaving vesting arrangements to be pursued during the intervening period with no certainty of outcome.
4. Also relevant to context, EDS submits that there is no certainty that Thomson Gorge Road will be ‘stopped’ under Schedule 10 of the Local Government Act 1974 (or, the Public Works Act process, if that is legally available). The Panel must of course act on the basis that the outcome of a future exercise of discretion under a legally distinct approvals process, cannot be predetermined.¹

The new public access through Shepherds Valley

5. As a starting point, the Applicant appears to acknowledge the validity of the vires considerations identified above.
6. The latest proposal is to provide an alternative access solution, if the vesting process for new Ardgour Rise has not been completed by Year 25.

¹ EDS continues to reserve its position on the legality of the road-stopping agreement(s) / Deed(s) as between CODC and the Applicant.

7. This involves providing:

“..long-term alternative public vehicle access through the road described as ‘upgraded/new four wheel drive track in Shepherds Valley..” shown in Appendix 4 (the **New Alternative Route**).

Same issues arise for the New Alternative Route which remains conditional on future regulatory approvals

8. EDS submits that the most recent iteration of consent conditions does not answer the vires and uncertainty issues identified by the Panel in Minute 56.
9. As with Ardgour Rise, it is **not** certain that Central Otago District Council (**CODC**) will consent to the vesting of the New Alternative Route as public road, **and** that any relevant regulatory approvals will be granted. All that is certain is that future approvals will be required for vesting.
10. This is reflected in new conditions 71A and 71B of D.01 which are contingent upon the grant of future approvals (including consent by the CODC to vesting of the New Alternative Route):

“(iv)..Provided that subdivision consent is granted and any other necessary approvals have been obtained (if any, noting that the entirety of the New Alternative Route is on land owned by Matakanui Gold) the New Alternative Route will be vested in CODC...”

11. While hope may spring eternal, as a matter of law the Panel is required to proceed on the basis that future third party approvals to Ardgour Rise are not secured by Year 25, and that third party approvals to the New Alternative Route are also not secured by Year 30. Accordingly, the Panel must assess whether an easement conferring public access through or adjacent to a mine site over privately held land is equivalent and co-extensive to the existing Thomson Gorge Road.
12. EDS submits that it is not and that this remains an adverse impact under s 85(3) FTAA.

A privately owned road is not a public road

13. The Court of Appeal in *Ours Not Mines*² has recently affirmed the public interest, and importance, of the public right to pass and repass a public road, which does not depend on how often it is used, or whether it is formed. An unformed or long-unused ‘paper road’ carries the same legal public right of passage as any busy city street. The public right to pass and repass remains the paramount consideration. Council roads are held on trust to facilitate the public right of passage over the relevant land.

² *Ours Not Mines Ltd v Hauraki District Council* [2026] NZCA 138 at paragraphs [25], [33]- [34]

14. While that decision related to the context-driven question of appreciable interference through grant of licence for exclusive occupation, it confirms that long-term certainty of rights of public access over a publicly owned road is a fundamental concern.

Not like-for-like

15. The question of alternative access to Thomson Gorge Road remains one of a number of 'Achilles heels' for the Applicant, in which consent conditions agreed to or offered by the Applicant cannot answer fundamental uncertainty in respect of public domain rights.
16. The Applicant is seeking that the Panel endorse a consent conditions regime in which an unformed public road (Thomson Gorge Road) is substituted for a privately owned and managed easement (the New Alternative Access). These are not equivalent or co-extensive, creating a vires question (as the New Alternative Access relies on future and contingent 3rd party approvals), and a merits question under s85(3) FTAA (below).
17. Finally, there is also a merits question relevant to s85(3) FTAA, and on which the Panel has no evidence:
 - (a) The New Alternative Route is effectively located in (or adjacent to) the working areas of the mines, as shown in the Applicant's Appendix 4. No assessment has been done by the Applicant as to technical viability, recreational impacts and user experience, and any other qualitative considerations, such whether this is a like-for-like road;
 - (b) Whether, and the extent to which, use of Ardgour Rise for up to 25 years can be remediated, including ecological restoration or other considerations.
18. In summary, EDS submits that the Applicant has not answered the vires issues raised by the Panel in Minute 56. There remain layers of uncertainty which cannot be addressed by consent conditions offered by the Applicant or imposed by the Panel. These are:
 - (a) Substitution of Thomson Gorge Road for Ardgour Rise Road is contingent on a separate regulatory process (road-stopping) and subject to statutory rights of first refusal in favour of Ngāi Tahu;
 - (b) CODC must vest Ardgour Rise Road;
 - (c) The New Alternative Access is conditional on future subdivision, and likely other approvals, including CODC approval for vesting;
 - (d) Evidential gap in relation to the potential impacts of the New Alternative Access.

19. In all cases, 3rd party approvals have not been obtained, and there is no certainty that they ever will be. These are adverse impacts in relation to the approvals sought, that must be considered under s85(3) FTAA.

Dated this 09th October 2026

Rob Enright / Jen Vella
Counsel for EDS