

**BEFORE THE ENVIRONMENT COURT  
I MUA I TE KOOTI TAIAO O AOTEAROA**

**Decision No. [2019] NZEnvC 160**

IN THE MATTER of the Resource Management Act 1991  
AND of appeals under clause 14 of the First  
Schedule of the Act concerning Topic 2:  
Sub-topic 1 of the Proposed Queenstown  
Lakes District Plan  
BETWEEN HAWTHENDEN LIMITED  
(ENV-2018-CHC-55)  
UPPER CLUTHA ENVIRONMENTAL  
SOCIETY (INC)  
(ENV-2018-CHC-56)  
SEVEN ALBERT TOWN PROPERTY  
OWNERS  
(ENV-2018-CHC-95)  
JAMES WILSON COOPER  
(ENV-2018-CHC-144)  
ALLENBY FARMS LIMITED  
(ENV-2018-CHC-148)  
Appellants  
AND QUEENSTOWN LAKES DISTRICT  
COUNCIL  
Respondent

Court: Environment Judge J J M Hassan  
Environment Commissioner K A Edmonds  
Environment Commissioner J T Baines  
Hearing: at Queenstown on 8, 9, 10, 11, 12, 15, 16, 17, 18 April 2019,  
6, 7, 8, 9, 10, 13, 14, 15, 16 May 2019; and  
at Christchurch on 24 June 2019  
(Site visits were undertaken in the week of 6-10 May 2019)  
Appearances: S Scott & M Wakefield for the Queenstown Lakes District Council  
T J Shiels QC and M G Nidd for Hawthenden Ltd  
J Haworth for Upper Clutha Environmental Society Inc



M Baker-Galloway for Seven Albert Town Property Owners, Real Journeys Ltd, Real Journeys (t/a Go Orange Ltd), Real Journeys (t/a Canyon Food and Brew Co.), Jacks Point Residential No.2 Ltd, Jacks Point Village Holdings Ltd, Jacks Point Developments Ltd, Jacks Point Land Ltd, Jacks Point Land No. 2 Ltd, Jacks Point Management Ltd, Henley Downs Land Holdings Ltd, Henley Downs Farms Holdings Ltd, Coneburn Preserve Holdings Ltd, Willow Pond Farm Ltd, Glendhu Bay Trustees Ltd, Darby Planning LP, Waterfall Park Developments Ltd, Te Anau Developments Ltd, Bill and Jan Walker Family Trust, Darby Planning LP, Real Journeys Ltd, Allenby Farms Ltd, NZ Tungsten Mining Ltd & others, Mt Christina Ltd, Steve Xin, A B Duncan, Gertrude Saddlery Ltd, Sunnyheights Ltd  
 G M Todd for James W Cooper & SYZ Investments Ltd  
 J Gardner-Hopkins for Kawarau Jet Services Holdings Limited & Lake McKay Station Ltd  
 J Leckie for Cardrona Alpine Resort Ltd and Anderson Branch Creek Station, M & C Burgess, Soho Ski Area Limited, Blackmans Creek Holdings No 1 Limited Partnership and Treble Cone Investments Limited  
 J Macdonald for the Rob Roy Residents  
 P Page & S Peirce for Longview Environmental Trust  
 A J Logan for Otago Regional Council  
 R Ashton for Remarkables Park Ltd and Queenstown Park Ltd  
 Dr Cossens in person

Date of Decision: 20 September 2019

Date of Issue: 20 September 2019

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**INTERIM DECISION OF THE ENVIRONMENT COURT**  
**Topic 2: Sub-topic 1 – ONL and ONF maps**  
**Decision 2.1: overarching principles, the Clutha/Mata Au Corridor, Mt Iron**

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- A: The appeal by Upper Clutha Environmental Society (Inc) ENV-2018-CHC-56 is **declined in part**, namely:
- (i) the request for the Landscape Lines shown on the ODP maps to be rolled-over in their exact current form (with associated text) is **declined**;
  - (ii) the determination of the remainder of UCESI's relief on Sub-topic 1 (and the remainder of Topic 2) is **reserved**.





- B: The appeal by Seven Albert Town Property Owners ENV-2018-CHC-95 is **declined in part**, namely:
- (i) the outstanding natural landscape notation on the relevant district planning maps is to be changed to an outstanding natural feature notation;
  - (ii) subject to that notation change, the present landscape overlay boundary in the locality of the appeal area is confirmed unchanged;
  - (iii) determination of the nature and content of an associated schedule of outstanding natural feature values and other matters is reserved, with directions for a pre-hearing conference to follow.
- C: The appeal by James Wilson Cooper ENV-2018-CHC-144 is **declined in part**, namely:
- (i) the outstanding natural landscape notation on the relevant district planning maps is to be changed to an outstanding natural feature notation;
  - (ii) subject to that notation change, the present landscape overlay boundary in the locality of the appeal area is confirmed unchanged;
  - (iii) determination of the nature and content of an associated schedule of outstanding natural feature values and other matters is reserved, with directions for a pre-hearing conference to follow.
- D: The appeal by Allenby Farms Limited ENV-2018-CHC-148 is **allowed in part**, namely:
- (i) the relevant district planning maps are to be changed to remove 'Area A' from the Mt Iron outstanding natural feature;
  - (ii) determination of the nature and content of an associated schedule of ONF values and other matters is reserved, with directions for a pre-hearing conference to follow;
  - (iii) Rob Roy Residents Group's request for a consequential amendment/s293 determination to change the Low Density Residential zoning of Areas B and C to a Rural zoning is declined.
- E: Costs are reserved. Timetable directions will be made in due course (following determination of the Topic 2 appeals).



## REASONS

### Introduction

[1] Queenstown Lakes District Council ('QLDC')<sup>1</sup> is undertaking a review of its district plan ('ODP') ('Plan Review') in chapter-related stages. This is a partial review, in that it does not encompass the entirety of the ODP.<sup>2</sup> Public notices for the review refer to the collection of notified proposed changes to the ODP as a 'proposed district plan'<sup>3</sup> ('PDP'). However, the review is not to replace the district plan as a whole but to substantially change and replace much of its content.

[2] QLDC's decisions on Stage 1 of this review were made in 2018. Appeals against those decisions are being heard and determined in topic groupings. We refer to the plan provisions updated or made by those decisions as the 'DV'.

[3] This decision concerns an aspect of what is termed 'Topic 2' of the appeals, on 'Rural Landscapes'. It concerns the mapping of Outstanding Natural Landscapes ('ONL') and Outstanding Natural Features ('ONFs') (ie 'Sub-topic 1' of 'Topic 2'). Those maps are provisions that serve the application of related objectives, policies and rules for the control of the subdivision, use and development of land for the protection of ONLs and ONFs.

[4] In *WESI*,<sup>4</sup> the Environment Court borrowed from Denis Glover's poem, *Arawata Bill*, in characterising the District as "this country crumpled like an unmade bed".<sup>5</sup> Some 97% of the District's land area is mapped in the PDP as ONL or ONF.<sup>6</sup> However, appeals against the DV's ONL and ONF mapping are generally confined. With the important exception of the appeal by Upper Clutha Environmental Society Inc ('UCESI'),<sup>7</sup> they do not challenge the fundamental approach of the DV to mapping ONLs and ONFs. Nor do they oppose the entirety of any ONL or ONF; instead they are concerned with whether

<sup>1</sup> Queenstown Lakes District Council, the respondent in the appeals.

<sup>2</sup> Refer to Decision [2019] NZEnvC 133 at [6].

<sup>3</sup> <https://www.qldc.govt.nz/planning/district-plan/proposed-district-plan-stage-1/>

<sup>4</sup> *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59, at [1].

<sup>5</sup> The Search from *Arawata Bill* Denis Glover, Selected Poems, Penguin, 1981.

<sup>6</sup> Most of the remaining 3%, leaving aside the urban areas, is identified by the PDP as Rural Character Landscapes ('RCL').

<sup>7</sup> ENV-2018-CHC-56.





boundaries should be changed in specified areas and localities. Those disputed areas and localities will be broadly familiar to residents of and frequent visitors to the Wanaka area:

- (a) the 'Alpha Fan', that appears as a sloping pastured terrace cut by a central gully, beneath the Mt Alpha Range to the west of the township of Wanaka;<sup>8</sup>
- (b) an area referred to as 'Waterfall Hill and Waterfall Creek' just beyond the township along Mount Aspiring Road;<sup>9</sup>
- (c) beyond Dublin Bay and Mount Brown, some 8km or so by road from Albert Town, a large area of land including the Maungawera Valley, Mt Brown and the Maungawera Fan;<sup>10</sup>
- (d) back at Albert Town, a reach of the Clutha River/Mata Au Corridor, on the true right bank, more or less between the waters and the top of the distinctive embankment just to the right as one crosses the SH6 single lane bridge on a return to Wanaka;<sup>11</sup>
- (e) further down river below the Clutha/Hawea confluence and above Rekos Point and the 'Red Bridge', an area of terraced dairy farming land on Hawea Flat;<sup>12</sup> and
- (f) above and surrounding the township of Luggate, at the northern end of the rugged Pisa and Criffel Ranges, a series of elevated pastured plateaus and downs that form part of Lake McKay Station.<sup>13</sup>

### Issues addressed by this decision

[5] In accordance with directions made, all closing submissions from parties to Sub-topic 1 (and the remainder of Topic 2) have been received and considered. This first decision on Sub-topic 1 concerns the following matters:

- (a) a preliminary issue raised by UCESI concerning our capacity to determine ONL and ONF mapping boundary matters;

<sup>8</sup> Appeal by Hawthenden Farm Limited ENV-2018-CHC-55.

<sup>9</sup> Appeal by UCESI ENV-2018-CHC-56.

<sup>10</sup> Appeal by UCESI ENV-2018-CHC-56.

<sup>11</sup> Appeal by Seven Albert Town Property Owners ENV-2018-CHC-95.

<sup>12</sup> Appeal by James Cooper ENV-2018-CHC-144.

<sup>13</sup> Appeal by Lake McKay Station Limited ENV-2018-CHC-160.



- (b) related to that issue, some principles for landscape assessment that are also pertinent to our determination of other Sub-topic 1 appeals;
- (c) the following ONL and ONF boundary dispute matters:<sup>14</sup>
  - (i) in relation to land along the Clutha River/Mata Au corridor, the appeals by Seven Albert Town Property Owners ('SATPO') and James Cooper;
  - (ii) in regard to the Mt Iron ONF, the appeal by Allenby Farms Limited ('Allenby') (and s274 party matters raised by Rob Roy Residents).

### **Statutory framework and general principles**

#### ***General***

[6] Some general matters as to the statutory framework and related legal principles are traversed in our first substantive decision on appeals on Topic 1 Stage 1 ('Topic 1 Decision').<sup>15</sup> As none of those general matters are contentious for Sub-topic 1, we adopt and apply what we said in that decision on those matters. In summary:

- (a) we apply that version of the Resource Management Act 1991 ('RMA') that predates the Resource Legislation Amendment Act 2017;
- (b) our primary jurisdiction, as a judicial appellate body, is in s290 RMA and is limited to matters that are reasonably and fairly raised in the PDP, submissions and appeals (subject to the discretion in s293, the parameters of which are summarised in that decision);
- (c) we must have regard to the appealed decision(s) (s290A), and we also have regard to the report and recommendations of the independent hearings commissioners that informed QLDC's decisions; and
- (d) we inherit the powers, duties and/or discretions listed at [23](a) – (e) of the Topic 1 Decision, within the above-noted parameters of our appellate function.

[7] We adopt the analysis of s32 RMA at [26] – [40] of the Topic 1 Decision insofar as it is relevant to this decision. In terms of s32, we note that the planning maps in issue with Sub-topic 1 appeals are to be analysed as provisions to serve related objectives,

<sup>14</sup> Other Sub-topic 1 appeals will be the subject of decision(s) to follow.

<sup>15</sup> [2019] NZEnvC 133 at [15] – [21].





policies and other rules. Related objectives and policies will be the subject of our later Topic 2 decision(s). Other provisions, including assessment matters and other rules, are scheduled to be determined later in our topic sequence.

***Section 6(b) and the proposed Regional Policy Statement***

[8] The issues in the Topic 2 Sub-topic 1 appeals concern the proper application of s6(b) RMA. Related to that is the proper interpretation of related policy directions in the partially-operative proposed Otago Regional Policy Statement 2019 ('pRPS').

[9] Section s6(b) RMA provides:

**6 Matters of national importance**

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

...

- (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development: ...

[10] At [25] of the Topic 1 Decision, we recorded as follows concerning the pRPS:

The review of the Otago Regional Policy Statement 1998 ('RPS98') is now well advanced with several of its provisions now superseded by operative provisions of the ... [pRPS]. Some of the pRPS provisions are before the court for consent order determination. It can be anticipated that the advance of the pRPS to becoming the only operative RPS will continue through the process of the court's determination of PDP appeals. As such, in determining whether the PDP gives effect to the RPS, we leave aside all superseded RPS98 provisions and treat all operative pRPS provisions as, in essence, part of the emerging RPS. Further, our regard to yet-operative pRPS provisions is on the basis that provisions beyond contention on appeal are accorded weight that reflects their likely role as future operative RPS provisions.

[11] The position as described in that paragraph remains essentially unchanged. The pRPS includes some policies and related provisions on the approach to landscape assessment that were not contentious in regard to Sub-topic 1.<sup>16</sup> Those provisions were duly considered and applied by those landscape experts who undertook expert

<sup>16</sup> We record that aspects of the interpretation of the pRPS are more matters of contention for other Topic 2 matters to be the subject of our further decision(s).



conferencing on landscape methodology to produce a joint witness statement, dated 29 January 2019 ('Landscape Methodology JWS').<sup>17</sup> Relevant provisions are as follows:<sup>18</sup>

**Policy 3.2.3 Identifying outstanding natural features, landscapes and seascapes**

Identify areas and values of outstanding natural features, landscapes and seascapes, using the attributes in Schedule 3.

**4.2 Implementing district plans.**

City and District Councils will implement the following policies:

4.2.2 Policies ... 3.2.3 ...: to assess the values of places of potential significance to inform the decision making process;

**Schedule 3 Criteria for the identification of outstanding natural features, landscapes and seascapes, and highly valued natural features, landscapes and seascapes**

The identification of natural features, landscapes and seascapes will have regard to the following criteria:

1. Biophysical attributes
  - a. Natural science factors, including geological, topographical, ecological and dynamic components
  - b. The presence of water including in seas, lakes, rivers and streams
  - c. Vegetation (native and exotic)
2. Sensory attributes
  - a. Legibility or expressiveness—how obviously the feature or landscape demonstrates its formative processes
  - b. Aesthetic values including memorability and naturalness
  - c. Transient values including presence of wildlife or other values at certain times of the day or year
  - d. Wild or scenic values
3. Associative attributes
  - a. Whether the values are shared and recognised
  - b. Cultural and spiritual values for Kāi Tahu, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features
  - c. Historical and heritage associations.



<sup>17</sup> As we come to discuss in our Topic 2 decisions, the relevant landscape experts also produced a number of other helpful joint witness statements on matters in issue for particular appeals.

<sup>18</sup> As changed by Environment Court in Procedural Decision [2019] NZEnvC 42, dated 15 March 2019.



[12] There are some related principles on landscape assessment that we discuss from [35]. Before we do so, we now address the preliminary issue raised by UCESI.

**Is the lack of a District-wide landscape assessment fatal to the PDP maps?**

[13] UCESI express their concern on these matters in this way:

10. The decision errs in deciding that the Landscape Lines delineating ONL, ONF's and Rural Character Landscape in the maps in the PDP Stage 1 decision are credible. The decision errs in failing to recognise that the process behind identifying these Landscape Lines is flawed. The decision errs in deciding that there is "an adequate evidential foundation for identifying ONL and ONF lines". The decision errs in deciding that, as delineated, these Landscape Lines will be efficient and effective in categorising landscapes and in implementing the objectives, policies, assessment matters and rules attached to such categorisations. The decision errs in giving limited weight to the expert landscape evidence of Diane Lucas in relation to the ONL/ONF/RCL Landscape Lines

[14] By way of relief, UCESI seek reversion to the ODP, in essence to the effect that the PDP maps are set aside:

7. That the Landscape Lines shown on the ODP maps are rolled-over in their exact current form. That the Landscape Lines additional to those contained on the ODP maps, shown on the PDP Stage 1 maps, are included in the PDP as dotted lines (with the exception of the two locations at Dublin Bay/Mount Brown, Waterfall Hill/Waterfall Creek described below) with the following attendant text shown on all maps where these dotted lines appear:

*Boundary between two different landscape categories. The solid lines represent landscape categories determined by the Court and are not subject to change. The dotted lines have been determined under a broad-brush analysis as part of the District Plan process but have not yet been through a detailed analysis of specific physical circumstances of each site in the Environment Court to determine their exact location and so are not definitive. The dotted lines are purely indicative until their exact location has been determined through the Environment Court process.*

[15] The Landscape Methodology JWS helpfully explains the background to this issue



concerning the lack of a District-wide landscape assessment:<sup>19</sup>

- (a) In the Operative District Plan (ODP), some landscape classifications were identified in maps appended to the plan. These were based on Environment Court appeal decisions and were limited to locations where appeals had occurred. ONL/F boundaries in the maps were either dashed (indicative) or solid (fixed), with both types of boundaries being based on Environment Court decisions.
- (b) We understand that in preparation for the PDP the following processes took place:
  - the ONLs and ONFs that had already been identified on the maps appended to the ODP were assumed by Council's landscape architects to have been appropriately identified, in a general sense;
  - review of the boundaries identified on the maps, and extension of these boundaries, using landscape characterisation methods and with reference to previous landscape assessment reports;
  - a process of matching 'like with like' (through landscape characterisation and evaluation based on the Pigeon Bay factors) to identify other ONL and ONF that had not been identified in the ODP appendices;
  - peer review by landscape architects familiar with the district.
- (c) The attributes and values of each ONL/ONF were not consistently documented as part of this process.

[16] The independent commissioners who heard submissions and made recommendations for the Topic 2 provisions were also very much alive to this issue. Their Report and Recommendations to QLDC records:<sup>20</sup>

- 384. In our view, some aspects of ONLs and ONFs are more important than others, as the Proposed RPS recognises. Desirably, one would focus on the important attributes of the particular ONL and ONF in question. The PDP does not, however, identify the particular attributes of each ONL or ONF. The ODP, however, focuses on the landscape values, visual amenity values and natural character of ONLs in the Wakatipu Basin, and we recommend that this be the focus of the PDP objective addressing ONLs and ONFs more generally – accepting in part a submission of UCES that, at least in this regard, there is value in rolling over the ODP approach.
- 385. Identifying the particular values of ONLs and ONFs of most importance also responds to submissions made by counsel for Skyline Enterprises Ltd and others that the restrictive provisions in the notified plan had not been justified with reference to the factors being protected.



<sup>19</sup> Landscape Methodology JWS, at 2(a) – (c).

<sup>20</sup> Hearing of Submissions on Proposed District Plan Report 3 Report and Recommendations of Independent Commissioners Regarding Chapter 3, Chapter 4 and Chapter 6.



[17] Their Report 16.1<sup>21</sup> recommended, amongst other things, that QLDC:

... identify the attributes of ONLs and ONFs that are identified that contribute to those landscapes and features being outstanding.

[18] Contrary to that recommendation, the DV does not include any description of values for its mapped ONLs and ONFs.

### **Evidence**

[19] The Landscape Methodology JWS expresses various opinions of the landscape experts on the implications of this lack of District-wide landscape assessment for the reliability or otherwise of the ONL and ONF boundaries. There is a general consensus amongst the experts who signed that statement that a District-wide assessment is the 'ideal'. The witnesses record (at p 11, of the JWS):

- (e) In an ideal case, a comprehensive district-wide landscape study (undertaken from 'first principles') would have been done in preparation for the PDP. Such a landscape study could be referenced in the PDP and would underpin assessment of any future resource consent or plan change applications, thus improving consistency between application-specific assessments under 21.21.1 of the PDP.
- (f) A comprehensive study would also establish the attributes and values of the ONL and ONF and how they relate at the scale of the district as a whole. It is important that attributes and values be determined independently and consistently.

[20] The experts acknowledge, however:<sup>22</sup>

- (d) Most of the ONL and ONF identified in the PDP have not been contested. The boundaries of the ONL/F have been contested in some locations, and in general by one party.
- ...
- (g) Due to the scale and complexity of the District's rural landscapes, a comprehensive study would be time-consuming to undertake.



<sup>21</sup> Report and Recommendations of Independent Commissioners Regarding Upper Clutha Planning Maps, Outstanding Natural Landscapes, Outstanding Natural Features and Significant Natural Areas, at [42].

<sup>22</sup> Landscape Methodology JWS p 11.

[21] UCESI called a highly experienced landscape expert, Dianne Lucas. She does not support the relief UCESI pursue in regard to this matter. Instead, the Landscape Methodology JWS records Ms Lucas as agreeing with QLDC's experts (Ms Mellsop, and a peer review landscape expert Ms Gilbert).<sup>23</sup> Their collective opinion is as follows:<sup>24</sup>

(h) While a comprehensive first principles rural landscape assessment may be ideal and helpful, there are concerns about its level of usefulness as part of this district plan review. There is also concern about the scale and extent of ONL within the District, and the potential lack of detail identified for attributes and values to address every locale. The level of detail possible in a district-wide study may not be of any great practical assistance in plan administration (HM, DL, BG).

...

(k) Given that there are relatively few challenges (in terms of location or spatial extent) to the PDP ONL and ONF, then the application-specific assessment of landscape attributes and values (in accordance with 21.21.1.3) may be a pragmatic solution for areas inside the boundaries of the ONL and ONF (HM, BG, DL).

[22] Those opinions are not shared by the other landscape experts who are signatories to the Landscape Methodology JWS: Nicola Smetham (called by Hawthenden Farm), Tony Milne and Yvonne Pflüger (neither of whom gave evidence on Sub-topic 1). Their opinion is as follows:

(i) If a landscape study is prepared well and according to best practice there will not be any issues with usefulness or inadequacies of detail. The Proposed Otago Regional Policy Statement directs that a landscape study be undertaken and the area requiring assessment is comparable to that in other districts. It is preferable for attributes and values to be determined independently and consistently rather than in response to applications for use and development. (TM, YP, NS).

...

(l) A pragmatic approach as described under (...k) under the current circumstances is not an appropriate response (YP, TM, NS).

### **Submissions**

[23] At [13] and [14], we set out the position that UCESI has about these matters. In closing submissions, UCESI President, Mr Haworth also said:<sup>25</sup>

<sup>23</sup> Ms Gilbert was called by QLDC as a peer review witness. While she offered opinions on these matters in her Topic 2 evidence, including in answer to the court's questions, she did not give evidence on Sub-topic 1.

<sup>24</sup> Landscape Methodology JWS p 12.

<sup>25</sup> Closing submissions for UCESI, dated 24 July 2019, at [3] – [5].





In relation to the District's Landscape Lines (LL) it is central to the Society's case that the process followed to arrive at the new LL in the PDP was not sufficiently robust and so not always reliable. (This is termed the PDP's "lack of clear foundation in values identification" in the Court's minute.)

[24] Hawthenden Farm also made submissions on this issue. Unlike UCESI, however, Hawthenden did not challenge the reliability of the DV's ONL and ONF mapping as a whole. On Sub-topic 1, its appeal is confined to the choice of boundary for the Mt Alpha ONL across its Farm.

[25] Counsel for Hawthenden, Mr Shiels QC submits that it "certainly does not assist" determination of the spatial extent of the ONL "that it is not clear exactly what it is in that landscape that it is necessary to protect".<sup>26</sup> He makes a number of submissions in favour of the use of scheduling and the proper interpretation of s6(b) and the pRPS. We leave those submissions aside as they are more properly addressed in the context of our consideration of the Hawthenden appeal, which will be the subject of a further decision in due course.

[26] QLDC does not offer any closing submissions on these matters. That is on the basis that it read the Court's 11 July Minute on issues for closing as intending that only site-specific matters would be determined by this decision. We record that the Minute was explicit that it was not intended to constrain or prescribe how parties preferred to frame their closings. Furthermore, the general matters raised by UCESI pertain to consideration of landscape assessment methodology, a matter that is inherent to the determination of all site-specific relief in the Sub-topic 1 appeals. However, we have not been significantly impeded by QLDC's approach. Further, our findings in this decision take account of QLDC's related closing submissions on the remainder of Topic 2.<sup>27</sup>

### ***Discussion***

[27] We decline UCESI's request that we direct that the ONF and ONL mapping revert unchanged to what the ODP provided, for the following reasons.

<sup>26</sup> Opening submissions for Hawthenden, dated 24 June 2019, at [8].

<sup>27</sup> Second supplementary closing submissions for QLDC, Topic 2: Rural landscapes, Sub-topics 2 to 10, dated 4 September 2019.



[28] We acknowledge that QLDC made its mapping decisions on the basis of peer-reviewed advice from landscape experts. We are satisfied that we can determine the relatively confined ONF and ONL boundary issues that are in issue in the Sub-topic 1 appeals on the evidence before us.

[29] However, those findings keep alive our consideration of the most appropriate package of Topic 2 provisions in response to s6(b), of which ONF and ONL mapping is only a part.

[30] As *Man O'War Station Limited v Auckland City Council*<sup>28</sup> recognised (in the context of a policy instrument that enunciated related values), much turns on what is sought to be protected.<sup>29</sup> Mapping only assists in identifying the geographic extent of what is sought to be protected. Listing those values that inform why a feature or landscape is an ONF or ONL is an important further element of setting out what is sought to be protected. That is particularly given the significant element of judgment required to select features and landscapes as “sufficiently natural” to warrant identification as ONFs or ONLs. In particular, that selection includes choices as to the significance or otherwise of human modifications to a feature or landscape. Associated with those choices are judgments as to the resilience, or otherwise, of the feature or landscape to further human modification. Transparency in the ODP about those choices is highly desirable, in terms of certainty, in that it helps inform what is inappropriate subdivision, use and development.

[31] Objectives, policies, assessment matters and other rules are relatively limited in their capacity to enunciate particular ONF or ONL values because they are designed to apply generically. The listing of relevant values, provided it is properly informed and expressed, helps plug that gap. As such, scheduling values would assist the ODP to fulfil its protective purposes.

[32] The related objectives, policies and rules (including on assessment matters) will be the subject of our further Topic 2 decision(s) (for which we have now received closing submissions).

[33] As to the matters UCESI raises concerning the lack of any underpinning District

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<sup>28</sup> *Man O'War Station Limited v Auckland City Council* [2017] NZCA 24.

<sup>29</sup> *Man O'War*, at [65].





wide landscape assessment, we agree with Ms Lucas and Ms Mellsop that this does not preclude us from determining the most appropriate Topic 2 provisions. That is because we are satisfied that we can do so within the scope of the relevant appeals (and, potentially through s293, RMA). However, insofar as the Landscape Methodology JWS goes on to record that those experts consider landscape assessments can be left to resource consent application processes, we do not agree that this is appropriate for the following reasons:

- (a) an inherent problem in seeking to rely on consent application processes as the primary means of landscape assessment is that those processes do not typically pertain to an entire ONF or ONL. More typically, they pertain to very confined areas of land, not necessarily even entirely within any ONF or ONL and to the proposal for which consent is sought. Hence, any landscape assessment undertaken in a resource consent application process would not properly substitute for the role the plan itself is intended to fulfil in identifying what is sought to be protected for the purposes of s6(b) RMA;
- (b) secondly, the landscape and other environmental assessment in a resource consent application process is not impartial. Rather, a consent application AEE advocates for the proposal sought to be advanced by the consent application;
- (c) related to those problems, QLDC's consideration of a consent application is as a consent authority, not a planning authority with stewardship responsibility for the identification of features and landscapes as ONFs and ONLs. Furthermore, that consent authority role would be typically delegated to independent commissioner(s).

[34] On the basis of those findings, we proceed to determine the site-specific mapping relief pursued in the various Sub-topic 1 appeals. We next discuss related principles for landscape assessment that inform our findings on the relief pursued in those appeals.

### **Principles for landscape assessment**

#### ***The meaning of 'natural feature' and 'natural ... landscape' in s6(b)***

[35] The RMA does not define 'natural feature' or 'natural ... landscape' as used in s6(b) RMA. The Landscape Methodology JWS assists our understanding of these



concepts. It applies the following definition of 'landscape' (more precisely, 'natural landscape') developed by the NZ Institute of Landscape Architects ('NZILA') for the purposes of s6(b):

Landscape is the cumulative expression of natural and cultural features, patterns and processes in a geographical area, including human perceptions and associations.<sup>30</sup>

[36] We accept and apply that definition in our consideration of the Sub-topic 1 appeals.

[37] We also accept and are guided by the following related explanation in the Landscape Methodology JWS:

Typically, 'landscapes' display characteristics such that they are distinctive from adjacent landscapes and can be identified and mapped. However, in some circumstances the attributes are more subtle and/or common to more than one area, making it more difficult to define the spatial extent of a landscape. In such circumstances it may be appropriate to focus on whether the landscape can be meaningfully perceived as 'a whole'. It is important that where this approach to the identification of a landscape is applied, it is clearly transparent in the assessment.

[38] We are not aware of any corresponding NZILA definition of 'natural feature', but note that the following explanation of this concept in the Landscape Methodology JWS is helpfully consistent with the NZILA's definition of 'landscape':

A feature typically corresponds to a distinct and clearly legible biophysical feature (eg. *rôche moutonnée*, volcanic cone, water body). It is acknowledged that scale and context will play a role in determining whether the area is a feature or landscape.

### ***The WESI factors for assessing landscape significance***

[39] The courts have frequent recourse to the so-termed *WESI*<sup>31</sup> factors to guide the assessment of landscape significance for the purposes of s6(b). They are from the decision of His Honour Judge Jackson's division in *WESI*,<sup>32</sup> particularly the following passage (footnotes omitted):

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<sup>30</sup> NZILA Best Practice Note 10.1 'Landscape Assessment and Sustainable Management'.  
<sup>31</sup> *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59.  
<sup>32</sup> *WESI*, at [80].





Consequently, we have no reason to change the criteria stated in *Pigeon Bay* in any major way. We list them here for three reasons: first, in (a) to add 'ecological' components and to delete 'aspects' and substitute 'components', and secondly to correct the grammar in (c) and (d); and thirdly in (c) to give an alternative for 'expressiveness'. The corrected list of aspects or criteria for assessing a landscape includes:

- (a) the natural science factors – the geological, topographical, ecological and dynamic components of the landscape;
- (b) its aesthetic values including memorability and naturalness;
- (c) its expressiveness (legibility): how obviously the landscape demonstrates the formative processes leading to it;
- (d) transient values: occasional presence of wildlife; or its values at certain times of the day or of the year;
- (e) whether the values are shared and recognised;
- (f) its value to tangata whenua;
- (g) its historical associations.

We should add that we do not regard this list as frozen – it may be improved with further use and understanding, especially of some of the issues we now explore. One aspect that troubles us in particular is that the dictionary senses of landscape as a view of scenery or, perhaps, a collection of views – while included in (b), is given less emphasis than we consider the RMA might suggest. Another matter that needs further consideration is whether (b) might be better expressed in terms of all the amenity values, rather than just one quality – aesthetic coherence.

[40] It can be observed that pRPS Sch 3 reflects *WESI* and the case law that built on it. Furthermore, the Landscape Methodology JWS explains:

- (a) For a landscape to rate as an ONL or ONF, three key questions need to be satisfied:
  - a. Is the area a 'landscape' or 'feature'?
  - b. Is the landscape or feature 'natural'?
  - c. Is the natural landscape or feature 'outstanding'?
- (b) For the purposes of a Landscape Study, the following definition of 'landscape' (endorsed by the NZILA) is usually applied by the study team:

*"Landscape is the cumulative expression of natural and cultural features, patterns and processes in a geographical area, including human perceptions and associations."*

– NZILA Best Practice Note 10.1

'Landscape Assessment and Sustainable Management'



- (c) This definition points to the concept of 'landscape' embracing three broad components:
- a. Biophysical attributes;
  - b. Sensory attributes; and
  - c. Associative attributes (the 'meanings' of the landscape).

(NB: consistent with ... [pRPS] Schedule 3.)

The scope of this definition of 'landscape' is in keeping with the range of attributes (commonly referred to as the WESI or modified Pigeon Bay attributes) that have been widely accepted by the Environment Court and landscape experts to provide a useful starting point in evaluating landscapes.

Put another way, it is generally accepted that a thorough assessment of a landscape in terms of these three components assists in identifying 'the extent of the landscape/feature' and answering the questions to whether it is 'natural' and 'outstanding'.

[41] We find the Landscape Methodology JWS sound in its application of the *WESI* factors and in response to related pRPS provisions. As such, we also find the Landscape Methodology JWS a helpful point of reference for our evaluation of the landscape assessments undertaken by the respective witnesses. Our consideration of *WESI* is in light of the guidance and instruction offered by the Court of Appeal decision in *Man O'War*.

***Is there a threshold of sufficient naturalness and is planning status relevant?***

[42] We deal with these issues together as the Court of Appeal decision in *Man O'War* is a leading authority on both. The issues are relevant to the proper interpretation of s6(b) RMA in the context of district plan formulation. For s6(b) to apply to any natural feature or landscape, it must be 'outstanding'. The RMA does not define that word. Inherently, it calls for the exercise of informed comparative judgment as to the values of any natural feature or landscape.

***Is there a threshold of sufficient naturalness?***

[43] The *Man O'War* decisions concerned an appeal on a change to the Auckland Regional Policy Statement ('ARPS') on ONL policies. A matter agreed between the parties was that all of the areas where ONL classification was disputed had "sufficient





*natural* qualities for the purposes of s6(b) of the Act".<sup>33</sup> The High Court upheld the Environment Court's decision (of Principal Judge Newhook's division). On further appeal, the Court of Appeal upheld the High Court decision. In doing so, it made the following observations as to the intentions of s6(b):<sup>34</sup>

[61] ... the issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s 6(b) of the Act requires an essentially factual assessment based upon the inherent quality of the landscape itself. The direction in s 6(b) of the Act (that persons acting under the Act must recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development) clearly intends that such landscapes be protected. Although that was underlined in *King Salmon*, the Court was simply reflecting an important legislative requirement established when the Act was enacted.

[44] In discussing the question of whether it is necessary to undertake a comparative assessment with other landscapes, nationally or regionally, in order to adjudge whether a landscape is sufficiently natural to be an ONL, the Court made the following observation:<sup>35</sup>

[86] We do not see any error in the Environment Court's approach. The question of whether or not a landscape may be described as outstanding necessarily involves a comparison with other landscapes. We also accept that the adjective is a strong one importing the concept that the landscape in question is of special quality. However, we suspect little is to be gained by applying a range of synonyms for what in the end involves a reasonably direct appeal to the judgment of the decision-maker. Whatever comparator is taken, the ultimate question is whether the landscape is indeed able to be described as outstanding.

[45] In the following paragraphs, the Court makes the following related observations (**our emphasis**):<sup>36</sup>

... We see no reason why a landscape **judged to be outstanding** in regional terms should not be protected as a matter of national importance, the legislative policy being achieved by the protection of ONLs throughout the country on this basis.

...

<sup>33</sup> *Man O'War*, at [7].

<sup>34</sup> *Man O'War*, at [61].

<sup>35</sup> *Man O'War*, at [86].

<sup>36</sup> *Man O'War*, at [87].



It is necessary to take into account that in developing a regional policy statement, **the regional council (or unitary authority) concerned is engaged on a task that is based upon its stewardship of the region. ...**

[46] One issue between QLDC and some parties, and their respective experts, is as to whether there is a necessary naturalness threshold to be met (ie 'moderate-high') before an area of land is eligible to be considered as part of an ONL or ONF.

[47] In opening, QLDC submitted that "the location of the extent/boundaries of ONL/F is, in essence, a matter of primary fact and judgment". It referred to *Man O'War* as "approving of a 'top-down' approach to the categorisation process, finding that whether land is sufficiently natural to make it an ONL requires an essentially factual assessment based upon the inherent quality of the landscape itself".<sup>37</sup>

[48] QLDC argues that an area of land that has comparatively less naturalness through human modification, but reads as part of an ONF or ONL, is still capable of being treated as part of the ONF or ONL. It depends on context. That is on the basis that the primary focus should be on how the ONF or ONL reads as a landform (not on how any comparatively small area of land in contention in an appeal reads in isolation). It submits that 'carve outs' of developed areas that are legibly within an ONF or ONL are "undesirable". Counsel cites the Environment Court decision in *Western Bay of Plenty District Council*<sup>38</sup> (commonly termed the *Matakana* decision) in support of its position, particularly the following passage:<sup>39</sup>

The case law does not support a categorical approach that the presence of human activities disentitles a feature or landscape from being identified as outstanding or natural. The acceptance of features and landscapes that are not pristine as being still natural and the concept of cultured nature are based on recognition not only that the impact of human activity is pervasive but also that the presence of such activity may be congruent with nature. Obviously it is a matter of degree. But in the same way that pasture or other farmed areas can be part of an ONFL, there is no categorical basis on which a plantation forest cannot.

[49] QLDC relies on the Landscape Methodology JWS and the opinion of Ms Mellsop for its position.

<sup>37</sup> Opening submissions for QLDC, dated 6 May 2019, at [3.2], citing *Man O'War* at [61].

<sup>38</sup> Closing submissions for QLDC, dated 2 August 2019, at [2.13] – [2.18], [3.15] – [3.30].

<sup>39</sup> *Matakana*, at [158].





[50] ORC, Allenby, James Cooper and Lake McKay Station Limited ('LMSL') disagree. Counsel for Otago Regional Council<sup>40</sup> ('ORC'), Mr Logan submits that it is "generally recognised" that, in order for land to qualify as "sufficiently natural", there must be "at least [a] *moderate-high* degree of naturalness" to be an ONL or ONF.<sup>41</sup> These parties rely on their respective experts (Stephen Quin, Anne Steven, Benjamin Espie, Patrick Baxter).

[51] Before we discuss the basis for these different interpretations, we note that the construct of 'moderate to high' naturalness derives from systems for scaling relative naturalness that the expert witnesses applied (and, indeed, are now in reasonably common usage in the landscape assessment profession). One such scale, preferred by a number of the experts, has seven divisions from 'Very low modification' (tagged 'VL') to 'Greatest modification' (tagged 'VH'). The five intervening points or ranges on this scale are 'L', 'M-L', 'M', 'M-H' and 'H'. Ms Mellsop prefers, and applied, a five division "qualitative verbal scale" of the "significance and strength" of values, ie "very low, low, moderate, high and very high". Aside from those different preferences, a more substantial difference between some experts (notably, Ms Steven and Ms Mellsop) is as to whether there is a threshold of eligibility for 'sufficiently natural' in order for land to qualify as part of an ONF or ONL.

[52] Ms Steven explained her reason for applying such a threshold to be that "a rating of moderate to high for naturalness" is unhelpfully loose as it would mean "that a landscape could either have a moderate degree of natural character or a high degree of natural character or somewhere in between".<sup>42</sup>

[53] The signatories to the Landscape Methodology JWS<sup>43</sup> (including Ms Mellsop) do not subscribe to that approach, instead considering:

As a useful guide, a rating of moderate to high for naturalness is a starting point in determining whether a landscape is 'natural' enough to qualify in terms of RMA s6(b).

<sup>40</sup> As a s274 party to the appeal by Seven Albert Town Property Owners.

<sup>41</sup> Closing submissions for ORC, dated 24 July 2019, at [35] – [40].

<sup>42</sup> Transcript, p 788, l 31-33.

<sup>43</sup> The other signatories are Bridget Gilbert (QLDC peer review witness for other Topic 2 matters, Dianne Lucas (called by UCESI), Nicola Smetham (called by Hawthenden), and two witnesses who do not give evidence on Sub-topic 1 but gave evidence on other Topic 2 matters, Yvonne Pflüger and Tony Milne.



[54] Ms Mellsop explained that one reason for this more flexible approach is that the question of whether any particular landscape is sufficiently natural would be contingent on context.<sup>44</sup> She emphasised the need for an holistic assessment, observing that “in some situations a landscape with moderate level of naturalness could still be an ONL if that level of naturalness has been balanced against other characteristics including perceived naturalness and other attributes and values of the landscape”.<sup>45</sup>

### *Discussion*

[55] The direction in s6(b) RMA to ‘recognise and provide for’ the protection of ONLs and ONFs is not sufficiently fulfilled by mapping the geographic extent of such landscapes and features. Rather, it also requires an informed exercise of judgment as to the qualities or values in that feature or landscape and whether, in a comparative sense, they are sufficiently natural to be classed as ‘outstanding’.

[56] As the Court of Appeal emphasises in *Man O’War*, ‘outstanding’ is a strong adjective intending that a landscape or feature must be of special quality to be an ONL or ONF. However, as it also emphasises, the determination of whether a landscape or feature is sufficiently natural calls for the exercise of well-informed contextual judgment.

[57] Queenstown District stands somewhat apart in being well-endowed with landscapes and features of special quality. While comparison is appropriately undertaken at a district level, for a district plan, it is not unsound conceptually for QLDC to have adjudged that 97% of its entire District land area is either ONL or ONF. However, as we discuss at [27] and following, mapping ONFs and ONLs is just one necessary part of ensuring the ODP properly responds to s6(b), RMA.

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<sup>44</sup> The Landscape Methodology JWS, at 1.3(c) recording an agreed position of the signatory witnesses that “The appropriate level of naturalness will however be contingent on the context and/or the scale of the assessment (eg. district or regional scale).”

<sup>45</sup> Transcript, p 974, l 10 – 12.





[58] We find the following observations in the Landscape Methodology JWS, as to judgment, properly reflective of *Man O'War* and we accept and apply them (**our emphasis**):

- (b) It is recognised that in many cases **it will be obvious** if a landscape or feature is outstanding. However, in some cases, expert assessment will be needed (eg. where associative values or less obvious biophysical values are present). The expert assessment may require identification and analysis by other disciplines.
- (c) The method generally employed involves describing the attributes and values and rating them. However **an overall judgement is made of the significance of the landscape or feature, and its outstandingness.**

[59] On the same theme, we note that the Court of Appeal makes the following observation in the context of its discussion as to the judgment aspect of determining whether a landscape is an ONL:

...

It is necessary to take into account that in developing a regional policy statement, the regional council (or unitary authority) concerned is engaged on a task that is based upon its stewardship of the region. ...

[60] Unlike the position in the PDP, the APRS in issue in *Man O'War* included an appendix that gave descriptions of each of the ONLs, dealing separately with, among other things, their "Landscape Type, Nature and Description", "Expressiveness" and "Transient Values". The decision gives two examples from that appendix. Related to this, the Court of Appeal observed that the "drafting of the Appendix and the headings used was clearly designed to address the factors set out in Environment Court decisions articulating a methodology for landscape assessment, such as ... [WESI]".<sup>46</sup>

[61] Importantly, the judgment required to determine that a landscape or feature is sufficiently natural is not the preserve of the expert. Rather, the expert contributes opinion in order for the relevant decision-maker to exercise that judgment. That is one reason why we accept Ms Mellsop's opinion, and that of the signatories to the Landscape JWS, in finding that there is no necessary 'threshold' of 'moderate – high' to be met in order for an area of land to qualify as part of an ONF or ONL. It is simply artificial to try to construct a threshold for what is inherently a judgment call. Doing so also wrongly assumes that the judgment rests with the expert. It does not. Rather, an expert's

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<sup>46</sup> *Man O'War*, at [7] – [9].



evaluative role is to assist the decision-maker to make a properly informed judgment on whether land in issue should be within the ONF or ONL.

[62] We also accept QLDC's submission, supported by the Landscape Methodology JWS and Ms Mellsop, that the primary enquiry should be as to whether the area of land in question belongs within the landform that properly defines the boundaries of the ONF or ONL. Once that is determined, attention turns to the degree of naturalness of the land in question. Contextual evaluation then guides the judgment. The judgment called for is as to whether the area of land in issue is too modified or inappropriately developed such that including it in the ONF or ONL would detract from, or undermine, the values of the ONL or ONF when considered as a whole.

[63] The fact that a landscape or feature is classed as an ONF or ONL on the basis of expert opinion that it has 'moderately high' or even 'high' naturalness does not necessarily dictate that the same threshold must be passed for land to be added to, or excluded from it. Rather, an overriding consideration must be to ensure the overall legibility of the ONL or ONF is maintained. Again, that question is one for properly informed judgment.

*Is the planning context material for determining whether land is ONL or ONF?*

[64] In *Man O'War*, two of the four questions the Court of Appeal was asked pertained to planning context. Those questions were:

- (1) Is the identification (including mapping) of an outstanding natural landscape in a planning instrument prepared under the Resource Management Act 1991 for the purpose of s 6(b) of that Act informed by (or dependent upon) the protection afforded to that landscape under the Act and/or the planning instrument?
- ...
- (4) Is it relevant to the identification of an outstanding natural landscape (particularly in the coastal environment) that is a working farm, that the applicable policy framework would prohibit or severely constrain its future use for farming, such that the determination of whether a landscape is an outstanding natural landscape should take account of the fourth dimension — that is, future changes over time by reason of that landscape's character as a working farm?

[65] The Court answered "no" to both.





(a) Its reasoning in answer to its question (1) included:

[62] The questions of what restrictions apply to land that is identified as an outstanding natural landscape and what criteria might be applied when assessing whether or not consent should be granted to carry out an activity within an ONL arise once the ONL has been identified. Those are questions that do not relate to the quality of the landscape at the time the necessary assessment is made; rather, they relate to subsequent actions that might or might not be appropriate within the ONL so identified. It would be illogical and ultimately contrary to the intent of s 6(a) and (b) to conclude that the outstanding area should only be so classified if it were not suitable for a range of other activities.

[63] The result of this approach may mean that, in some cases, restrictions of an onerous nature are imposed on the owners of the land affected. In a dissenting judgment in *King Salmon* William Young J drew attention to the potentially wide reach of the restrictions resulting from the decision having regard to the broad definition of effect in s 3 of the Act (the definition embraces, amongst other things, any positive or adverse effect, whether temporary or permanent).

[64] William Young J considered that the effect of the majority's judgment was that regional councils would be obliged to make rules that specify activities as prohibited if they have "any perceptible adverse effect, even temporary, on areas of outstanding natural character". He raised the possibility of significantly disproportionate outcomes as a result of the strict approach inherent in the majority judgment.

[65] As the majority judgment indicates, however, much turns on what is sought to be protected. And it must be remembered that the decision in *King Salmon* took as its starting point the finding by the Board that the effects of the proposal on the outstanding natural character of the area would be high, and there would be a very high adverse visual effect on an ONL.

[66] In the present case, as the Environment Court noted, it was agreed that the areas to which the ONLs were applied are sufficiently natural for the purposes of s 6(b) of the Act. It is also clear that there are a number of different elements currently forming part of the ONLs. Thus significant areas of native vegetation and pastoral land are both elements of ONL together with buildings (albeit said to be subservient to other elements) and vineyard and olive grove activities. Although natural, it is not pristine or remote. As Mr O'Callahan acknowledged on behalf of Auckland Council, it is in that setting the question of whether any new activity or development would amount to an adverse effect would need to be assessed.



(b) Its reasoning in answer to question (4) included:

[80] This is a further question predicated on a link between identification of an ONL and the activities contemplated by the relevant planning instrument within that ONL. For reasons we have already explained, we are not persuaded that there is a logical link between the two. Nor have we been persuaded that the ongoing use of MOWS's land in the ONLs for purposes equivalent to those currently taking place would constitute relevant adverse effects on ONLs 78 and 85 having regard to the basis upon which those ONLs have been identified as outstanding in the ARPS.

[66] ORC and Allenby present similar arguments for why *Man O'War* should be distinguished on the matter of what account, if any, should be given to what the PDP allows for by way of permitted activities when determining whether land is "sufficiently natural" to be an ONL or ONF. Rob Roy Residents and QLDC present similar counter-arguments.

*ORC's submissions*

[67] As noted, ORC's interest is in an area of road reserve that runs alongside the true right bank of the Clutha River on its approaches to the State highway bridge across the Clutha at Albert Town. Seven Albert Town Residents appealed the DV's treatment of this land as ONL. As a s274 party, ORC in essence assumed the lead in opposing that ONL overlay.

[68] ORC emphasises the fact that the appeal area is on road reserve. It points out that the PDP permits a range of activities to be undertaken on such reserves and the permitted activity rules are not the subject of any appeal. It points out that the specified permitted activities include landscaping, street furniture, rubbish bins, barbeques and shelters, and forms of transport infrastructure (including those incidental to walkways and cycleways). Counsel for ORC, Mr Logan, argues that, given the existing character and use of the appeal area, is not fanciful to contemplate at least some of these activities would occur. He submits that, if some of those activities were undertaken, that would increase the degree of modification of the appeal land and hence decrease its naturalness. He argues that a relevant point of distinction from *Man O'War* is that the present case does not concern the planning consequences of land being recognised as ONL or ONF (which *Man O'War* found were irrelevant to its classification as ONL or





ONF). He says that, by contrast to *Man O'War*.<sup>47</sup>

Here, further human modification can lawfully take place and continue the diminution of the residual natural attributes the site may possess, because of other provisions in the plan. These outcomes are not consequences of recognising the area as part of an ONF; they can occur despite ONF status. Those provisions apply because the land is road, and are not influenced by whether or not the ONF label is attached to the land. Permitted future activities makes the application of the ONF status to the appeal area anomalous.

[69] On that basis, ORC submits that an ONF overlay is not appropriate.

*Allenby's submissions*

[70] Allenby seeks the exclusion of three particular areas of its land (Areas A, B and C) from the Mt Iron ONF. Areas B and C are slithers of land adjacent to a relatively newly developed residential area. Furthermore, by contrast to the Rural zoning of other parts of Mt Iron, the PDP includes Areas B and C in the same residential zone as that developed residential area (and within its Urban Growth Boundary ('UGB')). Counsel for Allenby, Ms Baker-Galloway, submits that those considerations, as well as the relatively modified state of Areas B and C, mean that *Man O'War* can be properly distinguished.

[71] Allenby goes on to submit that it is sound and appropriate, when assessing whether land is "sufficiently natural", to treat that land as it can be anticipated to be modified in the future. Ms Baker-Galloway submits that this approach is properly consistent with how 'environment' is treated for the purposes of effects' assessments in resource consent application processes, under s104 RMA. For that submission, she notes that 'landscape' comes within the definition of 'environment' in s2(1) RMA and refers to a number of Court of Appeal and High Court authorities on the meaning of 'environment' for the purposes of s104 RMA (but no authorities pertaining to plan development processes).

[72] On that approach, and on the evidence, Allenby submits that Areas B and C are insufficiently natural to be included in the Mt Iron ONF.



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<sup>47</sup> Closing submissions for ORC, dated 24 July 2019, at [50], [51].

*Rob Roy Residents' submissions*

[73] Rob Roy Residents are s274 parties to Allenby's appeal and oppose removal of Areas B and C from the Mt Iron ONF. Counsel for Allenby, Ms Macdonald, submits that Allenby's attempt to distinguish *Man O'War* is unsound and that the Court's findings (at [61] and [62] of the judgment) are directly applicable and run counter to Allenby's argument.<sup>48</sup> Ms Macdonald further submits that Allenby's argument that it is sound to consider the capacity for future modification of naturalness is also misconceived and contrary to authority. She refers, in particular, to the High Court decision, in *Shotover Park*,<sup>49</sup> which upheld the Environment Court's decision declining to apply the resource consent application approach to the consideration of 'environment' when dealing with a plan change (PC19 to the ODP).

*QLDC's submissions*

[74] In opening, QLDC submit that the Court of Appeal in *Man O'War* "confirmed that the planning consequences that flow from categorisation of land as ONL are irrelevant in determining whether or not it is an ONL – they are conceptually separate ideas".<sup>50</sup>

[75] QLDC reiterates in closing that *Man O'War* is not properly distinguishable. In response to ORC's submissions, it notes that the Court of Appeal did not accept that there is a logical link" between the identification of an ONL and the activities contemplated within that ONL. While it accepts that permitted activities could take place that will modify the area and further reduce its naturalness, the "real issue here is where the boundaries of the Clutha River ONF lie in relation to the appeal area".<sup>51</sup> In response to Allenby, QLDC adopts the closing submissions for Rob Roy Residents and emphasises similar points to those it makes in response to ORC. It adds that Allenby's submissions misinterpret *Man O'War* (at [66]) by wrongly conflating "sufficiently natural" with the s104 permitted baseline concept. It also cites *Shotover Park* as authority against Allenby's argument of extending this concept to plan appeals (noting that Allenby does not cite any

<sup>48</sup> *Man 'O War*, at [61], [62].

<sup>49</sup> *Shotover Park Limited and Remarkables Park Limited v Queenstown Lakes District Council; and Foodstuffs (South Island) Limited v Queenstown Lakes District Council* [2013] NZHC 1712. (It is noted that Foodstuffs had lodged a separate appeal, but the High Court issued a single judgment in respect of both appeals).

<sup>50</sup> Opening submissions for QLDC, dated 6 May 2019, at [3.3], [3.4] citing *Man O'War* at [62].

<sup>51</sup> Closing submissions for QLDC, dated 2 August 2019, at [3.11] – [3.14], citing *Man O'War* at [80] and [61].





authority for its proposition).<sup>52</sup>

### *Discussion*

[76] As *Man O'War* explains, the starting point for adjudging whether a landscape is ONL or ONF is a reliable factual assessment as to the qualities inherent in the landscape or feature. Guided by *Man O'War*, where we find the inherent qualities of an area justify its inclusion in an ONL or ONF we do not then disqualify it by reason of what the PDP would allow by way of development.

[77] As the Court of Appeal observed in *Man O'War* (citing the majority judgment in *King Salmon*) "much turns on what is sought to be protected". The qualifying words in s6(b) to "from inappropriate subdivision, use and development" reflect that position.

[78] A notable point of distinction from *Man O'War* is that the PDP does not yet include a schedule of values for its mapped ONFs and ONLs.<sup>53</sup> The mapping colours all ONFs and ONLs much the same, and the overarching objectives and policies and related assessment matters (to be addressed by our further decision(s)) do not materially assist to elucidate their values.

[79] Our directions later in this decision seek to address this to the extent we consider available at this stage, although the task will continue through our related decision(s), albeit within the scope of our appellate role (and potentially, s293).

### ***Other principles on landscape assessment methodology***

[80] Subject to those observations, we find what the Landscape Methodology JWS says about landscape assessment methodology of significant assistance. We complete our discussion on these matters by highlighting and endorsing some of the matters it covers:

- (a) we agree that evaluation must be at the appropriate geographic scale treating a landscape or feature as a whole. Relevant to this decision, we

<sup>52</sup> Closing submissions for QLDC, dated 6 August 2019, at [2.17] – [2.28].

<sup>53</sup> For reasons we explain later in this decision, our preliminary finding is that any ONF schedules for the PDP should also include reference to what we loosely term 'compatible land uses'.



add that:

- (i) the focus of our task, for this decision, is to determine the most appropriate extent of each ONL or ONF insofar as this is in issue in the appeals. The DV's ONL and ONF maps are ultimately servants of s6(b) RMA. The focus in s6(b) is at the landscape scale for ONLs and feature scale for ONFs;
  - (ii) an important consideration in our evaluation of the landscape evidence is whether the landscape witness has approached assessment at that appropriate scale. That includes consideration of relevant values.<sup>54</sup> An assessment of the landscape or feature, and its relevant values (biophysical, sensory, associative), is a necessary prerequisite to a reliable opinion on whether land at issue in an appeal should be part of an ONL or ONF or excluded from it.
- (b) we agree that ONF and ONL boundaries should be legible and coherent to the community. That is a factor against which we evaluate the expert evidence. Related to that, we also accept the consensus opinion in the Landscape Methodology JWS that:
- (i) geomorphological boundaries are a desirable first preference for determining appropriate ONL and ONF boundaries;
  - (ii) acceptable alternative boundaries, if geomorphology does not so assist, include marked changes in land cover or use patterns (and, potentially, road corridors); and
  - (iii) localised cut-outs from ONL or ONF boundaries, for example for developments, are not generally appropriate where evaluation demonstrates that, with the development included, the landscape or feature remains an ONL or ONF (eg by reason of its scale or character).
- (c) we agree that an assessment of biophysical attributes is the appropriate starting point for assessment. This reflects the principle that the evaluative opinion required of a landscape expert ought to be informed by the best available factual/scientific or other foundations for an evaluative opinion. Contextual assessment should follow to elicit how people would perceive its relative naturalness, given the associations they may have with a landscape or feature. Community surveys are an important tool for reliably informing

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<sup>54</sup>

As per the court's 11 July 2019 Minute on closing submissions, where we refer to 'values', in regard to natural features and landscapes, we include their attributes, qualities and characteristics.





expert opinion on these matters, but not available on the evidence before us.

### **Appeals seeking site-specific changes to ONL or ONF boundaries**

[81] We now turn to the first of the appeals seeking site-specific changes to ONL or ONF boundaries:

- (a) the appeals by Seven Albert Town Property Owners ('SATPO') and James Cooper (each of which concern parts of what we determine should be the Clutha River/Mata Au Corridor ONF); and
- (b) the appeal by Allenby which concerns parts of the Mt Iron ONF.

### **Seven Albert Town Property Owners**

#### ***The issues***

[82] SATPO's appeal concerns an area of land along the Clutha River/Mata Au Corridor at Albert Town. It sits just west of the single lane State highway bridge at Albert Town on the true right bank of the River.<sup>55</sup> It is distinguished by a high engineered embankment set back some 30m from the water's edge, the appellants' dwellings being amongst those that sit just beyond a flat grassed reserve at the top of the embankment. The appeal area is within an ONL overlay, more or less between the water's edge and the top of the embankment.<sup>56</sup>

[83] A significant concern for the appellants is the potential for an ONL (or ONF) overlay to impede the capacity of ORC to undertake necessary work to stabilise the bank and provide against flood and other natural hazards associated with the River.

[84] Part of ORC's case is that the appeal area is already so modified that it can be properly excluded as not being "sufficiently natural" to remain in an ONL or ONF. That is particularly given its engineered embankment and other hazard mitigation works, and

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<sup>55</sup> Evidence-in-chief of Mr Quin, for ORC, dated 10 April 2019, at [31].

<sup>56</sup> The court undertook site visits of the area of interest in the appeal ('appeal areas'), on the true right bank of the Clutha River near the approaches to the SH6 bridge, from the public reserve at the top of the embankment, and then from the flat land below it in the vicinity of the Albert Town – Wanaka walking and cycling trail.



the likelihood of further works.

[85] If unsuccessful in having the landscape overlay boundary shifted, ORC would seek the inclusion in the PDP of a schedule that specifies relevant values of the natural feature or landscape and also acknowledges the state of modification in the locality of the appeal land and the ongoing presence and need for hazard mitigation works.

[86] Although planning issues as to the obtaining of consents for hazard management works were traversed in the hearing, QLDC and ORC have informed the court that these are the subject of ongoing dialogue. On that basis, they seek that we defer determination of those issues.<sup>57</sup> We accept that request.

[87] Therefore, the issues can be paraphrased as the following questions:

- (a) should the boundary for the landscape overlay remain at the top of the embankment or be shifted back much closer to the water's edge, given the extent of modifications and the likelihood of ongoing hazard mitigation works?
- (b) if that is answered 'no', should the PDP be modified by inclusion of a schedule as sought by ORC?
- (c) should the notation for any landscape overlay for the Clutha River Corridor be ONF rather than the present ONL?

### **Evidence<sup>58</sup>**

[88] It is unnecessary to traverse much of the evidence, given the relatively confined nature of the matters in issue. It is sufficient to record that:

- (a) the evidence of Dr Mackey and Mr Salt was admitted by consent and, as indicated to the witnesses, is accepted;<sup>59</sup>
- (b) the planning evidence of Ms Dawe and Mr Barr primarily concerned the planning issues as to the obtaining of consents for hazard management

<sup>57</sup> Joint memorandum of counsel (ORC and QLDC), dated 15 January 2019.

<sup>58</sup> ORC called landscape expert, Mr Stephen Quin, planning expert, Ms Anita Dawe, and as well as natural hazards expert Dr Benjamin Mackey and geotechnical engineer, Mr Graham Salt. QLDC called its landscape expert, Ms Mellsop, and its planning expert, Mr Barr.

<sup>59</sup> Transcript, p 1074, l 4 – 9.





- works (a matter deferred, as noted); and
- (c) the material point of difference between the landscape experts, Mr Quin and Ms Mellsop, concerns how the acknowledged modified and moderately natural state of the appeal area is appraised in its relevant ONF context. The submissions for ORC and QLDC fairly identify key differences in the experts' opinions as we summarise at [89] and following.

### **Submissions**

#### *ORC*

[89] ORC submits that the ONF boundary should return to where it was in the Notified Version ('NV') or to where its landscape expert, Mr Quin recommends (the latter preferred). Both options would see it shifted from its present location at the top of the embankment to be much closer to the water's edge on the flat area below. If we decide that the boundary is correctly located where it is at the top of the embankment, ORC seeks that the associated "site-specific values and modifications ... be recorded and scheduled". It submits that the schedule "should document the exposure of the site to natural hazards and acknowledge the likelihood of further works to address the effects of those hazards".<sup>60</sup>

[90] ORC accepts that the Clutha River itself is an ONF. However, its case is in essence that the appeal area does not have sufficient naturalness<sup>61</sup> to be included in that ONF.<sup>62</sup> On these matters, counsel for ORC Mr Logan referred to the extensive earthworks and degree of change that has occurred in relation to the appeal area.

[91] Mr Logan pointed to several examples of this from the evidence, particularly of Mr Quin.<sup>63</sup> In relation to the appeal area, those include the lowering and shaping of the embankment into a uniform profile. He points out that the stabilisation works that have been undertaken mean that there is now a riverside terrace of some 35m wide between the embankment and the water of the River. He points out that those works include extensive visible rockwork from below the waterline through to and over the embankment.

<sup>60</sup> Closing submissions for ORC, dated 24 July 2019, at [7].

<sup>61</sup> ORC makes related submissions on how 'sufficiently natural' is properly interpreted, including as it is applied in *Man O'War*. We deal with these matters at [58] and following.

<sup>62</sup> Closing submissions for ORC, dated 24 July 2019, at [64] – [66].

<sup>63</sup> Evidence-in-chief of Mr Quin, for ORC, dated 10 April 2019, paras 19 – 25, Transcript, p 1146 – 1147.



He also notes the extensive works that have been carried out for the SH6 bridge and its protection. That includes the lowering of the escarpment downstream of the bridge and cutting through the embankment for the bridge approaches.<sup>64</sup>

[92] Mr Logan points out that those extensive engineering works have been undertaken deliberately so as to disrupt natural processes (those processes being a factor going to determination of whether a landscape is 'sufficiently natural'). Specifically, he notes the history of instability and erosion, in that the embankment is inherently fragile and has a low factor of safety, being vulnerable to the erosive force of the River (particularly when it is in flood).<sup>65</sup>

[93] Mr Logan points out that further works are in contemplation given the inherent instability of the embankment. He notes the irony in the opinion expressed by QLDC's planner (Mr Barr) that ONF classification would not be a barrier to consenting necessary hazard mitigation works "even though the range of works under consideration is likely to lead to further substantial changes to the landform of the site because of the degree to which the site has already been modified".<sup>66</sup>

[94] Mr Logan also observes that there is little separating the opinions of Ms Mellsop and Mr Quin on the relative naturalness of the appeal area. He notes that Ms Mellsop viewed the landforms as "significantly modified" (and perceived as "moderately natural"). He also points out that Ms Mellsop acknowledged to the effect that if one combines the level of actual physical modifications to the area and people's perceptions, it would be "less than moderate" in terms of naturalness. He points out that Mr Quin agreed with the "significantly modified" description. Mr Logan submits that, on that basis, the level of naturalness of the appeal area "is not sufficient to merit inclusion in the ONF".<sup>67</sup>

[95] Mr Logan acknowledges that a key point of distinction between the landscape experts is that Ms Mellsop explained that she considers it is inappropriate to assess the naturalness of a landscape feature by "concentrating on such a small area" and that it

<sup>64</sup> Closing submissions for ORC, dated 24 July 2019, at [52].

<sup>65</sup> Closing submissions for ORC, dated 24 July 2019, at [58] – [59].

<sup>66</sup> Closing submissions for ORC, dated 24 July 2019, at [55] – [56], regarding Barr referring to the Transcript, p 1113, l 14 – 27, p 1126, l 4 – 12, p 1127, l 16 – 25, p 1128, l 24 – 30; also referring to historic photographs in App 3 of the evidence-in-chief of Mr Quin, dated 10 April 2019, and to the Transcript, p 1088 – 1089 (Ms Mellsop).

<sup>67</sup> Closing submissions for ORC, dated 24 July 2019, at paras 53, 54, 60 – 63; referring to the Transcript at p 1090, l 20 – 28, p 1092, l 17 – 19, p 1079, l 19 – 20 (re Ms Mellsop) and at p 1150, l 7 (re Mr Quin).





was “important to look at the Clutha River ONF as a whole, and set the river within its legible enclosing boundaries”. On this point, Mr Logan submits (his *emphasis*):<sup>68</sup>

There is no dispute that the river itself is an ONF. The issue however is where, in this location, the true right boundary of that feature lies.

The claim that the area is part of [a] greater, more extensive feature cannot override the need to properly determine where the boundaries of the feature should be drawn and whether the area proposed to be included within those boundaries is sufficiently natural to warrant being part of the ONF.

To include land within an ONF, that does not have that status calls the whole classification process into question and produces an outcome that lacks integrity. That would be the result of this “*significantly modified*” area remaining within the ONF.

Removal of the appeal area from the ONF would, in Ms Mellsop’s opinion, only detract from the feature “*a low degree*”.<sup>69</sup> With respect, because of the high degree of modification, acknowledged by Ms Mellsop herself, it would not derogate from the feature or its protection under the PDP at all.

It might be a working, prima facie principle that enclosing landforms of the river feature should be included, but that presumption must be tested and assessed at individual locations and yield to realities.<sup>70</sup>

As all the Topic 2 landscape experts recognised in their Joint Witness Statement, where development is evident on the edge of a landscape or feature, it may be appropriate to exclude that area.<sup>71</sup>

Where land has been “*significantly modified*” resulting in consequentially high loss of naturalness, the exclusion of the area from the feature is entirely justified.<sup>72</sup>

[96] Mr Logan also challenges the validity of Ms Mellsop’s treatment of the embankment as an “enclosing escarpment”, pointing out that it is significantly set back from the river and is not enclosing. In particular, he refers to the fact that, at its upstream end, it curves away from the River towards Albert Town (where the DV’s Map 24 shows it losing its ONF status). By contrast, he says reversion to the true right boundary of the

<sup>68</sup> Closing submissions for ORC, dated 24 July 2019, at [64] – [71].

<sup>69</sup> Referring to Transcript, p 1100, l 11 – 13.

<sup>70</sup> Referring to Transcript, p 1149, l 1 – 11 (Mr Quin).

<sup>71</sup> Referring to the Landscape Methodology JWS, at para 1.7(d).

<sup>72</sup> Referring to Transcript, p 1150 (Mr Quin).



NV (much closer to the river) would see the boundary much more continuous.<sup>73</sup>

[97] The ORC's closing goes on to set out its position on any scheduling of ONF values for the Clutha River Corridor ONF. Whilst acknowledging that consideration of "District wide" issues is properly left to our further Topic 2 decision(s), Mr Logan observes that "considerable evidence" which might inform a schedule has been presented in the various site-specific appeal hearings. As to the substance of a schedule for the Clutha River Corridor ONF, he cautions against relying on Ms Mellsop's list of values (at para 4.7 of her evidence), submitting this is unhelpfully generic and does not suit the appeal land (where landform changes and human modifications have diminished biophysical legibility, expressiveness and aesthetic values). He submits that it is important that her list "be tempered" with reference to those site-specific modifications (referring to Mr Quin's description of them). He offers various elements for a useful schedule which we paraphrase:<sup>74</sup>

- (a) acknowledgement that the appeal area is "significantly modified", specification of those modifications and description of the true values on the true right bank in this locality;
- (b) identification of natural hazards that affect the appeal area (and presumably the locality);
- (c) acknowledgement of the likelihood and nature of further physical natural hazard mitigation works and their associated potential to modify the appeal area (and presumably the locality).

#### QLDC

[98] QLDC acknowledges the appeal area is "significantly modified" and has a reduced level of naturalness. However, it submits that this does not disqualify the appeal area from inclusion in the ONF. Counsel submit that Mr Quin's starting premise that the ONF does not extend to modified embankments is contrary to the Court of Appeal's approach in *Man O'War*. Furthermore, it observes that Mr Quin ultimately qualified his opinion under cross-examination to the following extent:<sup>75</sup>

<sup>73</sup> Closing submissions for ORC, dated 24 July 2019, at [72] – [78].

<sup>74</sup> Closing submissions for ORC, dated 24 July 2019, at [86] – [93].

<sup>75</sup> Closing submissions for QLDC, dated 2 August 2019, at [3.2] – [3.6], referring to the evidence-in-chief of Mr Quin, dated 10 April 2019, at [15], and Transcript, p 1160, l 20.





... I don't also agree that all ONFs would be entirely unmodified. There is a degree or scale and I consider that containing this, essentially a small part of the rock armoury fits within an acceptable scale of modification to be included, whilst also providing a legible boundary that encloses and contains the Clutha River ONF... .

[99] QLDC submits that modifications in the appeal area are “not so unnatural as to exclude” it from the ONF (comparing them, for example, to the concrete support structures for the bridge). It submits that we should rely on Ms Mellsop's opinion that the “top of the escarpment still reads as a legible and defensible boundary for a feature of the river”. It notes her observation that the embankment is “still a legible landform associated with the river and its erosive forces and that it remains the first enclosing escarpment of the river”.<sup>76</sup>

[100] It submits that the correct approach, applied by QLDC and its witnesses, is to consider whether the wider Clutha River Corridor ONF can, and should, include the appeal area. Considered on that basis, it submits that the acknowledged modifications in the appeal area are not so significant as to disqualify it from the ONF. It characterises ORC's case as invalidly focussing on the localised character of the appeal area itself. Were the ORC's approach endorsed and applied consistently, QLDC submits that it would have wider serious implications. Referring to Ms Mellsop's answers in cross-examination (the same passage relied on by ORC), counsel for QLDC add:<sup>77</sup>

It could potentially capture a range of modifications within ONL/F across the District, including roads, bridges, farm buildings, etc, despite those modifications not undermining the overall categorisation of the relevant ONL/F. This approach could result in ONLs being dotted with small excluded areas ...

[101] It submits that the correct frame of reference for assessment, applied by Ms Mellsop, is “whether the modified area is such that the ONL/F retains its overall categorisation”. As to that, it notes as “significant” Mr Quin's acceptance, in cross-examination, that inclusion of the appeal area would not detract from or undermine the overall values of the Clutha River ONF, and that the Clutha River will remain an ONF if the appeal area were included. Referring to the approach outlined in the Landscape Methodology JWS (whereby it can be appropriate to exclude areas from an ONL or ONF in light of an adjacent development), QLDC submits that “that there is no clear landscape

<sup>76</sup> Closing submissions for QLDC, dated 2 August 2019, at [3.10].

<sup>77</sup> Closing submissions for QLDC, dated 2 August 2019, at [3.15] – [3.19], referring to the Transcript, p 1079, l 19 – 26.



reason to exclude [the appeal area] from the Clutha River ONF".<sup>78</sup>

[102] As to ORC's submissions to the effect that the embankment is not an "enclosing escarpment", QLDC points out that both landscape experts agreed that the concept was of "enclosing landforms". QLDC adds that "this term has been deliberately used by the landscape witnesses due to the variety of landforms that can border a river or feature...". QLDC adds that, contrary to ORC's submissions, Mr Quin accepted that there are a "wide range of enclosing land forms" along the Clutha River in this location, and went on to note that:<sup>79</sup>

There's no requirement [to follow a continuous escarpment] as such, there is rather a continuous line but that can follow one escarpment joining another escarpment which may not necessarily be seen as a continuous escarpment.

[103] QLDC also records Ms Mellso's explanation that the escarpment alongside the Cooper property is "fairly consistent", but that it gets lower towards the confluence with Hawea River. It adds:<sup>80</sup>

... any suggestion that the Clutha River ONF boundary should be drawn on a continuous line / landform does not reflect reality. Instead, it can be expected that the immediate enclosing landforms will take on a number of shapes and sizes along the Clutha River.

[104] QLDC does not respond to ORC's submissions on the scheduling of values.

### ***Discussion***

[105] We accept the consensus of the landscape witnesses that the appeal area is "significantly modified". That finding is not contingent on what the permitted activity rules allow by way of further modification to the appeal area. Rather, our site visit confirms to us that the combined effect of all of the modifications noted by Mr Logan render it that way.

<sup>78</sup> Closing submissions for QLDC, dated 2 August 2019, at [3.20], [3.21], referring to the Transcript at p 1161, l 3, p 1163, l 24 – 27, p 1150, l 27.

<sup>79</sup> Closing submissions for QLDC, dated 2 August 2019, at [3.22] – [3.27], referring to the Transcript at p 1148, l 14, and 1151, l 13 for the opinions of Mellso and Quin on "enclosing landform"; closing submissions for QLDC, dated 2 August 2019, at [3.28] – [3.30], referring to the Transcript, p 1152, l 11 – 13 (Mr Quin).

<sup>80</sup> Closing submissions for QLDC, dated 2 August 2019, at [3.29], referring to the Transcript p 814, l 14.





[106] However, in what is a relatively small although visually prominent section of the Clutha River Corridor, we bear in mind the primary focus is on where we should locate a legible and defensible boundary for the Clutha River Corridor ONF. We accept Ms Mellsop's evidence that, despite its extensively modified state, the embankment still reads as a legible and defensible boundary. In perception terms, we find it to be sufficiently natural to remain as part of the ONF. We acknowledge that the uniform shape of the embankment, and its separation by some 30m from the water's edge, are deliberate engineering measures to mitigate the risk presented by the erosive natural processes of the River when in flood. However, on the evidence we find that maintaining that highly legible frame for the ONF by protecting against those erosive forces assists to maintain perceptions of naturalness of part of the Clutha River (Mata Au) Corridor feature. It frames a reach of the River that is highly visible from the State highway, the cycling and walking tracks, the River itself and other public viewing places on its true left and right banks. Looked at another way, were the erosive power of Mata Au allowed to undermine the embankment so it were to collapse, we infer that the public would perceive that as a degradation of its current naturalness.

[107] Turning to the issue of scheduling, we make an initial observation that we find the evidence called by ORC presents a compelling example of why it is important to accompany mapping with meaningful information about the associated values identified for relevant natural features and landscapes (and for a feature such as the Clutha River, its natural hazard risks). We note that ORC's evidence as to the need for ongoing natural hazard mitigation works in the vicinity of the appeal area was not challenged and we accept it. Our findings that the highly visible and extensive existing works contribute to perceptions of naturalness present one reason why it is important that this be recorded clearly in the PDP. Related to that is the importance of maintaining the safety of residents and the integrity of the bridge. Those matters go directly to s5 RMA (and, we note, are now also relevant under s6(h) RMA).

[108] We agree with Mr Logan that Ms Mellsop's listed values are too generically expressed to be suitable for inclusion in a schedule in the PDP without significant refinement. We mean no criticism of Ms Mellsop in saying that. She presents a useful start to what is required. However, an illustration of the lack of necessary precision is in the following of her "key values":<sup>81</sup>

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<sup>81</sup> Evidence-in-chief of Ms Mellsop, for QLDC, dated 27 March 2019, at [4.7].



- (a) **Very high biophysical values** as a consequence of the strong flow characteristics, water quality and the rare switchback feature at Devils Nook.

[109] That is generally sound as a description of this attribute of the Clutha River (Mata Au), as are her other identified values (b) – (g). However, it does not acknowledge the importance of the hazard mitigation works, in key locations, for maintaining perceptions of naturalness of the Clutha River Corridor as an ONF.

[110] As for ORC's submissions concerning what should be included in the schedule, we refer to [247].

[111] For those reasons, we have accepted aspects of ORC's case but not others.

### **James Cooper**

#### ***The issues***

[112] The stretch of Clutha River (Mata Au) of most interest in this appeal is between its confluence with the Hawea River (in the west) and Rekos Point (in the east). The DV's Maps 18 and 24b show the ONL and ONF notations associated with the Clutha River/ Mata Au between the Lake Wanaka outlet and Rekos Point.

[113] An ONF notation presently encompasses the River and its immediate enclosing banks. In addition, an ONL notation extends over a large area of Hawea Flat. It encompasses lower terrace on James Cooper's farm between a distinctive escarpment and a reserve on the true left bank of the River. The ONL notation also extends across a terrace and similar parallel escarpment on the River's true right bank but that land is not within the Cooper Farm.<sup>82</sup>

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<sup>82</sup> The court undertook a site visit on 9 May 2019. We took a view via Kane Road and the Farm's Watkins Road entrance before being accompanied on a drive through the central spine farm road down to the lower terrace on the true left bank of the Clutha River (Mata Au). Our route then took us along this lower terrace to the Farm's western extremity and then north to view the Hawea River channel in the vicinity of the western end of Newcastle Road before returning. We took an unaccompanied view from various publicly accessible viewing points including from the summit of Mt Iron and on Stevensons Road and the top of the lower terrace on the true right bank of the Clutha River/ Mata Au opposite Cooper Farm. The court viewed the cycling and walking trails on the reserves in various locations.





[114] Mr Cooper is concerned about how the ONL notation could impact on future farm development activities, particularly those requiring resource consents.<sup>83</sup> The determinative issues are accepted to be as to the most appropriate boundary for an ONL (or ONF), ie whether it should remain where the DV places it or be moved to coincide with the reserve boundary much closer to the River's enclosing true left bank (with the appeal land instead having a rural character landscape ('RCL') notation).

[115] A related secondary issue is whether any notation for the Clutha River (Mata Au) Corridor should be simply ONF, not the present ONF and ONL combination. QLDC now favours reversion to an ONF notation for the Clutha River Corridor from its Lake Wanaka outlet to the Central Otago District boundary.

### ***The Cooper Farm***

[116] The Cooper Farm on Hawea Flat is bounded by Kane Road to the east, Watkins Road and Butterfield Road to the north-east. It is some 2,700 ha and extends from close to Albert Town and Hawea Flat village to the north, past Wanaka airport towards the 'Red Bridge' across the Clutha River (Mata Au) to the south.<sup>84</sup> It comprises five functionally distinct dairying platforms.<sup>85</sup> As a further indicator of its scale, there are seven dwellings on the Farm (and a further three house sites). In addition, there are several buildings and structures to support the scale of operations undertaken, including sheds for milking, calf-rearing, fertiliser and feed storage and a mechanics workshop. There is a network of gravelled farm access roads, including those that negotiate the escarpment to access the lower terrace land. Irrigation infrastructure includes water storage ponds and pump station, and a network of water pipes. Counsel informs us that the Farm is probably "the most intensive irrigated property in, not only the Upper Clutha, but the Queenstown Lakes District."<sup>86</sup>

### ***Views of the Farm from tracks and other public areas***

[117] Reserves administered by DOC border the Farm and the Clutha (Mata Au) and Hawea Rivers. These reserves run alongside both banks and host popular riverside

<sup>83</sup> Transcript, pp 823 – 825.

<sup>84</sup> The land in contention is most clearly illustrated in Fig 9 of Ms Mellsop's second statement of evidence, Appendix B, as the area shaded light green and marked "Area sought to be excluded from ONL (in light green)".

<sup>85</sup> Mr Todd's opening submissions for Cooper.

<sup>86</sup> These details are helpfully depicted on Mr Espie's App 2 aerial photo-map.



cycling and walking trails that link to Hawea and run between the SH6 bridge at Albert Town and the Red Bridge near Luggate. Views of the Farm are generally confined, but occasionally encompass the appeal area.

[118] Other public viewpoints of Farm land subject to the ONL notation are generally from the south and west. These include:

- (a) glimpses from SH8 before its junction with SH6;
- (b) close views from that part of Stevensons Road at or within the southern ONF boundary;
- (c) views from the eastern edges of Albert Town;
- (d) glimpses from SH6 north of the Albert Town bridge; and
- (e) more distant elevated views from Mt Iron.

[119] In most of these views, the escarpment and lower terrace areas on the Farm are framed by mountainous ONL backdrops. From Mt Iron, much of the Farm can be seen with its extensive established exotic shelter belts. However, from the other public viewing south and west, only the edge of the upper terrace areas is typically visible. From those viewing points, and from the cycling and walking trails, the Farm buildings are distant views masked by shelter belts such that they are not highly visible.

***The extent of ONF and ONL notation in the DV***

***ONF***

[120] The extent of the ONF is shown on DV's Maps 18 and 24. On the true right bank, starting at the Clutha/Hawea confluence, the ONF boundary aligns closely follows the River east of the SH6 bridge as far as the confluence with the Cardrona River. Downstream of that confluence, it follows the northern edge of the top terrace above the escarpment and then drops to a lower terrace and continues as far as Rekos Point. As Map 18 shows, the width of this lower terrace varies considerably. It is relatively narrow for about 2km downstream of the Cardrona River, then broadens before narrowing again for a short section just upstream of Rekos Point.

[121] In the broad middle section of this lower terrace, and continuing a development pattern on the upper terrace, there are a number of dwellings, and others under





construction. Several building platforms have been established.<sup>87</sup> DV Map 18 also shows Significant Natural Areas ('SNA') in this locality.<sup>88</sup>

[122] Now returning to the Clutha/Hawea confluence but considering the ONF position on the true left bank of the Clutha (Mata Au), the ONF boundary follows the river past Waterford Terrace before rising up the escarpment to the southern edge of the lower terrace. For some 2.5km, it follows this alignment outside the southern boundary of Cooper Farm land before crossing the lower terrace (and entering the Farm land) to follow the southern edge of the top terrace in the vicinity of an identified SNA.<sup>89</sup> The ONF boundary then continues along this top terrace edge as far as Rekos Point.

### *ONL*

[123] A substantial area of ONL is shown on the DV's Maps on both sides of the Hawea River between Newcastle Road (on the east side of the Hawea River) and the Hawea River's confluence with the Clutha River (Mata Au). East of the Hawea River, this ONL includes a substantial area of the Hawea River reserve as well as a similar sized area of the lower terrace of Cooper Farm at its most westerly point.<sup>90</sup> It also includes a long, thin finger of land described by Ms Mellsop as Hawea Terminal Moraine. The ONL boundary follows the edge of the top terrace on the Farm, beginning at its northern end at Butterfield Road and running in a southwesterly direction along both edges of the Hawea Terminal Moraine. It then follows the edge of the top terrace around to the southeast to meet the ONF at the point where the latter begins to follow the southern edge of the top terrace.

### ***Does the appeal confine jurisdiction for landscape assessment to the Cooper Land?***

[124] In his opening submissions for Mr Cooper, Mr Todd raised the following preliminary question of jurisdiction as to the approach to landscape assessment:<sup>91</sup>

<sup>87</sup> Evidence-in-chief of Mr Espie, for Cooper, dated 30 November 2018, App 2: Built and Consented Residential Development in the Upper Clutha Area as per QLDC records; also DV Map 18 shows two of these titles east of Stevensons Road.

<sup>88</sup> Marked on DV Map 18 as E38A\_1 to E38A\_5.

<sup>89</sup> Marked on Map 18 as E18B.

<sup>90</sup> Second statement of evidence of Ms Mellsop, dated 2 November 2018, App B, Fig 9.

<sup>91</sup> Closing submissions for Cooper, dated 24 July 2019, at [9].



Counsel for the Council put to Mr Espie that by focusing on the Appellant's land his assessment was more narrowed than Ms Mellsop's who conversely "considered the terraces and the escarpment in their wider context". The Appellant submits in response to this suggestion that given it is only the Appellant's land that is in dispute in terms of the ONL location, there is only jurisdiction to focus on this part of the landscape.

[125] No authority is cited in support of that submission and we find no such jurisdictional constraint. On the contrary, the relevant focus for the purposes of s6(b) must be on features and landscapes considered as a whole, as is endorsed in the Landscape JWS.

### ***Evidence***

[126] Ms Mellsop gave evidence for QLDC. She supports the ONL boundary where it is located in the DV. Mr Benjamin Espie gave evidence for James Cooper and supports moving the ONL notation from the Cooper Farm so as to not extend beyond the reserve along the true left bank.

[127] Mr Espie was not involved in the development of the Landscape Methodology JWS. However, he and Ms Mellsop undertook further expert witness conferencing and produced a Joint Witness Statement on 30 January 2019 ('Cooper JWS'). The Cooper JWS indicates that both witnesses take guidance from the NZILA Practice Note on landscape assessment and broadly agree about the appropriate methodology for doing so for the purposes of s6(b), RMA. That includes their agreement that "the landscape itself (along with the elements, patterns and processes that comprise it) is what must be analysed in order to arrive at a decision on appropriate landscape categorisation." Further, in his evidence-in-chief, Mr Espie confirmed that he largely supports Ms Mellsop's description of landscape methodology.<sup>92</sup>

[128] The witnesses agree that the Clutha River (Mata Au) and its immediate enclosing banks is an ONF.<sup>93</sup>

<sup>92</sup> Evidence-in-chief of Mr Espie, dated 30 November 2018, section 4.

<sup>93</sup> The Cooper JWS records the witnesses agree that the part of the Hawea River upstream of the unformed end of Newcastle Road is not of such landscape quality as to be classified as ONF: Cooper JWS, p 3, Table 1, 5<sup>th</sup> box.





[129] A key point of difference between them is as to the relevant landscape for the purposes of their assessments:

- (a) Ms Mellsop's landscape is the ONL corridor of land that flanks the Clutha River (Mata Au) ONF and extends over the lower terrace land to the escarpments noted (also including the lower Hawea and the Clutha/Hawea confluence). Her assessment of whether the appeal land properly remains as part of that landscape commences with her assessment of that Corridor landscape's values that make it, in her view, an ONL.
- (b) Mr Espie's landscape is far broader. In the Cooper JWS, he describes it as being in essence, a "farming landscape that extends to the north and ... while pleasant and of rural character, ... is not an ONL and should be appropriately categorised as RCL".<sup>94</sup> In essence, he reads the escarpments that frame Ms Mellsop's landscape as just part of a relatively flat valley floor, also incised by rivers, and framed by mountains.<sup>95</sup>

[130] A further key difference is that, within his much broader landscape setting, Mr Espie focusses his assessment on the relative values of the appeal land.<sup>96</sup> This is with reference to a report he prepared in 2011 for an area of land the report describes include "Camp Hill/Forest Hill/Gimmermore Station".<sup>97</sup> By contrast, Ms Mellsop focusses on the Clutha River Corridor land as is subject to either ONF or ONL notation in the DV.

#### *Ms Mellsop's assessment*

[131] Inherently, given her focus is on the ONF and ONL land encompassed by the DV's maps, Ms Mellsop's assessment of the landscape goes significantly beyond the boundaries of the Cooper Land.

<sup>94</sup> Joint Witness Statement, Espie and Mellsop, dated 30 January 2019 ("Cooper JWS").

<sup>95</sup> Evidence-in-chief of Mr Espie, dated 30 November 2018, App 1, Report, at 3.2, 3.3 – 3.5, 3.7, 3.13.

<sup>96</sup> Although not noted by Mr Espie, we understand that a change that has occurred since Mr Espie prepared that Report is that the Cooper Farm now includes a further parcel of land (Block 9) encompassing an approximately 2km stretch of the upper escarpment on the true left bank of the Clutha River (Mata Au), just upstream of Rekos Point. We draw this from the Report's App 1. It illustrates that the spatial extent of the Camp Hill/Forest Hill/Gimmermore Station land is similar to but not identical to the current Cooper Farm (as shown in App 2 of that Report). However, this difference does not materially impact on our overall findings.

<sup>97</sup> Evidence-in-chief of Mr Espie, dated 30 November 2018, at [5.1].



[132] She draws our attention to the Hawea Terminal moraine, which she describes as "a distinctive and visually prominent escarpment of up to 60 metres in height". In her opinion, this moraine "retains a moderately high level of natural character and remains a striking and expressive landform that is legibly related to the erosive action of the Hawea River." She notes also that the entire terminal moraine is identified as an important landform in the NZ Geopreservation Inventory for Otago.<sup>98</sup> Her opinion on that appears to align with Mr Espie's. He refers to this escarpment as "particularly large, defined, distinct from its surroundings, and easily legible and forms part of the Lake Hawea penultimate terminal moraine ridge" and potentially "an ONF".<sup>99</sup>

[133] She concludes that the section of the river corridor between Rekos Point and the western end of the reserve:<sup>100</sup>

... is either part of the Clutha River ONF or part of a wider ONL, with the boundary following the top of the enclosing escarpment. The escarpments and lower terraces are an integral part of the river corridor and their biophysical and aesthetic characteristics and values are important to the assessment of the corridor as outstanding within the District.

[134] For the land west of the reserve and east of the Clutha/Hawea confluence, Ms Mellsop acknowledges that:<sup>101</sup>

... the definition of the river corridors is complicated by the fact that the highest enclosing escarpment moves significantly further away from the river banks and encloses a much larger area of terrace land. The scarp is up to two kilometres from the river edge and the terraces below comprise about 370 hectares of land. Some of this land is another DOC reserve, which supports indigenous plant communities, and the remainder is part of the Appellant's property and has been developed for dairying with pivot irrigators (a permitted activity within the District), fences, shelter belts and a milking shed and silos.

[135] She gives the following reasons why she treats the Clutha River, within its immediate enclosing banks, as an ONF and the wider Clutha River Corridor as an ONL:<sup>102</sup>

<sup>98</sup> Second statement of evidence of Ms Mellsop, for QLDC, dated 2 November 2018, at [9.14].

<sup>99</sup> Evidence-in-chief of Mr Espie, for Cooper, dated 30 November 2018, at [7.15].

<sup>100</sup> Second statement of evidence of Ms Mellsop, for QLDC, dated 2 November 2018, at 9.12, App B Fig 9.

<sup>101</sup> Second statement of evidence of Ms Mellsop, for QLDC, dated 2 November 2018, at [9.13].

<sup>102</sup> Second statement of evidence of Ms Mellsop, for QLDC, dated 2 November 2018, at [9.16].





The terraces and escarpments around the Clutha/Hawea confluence form a memorable and expressive landscape. In my view they are part of the wider landscape of the Clutha River corridor and river confluence. This landscape is of too large a scale and extent to be considered a feature (a discrete landform or biophysical entity). In my opinion it is appropriately classified in the PDP as an ONL that encompasses the Clutha River corridor and the fluviially formed landscape around the Clutha/Hawea confluence. The Clutha River and the lower part of the Hawea are ONFs within this wider landscape.

[136] She explains why she considers the Cooper Farm part of this wider ONL as follows:<sup>103</sup>

While observers may not recognise the developed dairy farm land on the Cooper property as an outstanding natural landscape by itself, it forms a small part of the larger ONL of the Clutha River corridor and Clutha/Hawea confluence. If the large terrace east of the confluence was considered in isolation from its landscape context and was instead surrounded by other intensively farmed terrace land, it is unlikely to be classified as ONL. However, when the entire extent of the terrace and escarpments (not just the intensively farmed parts) are evaluated as part of the river corridor I consider they are, as a whole, sufficiently natural to be included within the ONL. I note that many ONL within the District contain smaller areas within their boundaries that are neither highly natural nor outstanding of themselves (eg. parts of the floor of the Cardrona Valley).

[137] Ms Mellsop describes the values she considers renders the Clutha River (Mata Au) an ONF and her wider landscape to be an ONL and, we summarise these in the following table:

Clutha River Mata Au ONF	Clutha Corridor ONL
(a) <i>Very high biophysical values</i> : strong flow characteristics, water quality, rare switchback feature at Devils Nook;	(a) <i>High biophysical values</i> : sequence of landforms shaped by erosive action of the rivers, regenerating indigenous vegetation;
(b) <i>High naturalness values</i> : relative lack of landform modification, natural patterns of margin vegetation, water quality/clarity;	(b) <i>Very high legibility/expressiveness values</i> : formative processes of the landscape;
(c) <i>High legibility/expressiveness values</i> : river course pattern e.g. meanders, deeply cut banks indicating ongoing formative processes;	(c) <i>High memorability values</i> : dramatic scale and sense of enclosure experienced on public walking and cycling tracks along the rivers; and



<sup>103</sup> Second statement of evidence of Ms Mellsop, for QLDC, dated 2 November 2018, at [9.18].

(d) <i>High aesthetic values</i> : intense water colour contrasting surrounding vegetation, dramatic enclosing escarpments visible from public tracks and reserves;	(d) <i>High experiential values</i> : tracks giving access through the landscape and the recreational activities associated with the rivers, particularly the lower Hawea River.
(e) <i>High experiential values</i> : ability to interact with the water, sequentially experience the feature on tracks;	
(f) <i>High shared and recognised values</i> : e.g. local groups to protect river's scenic and recreational values and enhance public access; <sup>104</sup> and	
(g) <i>High cultural values to Ngāi Tahu</i> : seasonal migrations and transport route. <sup>105</sup>	

*Mr Espie's assessment*

[138] As we have explained, Mr Espie draws heavily from his 2011 Report which was attached to his evidence-in-chief. An immediate difficulty is that the Report was prepared for a consent application and according to related rules for that purpose as specified in the ODP.<sup>106</sup> As such, it was not properly fit for the purposes of determining the appropriate extent of an ONL or ONF for inclusion in the ODP, through the present plan review process.

[139] Mr Espie presents a useful analysis of the characteristics of the Farm itself. He points out that a number of improvements for development of the Farm have occurred since he wrote his Report. He also observes that coniferous shelter belts shorten views and visually compartmentalise the site and that there is little remnant vegetation across the property. We accept that evidence, although noting it is not materially at odds with Ms Mellsop's analysis of these matters.

[140] In his analysis of landscape characteristics, with a few notable exceptions that we discuss, Mr Espie does not materially elaborate on what he traversed in his 2011 Report. As such our discussion of his evidence is primarily with reference to what he says in that Report.

<sup>104</sup> Referencing Clutha Mata-au Parkway Group.

<sup>105</sup> Referencing Statutory Acknowledgements listed in Ch 5 PDP.

<sup>106</sup> Evidence-in-chief of Mr Espie, dated 30 November 2018, App 1, Report, at [4.1].





[141] Mr Espie's choice of a much larger landscape setting for his assessment results in an analysis of landscape characteristics that is comparatively much more generic than Ms Mellsop's.

[142] He discusses topography, including the existence of the Hawea, Clutha and Cardona Rivers within the Upper Clutha Basin, recording that "rivers are incised into the flat to varying degrees." He discusses geology and geomorphology, acknowledging the alluvial action creating "terraces and undulating forms that are evident in the valley floor" and recording that "the action of rivers have since incised into the floor itself."<sup>107</sup> However, in discussing 'ecology and land management' and 'naturalness', he makes no reference to river features or escarpments, including the sizeable escarpment which now incorporates Block 9 of the Farm (but was outside the Farm at the time he wrote his Report).

[143] He discusses "human held values and perceptions associated with the landscape". He draws from his interpretation of statutory documents for this. As is also the position for Ms Mellsop, he does not claim to rely on any direct community input, however.<sup>108</sup> He draws some broad conclusions regarding the community's landscape values, identifying some landscape elements that he believes the district community prioritises. However, notable by its absence from his Report is any analysis of river features, either as a general category of landscape element or by specific reference to the Clutha River itself. In that respect, Mr Espie's Report sits in contrast to his acknowledgement in evidence that "the relevant parts of the Clutha and Hawea Rivers may be outstanding natural features."<sup>109</sup>

[144] In his Report, Mr Espie analyses "more specifically how the landscape surrounding and including the subject site is valued".<sup>110</sup> Discussing aesthetic values, Espie identifies the Clutha Trail as one of a number of public walking tracks from which observers will appreciate the landscape character.<sup>111</sup> However, in his ensuing description of aesthetic values, he refers only to the generality of the valley floor compared with the mountain slopes and peaks that surround the Upper Clutha valley

<sup>107</sup> Evidence-in-chief of Mr Espie, dated 30 November 2018, App 1, Report, at [3.2], [3.3] – [3.5], [3.7], [3.13].

<sup>108</sup> Evidence-in-chief of Mr Espie, dated 30 November 2018, App 1, Report, at [3.14] – [3.19].

<sup>109</sup> Evidence-in-chief of Mr Espie, dated 30 November 2018, App 1, Report, at [4.18].

<sup>110</sup> Evidence-in-chief of Mr Espie, dated 30 November 2018, App 1, Report, at [3.19].

<sup>111</sup> Evidence-in-chief of Mr Espie, dated 30 November 2018, App 1, Report, at [3.20] – [3.22].



floor. He does not acknowledge that the Clutha River (Mata Au) corridor passes nearby the southern boundary of the site and indeed encompasses the Clutha Trail.

[145] His discussion of 'memorability' focusses on comparing the flat basin floor with the surrounding mountains. As for the legibility of "formative processes that have led to the current landform in both valley floor and the mountainous walls", and perceived naturalness, he comments that:<sup>112</sup>

... an ordinary untrained observer would place little value on such things, although may recognise that the mountain slopes are more rugged and jagged in form and perhaps more dynamic in terms of how they are affected by the actions of water and snow.

[146] At this point, we record that we are not persuaded by that assertion. Firstly, so far as we know from the Report, it is not backed by anything by way of community survey data. Rather, it would appear to be simply Mr Espie's personal opinion. As an opinion, it contrasts with his evidence-in-chief where he refers to the Clutha River feature as having "remarkable and memorable aesthetics that come from a large, sinuous, fast-moving river set within a rugged gorge."<sup>113</sup> In contrast to that more recent opinion, the Report's section on the legibility of formative processes associated with this element of the landscape surrounding the site does not mention the Clutha River.

[147] Despite the particular respects in which Mr Espie appears to have updated the opinions he expressed in his 2011 Report, he confirmed in his evidence-in-chief that he maintains the overall opinion the Report offered on landscape matters and how we should regard the appeal land. In summary, his opinions are:<sup>114</sup>

- (a) the Clutha River ONF is confined to the river itself and its immediate escarpment banks. Neither the terrace flats nor the escarpments of Farm can correctly be considered to be part of the feature of the river. These terrace flats and escarpments are distinct from the river but are not distinct from the surrounding landscape that continues to the north;
- (b) none of the terraces or escarpments within the Farm can correctly be considered to be ONFs themselves. They are not sufficiently distinct from their surroundings to be correctly termed features. They are no more

<sup>112</sup> Evidence-in-chief of Mr Espie, dated 30 November 2018, App 1, Report, at [3.23].

<sup>113</sup> Evidence-in-chief of Mr Espie, dated 30 November 2018, at [7.10].

<sup>114</sup> Evidence-in-chief of Mr Espie, for Cooper, dated 30 November 2018, at [5.1] – [6.3], App 3.





- natural than the surrounding non-ONL landscape. They are “insufficiently outstanding” to be elevated above the landscapes of the district generally;
- (c) “categorising landscape components such as the relevant escarpments as ‘outstanding’, runs a risk of devaluing the term ‘outstanding’”. In terms of managing the landscapes of our district in accordance with the RMA, we must be careful to reserve the term ‘outstanding’ for landscapes and features that genuinely do stand out from the district’s landscapes in general, in terms of merit and naturalness;
- (d) overall, no part of the Cooper Farm is correctly categorised as ONL or ONF. The most appropriate landscape classification for the Farm land denoted ONL is RCL.

### ***Submissions***

[148] Closing submissions for both parties primarily focus on why we should prefer the opinion of their respective experts.

[149] Counsel for Mr Cooper submits that, to qualify as ONL and be subject to the related restrictions on development, an area “must have unique or special characteristics not held by land that is not classified as ONL”.<sup>115</sup> He submits that Mr Espie’s opinion should be preferred because “he correctly assesses the land in the context of the wider landscape and in particular the characteristics and use of the Appellant’s land” and, in particular, asks “whether it has outstanding qualities in comparison with the broader rural landscape outside the ONL”.<sup>116</sup>

[150] Mr Todd points to the relative consistency between Mr Espie and Ms Mellsop that the appeal land does not reveal any such features as would distinguish it from the remainder of the Cooper Land that is not ONL. He points to the modifications to the Cooper Farm, in the form of irrigation and other farming operations and structures and its comparative lack of natural character compared to the land immediately adjoining the Clutha River. He does not argue that those modifications preclude the appeal land from being read as part of the wider Clutha River Corridor. However, he emphasises that the “relevant question is whether such wider corridor is of sufficient natural character that it

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<sup>115</sup> Closing submissions for Cooper, at [12] – [14].

<sup>116</sup> Closing submissions for Cooper, at [5].



should be categorised as an ONL” (which Mr Espie considers it does not).<sup>117</sup>

[151] He submits that a fundamental failing in Ms Mellsop’s approach is that she did not consider “the context of the balance of” the Cooper Land outside her recommended ONL and “the fact that such has no distinguishing features when compared against that part” within her recommended ONL boundary.<sup>118</sup>

[152] Finally, Mr Todd responds to QLDC’s opening submissions in reliance on two Environment Court decisions, a 2007 decision in *Upper Clutha Environmental Society*<sup>119</sup> and a 2018 decision in *Willowridge Developments*.<sup>120</sup> Mr Todd submits:<sup>121</sup>

... these can be factually distinguished as in those cases the ONL or ONF boundary represented a clear delineation of the landscape and the change from high to low natural character. Here the boundary as recommended by Ms Mellsop is an arbitrary delineation given the difference (or lack thereof) in natural character between the part of the Appellant’s land sought to be included in the ONL and the part sought to be excluded.

[153] QLDC emphasises the importance of the historical association that the Farm’s lower terrace, framed by the escarpment, has with the Clutha River. Counsel refers to Ms Mellsop’s evidence that the “legibility and expressiveness of the wider corridor”, including this terrace and scarp, is “the most important value that contributes to” the river corridor landscape being an ONL”. In particular, counsel notes her observations that the escarpment creates “a clear distinction between the upper and lower terraces”, “dwarfs the human modifications present” and is “clearly visible and legible, including from the top of Mt Iron”. Counsel also refer to some related concessions by Mr Espie in cross-examination. One was that the escarpment across the Cooper Land is “discernible” and a geomorphologist could potentially recognise the appeal area as part of a river corridor. Another was that, if an ONL is to be identified for the River Corridor, it “would require an ONL boundary on both banks”. QLDC points out that those concessions are materially consistent with Ms Mellsop’s opinion that it would be “somewhat illogical” to exclude one set of escarpments and terraces and include the other set.<sup>122</sup>

<sup>117</sup> Closing submissions for Cooper, at [6] – [8], referring to Transcript at p 816, l 15, p 841, l 5.

<sup>118</sup> Closing submissions for Cooper, at [10].

<sup>119</sup> *Upper Clutha Environmental Society v Queenstown Lakes District Council* C114/2007.

<sup>120</sup> *Willowridge Developments Ltd v Queenstown Lakes District Council* [2018] NZEnvC 83.

<sup>121</sup> Closing submissions for Cooper, at [11].

<sup>122</sup> Closing submissions for QLDC, dated 2 August 2019, at [2.4] – [2.8], referring to Transcript at p 830, l 33, p 819, l 20 – 24.





[154] As for the irrigation and other improvements, QLDC submits that these do not cause the appeal area to be excluded from the ONL. Counsel refers to observations in the *Matakana* case to that effect. QLDC acknowledges that the fundamental issue to determine is whether the River Corridor, as a landform, is an ONL.

[155] On the issue of the planning consequences of an ONL classification, counsel refer to *Man O'War* in submitting that this is a "secondary consideration" not determinative of the classification question. On this matter, counsel add:<sup>123</sup>

While it is not relevant to the determination of this site-specific ONL appeal, the Stage 1 decisions version Rural Zone chapter (Chapter 21) "enables farming activities" by way of permitted activity rules (subject to compliance with certain standards). As a result, it is unlikely that any consents at all will be required for the ongoing operation of the 'fully developed' dairy farm.

### ***Discussion***

[156] We prefer Ms Mellsop's opinion over that of Mr Espie for several reasons.

[157] Starting with the choice of landscape for assessment purposes, we find Ms Mellsop's approach more in keeping with the Landscape Methodology JWS and more relevantly focussed on the ONL in issue. By contrast, Mr Espie's focus is centred on the Cooper Land. While that would have been appropriate for a resource consent application, it does not properly sit with determining ONL or ONF boundaries in a plan appeal. On the other hand, his related concept of 'landscape' is unhelpfully broad in extending well beyond the ONL in contention. We agree with Ms Mellsop that the scarps that border the lower terraces of the Clutha River (Mata Au) are highly legible and expressive of their historical relationship to the River itself. By taking a broad construct of landscape, extending across much of Hawea Flats to the framing mountains, Mr Espie effectively loses sight of the significant relationship between the scarp and terrace land and the River. We do not accept his opinion that it would be potentially only geomorphologists who would read the scarps as related to the River. In particular, our site visit (particularly our viewing from Stephenson's Road) reinforced to us that even the untrained eye would perceive the scarps as related to, and framing, the River itself.



<sup>123</sup> Closing submissions for QLDC, dated 2 August 2019, at [2.22] – [2.24], referring to PDP Chapter 21, 21.1 Zone Purpose; Objective 21.2.1.

[158] Hence, we find that those scarps and terraces are legibly and sufficiently related to the River, itself an ONF.

[159] Having reached that finding, the next issue is whether the wider River Corridor should be treated as a landscape or a feature. We have considered Ms Mellsop's opinion that the River Corridor is of "too large a scale and extent to be considered a feature (a discrete landform or biophysical entity)". Having considered the evidence, including the Landscape Methodology JWS, we do not agree with Ms Mellsop on that point.

[160] Our starting point is that the choice of allocating an area to the class of 'landscape' or 'feature' for s6(b) purposes is a matter of informed judgment, as the following explanation in the Landscape Methodology JWS indicates:<sup>124</sup>

- (a) Typically, 'landscapes' display characteristics such that they are distinctive from adjacent landscapes and can be identified and mapped. However, in some circumstances the attributes are more subtle and/or common to more than one area, making it more difficult to define the spatial extent of a landscape. In such circumstances it may be appropriate to focus on whether the landscape can be meaningfully perceived as 'a whole'. It is important that where this approach to the identification of a landscape is applied, it is clearly transparent in the assessment.
- ...
- (c) A feature typically corresponds to a distinct and clearly legible biophysical feature (eg. *rôche moutonnée*, volcanic cone, water body). It is acknowledged that scale and context will play a role in determining whether the area is a feature or landscape.

[161] In a linear sense, the Clutha River and its immediate enclosing banks, encompass an extensive area from the Lake Wanaka outfall to the District boundary with Central Otago. Yet, the experts agree it is appropriately an ONF. The scarps and intervening terraces are, as we have explained, legibly related to that ONF. We find they are more appropriately treated as part of that ONF than as a separate related landscape in their own right.

[162] We now turn to the appropriate choice of boundaries for the remainder of this ONF. Towards the west, we accept the agreed position of the experts that the ONF appropriately encompasses the lower reaches of the Hawea River to its confluence with the Clutha/Mata Au.<sup>125</sup> There is an element of difference between Ms Mellsop and Mr

<sup>124</sup> Landscape Methodology JWS, at [1.2].

<sup>125</sup> Cooper JWS, at p 3, Table 1, 5<sup>th</sup> box.





Espie as to whether to include or exclude the piece of lower terrace land marked as Block 2 on Mr Espie's App 2. We prefer Ms Mellsop's recommended boundary following the escarpment as it is more consistent with the Landscape Methodology JWS in that it follows a legible geomorphological line and avoids 'cut outs'.

[163] Finally on this topic, we observe that our findings on the appropriate location of the ONF boundaries in relation to the Cooper Land are consistent with the outcome reached in *Willowridge*.<sup>126</sup> QLDC pointed out, in opening, that *Willowridge* recognised that the escarpment enclosing the Clutha River Corridor (the "long horizontal lines") is an ONF. The land in issue in that case is between Rekos Point and the Red Bridge, also on the true left of the Clutha/Mata Au. While we emphasise that we have reached the same position on the evidence before us, we record that we do not accept Counsel's submission for Mr Cooper that there is any material distinction between the two cases. Rather, as we have explained, we have similarly found that the boundaries we have described are appropriate for the Clutha River/Mata Au Corridor ONF.

[164] The remaining issue concerns the appropriate expression of values, recognising Mr Cooper's concerns about uncertainty for farming operations.

[165] On these matters, we refer to our findings at [27] – [34]. The Cooper Farm illustrates why it is important to accompany ONF mapping with a properly descriptive scheduling of the values that inform why a feature is adjudged 'sufficiently' natural to be chosen as an ONF.

[166] Whilst we find Ms Mellsop's description of the landscape values of the Clutha River and Corridor helpful, it is materially deficient in not recognising anything of the productive rural character of the terraces, notably as associated with the Cooper Land.

[167] As *Man O'War* found, the determination of whether land has values sufficient to make it an outstanding landscape within the ambit of s6(b) RMA "requires an essentially factual assessment based on the inherent quality of the landscape itself".<sup>127</sup> Our factual assessment of that accounts for the ONF's accommodation of the Farm's operations and infrastructure, but not on the footing that the way things are now configured and operated is locked down. That would be unrealistic and unwarranted. The Court of Appeal, in

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<sup>126</sup> *Willowridge*, at [22].

<sup>127</sup> *Man O'War*, at [61].



discussing the Supreme Court's decision in *King Salmon*,<sup>128</sup> noted William Young J's concern about "significantly disproportionate outcomes as a result of the strict approach inherent in the majority judgment". On that concern, the Court of Appeal went on to record the majority judgment's related indication that "much turns on what is sought to be protected".<sup>129</sup>

[168] Plainly, the Cooper Farm is a highly developed and productive dairy farm. It is equally clear that the land use of productive farming is dynamic. What we observe now will not necessarily remain static. For example, we infer that market and/or regulatory conditions could well see changes in the nature of production, whether dairy or otherwise, from time to time. As QLDC points out, the DV's Rural Zone chapter (Chapter 21) "enables farming activities" by way of permitted activity rules (subject to compliance with certain standards). It adds that, as a result, it is unlikely that any consents at all will be required for the ongoing operation of the 'fully developed' dairy farm.

[169] We find an important addition to a Clutha Corridor ONF is a schedule of ONF values (the latter being properly descriptive of the character of the land uses along the Corridor, including the noted productive land use of the Cooper Farm).

[170] We return to these matters at [241] and following.

### **Allenby Farms Limited: Mt Iron ONF**

#### ***The issues***

[171] Allenby Farms Limited ('Allenby') seeks the removal of three areas of its land ('Areas A, B and C') from the Mt Iron ONF at Wanaka.<sup>130</sup> Unlike the Rural zoning of most of Mt Iron, Areas B and C are zoned Low Density Residential ('LDR') and are within the 'Urban Growth Boundary' ('UGB') under the PDP. Rob Roy Residents Group ('Rob Roy

<sup>128</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

<sup>129</sup> *Man O'War*, at [64], [65], referring to *King Salmon* at [201].

<sup>130</sup> We undertook a site visit of Mt Iron (including Areas A, B and C) on 5 May. Approaching Mt Iron via the Cleugh Access road, we went on to the Cleugh property and viewed Area A from a central, elevated position. We commenced our climb of Mt Iron from an unformed walking track signposted at a stile near the Cleugh's access road. After viewing Areas B and C from that vantage, we took the main public walking track to the summit, where we could appreciate the broader amenity values associated with the Mt Iron ONF. We descended via main track down the south-western flank the Allenby Place entry/exit point where we walked via Anstead Place and Rob Roy Lane back to our starting point.





Residents', 'Group') is a s274 party to the appeal. They oppose the removal of Areas B and C from the ONF and seek that the underlying zoning be changed to Rural. The Group represents some residents who live in proximity to Allenby's land at Mt Iron.<sup>131</sup>

[172] The key issues are:

- (a) for Area A:
  - (i) is it properly part of the Mt Iron natural landscape feature?
  - (ii) in any case, is it in such a modified state that it is appropriately excluded from the Mt Iron ONF?
- (b) are Areas B and C appropriately excluded from the ONF given their modified state, close proximity to residential development and LDR zoning that is enabling of residential development?
- (c) should we exercise any available powers to change the underlying zoning of Areas B and C from LDR to Rural?

### **Background**

[173] A helpful degree of consensus amongst the landscape experts, as recorded in a joint witness statement dated 31 January 2018 ('Mt Iron JWS'), allows us to traverse some of Mt Iron's landscape values relatively briefly in this background section.

[174] Mt Iron (including 'Little Mt Iron') is a classic 'rôche moutonnée'<sup>132</sup> more or less between Albert Town and Wanaka township. As described by Mr Baxter,<sup>133</sup> it "occupies a prominent position in the wider Wanaka landscape". It was formed by the passing of glacial ice over bedrock. This has resulted in its blunt asymmetrical shape including a gently graded western side and a more rugged eastern side, edged with cliffs. Mt Iron is a very popular recreational area, traversed by numerous walking tracks that offer spectacular views over the Wanaka, Hawea and Upper Clutha environs.

<sup>131</sup> Eight other parties also joined the appeal: Marc Scaife, Longview Environmental Trust, Queenstown Airport Corporation Limited, Otago Regional Council, the Alpine Group Limited, Remarkables Park Limited, Royal Forest and Bird Protection Society of NZ Inc, Transpower NZ Ltd. However, none called evidence or made submissions on Sub-topic 1.

<sup>132</sup> According to Douglas Benn and David Evans, *Glaciers & Glaciation*, Arnold, London, 1st ed. 1998 p 324 – 326, the 18th-century Alpine explorer Horace-Bénédict de Saussure coined the term *rôches moutonnées* in 1786. He saw in these rocks a resemblance to the wigs that were fashionable amongst French gentry in his era and which were smoothed over with mutton fat (hence *moutonnée*) so as to keep the hair in place. The French term is often incorrectly interpreted as meaning "sheep rock", or "rock sheep" or "fleecy rock".

<sup>133</sup> Evidence-in-chief of Patrick Baxter, for Allenby, dated 30 November 2018, at [7].



[175] The Mt Iron JWS notes that Mt Iron:

... has been identified as a geopreservation site of national significance and is a distinctive, prominent and highly visible landform, intimately associated with the Wanaka and Albert Town townships.

[176] There are five public access points to Mt Iron, associated with the network of walking tracks – from the Wanaka-Luggate Highway, Allenby Place, Rob Roy Lane, Hidden Hills Drive and Old Racecourse Road.

[177] The Mt Iron JWS records that the landscape experts agree that:

Mt Iron as a natural feature extends beyond the ONF boundary shown in the Decisions Version PDP Map 18.

[178] That much was readily evident to us on our site visit. The lower slopes of Mt Iron are already long-colonised by residential neighbourhoods. Those established neighbourhoods are subject to Rural Residential ('RR') or Low Density Residential ('LDR') zoning in the ODP and Large Lot Residential ('LLR') and LDR zoning in the DV of the PDP. The Mt Iron JWS records the experts' agreed position that "current and proposed zone boundaries do not relate closely to landform features or topography". Put another way, we infer that zoning decisions over the years have paid little respect to those matters.

[179] What we observed on our site visit helped confirm what is evident in that respect in Ms Mellsop's Rebuttal Fig 3 and in Ms Steven's Figs 9 and 10. The established residential development in those zones has already significantly reduced the level of naturalness of those lower flanks of Mt Iron. That is reflected in the placement of the northern boundary of the ONF in the DV's Map 18. On these matters, the Mt Iron JWS records the following consensus of the landscape experts:

Mt Iron as an entity is appropriately classified as an ONF despite rural residential development on the northern and north-eastern slopes and suburban development on the western side. The key landscape values of Mt Iron are set out in paragraph 40 of Ann Steven's EiC, paragraph 11.6 of Helen Mellsop's EiC, and paragraph 12 of Patrick Baxter's EiC, all of which reach similar conclusions.





[180] The Allenby Farms Limited ('Allenby') appeal concerns three discrete areas of its land that Map 18 includes within the Mt Iron ONF:

- (a) Area A is easily the largest of these areas and sits on the northwestern flank of Mt Iron and within the Rural zone. Apart from some sheds and site works, it is largely undeveloped;
- (b) Areas B and C are narrower strips of land on the lower parts of Mt Iron's western flank adjacent to established dwellings. As we come to discuss, the LDR zoning of those dwellings under the DV also encompasses Areas B and C (although those areas remain undeveloped). That is, in essence, a carry-over of the established position under the ODP and this zoning is not challenged by appeal.

### ***Evidence***

[181] We heard landscape evidence from three landscape experts:

- (a) Mr Patrick Baxter, called by Allenby;
- (b) Ms Anne Steven, called by Rob Roy Residents; and
- (c) Ms Mellsop, for QLDC.

[182] Those experts undertook facilitated expert conferencing that resulted in the Mt Iron JWS. Neither Mr Baxter nor Ms Steven participated in conferencing that produced the Landscape Methodology JWS. However, they clarified their position on it in questioning.

### *The values of Mt Iron ONF*

[183] Each of the landscape witnesses offered opinions, applying the *WESI* factors, as to the values of Mt Iron leading to their agreed position that it has sufficient naturalness to be classed as an ONF.

[184] Ms Mellsop offered a relatively high level analysis of why she considers the feature to qualify as an ONF for its "very high" biophysical values (pertaining to its prominence as a *rôche moutonnée*), "very high legibility/expressiveness value" (pertaining to the legibility of its formative processes and exposed schist cliffs), "high naturalness values" (pertaining to extant indigenous vegetation and largely unmodified



upper slopes), “very high aesthetic values” (also pertaining to prominence and memorability), “high experiential values” (pertaining to its accessibility) and “very high shared and recognised values” (in essence as a Wanaka landmark).<sup>134</sup>

[185] Mr Baxter agreed with that assessment.<sup>135</sup>

[186] Ms Steven explained that her BSc in geography included study of geomorphology. She did not claim to be an expert on that topic but explained that she did have some understanding of landforms and processes.<sup>136</sup> Her descriptions of the ‘key landscape values’ which underpin the outstandingness of Mt Iron as an ONF are as follows:

*Biophysical*

- classic, large *r*oche moutonnée landform (ice-sculpted schist bedrock with moraine veneer in places); an extremely well-defined landform of scientific/educational value; displays the typical gentler sloping and smoother uphill side and a steep downstream side;
- extensive *k*ānuka woodland cover, mixed with grey shrubland in places and a few areas of short tussock grassland and cushionfield/herbfield (albeit severely degraded due to rabbit pressure);
- some of the best examples of *r*oche moutonnée’ habitats within the Pisa Ecological District, with a moderate diversity of habitats and moderate species richness of birds and plants;
- contains species that are threatened (*Acaena rorida*, *Pimelea sericeovillosa*) or At Risk of Declining (*Discaria toumatou* (Matagouri) and *Carmichaelia petriei* (desert broom));
- the mountain provides habitat for Brown Creeper, a small passerine bird and therefore also supports NZ Falcon populations, a Threatened-Nationally Vulnerable species, and native lizards. Indigenous fauna are protected;
- the site is relatively large and compact and thus is conducive to ecological values being self-sustained and is an important component of a network of sites in the vicinity of the Upper Clutha River that support indigenous scrub and shrubland habitat;
- *Coprosma* scrub and shrubland on the shady south-facing slopes of the site have excellent potential for ecological restoration into indigenous forest;
- overall, the site does support significant indigenous vegetation and significant habitats of indigenous fauna. A key attribute of the site is the gradient of indigenous woody vegetation from relatively moist shady habitat on south-facing slopes to dry sunny habitat on north-facing slopes.

<sup>134</sup> Second statement of evidence of Ms Mellsop, for QLDC, dated 2 November 2018, at [11.6].

<sup>135</sup> Evidence of Patrick Baxter, for Allenby, dated 30 November 2018, at [12], [13].

<sup>136</sup> Transcript, p 791, l 29 – 32.





*Perceptual*

- Highly visible, prominent and isolated distinctive landform with a high degree of legibility and strong visual contrast with surrounding landscape, imparting high aesthetic values and strong contributor to sense of place for Wanaka;
- Highly natural character overall with some more modified areas containing tracks, roading, buildings and structures within a kanuka/grey shrubland matrix.
- Early summer (December) mass kanuka flowering is a notable transient effect, reminiscent of a dusting of snow, as well as the passing effects of light and shade.

*Associative*

- Very high degree of shared values in a visual and recreational sense, supporting one of Wanaka's most heavily used walking tracks.
- Key feature in the everyday life of Wanaka residents and widely visible from surrounding township areas; backdrop to residential areas.
- Key element contributing to the place of Wanaka and Albert Town.
- Large proportion of the mountain is proposed as Significant Natural Areas ('SNAs') in the proposed District Plan.
- The southeast corner of the mountain is a Scenic Reserve.

*Area A*

[187] Together with Ms Mellsop and Mr Baxter, Ms Steven also gave her opinion on the values of Area A, despite the fact that Rob Roy Residents' interest is confined to Areas B and C. We find nothing inappropriate in that approach in that all three areas are part of the feature in issue.

[188] The Mt Iron JWS records that Ms Mellsop regards Area A as part of the Mt Iron landform, but Ms Steven and Mr Baxter disagree.

[189] Ms Mellsop's opinion that Area A is part of the ONF is primarily on the basis of how it would be perceived from relevant viewing points. She notes Area A is visible from parts of the Mt Iron walking tracks and from public roads. She observes that, at such viewing points, Area A would be perceived as part of the same Mt Iron landform. She recognises its lack of vegetation (through fire) and the presence of a dwelling/garden. However, she observes that similar human-induced elements are evident in some other parts of the ONF (eg on the northern and north-eastern slopes).<sup>137</sup>

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<sup>137</sup> Mt Iron JWS, at [2].



[190] In cross-examination, Ms Mellsop acknowledged, that “apart from the escarpment”, Area A “is slightly flatter” but confirmed her overall opinion is that Area A is “still distinguished from lower areas in terms of its topography”.<sup>138</sup> She remained of the opinion (as shown in her exhibit MH1) that “the topographical limits of” Mt Iron “extend outside the area that is currently annotated as ONF”.<sup>139</sup>

[191] Ms Steven and Mr Baxter acknowledge the presence of moraine at Area A but explain that this similarity with parts of Mt Iron does not make it appropriate to treat it as the same landform. On the contrary, Area A exhibits basin floor moraine. In addition, they point out that Area A is visually much less prominent than Mt Iron and is not accessible to the public. They point out that the views of Area A from the Mt Iron walking tracks are relatively confined (largely restricted to immediate residential properties). They consider that it does not have the same shared/associative values as the rest of Mt Iron.

[192] In evidence, Ms Steven confirmed her opinion that Area A “it is not part of the *rôche moutonnée* landform” and instead reads it to be “a different landform and appears to be more part of the flatter basin floor than the mountain” (while acknowledging that the basin floor has a “much gentler rolling topography”).<sup>140</sup>

#### *Areas B and C*

[193] There is no material difference between the experts that Areas B and C are properly considered part of the Mt Iron landform and have a similar landscape character to the balance of the Mt Iron ONF. The Mt Iron JWS records their agreement that:<sup>141</sup>

Areas B and C are part of the ONF Mt Iron landform and currently have similar landscape character to the remainder of the feature. It is part of the *rôche moutonnée* landform.

[194] Ms Steven’s evidence draws our attention to considerations of landform continuity, ecological character, natural character, high visibility and strong associative values both for the public at large and for the neighbouring residential area. Ms Steven told us<sup>142</sup> that Area B is part of a landscape that “provides a sharply contrasting natural

<sup>138</sup> Transcript for week 3, at p 753, l 24 – 26.

<sup>139</sup> Transcript for week 3, at p 753, l 27 – 29.

<sup>140</sup> Evidence-in-chief at [46].

<sup>141</sup> Mt Iron JWS, at [3] and [4].

<sup>142</sup> Evidence-in-chief of Ms Steven, for Rob Roy Residents, dated 21 December 2018 at p 13, 4<sup>th</sup> bullet





backdrop to the adjoining residential area". When cross-examined on behalf of QLDC (a party with similar interests to Rob Roy Residents), Ms Steven relevantly explained:<sup>143</sup>

Area B:

... is actually a reasonably thin veneer of moraine over a lumpy lower bump on the *rôche moutonnée* if you like, whereas Area A you're beginning to get into thicker moraine deposits, still over bedrock because all the basin floors have got bedrock under it, it just depends on the thickness of the surface geology above it, and I also know that there are thin veneers of moraine on top of the purple, because I've seen them. So it's a very crude map and you really need to understand and be able to read the landscape to be more definitive about what's what.

Area C:

... is not actually moraine. It's... a colluvial slope, ... formed from colluvial material that's come down off the steeper slopes and gradually washed down, as I explained in my evidence. Area B is part an area that's lumpy bedrock on the shoulder, or the lower shoulder of that *rôche moutonnée*, but it's veneered with moraine. So this is a surface geology map. You must remember that it doesn't show what's just beneath...

[195] When challenged under cross-examination on whether Area B's close proximity to a residential area detracted from its naturalness, Ms Mellsoop answered:<sup>144</sup>

It affects people's perceptions of naturalness but part of the attributes of Mount Iron is that it is a natural area directly adjacent to an intensive suburban area, and that contrast forms part of its value to the local population.

[196] A statement from the Landscape Methodology JWS to the effect that development on the edge of an area of landscape may make it appropriate to exclude that area from an ONL was then put to Ms Mellsoop.<sup>145</sup> She was then asked the following question:<sup>146</sup>

So what I'm suggesting is that because of that adjacent development, and the comparative lack of any regenerating vegetation, in this instance it is appropriate to exclude that area just as you flagged might be the case in the joint witness statement?

point in [48].

<sup>143</sup> Transcript, p 791, l 33, p 792, l 12.

<sup>144</sup> Transcript for week 3, at p 759, l 23 – 25.

<sup>145</sup> Landscape Methodology JWS, p 10.

<sup>146</sup> Transcript, p 759, l 26 – 33.



[197] Her answer was as follows:<sup>147</sup>

No I wouldn't agree with that. I would say that is that kind of a statement is referring to the suburban development that is below that area that has occurred and has modified that area, but adjacent to it is an unmodified area. And I wouldn't consider it appropriate to exclude that unmodified area just on the basis that it was adjacent to a developed area. That approach would lead to a spread of development, you know, could lead to a spread of development further and further up.

### **Submissions**

#### *Area A*

[198] For Allenby, Ms Baker-Galloway submits that, in respect of naturalness, Area A has been very obviously modified (by earthworks, roading, buildings and lack of natural vegetation) such that it displays a “moderate level of human built change”. She refers to Ms Mellsop’s acknowledgement, in cross-examination, that Area A had only “moderate to low” naturalness, and submits that, in terms of the Landscape Methodology JWS, Area A should be treated as falling below the threshold for being part of an ONF. As for differences between Ms Mellsop and Ms Steven on whether Area A is part of Mt Iron, in geological and topographical terms, she submits that we should prefer Ms Steven’s opinion given her relevant qualifications. In any case, she submits that Ms Steven’s opinion on these matters is clearly the more persuasive, namely that Area A is a separate low-lying moraine landform rather than being part of Mt Iron (ie “simply part of the ice sculptured moraine veneered basin floor, similar to other lumpy areas around, under Wanaka township”).<sup>148</sup>

[199] QLDC’s overall closing submission acknowledges that the court will need to form its view on Area A on the weight of evidence presented. Whilst acknowledging Ms Mellsop’s acceptance of the ‘moderate to low’ naturalness of Area A, QLDC emphasises Ms Mellsop’s opinion on why Area A should be considered part of the Mt Iron *r*och

<sup>147</sup> Transcript, p 760, l 1 – 7.

<sup>148</sup> Closing submissions for Allenby, dated 26 July 2019, at [8] – [17]; Transcript, p790, l 11-13.





perceived as visually separate from adjacent developed residential areas. It takes a different position from Allenby as to the value of the Lidar images used by Ms Mellsop.<sup>149</sup>

[200] QLDC dispute Allenby's interpretation of the Landscape Methodology JWS as setting any 'threshold' of sufficient naturalness, pointing out that this JWS refers to 'moderate to high' as a 'useful guide' and 'starting point'.<sup>150</sup> We record that we agree with QLDC on this point, and would add that this part of the JWS was referring to whether an ONL or ONF qualifies, not whether an area belongs as part of an ONL or ONF. The latter question is quite different from the former. However, as we shortly explain, neither of these points is ultimately decisive.

#### *Areas B and C*

[201] Legal submissions in regard to Areas B and C are far more wide-ranging. In addition to traversing the evidence, they address a range of legal issues. We deal with the evidential issues first.

[202] Allenby submits that, "on the merits", Areas B and C are not "sufficiently natural" to qualify as part of the Mt Iron ONF. Counsel emphasises the passage in the Landscape Methodology JWS that she put to Ms Mellsop in cross-examination and that, in essence, recognises that the evidence of development on the edge of a landscape may make it appropriate to exclude it from an ONL.<sup>151</sup> However, counsel does not acknowledge the following part of Ms Mellsop's answer in cross-examination as to the relevance of that part of the JWS to the consideration of Areas B and C (and which we more fully quote at [199]):

... I wouldn't consider it appropriate to exclude that unmodified area just on the basis that it was adjacent to a developed area. That approach would lead to a spread of development, you know, could lead to a spread of development further and further up.

[203] Allenby emphasises the fact that the vegetation in the vicinity of Areas B and C is "highly modified". However, counsel's reference to related evidence is confined to noting Ms Steven's assessment of Areas B and C as supporting mainly exotic grassland. Counsel does not acknowledge the fact that all the landscape experts are agreed, as



<sup>149</sup> Closing submissions for QLDC, dated 6 August 2019, at [2.2] – [2.14].

<sup>150</sup> Closing submissions for QLDC, dated 6 August 2019, at [2.7] – [2.14].

<sup>151</sup> Closing submissions for Allenby, dated 26 July 2019, at [21].

recorded in the Mt Iron JWS, that “Areas B and C are part of the ONF Mt Iron landform and currently have similar landscape character to the remainder of the feature.” Instead, counsel asserts, without referencing supporting expert evidence, that “on the face of what is present at the moment ... areas B and C cannot be found ... of ‘moderate-high naturalness’”.<sup>152</sup>

[204] Allenby goes on to set out how it considers the LDR zoning relevant to our consideration of whether Areas B and C should be removed from the ONF. Counsel explains that the LDR zoning enable feasible development of Areas B and C to a LDR density without subdivision. Subdivision would require a consent application. However, Ms Baker-Galloway points out that a subdivision application cannot be publicly notified and, if it is given limited notification, there is no rights of appeal (ss 95A(5)(b), 120(1A) RMA). She submits that this planning context is a further valid basis for finding that Areas B and C do not meet “the ‘naturalness’ threshold” and, hence, should be excluded from the ONF.<sup>153</sup>

[205] QLDC responds that Allenby’s closing submissions are “difficult to square up with” the Mt Iron JWS. In particular it refers to the experts agreement that the experts agree that Mt Iron’s ONF categorisation is appropriate despite development on its flanks including “suburban development on the western side”.<sup>154</sup> It submits that the opinions of the experts on naturalness, as recorded in the Mt Iron JWS, should be preferred to the submissions Allenby makes on this. It emphasises the fact that Mt Iron is an ONF, not part of an ONL, and a distinct and clearly legible biophysical feature, namely a *rôche moutonnée* landform. It adds:<sup>155</sup>

The landform in this case abuts the residential areas of Albert Town and Wanaka on two of its flanks, with rural residential along the northern faces. The boundaries must be drawn somewhere, and ... the appropriate boundaries for Areas B and C align, in this case, with the extent of the existing residential development. Excluding Areas B and C on the basis that they abut developed land could result in continued boundary creep into the ONF along, not only the western flanks of Mt Iron, but three flanks of the ONF.

<sup>152</sup> Closing submissions for Allenby, dated 26 July 2019, at [22].

<sup>153</sup> Counsel’s submissions on *Man O’War* are addressed from [42] and following.

<sup>154</sup> Closing submissions for QLDC, dated 6 September 2019, at [2.16].

<sup>155</sup> Closing submissions for QLDC, dated 6 September 2019, at [2.18] – [2.22].





[206] Rob Roy Residents similarly submit that, on the evidence, Areas B and C are appropriately part of the Mt Iron ONF.<sup>156</sup>

*Submissions as to the LDR zoning of Areas B and C*

[207] The issues here are slightly broader than the LDR zoning, in that Rob Roy Residents also seek that the ODP's Urban Growth Boundary ('UGB') be adjusted so as not to encompass Areas B and C.

[208] Rob Roy Residents first submit that we can make these changes as consequential on determining the ONF boundaries in relation to Areas B and C. We do not accept that submission for the following reasons.

[209] We do not accept Rob Roy Residents' characterisation of the present overlay of ONF over LDR zoning and the UGB as a "mapping error". The references in various reports of the independent commissioners to Mr Barr's characterisation of the mapping position as anomalous or inconsistent is not a sound basis for the submission. Whatever he may have said at that time was in his capacity as a planning officer. It is not properly to be taken as representing QLDC's position. The referenced reports are evidence that QLDC was informed of the position whereby Areas B and C are zoned LDR and within the UGB. Having been so informed, QLDC did not seek a variation to change this. As such, there is no sound basis for Rob Roy Residents' claim of mapping error.

[210] As QLDC correctly point out, zoning is conceptually different from the determination of the spatial extent of ONL and ONF. Further, we agree with QLDC's observation that that there is nothing in the PDP preventing a residential zone from being categorised as ONL or ONF. Rob Roy Residents do not refer to any sound basis for concluding otherwise. Insofar as there are potentially anomalous outcomes, that does not confer on the court jurisdiction to attempt to rectify these outside the scope of appeals. We agree with QLDC that we have no requisite jurisdiction to make any consequential zoning and/or UGB change as Rob Roy Residents seek. We also agree with QLDC's related submission as follows:<sup>157</sup>

The determination of what is an appropriate zone for any land requires an assessment

<sup>156</sup> Closing submissions for Rob Roy Residents, dated 2 August 2019, at [3].

<sup>157</sup> Closing submissions for QLDC, dated 6 August 2019, at [2.32] – [2.37].



against section 32 of the RMA. In addition, decisions in relation to the zoning of land must have regard to the actual or potential effects on the environment of any activities that would apply through the application of a rule within a new zone. Any rezoning needs to be associated with a level of detail that corresponds to the scale and significance of the environmental effects that are anticipated from the implementation of the new zone, and in the Council's submission, sufficient evidence to assist the decision-maker in considering whether actual or potential adverse effects are satisfactory would be required.

[211] Rob Roy Residents submit, in the alternative, that we should invoke s293 RMA to potentially make this zoning and UGB change. As QLDC expresses some degree of support for this approach, we traverse related submissions in some further detail.

[212] On s293, Rob Roy Residents submit that there is jurisdiction for the court to invoke this and make a direction. They argue there is the required 'nexus' between the relief in Allenby's appeal and the zoning change they seek, a sound evidential basis for the court to exercise its discretion, and a lack of prejudice in so doing (in that all parties are before the court).<sup>158</sup>

[213] In reply to Allenby's submission that there has been "no substantive hearing relevant to" the zoning of Areas A and B or their inclusion in the UGB, and hence no capacity to invoke s293, Rob Roy Residents submit that it is a sufficient basis to do so in the following way:<sup>159</sup>

The issues considered at the substantive hearing, including the consequences of development pursuant to a LDR zoning on the values and attributes of the ONF, are relevant to the residential zoning of Areas B and C and the location of the UGB. There is thus a nexus, or rational connection between the rezoning now sought, and the finding on the substantive appeal, that Areas B and C are within the ONF of Mount Iron.

[214] Rob Roy Residents take issue with Allenby's submission that the ONF landscape classification of Areas B and C and their zoning are separate issues, arguing:<sup>160</sup>

... the two are not separate issues at all, but necessarily related. The logical nexus exists in this case between the plan review and the classification of land as ONL and ONF, the appeal – which challenges the location of the ONF boundary on this part of Mount Iron, and the proposed change advocated for by the Rob Roy Residents, being the Rural zoning of Areas

<sup>158</sup> Opening submissions for Rob Roy Residents, dated 6 May 2019, at [9].

<sup>159</sup> Closing submissions for Rob Roy Residents, dated 2 August 2019, at [32].

<sup>160</sup> Closing submissions for Rob Roy Residents, dated 2 August 2019, at [33], [34].





B and C, and consequent movement of the UGB, both of which are outside scope of the appeal.

[215] Rob Roy Residents also argue that, contrary to Allenby's position, the evidence before the court is sufficient to be able to "adequately consider" the matter of the Rural zoning of Areas B and C, and location of the UGB. They argue that there is a sufficient nexus between these matters with reference to evidence from Ms Mellsop and Ms Steven to the effect that developing areas B and C pursuant to a LDR zoning would not accord with its ONF classification. They submit that the only appropriate zoning of Area B and C is Rural, which is consistent with the vast majority of other land classified as ONL and ONF in the District.<sup>161</sup>

[216] Rob Roy Residents submit that, should the court elect to invoke s293 (rather than make an immediate consequential change to the zoning of Areas B and C), the direction should "be subject to and conditional upon [Allenby ] first filing and serving an undertaking that it will not take any steps to develop Areas B and C pursuant to the LDR zone (whether as a permitted activity or otherwise) until the matter of the zoning ... has been finally determined".<sup>162</sup>

[217] Ms Macdonald submits that a further ground for the court exercising its s293 discretion is that s6(b) obliges local authorities to protect ONFs from inappropriate subdivision, use and development and the risk that delay in changing the zoning treatment of Areas B and C could render the ONF nugatory. She adds:<sup>163</sup>

[43] The Appellant's submissions point to the relevant development controls in the PDP as they currently apply to Areas B and C. While it is not necessarily accepted that development of houses to 450m<sup>2</sup> could occur as of right, the LDR zoning of Areas B and C is at present deemed operative. Save special circumstances, subdivision applications for land zoned LDR will not be notified or limited notified. The Appellant is correct that there is no right of appeal in respect of such subdivision applications.

[44] The Appellant is able to apply for any of those activities now. In this context, the parties draw to the Court's attention two recent approvals obtained by the Appellant (provided with these submissions). The first authorises a boundary adjustment between two titles. The effect of this consent is to rearrange the boundaries so that all of the land zoned

<sup>161</sup> Closing submissions for Rob Roy Residents, dated 2 August 2019, at [38], referring to Transcript p 759, l 16 (Mellsop), p 798, l 25 (Steven).

<sup>162</sup> Closing submissions for Rob Roy Residents, dated 2 August 2019, at [40].

<sup>163</sup> Closing submissions for Rob Roy Residents, dated 2 August 2019, at [41] – [45]. Footnotes omitted.



LDR is contained within one title, and all of the land with a Rural zoning is contained within the other title. These parcels are labelled as Lots 1 and 2 on the approved subdivision plan. Lot 2 contains all of the land zoned LDR. The second approval has been issued pursuant to s348 of the Local Government Act 1974 and authorises the legal creation of a right of way over Cleugh's Lane to Lot 2.

[45] The lodgement and subsequent grant of consent to these applications "paves the way" for a future subdivision application in respect of Lot 2 to a minimum density of 450m<sup>2</sup> per lot, in a manner that can avoid public notice, or service, given that the Rural zoned land has been removed from the title.

[218] In closing, Allenby submits that there is no evidence to support Rob Roy Residents' claim of error in the zoning of Areas B and C, noting that the PDP simply rolled over the ODP zone boundary. It adds that this position was not challenged by submissions, including by the s274 parties who have lived adjacent to this zoning strip for many years. It points out that the PDP does not confine ONL and ONF notations exclusively to Rural land (noting there are examples of ONL notations in Open Space zones, Jacks Point Zone, Rural Visitor zones, special zones, MDR zones and LDR zones). Hence, it submits there is no basis for the claim of mapping error.<sup>164</sup>

[219] With reference to the High Court decision in *Albany North Landholders*,<sup>165</sup> it submits that there is no jurisdiction for making a consequential zoning change in that it would not be "necessary and desirable" and "foreseen as a direct or otherwise logical consequence of a submission". That is in the sense that the PDP does not apply the ONL and ONF notations exclusively to Rural land. Hence, there is not a "direct or otherwise logical consequence of a confirmation of" an ONF or ONL boundary "that could lead to a consequential review of the ... zoning". Consistent with that, Allenby points out that the decision version of a QLDC variation to PDP Ch 6, ratified by QLDC decision on 7 March 2019, included the removal of the former explanation of landscapes being "categorised into three classifications within the Rural Zone". Counsel, Ms Baker-Galloway, adds:<sup>166</sup>

54 ... the determination of an ONF Boundary involves a range of considerations very different from those involved in determination of a zone boundary, particularly a development zone. As one example of that difference, the determination of development zone boundaries

<sup>164</sup> Closing submissions for Allenby, dated 26 July 2019, at [43] – [49].

<sup>165</sup> *Albany North Landholders v Auckland Council* [2017] NZHC 138.

<sup>166</sup> Closing submissions for Allenby, dated 26 July 2019, at [50] – [55], citing *Albany North Landholders* at [105] – [108], [115] – [118] and [135].





almost always involves infrastructure considerations which have no relevance to determination of an ONF Boundary. Area B in particular has legal and practical access, accessible infrastructure, and has never been the subject of any challenge by way of submission in either the ODP or PDP process as to its suitability for residential zoning.

55 Therefore, if in respect of Areas B or C the Court declines the Appellant's relief, and determines not to move the boundary of the ONF, it is submitted there is no consequential jurisdiction to revisit to underlying LDSR zoning or the UGB line.

[220] Allenby points out that s293 begins "after hearing an appeal".<sup>167</sup> Accepting there is limited authority on the meaning of those words, Ms Baker-Galloway submits that the words plainly mean that s293 cannot be invoked unless there has been a substantive appeal and hearing on the matter the subject of the s293 application. She acknowledges that the court has applied s293 "when a hearing on the papers has occurred, so long as the Court was provided with sufficient information to enable it to consider the amendments sought by the parties via the s293 application".<sup>168</sup> However, she submits that in any case, the court "must have had the opportunity to adequately consider the matter the subject of the s293 application" in order to decide to invoke s293. She submits that her interpretation is consistent with the well-established position that there must be a nexus between appeal relief and what is pursued under s293 and is the plain intention of the words "after hearing an appeal".<sup>169</sup>

[221] Ms Baker-Galloway submits that the requirement in those words is not met in this case because "there has not been a substantive 'hearing' either before the court, on the papers, in mediation, or via party agreement of the matters at hand on the matters relevant to the residential zoning of the land and the location of the UGB". She adds:<sup>170</sup>

61 Determination of the appropriate landscape classification boundary over the Land and determination of the appropriate zoning of the Land are two separate issues to be dealt with in separate substantive hearings. It is understood that this was the intention of the Court in allocating matters of landscape classification and matters of zoning to separate topics of the District Plan Review process to be mediated and heard separately.

62 A substantive hearing (the Topic 2 hearing) on the merits on the location of the landscape classification boundary has concluded. In these proceedings the Court was presented with evidence to enable it to make a factual determination on the appropriate

<sup>167</sup> Closing submissions for Allenby, dated 26 July 2019, at [56].

<sup>168</sup> Citing *Invercargill Airport Limited v Invercargill City Council* [2018] NZEnvC 9 at [36].

<sup>169</sup> Closing submissions for Allenby, dated 26 July 2019, at [57] – [64].

<sup>170</sup> Closing submissions for Allenby, dated 26 July 2019, at [57] – [64].



location of the landscape classification boundary. There is no appeal on the residential zoning or UGB, no jurisdiction to make changes to the residential zoning or UGB, and no relevant evidence before the court (such as engineering, servicing, traffic, residential demand etc.) that could be relevant to any such determination.

63 Given the clear separation of these two matters, it cannot be said that a substantive hearing, in any form, has occurred on the matter which would be the subject of a potential s293 application (i.e. the residential zoning of the Land).

64 It is therefore respectfully submitted that no jurisdiction arises from final decision on the landscape classification boundary for the Court to use s293 to amend the residential zoning of the Land.

[222] On the other hand, QLDC expresses some support for the exercise of the s293 discretion as follows:<sup>171</sup>

The extent of relief sought by Allenby is limited to the location of the ONL boundary as it relates to Areas B and C. The underlying zoning of Areas B and C, being a separate regulatory method used in the PDP (along with the Urban Growth Boundary), is not subject to challenge by the Allenby appeal.

While that is the situation in terms of the relief sought, Council agrees with the closing submissions for Rob Roy Residents (paragraphs 31 and 32) that there is a rational connection between the categorisation of land as ONL/F and other methods used in the PDP to regulate that land. Put another way, Council's view is that the resource management issues arising from the potential determination of Areas B and C as ONF may need to involve, or engage, with other provisions and/or methods used in the PDP (which may necessitate the use of section 293).

Were the Court to find that the exercise of section 293 is warranted in this instance, it is submitted that a conservative process should be adopted to ensure that adequate opportunities are provided for potentially affected persons to join and provide input.

### ***Discussion***

[223] Of the three experts, we found Ms Steven to have applied the more detailed and thorough approach in the assessment of Mt Iron's values as an ONF. We mean no disrespect to either Mr Baxter or Ms Mellsop in making that observation. In particular, Ms Mellsop had a significant evidential burden in responding to several other appeals. All experts applied a consistent approach according to the Landscape Methodology JWS



<sup>171</sup> Closing submissions for QLDC, dated 6 August 2019, at [2.40], [2.41].



and the pRPS Sch 3. Nevertheless, in a context where the appeal challenges only confined peripheral areas of the ONF and without the assistance of any PDP schedule of values, we found Ms Steven's approach the more helpful.

[224] We turn now to Areas A, B and C and what the experts have said about the landscape values that relate most relevantly to those of the Mt Iron ONF. Before dealing with each area individually, we record our finding that the experts' observations on the biophysical attributes of landform, topography and the level of naturalness are the most influential. We are also assisted by their observations on perceptual and associative values derived from considerations of visibility and public access.

#### *Area A*

[225] In testing the contrasting observations of the experts as to the existing physical state of Area A, we have considered supporting photographic evidence (particularly Ms Steven's photographs 2 and 11), the contour lines in Ms Mellsop's rebuttal Fig 3 and our own observations on our site visit.

[226] The dwelling on Area A is clearly well above the suburban houses directly to the west of it (ie "distinguished from lower areas in terms of topography"). However, it can also be seen, from relevant public viewing points, as distinctly lower than other houses behind it, further to the east. Furthermore, the dwelling on Area A is at a very similar elevation to the dwellings east of Fastness Crescent on the western boundary of the ONF, indicating that suburban development on this side of Mt Iron on the "basin floor" has occurred over "rolling topography".

[227] Given the interplay between bedrock schist and the moraine which in some places overlies it, it is evident that geomorphological distinctions are not always the determining factor for ONF boundaries. In the case of Mt Iron, the southern and eastern boundaries appear to align relatively closely with changes between underlying bedrock and surface moraine. This is clearly not the case on the northern and western boundaries. We also accept that there may well be differences in how individual experts read the landform.

[228] Topographical elements (in this case, escarpments) appear to align with both the alignment of the ONF boundary that Ms Mellsop supports (ie the ONF boundary around the western edge of Area A on the relevant DV map) and the boundary alignment recommended by Ms Steven and Mr Baxter (ie along the eastern edge of Area A).



Indeed, a careful examination of Ms Mellsop's rebuttal Fig 3 reveals separate contour lines associated with each of these alignments. While we do not give significant weight to the LIDAR images, we note that they appear materially consistent with Ms Mellsop's Fig 3 (Exhibit MH1).

[229] When assessing the extent to which Area A would contribute to the naturalness of the Mt Iron ONF, the experts are in material agreement as to the fact that Area A is relatively bare of indigenous vegetation (as a result of fire). We also accept Ms Steven's explanation that the present condition of the land cover means that it is "not likely to provide any significant habitat and that the indigenous vegetation is more connected to the exotic plantings on residential sections than to Mt Iron's indigenous vegetation. All witnesses acknowledge the domestic dwelling. Ms Steven and Mr Baxter also point to the roading and excavation. We are well familiar with these modifications from our site visit.

[230] The material difference between Ms Mellsop, on the one hand, and Mr Baxter and Ms Steven on the other is as to how they adjudge the significance of these modifications with regard to the degree of naturalness. On these matters, we find Mr Baxter and Ms Steven present a relatively more reliable factual narrative and we concur in their evaluation as to the relatively degraded nature of Area A. We concur in Ms Steven's assessment that the natural character is "moderate overall" and "consistent with the RRZ character to the north".

[231] We accept the accuracy and relevance of Ms Steven's assessment of the visibility of Area A<sup>172</sup> – "being less visually prominent, not accessible to the public and on the periphery of the Mt Iron open space area, this area would have less significance to most people as part of the valued backdrop, setting and place of Wanaka. It would not feature nearly as much in most people's daily lives. It would have localised significance to the people who live along its western edge". Our site visit confirmed to us that views of Area A from Mt Iron's public tracks will be generally moderately distant. Our impression, in light of our site visit, is that viewers' attention is more realistically likely to be drawn to the panoramic vistas further north and west. Our site inspection also confirmed that, from the adjacent suburban neighbourhood, views of Area A are mostly piecemeal views seen through or just above a foreground of buildings.



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<sup>172</sup> Ms Steven, evidence-in-chief, at p 12, 5<sup>th</sup> bullet point in [46].



[232] Another factor to consider is the public access to Area A. All three experts make passing reference to the lack of public access. Mr Baxter notes the relevance of public access – or the lack of it – to the development of shared and recognised values in the community. Ms Mellsop points out that a lack of public access “is also true of many other parts of Mt Iron.”<sup>173</sup> However, we note that her reference is to Mt Iron, as distinct from the Mt Iron ONF. Furthermore, she provides no explanation as to the significance such lack of public access may have to the public’s appreciation of the ONF. Ultimately, it is evident that public access to Area A is unlikely to have any effect at all on the extent of public access to the Mt Iron ONF.

[233] In summary, while geomorphological processes were unquestionably integral to the formation of the natural feature which is Mt Iron, we find that surface features that indicate a transition between schist bedrock and overlying moraine have far less relevance on the northern boundary and particularly the north-western corner. However, topographical considerations still have relevance, particularly the alignment of escarpments when they are also associated with discernible changes in indigenous vegetation cover.

[234] Mt Iron is a landform already significantly colonised on its lower flanks by residential neighbourhoods. Also given the presence of the private accessway between Area A and the balance of Mt Iron, we do not find that exclusion of Area A from the ONF would materially impact on perceptions of Mt Iron as a delineated feature.

[235] For these reasons, we find that it is appropriate that we direct that Area A be deleted from the Mt Iron ONF.

#### *Areas B and C*

[236] The evidence overwhelmingly satisfies us that Areas B and C are properly to be considered as part of the Mt Iron ONF. That evidence is against the substance of Allenby’s submissions on relative naturalness. Furthermore, whilst Area C is very close to the boundary between schist bedrock and overlying moraine (as evidenced in Ms Mellsop’s rebuttal Fig 3), we find no reason to treat Area C differently from Area B.



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<sup>173</sup> Ms Mellsop, rebuttal at [10.2].

*LDR zoning of Areas B and C*

[237] For the reasons we give at [64] and following, we do not accept Allenby's submissions on the relevance and significance of LDR zoning for our determination of the relative naturalness of Areas B and C.

*Reasons for declining Rob Roy Residents' request for a s293 direction*

[238] We find it would not be appropriate for us to exercise any discretion under s293 for the purposes of changing the zoning of Areas B and C from LDR to Rural (and removing those areas from UGB coverage). Fundamentally, as QLDC points out, the zoning question is distinct in a planning sense from the question of whether Areas A and B should remain notated ONF. Related to this point, a number of s32 considerations should be factored into any choice to change the zoning. We acknowledge Rob Roy Residents' point that ONF protection has elevated significance as a s6(b) matter. However, that is not the sole or necessarily trumping planning consideration.

[239] Because we are satisfied it would not be a proper exercise of any discretion, we do not need to decide the jurisdictional matters raised by Allenby. However, we record that we are far from satisfied that we would have jurisdiction. Our primary concern there is that our jurisdiction is subject to the due process dimensions identified by the High Court in *Federated Farmers (Mackenzie Branch)*.<sup>174</sup> In the circumstances, we find that any change of zoning of Areas B and C go well beyond the proper exercise of our appellate function and fall squarely for QLDC to determine, as the responsible planning authority.

[240] We make no finding on whether the zoning position is anomalous. Insofar as this means a loss of landscape protection over these relatively small outer parts of the Mt Iron ONF, QLDC is the properly responsible planning authority for that. As a planning authority, it can elect to notify a variation should it consider that a proper exercise of its planning function.

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<sup>174</sup> *Federated Farmers of New Zealand Inc (Mackenzie Branch) v Mackenzie District Council* [2014] NZHC 2616, at [1], [106], [120] – [122], [134] – [138], [144] – [155].





### **Scheduling for ONFs and related directions**

[241] This decision leaves reserved our determination of the nature and extent of any s293 direction for the purposes of completing the mapping of a Clutha River (Mata Au) Corridor ONF and for including in the PDP schedules pertaining to that ONF and the Mt Iron ONF.

[242] The position with regard to the Mt Iron ONF is relatively more straightforward. Rectification of the ONF mapping to remove Area A does not require a s293 direction. The confined extent of the Mt Iron feature and its predominantly recreational usage would suggest a relatively less complex task in completing a values schedule for the purposes of a s293 direction (using Ms Steven's evidence on this as a starting point).

[243] In the case of the Clutha River (Mata Au) Corridor, we find QLDC's proposals (in its closing submissions) for completing of mapping in order to define an ONF from the Lake Wanaka outfall to the District boundary appropriate. We also agree with QLDC that an initial step should be to direct further expert witness conferencing in order to assist the sound identification of its boundaries for s293 purposes.

[244] A further issue we are mindful of, in regard to the Clutha River (Mata Au) Corridor, is that the evidence we have so far received is confined to those sections of the Corridor that pertain relevantly to the appeals before us. Our insight into the land uses and values along the remainder of the Corridor is limited at best.

[245] Furthermore, it is important to go beyond broad generic descriptions of values if a schedule is to serve its intended purpose in assisting consent application processes. Our findings on the Seven Albert Town Property Owners and James Cooper appeals illustrate that. As we have noted, mapping and scheduling are forms of provision that serve their related objectives, policies, and implementing rules including assessment matters. Schedules supplement ONF (and ONL) mapping by enunciating why the land so mapped is sought to be protected. That pertains directly to the effective implementation of related objectives and policies through rules including assessment matters. A very strong common theme across the spectrum of interests represented in Topic 2 is the importance of providing as much certainty as possible on what is being protected and why.



[246] We find that QLDC's administration of the ODP would be better served by the inclusion in the ODP of schedules that accompany the ONF maps for Mt Iron and the Clutha River (Mata Au) Corridor and effectively identify key informing values *and* compatible land uses and natural hazard mitigation works. We reserve whether we will make s293 directions to achieve that end or whether it is more appropriate to leave this to QLDC to complete, through this review or by later plan change, subject to our determination of remaining Topic 2 matters.

[247] In the meantime, we identify the following as determinative questions in the sense that answering them will inform the development of appropriate ONF schedules:

- (a) what are the key values (ie including attributes, qualities and characteristics) that contribute to the ONF and hence need protection?
- (b) what changes to those values would (or would not) adversely affect those values, and why?
- (c) where are there areas of material modification in the Clutha River (Mata Au) Corridor in addition to those revealed in our findings in relation to the Seven Albert Town Property Owners and Cooper appeals (ie material in a spatial and/or prominence sense)?
- (d) for all areas of material modification in the Clutha River (Mata Au) Corridor, are there identifiable parameters (e.g. by location and the nature of use or development) within which change of land use or development could occur? The focus in this is to assist the decision-maker to discern what is appropriate versus inappropriate subdivision, use and development (in tandem with related policies and implementing rules including assessment matters);<sup>175</sup>
- (e) where (d) is answered 'yes', to what extent can this be expressed in a schedule (as opposed to being left for determination in consenting processes subject to the application of related objectives, policies and implementing rules including assessment matters)?
- (f) in addition to the natural hazard mitigation works at Albert Town that we have addressed in our findings on the Seven Albert Town Property Owners appeal, are there other locations along the Clutha River (Mata Au) Corridor where maintenance of established hazard mitigation works similarly

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<sup>175</sup> We are mindful that consideration of Ch 21 including assessment matters is later in the Topic sequence.





contributes to maintaining ONF naturalness values?

- (g) similar to (f), are there locations along this corridor where regionally significant infrastructure contributes in that way and/or is compatible with maintaining ONF naturalness values?

[248] As a first step towards progressing these matters, a pre-hearing conference will be convened shortly. At that conference, we will discuss parties' positions on the most appropriate procedural steps forward for completing the court's determination of the Seven Albert Town Property Owners, Cooper and Allenby Sub-topic 1 appeals including the making of any s293 directions. Directions for any supplementary closing submissions and/or further expert witness conferencing will follow by Minute.

### **Conclusion**

[249] For those reasons:

- (a) our determinations on the relief pursued in the relevant Sub-topic 1 appeals are set out at A – E;
- (b) directions for a pre-hearing conference on the matters in [241] and following will be made by Minute;
- (c) other matters for determination, including as to any s293 directions, are reserved; and
- (d) costs are reserved, with a timetable to be set in due course after the remainder of Topic 2 is determined.

For the court:



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**J J M Hassan**  
**Environment Judge**

