

**IN THE WARDEN'S COURT OF QUEENSLAND
HELD AT WINTON**

IN THE MATTER OF: **APPLICATION UNDER PART 7 OF THE MINERAL
RESOURCES ACT 1989 FOR A MINING LEASE
(NUMBER 95288) IN THE WINTON DISTRICT**

BEFORE: **MR F W WINDRIDGE
MINING WARDEN**

APPLICANT: **MICHAEL JOHN MANN**

OBJECTORS: **HOLGER PAUL LEINUNG and EDELFRAUT
LEINUNG**

CATCHWORDS: **MINING LEASE – OPAL – CHILTERN HILLS
HOLDING – OBJECTION – EVIDENCE
(PHOTOGRAPHS) NOT DISCLOSED IN NOTICE –
NOT ACCEPTED – QUESTIONABLE RIGHT OF
CONSENT UNDER EP APPLICATION –
UNAUTHORISED MINING – RECOMMEND
REFUSAL - NON-COMPLIANCE WITH ACT**

Mineral Resources Act 1989 s. 269, s. 249(2)

REPORT:

The applicant (hereinafter referred to as the miner or applicant miner) seeks a mining lease under the provisions of section 234 of Part 7 of the *Mineral Resources Act 1989* (hereinafter referred to as the *MRA* or the act) for the purpose of mining for OPAL. The application is for surface area of 73.0283 hectares and is situated on LOT 3698 on PLAN PH47, County of KINGSLEY, Parish of WARRENNE, being part of Chiltern Hills Holding. Access is through Lot 3633 on PH763 being Pink Hills Holding. The lease if granted is to be known as "LUIGI."

Initially the application was lodged in the names of Graeme John East holding a 50 per cent interest and Michael John Mann holding the other 50 per cent interest. The Court is informed and accepts that Mr East has assigned his interest to Mr Mann, and Mr Mann is now the sole applicant. The recommendation will proceed on the basis that Mann is the applicant and holder of 100 per cent interest in the application.

Power to grant such a lease is vested in the Governor-in-Council pursuant to section 234 of the act after recommendation by the Minister. Except for the reservation in section 8(3) all minerals are the property of the Crown. The grant of a lease does not create any estate or interest in the land (s.10), although there is the power to determine title to land

(s.363(5)). The landowner has no right of veto. The use of the land for the purposes nominated is a permitted use under s.319 of the *MRA*. Any mining tenure is not subject to the provisions of the *Integrated Planning Act*, being exempt from the provisions of the *Local Government Planning and Environment Act 1990* by virtue of s.319 (Part 8) of the *MRA*.

The application was lodged at the Mining Registrar's Office at WINTON on 1 OCTOBER 1999. A certificate of application was issued on 4 OCTOBER 1999 (s.252 (1)) setting 1 NOVEMBER 1999 as the last date for receipt of objections (s.252 (2)). The hearing was held at Winton Wardens Court on 9 May 2000.

One objection was lodged pursuant to s.260 (1) of the act by Holger Paul LEINUNG and Edelfraut LEINUNG. The objection cited two grounds as follows:

1. Mr G East and Mr M Mann obtained our permission to peg a claim on our EP's under false, misleading, deceptive and misrepresentation of facts.
2. Mr G East and Mr M Mann have been mining and prospecting on our EP's. All our EP's are only an application, not yet granted for exploration or mining.

The notice of objection then goes on to document the facts and circumstances relied upon to support those grounds. Both the objectors gave evidence at Winton Wardens Court on 9 May 2000. The objections will be dealt with at the appropriate stage of the following recommendation.

The legal representative for the objector sought to introduce evidence being photographs of alleged mining activity on the Exploration Permit area taken by a third party. The fact that these photographs existed and that the objector proposed to introduce them into evidence was not disclosed in the notice of objection. Section 268 subsection 4 of the *MRA* states:

“(4) The Wardens Court shall not entertain an objection to an application or any ground thereof or any evidence in relation to any ground if the objection or ground is not contained in an objection that has been duly lodged in respect of the application.”

Although the ground of objection refers to “mining and prospecting on our EP's”, the existence of photographs taken by a third party was not disclosed in the facts and circumstances. I consider that these photographs can be classified as "any evidence in relation to any ground", and therefore ruled against the introduction of those photographs as evidence of a ground of objection.

The following matters have been taken into account and considered in making my recommendations. (s.269 (4)). (*Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 p.481).

(a) Have the provisions of the act been complied with?

The material indicates that the applicant is an eligible person as defined in section 5 of the act and is entitled to make the application under s.232 of the Act.

The application area is not located on or forming part of any reserve. I find that the application is therefore not in respect of land over which, pursuant to s.238(1) of the *MRA*, a mining lease shall not be granted without the consent of another person or persons. There is no relevant permanent building or relevant feature on the land as defined in s.5 requiring the consent of any person (s.238(2)).

At the time of marking out and lodging the application, the applicant was the holder of PROSPECTING PERMIT 95711(s.232 (1)). The land marked out was within the boundaries of an Application for Exploration Permit (number 11960) held by Paul Leinung, one of the objectors. The consent of Leinung was necessary under section 249(2), and this consent was obtained in writing. That consent having been obtained, the registrar was able to accept the application under section 249 subsection 6. It is the manner of obtaining this consent that raises the objection under Ground 1 by Mr and Mrs Leinung.

Ground 2 of the objection, although not framed precisely to tailor into any of the matters that have to be considered under section 269, would appear to relate to activities that were not permitted or licensed under the Act. The inference to be drawn is that this ground of objection could be taken to refer to non-compliance, a matter to be considered under section 269(4)(1). I will refer to this matter again at a later stage of this recommendation.

A declaration of posting was lodged on 3 NOVEMBER 1999 (s.252 (9)), and service of documents was in accordance with s.399.

I am satisfied, on the material, including the uncontested information in the application form and the declaration of posting and advertising that all the provisions of the act relating to posting and advertising have been complied with or substantially complied with. (s.392).

The hearing of the application and the objections thereto took place at Winton on 9 May 2000. Both objectors gave evidence and called evidence from one other party. The applicant declined to give evidence in rebuttal, choosing to rely on the submissions of his Counsel and other material filed with the application.

(b) Is the land mineralised or is the other purpose for which the lease is sought appropriate?

I am satisfied that the resource sought is a mineral (s.5). The applicant has not proposed to erect other infrastructure to assist in the winning of those minerals, although he is entitled to do so under the provisions of Section 234(1).

I accept the applicant's advice and I am satisfied on the information given that the purpose for which the lease is sought is appropriate. The application area is within an area generally recognised as opal bearing. The applicant operates on another lease nearby and has an established camp. The ban on exploration through "native title" considerations means that opal miners can only rely on visual surface signs. The economic viability of the project is a matter for the applicant's commercial assessment, but I am satisfied that there is sufficient evidence of mineralisation to warrant the grant of a lease.

(c) Will there be an acceptable level of development and utilisation of the resources within the area applied for?

From documentation lodged with the application, I am satisfied the applicant has sufficient resources to progress development to an acceptable level. The evidence at the hearing indicated that the applicant has an excavator at his disposal.

(d) Is the area sought an appropriate size and shape?

There is nothing in the information supplied by the applicant to suggest that the surface area of the land over which the mining lease is sought is not an appropriate size and shape. There is no evidence of any conflict with the boundary of any other tenement and therefore the cost and delay of a survey would appear to be not warranted.

(e) Is the term sought appropriate?

The term of lease applied for is 20 years. I am satisfied that the term sought is appropriate and will allow for mining and rehabilitation to be completed. The applicant has the option of renewal under s.286 of the act, or surrender at an earlier date under s.309.

(f) Has the applicant the necessary financial and technical capabilities to carry on mining operations under the proposed mining lease?

From the information supplied, I am satisfied the applicant has the necessary financial and technical capabilities or access to those resources to carry out the mining operation. Mining for opal is basically an extractive industry utilising shallow open cuts and does not require extensive plant, processing equipment, or large injections of capital. The applicant has mined opal for a number of years and in my opinion has the experience necessary to complete the mining operation. [*Carr -v- Simnovec* (1980) 26 SASR 263 at 268, and *Pacminex -v- Aust. Nephrite Jade Mines* (1974) 7 SASR 401 at 415].

(g) Has the past performance of the applicant been satisfactory?

There is no material before me to suggest that the past performance of the applicant in relation to other leases or tenements has been unsatisfactory. The local Field Officer and Environmental Officer will be available to monitor performance and rehabilitation and report any breach of conditions. The Inspectorate should monitor the methods adopted for mining, ensuring that industry standards are maintained and that all machinery is operated in a safe and competent manner by licensed persons.

(h) Is there any disadvantage to the holder of or applicant for exploration permits or mineral development licences?

The applicant was the holder of the relevant pre-requisite title under s.232 of the *MRA* at the time of marking out. The lease application is within an application for an Exploration Permit by Holger Paul LEINUNG. Leinung has given written consent (see Exhibit 1) to the application.

(i) Will the operations to be carried on under the proposed lease conform with sound land use management?

The land appears to be used for low intensity grazing under favourable conditions, and it seems the proposed mining operation will cause no significant disturbance to stock or stock watering or management facilities. The general nature of the land is described as consisting of "stunted gidea and gums" with "nil" pasture grasses. There is no arable top soil. Rainfall is low. Stock fodder is generally of poor quality on the application area with little or no fodder in deficit rainfall years, as evidenced in the photographs admitted as Exhibit 2.

Information has been supplied as to the applicant's site management proposals. The evidence leaves me with no reason to believe that the proposed mining operations do not conform with sound land use management.

(j) Will there be adverse environmental effects caused by the proposed operation, and if so, the extent thereof?

An Environmental Management Overview Strategy (EMOS) has been lodged with the Registrar, accepted under delegation, and will form part of Project 95086, subject to any recommendation of this Court and any further requirement of the Minister.

The proposed mining activity is in an isolated area away from human habitation. The mining will not have any deleterious effect on any river or creek system. Chemicals will not be used in the mining process. Due to low rainfall and the method of mining, erosion will not be a problem provided the usual controls are in place. There are no other environmental factors of significance that may be adversely affected by the operation. It is observable from other operations that the disturbed crust retains more of the natural rainfall, thereby encouraging the regeneration of native flora. The applicant will be

required to backfill where possible as mining progresses, keeping out-standing rehabilitation to a bare minimum where possible.

(k) Will the public right and interest be prejudiced?

No factors prejudicial to the public right and interest have been identified. There appears to be no endangered flora or fauna within the application area. There are no public utilities on or across the application area. There are no sites of historical interest or aboriginal significance within the area. If any such sites are identified, the EMOS can be amended to put forward specific site protection or site avoidance strategies.

(l) Has any good reason been shown for a refusal to grant the mining lease?

The economic viability of this project is a commercial decision of the applicant. When all other aspects of the application and the matters referred to in s.269 are taken into account, I am satisfied that the objects of section 2(a), (b), (c), (d), (e) and (g) will be attained if a mining lease is granted for the term recommended for the following reasons:

- ◆ A small scale/low impact operation is planned.
- ◆ It is unlikely that the land applied for is of any interest to a large scale miner.
- ◆ The location of the proposed mining operation and the proposed method of mining is unlikely to cause environmental or public interest concerns about safety.
- ◆ A realistic security deposit will be imposed to guard against financial failure of the miner to ensure rehabilitation is completed.
- ◆ The applicant appears to have sufficient experience in the industry to accurately assess the potential of the project.
- ◆ There is a market for the product and the project will provide employment.

Subject to what will be decided in relation to the two grounds of objection, in my view, no good reason has been shown for a refusal to grant the lease application (*Carr –v- Simmovec, Pacminex –v- Aust Nephrite Jade Mines supra*).

(m) Is the proposed mining lease operation an appropriate land use, taking into consideration the current and prospective uses of the land?

The material indicates that the land is currently used for grazing purposes and appears, on the evidence, to be suitable for no other use. In my view, there appears to be no risk of significant conflict between the current land use, or any prospective land use and the proposed mining operation. The land appears to be Class VII, and post mining will return to Class VII. The proposed mining operation appears, on the evidence, an appropriate land use, taking into account the current and prospective uses of the land.

A compensation agreement or determination of the Court will compensate the landowner for any conflict or loss over land use (s.281). I note that a compensation agreement has not been filed with the Registrar in accordance with s.279 of the Act to date.

GENERAL COMMENTS

This recommendation is based on an assessment of the information supplied. Should there be any dispute over damage or loss, or should the miner depart from his plan of operations or EMOS and cause loss or damage or interruption to the management of the property not envisaged or not foreseen in the terms of the compensation agreement, the parties are at liberty to apply to the Court for a determination or award of compensation, and if necessary, injunctive relief under the powers contained in s.363 (6).

THE OBJECTIONS:

Ground 1. Exhibit 1 is the consent referred to under section 249 of the *MRA*. The objectors allege that East and Mann obtained permission to peg a claim on the "EP" under "false, misleading, deceptive and misrepresentation of facts". Both objectors gave evidence on this point. However, it is admitted that East and Mann indicated they had found some opal on the EP area, and were seeking consent to "peg a claim". There is no deceptive or misleading conduct evident here as the objectors knew exactly what the applicants (East and Mann) were seeking. Consent was willingly given, and the fact that it was for one lease in certain sub-blocks is irrelevant. The objectors have attempted to show that the false story about "building a dam for the landowner" induced Mr Leinung (the applicant for the Exploration Permit) to give consent. Leinung now seeks to revoke that consent by his objection. However, the purpose of "pegging a claim" was ultimately a step in the process of obtaining a right to mine, and Leinung knew this. The purpose of the pegging was disclosed to him. He gave consent. At all times, up to that point, he had the right to refuse consent. It is a reasonable inference that the story, allegedly given by East, that some opal was discovered while constructing a dam for the landowner, was designed or concocted to legitimise the presence and activity of East and Mann on the Exploration Permit area held by Leinung. This was of no interest to Leinung until he discovered the workings. I am not satisfied there was any false, deceptive, or misleading conduct or a misrepresentation of facts, in obtaining the consent under Section 249 of the *MRA*. Any misrepresentation about the alleged construction of a "dam" does not go to the core of the issue, ie "consent to peg a claim". That ground of objection is struck out.

Ground 2. The remaining ground of objection relates to the allegation of "mining and prospecting on our EP's". Leinung's evidence discloses that the "Exploration Permits" are only applications that are awaiting grant. That grant appears to be somewhat delayed due to "native title" considerations. The objectors are concerned that activity on the area under application may affect their application. That is a genuine concern and validly held, in my opinion. However, it appears that the evidence before this Court would exonerate the applicant from any blame or liability in causing the surface to be disturbed. In hindsight, it might be questionable that consent was given when the application had not been finalised, irrespective of the right to do so under Section 249 of the Mineral Resources Act.

Counsel for the applicant miner submits the only real evidence of activity on the surface of the Exploration area is from an admitted perjurer. That being the case, I am urged to disregard the evidence of East. Leinung, when he visited the area on 3 October, took photographs of the disturbed surface and the machinery nearby. He considered the disturbance fresh. Notwithstanding East admits he told a lie under oath in relation to obtaining some opal from the mining operation, when combined with the observations of Leinung, I consider there is enough evidence to link East and Mann to activity took place on the surface area of Mining Lease Application 95288 before the grant of the lease, and that this activity was also within the area of Exploration Permit 11960 which was still an application at that stage.

A person may only "mine", ie win a mineral, extract a mineral or dispose of any mineral (Section 5) under the appropriate licence or lease. I am satisfied that there has been disturbance of the surface of the area within mining lease application 95288. There is some basis for inferring that East and Mann were responsible for the disturbance. Therefore, the provisions of the Act have not been complied with. To rule otherwise is to infer that the lodgment of an application gives the right to mine. That obviously is incorrect. I am satisfied that Ground 2 of the objection has been made out.

COSTS

No submissions were invited or received in relation to costs of this hearing. Each party is given leave to make any application in respect of costs within sixty (60) days of the date of this recommendation.

RECOMMENDATION:

Upon consideration of all the matters set forth in s.269 (4) of the *Mineral Resources Act 1989*, I recommend that the mining lease be rejected on the following ground:

- 1. The provisions of the Act have not been complied with in that disturbance of the surface area by Mann and East constitutes an act of unauthorised mining before the lease application has been considered, recommended or granted.**

Dated at BRISBANE this 24th day of May 2000.

**F W WINDRIDGE
MINING WARDEN**

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