IN THE WARDEN'S COURT
HOLDEN AT SYDNEY ON
8TH OCTOBER, 1982
BEFORE J.L. McMAHON,
CHIEF MINING WARDEN.

HAYES & ANOTHER

v.

KRATOS URANIUM N.L.

This has been the hearing of an application for assessment of compensation in respect of part of the land covered by Exploration Licence No. 1406 held by Kratos Uranium N.L. The application had been lodged by a firm of solicitors, Messrs. Lee & Sames of Coffs Harbour on behalf of Kenneth Hayes and Robert Wyllie (herein called the applicants) who are the registered proprietors of lot 41 in DP 614552 in the Parish of Coff, County of Fitzroy, comprised in Certificate of Title Volume 13894, Folio 101. The subject land is within 7 kilometres of Coffs Harbour on the north coast of New South Wales.

In granting the exploration licence which was said to cover some 16 square kilometres in the County of Fitzroy, the Governor had laid down certain conditions, some of which will be referred to later. The licence entitles Kratos Uranium N.L. (herein called the respondent) to prospect for group I minerals by means of literature study, mapping, rapid reconnaissance magnetic induced polarisation and/or geochemical soil survey and drilling. Group I minerals are classified as elemental minerals (metallics) coming generally within the gold, lead, silver, zinc type. The land the subject of this compensation hearing represents only a small fraction of the land the subject of the exploration licence.

It is apparent that the respondent commenced its activities of exploring on the subject land in January, 1982 and found it necessary in order to pursue the licence and to get proper equipment onto the land to place certain tracks across it. These tracks were laid by means of bulldozer and it is primarily the disturbance caused by the bulldozer about which the applicants now complain and in respect of which they seek compensation. During the course of the laying of the tracks certain bedrock was intermittently exposed and from that bedrock was taken soil samples with a view to analysis as to mineral content.

Prior to the operation commencing, discussions had taken place between Mr. Hayes and Mr. Hickling, the latter being a geologist with the respondent, and as a result on 5th January, 1982 an agreement was presented to the applicants which they subsequently signed. This agreement was tendered as an exhibit before me and it contains details as to the intention of the parties and in particular that of the respondent as to prospecting operations and purports to set out a rate of compensation as follows:-

"$50.00 per diamond drill hole

$25.00 per percussion drill hole

$0.20 per square metre of land surface disturbed in costeaning operations on land other than cultivated land

$0.40 per square metre of land surface disturbed in costeaning operations on cultivated land (under lucerne or crop)."

An additional paragraph however adds the following words:-

"Notwithstanding the foregoing provision the parties agree that in the event of actual loss by the Owner/occupier exceeding in value the amount calculated in accordance with the preceding clause then the parties shall, at the request of the Owner/occupier negotiate to determine an agreed amount of compensation for loss in fact suffered by the Owner/occupier in lieu of that calculated in the preceding clause and in default of agreement the matter may be directed to a Mining Warden for assessment.",

and there are some additional special conditions which do not appear to have relevance to this hearing. Mr. Hayes stated in evidence that the reason why the compensation agreement had been signed was to comply with the provisions of the Mining Act.

Generally speaking part VIII of the Act deals with compensation and provides that the holder of an authority may treat and agree with the owner or occupier of land on the compensation question and any agreement reached is not valid unless reduced to writing, signed by the parties thereto and lodged with the Secretary of the Department of Mineral Resources. It is further provided in the

same section that in the absence of a valid agreement any party may apply to the Warden to assess compensation and the Warden shall make such an assessment. So it seems to me that for the written agreement dated 28th January, 1982 to have been valid it would have not only to be signed by the parties but also lodged with the Secretary of the Department and until that was done no valid agreement would be in existence. Evidence was given by Mr. Hickling that only on the day before the hearing at Coffs Harbour which took place on 23rd September, 1982 had the agreement been lodged with the Secretary of the Department of Mineral Resources, but notwithstanding that Mr. Hickling advanced the argument that the section had been complied with. A further particular arising from my reading of the Act is that once a party makes an application for assessment of compensation to the Warden, agreement can still be reached between the parties and the Warden may receive a signed document and shall adopt as his assessment of compensation the amount so agreed to in writing. This arises from Section 125(2). However, earlier in Section 125 subsection (1) appears which sets out procedures in assessing compensation and the arrangements as to a hearing. I find therefore that an agreement so lodged with the Warden pursuant to Section 125(2) must be signed after an application for assessment has been made by either party. The application for assessment received from Lee & Sames was dated 16th July, 1982 and was received by me later that month while the agreement lodged with the Secretary of the Department of Mineral Resources on 22nd September, 1982 is dated 28th January, 1982. I am of the view that because subsection (2) is preceded by subsection (1) which talks about the procedures as to assessment being made by a Warden that it was never intended that a pre-dated agreement form the basis of a document envisaged by subsection (2). Indeed the word "enters" indicates a present tense rather than a past tense.

A further complication in this matter is that while the extract of the agreement, tendered as an exhibit above, talks about 20¢ per square metre of land disturbed in costeaning operations, the subject exploration licence specifically prohibited costeaning operations. The practice of costeaning is generally defined as the sinking of trenches by means of heavy equipment with a view to a prospector getting to a subsoil level and exposing a cross section of the earth and bedrock below. Mr. Hickling explained on oath that when he realised that costeaning

had been prohibited he had telephoned the Department of Mineral Resources and had spoken to a male person within the Prospecting Branch. He stated that the question of access roads had been raised with that person who had informed him that there was no objection to placing these roads in position in order to permit the respondent access. It is plain however that the respondent used some of the exposed earth in order to obtain samples. Notwithstanding this, Mr. Hickling suggested that the disturbance by means of a bulldozer blade was not in the form of costeans, but were simply roads of access.

In order to determine this question I conducted an on-site inspection, obtaining the consent of both parties that what I saw could be evidence in the hearing. The disturbance consisted of cuts which had been made with a bulldozer blade around the sides of steep hills. The cuts were such that a 4 wheel drive motor vehicle could be accommodated if the surface were sufficiently smooth to allow for body clearance. The depths of the cut depended upon the slope across which it was inserted but generally speaking I formed the opinion that they went from 1 metre to 3 metres. Material cut out of the slope was then transferred across a reasonably level area so formed by the cut to overflow down the slope for some distance. On many occasions, however, a windrow of earth to a height between 15 cm to 45 cm had been left on the downward edge of the disturbed area roughly parallel with the course of the track. In my presence one measurement was taken and it was found that in one spot there were some 12 metres from the surface of the disturbed area on the high side to the lower edge of the overflow on the down side. Again this varied with the slope of the land which of course determined the depth of the cut. On numerous occasions I observed where cutting had taken place at a point very close to a tall tree that the roots of it were becoming undermined and on several other occasions saw an amount of fretting and subsidence from the top edge of the cut to the surface of the track. It was put to Mr. Hayes that the tracks could be used for access by himself and his employees especially in times of fire hazard but he replied that they were unfinished and went nowhere and their use was limited. If fact I observed two areas where because of the very difficult terrain the bulldozer operator apparently considered it inappropriate to continue. Some dispute existed between the parties as to the length overall upon the applicants' property of these so called access tracks but I accept the evidence of Mr. Hayes who deposed

that they were 1,586 metres long.

I turn then to the compensation question. An expert in consulting civil and geotechnical engineering, Mr. E.J. Armstrong, deposed that in his opinion the excavations required treatment to minimise erosion and to enable wheel tractor access for future maintenance, cross drains were needed at frequent intervals, better grading required and seeding to promote ground cover. Proper pipe culverts were needed where the tracks crossed gully lines. While Mr. Armstrong considered that the area did not have a high risk of slip failure the excavations were still said to be subject to localised small slumps. He was of the view that a figure of $1,500 was appropriate for the work to cover future maintenance. Mr. Hickling said that in his view as the tracks did not constitute costeans, which were prohibited anyway under the exploration licence, nothing should be forthcoming from the exploration company but when I requested him to make inquiries of his employers he indicated after a break in the proceedings that a sum of $800 was considered appropriate but not on the basis that the disturbances were costeans.

In my view quite clearly costeans have been put in on the subject land. True it is that they serve the purpose of roads but even on the evidence of Mr. Hickling and the site geologist, Mr. Ryan, samples were taken from bedrock in the disturbed land. However, this is not to say that I am bound to apply the criteria laid down in the exhibit which purports to be an agreement between the parties as to the cost per costean although I think that the figure is reasonable bearing in mind that the parties had treated and agreed with each other that the cost per costean would be 20¢ per square metre on land other than cultivated land. I take into account the fact that although the roads that I saw came to an abrupt end, the fact is that there is now on the property a series of tracks which could be used for some measure of access. I propose therefore to disallow any claim for further maintenance which the applicants have made.

I note the evidence that the costeans in length are 1,586 metres which, as I have said, I am satisfied to accept. While the width measured in front of me

was something in the vicinity of 12 metres there were sections which were narrower and I note the evidence of Mr. Armstrong that the average horizontal width was 9 metres. In the circumstances I multiplied 1,586 metres by 9 metres and came to 14,274 square metres and at 20¢ per square metre I reach a figure of $2,854.80. This figure I assess as being the compensation payable.

I note that Mr. Hayes had requested what were in effect witness expenses in connection with his appearance at court and that earlier he had consulted with a firm of solicitors and in the circumstances I propose, bearing in mind the finding at which I have arrived in connection with this assessment, to add to this assessment the sum of $200 by way of professional costs and witness expenses.

I direct that the total amount of $3,054.80 be paid by the respondent company direct to the applicants within twenty-eight days from today, without the need for any payment to be made to the Registrar. I make this direction as to payment pursuant to the provisions of Section 141.