Mediation and Arbitration Board
 # 114, 10142 - 101 Avenue
Fort St. John, BC V1J 2B3

Date: February 24, 2006 **Board Order No. M394-A2**

BEFORE THE ARBITRATOR:

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C. 1996, c. 361 as amended and THE MINING RIGHT OF WAY ACT, R.S.B.C. 1996, c. 294
(THE ACTS)

AND IN THE MATTER OF PLAN 1187, SUBSIDY LOT 3, DISTRICT LOT 2707, SIMILKAMEEN DIV OF YALE LAND DISTRICT, PID #011-111-117
(THE LANDS)

BETWEEN:

ZENA CAPITAL CORP. AND ROCK CREEK MINERALS
("APPLICANTS")

AND:

FALKOSKI HOLDINGS LTD.
("RESPONDENT")

ARBITRATION ORDER

Applicant: Zena Capital Corporation and Rock Creek Minerals Ltd., Roy Brown

Respondent: Falkoski Holdings Ltd., Joseph Falkoski

Hearing: November 25, 2005

Decision: February 24, 2006

Arbitrator: Paul Love, Chair Mediation and Arbitration Board

Board Order

Background:

Zena Capital Corp. And Rock Creek Minerals Ltd. (the "Applicants") seek entry and access to the lands owned by Falkoski Holdings Ltd.(the "Respondent") described as Plan 1187, Subsidy Lot 3, District Lot 2707. Similkameen Div. of Yale Land District, PID 001-777-117 (the lands) for the purposes of exploration, including bulk sampling, of up to 10,000 metric tons of lapin barite ore. The applicant seeks to access its industrial minerals, particularly lapin barite on claims known as Rock 1, 2, 3, 4. Falkoski Holdings Ltd. owns the surface of the land, and Joseph Falkoski, the principal uses this land to graze cattle.

In 2004, the Barbara Henry, Gold Commissioner, Nelson attempted to resolve this dispute. The Gold Commissioner came to the following conclusion:

> In my early conversations with Mr. Falkoski, he mentioned that he did not want to make the decision, he wanted to remain neutral and have the Ministry of Energy and Mines make the decision. However, in all the discussions that followed, it seemed apparent to me that Mr. Falkoski was not neutral. He continually referred to "we" in his group of concerned citizens. **I don't feel that Mr. Falkoski ever stated what he actually wanted from Rock Creek Minerals, or what could be done to work out an agreement. He stated that he did not want to do business with Rock Creek Minerals, so I do not feel that he was negotiating in good faith. I do not think the issue of access was the problem it was the issue of the community.** ...

I do not see any opportunity for the two parties to come to an agreement, and recommend that this matter be referred to Mediation and Arbitration.

(my emphasis)

The Applicants filed their application with the Board on April 5, 2005. A Board member held a pre-hearing conference, and fixed a mediation date. This matter proceeded to mediation before a Board member on June 28, 29, 2005. The parties were unable to reach an agreement at mediation. [1] The Board member gave the parties an opportunity to make submissions and the Board member made an order on July 11, 2005. An amended mediation order was issued on August 11, 2005. [2]

At mediation a board member is empowered by section 19 of the *Petroleum and Natural Gas Act* to issue an order. Section 19 reads as follows:

Entry, occupation or use order

19 (1) A mediator may make an order permitting, subject to the terms the mediator may specify in the order, an applicant under section 16 to enter, occupy or use the land for a purpose stated in that section.

(2) Before making an order, a mediator must

(a) require the applicant to deposit with the board security in the amount, form and manner that the mediator considers necessary for the purpose of ensuring that the owners of the land will be paid any amount ordered subsequently to be paid to them,

(b) require the applicant to pay to the owners, as partial payment of the amount subsequently ordered by the board to be paid to them, an amount of money not less than 1/2 the amount of security required to be deposited, and

(c) require the applicant to serve a copy of the order on each owner of the land, and direct the manner of service.

[1] Mr. Falkoski claims that an agreement is reached despite the Mediator's order
[2] Board order, M-0022M

(3) Despite subsection (2), the board, on application at any time, may require the applicant to pay to the owners under subsection (2) (b) additional amounts the board considers proper.

(4) In determining an amount of money to be paid, the board is not bound by an order of the mediator under section 18 (4) or by a requirement of the mediator under subsection (2).

Nature of the Arbitration Hearing:

Under the system of land ownership in British Columbia, the owner of the legal title to the land surface does not own the mineral rights, unless the rights have been transferred expressly to the owner of the land. The Crown in- right - of the Province of British Columbia owns the sub-surface mineral rights. Mineral rights can be obtained through a free miner's certificate which permits access onto lands and the acquisition of mineral title. From time to time disputes will arise between the owner of the land surface and sub-surface owner of the mineral rights, as a mineral rights holder may require access to the surface in order to exploit the mineral claim.

If there is a dispute involving access to a mineral claim it goes first to the Gold Commissioner. If the dispute cannot be resolved by the Gold Commissioner the dispute is referred to the Mediation and Arbitration Board. Under the Board's process an application is first mediated. The Board's mediation processes are generally held in private, the discussions are without prejudice and are not recorded, and therefore the only record or document from the proceeding is the order that is made by mediator. Because mediation is generally considered to be a without prejudice process, the statements made by the parties and documents adduced in the mediation proceeding should not be considered by the arbitrator.

If an agreement is not reached at the mediation session, the Board's mediator may make an order. That order can be accepted or rejected by the parties. Many of the Board's orders are accepted. If an order is not accepted, and the application is not withdrawn, the Board is required to hold an arbitration hearing.

The nature of the arbitration hearing is a **hearing de novo** where the arbitrator considers the evidence led at the arbitration hearing and the previous mediation order made. The oral statements made and documents tendered at the mediation are not evidence in the arbitration process. The arbitration proceeds upon the oral and documentary evidence tendered at the arbitration hearing. The parties are generally free to call relevant oral evidence and adduce relevant documents at an arbitration proceeding. The arbitrator considers the evidence and argument tendered at the hearing and the mediation order. The arbitrator is not required or bound to accept the mediator's order. The arbitrator is at liberty to craft the terms of the order based on the evidence and is not limited to or by the mediator's order.

Jurisdictional Objections by the Respondent:

The position of the respondent, Falkoski Holdings Ltd., is somewhat unique. Mr. Falkoski considers that the Board's earlier mediation efforts were a sham. Falkoski Holdings Ltd. submits that this Board has no jurisdiction to deal with this matter because there is "no evidence that he refused the order". I have dealt with this argument below as it is clear Mr. Falkoski has in fact rejected the mediation order. I note that even if there were defects in the mediation process, the arbitral process is a complete cure, as the arbitrator is not bound to accept the terms ordered by the mediator. A flawed mediation process does not require a new mediation; it is simply cured by an arbitration hearing.

Mr. Falkoski further argues that this Board has no jurisdiction to issue an entry order given the order of the Ministry of Energy, Mines and Petroleum Resources. This appears to be an inaccurate characterization of the evidence concerning the permitting documents issued by the Ministry of Energy, Mines and Petroleum Resources. If the Ministry had issued an order indicating that no further activity could take place on Mr. Falkoski's lands[3], this would not

[3] There is no substance to this argument, and it merely is Mr. Falkoski's characterization of the correspondence he filed from the Ministry.

prevent the Board from exercising its jurisdiction. The jurisdiction of the Board arises as a result of the Board's statutory duty to resolve applications before it which are not either settled or withdrawn, where a party has not accepted the terms of a mediator's order, where the application is otherwise within the jurisdiction of the Board. The issue of permitting is a separate matter for the Ministry over which the Board has no jurisdiction.

The Board held a hearing pursuant to section 20 of the *Petroleum and Natural Gas Act*, which requires the board to arbitrate the matter unless the parties accept the mediation order:

> **Arbitration hearing**
>
> **20** (1) Unless the application is withdrawn or the applicant and the person who will likely be directly affected by an order approve the order of the mediator, the board must hear representation by or on behalf of the applicant and persons likely to be directly affected by an order, and must arbitrate for the purpose of resolving the complaint specified in the application.
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> (2) Unless the applicant and the other persons otherwise agree, the board must review an order of the mediator made under section 19, and may confirm or vary the order, subject to the terms it considers proper.
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> (3) Unless the applicant and the other persons otherwise agree, the board,
>
> (a) if a mediator has made an order under section 18 (4), must review the order, confirm it or vary it in the manner and subject to the terms the board considers proper,
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> (b) if a mediator has not made an order under section 18 (4), must determine the amount of money to be paid to a person, as rent for occupation or use, or for damage caused, up to the date stated in a certificate of restoration, for the entry, occupation or use, and
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> (c) may determine the disposition of the amount remaining of the deposit required under section 19 (2) as between the applicant and the owner.

The Board is therefore required to hold a hearing pursuant to section 20 of the *Petroleum and Natural Gas Act* to resolve the issues of access and compensation where an application is not withdrawn and when a mediation order is not accepted by the parties.

On August 29, 2005, the Applicants communicated its acceptance of the terms of the Board order. On September 8, 2005, the Board received communication from Falkoski Holdings Ltd. indicating that the Respondent did not require the further services of the Board. The Board's order and letter delivering the order was returned. The Board considered this response to be a non-acceptance of the mediator's order, as it was non-responsive. The Board called a pre-hearing conference, at which it is clear from the evidence at this hearing Falkoski Holdings Ltd. had notice, but deliberately neglected or refused to attend.

This arbitration hearing would not have been necessary had Falkoski Holdings Ltd. clearly communicated to the Board that it accepted the terms of the mediation order. It was clear that Falkoski Holdings Ltd. did not accept the Board's mediation order. Mr. Falkoski at the hearing repeatedly asked "why are we here", in connection with why a hearing was proceeding. The simple answer is that the Board's order was not accepted by Falkoski Holdings Ltd. It appears from the evidence of Mr. Falkoski that the Rock Creek Community is opposed to the exploration activity and possible mining activity that may result if the exploration proves an economic source of material. The Board, however, is not a proper forum to raise these concerns.

Some of the concerns raised by Falkoski Holdings Ltd. deal with contamination concerns or environmental effects arising from a mining activity on the land. The Mines Branch of the Ministry of Energy, Mines and Petroleum Resources, is the entity that is charged with permitting for exploration and mining activity. This entity is also charged with authority concerning reclamation.

The Board deals with entry to land disputes in the oil and gas and mining industries. It is a statutory body. As an administrative tribunal the Board exercises the jurisdiction conferred on it by the legislature. The Board cannot expand on its jurisdiction beyond that given by the legislature. The Board as an administrative tribunal does not have the same jurisdiction that the Supreme Court of British Columbia has to deal with actions for nuisance, trespass and negligence.

The Board does not have the jurisdiction to consider the public health effects that might arise if mining activities are subsequently permitted on the lands. The Board does not have the jurisdiction to consider what public health effects might arise once ore is transported from the Falkoski lands to any other place. The Board does not have the jurisdiction to regulate activities such as "crushing" the ore that might take place off the lands to which access was sought. Further the Board does not have the jurisdiction to consider the possibility that radon gas might be emitted if exploration takes place on the land. In my view, the Board also is not charged with the environmental regulation of mining in the province of British Columbia.

The Board's jurisdiction relates to the entry onto land. The fact that the Board has permitted entry on the land does not operate to release the applicant from liability arising as a matter of common or statute law from its activities on the land. I also wish to make it plain that the Respondent is not consenting to the actions of the Applicants on its land, and opposes entry onto its land, for any purpose other than the purpose of reclaiming the work performed by prior operators on his land.

The Applicants filed a report from URS Canada Inc. concerning radiation or radon readings on the property in these materials. I expressly disregard the contents of that report as it is not relevant to any consideration that I must decide in determining whether the applicant should have entry to the property. It is apparent from the reading of the Gold Commissioner's report that there are no significant radiation concerns. I make no findings concerning the health effects of lapin barite mining because it simply is not a matter properly before this Board, and is a matter outside the Board's jurisdiction.

The *Mineral Tenure Act* indicates the Board must make an order

> (a) specifying conditions of entry that will minimize the obstruction to or interference with the existing circumstances of the land, and

In connection with "specifying the conditions of entry that will minimize the obstruction to or interference with the existing circumstances of the land" the Board does have jurisdiction to specify conditions that would mitigate the effects of entry. It must be borne in mind, however,

that the Board is not the primary entity charged with the regulation of the mining and mining exploration industry. In the case of mining this is the Ministry of Energy, Mines and Petroleum Resources, Mining Branch. The focus of the Board's tasks is on "conditions for the entry".

POSITIONS OF THE PARTIES

Position of the Applicants:

The evidence before the Board supports the Applicant's right to enter onto the property of Falkoski Holdings Ltd. The Applicants hold certain mineral rights to the property. Those rights are located on the property of Falkoski Holdings Ltd. The Applicants wish to use existing roads on the property to access their mineral rights. The Applicants assert that they have obtained all necessary permits in order to explore for lapin barite. The Applicants seek an order confirming the order made by the Board's mediator with some minor modifications, including reduction of deposits. The Applicants seek some direction from the Board as to payment of the amounts set out in the Board's order, if Mr. Falkoski refuses to accept payment of those amounts.

Position of the Respondent:

Falkoski Holdings Ltd says that the Board ought not to make the order for access and if the Board did make the order for access it is liable for any harm caused by the entry. Mr. Falkoski seeks an indemnity from the Board, from any third party claims arising from the actions of the applicant on the land. Falkoski Holdings Ltd. says that reclamation, on past exploration activities should be completed before the Applicants should be permitted to conduct further exploration work. Mr. Falkoski claims that he has never denied Zena access for the purpose of carrying out reclamation work.

In the words of Mr. Falkoski:

> There is no right or reason for this arbitration. I have never refused entrance or access to my property. I did not refuse the mediation report. There is no evidence that I refused it. No need to see why I need to drive eight kilometres in one direction to go pick up mail that is registered. Don't see why I need to pay for telephone calls, or reply to people who I have no desire to have communication with.

> If any board, government official or company feels they need "right of entry" on the land, why do they take it they have no need to involve me in their damn decision, if they want to mine it, let them go and mine it. I will not take responsibilities for anybodies' actions.
>
> There will great consequences. I will not be responsible for what other people do on my lands without approval. I don't care what the order is, I don't want to be forced to be part of their project. If they have a project in mind they? can carry it out without me. I have own life and own projects.

The Respondent is concerned the activity envisaged by the Applicants is mining and not exploration. The Respondent is concerned that the Applicants might disturb the surface and remove more than 10,000 tonnes of mineral. The Respondent says that the Applicants has not complied with the permitting requirements of the Government including reclamation requirements, and that the Chief Gold Commissioner has refused further permits. The Respondent has concerns that a prior agent [4] of the Applicants left an "environmental mess" at another exploration or mining location in the past. [5] The Respondent is also concerned that he is named as a contact person, and his number is used as a contact on the Mineral & Coal Notice of Work and Reclamation Program, when it has no active involvement in the Applicants' mining project.

While Falkoski Holdings Ltd. provided certain input or comments on the terms of access, in response to my questions concerning the terms of the mediator's order, I do not consider that Falkoski Holdings Ltd. has in any way relinquished its position that a Board order should not be made. Falkoski Holdings Ltd. does not want the applicant on its land to bulk sample or mine; it is only prepared to grant access to permit the applicant to reclaim the work done by earlier operators on the land. Falkoski Holdings Ltd. seeks that the applicant reclaim to a "higher standard" than that specified by the Ministry of Energy, Mines and Petroleum Resources.

Applicants' Reply:

[4] For privacy reasons I have not named the agent.

[5] These facts are not agreed to by the parties, and it is unnecessary for me to resolve these allegations in order to decide this application. I note that Mr. Falkoski information constitutes hearsay and insufficient evidence to support proof of a disputed material fact.

The Applicants submit that they intend to remove material in accordance with their permit. At this point they wish to explore in order to ascertain the viability of a mine on the site. Any mining decision will be dependent on a number of factors, including grade/quality of the minerals, and price of the minerals, among other factors. Mining activity will be subject to further government regulation and permitting. The Applicants have no connection with the agent of concern to the Respondent. They will not be dealing with the agent given the concerns raised by Falkoski Holdings Ltd.

Procedural Issues:

A number of procedural issues arose during this hearing, which it is necessary to identify and address before addressing the evidence and the arguments of the parties.

(a) Recording of the Hearing:

The recording of a hearing is not necessary of me as an arbitrator in order to prepare a decision as I have my notes of the evidence. The Board is not required to record hearings under the *Petroleum and Natural Gas Act.* At the hearing Falkoski Holdings Ltd. objected to the fact that the hearing was not going to be recorded. If Falkoski Holdings Ltd. had participated in the pre-hearing conference or raised this issue prior to the hearing, this issue could have been dealt with. Falkoski Holdings Ltd without any permission or ruling of the arbitrator attempted to set up a recording device, however, then it was expressed that no tapes were available. It then apparently ceased its efforts to record the proceedings.

It is apparent that a portion of the proceeding was being video taped by a member of the audience, without the permission of the arbitrator. I did not make this the subject of any order during the course of the hearing.

(b) Media Attendance at the Hearing:

Shortly after the hearing commenced a camera man and reporter from a television network walked into the hearing. After ascertaining the identity of the media personnel present, and the

positions of the parties, I permitted the media to record the proceedings, provided that the media did so without interrupting or inconveniencing the witnesses and parties in this proceeding.

An arbitration hearing, unlike mediation proceeding is a public hearing. Several members of the public were in attendance, and supported verbally Mr. Falkoski. It appears that the media attendance was arranged by Mr. Falkoski or his supporters. I also note that the media personnel present left before lunch.

(c) Documentary Evidence:

I issued written directions for hearing in this matter which required advance disclosure and delivery of a position paper and documents on which a party intended to rely at the hearing. The Respondent provided its position paper, but did not provide the documents, indicating that it intended to rely on a previous binder provided to the Board during mediation proceedings.

The Board wrote to the Respondent and indicated that if it intended to file documents in the arbitration process it was required to provide the documents in accordance with the directions for hearing. The Applicants did provide their documents in compliance with the directions, and the Respondent neglected or refused to accept delivery of the Applicants' documents. The Respondent did not deliver any documents to the Board or to the applicant in the arbitration process. At the hearing the Respondent attempted to file a large red binder of documents. The Respondent said that these documents had been delivered previously to the Board and to the applicant. The applicant opposed the filing of the material which had not been delivered previously in accordance with the directions for hearing, when it had attempted to comply with the direction for hearing. [6]

I find as a fact that the Respondent refused to accept delivery of materials from the Board or from the Applicants as the Respondent considered the mediation process a sham. This was the evidence of Mr. Falkoski. The Respondent ignored the Board's attempt to set this matter for pre-hearing conference to discuss scheduling issues and did not appear at the pre-hearing conference. The Respondent asked for an adjournment of the hearing date set on the basis that it wished an

[6] Mr. Falkoski refused to accept delivery of the material.

opportunity to file material. The Respondent then deliberately failed to file material with the Board, and sought to rely on materials filed with the mediator.

I did not permit the Respondent to file its large red binder of documents at the hearing. As indicated earlier documents and statements presented at a mediation are not before the arbitrator in the arbitration process. The Respondent did not comply with the direction to file and deliver material to each party in advance of the hearing. The Respondent did not have sufficient copies of the material available for the opposing party, the Board or a witness copy at the hearing. The Respondent deliberately and knowingly flouted the earlier direction for hearing, which was given in order to ensure that the scheduled hearing proceed in a fair and expeditious manner. In my view, it would have been grossly unfair to the Applicants to permit the Respondent to introduce and use materials which were not provided.

After hearing the evidence of Mr. Falkoski I permitted him to file documents which he claimed supported his position that the Board did not have jurisdiction to proceed with the hearing because the Ministry had revoked approval to work on the land.[7] I did so on the basis that I must consider jurisdictional arguments when presented, even if the presentation at a hearing is objectively unfair and based on documents not disclosed until the date of the hearing.

(c) Evidence by Ms. Walker

At the hearing, Falkoski Holdings Ltd. sought to call Ms. Joey Walker to give what amounted to evidence which one would ordinarily expect to be properly the subject of expert evidence. The intended nature of the evidence was to show that there were radon or radiation readings on the property beyond health standards, and further that if a mining operation were to take place on the property, or if mineral taken from the property would be crushed near a school, it would present a health hazard in the Rock Creek community.

[7] Exhibit 3 Letter from S. Wuschke dated July 14, 2004; Exhibit Letter from G. German to J. Falkoski, dated July 19, 2004.

I did not permit Ms. Walker to testify on these points. The opinions sought to be given are irrelevant to the access and compensation issues that the Board has to decide. Further, there was no proof that Ms. Walker was an expert. She is apparently a companion of Mr. Falkoski, and involved in a local environmental group in the Rock Creek area. There was no advance notice given of an expert opinion as required by sections 10 and 11 of the *Evidence Act, R.S.B.C. 1996, c. 124.*

I expressed to both parties at the hearing, that I considered the issue of radioactivity to be an irrelevant consideration in the exercise of this Board's jurisdiction. I note that the Applicants filed a report by Steve Sibbick, M.Sc., P.Geo, Manager, Mining Services for URS Canada Inc., dated May 16, 2005, which contained an opinion concerning the radioactivity of the site. I have not relied on this report in making this decision. In my view, the issue of radioactivity or non-radioactivity of minerals exposed or extracted by exploration activity on the property is not a relevant consideration for this Board to continue in issuing a Board order permitting access to the lands. I advised the parties of my views on this point in the course of the oral ruling at the hearing concerning whether Ms. Walker would be permitted to give evidence on this issue.

After giving these ruling Mr. Falkoski and his supporters walked out of the hearing. I indicated that I would continue to hear closing argument in the absence of the Respondent, if the Respondent chose to leave the hearing. Several rude comments were uttered by Mr. Falkoski before he left. I proceeded to hear closing argument on behalf of the Applicants and then closed the hearing, reserving my decision to an award in writing.

Facts:

The Rights of the Applicants:

Falkoski Holdings Ltd owns the lands described above. It is apparent from the material filed that the Applicants hold certain mineral rights underlying the lands owned by Falkoski Holdings Ltd. for the claims described as Rock 1, Rock 2 and Rock 3. These claims are shown on Exhibit "A" to the application.

The Applicants have a permit or letter of authority, dated May 18, 2005, issued by Bruce Reid, P. Geo., Inspector of Mines, Mining & Minerals Division, Mining Operation Branch, Ministry of Energy and Mines approving a mineral exploration program, described in a Notice of Work, dated September 30, 2004, subject to compliance with the attached special conditions.

The permit or letter of authority contains special conditions which include:

(a) the removal of a bulk sample of up to 10,000 tonnes as described in the Notice of Work dated September 30, 2004 of lapin barite;
(b) conditional on completion of the Mediation and Arbitration process;
(c) compliance with the Mines Act, the Health, Safety and Reclamation Code for Mines in British Columbia

The letter of authority also contains conditions related to timber issues and water runoff issues.

This letter appears to supersede documents filed by Falkoski Holdings Ltd. indicating that the permitting is in a state of suspension for the property. The property was apparently inspected by the Manager of Permitting, Exploration and Small Mines, Mining & Minerals Division, Mining Operation Branch, Ministry of Energy and Mines, Steven Wushcke, P.Eng. on June 18, 2004. The inspection report denotes that there were complaints about reclamation and presence of uranium. The following observations were made:

> Some standing timber was damaged, trenches were not adequately reclaimed, large diameter drill holes were not plugged in a manner that would prevent grazing cattle from stepping into them and causing injury (one cow was said to be lame from this happening), drill cuttings were not returned to the hole thus inhibiting plant growth, drill cutting samples remained on the property, excavations for some drill pads were not reclaimed, some disturbed areas had an excess of weed species.
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> A scintillometer was used to check for indications of radiation. Background counts seemed to be in the order of 50 +or – 10 counts per minute. Disturbed soils gave up to 150 to 175 counts per minute. It was noted that the granite boulders in the glacial till provided about the same reading, leading to the conjecture that the till had ground up granite components. The barite exposures indicated counts below the background readings.

Mr. Wuschke indicated in a letter dated July 14, 2004, that:

> It appears from the above noted letter that the land owner is very dissatisfied with the current state of affairs. Until there is an acceptable subsisting agreement in place between the landowner and yourself, I am directing the regional permitting staff to forgo the issuance of any further permits or authorization under the existing permit. This is in keeping with what I advised you in our last telephone conversation.
>
> Your existing permit will be held in abeyance, except for your obligations to reclaim (subject to the landowners agreement). ...

This Board has no jurisdiction to add to or modify the terms of the permit issued by the Ministry of Energy, Mines and Petroleum Resources. If Falkoski Holdings Ltd. is unhappy with the issuance of the permit it should pursue that matter in the appropriate forum.

Existing Circumstances of the Land:

Mr. Falkoski lives on the lands. The oral testimony shows that the area which comprises the mineral rights is on a part of the lands which do not contain a dwelling house, buildings, orchard land, or cultivated land. The claims are across a public road from the dwelling house of Mr. Falkoski. The area is not visible from the Falkoski dwelling. The area is used by grazing cattle, and ungulates.[8] In this case the existing circumstance of the land is that the land is used by grazing animals. There are some trees on the land in various stages of maturity.

The amount of land taken up by this application constitutes less than 2 % of the property, and it is located away from Mr. Falkoski's dwelling house. It has been used in the past for mineral uses, and Mr. Falkoski has held claims over this portion of his property in the past.

In order to minimize interference with the existing circumstances of the land it is necessary to consider terms related to fencing, reclamation work, surface water runoff, damage to trees, and repair to any roads damaged during the operation, as well as orders dealing with damage to trees, that may be appropriate to minimize interference with the existing circumstances of the land.

[8] Wildlife is crown property in British Columbia

Risks to the Existing Circumstances of the Land:

It is apparent that the activity on the land has the potential to create runoff. There is also a risk of injury to persons or animals from any excavations or drill holes. It is possible that roads may be impacted when equipment is used in the exploration activities. Trees may be removed or damaged during the process.

The primary interference is that there is a risk of injury to Mr. Falkoski's cattle licking the disturbed ground surface, being exposed to or drinking contaminated runoff water. Mr. Falkoski claims he had to "shoot three cows", which were sick or injured. He also says that he "damn near lost a horse" to injury from an exposed drill hole. There is also a risk of injury to persons who might walk onto the property and step into a drill hole or excavation, which is not marked or reclaimed.

Compensation Issues:

Neither party raises an issue that $1,700 per acre is not fair and reasonable compensation or that $5,000 as compensation for the entry is not fair and reasonable. Falkoski Holdings Ltd. has submitted that this matter was settled at mediation on the basis of $1,700 per acre. Neither party adduced any evidence from which I could fix an amount other than the above noted amounts.

Mr. Falkoski suggested that the sum of $25,000 was the appropriate amount to ensure that the Applicants carry out all reclamation activities. In my view the statutory purpose under s. 19(2)(a) of the *Petroleum and Natural Gas Act* for a deposit is to ensure that the Applicants pay the amounts considered necessary for the purpose of ensuring that "the owners of the land will be paid any amount ordered subsequently to be paid to them." The Ministry of Energy, Mines and Petroleum Resources has also required a deposit of $10,000 to ensure that the applicant carries out any reclamation responsibilities. In my view, it is inappropriate for the Board to be issuing a deposit requirement for reclamation responsibilities as this falls within the purview of the

Ministry of Energy, Mines and Petroleum Resources under the permitting requirements for mining exploration.

Mr. Falkoski suggested that if mining activity took place on a portion of his land, the balance of the portion of the land might be injuriously affected if he decided to sub-divide his land for cottage or residential use. The amount of land taken up by this application constitutes less than 2 % of the property, and it is located away from Mr. Falkoski's dwelling house. It has been used in the past for mineral uses, and Mr. Falkoski has held mineral claims over this portion of his property in the past. There is no evidence that the land is capable of being sub-divided and used for recreational development.

Injurious affection is a concept that arises in the context of expropriation proceedings under the *Expropriation Act,* R.S.B.C. 1996, c. 125. It is clear that permission from the Board to access the surface is not an expropriation. I note that the *Petroleum and Natural Gas Act, Mineral Tenures Act and Mining Right of Way Act,* do not raise "injurious affection" as a factor which the Board should consider in awarding compensation. In any event, I am not able to consider this submission as this theory was not developed with any cogent evidence by Mr. Falkoski supporting a loss.

Mr. Falkoski also seeks compensation for the costs of the roads he has built on his property which the Applicants might utilize. In my view, it is clear under the legislation that the Applicants have the right to use existing roads on the lands under section 6 of the *Mining Right of Way Act*, R.S.B.C. 1996, c. 294. [9] The applicant however is responsible for any damage to

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[9] **Industrial use of access road**

> **6** (1) Subject to this section and to regulations made under the *Industrial Roads Act,* if an access road is deemed to be owned by a person, every person desiring to use the access road for the purpose of obtaining access to an existing mineral title, or for forest harvesting or another industrial purpose, is entitled to do so.

those roads. Falkoski Holdings Ltd. has a concern about heavy trucks used in mining operations, and roads through wetter areas on the property. There is, however, at present no proof of the cost of maintenance. Mr. Falkoski in his oral testimony sought $25,000 per kilometer, as the building cost for the road. There is however no evidence before me of any such cost.

The Mediation order also provided for $1.00 per foot for merchantable trees cut. Mr. Falkoski wants an amount for all trees cut. He says that all trees have value. He has not, however, tendered any evidence of the value of a tree. In my view, a merchantable tree is one with a diameter of 6 inches or more measured at "breast height". This is a tree that is capable of at least being used as a fence post.

Appropriate Considerations to Minimize the Effects on Existing Circumstances of the Land:

Having considered the oral and documentary evidence in this case, in my view it is appropriate to attach conditions to the entry which address the risks of entry in order to minimize the effects on the existing circumstances of the land. The existing circumstance is that the land is used by grazing animals. There may also be interference with trees on the property which could have some commercial use. This can be done by addressing the risks to animals and persons, risk of damage to trees, and damage to the lands. I am required to consider the award made by the Mediator in this matter. The Mediator addressed concerns related to injury to persons and animals, reclamation, water quality, and damage to trees. In this case it is unnecessary for me to

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(2) A deemed owner of an access road may, in respect of the use of the access road under subsection (1), require a reasonable payment from that person in respect of the actual maintenance costs of the access road, and may also require

(a) a reasonable payment to reimburse the deemed owner for actual capital costs incurred by the deemed owner in order to accommodate any special needs of that person, and

(b) if the use by the other person results in the need for substantial capital expenditure on the access road by way of rebuilding to a higher standard, a reasonable payment by way of reimbursement for that capital expenditure.

impose conditions relating to timing of the entry or performance of work in the lands, as fortunately Mr. Falkoski's dwelling is not proximate to the area proposed for work.

In imposing conditions, I also bear in mind the Ministry of Energy, Mines and Petroleum Resources, Mining Branch that is the regulator of mining and mineral exploration activities on land. In my view the Board should not be setting environmental or mineral exploration or performance standards which differ from those imposed by that Ministry, under the guise of setting conditions which minimize interference with the existing circumstances of the land.

For example, Mr. Falkoski said that he wished to have reclamation to the following standard:

> I want the back filled level with the upper perimeter of whatever they have dug, plus 10 % to allow for settlement. I will not settle for a government standard which is a 2:1 slope. If they want to work to government standard let them work on government land. When they have reclaimed I want as many trees replanted as those they took out.
> ...
>
> I also want the land to be re-contoured the way it was, don't want rocks left on the surface, don't want drill cuttings left or anything for animals to lick. I want drill cuttings poured back down the holes, and want the drill holes filled with concrete. I want the core boxes and samples removed.

Mr. Falkoski also wanted mining liability insurance in the "millions of dollars" range. He also wanted $25,000 paid as an advance, presumably against reclamation costs. He also wanted an "indemnity" from the Board with respect to the possibility of contamination.

There has been no cogent evidence led which supports a different standard. Having considered this in the context of the evidence before me, in my view the mediation order should stand with amendments to paragraphs 4c, 4e, 4f, 4g, 4h, 4i, the addition of paragraph 4k which deals with weed control.

Reasons:

It is apparent that the Applicants established that they have mineral rights under the surface of the lands owned by Falkoski Holdings Ltd. This is not seriously disputed. The Gold Commissioner was unable to resolve this entry dispute. Mr. Falkoski disputes the quality of the dispute resolution process before the Gold Commissioner. There is, however, no doubt that the

Gold Commissioner could not solve this problem. There is some question as to whether Falkoski approached these discussions in good faith. The Board appointed mediator was unable to resolve this matter despite two days of meetings and issued an order. Mr. Falkoski again disputes the quality of the dispute resolution process before the Board.

The Applicants are prepared to accept the terms and conditions imposed by the mediator. The Applicants would like the deposits reduced because Mr. Falkoski has refused to accept payment for the monies tendered as an attempt to comply with the mediator's order. In my view this is not a valid reason to reduce the amounts, which the Applicants have earlier, by inference, admitted are reasonable and proper amounts. It is apparent that Mr. Falkoski did not wish to accept the monies tendered, as he believed this would be an admission on behalf of Falkoski Holdings Ltd. of the validity of the mediation process, or acceptance of the right of the Applicants to come onto his lands, or his endorsement of plans which may not be acceptable to the residents of Rock Creek.

It is unclear to me whether Falkoski Holdings Ltd. will accept payment of amounts under this order. I note that there is a dispute between the parties as to how a process server, retained by the Respondents treated Mr. Falkoski and how the process server was treated by Mr. Falkoski when the process server attempted to provide the deposits and amounts set out in the mediation order. This was the subject of documentary evidence consisting of an affidavit from the process server, and oral testimony of Mr. Falkoski. It is unnecessary for me to determine the facts of what happened between the process server and Mr. Falkoski.

The Respondent has demonstrated through its correspondence with the Board following the mediation, and its conduct at the mediation, contempt for the Board's processes. There has been a history of a refusal to accept documents or participate in process. In the statement of points of Falkoski Holdings Ltd. contained in an e-mail of November 15, 2005 [10] Mr. Falkoski stated:

> [...] Falkoski was under no legal obligation to accept Zena's money, as the Mediation order was not legally binding. If Falkoski HAD (sic) accepted their money, he would then be acknowledging his partnership in their

[10] Exhibit 2

> mining operation and thereby his future responsibility to the protesting citizens nearby. He refuses to be forced into partnership with Zena Capital Corp. under any circumstances.

In my view the Applicants have reasonably held concerns that Falkoski Holdings Ltd. will frustrate their access under the arbitration order by refusing to accept funds and then denying access. Arbitrators generally do not have powers to enforce their own orders. A party who seeks to enforce an arbitration order must use the Courts. Under the Board's statutory arbitration process there is a particular method to obtain access and possession of lands where a land owner refuses access. The Board, can on application, deal with the costs associated with a refusal to give access by deducting costs associated with the refusal of access from payments otherwise due to the land owner.[11]

In order to reduce the prospect of further disputes concerning the payment of monies under the Order, I have set out a method to avoid the potential for further conflict. I am not, however, making this a term of this Order, as there is no apparent statutory authority given to the Board to enforce its Orders other than a power on application to deduct the costs associated with refused access from payments otherwise due to a land owner

The proper method is for the Applicants to submit payment by cheque to Falkoski Holdings Ltd., of the amounts due under the order. The mailing of a cheque by regular mail is sufficient to constitute payment under the Order on the 5th day following the mailing of the cheque, barring any intervening statutory holidays. If Falkoski Holdings Ltd. within 60 days of the issuance and delivery of the cheque has not cashed a cheque, or refuses to accept the cheque the Applicants are at liberty to stop payment on the cheque, and deposit the sum represented by the cheque to a bank account held in trust for Falkoski Holdings Ltd., bearing interest at regular bank rates. The Applicants may use a bank with a branch convenient to them.

[11] Section 30, *Petroleum and Natural Gas Act*

The concerns raised by Falkoski Holdings Ltd. at the hearing and in its statement of points do not amount to any reason why the Board should refuse to issue an order for entry. If the Applicants take more rock or mineral than they are authorized to take under the permit, contaminate the respondent's property, or damage the respondent's property there are remedies available to Falkoski Holdings Ltd. It is up to Falkoski Holdings Ltd. to pursue those remedies in the appropriate forum if a problem arises, and Falkoski Holdings Ltd. may wish to seek appropriate legal advice. This Board does not have the jurisdiction to deny entry based on environmental or health allegations, or the possibility that in the future, if the mineral property proves commercially viable, that the Applicants may seek authority from the Ministry of Energy, Mines and Petroleum Resources to extract minerals in a mining operation and that the mining activity may cause environmental, health or social effects on the land owner, the Rock Creek community or its inhabitants. The Board's authority rests simply to determine whether the Applicants have established a right to enter and to set the terms of conditions of entry to minimize interference with the existing circumstances of the land.

Mr. Falkoski asked for a standard of reclamation in excess of that standard required by the Ministry of Energy, Mines and Petroleum Resources. I decline to make an award concerning the standard of reclamation. The proper standards of reclamation are dealt with the Ministry of Energy, Mines and Petroleum Resources, Mines Branch in the Mineral Exploration Code.

THEREFORE THE BOARD MAKES THE FOLLOWING ORDERS:

1. Pursuant to Section 19 (2) of the *Petroleum and Natural Gas Act*, the Applicant must deposit with the Board the amount of $10,000 as security. The amount shall be held in trust by the Board or Government of British Columbia for the purpose of ensuring payment to the Respondent

2. Pursuant to Section 19(2) of the Petroleum and Natural Gas Act, the Applicants must immediately pay to the Respondent the sum of $5,000 as an advance on the amounts required to be paid, and set out below.

3. The Applicants shall tender any payments due under this Order to Falkoski Holdings Ltd. to Falkoski Holdings Ltd. by regular mail, registered mail or by personal service. If Payment is made by regular mail, the Payment under the Order shall be deemed to be received by Falkoski Holdings Ltd. on the fifth day after mailing.

4. Upon payment of the amounts set out in paragraphs 2 and 3 of this Order, pursuant to Section 19(1) of the *Petroleum and Natural Gas Act*, the Applicants shall have entry and access to the described as Plan 1187, Subsidy Lot 3, District Lot 2707. Similkameen Div. of Yale Land District, PID 001-777-117 (the lands) for the purposes of exploration, including bulk sampling, of up to 10,000 metric tons of lapin barite ore and reclamation on claims known as Rock 1, 2, 3, 4. on the following terms:

    a. The Applicants shall pay to the Respondent an annual land rental fee of one thousand seven hundred dollars ($1,700) for each entire acre of land that surrounds the site utilized. The Applicants shall pay the annual land rental fee for a minimum of three acres. This amount shall be paid in advance, and provided the Applicant continues to perform exploration, including bulk sampling, and reclamation beyond 2006, the applicant shall pay the annual land rental fee on the anniversary date in 2007 and in each following year.

    b. Road use to and from the work site shall not be included in the annual land rental fee set out in paragraph (a).

    c. The Applicants shall pay to the Respondent an amount equal to $1.00 per linear foot length above ground level of marketable trees cut, pulled down or damaged, on the Lands. A marketable tree for the purposes of this sup-paragraph is a tree which is at least six inches in diameter, measured at breast height. These amounts shall be payable on a monthly basis the first day of each month.

    d. Pursuant to Section 21(1) of the *Petroleum and Natural Gas Act*, Applicants shall pay to the Respondent an annual amount of three thousand dollars ($3,000.00).

e. The Respondent or its representative, at its own cost and risk, shall be permitted reasonable access to any site where exploration, including bulk sampling, or reclamation takes place. In any event, the Respondent or its representatives shall be permitted access to any site at least every 30 days. The Respondent shall give reasonable notice to the Applicants, bearing in mind their may be safety issues associated with entry onto the site of mineral exploration activities.

f. Any site where exploration, including bulk sampling, and reclamation takes place shall be enclosed by a fence suitable for keeping children, ungulates, farm animals, and cattle, out of the Site. Before carrying out any further exploration or restoration work on the property, the Applicants shall fence the lands where exploration, bulk sampling and reclamation takes place, with a suitable gate to ensure that children, ungulates, farm animals and cattle are kept out of the Site.

g. The Applicants shall make every reasonable effort to avoid persistent and measurable harmful contamination of water sources, in accordance with requirements set by the Ministry of Energy, Mines and Petroleum Resources, Mines Branch.

h. The Applicants shall make every reasonable effort to avoid damage to standing timber.

i. The Applicants shall immediately carry out and complete reclamation work of prior disturbances of the Lands, except where mineral excavation is to take place, caused by the Applicants, its agents, employees or representatives. Without limiting the generality of the foregoing, the Applicants shall:

    i. Restore exploration access roads, drill pads, trenches and scalps;
    ii. Remove all drill cuttings or return them into the drill holes;
    iii. Plug all drill holes with concrete; and

iv. Remove all existing core boxes and sample bags.

in accordance with the reclamation standards imposed by the Ministry of Energy, Mines, and Petroleum Resources, Mines Branch.

j. Upon completion of exploration, including bulk sampling, except where mineral excavation is to take place, the Applicants shall immediately carry out and complete reclamation work of any disturbances of the Lands. Without limiting the generality of the foregoing, the Applicants shall:

v. Restore exploration access roads, drill pads, trenches and scalps;
vi. Remove all drill cuttings or return them into the drill holes;
vii. Plug all drill holes with concrete; and
viii. Remove all existing core boxes and sample bags.
ix.

in accordance with the reclamation standards imposed by Ministry of Energy , Mines and Petroleum Resources, Mines Branch.

k. The Applicants shall ensure that no noxious weeds are introduced to the Respondent's lands as a result of entry, and shall take reasonable steps to ensure weed control in any site excavated by them.

The Applicants shall pay for such road maintenance as may be required as a result of the Applicants' use of existing roads.

Costs:

The Applicants request liberty to address the issue of costs. If the Applicants wish to apply for costs they shall send their written submission to the Respondent and to the Board by the close of business on March 10, 2006. The submission will be detailed so that the Board can deal with the issues of entitlement and the amount of costs. Any evidence concerning the amount of costs will be provided by statutory declaration or affidavit. The Respondent shall have to the close of

business on March 24, 2006 to provide to the Board and to the Applicants its written acceptance of the application or its written submission opposing the application. The Applicants shall have a further right to reply by the close of business on April 7, 2006. The Board will decide the application for costs on the basis of the written submissions it receives from the parties.

DATED: February 24, 2006

Paul Love,
Chair, Mediation and Arbitration Board

Mediation and Arbitration Board
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Fort St. John, BC V1J 2B3