

File No. 1806
Board Order No. 1806-1

September 4, 2013

SURFACE RIGHTS BOARD

IN THE MATTER OF THE MINERAL TENURE ACT
ACT, R.S.B.C., C. 292 AS AMENDED

AND IN THE MATTER OF
BLOCK A DISTRICT LOT 5365 RANGE 5 COAST DISTRICT
THE SOUTHEAST $\frac{1}{4}$ OF DISTRICT LOT 3427 RANGE 5 COAST DISTRICT
THE SOUTH $\frac{1}{2}$ OF DISTRICT LOT 3426 RANGE 5 COAST DISTRICT
THE NORTH $\frac{1}{2}$ OF DISTRICT LOT 3426 RANGE 5 COAST DISTRICT
THE WEST $\frac{1}{2}$ OF DISTRICT LOT 3424 RANGE 5 COAST DISTRICT
THE WEST $\frac{1}{2}$ OF THE EAST $\frac{1}{2}$ OF DISTRICT LOT 3424 RANGE 5 COAST DISTRICT
(The "Lands")

BETWEEN:

C. Donald Christmann and
0712249 BC Ltd.

(APPLICANTS)

AND:

New Nadina Explorations Limited

(RESPONDENT)

BOARD ORDER

Heard: June 4-6, 2013 at Smithers, BC
Appearances: Jeff Frame, Barrister and Solicitor, for the Applicants
Donald Giddings, Barrister and Solicitor, for the Respondent

INTRODUCTION

[1] The Applicants, Donald Christmann and 0712249 BC Ltd. (of which Mr. Christmann is a part owner), own the Lands comprising the Mission Outpost Ranch, New Nadina Unit (the Ranch). The Ranch is located approximately 45 kilometers south of Houston, BC in a beautiful wilderness setting. The Respondent, New Nadina Explorations Limited (New Nadina) is a publically traded junior mining company that holds mineral tenures with respect to the minerals beneath the surface of the Lands and other adjacent parcels. This dispute arises from the conflicting interests and rights of these parties with respect to the use of these privately owned Lands.

[2] Mr. Christmann is a rancher and has been involved for many years in various aspects of the ranching industry. In early 2001, Mr. Christmann (and the numbered company with respect to some parcels) purchased the Ranch, formerly known as the Owen Lake Ranch, at the time comprising approximately 2,000 acres. Over time, he purchased additional neighbouring properties and obtained the Crown grant for an adjacent area that was previously a grazing lease. The Ranch now comprises approximately 3,000 acres. Additionally, Mr. Christmann holds grazing licenses over approximately 40,000 acres of Crown land in the area.

[3] Mr. Christmann moved to the Ranch in the summer of 2001. He typically resides at the Ranch from some time in the spring until into the fall and spends the winter in Arizona.

[4] In recent years, the Mission Outpost Ranch has been operated as a cattle ranch in conjunction with another ranch property near Smithers, known as the Hudson Bay Unit. Generally, in the summer, although not for the last two summers, the New Nadina Unit of the Ranch is used to graze cow/calf pairs and yearlings. At the end of the season, the cattle are sent to market or overwintered in Smithers.

[5] New Nadina's President and CEO is Ellen Clements. The corporate predecessor to New Nadina has held mineral tenure in the area since 1915. New Nadina and its corporate predecessors have engaged in mineral exploration activity in the area for many years. Since his purchase of the Ranch in 2001 and until recently, Mr. Christmann has given New Nadina permission to enter the Lands to conduct exploration activities.

[6] Until his death in 2005, New Nadina was run by Ms. Clement's husband, George Stewart. Just prior to Mr. Stewart's death, New Nadina obtained test results indicating promise of a significant find. After taking some time to reflect upon her options following her husband's death, Ms. Clements decided she would take over the company and continue its exploration work. She visited the site in 2006 and 2007. In 2009, the company did some reclamation work from historical activity. New Nadina started exploration again in 2010. Mr. Christmann gave New Nadina permission to enter the Lands for this purpose.

[7] New Nadina conducted geophysical work during the summer of 2011 and did some drilling commencing in September of 2011 until mid October 2011. Mr. Christmann was not happy with the amount of disturbance created by this drill program.

[8] In June 2012, New Nadina provided notice, as required, to the landowners of its intention to enter the Lands to conduct various activities including surface drilling and trenching. Mr. Christmann objected to New Nadina entering portions of the Lands described as the Hay Meadows. The Chief Gold Commissioner was unable to resolve the dispute, and the landowners brought this application to the Board.

THE LEGISLATION

[9] Pursuant to section 11(1) of the *Mineral Tenure Act*, a free miner may enter private land to explore for minerals vested in or reserved to the government. In accordance with section 11(2), however, the right of entry does not extend to certain land including, "land under cultivation" (section 11(2)(d)). Section 11 of the *Mineral Tenure Act* is set out in full below:

- 11 (1) Subject to this Act, only a free miner or an agent of a free miner may enter mineral lands to explore for minerals or placer minerals.
- (2) The right of entry under subsection (1) does not extend to
 - (a) land occupied by a building,
 - (b) the curtilage of a dwelling house,
 - (c) orchard land,
 - (d) land under cultivation,
 - (e) land lawfully occupied for mining purposes, except for the purposes of exploring and locating for minerals or placer minerals as permitted by this Act,
 - (f) protected heritage property, except as authorized by the local government or minister responsible for the protection of the protected heritage property, or
 - (g) land in a park, except as permitted by section 21.

[10] The landowners seek a declaration from the Board that an area of the Lands described as the Hay Meadows is “land under cultivation” within the meaning of section 11(2)(d) of the *Mineral Tenure Act*, and therefore not subject to right of entry for mining exploration purposes.

ISSUE

[11] The issue is whether all or part of the Hay Meadows is “land under cultivation” within the meaning of the *Mineral Tenure Act*.

THE HAY MEADOWS

[12] The Hay Meadows comprise approximately 400 acres and are demarcated by fencing into three areas, which I will refer to as the “West Meadow”, the “Main Meadow”, and the “South Meadow”. The area comprising the Hay Meadows is roughly depicted in yellow on page 1 of Exhibit 4. Mr. Christmann describes the Hay Meadows as “the heart” of the Ranch.

[13] Referring to page 1 of Exhibit 4, the West Meadow is the yellow area west of the fence line marked in green running north/south (more or less). It is also the area marked “yearling”. The Main Meadow is the yellow area east of the north/south green fence line and north of the fence line running east/west. It is the largest of the three meadows and marked on page 1 of Exhibit 4 with the word “hay”. The South Meadow is the yellow area to the south of the east/west fence line and the area south of the Main Meadow.

[14] A driveway from the main road traverses across the West Meadow and through the Main Meadow. There is a cattle guard across the driveway near the fence boundary between the West Meadow and the Main Meadow. It is the area near this cattle guard that is of particular interest to New Nadina.

ANALYSIS OF LAW AND EVIDENCE

[15] I start my analysis by considering what is meant by the words “land under cultivation” in the *Mineral Tenure Act*. It is well established that the words of an enactment must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. v. Zibbler, Siblin & Associates, Inc., et al* [1998] 1 SCR 27). Next, I will discuss the evidence of cultivation on the Hay Meadows. Finally, I will consider whether all or part of the Hay Meadows is “land under cultivation” within the meaning of the *Mineral Tenure Act*.

What is “land under cultivation” within the meaning of the *Mineral Tenure Act*?

[16] I start with the meaning of “cultivation”. According to the Dictionary of Canadian Law, Fourth Edition, “cultivation” is “the preparation and use of land to raise a crop”. The Oxford English Dictionary offers “the tilling of land; tillage, husbandry” and “the bestowing of labour and care upon a plant, so as to improve its qualities: the raising of a crop by tillage”. Cultivation, therefore, may involve a number of activities including preparing the land, seeding, fertilizing and controlling weeds, all for the purpose of raising a crop.

[17] As to the phrase “land under cultivation”, the only judicial authority considering this phrase is the 1977 decision of the Supreme Court of British Columbia in *Coffrin v. Bicchieri*, 1977 CanLii 354. That case involved an interpretation of the then in force *Placer Mining Act*, which provided that a free miner may enter and acquire a location on waste land within designated placer land for the purpose of exploring for, developing and producing a mineral. The Act went on to provide that

- “waste land does not include land...
- b) occupied by a building; or
 - c) falling within the curtilage of a dwelling house or orchard; or...
 - e) under cultivation”

[18] In that case, the Plaintiff landowner sought an injunction to prevent the Defendants, miners and holders of placer leases, from entering the land and conducting exploration activities. The Plaintiff had allowed two individuals, Addy and Matthews, to rehabilitate and move into two old cabins on the land. Both individuals planted gardens, and Addy kept chickens and horses. The Defendant had entered and conducted mining activities on the land only 50 yards from Addy’s cabin. In considering whether the land was excluded from the right of entry by virtue of the restrictions in the legislation, Fulton J. said:

“...in my view the only specific exclusion which needs to be considered here is land “within the curtilage of a dwelling house”. There are no orchards here, no land occupied by a building has been entered, and apart from Addy’s garden – which was not entered – the land is not actually under cultivation. With respect to that exclusion, the words used are not “arable land” or “land capable of being cultivated” or “farm land” or any other such words of general import: the expression is land “under cultivation”. In my view these words clearly denote not a past state or a potential or planned use, but a present actual state of being cultivated. The lands entered here are not in that category. (Emphasis added)

[19] Fulton, J. went on to conclude that the mining activity had been conducted on land within the curtilage of a dwelling house and was, therefore, excluded from right of entry by a miner.

[20] The scheme of the *Mineral Tenure Act* is to set out the rights and obligations of free miners and recorded holders of mineral tenure with respect to their mining activities on crown and private land, and to provide a mechanism for resolving disputes between private land owners and free miners or recorded holders arising from their competing interests and conflicting uses of private land. I note that section 11 of the *Mineral Tenure Act* only deals with the rights and restrictions of free miners to explore for minerals. The restriction on a free miner's right to enter "land under cultivation" to explore for minerals does not necessarily apply to mining activity inclusive of exploration, development and production of minerals. Section 19 of the *Mineral Tenure Act*, deals with disputes between persons and private landowners when terms of access to private land for mining activities, including exploration, development and production of minerals, is not agreed. Section 19(7) provides that where a landowner opposes entry to land by a recorded holder on the grounds that the intended activity would obstruct or interfere with an existing operation or activity on the land, the Surface Rights Board must determine the impact and which parts of the land would be affected. Section 19(8) requires the Board to make an order specifying conditions that will minimize obstruction or interference with the existing circumstances of the land when it determines it is not possible to enter the land without obstruction or interference. Section 19(9) requires that the Board take into account the extent of the obstruction or interference with land under cultivation.

[21] In the context of this legislative scheme, Fulton J.'s conclusion that the words "land under cultivation" import a temporal element and "denote not a past state or a potential or planned use, but a present actual state of being cultivated" is compelling. I find that to be "land under cultivation" within the meaning of the *Mineral Tenure Act*, the land must be presently and actively subject to activities for the purpose of raising a crop.

Evidence of cultivation on the Hay Meadows

[22] I heard testimony from Mr. Christmann, Ms. Clements, Dave Jaarsma, Harry Vandenburg, Jessie Vandebroek and Lorie Engelhart. Both parties filed documentary evidence. In addition, I visited the Mission Outpost Ranch to observe the Hay Meadows in the company of Mr. Christmann, Ms. Clements, and their counsel.

[23] Prior to being purchased by Mr. Christmann, the Ranch (then known as the Owen Lake Ranch) was owned by Harry and Annette Vandenburg. The Vandenburgs purchased the property in 1991 and used it to raise cattle and grow hay. They had a cow calf operation on the ranch until 1998 and a yearling operation for the last two years before selling to Mr. Christmann. They regularly took hay crops off the hay meadows. Once their operation reached about 140 head of cattle, they did not take hay

off the West Meadow, but just used the meadow for grazing. They had soil analyzed and fertilized the Main Meadow in accordance with soil test results to maximize hay production, but did not fertilize the West Meadow. Mr. Vandenburg constructed most of the existing fences creating three separate pastures for grazing and breeding. He seeded some of the area with oats that were cut and baled for silage, and later seeded with different grasses. The Main Meadow produced really well and he never had to seed it. He sprayed daisies as necessary. He removed rocks from the meadows.

[24] Lori Engelhart lived at Owen Lake Ranch for three years until 1982. At the time, the ranch was used to run cattle. It was hayed from June to September in order to put up feed for the cattle. According to Mrs. Engelhart, the Hay Meadows were disced, harrowed and seeded during that time. Her evidence was that in some years the meadows were seeded with oats and some years with grass. Rocks were picked out of the meadows. She and her husband continued to hay the Owen Lake Ranch in the late eighties and early nineties when they owned another nearby ranch known as High Lonesome. Mrs. Engelhart's evidence was that High Lonesome was infected by rattlebox as a result of hay being brought to the ranch from the Owen Lake Ranch. High Lonesome was eventually purchased by Mr. Christmann, and is now part of the Mission Outpost Ranch.

[25] Ms. Clements worked for New Nadina for many years before becoming a director and, ultimately, the President. She first visited the area in the 1970's. She observed hay being taken from the Hay Meadows in the 1970's, but was unaware of any cultivation activities. She has always considered the Hay Meadows to be natural pasture.

[26] Dave Jaarsma ran cow/calf pairs on the ranch the first year it was owned by Mr. Christmann and the last year that it was owned by the Vandenburgs. In the first year of Mr. Christmann owning the Ranch, Mr. Jaarsma hayed the Main Meadow. Charlie McClary, Mr. Christmann's ranch manager and a part owner of the applicant numbered company, cropped some of the Hay Meadows in the ensuing couple of years. A hay crop has not been harvested from the meadows since 2003 or 2004.

[27] Jessie Vandebroek worked on and off during the summer for Mr. Christmann as a general ranch hand from 2003 to 2012. Her duties included repairing fences, spraying weeds, and moving cattle around.

[28] Mr. Christmann has used the West Meadow as a yearling steer pasture. He has not had the need to hay it. The Main Meadow is typically used to pasture cow/calf pairs while they "mother up" and before they are sent out onto the range lands to graze. The South Meadow has been used for heavy steer pasture. Typically, the cattle go out on the Ranch in May and are taken in in September; however, Mr. Christmann does not presently own any cattle. His evidence was that he is in the process of dissolving his business partnership and that the cattle are owned by his business partner. His

evidence was he did not put cattle out in 2011 to allow New Nadina to do some geophysical and exploration work. His evidence was he did not put cattle out in 2012 because of extensive surface damage from the mining operations in 2011, and concerns about traffic and containment and keeping the cattle quiet so as to promote weight gain. Mr. Christmann did not provide evidence of his intention with respect to use of the Hay Meadows for cattle next year.

[29] Since purchasing the Ranch, Mr. Christmann has redone the barn adding living quarters and upgraded the shop. He has built a new house, and has maintained the perimeter and internal fencing, extending some internal fencing in a swamp area. In some years, fence maintenance involves extensive repairs from winter snow damage. The purpose of the perimeter fencing is to keep cattle off the logging road. The purpose of the interior fencing is to segregate pastures so that cow calf pairs can be put in one area, and yearlings can be put in another area.

[30] Mr. Christmann has applied fertilizer to portions of the Main Meadow including an area west of the main driveway affected by rattlebox, and an area to the south of the main driveway that was not producing very well. He has reseeded damaged areas, and has treated areas of the Main Meadow every year for the last eight years for invasive weeds such as daisy. He has personally sprayed areas to control weeds, as well as hiring a contractor to spray.

[31] Mr. Christmann mows areas of the Main Meadow to keep rose bushes from getting out of control.

[32] Three areas of the Main Meadow are infected by rattlebox, which Mr. Christmann has tried to eradicate by fertilizing and then resting the land. Rattlebox chokes out the hay. Mr. Christmann's evidence was that he has not hayed the fields while infected with rattlebox because it is not worthwhile in light of the reduced yield, haying just spreads the rattlebox seed, and he has not had need of the hay as he has not run yearlings. He has taken the advice that it is better to let the fields rest until the rattlebox "runs its course" and eventually chokes itself out. His evidence was that some new literature suggests that the hay can be cut early before the rattlebox goes to seed. Mr. Christmann indicated he was planning to hay the infected areas this year before the rattlebox went to seed in an effort at eradication.

[33] Mr. Christmann has not seeded the meadows other than to reseed damaged areas such as areas where the mineral feeders for the cattle are put out.

Are the Hay Meadows "land under cultivation" within the meaning of the *Mineral Tenure Act*?

[34] The evidence discloses the Hay Meadows were disced, harrowed and seeded in the 1980's. They were hayed in the 1970's and were regularly cropped during the

1980's and 1990's and occasionally seeded. They were hayed in the early 2000's, the last crop being taken in either 2003 or 2004. Although no crop has been taken for approximately 10 years, the meadows, and in particular the Main Meadow has been recently fertilized and is maintained for weeds continuing until the present time. All of the meadows have been used for pasture, although not in the last two seasons.

[35] I find that all of the Hay Meadows are cultivated in the sense that they have been tilled and seeded, fertilized and managed for weeds, for the purpose of harvesting a crop, namely hay, and in earlier years for oats. They are not natural pasture as assumed by Ms. Clements. The Statistics Canada Glossary of agricultural terms describes "natural land for pasture" as "Areas used for pasture that have not been cultivated and seeded, or drained, irrigated or fertilized...." In accordance with this definition, while used for pasture, the Hay Meadows are not natural pasture, but have been cultivated.

[36] The exemption from the right of entry does not apply to "cultivated land" however, but to "land under cultivation". Relying on the interpretation of "land under cultivation" in *Cofrin, supra*, New Nadina argued that the land is not actively under cultivation because no crop had been taken for approximately 10 years. The landowners, on the other hand, argued a crop is not necessary for the land to be actively under cultivation, but is only a component of cultivation. In support, counsel referred me to judicial interpretation of a similar phrase.

[37] In *Janes v. Her Majesty the Queen in Right of Newfoundland*, 2006 NLCA 4, the Newfoundland and Labrador Court of Appeal considered the meaning of the phrase "put in cultivation" in a Crown lease. Under the lease, the lessee was required to "put in cultivation" a minimum portion of the leased area within specified time frames in order to be entitled to receive a Crown grant of the land in accordance with the *Crown Lands Act*. The only activity undertaken by the lessee to satisfy the lease criteria was to spread manure on the land. While the Court found that "[t]he phrase 'put into cultivation' carries with it a connotation beyond mere preliminary activity on the land, such as the spreading of manure," "[t]he actual harvesting of a product is not an essential component of putting land into cultivation since, for example, crops may fail." In concluding that "taking sufficient steps with the reasonable objective of harvesting is a necessary component" to putting land into cultivation, the Court said:

The phrase "put into cultivation" incorporates...a consideration of a product to be produced....In my view, while planting crops would be sufficient to constitute putting land into cultivation, it is not necessarily an essential component. For example land may be put into cultivation using plants already established such as wild blueberries or grasses harvested for hay. However, in either case, putting land into cultivation would require activity by the farmer to nurture the soil and plants in the process of producing a product. This may, of course, include land lying fallow for a period of time as part of an agricultural plan. However, the

spreading of manure, by itself, is simply an activity undertaken on the land, which may improve the fertility of the land, but which, in the absence of something more, would not produce a product.

[38] Although not binding upon me, this consideration of the phrase “put in cultivation” or “put into cultivation” is instructive. Cultivation is a state of being as a result of purposeful activities to produce a crop. Land can be said to be “under cultivation”, if activities are presently and actively being conducted on the land for the purpose of producing a crop. I agree that a crop may not necessarily result, but the activities on the land must be for the purpose of producing a crop and collectively capable of achieving that result.

[39] I do not agree, however, that “under cultivation” has the same meaning as “put in cultivation” and imports a continued state of being in the absence of current purposeful activity. I am not convinced, as suggested in *Janes*, that land lying fallow as part of an agricultural plan, will constitute “land under cultivation” within the meaning of the *Mineral Tenure Act*. I agree that it makes sense in the context of determining whether sufficient activity constitutes putting land into cultivation for the purpose of obtaining a crown grant, that leaving land lying fallow as part of an agricultural plan should be considered land that has been “put in cultivation.” In that way, a farmer whose land happens to be in fallow in accordance with an agricultural plan at the relevant time for determining whether he is eligible to obtain a crown grant will not be deprived of the opportunity to obtain the grant. That context is very different, however, from the context of the *Mineral Tenure Act*.

[40] The *Mineral Tenure Act*, in setting out exceptions to a miner’s right of entry, and providing a dispute resolution mechanism where private landholders are affected by mining activity, is attempting to balance the interests of surface and subsurface rights holders engaged in competing uses of land. In that context, it does not make sense to deprive one right holder from making use of land that is not actively being used by the other right holder. The *Mineral Tenure Act* does not protect land “put” into cultivation, but land “under” cultivation, which as I have found above and in accordance with *Cofrin, supra*, implies a present and active state of cultivation and current activity contributing to the raising of a crop.

[41] Mr. Christmann relied on the law of discontinuance and commitment to use under the *Local Government Act* to argue that land under cultivation did not cease to be land under cultivation as a result of short periods of discontinued use or because of seasonal use. The *Local Government Act* provides that uses of land that do not conform to a bylaw when the bylaw is enacted may continue unless the non-conforming use is discontinued for a specified period of time. In that context, the Court of Appeal has held that a commitment to use is equivalent to the use itself and that use is not discontinued because one activity of many that constitutes the use has ceased temporarily (*Cowichan Valley (District of) v. Ward*, 1994 CanLII 427, and *Cowichan v. Yole* [1988]

BCJ No 2448). Counsel argued failure to undertake specific activities involved in cultivating land, including failure to harvest a crop, did not take away from the land's status as "land under cultivation". He referred to the specific exception in the *Local Government Act* to the loss of permission for a non-conforming use if discontinuance is part of a normal seasonal or agricultural practice.

[42] While I agree the harvesting of a crop need not occur for land to be "under cultivation", I disagree that once cultivated, land continues to be "land under cultivation" and thereby protected from entry by a free miner, regardless of the seasonal nature of cultivation. While such a result makes sense in the context of determining whether there has been a discontinuance of a non-conforming use thereby rendering the non-conforming use no longer legal, it does not make sense in the context of the *Mineral Tenure Act* providing a legislative scheme to balance the rights and interests of competing legal uses of land. If it had been the legislature's intent to exclude from a free miner's right of entry to private land any cultivated or once cultivated land, the legislature could have easily chosen to exclude "cultivated land". Rather, it chose to exclude "land under cultivation", or land subject to a present and active state of cultivation for the purpose of raising a crop, acknowledging the seasonal nature of cultivation activities. Given the seasonal nature of activities for the purpose of raising a crop, it will only be on a seasonal basis that land will be presently and actively subject to activities for that purpose.

[43] I find that the *Mineral Tenure Act*, in excluding "land under cultivation" from entry by a free miner, is intending to exclude land that is presently and actively subject to activities on the land for the purpose of nurturing and harvesting a crop and with the intent that a crop will be harvested in the present season. Once the crop is harvested, or is no longer capable of being harvested because of poor weather, infestation or disease, the land is no longer "under cultivation" until such activities begin on the land again the following season for the purpose of nurturing and harvesting a crop. In the context of a hay crop, it should not matter whether the hay is harvested and fed to the cattle later, or whether it is fed to the cattle *in situ* while they are turned out on the pasture, as long as the pasture can be said to be currently under cultivation for the purpose of improving the quantity and quality of the hay, as opposed to natural pasture. This interpretation not only gives the words their ordinary meaning and conforms to the interpretation set out in *Cofrin, supra*, but takes into consideration the purpose and intent of the legislation to provide a scheme to deal with the conflicting interests of rights holders engaged in conflicting uses of land.

[44] Mr. Christmann's evidence was that he intended to hay the Main Meadow this season before the rattlebox goes to seed. He has rested and fertilized the Main Meadow in an effort at controlling the rattlebox and thus improving the quantity and quality of the hay, and has managed weeds and rose bushes for the same purpose. These are current activities to support the raising of a crop carried out with the intent of harvesting a crop. I find that as of the date of this arbitration, in early June 2013, the

Main Meadow was “land under cultivation” within the meaning of the *Mineral Tenure Act*, and that the Main Meadow is “land under cultivation” for this growing season until either a crop is taken or the opportunity to harvest a crop has passed. Whether the Main Meadow will be “land under cultivation” next season will depend on whether it is subject to activities for the purpose of nurturing the hay either for harvest or for pasture at that time.

[45] The evidence does not disclose any recent activity on either the West Meadow or the South Meadow for the purpose of raising a crop either for harvesting or for pasture. The evidence discloses annual activity repairing fences, but I do not consider the building, repair, or maintenance of fences to fit the definition of cultivation, as these activities are not for the purpose of raising of a crop, but for the purpose of separating and containing livestock. Mr. Christmann does not presently own any cattle and he did not provide evidence of any intent to turn cattle out onto the Hay Meadows this summer. As of early June 2013, and for this growing season, I find the West Meadow and the South Meadow are not “land under cultivation” within the meaning of the *Mineral Tenure Act*. Whether they will be “land under cultivation” next season will depend on whether they are subject to activities for the purpose of nurturing the hay either for harvest or for pasture at that time.

CONCLUSION

[46] To be exempt from entry by a free miner for exploration purposes, “land under cultivation” must be presently and actively subject to activities for the purpose of raising a crop with the intent to harvest or pasture the crop in the current season. In the absence of current cultivation activities with intent to harvest or pasture a crop, land is not “land under cultivation” within the meaning of the *Mineral Tenure Act*. Once the seasonal opportunity to harvest or pasture a crop has passed, the land is no longer “land under cultivation” within the meaning of the *Mineral Tenure Act* until such time as cultivation activities for the purpose of raising and harvesting or pasturing a crop begin again the following season.

[47] As the Main Meadow is presently subject to cultivation activities for the purpose of harvesting a crop, it is presently “land under cultivation” and not presently subject to right of entry for exploration purposes. The West Meadow and the South Meadow are not presently and actively subject to cultivation activities for the purpose of harvesting a crop and are not, therefore, land under cultivation within the meaning of the *Mineral Tenure Act*.

[48] The Board has not been asked in the context of this application to determine terms and conditions of New Nadina’s use of the Lands that are not land under cultivation. Nor has the Board been asked to make orders specifying conditions that will minimize obstruction to or interference with respect to land under cultivation, pursuant section 19

of the *Mineral Tenure Act*, or to resolve compensation payable for entry to and use of these privately held Lands. I expect that the parties will attempt to resolve between themselves any such issues that may arise. If they are not able to, either party is at liberty to seek the Board's assistance.

DATED: September 4, 2013

FOR THE BOARD



Cheryl Vickers, Chair