

2007/43

IN THE WARDEN'S COURT
AT SYDNEY IN THE STATE OF
NEW SOUTH WALES
25 SEPTEMBER 2007
J A BAILEY CHIEF MINING WARDEN

MINING ACT 1992
SECTION 155

REVIEW OF DETERMINATION OF ARBITRATOR CONCERNING
EXPLORATION LICENCE 396 AND ENDEAVOUR COAL PTY LTD (Mining
Company) AND PRESQUARTZ PTY LTD (Landholder)

APPEARANCES AT CAMDEN ON 22,23 AUGUST 2007:

Mr. P. Holland, Solicitor of MinterEllison, appears for Mining Company
Mr. A. Abbott appears as agent for Landholder

Reserved Decision handed down in the absence of parties

DECISION:

BACKGROUND:

Pursuant to Exploration Licence 396 [EL396] granted to Endeavour Coal Pty Ltd [the Mining Company], an access arrangement was determined by an Arbitrator, under the provisions of Division 2 of Part 8 Mining Act 1992, in respect of Lot 1, DP 58067 on 13th June 2007.

On 25th June, the landholder, Presquartz Pty Ltd, sought a review of the Arbitrator's Final Determination. There were two grounds of Review, which were, in summary:

1. The Arbitrator erred in making a determination under S.164 in respect of a right of way into the area subject to EL 396
2. Future loss was not considered when making the compensation determination

The Landholder, in lodging its application for review, indicated that "further grounds of review may be added."

THE LEGISLATION

The appropriate sections of the Mining Act 1992 are outlined hereunder:

Mining Act 1992 No 29

155 Review of determination

- (1) A party to a hearing who is aggrieved by an arbitrator's final determination (other than a determination referred to in section 147 (2)) may apply to a Warden's Court for a review of the determination.
- (2) An application:
 - (a) must be accompanied by a copy of the determination to which it relates, together with a copy of any access arrangement forming part of the determination, and
 - (b) must be filed in a Warden's Court:
 - (i) in the case of an interim determination that has become a final determination—within 28 days after a copy of the interim determination was served on the applicant, or
 - (ii) in the case of a final determination—within 14 days after a copy of the final determination was served on the applicant.
- (3) An application for review may not be made:

- (a) during the period of 14 days within which an application may be made to an arbitrator, or
- (b) if such an application is made, until the arbitrator has made a final determination with respect to the application.
- (4) The applicant must cause a copy of the application to be served on each of the other parties to the determination to which the application relates.
- (5) Subject to any order of a Warden's Court to the contrary, an application for review of a determination operates to stay the effect of any related access arrangement in relation to a party to the arrangement from the time when a copy of the arrangement has been served on the party until the decision of a Warden's Court on the review.
- (6) In reviewing a determination under this section, a Warden's Court has the functions of an arbitrator under this Division in addition to its other functions.
- (7) The decision of a Warden's Court on a review of a determination is final and is to be given effect to as if it were the determination of an arbitrator.

263 Compensation arising under exploration licence

- (1) On the granting of an exploration licence, a landholder of any land (whether or not subject to the licence) becomes entitled to compensation for any compensable loss suffered, or likely to be suffered, by the landholder as a result of the exercise of the rights conferred by the licence or by an access arrangement in respect of the licence.
- (2) The holder of an exploration licence may agree with a landholder as to the amount of compensation payable, but an agreement reached is not valid unless it is in writing, signed by or on behalf of the parties to the agreement.
- (3) Such of the provisions of an access arrangement (whether or not in writing) as relate to compensation have effect as an agreement for the purposes of this section.
- (4) Payment of compensation under this section (other than compensation payable under an access arrangement agreed on as referred to in section 140 (a)) is taken, for the purposes of any security given by the licensee, to be an obligation under the licence.

276 Additional assessment

- (1) If, after an assessment of compensation has been made, it is proved to the satisfaction of a warden:
 - (a) that the whole of the amount paid into court under this Part has been duly paid out, and
 - (b) that further compensable loss has been caused, or is likely to be caused, in respect of the land to which the assessment relates, or to other land,
 - the warden must, on the application of any of the parties concerned, assess that loss and order that the amount so assessed be paid by the holder of the authorisation to which the assessment relates, within the time and to the persons specified in the order.
- (2) If it is proved to the satisfaction of a warden:
 - (a) that an access arrangement does not make provision for or with respect to compensation, and
 - (b) that compensable loss has been caused, or is likely to be caused, in respect of the land to which the arrangement relates,

the warden must, on the application of any of the parties concerned, assess that loss and order that the amount so assessed be paid by the holder of the authorisation to which the assessment relates, within the time and to the persons specified in the order.

- (3) If it is proved to the satisfaction of a warden:
 - (a) that the whole of the amount assessed by or in accordance with an access arrangement determined by an arbitrator as referred to in section 140 (b) has been paid in accordance with the arrangement, and
 - (b) that further compensable loss has been caused, or is likely to be caused, in respect of the land to which the assessment relates or to other land,
the warden must, on the application of any of the parties concerned, assess that loss and order that the amount so assessed be paid by the holder of the authorisation to which the assessment relates, within the time and to the persons specified in the order.
- (4) A warden's decision on such an application has effect as an assessment of compensation under this Division.
- (5) In making an assessment of compensation, a warden must have regard to any agreement between the parties concerned as to the compensation payable.

THE REVIEW

On 22nd August 2007, the matter came before the Warden's Court at the Camden Court House. At the commencement of the proceedings the Mining Company, represented by Mr. P Holland Solicitor, conceded that the Arbitrator had no power at law to grant a right of way under the provisions of Section 164 Mining Act 1992.

When the court sought from the landholder, represented by Mr. A. Abbott, a director of the landholding company, as to whether there were any other grounds of review, he indicated that he was concerned that the company was going to leave a pipe extending out of the ground after it had drilled a 96mm diameter hole some 500 to 600 metres below the surface.

The Mining Company called evidence from Peter John Riley, an employee of BHP Billiton, the parent company of the holder of EL 396. He gave evidence that the company required the drilling of 129 seismic shotholes and also a 96mm hole, some 500 to 600m deep, to check for coal quality. He indicated that there is a preference to put instruments in the hole to test for pressure at the coal seam.

However, the mining company gave a concession that it would not, in this instance, leave instruments there, which would obviate the necessity to leave a pipe protruding out of the ground after drilling had finished. Apparently testing could be done on a sample extracted from that hole, whilst the employment of instrumentation would take place in holes drilled on nearby properties.

Mr. Riley outlined that the hole would be sealed with concrete to the depth of 470 metres (assuming it is a 500 metre hole) with the top 30 metres being filled with topsoil. Whilst this hole was being drilled, a 30m x 30m perimeter fence would be erected for safety.

The whole project would take a maximum of 12 weeks and it was hoped would be completed within 6 to 8 weeks.

At this point of time, the mining company had not set foot upon the subject property. As there was some concern as to the exact location of both the shotholes and the 500m drill hole, the court and all parties took a view of the area.

Whilst viewing the area, the mining company indicated where the 500m hole would be drilled and also indicated that the shotholes would not now be required to go into the wooded area of the land. At the view, Mr. Abbott indicated he had no concern about the proposed location of the drill hole or the shotholes, so long as the shotholes do not interfere with the dams on the property.

It should be said at this point of time that although Mr. Abbott expressed the lack of concern about the placement of those holes where indicated, at no time was he consenting to the mining company coming upon the land. He made it quite clear that he did not want the company coming upon the land whatsoever, although not disputing that an Exploration Licence holder does have appropriate rights.

Although not mentioned in court, whilst on the property Mr. Abbott did mention that it is used frequently by school children who do horse riding, both a weekends and during school holidays. He was concerned as to their safety. At the scene Mr. Riley accepted that the work could be done outside those times. Whilst on the property, we did observe a young child on a horse. I propose to place an appropriate condition in the access arrangement which would satisfy this concern,

The question of entry of the mining company into the area was raised both prior to evidence being received and also during the view. After the view, the mining company went to prepare a plan of its proposed area of exploration whilst Mr. Abbott was to ascertain the landholders' position as to the point of entry of the mining company and also the position in relation to compensable loss.

At the continuation of proceedings on 23rd August 2007, the mining company tendered a revised plan. "X-333b Version 3", which was marked exhibit 7. That plan outlines the location of the shotholes (in one instance no closer than 50 metres from a dam on the property), together with the location of the borehole. It was indicated by Mr Holland that as some of the shotholes were close to trees in the north west portion, it would be necessary for any access arrangement to make appropriate conditions concerning the labelling and identification within 5 metres of the shot holes.

Evidence was then received from Mr. Abbott on behalf of the landholder, firstly in relation to compensatory loss. This subject land was purchased some 20 years ago purely for housing development. At present the landholding company, with a consortium of adjoining landholders, or seeking to have the area re-zoned so that sub division can take place for housing. Without going into details, Mr. Abbott is confident that within 4 to 5 years, the landholder's vision will come to fruition.

To that end, he said his concern is that the exploration on the land (referring to the borehole) could allow gas seepage in future and thus hamper the sale of the land for housing lots. This he said could cost the landholder tens of millions of dollars. He wanted the court to make an order requiring the mining company to deposit security to cover any claim that may be made for compensable loss in the future. He said he was not concerned about any compensatory loss now, "but it will be known later".

Mr. Riley gave evidence that the shot holes would be filled with crushed sandstone and soil and that from his experience houses have been built over such holes to no detriment. However, the issue as to whether or not there was a possibility that a gas leak would occur in future was not addressed.

Although I have not seen a copy of the exploration licence, no doubt there is a generic clause in there as to the sealing of any borehole. I am aware the Department of Primary Industries has guidelines as to the filling of such holes. As well as that, it is assumed that the mining company is currently using the "best practice" concerning the plugging of boreholes. With the utilisation of the guidelines and/or the current practice of the mining company, one may assume that after sealing, the possibility of a leak will be either extremely remote or non-existent.

Mr. Abbott in his evidence made reference to his knowledge through the media concerning gas leaks in the area and in relation to a river. I am personally aware of a gas leak in the Catarat River, as proceedings were before me in respect of compensation. That leak arose as the result of mining creating a crack in the river bed rock, it was not in relation to any borehole.

If there is a gas leak from this borehole, it is more likely to be the result of any future mining that may take place in the vicinity of that hole, not as the result of the present intended drilling and plugging.

Insofar as the concern over compensatory loss due to a future gas leak, clearly it may come from two aspects:

- a) due to the exploration and plugging that is intended to take place or
- b) due to future mining.

If scenario a) eventuates, the landholder has a right to bring an action before the warden's court pursuant to Section 276(3) Mining Act 1992 at some time in the future. If scenario b) is applicable, then the landholder would have a right to claim for compensatory loss under S.265 of that Act. The present right to compensation comes under S.263 of the Act; if scenario b) is applicable, S.263 does not apply.

To make it clear, the landholder is only entitled (insofar as gas leaks) to compensation in respect of any action done by the mining company under EL396 if there is a gas leak in future that has been caused by the drilling and plugging of the borehole.

As to the requirement that the mining company deposit a security to cover such possible situation, I cannot see any need for that to be done. All exploration licence holders have a security deposited pursuant to such licence. Section 263(4) appears to place an obligation upon the licence, insofar as such security is concerned, in respect of compensation under S.263.

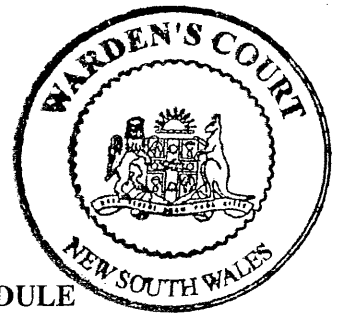
Although Mr. Abbott was not seeking any compensatory loss at this point of time, I do propose to allow compensation which is principally based upon a sum for each hole drilled and other sundry matters.

Mr. Abbott next addressed the aspect of the location of entry into leasehold area. He was not consenting to the mining company entering through the fence located on the southern portion of the land, adjoining Leaf's Gully Road. To that end, it is necessary to embark upon an inquiry under the provisions of S.164 Mining Act 1992. I propose to do that upon my own motion pursuant to S.164(7) of that Act. It was agreed to attend to this matter by way of written submissions. Directions were made by the court concerning that. The matter of the right of way will be considered in another decision by the court.

Exhibit 5 in the proceedings is a "Draft access arrangements and compensation schedule produced by the Mining Company. I propose to utilise that as a template, with appropriate variations to reflect my determination in respect of some aspects.

THE DETERMINATION

See attached document for conditions of access and compensation



ACCESS ARRANGEMENTS AND COMPENSATION SCHEDULE

1.0 Parties

- 1.1 Presquartz Pty. Ltd (ACN 003 393 851). The Landholder
- 1.2 Endeavour Coal Pty. Ltd (ABN 38 099 630 830). The company.

2.0 Introduction

- 2.1 The Landholder owns the Lands
- 2.2 Endeavour Coal holds Exploration Licence No. 3906 under The Mining Act 1992 for coal.
- 2.3 Exploration Licence No. 396 covers a large area of land including the southern part of Lot 1 DP 5807 – the Lands as indicated in Attachment A.
- 2.4 Under The Mining Act 1992 the holder of an Exploration Licence has a right to prospect for coal on the land subject to the Exploration Licence during the term of the Exploration Licence.
- 2.5 Under The Mining Act 1992 the holder of an Exploration Licence may not carry out prospecting operations on any land otherwise than in accordance with an Access Arrangement.

3.0 Purpose

This arrangement is made in respect of Exploration Licence No. 396 for the purposes of recording the details in relation to access to the land and the compensation to be paid by the company to the landholder to conduct its prospecting operations.

4.0 Definitions

In this Arrangement:

“Act” means The Mining Act 1992

“Business Day” means any day except a Saturday or a Sunday or other public holiday.

“Company” means Endeavour coal Pty. Ltd (ABN 38 099 830 576) its successors or assigns, employees, servants or agents, contractors and/or invitees.

“Landholder” means Presquartz Pty. Ltd (ACN 003 393 851).

“Land” means that part of Lot 1 DP 58067 (postal address 675 Appin Road, GILEAD NSW 2560) that falls within Exploration Licence No. 396.

“Exploration Licence No. 396” means the Exploration Licence No. 396 issued under The Mining Act 1992 renewed by the Minister for Mineral Resources on 20th December, 2004 for a period until 27th June, 2009.

“The Department” means the Department of Primary Industries (Minerals).

5.0 Interpretation

- 5.1 In this Arrangement unless the context otherwise requires:
- (a) a word importing the singular includes the plural and vice versa and a word importing a gender includes each other gender and a reference to a person includes an individual, firm or body corporate;
 - (b) a reference to a party includes the party’s successors, substitutes (including persons taking by novation), transferees and assigns.
- 5.2 This document comprises the whole of the Arrangement. The Arrangement may only be modified in writing and signed by the parties.
- 5.3 This Arrangement is governed by the laws of New South Wales

4.0 Term

This Arrangement terminates on the earliest of the following events to occur:

- (a) if the Landowner ceases to be the owner of the Lands covered by this Arrangement; or
- (b) Exploration Licence No. 396 ceases to remain in force. Where Exploration Licence 396 is renewed under The Mining Act 1992 the Exploration Licence is considered to remain in force and this Arrangement continues to bind the parties.

5.0 Rights and Obligations

- 5.1 Endeavour Coal may access the Lands during the term of the Exploration Licence 396 to conduct the following prospecting operations:
- (a) Surveying, site preparation, seismic survey, drilling or borehole AE-07-E decommissioning and rehabilitation;
 - (b) The carrying out of any other studies required for gaining of any other approvals for the above prospecting operations.
- 5.2 Endeavour Coal will access the Lands from Leaf’s Gully Road on the southern side of the Lands as per Right of Way granted by the Warden’s Court (see diagram, Annexure “A”).
- 5.3 Endeavour Coal will liaise with Campbelltown City Council about the location of an access gate and track from Leaf’s Gully Road to ensure all road safety issues have been considered.
- 5.4 Prospecting operations will not be conducted within 50 metres of the perimeter (high water mark) of a dam.
- 5.5 Prospecting operations will only be carried out on lands within Exploration Licence 396.

- 5.6** Revised maps outlining more precisely the intended placement of shot holes and borehole AE-07-E are to be provided to the Landowner at the same time they are submitted to the Department and before the commencement of the prospecting operation.
- 5.7** Notice in writing will be given to the Landowner or the Landowner's Representative at least 15 days in advance of the first date that Endeavour Coal intends to enter upon the Lands.
- 5.8** Endeavour coal shall give 5 days notice to the Landowner when requiring subsequent access and shall use its best endeavour to minimise disruption to, and interference with, the Landholder's use of the Land.
- 5.9** Unless in the case of an Emergency, Endeavour coal will only access the land between 8.00 a.m. and 6.00 p.m. on a business day, excluding gazetted school holidays.
- 5.10** An Emergency means a threat arising to:
- (a) the integrity of Endeavour Coal's property on the Land;
 - (b) the health and safety of people on the Land and the community;
 - (c) the environment; or
 - (d) property on the Land.
- 5.11** Endeavour Coal must notify the Landholder of any such Emergency and Access as soon as reasonably possible in the circumstances.
- 5.12** Endeavour coal will identify, label and number all trees and saplings over 1 metre in height and within 5 metres of the proposed line of shot holes. That is, each tree or sapling within this area will have a label attached to it and each label will have a unique identifying number for that tree or sapling. Numbers will be sequential.
- 5.13** Endeavour Coal will document the number of trees and saplings identified, labelled and numbered and provide details of these to Presquartz before the exploration program commences.
- 5.14** While on the Lands Endeavour Coal will:
- (a) construct access tracks by the most direct route and wherever possible will be restricted to high ground;
 - (b) when constructing access tracks, not use materials likely to bring onto the property any disease or noxious weeds;
 - (c) only access the Lands by all-weather access ways in wet conditions;
 - (d) undertake all operations so as to minimise any impacts on any livestock on Lot 1 DP 58067;
 - (e) leave open gates and open and close gates closed;
 - (f) not camp overnight;
 - (g) take proper fire precautions;
 - (h) not leave rubbish on the Lands;
 - (i) only cross fence lines at gates;
 - (j) comply with all provisions of Section 164 of The Act when installing gates or grids;
 - (k) not bring dogs onto the lands;
 - (l) not use any water, other than in an Emergency, that is on the Lands without the agreement of the Landholder;

- (m) not bring any guns or firearms onto the property;
- (n) minimise soil disturbance or erosion; and
- (o) not pollute any land, stream or watercourse.

6.0 Restoration

On completion of the prospecting operations in the Lands, Endeavour Coal will:

- (a) immediately commence restoration work;
- (b) remove all equipment;
- (c) repair any damage to the Lands or any fence, building or other improvement on the Land as near as practicable to its original condition. Where practicable, such repairs should be carried out prior to the completion of prospecting operations of the Lands;
- (d) repair any previously existing access track to its original condition;
- (e) remove any access tracks constructed for the prospecting operations that the Landholder wants removed;
- (f) seed and fertilise any area as may be reasonably requested by the Landholder;
- (g) fill the AE-07-E borehole with cement to within 30 metres of the surface and the remainder of the borehole to the surface with material extracted during the drilling process, and cover the surface with topsoil.

7.0 Insurance and Indemnity

- 7.1 Endeavour Coal must effect and maintain a public liability insurance policy in respect of the exploration program for a minimum amount of \$20,000,000 (twenty million).
- 7.2 The policy of insurance must be in the name of the company and the interest of the Landholder noted.
- 7.3 Endeavour Coal will give to the Landholder a copy of the policy and certificates of currency of the policy when it is renewed.
- 7.4 Endeavour Coal is to indemnify the Landholder against all claims and all losses, liability and expenses incurred by the Landholder in connection with Endeavour Coal's operations on the Land insofar as they relate to this Arrangement.

8.0 Supervisor

- 8.1 Endeavour coal will appoint a Supervisor for the purposes of monitoring the observance and performance by the Company of the terms and conditions of this Arrangement.
- 8.2 Endeavour Coal will ensure the Supervisor is available at all reasonable times to liaise with the Landholder concerning the terms and conditions of this Arrangement.

9.0 Ownership of Infrastructure

While this arrangement has effect, infrastructure and equipment installed on the Lands by Endeavour Coal, in accordance with the terms of this Arrangement, remain the property of Endeavour Coal.

10.0 Third Party Rights

The Landholder agrees not to grant any right to a third party that is inconsistent with Endeavour Coal's rights under this Arrangement.

11.0 Resolution of Disputes

Upon notification of a dispute by either party:

- (a) the parties will attempt to resolve any such dispute arising from this arrangement within 21 days; and
- (b) if a dispute arising from this arrangement cannot be resolved in accordance with this clause, the dispute should be resolved under The Mining Act 1992.

12.0 Force Majeure

Endeavour Coal is not liable for a breach of the conditions of this arrangement to the extent that the breach is caused by circumstances outside the control of Endeavour Coal, its employees, servants or agents and for a period those circumstances continue. If Endeavour Coal becomes aware of a breach it must:

- (a) immediately notify the Landholder; and
- (b) try to remedy the cause quickly.

Endeavour Coal must notify the Landholder when the cause has been remedied.

13.0 Notice

13.1 Any notice must be in writing and may be given by an authorised representative of the sender

13.2 Notice may be given to a party:

- (a) personally;
- (b) by leaving it at the party's address last notified;
- (c) by sending to by pre-paid mail to the party's address last notified; or
- (d) by sending it by facsimile to the party's facsimile number last notified.

13.3 Notice is deemed to be received by a party:

- (a) when left at a party's address; or
- (b) if sent by pre-paid mail or facsimile, on the second Business Day after posting or faxing

Compensation Schedule:

For the Borehole Program:

Entry onto property (Payable on date of first entry)	\$500
Per Borehole (Payable on Commencement of Drilling)	\$1,000
Rent (per annum or part thereof) 2007 (Payable on commencement of Drilling)	\$500
Rent subsequent years per annum or part thereof (payable on 1 st January each year)	\$500
Daily access fee payable each day beyond 6 weeks from the date of commencement of the borehole program (Payable on completion of drilling program)	\$100 per day

For the Seismic Program:

Entry onto property (Program more than 50 shot holes) (Payable on date of first entry)	\$1500
For every other 50 shot holes (or part thereof – approx. 140)	\$1500

DATED AT SYDNEY THIS 25TH DAY OF SEPTEMBER, 2007.

295500

296000

6219000

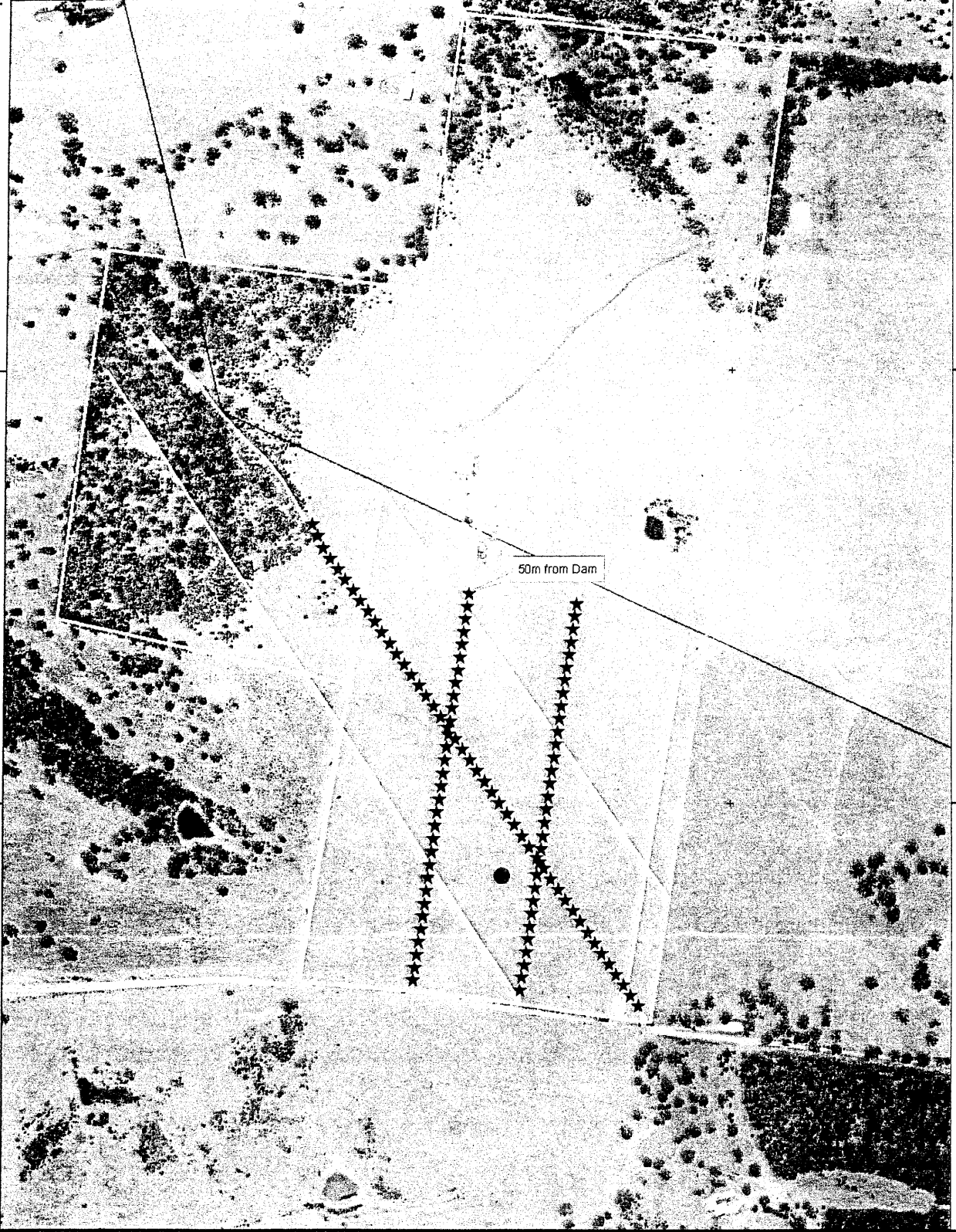
6219000

6218500

6218500

6218000

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50m from Dam

bhpbilliton
Carbon Steel Materials
 Wawona Coal Holdings Pty Ltd
 Asset Development
 Resource & Exploration

Legend

- Receivers
- Borehole
- Prop Boundary
- ★ Shotline (108 Source)
- Authorisations

100 50 0 100 Meters

Presquartz Pty Ltd
 Lot 1
 DP 58067

Date: 22nd August, 2007
 Author: LF
 Signed Off: PR

Shots: 108
 Receivers: 890

Scale 1:4,000
 Horizontal Datum
 MGA - Zone 58

X-333b
 Version 3

295500

296000