JURISDICTION	:	MINING WARDEN
TITLE OF COURT	:	BEFORE THE WARDEN
LOCATION	:	PERTH
CITATION	:	LANDTEC P/L v DIXON, LONGMAN, EUCALYPTUS GM P/L, REGAL RESOURCES P/L & anor [2016] WAMW 4
CORAM	:	WILSON M
HEARD	:	10 DECEMBER 2015
DELIVERED	:	11 MARCH 2016
FILE NO/S	:	APPLICATIONS FOR FORFEITURE 351544, 351545, 351558, 351559, 351803, 351804, 351805, 351806, 351807, 351808, 351809.
TENEMENT NO/S	:	AFFECTING MINING LEASES 39/292, 39/914, 39/966, 39/969, 39/991, 39/1064 & 39/480 and PROSPECTING LICENCES 39/4556, 39/4622, 39/4623, 39/4636.
BETWEEN	:	**Application for Forfeiture 351805, 351806, 351807, 351808, 351809, 351544, 351546, 351558** **Affecting M 39/914, 39/966, 39/969, 39/991, 39/1064, P 39/4622, 39/4623, 39/4636** Landtec Pty Ltd (Applicant for Forfeiture) v Trevor John Dixon (Respondent to Forfeiture) & Exterra Resources Ltd (Interested Party). **Application For Forfeiture 351804** **Affecting M 39/292** Landtec Pty Ltd (Applicant for Forfeiture) v Eucalyptus Gold Mines Pty Ltd (Respondent to Forfeiture) &

Exterra Resources Ltd
(Interested Party).

Application For Forfeiture 351559
Affecting M 39/480

Landtec Pty Ltd
(Applicant for Forfeiture)

v

Murray James & Noreen Joan Longman
(Respondents to Forfeiture)

&

Exterra Resources Ltd
(Interested Party)

Application For Forfeiture 351803
Affecting P 39/4556

Landtec Pty Ltd
(Applicant for Forfeiture)

v

Regal Resources Ltd
(Respondent to Forfeiture)

&

Exterra Resources Ltd
(Interested Party)

Catchwords:

Application – Forfeiture - Mining Lease – Prospecting Licence -- Non-Compliance with Expenditure Conditions – Consecutive Years - Obligation of Registered Holder to comply with Expenditure Conditions where Joint Venture Farm-in Agreement Exists – Actions of Equitable Holder of Mining Tenements – Failure to Record Expenditure – Loss of Sale Agreement and Transfer Documents - Gravity of Non-Compliance with Expenditure Conditions – Future Plans – Past Expenditure

Legislation:

Mining Act (WA) 1978: s. 49, s. 96, s. 98, s. 118A(6)

Mining Regulations (WA) 1981: r. 15(1)

Result:

Recommend to the Hon. Minister that M 39/292 held by Eucalyptus GM be forfeited.

Recommend to the Hon. Minister that M 39/480 held by the Longman's be forfeited.

Recommend to the Hon. Minister that M 39/914, M 39/966, M 39/969, M 39/991 & M 39/1064 held by Mr Dixon be forfeited.

P 39/4556 held by Regal is forfeited.

P 39/4622, P 39/4623 & P 39/4636 held by Mr Dixon are forfeited.

Representation:

Counsel:

Landtec	:	Mr G Lawton
Mr Dixon	:	Mr P Lafferty
Eucalyptus	:	Mr M Longman (Director)
Longman's	:	Mr M Longman (Self Represented)
Regal	:	Nil
Exterra	:	Mr J M Healy

Solicitors:

Landtec	:	Lawton Lawyers
Mr Dixon	:	Optima Legal
Eucalyptus	:	Represented by Director, Mr M Longman
Longman's	:	Mr M Longman (Self Represented)
Regal	:	Nil
Exterra	:	Kings Park Corporate Lawyers

Case(s) referred to in judgment(s):

Dixon, Longman, Eucalyptus Gold Mines P/L & Regal Resources P/L v Landtec [2014] WAMW 16

Craig v Spargos Exploration NL (unreported, Kalgoorlie Warden's Court, 22 December 1986, 6 AMPLA Bull 73)

Rose v Goldtime Australia Pty Ltd [2004] WAMW 8

Nova Resources NL v French (1995) 12 WAR 50

Blackfin P/L v Mineralogy P/L [2013] WAMW 19

Re: His Honour Warden Calder SM & anor; Exparte Lee & anor [2007] WASCA 161

Berkeley Resources ltd & anor v Limelight Industries Pty Ltd [2013] WAMW 2

Surrey Holdings Pty Ltd v Newcoast Nominees Pty Ltd [2003] WAMW 36

Case(s) also cited:

Landtec Pty Ltd v Dixon & ors [2012] WAMW 36

Commercial Properties Pty Ltd v Italo Nominees Pty Ltd (unreported Full Ct of Supreme Court of WA 16 December 1988, SCL 7427)

Brosnan v Flint and Sorna Pty Ltd [2003] WAMW 16

Majeed v Schulda (unreported, Warden's Court, 1988, 7 AMPLA Bull 146)

North v Elazac Mining Pty Ltd [2012] WAMW 42

Brosnan v JSW Holdings Pty Ltd [2011] WAMW 8

Finesky Holdings Pty Ltd v Minister for Transport for Western Australia [2002] WASCA 206

Background

1. Landtec Pty Ltd ("Landtec") makes application for forfeiture of various mining tenements held by Trevor John Dixon ("Mr Dixon"), Murray James and Noreen Longman ("the Longman's"), Eucalyptus Gold Mines Pty Ltd ("Eucalyptus GM") and Regal Resources Pty Ltd ("Regal") for non-compliance with the minimum expenditure conditions applicable to each of the mining tenements ("the Forfeiture Applications").

2. The mining tenements to which the Forfeiture Applications relate are as follows:

Eucalyptus GM Tenement

Tenement Number	Min.Expenditure 2010 Year	Report. Expenditure 2010 Year	Relevant Anniversary date	Forfeiture No.
M 39/292	$ 10,000	$ 2,094	26 June 2010	351804

The Longman's Tenement

Tenement Number	Min.Expenditure 2009 Year	Report. Expenditure 2009 Year	Relevant Anniversary date	Forfeiture No.
M 39/480	$ 20,000	$ 7,616	26 November 2009	351559

Mr Dixon's Mining Tenements

Tenement Number	Min.Expenditure 2010 Year	Report. Expenditure 2010 Year	Relevant Anniversary date	Forfeiture No.
M 39/914	$ 27,800	$ 15,470	26 June 2010	351805
M 39/966	$ 20,300	$ 12,230	26 June 2010	351806
M 39/969	$ 10,000	$ 7,479	26 June 2010	351807
M 39/991	$ 21,300	$ 12,662	26 June 2010	351808
M 39/1064	$ 56,500	$ 27,869	26 June 2010	351809

Mr Dixon's Prospecting Tenements

Tenement Number	Min. Expenditure 2009 Year	Report. Expenditure 2009 Year	Relevant Anniversary date	Forfeiture No.
P 39/4622	$ 4,880	$ 1,477	8 December 2009	351544
P 39/4623	$ 4,560	$ 1,395	8 December 2009	351545
P 39/4636	$ 6,400	$ 1,870	8 December 2009	351558

Regal's Tenement

Tenement Number	Min. Expenditure 2010 Year	Report. Expenditure 2010 Year	Relevant Anniversary Date	Forfeiture No.
P 39/4556	$ 3,040	$ 4,421	30 June 2010	351803

3. I intend to refer to the above mining tenements as either the Eucalyptus Project when referring to the above mining tenements as a whole, or, as Eucalyptus GM Tenement, the Longman's Tenement, Mr Dixon's Mining Tenement, Mr Dixon's Prospecting Tenements or Regal's Tenement when dealing with the mining tenements by owner or otherwise by their mining tenement number when dealing with them individually.

4. The Forfeiture Application for the Longman's Tenement and Mr Dixon's Prospecting Tenements are directed to the 2009 Expenditure Year ("2009 Year"). The remaining Forfeiture Applications against the Eucalyptus Tenement, Mr Dixon's Mining Tenements and Regal's Tenement relate to the 2010 Expenditure Year ("2010 Year").

5. All of the mining tenements the subject to the Forfeiture Applications by Landtec are situated approximately 220 kilometres north east of Kalgoorlie and are known as the Eucalyptus Project ("Eucalyptus Project").

6. Regal holds, with the exception of Regal's Tenement which Regal is the registered holder, an unregistered interest in the same mining tenements as a consequence of unregistered sale agreements with the registered holders of the mining tenements that comprise the Eucalyptus Project. (***Landtec Pty Ltd v Dixon & ors [2012] WAMW 36***).

7. Exterra Resources Ltd ("Exterra") was joined to these proceedings on 13 November 2012 as an Interested Party. Exterra holds an interest in all the mining tenements that comprise the Eucalyptus Project as a result of a purchase agreement with Regal dated 3 May 2012 ("Exterra Purchase Agreement").

8. All mining tenements the subject of the Forfeiture Applications were the subject of applications for exemption from expenditure conditions for the 2009 Year. In the absence of any objection being lodged by any person to the applications for exemptions from minimum expenditure conditions for the 2009 Year, the Hon. Minister for Mines and Petroleum ("Hon. Minister") refused all the applications for exemption for the 2009 Year for the mining tenements.

9. With the exception of Regal's Tenement, all of the mining tenements the subject of the Forfeiture Applications have been the subject of applications for exemptions from the minimum expenditure conditions for the 2010 Year ("the Exemption Applications") and objections thereto by Landtec. The result of the Exemption Applications by Mr Dixon, the Longman's and Eucalyptus GM was recommendations by the Warden to the Hon. Minister for refusal of the Exemption Applications. (***Dixon, Longman, Eucalyptus Gold Mines P/L & Regal Resources P/L v Landtec [2014] WAMW 16***) ("***2014 Dixon Decision***").

10. On 28 April 2015, the Hon. Minister upheld the recommendations of the Warden and refused the Exemption Applications for the Eucalyptus GM Tenement, Mr Dixon's Mining Tenements, Mr Dixon's Prospecting Tenements and the Longman's Tenement the subject of these proceedings.

11. As a consequence of the refusal of the Exemption Applications by the Hon. Minister for the 2010 Year, Mr Dixon's Mining Tenements, the Eucalyptus GM Tenement, Regal's Tenement have failed to comply with the minimum expenditure conditions for the 2010 Year. Further, as a consequence of the refusal of the Exemption Applications by the Hon. Minister for the 2009 Year, the Longman's Tenement and Mr Dixon's Prospecting Tenements have failed to comply with the minimum expenditure conditions for the 2009 Year. Landtec challenges part of the expenditure recorded in register ("Register")

maintained by the Department of Mines and Petroleum ("DMP") for Regal's Tenement in the 2010 Year and, if successful in that argument, it claims minimum expenditure conditions for the 2010 Year has not been complied with and seeks the forfeiture of that mining tenement.

12. Accordingly, the Forfeiture Applications to be considered relate to failure to meet minimum expenditure conditions in the 2009 for the Longman's Tenement and Mr Dixon's Mining Tenements and failure to meet minimum expenditure conditions for the Eucalyptus GM Tenement, Mr Dixon's Mining Tenements and Regal's Tenement.

13. The holders of all the mining tenements the subject of the Forfeiture Applications have lodged Responses in similar terms being that if the Exemption Applications are refused the circumstances of the case, and any failure to comply with minimum expenditure conditions, will not be of sufficient gravity to justify forfeiture.

14. On 31 May 2011, an order was made that the evidence in the hearing of the Exemption Applications be taken as read and stand as evidence in the Forfeiture Applications. That Order has not been revoked or otherwise amended by any other order and remains in force.

15. Warden Maughan ordered, on 17 July 2015, the following:

> *"1. By 14 August 2015, the Applicant for Forfeiture file and serve Statements of Evidence together with any supporting documents on which is proposed to rely in support of its Application for Forfeiture.*
> *2. By 14 August 2015, the Respondents file and serve any Statement of Evidence to the Applications for Forfeiture together with any supporting document on which they propose to rely in defence of the Applications for Forfeiture.*
> *3. By 11 September 2015, the Applicant for Forfeiture file and serve evidence in response together with any supporting documents of which is proposed to rely."*

16. In compliance with the Orders of 17 July 2015:

    a. Landtec filed and served, on 14 August 2015, certified copies of the tenement register for each of the mining tenements the subject to the Forfeiture Applications,
    b. Exterra filed an Affidavit of John Maxwell Davies sworn 13 August 2015; and
    c. Mr Dixon filed a witness statement dated 25 September 2015.

17. No evidence, in compliance with the orders of 17 July 2015, was lodged by or on behalf of Eucalyptus GM or the Longman's.

18. During the hearing of the Exemption Applications it was submitted by Mr Dixon and Exterra that the Exemption Applications for Mr Dixon's Mining Tenements and Mr Dixon's Prospecting Tenements were no longer necessary because the Register maintained by the Director General of the DMP revealed the minimum expenditure conditions for those mining tenements had been complied with as a result of the

lodgement of amended, additional or substituted Operation Reposts - Form 5 Reports ("Form 5") for the 2009 Year and the 2010 Year.

19. For the reasons expressed in the ***2014 Dixon Decision*** at [171] to [212] it was concluded the provisions of the Mining Act ("Act") and the Mining Regulations ("the Regulations") do not authorize or encourage the filing or lodgement of more than one Form 5 in any expenditure year whether in the form of an amended, additional or substituted Form 5 and that a Form 5 Report can only be lodged in accordance with the Act and Regulations. Accordingly, it was found the amounts included in the Register by the Director General of the DMP from the amended, additional or substituted Form 5 Report have not been entered in accordance with the Act and Regulations and should be ignored.

The Law and Burden of Proof for the Forfeiture Applications

20. The Forfeiture Applications by Landtec against the prospecting licences held by Mr Dixon and Regal and the Mining Leases held by Eucalyptus GM, the Longman's and Mr Dixon have been lodged pursuant to s. 96 and s. 98 of the Act respectively.

21. For Landtec to be successful in its Forfeiture Applications it is required to prove the minimum expenditure conditions relative to the mining tenements has not been complied with in the 2009 Year and the 2010 Year, as applicable to the Forfeiture Applications, by the registered holders and the non-compliance is of sufficient gravity to justify forfeiture.

22. With the exception of Regal's Tenement, Landtec submits it has discharged the obligation upon it to prove there has been non-compliance with the minimum expenditure conditions for the mining tenements in the 2009 Year and the 2010 Year because the Exemption Applications were refused by the Hon. Minister and the content of the Register for the 2009 Year and the 2010 Year records the minimum expenditure conditions applicable for each of the mining tenements has not been met by the registered holders.

23. The effect of proving non-compliance with minimum expenditure conditions for mining tenements in an expenditure year was considered in ***Commercial Properties Pty Ltd v Italo Nominees Pty Ltd (unreported Full Ct of Supreme Court of WA 16 December 1988 SCL 7427).*** In that case the Court said, at page 15, the following:

> *"In the case of failure to comply with expenditure conditions the legislation contemplates forfeiture. Hence, upon prima facie proof of non-compliance, we consider the plaintiff likewise establishes a prima facie case for forfeiture. Thus, in such circumstances, the evidentiary burden is on the defendant to satisfy the Warden that the case is otherwise not of sufficient gravity to justify forfeiture."*

24. Accordingly, Landtec submits it has established a prima facie case of non-compliance with the minimum expenditure conditions and, hence a prima facie case for forfeiture of each of the mining tenements the subject of the Forfeiture Applications, other than Regal's Tenement. Landtec further submits the evidentiary burden now rests upon each of the holders of the mining tenements, other than Regal, to prove on the balance of

probabilities that the non-compliance with the minimum expenditure conditions is not of sufficient gravity to justify forfeiture.

25. In respect to Regal's Tenement, Landtec submits part of the expenditure claimed by Regal in the 2010 Year as it appears in the Register is not allowable expenditure and if it is found to be so, and in the absence of an exemption from compliance with minimum expenditure conditions in that expenditure year, it has proven non-compliance and as such Regal's Tenement should be forfeited.

26. I accept the submission by Landtec that although the Forfeiture Applications have been heard together the Warden must be satisfied in respect to failure to meet the minimum expenditure conditions for each mining tenement is of sufficient gravity to justify forfeiture.

27. In respect to the Forfeiture Applications affecting the prospecting licences being Mr Dixon's Prospecting Licences and Regal's Tenement, the warden has the power to order forfeiture if satisfied the holder of the prospecting licence has not complied with the minimum expenditure conditions in a material respect and that the non-compliance is of sufficient gravity to justify forfeiture. As an alternative to making an order for forfeiture, the Warden may impose a penalty upon the holder of the prospecting licence not exceeding $10,000 and order whole or part of that amount be paid to the applicant for forfeiture or impose no penalty upon the holder of the prospecting licence. (s. 50, s. 96(1), (2) & (3) of the Act)

28. In respect to the Forfeiture Applications affecting Eucalyptus GM Tenement, the Longman's Tenement and Mr Dixon's Mining Tenements the Warden has the power to recommend to the Hon. Minister to forfeit a mining lease if satisfied the holder of the mining lease has filed to comply with minimum expenditure conditions and the warden is satisfied the non-compliance with such requirement is, in the circumstances of the case, of sufficient gravity to justify the forfeiture. (s. 98(1), (4A), (4B) & (5) of the Act.)

29. As an alternative to making a recommendation for forfeiture, the warden may impose a penalty upon the holder of the mining lease not exceeding $10,000 and order whole or part of that amount be paid to the applicant or may dismiss the application for forfeiture. (s. 98(4A) & (4B) of the Act)

Evidence – Landtec

30. Landtec did not call any oral evidence in the Forfeiture Applications. With the exception of Regal's Tenement, Landtec relies upon the content of the Certified Copies of the Register tendered at the hearing of the Forfeiture Applications to prove there has been a failure by each of the registered holder of the mining tenements that comprise the Eucalyptus Project to comply with the minimum expenditure conditions of each of the mining tenements for the 2009 Year and the 2010 Year.

31. Landtec submits the content of the Register for each of the mining tenements that comprise the Eucalyptus Project the subject of the Forfeiture Applications reveals, in addition to the details recorded in this decision the following:

32. ***Mining Lease 39/292 - Eucalyptus GM Tenement***

a. *The Forfeiture Application relates to the year ending 31 August 2010.*
b. *Expenditure for the 2010 Year was $9,166 reduced from $10,000 as a consequence of the lodgement of the Forfeiture Application on 19 July 2010.*
c. *The reported expenditure for the 2010 Year was $2,094 comprised of $94 for rates/ rent and $2,000 for administration.*
d. *The previous expenditure year ending 31 August 2009 the minimum expenditure condition was $10,000. The registered holder claimed expenditure for the 2009 Year was $2,714 comprised of Exploration Activities $1,400, Rates/Rent $314 & Administration $1,000. An application for exemption from expenditure conditions for the 2009 Year was sought for $7,286 but was refused on 5 December 2010 notwithstanding the absence of an objection. Forfeiture proceedings were instituted by the Department of Mines and Petroleum and the tenement holder was fined $729 for non-compliance with expenditure conditions.*

33. ***Mining Lease 39/480 – The Longman's Tenement***

a. *The Forfeiture Application relates to the year ending 26 November 2009.*
b. *In the 2009 Year, being the first expenditure year following grant of this mining tenement, expenditure claimed was $ 7,616 comprised wholly of Prospecting.*
c. *An application for exemption from compliance with expenditure conditions in the sum of $20,000 was sought by the tenement holders for the 2009 Year but was refused by the Hon. Minister on 5 October 2010.*
d. *In the 2010 Year, the minimum expenditure condition for the mining tenement was $13,333 reduced because of the existence of the Forfeiture Application. Expenditure claimed to the 2010 Year was $3,800 comprised of Rent/Rates $3,167 & Administration $633. The Exemption Application for the 2010 Year was refused by the Hon. Minister on 28 April 2015. A further Forfeiture Application for failure to comply with expenditure conditions for the 2010 Year stands adjourned pending the outcome of a similar application for the 2009 Year.*

34. ***Mining Leases 39/914, 39/966, 39/969, 39/991, 39/1064 - Mr Dixon's Mining Tenements***

a. *The Forfeiture Applications relates to the year ending 26 June 2010.*
b. *The minimum expenditure condition and the expenditure claimed by Mr Dixon for each mining tenement for the 2010 Year was as recorded earlier in this decision.*
c. *The Exemption Applications for the 2010 Year were refused by the Hon. Minister on 28 April 2015.*
d. *The Mining Leases the subject of the Forfeiture Applications were each granted on 27 June 2008. An Exemption Application for the 2009 Year was lodged, with no objection, but was refused by the Hon. Minister on 16 November 2011.*

35. ***Prospecting Licences 39/4622, 39/4623 & 39/4636 - Mr Dixon's Prospecting Tenements***

a. *The Forfeiture Applications relate to the 2009 Year ending 8 December 2009.*
b. *The minimum expenditure condition and the expenditure claimed by Mr Dixon for each mining tenement for the 2009 Year was as recorded earlier in this decision.*

c. *The Exemption Applications for the 2010 Year were refused by the Hon. Minister on 28 April 2015 this being the second year following grant of the Prospecting Licenses.*
d. *Applications for Exemptions from compliance with minimum expenditure conditions were also lodged by Mr Dixon for the 2009 Year it being in the first year of grant of the Prospecting Licences. Those applications were refused by the Hon. Minister on 6 October 2010.*

36. ***Prospecting Licence 39/4556 – Regal's Tenement***

a. *The Forfeiture Application relates to the 2010 Year ending 30 June 2010.*
b. *The minimum expenditure condition for the Prospecting Licence in 2010 Year is $3,040.*
c. *Regal claimed expenditure in the 2010 Year of $4,421 comprised of $ 608 for Administration, $ 396 for Rent/Rates and $3,417 for Exploration Activities.*
d. *The Form 5 Report for the 2010 Year was produced into evidence and reveals the amount of expenditure claimed for Exploration Activities describes those activities as:*

> *'Evaluation of geological data and the development of exploration programs and evaluation of tenements and development of technical reports for prospectus purposes.'*

e. *Landtec submits the claim for Exploration Activities in the Form 5 Report for the 2010 Year does not meet the requirement for expenditure to be "of mining on or in connection with mining on the licence" as required by r. 15(1) of the Regulations.*
f. *The 2010 Year is the second expenditure year following grant of the Prospecting Licence to Regal. Regal applied for and was refused an exemption from compliance with expenditure conditions for the Prospecting Licence in the 2009 Year having claimed a total of $1,705 in expenditure of a minimum required amount of $3,040.*

Evidence – Eucalyptus GM and the Longman's

37. Mr Longman appeared as a director of and on behalf of Eucalyptus GM and in his own right and on behalf of his wife as holders of the Eucalyptus GM Tenement and the Longman's Tenement in these proceeding. No evidence was called by Mr Longman on behalf of Eucalyptus GM or the Longman's.

38. Mr Longman advised the Warden the position as far as Eucalyptus GM and the Longman's were concerned had not changed from the proceedings in the Exemption Applications. That position was stated in the ***2014 Dixon Decision*** at [154] to [157] as follows:

> 154. *Eucalyptus GM and the Longmans did not call or submit any evidence in this proceeding matter. However, Mr Longman did read a statement to the court in closing. The statement by Mr Longman alluded to the whereabouts of the sale and purchase agreement by the Longmans & Eucalyptus GM with Regal. That issue was put to Mr Sullivan in cross examination by Mr Longman and raised by Mr Davis in his evidence.*
>
> 155. *In summary, the statement made by Mr Longman on behalf of Eucalyptus GM and the Longmans was the mining tenements held by the Longmans and Eucalyptus GM were the subject of a sale agreement with Regal in 2004. In 2005, after Regal was 'floated' on the ASX consideration for the sale exchanged hands and transfer documents for the transfer of registered proprietors from Eucalyptus GM and the Longmans to Regal were signed in the*

offices of Regal in Perth and duly stamped by the State Revenue Department and collected by legal representatives for Regal.

156. *Mr Longman stated on behalf of Eucalyptus GM and the Longmans that they were not made aware of any farm in agreement between Regal and OzMay in 2010. Further, Mr Longman stated attempts to draw together the content of the sale purchase agreement with Regal concerning the mining tenements held by Eucalyptus GM and the Longmans have raised concerns that the contents of what was produced was in potential conflict with the original January 2005 document.*

157. *In conclusion, Mr Longman stated that since Regal purchased the mining tenements held by Eucalyptus GM and the Longmans in January 2005, other than to change the registered address for notices to the tenement holder, neither Eucalyptus GM or the Longmans have made any contribution to the management or administration of the mining tenements nor have they been informed by Regal or any other party of any dealings with the mining tenements.*

Evidence - Regal

39. There has been no appearance by Regal, in its own right as the registered holder of Regal's Tenement or in any other right to give additional evidence in these proceeding. However, Exterra appears as an interested party pursuant to its interest in Regal's Tenement and all other mining tenements that form the Eucalyptus Project because of the terms of the Exterra Purchase Agreement

40. Evidence relative to the Forfeiture Applications was given by Mr Matthew Paul Sullivan ("Mr Sullivan"), the former CEO of Regal between 2005 and 2009 and Mr John Maxwell Davis ("Mr Davis"), the Managing Director of Exterra as contained in the ***2014 Dixon Decision*** at [20] to [31] for Mr Sullivan, at [139] to [153] for Mr Davis and at [5] for dealing that gave rise to the joining of Exterra to these proceedings. Mr Davis gave additional evidence concerning Exterra's intentions with all mining tenement that form the Eucalyptus Project should the Forfeiture Application not be successful.

Evidence – Mr Dixon

41. The evidence given by Mr Dixon in respect to these proceedings comprised of oral evidence and affidavit evidence of 25 September 2015. Prior evidence relied upon by Mr Dixon is that within ***2014 Dixon Decision*** at [20] to [138] together with an affidavit sworn in 2012 and a witness statement made in 2013.

42. In summary, Mr Dixon stated in his 2015 affidavit that he has been involved in the mining industry since the early 1980s and has been actively involved in exploration of mining tenements in the Leonora during that time. Mr Dixon stated he has been involved with joint-venture agreements or has vended various mining tenements into companies that have listed on the Australian Stock Exchange. Mr Dixon stated he is the managing director of Kin Mining Pty Ltd that is listed on the Australian Stock Exchange. Further, Mr Dixon stated Kin Mining Pty Ltd has progressed from an exploration company to a company with approvals to carry out mining and processing at the Lewis deposit.

43. According to Mr Dixon, the mining tenements registered in his name, and the subject of the Forfeiture Applications, were first marked out by him in about 1997. Mr Dixon stated he progressed the applications for mining tenements to the mining tenements. Mr Dixon further stated, in about March 2001, he entered into an Option Agreement with Newcrest Operations Ltd ("Newcrest") wherein Newcrest would meet minimum expenditure conditions on all mining tenements and Mr Dixon would retain alluvial mineral rights. Mr Dixon stated that Option Agreement continued between Mr Dixon and Newcrest from about 2001 until 2004 during which time Newcrest provided to him Annual Reports in respect to the work conducted on the mining tenements. Between 2003 and 2005, Mr Dixon stated he lodged with the DMP a Low Impact Mining – Notice of Intent ("LIMO") and received approval to carry out various work on the mining tenements.

44. Mr Dixon stated in 2004, Newcrest withdrew from the Option Agreement with him and from that time Newcrest was no longer obligated to meet minimum expenditure conditions on the mining tenements. After Newcrest withdrew from the Option Agreement, Mr Dixon stated he secured Regal within whom he entered into an Acquisition Agreement on 15 March 2005 ("Regal Agreement") in which Regal would upon meeting minimum expenditure requirements on the mining tenements earn up to 90% interest in the Mr Dixon's Mining Tenements and Mr Dixon's Prospecting Tenements.

45. During the term of the Option Agreement with Newcrest, Mr Dixon stated that Newcrest spent $763,750 on the mining tenements which was in excess of 460% of the minimum expenditure conditions required on the mining tenements.

46. On or about 14 November 2005, Mr Dixon stated that Regal released to the market a Resources Upgrade that indicated approximately 86,000 ounces of gold on the mining tenements registered in his name and the subject to the Forfeiture Applications but predominantly on M 39/914, M 39/966, M 39/969 and P 39/4636.

47. Between the date of entering into the Regal Agreement and 2008, Mr Dixon stated reports were provided to him concerning work completed on the mining tenements by Regal and included three reports in 2005, one report in 2006, three reports in 2007 and one report in 2008. In addition to receiving written reports Mr Dixon stated he was regularly liaising with Mr Sullivan by telephone until he resigned from that role in March 2009. Prior to Mr Sullivan resigning from Regal, Mr Dixon stated Regal had earned a further 30% interest in the mining tenements pursuant to the Regal Agreement thus giving to Regal a 90% interest in the mining tenements. Mr Dixon stated he retained a 10% interest in the mining tenements. After the resignation of Mr Sullivan from Regal, Mr Dixon stated Regal ceased communicating with him, sending him written reports and updates regarding the mining tenements.

48. From the time of marking out the mining tenements up to the 2009 reporting year Mr Dixon stated the minimum expenditure conditions on the mining tenements were complied with by Regal to approximately 240% above of the minimum expenditure conditions.

49. Mr Dixon further stated from August 2009 after not having received any updates from Regal since Mr O'Sullivan's resignation he commenced contacting Regal by telephone to obtain updates regarding the status of expenditure on the mining tenements and attempted to speak to the new director, Mr Angus Edgar. Mr Dixon stated he did not suspect Regal were not meeting minimum expenditure conditions on the mining tenements as they had complied with those obligations in the past and he believed they would continue to do so.

50. Further, Mr Dixon stated he began to make a number of telephone calls and facsimiles to Regal and its company secretary who were located in Melbourne including on 31 August 2009, 30 September 2009, 22 February 2010, 26 August 2010, 7 September 2010, 8 October 2010, 4 November 2010 and 20 December 2010. Mr Dixon stated a telephone call was also made to Mr Alex McHenry of GBU Capital in an attempt to ascertain the status updates for the mining tenements. Mr Dixon also send a number of e-mails to Regal on 1 July 2010, 16 July 2010, 2 August 2010, 18 August 2010, 20 August 2010, 24 and 25 August 2010, 31 August 2010, 3 February 2011, 1 December 2011 and 27 February 2012. Mr Dixon stated the above communications related to attempts to obtain information from Regal and GBU Capital relating to the mining tenement, expenditure on the mining tenements relative to the Forfeiture Applications and to permit prospectors onto the mining tenements.

51. Mr Dixon stated despite the Forfeiture Applications, he has continued to work on the tenements and incurred expenditure including the payment of rates, rents and taxes either from his resources or by third parties on his instructions by Exterra. Further, Mr Dixon states as he has continued to rehabilitate parts of mining tenements required by the DMP including obtaining a 36 month extension. He has continued to allow third-party prospectors to enter onto the mining tenements for the purpose of conducting metal detecting activities and has produced details of some three prospectors that have worked on M 39/914 and M 39/966 including the use of dry blowing activities. Mr Dixon also states he has continued to work the mining tenements pursuant to his alluvial rights in accordance with the LIMO.

52. Mr Dixon states he is aware Exterra wishes to pursue exploration activities on the mining tenements but will not do so unless and until the Forfeiture Applications are determined. Mr Dixon also states he has had discussions with Exterra in his capacity as director of Kin Mining NL to acquire Exterra's interest in the mining tenements for the purposes of further exploration and development.

53. Mr Dixon further states if Landtec is successful with the Forfeiture Applications and the mining tenements are forfeited all work and expenditure that has been conducted upon the mining tenements from the time of grant to 2009 and after the forfeiture applications were lodged will have been wasted in the sense that the gold resource referred to above will not be developed any further either by himself or Exterra and the JORC compliant resource will be lost to him and Exterra because of one year of non-compliance with minimum expenditure conditions on the mining tenements he has held since 1997.

Evidence – Exterra

54. The evidence relied upon by Exterra in respect to these proceedings comprised of oral evidence and affidavit evidence of 13 August 2015 of Mr Davis. Prior evidence relied upon by Exterra is also that of Mr Davis referred to within ***2014 Dixon Decision*** at [139] to [153] together with affidavits sworn in 2012 and a witness statement in 2013.

55. Mr Davis in his August 2013 affidavit, stated until ownership of the Eucalyptus Project mining tenements is resolved no further exploration plans have been drawn by Exterra. However, Mr Davis stated Exterra remains ready, willing and able to undertake exploration on the Eucalyptus Project mining tenements in accordance with that planned year one exploration program immediately on resolution of the present Forfeiture Applications and Exterra has the financial capacity to carry out those plans.

56. In his oral evidence on 10 December 2015, Mr Davis said, in summary, the position of Exterra had changed since he swore the August 2013 affidavit. Mr Davis said on 29 September 2015, Exterra entered into a Profit Share Agreement for the development of the Second Fortune Underground Goldmine ("Second Fortune") located at the Linden Project about 30 km to the north-east of the Eucalyptus Project. Mr Davis further said the Profit Share Agreement is with a company called Pit n Portal who will bring in all the capital development to develop the mine, personnel, expertise for a share in the percentage profit of the gold produced from that mine. As part of the Profit Share Agreement, Mr Davis said a drilling program of about 2000 metres had been completed for the Second Fortune that would result in Pit n Portal recalculating the resource and mine model which has to be completed by 29 February 2016. Mine development will commence immediately after that.

57. According to Mr Davis, Exterra has raised $250,000 for the drilling program that was a 50/50 shared program with Pit n Portal at a total cost of approximately $400,000. Mr Davis also said as part of the Second Fortune at the Linden Project is to build a plant to be fed from associated projects such as the Zelica and Eucalyptus Projects.

58. Mr Davis further confirmed Exterra will not progress any commitment to the Eucalyptus Project until the outcome of the Forfeiture Applications and ownership of the mining tenements is resolved. When that has occurred development of the 80,000 odd ounces of gold in the terms of further drilling and planning would commence. Mr Davis said Exterra had approximately $670,000 in capital available with the intended positive development of the Second Fortune at the Linden Project producing cash flowed from gold production that would form the basis of further funds being available to assist with the Eucalyptus Project. Mr Davis also said funds would be made available by Exterra in excess of the minimum expenditure conditions in each year for the Eucalyptus Project.

59. It was denied by Mr Davis in cross-examination that the financial obligations of Exterra to the Second Fortune at the Linden Project, the Eucalyptus Project, the Zelica Project and any other mining tenements held by Exterra would not be able to be funded from its existing resources, productions profits or capital raisings.

Outcome of Proceedings

M 39/292 held by Eucalyptus GM

60. I am satisfied and find, for the 2010 Year, Eucalyptus GM failed to comply with the minimum expenditure conditions of $10,000 on M 39/292 and its expenditure was only $2,094 comprised of $94 for rent and rates and $2,000 for administration. It is of note the Register reveals no expenditure was incurred by Eucalyptus GM on mining or exploration activities in the 2010 Year. I am also satisfied and find that, for the 2009 Year, Eucalyptus GM also failed to comply with the minimum expenditure conditions of $10,000 and its expenditure on M 39/292 was only $2,714 comprised of rates and rent of $314, administration $1,000 and exploration of $1,400.

61. It is also noted that applications for exemptions from compliance with expenditure conditions on M 39/292 by Eucalyptus GM in the 2009 Year and the 2010 Year were both refused by the Hon. Minister.

62. In assessing whether the failure by Eucalyptus GM to meet the minimum expenditure conditions for M 39/292 is, in the circumstances of the case of sufficient gravity to justify forfeiture pursuant to s. 98 of the Act, it is necessary to review the history of M 39/292.

63. M 39/292 was marked out by Jarrahmond Holdings Pty Ltd on 11 April 1993 and granted on 1 September 1993. On 20 August 1993, Jarrahmond Holdings Pty Ltd changed its name to Eucalyptus GM. From grant of M 39/292 in 1993 until the 2008 Expenditure Year, Eucalyptus GM has never applied for an exemption from compliance with expenditure conditions on M 39/292 and has always complied with the minimum expenditure conditions.

64. I accept and find that in 2005, Eucalyptus GM entered into an agreement for the sale of M 39/292 to Regal ("Eucalyptus Sale Agreement"). I accept and find the Eucalyptus Sale Agreement and associated transfer document to give effect to the sale and transfer of M 39/292 was duly signed by the directors of Eucalyptus GM and Regal and handed to Regal or its solicitors in 2005. I accept and find that for reasons that cannot or have been explained by Mr Longman as a director of Eucalyptus GM, Mr Sullivan as the Managing Director of Regal at or about the relevant time and Mr Davis as the Director of Exterra with an interest in the Eucalyptus GM Tenement, the duly executed Eucalyptus Sale Agreement and transfer document for M 39/292 cannot be found.

65. I accept and find from the evidence of Mr Sullivan that in about 2008, Regal sought to change its focus from gold mining to coal and relocated its offices from Western Australia to Victoria. I find and accept the evidence of Mr Sullivan that in 2009, he resigned from his employment with Regal. I also accept and find that Regal entered into Farm-in and Joint Venture Agreement with a company named OzMay Pty Ltd ("OzMay") in 2010 ("OzMay Agreement") in which OzMay would earn an interest in various mining tenements held by Regal, including M 39/292. In 2010, Exterra through Mr Davis became aware of the mining tenements known as the Eucalyptus Project,

which included M 39/292. Following various inquiries by Exterra being conducted Exterra entered into a Farm-in and Joint Venture Agreement on 23 March 2011 with Regal and OzMay ("Exterra Agreement") to take over the rights of OzMay under the OzMay Agreement.

66. I accept and find, Exterra has under either the OzMay Agreement or the Exterra Agreement or the Exterra Purchase Agreement any obligations to the mining tenements including M 39/292 that form the Eucalyptus Project until the mining tenements, are returned to good standing and as required, ownership determined. I find Exterra were aware on entering into the Exterra Purchase Agreement that M 39/292 was the subject of the Exemption Applications and the Forfeiture Applications.

67. I accept the evidence of Mr Davis that in early 2012, Exterra formed the opinion that OzMay was not taking steps to return the mining tenements to good standing and contacted OzMay and established that OzMay had withdrawn from the OzMay Agreement with Regal on 12 January 2012.

68. I also accept the evidence of Mr Davis that Exterra then proceeded to negotiate with Regal for the purchase of the Eucalyptus Project, including M 39/292, and to take over the legal action being the Exemption Applications and the Forfeiture Applications, or as put by Mr Davis, *"Exterra was aware that the Tenements were subject to various objections to applications for exemptions and applications for forfeiture. After some consideration, I determined in March 2012 that purchasing the Tenements with all the associated problems would be worthwhile if they could be obtained for the right price. The Exterra board agreed and I proceeded to try to negotiate a deal with Regal to acquire the Tenements."*

69. I accept the statement of Mr Longman and find he has not signed any further documents in the furtherance of any transfer of M 39/292 to Exterra because Eucalyptus GM was not made aware of the OzMay Agreement and attempts to draw together the content of a sale agreement with Regal raised concerns with Mr Longman that the contents of what was produced to him was in potential conflict with the original Eucalyptus Sale Agreement signed by him as director of Eucalyptus GM in January 2005. I also accept and find the statement of Mr Longman that since the signing of the Eucalyptus Sale Agreement in 2005, Eucalyptus GM have made contribution to the management or administration of M 39/292 nor has it been informed by Regal or any other party of any dealings with that mining tenement.

70. I accept the evidence of Mr Davis that Exterra has no obligation to any person under the terms of any agreement in respect to M 39/292 and it is clear Exterra seeks to maintain this mining tenement and others that form the Eucalyptus Project in furtherance of the Exterra Purchase Agreement with Regal. It is noted that all agreements and arrangements Exterra has with Regal were entered into well after the Forfeiture Applications were lodged.

71. The approach to be taken when deciding whether the non-compliance with expenditure conditions was sufficient gravity to warrant a recommendation for forfeiture of the

mining tenement was considered in ***Craig v Spargos Exploration NL (unreported, Kalgoorlie Warden's Court, 22 December 1986, 6 AMPLA Bull 73)*** in which the warden's said as follows:

> *"In my opinion, section 98 of the Act is a legislative provision by which a power is conferred upon a warden coupled, on certain facts or matters are established to the warden's satisfaction, with the duty to exercise that power. Thus, when and only when the warden is satisfied that first, there has been a failure to comply with the expenditure conditions, and secondly, that the non-compliance is, in the circumstances of the case, of sufficient gravity to justify forfeiture, the warden is required to recommend forfeiture.*
>
> *Subsection 98(5) thus impresses upon the warden the necessity of considering, not only the non-compliance and a facts directly bearing upon it, but also the events leading up to the non-compliance, the conduct of the parties and the actual and potential consequences of the non-compliance and of the forfeiture sought, having regard throughout, to the object and policy of the Act."*

72. Further, in ***Rose v Goldtime Australia Pty Ltd [2004] WAMW 8*** the warden said she could:

> *"Take into account things which have occurred and have affected the tenement or the tenement holder not only during the year the subject of the plaint, but, in addition, during any material period prior to the commencement of the plaint then before the warden. Likewise I consider that the warden may also properly take into account matters connected with the tenement and the tenement holder that have arisen between the end of the tenement year the subject of the plaint and the hearing of the plaint. The warden may also take into account plans which the tenement holder may have for the future concerning the tenement but in doing so would, in all cases, be obliged to assess the reasonableness of such plans and the likelihood of there ever been carried out."*

73. I find Eucalyptus GM as the registered owner of M 39/282 held the legal obligation to meet the minimum expenditure conditions in the 2010 Year and for that matter the 2009 Year. That legal obligation upon Eucalyptus GM persisted because of the failure of Regal to register the transfer of M 39/292 pursuant to the terms of the Eucalyptus Sale Agreement. I accept and find Eucalyptus GM did not take steps to meet the minimum expenditure conditions for M 39/292 beyond the execution of the Eucalyptus Sale Agreement as for all intents and purposes they have affected the sale of that mining tenement to Regal. I accept the Eucalyptus Sale Agreement and transfer between Eucalyptus GM and Regal was last in the possession of Regal and its whereabouts appears now to be unknown.

74. Notwithstanding that Eucalyptus GM as the registered holder of the Eucalyptus GM Tenement is solely responsible to meet the minimum expenditure conditions for M 39/292 in the 2010 Year, whatever the private contractual arrangement between Eucalyptus GM and Regal was as a consequence of the Eucalyptus Sale Agreement the Register reveals that the minimum expenditure conditions for the 2010 Year and the 2009 Year was not complied with. Further, I find the decision by Regal in about 2008 to move its headquarters to Victoria and to change its focus from gold and into coal and the resignation of Mr Sullivan resulted in Regal's interest in M 39/292 to diminish.

75. I find Regal, without the Eucalyptus Sale Agreement and the associated transfer forms sort to enter dispose of its interest in M 39/292 by entering into the OzMay Agreement and the Exterra Agreement and then Exterra Purchase Agreement in the full knowledge it did not have the necessary documents to assist with transfer of M 39/292 and nor did it advise Eucalyptus GM of its intentions in those circumstances.

76. I find whatever the circumstances that existed in 2009Year and the 2010 Year it is clear that Eucalyptus GM did not comply with the minimum expenditure conditions for M 39/292 because it consider it had disposed of its interest in M 39/292 and Regal as the beneficial holder of M 39/292 did not in its own right or through any other person comply with the minimum expenditure conditions for the same period.

77. The involvement of Exterra with M 39/292 occurred in 2011 and later in 2012 some one or two years after the failure to comply with the minimum expenditure conditions had occurred and the Exemption Applications and Forfeiture Applications had been lodged.

78. I find the evidence in this case establishes Eucalyptus GM has no future plans to do anything with that mining tenement least of all spend any money on it to meet the minimum expenditure conditions. I accept that Eucalyptus GM regards M 39/292 as having been sold to Regal and it has divested itself of all interest in that mining tenement. I find the evidence of Mr Sullivan establishes that Regal has changed its focus from gold mining to coal mining and moved its corporate offices to Victoria. I find on the evidence that Regal has no interest in meeting the minimum expenditure upon M 39/292 and has now on two occasions sought to enter into arrangements with other persons, on terms, to dispose of M 39/292.

79. Further, I find whoever may have been attempting to be responsible for meeting the minimum expenditure conditions on M39/292 fail to do so in the 2009 Year and the 2010 Year and attempts to obtain exemptions from compliance with the minimum expenditure conditions have been refused by the Hon. Minister in two consecutive expenditure years.

80. The policy behind the Act that gives rise to applications for forfeiture to police compliance with expenditure conditions was dealt with in ***Nova Resources NL v French (1995) 12 WAR 50*** in which the Full Court of the Supreme Court of WA said:

> *"The primary object of the act so far as it impacts on this case, is to ensure as far as practicable that land which has even known potential for mining or is worthy of exploration will be made available for mining or exploration. It is made available subject to reasonably stringent conditions and if these, including expenditure conditions, show that the purposes of the grant are not being advance, then the Act and Regulations make provision for others who have an interest in those purposes on that land to apply for forfeiture so they may exploit the area."*

81. Similarly, in ***Craig v Spargos Exploration NL*** (supra) the warden said:

> *"The whole policy of the Mining Act is that a tenement holder an able to explore for or exploit mineral resources of a tenement should give way to some other person to do so.*

The Act encourages exploration and mining activity and discourages a tenement holder from going to sleep on his rights and obligations."

82. I give little weight to the plans held by Exterra for M 39/292 as it holds no obligation to either Eucalyptus GM or Regal and entered into its arrangement with Regal in the full knowledge of the existence of the Exemption Applications and the Forfeiture Applications and in the words of Mr Davis *"I determined in March 2012 that purchasing the tenements with all the associated problems would be worthwhile if they could be obtained for the right price. The Exterra board agreed and I proceeded to try to negotiate a deal with Regal to acquire the tenements."* It is acknowledged that Exterra in seeking to acquire the various mining tenements that comprise the Eucalyptus Project, including M 39/292, required the payment of various sums of money to maintain the currency of rent and rates and other charges and expenses. However, in my opinion, it would undermine the whole policy behind the forfeiture provisions of the Act to give weight in the circumstances of this case to Exterra's plans when its interest in M 39/292 did not arise until after Landtec had lodged the Exemption Applications and the Forfeiture Applications in the expectation that if successful it may be given the opportunity to make application for the mining tenement, in priority, to others who have engaged with the beneficial holder of the mining tenement after they have commenced the Forfeiture Applications in the hope the mining tenement could be purchased.

83. In ***Majeed v Schulda (unreported, Warden's Court, 1988, 7 AMPLA Bull 146)*** the warden said *'as a general principle the emphasis should be on the nature and extent of the non-compliance and not on future proposals.'*

84. In ***North v Elazac Mining Pty Ltd [2012] WAMW 42*** at [49] the warden held that there should be no weight given to the respondent's future plans as to do so would reward the inaction by the respondent rather than the positive action by the applicant and would attack and undermine the self-policing policy and the intentions of the Act.

85. I find in the whole circumstances of this case there has been no explanation proffered by Eucalyptus GM as the registered holder of the M 39/292, albeit having disposed of its interest in M 39/292, or Regal, as the beneficial holder of M 39/292 as to why the minimum expenditure conditions were not complied with in the 2010 Year immediately following a similar non-compliance win the 2009 Year.

86. I find the failure to meet the minimum expenditure conditions on M 39/292 in the 2010 Year in circumstances where no exploration or mining occurred and the only expenditure made was for rent and rates and administration is inexcusable and a serious breach of the conditions of grant of M 39/292. I find the failure to comply with the minimum expenditure conditions cannot be further justified in the circumstances where there had been a similar failure in the 2009 Year.

87. There can be no doubt where in the circumstances of this case reveal Eucalyptus GM, as the registered holder of M 39/292, has disposed of its interest in 2005 to Regal, the beneficial holder, who has not registered that transaction in the Register and has not complied with the minimum expenditure conditions on two consecutive expenditure

years, but has sought to sell its interest to two other companies that the failure is sufficient to justify a recommendation to the Hon. Minister for forfeiture of this mining tenement notwithstanding any conditional proposals that may or may not come to fruition through Exterra.

88. I find the registered holder of M 39/292 has failed to meet the minimum expenditure conditions in the 2010 Year and in all the circumstances that failure is of sufficient gravity to warrant its forfeiture. The gravity of two years of consecutive failures to comply with the minimum expenditure conditions on M 39/292 is so serious that the imposition of a penalty as an alternative to forfeiture is not justified and to do so would undermine the intentions of the forfeiture provisions of the Act.

89. Accordingly, for those reasons I recommend to the Hon. Minister that M 39/292 be forfeited.

M 39/480 held by the Longman's

90. I am satisfied and find the Longman's failed to comply with the minimum expenditure conditions for M 39/480 in the 2009 Year of $20,000. I find expenditure on M 39/480 in the 2009 Year was only $7,616 comprised solely of exploration. It is noted the 2009 Year was the first year in which this mining tenement was a mining lease following conversion from a prospecting licence. It is also noted the Exemption Application for the 2009 Year was refused by the Hon. Minister despite there being no objection lodged against that application.

91. I do not propose to repeat my findings in respect to the circumstances in which the Longman's failed to comply with the minimum expenditure conditions on 39/480 in the 2009 Year, save to say, I find it occurred in the same circumstances described above in M 39/292. I also accept the evidence of Mr Sullivan as to the focus of Regal and its direction following the sale of M 39/480 by the Longman's to Regal. I accept the evidence of Mr Davis is not inconsistent with that of Mr Sullivan but goes to reveal information he has discovered occurred prior to his inquiries regarding M 39/480.

92. I do not propose to repeat my findings in M 39/292 in respect to the evidence of Mr Davis and his dealings with Regal and OzMay on behalf of Exterra except to say I make the same findings in respect to M 39/480.

93. Notwithstanding the above, no explanation has been proffered by either the Longman's, as the registered holder of M 39/480 or Regal, as the beneficial holder of M 39/480 that explains the failure to meet the minimum expenditure conditions on M 39/480 in the 2009 Year in circumstances of it being the first year after the grant of M 39/480 as a result of a s. 49 of the Act conversion from a prospecting licence. I repeat that I understand the position of the Longman's to be the same as in M 39/292 that they considered they had disposed of M 39/480 in accordance with a sale agreement and duly signed transfer handed to Regal in 2005. I also accept and find the Longman's have expended nothing and have no plans to expend on M 39/480 in order to meet the minimum expenditure conditions.

94. I do not propose to repeat my findings as to the Regal's position in this proceeding and that of Exterra, save to say, I make the same findings as they arise out of identical circumstances as in M 39/292.

95. I repeat my findings in M 39/292 in this case as to the weight to be given to the future intentions of Exterra on M 39/480.

96. I find the failure by the Longman's to meet the minimum expenditure conditions on M 39/480 in the 2009 Year is because of the inaction of the beneficial holder of that mining tenement. Failure to meet the minimum expenditure in the first year following conversion to a mining lease suggests a fundamental inability to expend on the mining tenement. Such failure to meet that condition cannot be justified in circumstances so found and where an application for exemption had been refused.

97. I find the failure to meet minimum expenditure conditions in the 2009 Year on M 39/480 is without excuse and caused for the same reason found in M 39/292.

98. In those circumstances, I find the Longman's have failed to meet the minimum expenditure conditions on M 39/480 in the 2009 Year and in all the circumstances that failure is of sufficient gravity to warrant its forfeiture. The gravity of a failure to comply with the minimum expenditure conditions on M 39/292 in the first year following conversion to a mining lease is so serious that the imposition of a penalty as an alternative to forfeiture is not justified and to do so would undermine the intentions of the forfeiture provisions of the Act.

99. Accordingly, for those reasons I recommend to the Hon. Minister that M 39/480 be forfeited.

<u>P 39/4556 held by Regal</u>

100. The Register for P 39/4556 reveals the minimum expenditure conditions for the 2010 Year was $3,040 and expenditure incurred by Regal in the 2010 Year was $4,421 comprised of $3,417 for exploration, $396 for rates and rent and $608 for administration. On the face of the Register, Regal appears to have been compliant with the minimum expenditure conditions for the 2010 Year for P 39/4556.

101. Landtec challenges the claim by Regal of expenditure of $3,417 for exploration on P 39/4556 in the 2010 Year and produced into evidence a copy of the Form 5 lodged for that mining tenement in that year. The details of the amount of $3,417 claimed by Regal for exploration in the Form 5 on P 39/4556 is stated to be as follows:

> *"Evaluation of geological data and the developm (sic) of exploration programs and evaluation of tenements and development of technical report for prospectus purposes."*

102. It is submitted by Landtec the purposes for which the amount claimed as expenditure in the Form 5 for the 2010 Year by Regal is not allowable expenditure because it is not expenditure that meets the requirements of r. 15(1) of the Regulations as being expenditure *"in mining on or in connection with mining on the licence"*. Regal and Exterra made no response to this submission by Landtec.

103. The issue of what amounts to allowable expenditure relevant to exploration licences was considered in ***Blackfin P/L v Mineralogy P/L [2013] WAMW 19*** at [64] to [89] from the application of the Supreme Court of WA (Court of Appeal) decision in ***Re: His Honour Warden Calder SM & anor; Exparte Lee & anor [2007] WASCA 161 ("the Lee Decision").*** In my opinion, the principles determined in the ***Lee Decision*** are also applicable to determining whether expenditure claimed on a prospecting licence is allowable expenditure as being *"in mining on or in connection with mining on the licence"*.

104. In applying the established principles and criterion established in the ***Lee Decision,*** I find the purpose for which the sum of $3,417 was expended by Regal in the 2010 Year on P 39/4556 was not expenditure that can be said to be *"in mining on or in connection with mining on the licence"*. I do not accept the purpose of *"evaluation of geological data and the developm (sic) of exploration programs and evaluation of tenements and development of technical report for prospectus purposes."* can be said to relate to the land or the ground the subject of P 39/4556.

105. The purpose of the expenditure relates to raising capital for Regal. Any consideration of data and the creation of technical reports for prospectus purposes does not, in my opinion, amount to the preparation of programmes of a nature and of such precision they would contain sufficient detail and information such they could be used on the ground of P 39/4556 for *"in mining on or in connection with mining on the licence"*. Further, prospectus purposes is aimed at raising funds for Regal, which may or may not be expended on any mining tenements held by it and may or may not be used *'in mining on or in connection with mining on the licence'*. I do not accept there is sufficient nexus between the purposes of raising capital as a consequence of the gathering of information for a prospectus and the possibility that any money raised may or would be expended upon P 39/4556.

106. I do not accept it is the case that the Act contemplates that <u>all</u> expenditure is allowable expenditure (see ***Blackfin P/L v Mineralogy P/L (supra)*** *at [82] to [84] and* ***Brosnan v JSW Holdings Pty Ltd [2011] WAMW 8*** *at [10] – [14])*.

107. I find the amount of $3,417 claimed by Regal as expenditure *"in mining on or in connection with mining on the licence"* for the 2010 Year was not allowable expenditure and as such Regal did not meet the minimum expenditure conditions in that year. Accordingly, I find Regal expended in the 2010 Year on P 39/4556 the amount of $1,004 comprised only of rates and rent and administration.

108. It is noted Regal withdrew its application for exemption from minimum expenditure conditions on P 39/4556 in 2010. It is further noted Regal failed to comply with its minimum expenditure conditions in the 2009 Year expending only $1,705 being comprised of $900 in exploration, rent and rates of $471 and administration of $334. Regal applied for an exemption from compliance with the minimum expenditure conditions for the 2009 Year but that application was refused by the Hon Minister.

109. I accept the evidence of Mr Sullivan and find, as I have previously in M 39/292 and M 39/480, that Regal changed its focus from gold to coal and shifted its offices to Victoria in or about 2009. I also accept the evidence of Mr Davis that he discovered Regal entered into the OzMay Agreement, later the Exterra Agreement and then the Exterra Purchase Agreement in respect to the mining tenements comprising the Eucalyptus Project including P 39/4556. I also find from Mr Davis evidence that OzMay withdrew from the OzMay Agreement at the beginning of 2012. No explanation has been made by Regal as to why the non-compliance with the minimum expenditure conditions occurred

110. I find Exterra entered into the Exterra Purchase Agreement with Regal in 2012 in regard to P 39/4556 and other mining tenements that comprise the Eucalyptus Project but has no obligations to Regal in the event the conditional terms of that agreement are not complied with.

111. I find, having considered all of the circumstances of this case, the failure by Regal to comply with the minimum expenditure conditions in the 2010 Year when in the preceding 2009 Year there had also been a similar failure amounts to a very serious breach of the conditions of grant of that mining tenement and the intentions of the Act.

112. I have considered the position of Exterra and note their interest in P 39/4556 arose well after the Exemption Applications and Forfeiture Applications were lodged and further note Exterra has no obligation to Regal in the event the terms of the Exterra Purchase Agreement is not met. Expenditure by Exterra to maintain P 39/4556 and another mining tenement the subject of these proceedings is part of the commercial risk well understood by Exterra when it entered into the Exterra Agreement and the Exterra Purchase Agreement. I repeat and adopt my previous finding in M 39/292 and M 39/480 and give a little weight to the plans held by Exterra in respect to P 39/4556 for the reasons previously expressed.

113. I find the absence of any proper explanation by Regal as to why this was allowed to occur causes me to find Regal "fell asleep" on the obligations imposed upon it upon grant of P 39/4556 to meet the minimum expenditure conditions on P 39/4556.

114. Accordingly, I find Regal has not complied in a material respect with the condition of grant of P 39/4556 to meet the minimum expenditure conditions in the 2010 Year and that such non-compliance is of sufficient gravity to justify the forfeiture of P 39/4556. I do not consider, upon the evidence, any circumstances exist that would warrant the imposition of a penalty other than forfeiture given that Regal has not complied with its fundamental obligation to meet minimum expenditure conditions in not only 2010 Year but also in the preceding 2009 Year and to do so would undermine the intentions of the forfeiture provisions of the Act.

115 For those reasons, I order that P 39/4556 be forfeited.

<u>M's 39/914, 39/966, 39/969, 39/991 & 39/1064 held by Mr Dixon's Mining Tenements</u>

116 I do not propose to recite the individual details in respect to Mr Dixon's Mining Tenements as those details already appear within this decision. However, what is apparent is the shortfall in meeting the minimum expenditure conditions for each of the mining leases in the 2010 Year occurred immediately after a similar shortfall for the 2009 Year for which no exemption from compliance was granted by the Hon. Minister.

117 I refer to the various oral and written evidence of Mr Dixon, Mr Davis and Mr Sullivan relied upon in this proceeding and the relevant evidence and findings contained with the decision in the ***2014 Dixon Decision.***

118 I accept and find Mr Dixon was responsible for marking out and all steps to the grant of Mr Dixon's Mining Tenements. I also accept and find following grant of various other mining tenements that have now resulted in the grant of Mr Dixon's Mining Tenements, Mr Dixon entered into an agreement with Newcrest to meet the annual minimum expenditure conditions for those mining leases. I also accept and find in 2004 Newcrest withdrew from the Option Agreement with Mr Dixon.

119 I also accept and find that in March 2005, Mr Dixon entered into the Regal Agreement whereby upon conditions that included Regal managing and expending a minimum amount of expenditure Regal could earn up to a 90% interest in Mr Dixon's Mining Tenements. Regal complied with the terms of the Regal Agreement and by 2008 Regal had earned a 90% interest in Mr Dixon's Mining Tenements with Mr Dixon retaining a 10% interest including the right to work alluvial ground to a depth of one metre. I find despite Regal earning a 90% interest in Mr Dixon's Mining Tenements no transfer of ownership was lodged with the DMP nor appears in the Register. The Register still records Mr Dixon as the registered holder of 100% interest of Mr Dixon's Mining Tenements.

120 I also accept and find that between March 2005 and March 2009 Mr Dixon dealt with Mr Sullivan at Regal and received oral reports as to activities being conducted upon Mr Dixon's Mining Tenements by Regal. In March 2009 Mr Sullivan resigned from Regal.

121 I accept and find in accordance with the evidence of Mr Sullivan at about the time of his resignation from Regal the board of Regal made a decision to move away from gold and pursue interests in coal resulting in the relocation of Regal's office to Victoria.

122 I accept and find following Mr Sullivan's resignation communication by Regal with Mr Dixon became less frequent. I also accept and find Mr Dixon, having not heard from Regal since the resignation of Mr Sullivan attempted on two occasions being 31 August 2009 and 30 September 2009 to speak with Mr Wing the then company secretary of Regal.

123 I further accept and find between about 5 and 9 February 2010, Mr Dixon became aware Regal had entered into the OzMay Agreement in respect to various mining tenements that comprise the Eucalyptus Project, including Mr Dixon's Mining Tenements in which OzMay would earn an 80% - 90% interest upon various conditions. I accept and find Mr Dixon then communicated with Mr Wing at Regal regarding the status of expenditure

on Mr Dixon's Mining Tenements and matters associated with the OzMay Agreement. I accept Mr Dixon received his first written correspondence from OzMay regarding the OzMay Agreement about 20 July 2010. Mr Dixon also became aware, at about the same time, of Exterra being interested in the Eucalyptus Project.

124 I accept and find about 20 August 2010, Mr Dixon wrote to Regal in response to a letter from OzMay and also put Regal on notice that Mr Dixon's Mining Tenements were subject to the Forfeiture Applications by Landtec.

125 I accept and find Mr Dixon received a telephone call from Mr Alec McHenry of Regal a day or two before the Form 5's were required to be lodged with the DMP to ascertain if there was any further expenditure he could provide details of to be included in the Form 5's as Regal intended to lodge the Form 5's and the Exemption Applications. I accept Mr Dixon was not involved in the preparation of the Exemption Applications and was reassured that Regal would attend to that matter. I also accept on 24 August 2010 Mr Dixon received an e-mail from Mr McHenry informing him the Form 5's and the Exemption Applications were being attended to. I accept despite that, Mr Dixon flew to Perth from Leonora on 25 August 2010 and lodged with the DMP Form 5's pertaining to Mr Dixon Mining Tenements. Copies of the Form 5's lodged with DMP by Mr Dixon on 25 August 2010 were attached to his witness statement produced into evidence in these proceedings and I note the amounts claimed as expended by Mr Dixon relate only to rates and rent and makes no reference to any other expenditure in the 2010Year. In those circumstances, I do not understand how the Register could include other amounts of expenditure for the 2010 Year given Mr Dixon is the registered holder of Mr Dixon's Mining Tenements unless a further Form 5 was accepted by DMP from another source. I repeat my comments regarding this apparent practice of receiving what appears to be multiple or amended or substituted Form 5's in the ***2014 Dixon Decision*** at [172] – [212].

126 It is appropriate at this time that I deal with the statements by Mr Dixon in his witness statements of 20 February 2013 and 25 September 2015 and his affidavit sworn 26 July 2012 regarding who was responsible for compliance with the minimum expenditure conditions and lodging of Form 5's for Mr Dixon's Mining Tenements.

127 I find it is a misconception by Mr Dixon that the terms of the Regal Agreement removed his responsibility, as the registered holder of Mr Dixon's Mining Tenements to meet the various statutory obligations and conditions imposed upon grant including complying with the minimum expenditure conditions for those mining tenements. There can be no doubt the legal obligation to comply with terms and conditions of the grant of a mining tenement rests upon the registered holder and cannot be passed by the registered holder to an unregistered transferee: (***Brosnan v Flint and Sorna Pty Ltd [2003] WAMW 16*** and ***Finesky Holdings Pty Ltd v Minister for Transport for Western Australia [2002] WASCA 206)***. Section 118A(6) of the Act makes that position beyond question as it expressly provides:

> *"The giving of an authorisation does not affect the duties or obligations of the holder of the relevant tenement under this Act."*

128 It follows the legal responsibility of Mr Dixon to comply with all terms and conditions of the grant of Mr Dixon's Mining Tenements including the payment of rent and meeting the minimum expenditure conditions imposed under the terms of grant and the lodging of the various reports. The terms of the private arrangement that Mr Dixon may have with Regal does not interfere with his legal obligation associated with the grant of Mr Dixon's Mining Tenements in the absence of the registration of transfer of the holder of the mining tenements.

129 I do not propose to revisit my comments and findings in the ***2014 Dixon Decision*** at [170] but confirm and adopt those findings in regard to the additional expenditure claimed by Mr Dixon. However, it is appropriate that I reiterate that I accept prospectors were allowed upon Mr Dixon's Mining Tenements with the oral consent of Mr Dixon, but I do not accept the purported details of time spent by the prospectors upon Mr Dixon's Mining Tenements were any more than "guesstimates" of time spent from reconstructions requested by Mr Dixon years later in an attempt to identify any expenditure he could to repel the Forfeiture Applications. I also find the evidence of Mr Dixon that he was asked by Regal to provide details of expenditure he incurred in the 2009 Year and the 2010 Year and he did not do so, as evidenced by his attempts to include that expenditure in his amended Form 5's, confirms he did not provide details to Regal and his attempts to establish what time he spent on his own mining tenements were "guestimates" at best made years later and are unreliable and inaccurate to the extent as not to be credible.

130 I find Mr Dixon, despite being a man with considerable experience with mining and mining tenements, "fell asleep" on his obligations, as the registered holder of Mr Dixon's Mining Tenements, by failing to ensure the minimum expenditure conditions for were complied with in the 2010 Year and 2009 Year. I find Mr Dixon "fell asleep" on his obligations because he sold 90% of his interest in Mr Dixon's Mining Tenements under the terms of the Regal Agreement, which included that Regal was solely responsible for all expenditure relating to the mining tenements in accordance with clause 10 and 13.2(c) of the Regal Agreement and then regarded his obligation to meet the minimum expenditure conditions in each expenditure year was absolved and rested upon the holder of the unregistered interest in the mining tenements despite Mr Dixon remaining the 100% registered holder of the mining tenements. That situation was confirmed and made clear by the comments within the various written evidence produced by Mr Dixon that it was the responsibility of Regal to meet the minimum expenditure and to lodge the Form 5's and make exemption applications.

131 I find in accordance with the Regal Agreement, Mr Dixon ignored his statutory obligations under s. 118A(6) of the Act and relied upon telephone conversations with Mr Sullivan to be assured minimum expenditure was being complied with. I do not accept it was reasonable or responsible for Mr Dixon to hold the view because Regal had always complied with minimum expenditure conditions they would continue to do so after Mr Sullivan resigned. I find Mr Dixon's actions in contacting Regal was to prompt them to lodge the Form 5's and not for Mr Dixon to do so. Mr Dixon contacted Regal on a number of times complaining of the assignment of their rights under the

OzMay Agreement without advising him in accordance with the Regal Agreement. Further, Mr Dixon, rather than seek to identify expenditure he may have incurred on Mr Dixon's Mining Tenements made telephone calls, sent emails and facsimiles and visited Regal's office in Victoria to complain they were not meeting their obligations under the Regal Agreement in particular the minimum expenditure conditions.

132 I find it is clear Mr Dixon understood the need to ensure minimum expenditure conditions were met in respect to Mr Dixon's Mining Tenements because he constantly refers to that obligation being met by Newcrest, Regal or OzMay in the various years since grant. I do acknowledge that Mr Dixon was at liberty to deal with Mr Dixon's Mining Tenements as he saw fit including entering into various agreements for the sale of any interest in those mining tenements. However, I find Mr Dixon did not take seriously his obligation to Mr Dixon's Mining Tenements, particularly the need to ensure minimum expenditure conditions were met in each expenditure year by those he contracted with in the sale or dealings with the mining tenements. Further, I find Mr Dixon did not keep nor did he require others who he permitted upon Mr Dixon's Mining Tenements to accurately record any activity they performed upon those mining tenements to be used towards allowable expenditure. If that had occurred and Mr Dixon had taken it seriously the need to accurately record expenditure upon Mr Dixon's Mining Tenements in each year there may have been no need to have attempted to reconstruct time and places of activity by Mr Dixon and others. I find it beggars belief Mr Dixon would lodge with the DMP Form 5's for Mr Dixon's Mining Tenements for the 2010 Year and not include the expenditure he said he incurred in that year. I find Mr Dixon's credibility lacking in respect of this aspect of his evidence.

133 I note the evidence of Mr Dixon in respect to steps he has taken since the Exemption Applications and Forfeiture Applications have been lodged to better manage the recording of expenditure incurred by those he permits upon Mr Dixon's Mining Leases to prospect. I repeat my previous comments in regard to the need to properly record expenditure upon all mining tenements held by Mr Dixon. The recording of expenditure to demonstrate compliance with the minimum expenditure conditions of the grant of a mining tenement is not a difficult task and should not lead to situation such as that encountered in these proceedings. I find what Mr Dixon now does to record expenditure on mining tenements registered in his name is what he should have been done before the Forfeiture Applications were lodged.

134 Further, I note the evidence and submissions of Mr Dixon concerning the past expenditure on the mining tenements, the inability to continue to work and develop the mining tenements if forfeited and his intentions for the mining tenements. I also note the evidence of Mr Davis as to the intentions of Exterra upon Mr Dixon's Mining Tenements.

135 I am cognisance of the past expenditure upon Mr Dixon's Mining Tenements by Newcrest and Regal and the data that has been obtained as a consequence of that expenditure. However, Landtec referred me to ***Berkeley Resources Ltd & anor v Limelight Industries Pty Ltd [2013] WAMW 2*** at [102] and [106] where the warden

made the following comments in respect to the aggregation of expenditure as an argument for the recommendation for exemption from compliance with minimum expenditure conditions:

> *"In my opinion, mathematical gymnastics with the quantum of expenditure incurred upon a mining tenement is not the basis upon which Parliament intended the policy behind the Act to be administered. [102]*
>
> *Any submission that suggests merit exists in the aggregation of expenditure over a number of years has a basis for the grant of an exemption from expenditure conditions should be seen as a deliberate attempt to undermine the very object and policy of the Act such that it would tie up land with the potential for mining or worthy of exploration and make it inaccessible for long periods of time for those who should otherwise be given the opportunity to exploit the mineral wealth that may lay in that land." [106]*

136 In contrast, Mr Dixon referred me to ***Surrey Holdings Pty Ltd v Newcoast Nominees Pty Ltd [2003] WAMW 36*** where the warden said of past expenditure the following:

> *"I am of the opinion that although there has been non-compliance I should not recommend forfeiture. The previous good standing of Newcoast over the first seven year of its life bespeak of much effort to exploit the tenement and allow me to consider the lack of expenditure of the last two years an aberration that is unlikely to be carried on into the future. The holder and those holding a beneficial interest in the tenement should be warned that they cannot rely on the work done on the tenement in the past. They must not be inactive. There will come a time when past work will not tip the scales in favour of the holder."*

137 The distinction to be drawn between the comments by the warden in the above case, where the registered owner and the beneficial owner were still working together, and the circumstances in these proceedings is Regal, as the majority beneficial owner of 90% of Mr Dixon's Mining Tenements, has changed its focus from gold to coal in 2009 and has simply left Mr Dixon in the lurch despite the Regal Agreement and done nothing to advance its interests or that of Mr Dixon in the Mr Dixon's Mining Tenements since the 2009 Year. There is no plan between Regal as the beneficial owner and Mr Dixon as the registered holder of the mining tenements. Regal, despite having been compliant with expenditure upon the mining tenements prior to the 2009 Year has attempted to dispose of its interest in Mr Dixon's Mining Tenements through the OzMay Agreement but that has come to an end. Regal has also attempted to dispose of its interest in Mr Dixon's Mining Tenements to Exterra through the Exterra Purchase Agreement, but that agreement is conditional upon the outcome of these proceedings and, as acknowledged by Mr Davis, Exterra has no binding commitment to do anything on these mining tenements. The suggestion by Mr Dixon that he seeks to enter into an arrangement with Exterra to purchase Regal's equitable share in the mining tenements through his private mining company has not progressed.

138 For the reasons given in respect to M 39/292, M 39/480 and P 39/4556, which I adopt and consider similarly applies to Mr Dixon's Mining Tenements, I give little weight to the future plans of Exterra in circumstances where Exterra has no binding obligation to do anything or anybody if the mining tenements are forfeited.

139 Further, the potential forfeiture of Mr Dixon's Mining Tenements is the creation, in a large part, of Mr Dixon's actions or lack thereof. While Mr Dixon remains the registered holder of a mining tenement he holds the legal responsibility to comply with all obligations associate with that mining tenement including compliance with minimum expenditure conditions. In this case, I find Mr Dixon having been granted Mr Dixon's Mining Tenements entered in to various arrangements with third parties to expend money on those mining tenements. I also find Mr Dixon, after having secured Regal in the Regal Agreement, considered his obligation to ensure the minimum expenditure conditions were complied with in each year and to lodge all other reports or applications rested solely with Regal and he became complacent with his obligations as the registered holder and did not ensure either he or Regal complied with the minimum expenditure conditions on Mr Dixon's Mining Tenements. Further, Mr Dixon allowed prospectors to prospect upon the mining tenements without complying with the Act and without requiring them to adequately record the time they expended upon these mining tenements. Mr Dixon did likewise and now finds himself in a serious position in deed.

140 I find, as indicated earlier that Mr Dixon "fell asleep" on his obligations by his complacence towards his obligations after he entered into the Regal Agreement and disposed of 90% of his interest in Mr Dixon's Mining Tenements and also contracted privately to require Regal to be responsible for meeting his obligation to comply with the minimum expenditure conditions for the mining tenements. The consequence of those actions by Mr Dixon was he relied upon Regal to be compliant and did nothing himself to check in an adequate and timely manner the obligations that rested upon him as the registered holder of Mr Dixon's Mining Tenements were complied with.

141 I find that failure by Mr Dixon has resulted in a failure by him to meet the minimum expenditure conditions for Mr Dixon's Mining Tenements in the 2010. That failure in the 2010 Year follows a similar failure by Mr Dixon to meet the minimum expenditure conditions for the 2009 Year for the same mining tenements.

142 In my opinion the failure in two consecutive years to meet the minimum expenditure conditions is a serious breach of a fundamental condition of the grant of a mining lease. The circumstances that give rise to the breach of the minimum expenditure conditions for Mr Dixon's Mining Tenements in the 2010 Year are the same reasons the same conditions were breached in the 2009 Year. The breach is the result of Mr Dixon privately disposing of a majority interest in mining leases and the obligation upon him as the registered owner of Mr Dixon's Mining Tenements to Regal and taking inadequate steps to ensure his obligation to comply with the minimum expenditure conditions occurred.

143 In those circumstances, and after considering the matters I have raised above including the history of past expenditure on Mr Dixon's Mining Tenements and the prior work by Mr Dixon on those mining tenements, I find Mr Dixon has failed to meet the minimum expenditure conditions on Mr Dixon's Mining Tenements in the 2010 Year and in all the circumstances that failure is of sufficient gravity to warrant its forfeiture. The gravity of a failure to comply with the minimum expenditure conditions on Mr Dixon's

Mining Tenements occurred in the 2010 Year after a similar non-compliance in the 2009 Year in the circumstances described above. In my opinion, the failure to comply with the minimum expenditure conditions in the 2010 Year on Mr Dixon's Mining Tenements is so serious the imposition of a penalty as an alternative to forfeiture is not justified and to do so would undermine the intentions of the forfeiture provisions of the Act.

144 Accordingly, for those reasons I recommend to the Hon. Minister the mining leases that comprise Mr Dixon's Mining Tenements be forfeited.

P's 39/4622, 39/4623 & 39/4636 held by Mr Dixon

145 I do not propose to recite the details pertaining to Mr Dixon's Prospecting Tenements as they are outlined earlier in this decision. It is the case and I find there has been a failure by Mr Dixon, as the registered holder, to comply with the minimum expenditure conditions for Mr Dixon's Prospecting Tenements in the 2009 Year, that year being the first year of grant for these mining tenements following s. 120AA of the Act conversions from mining leases.

146 I have noted and considered in respect to Mr Dixon's Prospecting Tenements, as I have with Mr Dixon's Mining Tenements, the history of each mining tenement from being pegged, applied for and granted and the expenditure on each mining tenement in the preceding years.

147 I do not propose to repeat my findings of fact and other comments made in respect to Mr Dixon's Mining Tenements as the nature of the manner in which that evidence was tendered and given by Mr Sullivan, Mr Dixon and Mr Davis was such that it is equally applicable to Mr Dixon's Prospecting Tenements as it was to Mr Dixon's Mining Tenements and the respective actions and intentions of Regal and Exterra.

148 It follows that I adopt each finding previously made in respect to the circumstances of the failure by Mr Dixon to comply with minimum expenditure conditions for Mr Dixon's Mining Tenements to the same failure to comply pertaining to Mr Dixon's Prospecting Tenements.

149 I find the Register indicates exemption applications made by Mr Dixon for Mr Dixon's Prospecting Tenements from compliance with the minimum expenditure for the 2009 Year was refused by the Hon. Minister despite there being no objection lodged to that application. I also note that there was no expenditure in the 2009 Year on Mr Dixon's Prospecting Tenements incurred for prospecting or exploration. I find the only expenditure incurred in the 2009 Year was for rent, rates and administration and the amount of the non-compliance with the minimum expenditure conditions was significant.

150 I repeat my findings of fact in respect to the cause of the non-compliance, the actions of Mr Dixon and Regal as to their contribution to the non-compliance, the prior expenditure on the land that was previously other mining tenements before they became Mr Dixon's Prospecting Tenements and the involvement of Exterra and its evidence of

its proposed future plans if the mining tenements comprising the Eucalyptus Project are not forfeited and the weight I give to that evidence and the actions of Mr Dixon since the Forfeiture Applications have been lodged.

151 In light of my findings I further find the failure to comply with the minimum expenditure conditions in the first year following grant of a prospecting license is inexcusable particularly in circumstances where the amount of the minimum expenditure is small. It is the case and I find, as I have said before, when Regal as the majority equitable owner of Mr Dixon's Prospecting Tenements changed its focus from gold to coal it simply walked away from its obligations under the Regal Agreement and then found OzMay who withdrew from the OzMay Agreement a short time later. I adopt my findings in respect to Mr Dixons response and beliefs in the obligations of Regal in respect to the minimum expenditure conditions.

152 I have considered the position of Exterra and note their interest in Mr Dixon's prospecting Tenements arose well after the Exemption Applications and Forfeiture Applications were lodged. I further note and find Exterra has no obligation to Regal in the event the terms of the Exterra Purchase Agreement are not met. I find expenditure by Exterra to maintain Mr Dixon's Prospecting Tenements and another mining tenement the subject of these proceedings is part of the commercial risk well understood by Exterra when it entered into the Exterra Agreement and the Exterra Purchase Agreement. I repeat and adopt my previous finding in M 39/292, M 39/480, P 39/4556 and Mr Dixon's Mining Tenements in giving no weight to the plans held by Exterra in respect to Mr Dixon's Prospecting Tenements for the reasons previously expressed.

153 I find the absence of any proper explanation by Mr Dixon or Regal as to why the non-compliance with the minimum expenditure conditions was allowed to occur in the 2009 Year being the first year of grant of Mr Dixon's Prospecting Tenements causes me to find Mr Dixon "fell asleep" on the obligations imposed upon it upon grant of Mr Dixon's Prospecting Tenements.

154 Accordingly, I find Mr Dixon has not complied in a material respect with the condition of grant of Mr Dixon's Mining Tenements to meet the minimum expenditure conditions in the 2009 Year and that such non-compliance is of sufficient gravity to justify the forfeiture of Mr Dixon's Prospecting Tenements. I do not consider, upon the evidence, any circumstances exist that would warrant the imposition of a penalty other than forfeiture given that Mr Dixon has not complied with its fundamental obligation to meet minimum expenditure conditions in the first year of grant and has not been granted an exemption form such compliance by the Hon. Minister. In my opinion, to impose a penalty in lieu of forfeiture in the circumstances that prevail in these proceedings would undermine the intentions of the forfeiture provisions of the Act.

155 For those reasons, I order that P 39/4556 be forfeited.

Conclusion

156 For those reasons, I recommend to the Hon. Minister that:

M 39/292 held by Eucalyptus GM be forfeited;.

M 39/480 held by the Longman's be forfeited, and;

M 39/914, M 39/966, M 39/969, M 39/991 & M 39/1064 held by Mr Dixon be forfeited.

157 For those reasons, I order that:

P 39/4556 held by Regal is forfeited, and;

P 39/4622, P 39/4623 & P 39/4636 held by Mr Dixon are forfeited.

S M Wilson
(signed)

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Warden