

Section 10

Compensation and Surface Rights Access



10. Compensation and Surface Rights Access

In Alberta, mineral rights for oil, gas, and coal are not included in the surface rights of land. In most cases these subsurface rights are owned and controlled by the province. In these instances, energy companies are entitled to lease surface rights from landowners and lease land holders to extract oil and gas underneath private and public land. This section provides information to empower you, the landowner, in the event that a company or the government requests access to the surface of your land for the purpose of subsurface operations or pipeline siting. This chapter primarily focuses on compensation and the matters that determine compensation. Additionally, this section explains the role of the Surface Rights Board in granting right-of-entry orders and recovery of rental orders, as well as the process of registering your private surface agreement with the Alberta Energy Regulator. This section is complementary to much of the commentary about surface leases in Section 2, which deals with negotiation on matters other than compensation.

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According to a recent guide published by the Alberta Land Institute, there is often confusion amongst *landowners* surrounding property rights and the complex relationship between surface and mineral rights.¹ Canadian common law acknowledges that “all Albertans, as subjects of the crown, have broad rights to own, use, and enjoy property”; however, there are limits to these provisions.² The provincial government currently holds 81% of Alberta’s mineral rights, with private entities and the federal government splitting the remaining amount.³ As a result, energy companies are entitled to lease surface rights from landowners to extract ‘minerals’ – in this case, oil and gas. This chapter provides information to empower you, the landowner, in the event that a company or the government requests access to your land for the purpose of subsurface operations or pipeline siting.

10.1 Compensation for wells and facilities

As a landowner, you will *negotiate* with a company or representative *land agent* to determine the amount of compensation you will receive for leasing land to a company so they can site wells or facilities. With regard to grazing leases on *public land*, the government determines access for oil and gas activities,⁴ but a company pays compensation to the *occupant (lessee)*.

Compensation issues are clearly outlined in the Farmers’ Advocate publication, *Negotiating Surface Rights*.⁵ A publication from the Alberta Energy Regulator (AER), *Proposed Oil and Gas Wells, Pipelines, and Facilities: A Landowner’s Guide*,⁶ also provides a summary of the compensation procedure and other topics outlined in this

¹ Alberta Land Institute, *A Guide to Property Rights in Alberta* (2014).

<http://www.albertalandinstitute.ca/public/download/documents/10432>

² *A Guide to Property Rights in Alberta*, 10.

³ *A Guide to Property Rights in Alberta*, 11.

⁴ The Public Lands Act allows the Minister to make more than one disposition in respect of the same land. Alberta, Public Lands Act, RSA 2000, c P-40, s25 (b) Alberta government acts and regulations are available at Alberta Queen’s Printer, “Laws Online/Catalogue.”

http://www.qp.alberta.ca/Laws_Online.cfm

⁵ Alberta Agriculture and Forestry, *Negotiating Surface Rights* (2009) Agdex 878-1.

[http://www1.agric.gov.ab.ca/\\$department/deptdocs.nsf/all/agdex1126?opendocument](http://www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/agdex1126?opendocument)

⁶ AER, *EnerFAQs: Proposed Oil and Gas Wells, Pipelines, and Facilities: A Landowner’s Guide* (2015), 9. https://www.aer.ca/documents/enerfaqs/AER_EnerFAQs07_Landowner.pdf. EnerFAQs and Fact Sheets are available at AER, “EnerFAQs (Q&As)” <http://www.aer.ca/about-aer/enerfaqs>

chapter. For a look at the life cycle of the typical well and the impact of various stages of construction and operation, you can turn to the Canadian Association of Petroleum Producer’s guide, *What to Expect When You’re Expecting a Well*.⁷

In the first year of a new lease, a company has to pay the landowner for the right of entry onto the leased land (except when the land is owned by the Crown).⁸ This fee is set at \$500 per acre, up to a maximum of \$5,000 for the entire site. If the area required is less than an acre, the entry fee is proportionate to the area, but not less than \$250.⁹ This is a fixed payment, but other payments (such as compensation) can be negotiated. Some companies may consider this fee as payment for your time to negotiate the process, but you can cost this out separately in your negotiations.

In addition to the one-time right-of-entry fee, a company is also required to pay annual compensation. In the first year, this compensation must take into account

- the value of the land (this is the value if sold on the open market or the per-acre value of the land)¹⁰, based on the highest approved use of the land (such as agricultural, industrial, and residential). This is typically only considered in the initial payment, not in subsequent rent reviews.¹¹
- the loss of use by the *owner* or occupant (such as the gross value of the crop per acre at the time of the rental review)
- the *adverse effect* of operations
- the nuisance and inconvenience that might be caused by the operations.¹²
- other relevant factors that may be specific to your situation, such as material and assets left at the end of construction or other non-cash transactions

⁷ Canadian Association of Petroleum Producers, *What to Expect When You’re Expecting a Well* (2014). <http://www.capp.ca/publications-and-statistics/publications/250098>.

⁸ Alberta, Surface Rights Act, RSA 2000, c S-24, s 19.

⁹ The initial entry fee is “per titled unit,” so a separate fee can be charged for each separately titled unit. A fee can also be charged for each occurrence, so if a company wants to put a second well on the same titled property a year later, they have to pay another fee.

¹⁰ You can find more information on land values in your area at Alberta Agriculture and Forestry, “Agricultural Real Estate Transfers by Municipality and C.L.I. Class: 1996-2015.” [http://www1.agric.gov.ab.ca/\\$department/deptdocs.nsf/all/sdd1504](http://www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/sdd1504)

¹¹ This means that if the parcel is zoned agricultural, you have a significant barrier to argue urban/subdivision values of the land if you have intention to develop it. Land values will have within themselves a premium or discount depending on their location.

¹² Surface Rights Act, s 20 and 25.

After the first year, annual compensation will be based on the loss of use and adverse effects.

You can determine the value of the land through a local real estate agent. If the land is irrigated, compensation should reflect the value of crops that can be grown on that land.

The adverse effect refers to effects on the remaining land held. This might cover, but is certainly not limited to, the difficulties of farming in close proximity to a well site or access road, the cost of weed control, any additional checks required to ensure that livestock have not gone through open gates or fences onto the well site, and excessive noise, dust, or odour caused by the operations.¹³ Adverse effect can be generalized as the cost of managing the field differently, the time that it takes you away from your work, and future loss of use of your field.

Having an oil or gas well on the land will impose some limitations on future use of the surrounding land, as a company will put a caveat on the land they lease, including the access road, to protect their right of access to the well. The access route or pipeline rights-of-way may, for example, restrict the options for subdivision, especially due to *setback* requirements (see Section 5.2.2.). However, in many instances, one can still farm a portion of the lease and land adjacent to an access road.

If you are unable to agree on the amount of compensation to be paid, you can temporarily refuse entry to your land. The company will then apply to the Surface Rights Board for a *right-of-entry order* and the board will determine the amount of compensation you are to receive (Section 10.3). Even if you mostly agree on compensation, you may prefer to have the agreement formalized through the SRB by requesting that the company obtains a right-of-entry order, instead of signing a surface lease privately with the company. This is explained further in Section 10.3.2.

Since the annual compensation agreement is reviewed only every five years,¹⁴ you will want to consider possible long-term impacts when negotiating the annual fee. However, a company may be willing to renegotiate compensation within the five-year period if circumstances change. It is important to note that companies are required to give you notice of the fourth anniversary of your agreement no more than 30 days after the fact;

¹³ The decision in *Canadian Natural Resources Ltd. v. Bennett & Bennett Holdings Ltd.*, 2008 ABQB 19 goes to great lengths to define adverse effect and may be useful to understand what the SRB may consider to be adverse effect.

¹⁴ Surface Rights Act, s 27.

be aware of this date as you must be proactive in the event that a company fails to do so.¹⁵ You can take action by contacting the company directly or by requesting a review from the Surface Rights Board, who will then have the responsibility of making the company aware that the agreement is up for renegotiation. While the Surface Rights Act does not harshly punish company non-compliance with the renegotiation procedure, it does allow landowners to circumvent company inaction by directly requesting a compensation review from the SRB.¹⁶

It may be helpful to discuss compensation issues with someone who already has a well on their land or to contact a local surface rights or *synergy group* (Section B.4.1).

The company must make annual payments until a *reclamation certificate* has been issued and they can terminate their lease.¹⁷ Sometimes a lease agreement includes a clause that will allow the company to reduce the annual lease rent once surface structures have been removed from the site, but before *reclamation* has been carried out. While this could enable you as the landowner/occupant to use or cultivate the land (if included in your agreement), a company may have less incentive to complete reclamation as it costs less for the company to keep the lease for potential future production than to pay for reclamation in the meantime. The Surface Rights Act makes no provision for such a reduction in compensation and you are legally entitled to the full annual lease rent until the reclamation certificate has been issued.¹⁸ A company is required to pay compensation even if it takes over wells from another company and the well is no longer operating.

If a company fails to pay rentals, you can request the SRB to terminate the company's right of access, which allows the SRB to divert funds to cover rental costs until the well is reclaimed or the company resumes payments (see Section 10.3.3 below).

Compensation cannot be recovered, however, if there is evidence that the person receiving the money is refusing access for operations, *abandonment* or reclamation.¹⁹ If

¹⁵ Surface Rights Act, section 27(4)

¹⁶ Fenner Stewart, "Section 27 of the Surface Rights Act and the Potential Fallout of Non-Compliance," *ABlawg.ca*, May 22, 2015. <http://ablawg.ca/2015/05/22/section-27-of-the-surface-rights-act-and-the-potential-fallout-of-non-compliance/>

¹⁷ Alberta, Environmental Protection & Enhancement Act, RSA 2000, c E-12, s 144.

¹⁸ *Negotiating Surface Rights*.

¹⁹ Surface Rights Act, section 36(8).

a company is still operating but the SRB has terminated or suspended its right of access, the company is still obligated to abandon the well and reclaim the site (Section 9.2).

In the case of *orphan wells* where the owner has gone out of business, the industry-funded Orphan Well Association (OWA) steps in to deal with the abandonment and reclamation process (Section 9.4). This non-profit association receives its funds primarily through a levy that all oil companies must pay, and in part from provincial government contributions.²⁰

Despite obligations for a company to reclaim a site, an increasing number of wells are being orphaned by insolvent companies (591 alone in the 2014/15 fiscal year),²¹ forcing the OWA to increase its efforts and secure more funding.

10.2 Compensation for pipelines

Unlike compensation for wells (Section 10.1), there is no recurring payment of rentals for pipelines in most instances. Instead, compensation is generally a one-time entry fee before the company installs the pipeline. Only occasionally may an annual rent be offered,²² usually in the case of high-pressure, large-diameter transmission lines that require constant monitoring and where long-term damage is caused by their construction. Compensation is considered the value of land, plus a premium.

Adverse effect, nuisance and inconvenience are considered damages, and may be settled after the pipeline is constructed. Compensation for adverse effects includes loss of crops, and loss of use of land during operations and while vegetation is re-established. Compensation is not calculated until a crop has been grown on the land so that the full extent of any damage can be assessed. The compensation does not include use of additional land for temporary workspace (typically called a staging area); the company should pay extra for this.

²⁰ Orphan Well Association, *2014/15 Annual Report* (2015), 25. [http://www.orphanwell.ca/OWA/2014-15 Ann Rpt Final.pdf](http://www.orphanwell.ca/OWA/2014-15%20Ann%20Rpt%20Final.pdf)

²¹ Orphan Well Association, *2014/15 Annual Report*.

²² The Farmers' Advocate Office has a good resource describing the case where annual compensation was granted to landowners by the Surface Rights Board. Farmers' Advocate Office, *Annual Compensation for Pipelines in Alberta* (2008). [http://www1.agric.gov.ab.ca/\\$department/deptdocs.nsf/all/ofa12451/\\$FILE/Annual-Pipeline-Compensation.pdf](http://www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/ofa12451/$FILE/Annual-Pipeline-Compensation.pdf)

Where you and the company are unable to agree on the amount of compensation, the company may ask Surface Rights Board to resolve the issue (Section 10.3). Even if you and the company can generally agree on compensation, you may prefer to have a board order, and request that the company requests one from the SRB (Section 10.3.2). This has generally fallen out of practice, but it is still an option.

Any outstanding claims related to damages caused during pipeline construction should be dealt with through *arbitration*; there should be an arbitration clause in the *right-of-way* agreement. This will allow any disputes (over damage, clean-up, or other issues) to be settled without going to court. However, it is also possible to bring disputes relating to damage off the right-of-way to the Surface Rights Board, provided that damages are recognized within two years and amount to less than \$25,000 (Section 10.3.3).

10.3 The role of the Surface Rights Board

The Surface Rights Board can be involved in determining the compensation for a well, pipeline or facility through a right-of-entry order and the subsequent compensation *hearing* (Section 11.3.3). Cost awards for time and incurred expenses are also granted by the Surface Rights Board, with an example cost tracking sheet provided in Appendix D.

10.3.1 Right-of-entry orders when landowner and company cannot agree

If you, as the landowner, and the company cannot agree on compensation for right of entry, the company can take their case to the Surface Rights Board after the company has an approval for their project from the AER. Additionally, in some cases an *operator* and a landowner may agree, but an occupant does not give consent to the operator. In these instances, the board must grant the company a right-of-entry order if the AER has approved the project. If you do need to go before the Surface Right Board because you are unable to reach agreement, be sure to keep both a log of the time spent in negotiations and a journal of events. You may be compensated for reasonable expenses related to negotiations with the proponent company.

When the company receives a right-of-entry order from the Surface Rights Board, the operator must first pay the entry fee and 80% of the last written offer (which may not be the last best offer). The SRB will then facilitate a dispute resolution conference or determine the amount of compensation payable through a compensation hearing (Section 11.2).

The Surface Rights Board also deals with issues relating to right of entry onto agricultural leases on public land for seismic operations (Section 3.1)

10.3.2 Right-of-entry orders when landowner and company agree

Sometimes you will be close to reaching an agreement with a company over their access to your land and the appropriate compensation, but still want to involve the Surface Rights Board by requesting that a company obtains a right-of-entry-order.

Some people choose this option as they consider that a right-of-entry order by the SRB protects their rights better than signing a *private surface lease agreement* or easement form prepared by the company.²³ This has mostly fallen out of practice, as there may be additional protection from registering your private surface agreement with the AER (Section 10.4 below).

There are many reasons for this preference, including the fact that a right-of-entry order can be reviewed at any time and updated if conditions change. If the board has placed conditions in the order to protect you as the landowner (e.g., with respect to soil conservation or other environmental protections) and the company fails to comply, you can take the issue to the board, instead of having to go to court. In the case of pipelines, a right-of-entry order enables a landowner to go to the board with a claim for compensation for any damage that occurs during construction. (Note: This is different from the compensation agreed to in advance for right of entry.)

If you request that a company takes out a right-of-entry order and are then able to subsequently agree with the company on compensation without the board having to set the rate, you can choose to have the agreement formalized through a Board Compensation Order (Section 11.3.3).²⁴ These compensation orders can only be applied for once a right-of-entry order is in place, and thus, are not applicable to private surface leases.

²³ Stringam LLP, “Surface Rights: Form of Agreement,” 2011.

<http://www.stringam.ca/practice/surface-rights/> Surface rights lawyer Darryl Carter states his reason why he advises clients to request a right-of-entry order.

²⁴ Surface Rights Board, “How to Apply for a Board Compensation Order.”

<http://surfacerights.alberta.ca/ResolvingDisputes/SettlementAgreement/HowtoApplyforaBoardCompensationOrder.aspx>

In the event that a right-of entry order has been issued, but you and the company wish to enter a private surface lease agreement instead, the company can rescind the right-of-entry order by making a request to the board.

10.3.3 Recovery of rentals when company fails to pay

If a company fails to pay the money required by a right-of-entry order or compensation order, you should contact the company to request payment. If the company has not paid within 30 days after the due date, you should apply to the Surface Rights Board. The board will ask you to provide the name of the company, proof of the lease, and the date that rent was last paid. The board will prepare and require you to complete a statutory declaration stating, among other things, the name of the company, the amount of rent due, and the due date. The board will verify the information and, if correct, notify the company that it must pay (where the company can be traced). If the company fails to pay, the board may suspend or terminate the company's right of access under the surface lease or right-of-entry order.²⁵ After the right of access is terminated, the board can then make arrangements for you to receive payment for the lease from the Ministry of Environment and Parks via the General Revenue Fund (as provided for in the Surface Rights Act, section 36(6)). The Surface Rights Board will also contact the AER and ask them to deal with the well under their enforcement program (if the company is active) or the Orphan Well Association (for wells where no owner can be traced). You should continue to receive payment for the lease from the Ministry until the well and its site have been reclaimed, but you must continue to apply each year that a company fails to pay.

Recent SRB decisions have brought to question whether the SRB can make an order terminating access rights of a bankrupt company, and grant landowner coverage for lease payments. The SRB's ability to terminate a bankrupt company's right to access the site, and subsequently to reimburse the landowner for unpaid rentals, is a matter of *when* the unpaid rentals accrued and when the company was assigned into bankruptcy. If the unpaid rentals accrued before the company was assigned into bankruptcy (as in the case of *PetroGlobe Inc. v Lemke*), the SRB is not able to make an order to terminate the rights to a site. In later decisions, the SRB was able to proceed with terminating the rights to a site if rentals were due *after* the company was bankrupt (*Portas v PetroGlobe Inc*), which allowed the SRB to direct funds from the General Fund. This is due to the federal Bankruptcy Insolvency Act, which prevents the SRB from terminating the rights

²⁵ Surface Rights Act, s 36(5).

to a site in response to a company's declaration of bankruptcy. However, the SRB is still empowered to do so in response to unpaid rentals. In *Rodin v PetroGlobe*, rentals were accrued both before and after the company was received into bankruptcy, so the SRB was able to terminate its rights in response to unpaid rentals after bankruptcy, and subsequently the landowner was able to recover rentals from before and after the company filed for bankruptcy.²⁶ This issue will be of increasing importance if the number of companies declaring bankruptcy continues to grow.

10.3.4 Compensation hearing for damages

The Surface Rights Board can also hold a hearing in some cases where you and a company are unable to settle disputes about compensation for damage caused by the company's operations to land outside of the lease agreement (Section 11.3.3). Additionally, a claim may be made for damage to livestock or other personal property that occurs on your land, whether or not there is a right-of-entry order or surface lease agreement in place for the particular area. The claim can include the time spent in recovering livestock that have strayed, as a result of the company's activities.²⁷ Claims must be brought to the Surface Rights Board within two years and the total amount of the claim must be for less than \$25,000.

10.3.5 Rental review process

The Surface Rights Board has the power to increase, decrease or keep annual rent the same. Surface lease agreements can be negotiated every five years, and both the company and the landowner have the ability to file a compensation review (also known as a rental review) with the SRB. The operator is responsible for giving notice for the review to the landowner within 30 days after the anniversary of the fourth year of the right-of-entry order or the surface lease. If an agreement can't be reached, the party that wishes to have the rental amount changed must apply to the SRB for a compensation review. The request²⁸ should include

²⁶ The Farmers' Advocate Office provides a good summary of these decisions. Farmers' Advocate Office, "Clarity on Recent SRB Decisions Regarding Bankruptcy/Receivership."

[http://www1.agric.gov.ab.ca/\\$Department/deptdocs.nsf/all/ofa15889](http://www1.agric.gov.ab.ca/$Department/deptdocs.nsf/all/ofa15889)

²⁷ Surface Rights Act, section 30(1).

²⁸ Surface Rights Board, *Information Sheet: Guide to Review of Annual or Other Periodic Compensation* (2012).

- name and address of the operator and *lessor*/respondent
- current rate and proposed new rate of compensation
- copy of the surface lease and any other relevant documents
- the effective date of the review of compensation

A compensation review will only consider a change in loss of use, or a change in adverse effect. As a landowner or lessor requesting a compensation review, you must show evidence that there is a change in the loss of use and adverse effect from the last agreement. The SRB will look at the pattern of surface lease dealings of all the wells in the general area that were *drilled* the same year as the well in question. If the SRB does not see a pattern, it will look at the farm evidence to examine a change.

If the operator did not give notice to the landowner for a right of review, the SRB may award interest. Additionally, it may award reasonable costs that a landowner incurs by participating in the SRB proceedings.²⁹

10.4 Private Surface Agreements Registry

If you are able to reach a private surface agreement with a company without obtaining any board orders from the SRB (right-of-entry order or board compensation order) you are eligible to use the Private Surface Agreements Registry (PSAR) (see Section 2.3 for registering your private surface agreement, and Section C.1 for enforcement).

The AER-monitored PSAR gives landowners another recourse if a company fails to comply with parts of an agreement. If the operator fails to meet certain terms and conditions of a registered agreement, you can submit a section 64 request under the Responsible Energy Development Act (REDA).³⁰ If the Regulator determines that the company has not complied with the conditions of the agreement, the Regulator can order the company to comply. If the allegations have merit, the AER can issue a compliance order to the company. While the AER itself does not have the jurisdiction to enforce this order, it does have the ability to follow up with a fine or have the order

http://surfacerights.alberta.ca/Portals/0/Documents/Guide_to_Review_of_Annual_Compensation_Aug_2012.pdf

²⁹ *Information Sheet: Guide to Review of Annual or Other Periodic Compensation.*

³⁰ Alberta Energy Regulator, “Private Surface Agreements Registry.”
<http://www.aer.ca/applications-and-notice/private-surface-agreements-registry>

enforced by a court judgement should non-compliance continue.³¹ The PSAR can lend further legitimacy to your agreement and give you stronger legal position if you must go to court to address contract breaches.

More information about the PSAR and how to register is available on the AER's website.³²

³¹ Giorilyn Bruno, "Phase 2 of the Implementation of the Alberta Energy Regulator: The Private Surface Agreement Registry," *ABlawg.ca*, January 20, 2014. <http://ablawg.ca/2014/01/20/phase-2-of-the-implementation-of-the-alberta-energy-regulator-the-private-surface-agreement-registry/>

³² AER, *EnerFAQs: How to Register a Private Surface Agreement* (2015). <http://www.aer.ca/about-aer/enerfaqs/enerfaqs-psa>

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