PEMBINA Institute

Landowners' Guide
to Oil and Gas Development

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Section 9

Compensation and Surface Rights Access

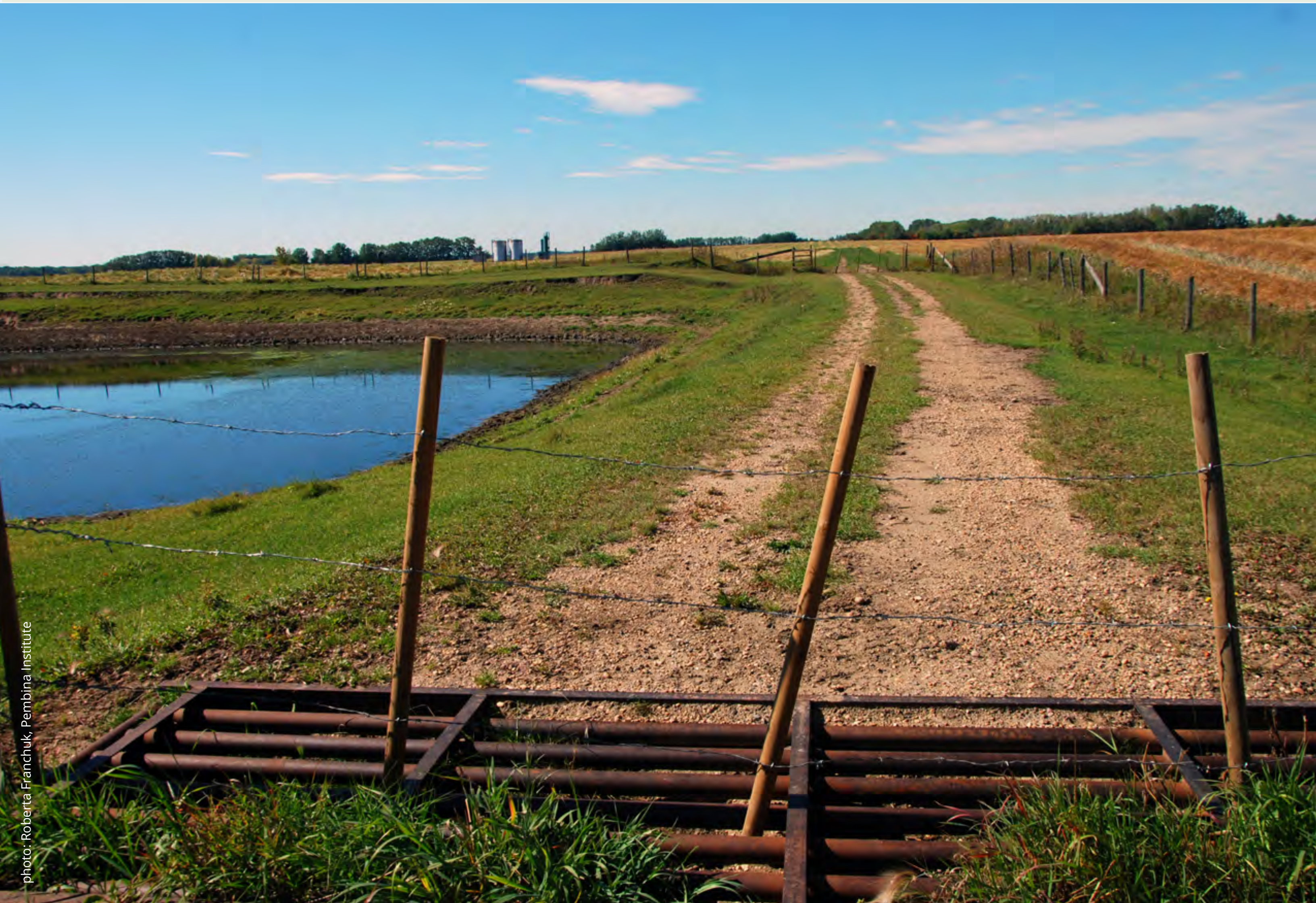

photo: Roberta Franchuk, Pembina Institute

9. 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 subsurface operations or pipeline siting. This section primarily focuses on compensation and the matters that determine compensation. Additionally, this section explains the role of the Land and Property Rights Tribunal 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 1, which deals with negotiation on matters other than compensation.

What's in this section

According to a guide published by the Alberta Land Institute, there is often confusion among 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 section provides information to empower you, the landowner, in the event that a company or the government requests access to your land for subsurface operations or pipeline siting.

9.1 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 to 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 government publication *Negotiating Surface Rights*.[5] A publication from the Alberta Energy Regulator (AER), *Proposed Oil and Gas Wells, Pipelines, and Facilities – EnerFAQ*,[6] also provides a summary of the compensation process and other topics outlined in this section. For a look at the life cycle of a typical well, watch the AER instructional video "What's in a Well's Life."[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

[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 for the same land. Alberta, *Public Lands Act*, RSA 2000, c. P-40, s. 25(b). https://open.alberta.ca/publications/p40

[5] Alberta Agriculture and Forestry, *Negotiating Surface Rights* (2009). https://open.alberta.ca/publications/4390211

[6] AER, *Proposed Oil and Gas Wells, Pipelines, and Facilities – EnerFAQ*. https://www.aer.ca/understanding-resource-development/enerfaqs-and-fact-sheets/enerfaqs-landowner

[7] AER, "What's in a Well's Life," YouTube, February 21, 2019. https://www.youtube.com/watch?v=eLM2gv4kSXE&t=15s

[8] Alberta, *Surface Rights Act*, RSA 2000, c. S-24, s. 19. https://open.alberta.ca/publications/s24

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 must also pay annual compensation. Regardless of whether right of entry is acquired by a private agreement or a right-of-entry order (discussed below), compensation for accessing and using the land should be determined in the same fashion, having regard to the compensation factors listed in section 25(1) of the Surface Rights Act and related judicial guidance.

In the first year, this compensation must take into account the following:

- 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, or 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

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.

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

Adverse effects refers to effects on the remaining land held. This might cover, but is certainly not limited to, the difficulties of farming close 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

[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 at Alberta Agriculture and Irrigation, *Agricultural Real Estate Transfers, Provincial Average: 2004–2023*. https://open.alberta.ca/publications/agricultural-real-estate-transfers-2004-2023

[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 intend to develop it. Land values will have within themselves a premium or discount depending on their location.

[12] *Surface Rights Act*, ss. 20 and 25.

fences onto the well site; and excessive noise, dust, or odour caused by the operations.[13] Adverse effects can be generalized as the costs associated with managing your field differently, the time taken away from your work, and the 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 right-of-way may, for example, restrict the options for subdivision, especially due to setback requirements. However, in many instances, one can still farm a portion of the lease and land next to an access road.

If you are unable to agree on the amount of compensation, you can temporarily refuse entry to your land. The company will then apply to the Land and Property Rights Tribunal for a right-of-entry order and the tribunal will determine the amount of compensation you are to receive (section 9.3). Even if you mostly agree on compensation, you may prefer to have the agreement formalized through the tribunal by requesting that the company obtain a right-of-entry order, instead of signing a surface lease privately with the company.

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; 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 Land and Property Rights Tribunal, who will then have the responsibility of making the company aware that the agreement is up for renegotiation. While the Land and Property Rights Tribunal 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 tribunal.[16]

[13] The decision *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 Land and Property Rights Tribunal may consider to be an adverse effect.

[14] *Surface Rights Act*, s. 27.

[15] *Surface Rights Act*, s. 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/

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 (Appendix B).

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 wells are no longer operating.

If a company breaks the terms of a surface lease, as the landowner, you can try to end the lease. For instance, if a company fails to pay compensation, you can request the Land and Property Rights Tribunal to terminate the company's right of access, which allows the tribunal to divert funds to cover rental costs until the well is reclaimed or the company resumes payments (see section 9.3.3).

However, the landowner doesn't always have to wait for the tribunal to act. Most leases say the company isn't "in default" right away if they miss a payment. The landowner first has to send them a written notice. After getting the notice, the company has 30 days to fix the problem. If they don't, the landowner can move to end the lease. For missed payments, it's important to send a written demand that gives the company a clear deadline (for example, 30 days) and warns that they'll lose their right of entry if they don't pay.

Landowners also have the right to file an application with the tribunal seeking compensation from the company for specific losses set out in section 30(1) of the Surface Rights Act, including damage to your land outside the area granted to the operator, loss or damage to livestock or personal property, or time or expenses spent recovering livestock that have strayed due to mistakes by the company.

The tribunal is entitled to adjudicate such matters and award up to a maximum of $50,000.00 if the application is filed within two years of the date the damages allegedly occurred. Seeking an

[17] Alberta, *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12, s. 144.

[18] *Negotiating Surface Rights*.

award from the tribunal does not preclude a landowner from seeking an additional amount through the courts.

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 a company is still operating but the tribunal has terminated or suspended their right of access, the company is still obligated to abandon the well and reclaim the site (section 8.2).

Watch out: Double compensation and overlapping rights of entry

There is a principle against double compensation which holds that a landowner is not entitled to be compensated twice for the same land area. While this is true, it doesn't mean that companies can skip getting proper overlapping rights of entry. If they fail to secure these rights, their new activity may constitute trespassing on your land.

Common examples:

- using the same road or lease area for a new well without new rights
- adding a second well on top of the first lease area without overlapping rights

Don't assume that land agents, licence issuers, or even the Land and Property Rights Tribunal always get this right. You can recover reasonable costs for hiring a lawyer or surface rights advocate — and it's usually a good idea to get help.

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 8.4). This non-profit association receives its funds primarily through a levy that all oil and gas companies must pay, and in part from provincial government loans.[20]

Despite obligations for a company to reclaim a site, insolvencies continue to add wells and facilities to the orphan well inventory.

9.2 Compensation for pipelines

Unlike compensation for wells, 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. Compensation is considered the value of land, plus a premium.

[19] *Surface Rights Act*, s. 36(8).

[20] Orphan Well Association, *Orphan Well Association 2024/25 Annual Report* (2025), 11. https://cdn.prod.website-files.com/66a3c445f4f5971ff979146e/68768ee501afb09ac3465afc_OWA%20Annual_2024-25_Web.pdf

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.

Where you and the company are unable to agree on the amount of compensation, the company may ask the Land and Property Rights Tribunal to resolve the issue (see below). 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 tribunal (section 9.3.2). 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, cleanup, or other issues) to be settled without going to court. However, it is also possible to bring disputes relating to damage of the right-of-way to the Land and Property Rights Tribunal, provided that the damages are recognized within two years and amount to less than $50,000 (section 9.3.4).

9.3 The role of the Land and Property Rights Tribunal

The Land and Property Rights Tribunal 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 10.3.3). Cost awards for time and incurred expenses are also granted by the tribunal, with an example cost tracking sheet provided in Appendix C.

An operator and a landowner can also enter into a voluntary agreement for land access without involving the Land and Property Rights Tribunal. These agreements typically fall into two categories:

- **Surface lease agreements** — used for well sites, facility sites, pipeline riser sites, and other upstream oil and gas operations. These agreements grant the operator surface access to a defined area of land. Depending on the terms, landowners' or occupants' access to the leased area may be restricted for safety or operational reasons.
- **Right-of-way agreements** — apply to buried pipelines or overhead power transmission lines, granting the operator the right to install and maintain linear infrastructure across the land.

9.3.1 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 Land and Property Rights Tribunal after they've received project approval 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 tribunal must grant the company a right-of-entry order if the AER has approved the project.

If you do need to go before the tribunal 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 Land and Property Rights Tribunal, the operator must first pay the entry fee and 80% of the last written offer (which may not be the last best offer). The tribunal will then facilitate a dispute resolution conference or determine the amount of compensation payable through a compensation hearing (section 9.3.4).

The Land and Property Rights Tribunal also deals with issues relating to right of entry onto agricultural leases on public land for seismic operations (section 3.1).

9.3.2 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 Land and Property Rights Tribunal by requesting that the company obtain a right-of-entry order.

Some people choose this option as they consider that a right-of-entry order by the tribunal protects their rights better than signing a private surface lease agreement or easement form prepared by the company.[21] This option has mostly fallen out of practice, as there may be additional protection from registering your private surface agreement with the AER.

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 tribunal 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 tribunal, instead of having to go to court. In the case of pipelines, a right-of-entry order enables a landowner to go to the tribunal with a claim for compensation for any damage that occurs

[21] Stringam LLP, "16 Reasons Why a Right-of-Entry Order is Better than a Surface Lease or Easement," 2017. https://stringam.ca/2017/09/22/16-reasons-right-entry-order-better-surface-lease-easement/

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 tribunal having to set the rate, you can choose to have the agreement formalized through a compensation order (section 10.3.3).[22] 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.

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 tribunal.

9.3.3 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 Land and Property Rights Tribunal. The tribunal will ask you to provide the name of the company, proof of the lease, and the date that rent was last paid. The tribunal 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 tribunal will verify the information and, if correct, notify the company that it must pay (when the company can be traced). If the company fails to pay, the tribunal may suspend or terminate the company's right of access under the surface lease or right-of-entry order.[23] After the right of access is terminated, the tribunal can then make arrangements for you to receive payment for the lease from the Ministry of Environment and Protected Areas via the General Revenue Fund (as provided for in the Surface Rights Act, section 36(6)). The Land and Property Rights Tribunal 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.

9.3.4 Compensation hearing for damages

The Land and Property Rights Tribunal 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

[22] Alberta, "Right of entry order – Compensation." https://www.alberta.ca/surface-right-of-entry-compensation

[23] *Surface Rights Act*, s. 36(5).

operations to land outside of the lease agreement (section 10.3.3). 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.[24] Claims must be brought to the Land and Property Rights Tribunal within two years and the total amount of the claim must be for less than $50,000.

9.3.5 Rental review process

The Land and Property Rights Tribunal 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 are able to file a compensation review (also known as a rental review) with the tribunal. 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 can apply to the tribunal for a compensation review. The request should include

- 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[25]

A compensation review focuses on a change in loss of use or a change in adverse effect. As a landowner or lessor requesting a compensation review, you should show evidence that there is a change in the loss of use or adverse effect from the last agreement. The tribunal 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 tribunal 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 tribunal may award interest. Additionally, it may award reasonable costs that a landowner incurs by participating in the tribunal proceedings.[26]

[24] *Surface Rights Act,* s. 30(1).

[25] Alberta, "Surface rights – Review the rate of compensation." https://www.alberta.ca/surface-rights-board-compensation-review

[26] Surface Rights Board, *Information Sheet: Guide to Review of Annual or Other Periodic Compensation* (2012). https://open.alberta.ca/publications/information-sheet-guide-to-review-of-annual-or-other-periodic-compensation

9.4 Private Surface Agreements Registry

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

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.[27] 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 physically enforce this order, it does have the ability to follow up with a fine or have the order enforced by a court judgement should non-compliance continue.[28] 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.[29]

[27] AER, "Private Surface Agreements Registry." http://www.aer.ca/applications-and-notices/private-surface-agreements-registry

[28] 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 /

[29] AER, "How to Register a Private Surface Agreement – EnerFAQ." https://www.aer.ca/understanding-resource-development/enerfaqs-and-fact-sheets/enerfaqs-private-surface-agreement

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