

APPEALED

File No. RE 2005.0153

Decision No. 2006/0067

SURFACE RIGHTS ACT
RSA 2000
Chapter S-24
(hereinafter "the Act")

Before:

SURFACE RIGHTS BOARD
(hereinafter "the Board").

IN THE MATTER OF certain lands within the North East Quarter of Section 24, Township 49, Range 9, West of the 5th Meridian, in the Province of Alberta, as described in Certificate of Title No. 052 123 840 (hereinafter referred to as "the said land").
Excepting thereout all Mines and Minerals.

B E T W E E N:

TRUE ENERGY INC.,

Operator,

- and -

NIGEL ANDREW KITCHING,
FARM CREDIT CANADA
and
RESPONSE ENERGY CORPORATION,

Respondents.

D E C I S I O N

Order No. 1593/2005 granting right of entry to the Operator was issued by the Board October 24, 2005, as amended by Order No. 1754/2005, dated December 8, 2005.

The land subject to the said Order is 1.94 acres for a well site and roadway in the said land as shown on the plan attached to the Order.

A hearing was held by the Board on February 27, 2006, at Drayton Valley, Alberta.

The Board inspected the area subject to the said Order on February 27, 2006.

PRESIDING BOARD:

- H. R. Watson, Presiding Chair
- C. W. Downey
- R. G. Pollock

APPEARANCES:

For the Operator:

- Allan Gagne, Senior Surface Landman, with True Energy Trust;
- Ronald C. Swist, B.A., LL.B., and Heidi Meldrum, B.Comm., LL.B, both of the law firm Swist & Company, Legal Counsel;

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For the Operator (cont'd.):

- Darcy White, Petroleum Landman, of White Land Consulting Ltd., Land Agent; and
- Robert J. Telford, B.Sc., AACI, P.App., P.Land, Land Consultant and Appraiser, with McNally Land Services Ltd.

For the Respondents:

- Nigel Andrew Kitching, Landowner;
- Roy W. Elander of the law firm Roy W. Elander Law Office, Legal Counsel;
- Robert A. Berrien, P.Ag., A.R.A., President, Berrien Associates Ltd., Appraisers; and
- Fred Weber, Consultant, with Shermac Farm Developments Limited.

The other Respondents were not represented although duly notified of the hearing.

EXHIBITS FILED:

Exhibit 1: Operator's presentation and supporting documents.

Exhibit 2: Survey plan of subject well site and roadway.

Exhibit 3: True Energy Inc.'s photo mosaic.

Exhibit 4: Copy of Plan No. 892 1631.

Exhibit 5: Surface Lease Compensation Report, prepared by McNally Land Services Ltd.

Exhibit 6: Appraisal of Compensation under the *Surface Rights Act*, prepared by Berrien Associates Ltd.

Exhibit 7: Respondent's presentation and supporting documents.

Exhibit numbers 1 to 5, inclusive, were filed for the Operator. Exhibit numbers 6 and 7 were filed for the Respondent Nigel Andrew Kitching.

The hearing was called to order on or about 1:30 p.m. Introductions took place and the oath was administered to those giving evidence.

The Chair established that the Operator had complied with the requirements of the *Surface Rights Act* in that they had paid to the Respondent in October 2005, 80% of their final written offer, as well as entry fee for the well site and roadway. The Operator indicated that the amount of \$5,854.00 had been paid.

SUMMARY OF THE EVIDENCE:

Operator's Evidence:

The Operator apprised the Board of the current status of the well and its history, dating back to 1957, noting the fact that in 1962 the use of the well changed. At that time the existing facilities were installed on the site and it became a water disposal well rather than a production well. Currently about 12 local wells dispose their waste water in this well by means of a pipeline.

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It was explained to the Board that a surface lease has never existed for this well site and roadway as the owners, of which there were a few, have until recently owned the surface title to the land. The original Well License No. 14301 was issued by the predecessor of the Alberta Energy and Utilities Board to Whitehall Canadian Oils Ltd. on October 22, 1957. It was indicated that in 2003-2004, TKE Energy Inc. (now True Energy Inc.) conducted unsuccessful negotiations with Response Energy Corporation endeavouring to secure a surface lease for the subject site. No agreement was reached.

Subsequent to the foregoing, on April 5, 2005, the Respondent Nigel Andrew Kitching purchased the NE ¼-24-49-9-W5M, being 143.30 acres for a price of \$1,605.00 per acre.

On September 7, 2005, TKE Energy Inc. (TKE) applied for a right of entry order listing both Nigel Andrew Kitching and Response Energy Corporation as Respondents.

On September 30, 2005, TKE filed a new right of entry application for a water disposal well and roadway. Right of Entry Order No. 1593/2005 was subsequently issued by the Board on October 24, 2005.

On November 2, 2005, TKE Energy Inc. and True Energy Inc. amalgamated to form True Energy Inc.

The Operator indicated that the Respondent had been verbally abusive toward their land staff and negotiations had been difficult. An onsite meeting between Allan Gagne of True Energy Trust, Robert Telford of McNally Land Services Ltd., Doug MacKenzie of Shermac Farm Developments Limited and the Respondent, took place on February 6, 2006. The Operator's final offer to the Respondent is as follows:

Value of Land: \$1,500.00 per acre x 1.94 acres	\$2,910.00
Loss of Use: \$250.00 per acre x 1.94 acres	485.00
General Disturbance:	1,200.00
Adverse Effect:	<u>1,510.00</u>
Total Initial Compensation:	<u>\$6,105.00</u>

Entry Fee: \$970.00

Total Annual Compensation:..... \$1,995.00

The Operator described the well site as being located on the north-east corner of the quarter section on a small parcel of land approximately five acres in size. It is completely severed from the balance of the quarter by the Pembina River. It is located approximately nine miles north west of the Town of Drayton Valley and travelling by road, located approximately seven miles from the balance of the quarter, which is not a home quarter.

Facilities on site are minimal, made up primarily of a small low profile fibreglass structure and a propane tank on a pad. It was indicated that under normal circumstances an operator visited the site for an inspection once a day.

The Operator, in considering this property in light of the Municipal Development Plan criteria, cited the following:

1. There are significant naturally occurring permanent features that sever this parcel of land, of which the well site and roadway are part, from the balance of the quarter.
2. These features make it impractical to utilize this property for normal agricultural practices unless it be leased out for limited grazing by a neighbouring livestock owner.
3. If this site were to be considered for residential use, it would have to be examined by the Regional Planning Authority and issues of sewage disposal and seepage considered, given its proximity to the Pembina River.

Comparables:

A number of lease comparables were presented for the Board's consideration, seven of which were within approximately one mile of the subject site. The Operator came up with a mean average as follows:

Land Value (per acre):	\$1,456.00
Loss of Use (per acre):	\$236.00
Adverse Effect:	\$1,818.00
Other Factors (general disturbance):	\$2,009.00

The Operator then adjusted upwards their offer of compensation to the Respondent as follows:

Value of Land: 1.94 acres @ \$1,600.00 per acre	\$ 3,104.00
Loss of Use: 1.94 acres @ \$250.00 per acre	485.00
Adverse Effect:	2,000.00
General Disturbance:	<u>1,250.00</u>
Total Final Offer:	\$6,839.00 rounded to: <u>\$6,845.00</u>
 Total Annual Compensation:	 \$2,485.00

Respondent's Evidence:

Mr. Berrien reviewed his report (Exhibit 6), beginning with a description of the subject site and adjacent land. The portion of the quarter in total owned by the Respondent is 143.30 acres more or less, crisscrossed by the Pembina River. The well site and roadway comprising of 1.94 acres, is located on a triangular corner in the north-east extremity of the quarter. This corner is approximately five acres in size and naturally subdivided from the balance of the quarter by the Pembina River. The site is high bank river frontage with a commanding view over the lower area on the opposite side of the river.

Agriculture would be a doubtful use for this corner property even if the well site and roadway were not there. The property is bounded by the river on one side and road allowances on the other two sides. A gravel municipal road services the site and power is at hand nearby. It must be noted that other acreage developments relative to rural residential are numerous in the area.

The consultant contended that this corner property on which the site is situated is an ideal housing potential lot and would have been so developed were it not for the well site and roadway. In short, the highest and best use for this area is different than that of the balance of the quarter, in that it is clearly best suited for country residential.

On the basis that the subject site and adjacent area, being five acres in all, is best suited for country residential, the Respondent presented the Board with 14 comparable acreage land sales from the general area. After reviewing these comparables, which fell in the range of \$4,072.00 to \$12,125.00 per acre, the Respondent concluded that given the singularly above average potential of the subject five acres upon which the well site and roadway is located, that its value should be set at \$12,000.00 per acre, or \$64,000.00 for the parcel. The consultant indicated that probably one of the most appropriate means of arriving at fair and suitable compensation would be to follow the precedent set in the taking of complete quarter sections for the mining of coal in the Forestburg area.

Reference was made to Surface Rights Board Decision No. E281/85 and its appeal and the subsequent decision of Court of Queen's Bench *Alberta Power Ltd. v. Kneeland (1987) 38 L.C.R., pp. 324-328*, wherein the *principle of substitution* of value was employed. This, in essence, would mean the value of the land, being \$64,000.00, would be paid to the Respondent on a one-time basis and no further payment would be forthcoming. An alternative to the foregoing would be to use the rate of return approach wherein the normally accepted rate of return on commercial, being 10%, would be paid out to the Respondent annually. In summary, an initial general disturbance fee would be paid to the Respondent in addition to an annual payment equalling 10% of the land value, or \$6,400.00.

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The Respondent personally presented the Board with Exhibit 7, which outlined the many problems he had experienced with TKE Energy Inc.'s representatives. Further, he provided the Board with photographs of garbage found in the well site area, specifically a dead dog, a deer skeleton and a T.V. The Respondent further speculated that pollution could be occurring from the wellhead and indicated that he was instrumental in encouraging the Operator to construct a new berm to contain spills should they occur.

Eight comparisons were presented to the Board from other lands owned by the Respondent. The annual compensation of seven of them ranged from \$3,000.00 to \$4,321.00. One muskeg site of 16.84 acres attracted an annual payment of \$9,625.00.

The Respondent indicated his contact with various information sources and consultants had given him a better realization of the compensation he should be receiving. Various pictures were presented to the Board illustrating acreage developments in the area.

The Respondent highlighted advice he received from one consultant advising him that a 10% return on commercial properties was the norm and this could prove a suitable comparison for him to go by. Another consultant postulated that a \$7,000.00 per acre value should be placed on the well site and roadway, as well as the additional three acres that is neutralized for development by the presence of the well site.

Summary by the Operator:

The Operator in responding to the values placed on the site by the Respondent, being \$64,000.00 for the five acre parcel, reminded the Board that this quarter had been purchased by the Landowner the previous year for an en bloc value of \$1,605.00 per acre, so the value of the land has been established in the current timeframe by the marketplace. Further, the well site was in place when the Respondent purchased the land, so he was very well aware of its existence even though a surface lease to cover it did not. It was indicated that True Energy Inc. had a clear picture of what went on with the subject well since 1957, and that it had been appropriately licensed as a disposal well since 1962.

Summary by the Respondent:

The Respondent emphasized that what we are dealing with is not a quarter section of land, but a naturally subdivided five acre parcel. Again, the poor efforts of the company in communicating and responding to the Landowner were mentioned.

The request for compensation was based on a "principle of substitution" for the value of the five acre site which encompasses the 1.94 acre well site and roadway, or a 10% return on the value of the land plus general disturbance of \$5,000.00.

In summary, land value of the five acre parcel \$64,000.00, pay this amount with no further payments or alternatively, pay 10% of this amount annually, this being \$6,400.00.

The sum of \$5,000.00 for general disturbance was requested if either of the above stated scenarios was employed.

* * * * *

What the Board may consider in determining compensation is set out at section 25 of the *Act*, and having heard and considered the evidence of the parties, and having read the exhibits filed, the Board makes the following findings and determinations.

DETERMINATION OF COMPENSATION:

The Board having reviewed the evidence and having inspected the area prior to the hearing concurs with the Respondent that the well site and roadway along with more or less three acres adjacent to it, are an extremely attractive, naturally occurring five acre subdivision with a commanding view of the area to the west and south. It was further noted that given the numerous acreage developments in the area, it follows that in all likelihood there is market demand for this type of property. Therefore, the Board noting that this well site is in the middle of this naturally occurring

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five acre parcel, recognizes that it is neutralizing the site for its highest and best use. For purposes of valuation and annual compensation, the Board will regard this site on the basis of a 1.94 well site and roadway and the 3.06 acres adjacent to it as being impacted by the well facility and justifiably worthy of comparable compensation.

The Board rejects the formula for compensation proposed by the Respondent. However, the Operator's offer for adverse effect is inadequate and does not take into consideration the fact that the well site and roadway have a significant adverse effect on the remaining 3.06 acre portion of land with a residential highest and best use. The adverse impact of a well site and roadway on this land is not comparable to the adverse effect on land with an agricultural highest and best use.

Accordingly, the Board is of the view that the first year compensation should take into consideration the land value of the remaining 3.06 acre portion as a means of calculating an additional adverse effect component.

On the question of the valuation of the property on the *principle of substitution*, the Board rejects this concept noting that while s.25(2) of the *Surface Rights Act* states: *...the Board may, in determining the compensation payable, ignore the residual and reversionary value to the owner...* in this case chooses not to ignore the residual and reversionary value to the owner. The Board must also consider the fact that this parcel of land sold only last year in a free and open market for an en bloc value of \$1,605.00 per acre. No evidence was brought forward for the Board's consideration that would indicate that this five acre parcel in question, was given special mention in the en bloc sale of the subject quarter of land.

The Board finds that the Operator's offer for loss of use to be reasonable under the circumstances. However, the offer for general disturbance is low in the Board's view.

The Board finds reasonable and fair compensation to be as follows:

First Year Compensation

Land Value: 1.94 acres x \$1,605.00 per acre	\$3,113.70
General Disturbance:	2,000.00
Loss of Use: 1.94 acres x \$250.00 per acre	485.00
Adverse Effect:	4,000.00
Additional adverse effect based on adjacent and impacted land 3.06 acre x \$1,605.00	<u>4,911.30</u>
Total First Year Compensation:	\$14,510.00

Annual Compensation

Loss of Use: \$250.00 per acre x 1.94 acres	\$ 485.00
Adverse Effect:	<u>4,000.00</u>
Total Annual Compensation:	\$4,485.00

TO WHOM THE COMPENSATION IS PAYABLE:

The Board finds that the compensation as determined hereinbefore is payable to Nigel Andrew Kitching.

INTEREST:

The Board considers that it is proper to award interest on the compensation payable by the Operator from the date of the right of entry until payment in full, having regard to the part payment made by the Operator; and that the appropriate rate for that period pursuant to section 25(9) of the *Act* is 3.25% per annum.

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COSTS:

In considering costs, it is the Board's opinion that the fundamental principle in fixing costs is that a party entitled to an award of costs is entitled to be reimbursed for any reasonable costs reasonably incurred in and incidental to the proceedings before the Board, and necessary to the determination of fair compensation payable for that which gave rise to the proceedings.

Mr. Kitching requested costs as follows:

Personal Costs	\$10,906.40*
Berrien Associates Ltd.	10,783.97
Shermac Farm Developments Limited	2,626.90
Legal Costs	<u>3,800.00</u>
Total Costs	\$28,117.27

*(The Board notes an error in calculation, the amount should be \$11,398.60)

The Board considered Mr. Kitching's personal costs excessive in that he had also engaged two consultants and a solicitor to deal with the matter.

Costs are awarded as follows:

Personal Costs	\$2,500.00
Berrien Associates Ltd.	7,000.00
Shermac Farm Developments Limited	1,800.00
Legal Costs	<u>3,100.00</u>
Total Costs:	\$14,400.00

ORDER:

An Order will issue determining and fixing the compensation payable by the Operator as set out below.

The compensation payable by the Operator in respect of Right of Entry Order No. 1593/2005 shall be as follows:

- (a) For the period October 24, 2005, to October 23, 2006, the sum of \$14,510.00, less \$4,884.00 part payment made;

TOGETHER WITH INTEREST calculated at the rate of 3.25% per annum on \$9,626.00, from October 24, 2005, until paid in full; and

- (b) After October 23, 2006, and so long as the said Order No. 1593/2005 is in effect, for each year or portion thereof, the sum of \$4,485.00, to be paid on or before October 24, 2006, and on or before the 24th day of October in each year thereafter;

which amounts are payable to Nigel Andrew Kitching.

THEREFORE, the Operator shall forthwith pay to Nigel Andrew Kitching the sum of \$14,510.00, less \$4,884.00 part payment made together with interest calculated as directed above.

Costs of and incidental to the proceedings under the *Act* are fixed in the sum of \$14,400.00, payable to Nigel Andrew Kitching.

Dated at the City of Edmonton in the Province of Alberta this 10th day of May, 2006.

SURFACE RIGHTS BOARD

MEMBER