

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 South West Quarter of Section 22, Township 71, Range 4, West of the 6th Meridian, in the Province of Alberta, as described in Certificate of Title No. 052 404 152 +2 (“the Land”).
Excepting thereout all Mines and Minerals.

BETWEEN

DEFIANT RESOURCES CORPORATION,

Operator,

- and -

JERRY LEE DORSCHIED,
VIOLET DORSCHIED
and

THE COUNTY OF GRANDE PRAIRIE NO. 1,

Respondents.

DECISION

Order No. 0009/2007 granting right of entry to the Operator was issued by the Board on January 3, 2007.

The Land subject to the Order is 4.16 acres for a well site, 8.47 acres for an access road, 1.0 acre for work space and 0.37 acre for a log deck, as shown on the plan attached to the Order.

The Board scheduled a hearing in Grande Prairie, Alberta, on December 4, 2007, pursuant to Section 23 of the Act to determine the amount and to whom compensation is payable.

PRESIDING BOARD

- Edward V. Zenko, Presiding Chair
- Gregg A. Hook
- N. Allen Maydonik, Q.C.

N. Allen Maydonik Q.C. sat as a Panel Member of the Board at the Hearing. He was unavailable to complete the Board’s deliberations and decision writing process. Therefore the Board completed this Decision with two Members.

APPEARANCES

- For the Operator:
- Jeremy H. Hockin, with Parlee McLaws LLP, Legal Counsel;
 - Heidi Meldrum, with Parlee McLaws LLP, Legal Counsel;
 - Lorne Pudsey, Manager, Scott Land & Lease Ltd., Land Agent; and

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| For the Operator (cont'd.) | - John F. Wasmuth, AACI, P.App., P.Ag., CAC, , President, with Canadian Resource Valuation Group Inc. |
| For the Respondents: | <ul style="list-style-type: none"> - J. Darryl Carter, Q.C., with Darryl Carter & Company, Legal Counsel; - Jerry Lee Dorscheid, Landowner; - Violet Dorscheid, Landowner; - Sidney G. Cumming, AACI, P.App., CPPA, Manager, with Pomeroy Valuation Group Ltd.; and - Bruce Beairsto, Alberta Land Surveyor, Beairsto Stewart Wier Engineering Limited. |

The other Respondent was not represented although duly notified of the hearing.

BACKGROUND

The Operator entered into negotiations with Jerry Lee Dorscheid and Violet Dorscheid (the "Respondents") to obtain a surface lease to install a well site and access road on the Respondents' land. During the negotiations the Respondents advised the Operator that the Respondents had plans to subdivide the property and were concerned about the effect that the well site and access road would have on those plans. The Respondents believed that an oral agreement was reached but the Operator did not produce a written agreement reflective of the negotiations. The Operator made a final offer to the Respondents which was rejected. The Operator subsequently obtained a Right of Entry Order and the Board held a hearing in Grande Prairie, Alberta, on December 4, 2007, to determine the amount and to whom compensation is payable.

ISSUES TO BE DECIDED

1. What is the appropriate amount of compensation payable by the Operator?
2. To whom is compensation payable?

RELEVANT LEGISLATION

Interpretation Act, R.S.A. 2000, Chapter I-8

Majority and quorum

17(1) If in an enactment an act or thing is required or authorized to be done by more than 2 persons, a majority of them may do it.

(2) If an enactment establishes or continues a board,

(a) at least 1/2 of the number of members provided for under the enactment constitutes a quorum at a meeting of the board;

(b) an act or thing done by a majority of the members of the board present at a meeting, if the members present constitute a quorum, is deemed to have been done by the board;

(c) a vacancy in the membership of the board does not invalidate the constitution of the board or impair the right of the members of the board to act, if the number of members is not less than a quorum.

(3) In subsection (2), "board" means a board, commission or other body, whether incorporated or not, consisting of 3 or more members.

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*Surface Rights Act RSA 2000, Chapter S-24***Compensation hearing**

23(1) Forthwith on making a right of entry order, the Board shall give notice to the operator and each respondent of the date on which it will hold a hearing to determine the amount of compensation payable and the persons to whom it is payable.

(2) The compensation hearing shall be scheduled for a date that is not more than 90 days after the date the right of entry order was made.

(3) The Board shall make a compensation order not more than 60 days after the date on which the compensation hearing concluded.

(4) On notice to the parties, the Board may, if it considers it necessary to do so, extend the time limits referred to in subsections (2) and (3).

1983 cS-27.1 s23;1987 c2 s8

Determining Compensation

25(1) The Board, in determining the amount of compensation payable, may consider

- (a) the amount the land granted to the operator might be expected to realize if sold in the open market by a willing seller to a willing buyer on the date the right of entry order was made,*
- (b) the per acre value, on the date the right of entry order was made, of the titled unit in which the land granted to the operator is located, based on the highest approved use of the land,*
- (c) the loss of use by the owner or occupant of the area granted to the operator,*
- (d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,*
- (e) the damage to the land in the area granted to the operator that might be caused by the operations of the operator, and*
- (f) any other factors that the Board considers proper under the circumstances.*

(2) Where the right of entry order to which the compensation relates is made on or after July 4, 1983, the Board may, in determining the compensation payable, ignore the residual and reversionary value to the owner or occupant of the land granted to the operator.

(3) Where an owner or purchaser of land is required to relocate the owner's or purchaser's residence as a result of the making of a right of entry order, the Board shall, on application and after determining the amount of compensation payable, determine the additional amount that, in the opinion of the Board, is necessary in order to enable the owner or purchaser to relocate the owner's or purchaser's residence in accommodation that is at least equivalent to the accommodation on the land in respect of which the right of entry order is made.

(4) In fixing the additional amount of compensation under subsection (3), the Board shall include the increase in cost between the date on which the right of entry order was made and the time when the new accommodation can reasonably be obtained.

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(5) *In making a compensation order, the Board may also determine the amount of compensation payable by the operator*

- (a) *for damage caused by or arising out of the operations of the operator to any land of the owner or occupant other than the area granted to the operator, if those operations were incidental to the operations of that operator on the area granted to the operator under the right of entry order,*
- (b) *for the loss of or damage to livestock or other personal property of the owner or occupant caused by or arising out of the operations of the operator, and*
- (c) *for time spent or expense incurred by the owner or occupant in recovering any of the owner's or occupant's livestock that have strayed due to an act or omission of the operator,*

and shall determine the person to whom the compensation is payable.

(6) *When the Board makes a compensation order, it shall offset the amount paid as part payment of compensation to the respondent under section 20 or to the Board under section 22 against the total compensation it determines to be payable to the respondent, and*

- (a) *in a case where the money was paid to the respondent under section 20,*
 - (i) *if the amount the Board determines to be payable exceeds the amount paid, it shall order the operator to pay the difference to the respondent, and*
 - (ii) *if the amount paid exceeds the amount the Board determines to be payable, it shall order the respondent to pay the difference to the operator, and*
- (b) *in a case where the money was paid to the Board under section 22,*
 - (i) *if the amount the Board determines to be payable exceeds the amount paid, it shall pay to the respondent the money paid to the Board and order the operator to pay the difference to the respondent, and*
 - (ii) *if the amount paid exceeds the amount the Board determines to be payable, it shall pay to the respondent the money the respondent is entitled to and refund the difference to the operator.*

(7) *In determining the amount of compensation payable, the Board may fix certain amounts payable in the manner and over the periods the Board decides.*

(8) *Notwithstanding any other Act, if no thoroughfare exists on a road allowance prescribed under the Surveys Act and no disposition of the road allowance has been made to any person, an operator has the right to use the road allowance for the purpose of gaining access to the operator's drilling or mining operation without payment of compensation to the Crown or to the municipal corporation having the direction, control and management of the road allowance.*

(9) *The Board may order the operator to pay interest on any or all of the compensation payable on and from the date the right of entry order was made, at the Bank of Canada rate on the date the right of entry order was made.*

1983 cS-27.1 s25

PRELIMINARY MATTERS

There were no preliminary matters.

EXHIBITS FILED

- Exhibit 1: Binder of Evidence by Operator.
- Exhibit 2: Five (5) photographs of subject property taken by Operator in August 2007.
- Exhibit 3: Eight (8) pages of photographs taken by Lorne Pudsey on November 20, 2007.
- Exhibit 4: Offer by Operator.
- Exhibit 5: Operator documents on Halwa Farms Ltd. property.
- Exhibit 6: Appraisal Report by John F. Wasmuth of Canadian Resource Valuation Group Inc., dated November 27, 2007.
- Exhibit 7: Page 34 excerpt from *Expropriation in Canada* by Boyd.
- Exhibit 8: Tentative Subdivision Outline Plan.
- Exhibit 9: Appraisal Report by Sidney G. Cumming of Pomeroy Valuation Group Ltd., dated April 3, 2007.
- Exhibit 10: Map of en bloc comparables.
- Exhibit 11: Operator Business Cards.
- Exhibit 12: Photos of subject property.
- Exhibit 13: Country Road Specifications.
- Exhibit 14: Violet Dorscheid Testimony.
- Exhibit 15: Letter from J. Darryl Carter, Q.C., dated March 27, 2007.
- Exhibit 16: Operator's Proposed Development, dated September 14, 2006.
- Exhibit 17: Operator's Right of Entry Application, dated November 16, 2006.
- Exhibit 18: Borrow Pit Agreement.
- Exhibit 19: Release Form for Borrow Pit fencing.
- Exhibit 20: Land Agents Licensing Regulation.
- Exhibit 21: Ken Wilson Contracting Ltd. quote.
- Exhibit 22: Violet Dorscheid's notes.
- Exhibit 23: Section 25 of the *Surface Rights Act*.

Exhibit numbers 1 to 3, inclusive, and 6 were filed for the Operator. Exhibit numbers 4, 5 and 7 to 23 inclusive, were filed for the Respondents.

POSITION OF THE OPERATOR

The Operator provided evidence of its Right of Entry Order (Exhibit 1, Tab 2), its Last Offer (Exhibit 1, Tab 4) and proof of payment of 80% of the Last Offer and the Entry Fee (Exhibit 1, Tab 5).

Mr. Pudsey provided evidence from a personal visit to the subject property and from notes made by the Operator's land agent who had been involved in the negotiations with the Respondents. As at the effective date of the Right of Entry Order the land was being used for agricultural purposes. Evidence was provided on eight comparable surface leases reflecting land values ranging from \$2,500.00 to \$1,500.00 per acre, loss of use ranging from \$250.00 to \$300.00 per acre, general disturbance ranging from \$2,500.00 to \$1,800.00 and adverse effect ranging from \$2,250.00 to \$1,600.00 (Exhibit 1, Tab 7). The Operator submitted that these comparables established a pattern

of dealings in the area. On cross examination Mr. Pudsey admitted that there could be additional value to the taker on the comparable leases. On redirect questioning Mr. Pudsey distinguished the Halwa property (Exhibit 5) due to a potential ring road construction and it also involved a time pressure due to a pending mineral right expiration.

Mr. Wasmuth provided evidence from his Appraisal Report which concluded that the highest and best use of the Land at the effective date was a holding property pending country residential development, and the highest approved use was agricultural (Exhibit 6). He testified that considering many factors the further subdivision of the Respondents' property in the near future is highly improbable and the Respondents had not made any application for subdivision or for rezoning of the property. The value of the Land is \$1,700.00 per acre based on the comparison of en bloc sales of comparable land in the area to which he made several adjustments (Exhibit 6, Page 33).

The Operator is requesting an order for compensation as follows:

Land Value: \$2,500.00 per acre x 12.63 acres	\$ 31,575.00
Loss of Use: \$300.00 per acre x 12.63 acres	\$ 3,789.00
Adverse Effect:	\$ 3,211.00
General Disturbance:	\$ <u>2,500.00</u>

Total First Year Payment: \$41,075.00

Entry Fee:.....	\$ 5,000.00
Temporary Workspace: 1.00 acres	\$ 2,500.00
Log Deck: 0.37 acres	\$ 925.00

**Total First Year Payment
with Entry Fee, Temporary Workspace and Log Deck: \$49,500.00**

Annual Rental: \$ 7,000.00

Counsel for the Operator argued that the Board should award compensation based solely on the pattern of dealings evidence presented.

POSITION OF THE RESPONDENTS

The Respondents testified that subdivision of the property was a retirement fund and two lots had already been subdivided and sold. The Operator's actions have negatively impacted future subdivision. The Respondents provided evidence of an oral agreement which the Respondents believed they had with the Operator to deal with the concerns of the Respondents, but which did not materialize (Exhibit 4). The hill in the southwest corner of the property was not to be disturbed, a borrow pit was to be constructed to remove clay for fill in the low lying areas and the well was to be flared in an incinerator. As well, the Operator was to contribute \$200,000.00 to construct the access road to County standards and as designed by Mr. Beirstro. It was in anticipation of that agreement that the Respondents provided entry to the Land to the Operator.

The Respondents provided evidence on the adverse effect to their development plans, particularly of the access road and of the disturbance to a hill in the area of the well site. Mr. Beirstro provided evidence that the access road was specifically designed to accommodate future subdivision of the property according to the Tentative Subdivision Outline Plan which he prepared for the Respondents (Exhibits 8).

Mr. Cumming submitted that the value of the Land as a hypothetical small parcel rather than the en bloc value presented by the Operator is \$13,500.00 per acre (Exhibit 9). His value for the entire property is \$3,000.00 per acre. The Respondents also presented the Halwa Farms Ltd. comparable agreement involving the Operator which reflected first year compensation in excess of \$50,000.00 and \$4,500.00 for each subsequent year (Exhibit 5).

The Respondents are requesting compensation as follows:

Construction of the access road	\$200,000.00
Damages for disturbance to the hill	\$100,000.00
Land Value.....	\$100,000.00
(assuming that \$200,000.00 above will be paid, otherwise \$189,000.00 is claimed)	

Annual payments \$ 10,000.00

The Respondents testified that they may, to a certain extent, have been naive, but they also believe that they were misled by representatives of the Operator. The Respondents testified that the whole experience in dealing with the Operator has been very stressful and has caused them severe emotional anxiety.

FINDINGS OF FACT

1. The Land is not a home quarter.
2. The Land is zoned for agricultural use.
3. The Respondents have previously subdivided two lots on their property.
4. No formal application has been made for further subdivision or rezoning of the Land.
5. The total acreage under the Right of Entry Order is 14.00 acres.
6. A Final Offer was made and 80% of the Final Offer as well as the Entry Fee of \$5,000.00 was paid on January 2, 2007.

DECISION

1. The Board awards compensation as follows:

Land Value: \$3,000.00 per acre x 14.00 acres.....	\$ 42,000.00
Loss of Use: \$300.00 per acre x 14.00 acres	\$ 4,200.00
Adverse Effect: (adverse effect: \$3,300.00) (ongoing nuisance and inconvenience: <u>\$2,500.00</u>).....	\$ 5,800.00
General Disturbance:	\$ 5,000.00
Damages: (destruction of the hill: \$ 25,000.00) (access road: \$100,000.00)	<u>\$125,000.00</u>
First Year Compensation:	\$182,000.00
Annual Rental (Loss of Use and Adverse Effect):	\$ 10,000.00

2. The compensation is payable to Jerry Lee Dorscheid and Violet Dorscheid, jointly.

REASONS FOR THE DECISION

1. On Land Value, the Board is persuaded that \$3,000.00 per acre is fair and reasonable relative to the comparables provided by the Operator in which there may also be additional value to the taker (Exhibit 1, Tab 7). This is also the value established by the Respondents’ appraiser (Exhibit 9).
2. For Loss of Use, in the absence of evidence by the Respondents on this head of compensation, the Board accepts the value provided in evidence by the Operator and requested by the Operator (Exhibit 1, Tab 7).
3. With respect to Adverse Effect, the Board is persuaded that because of the circumstances in this case this head of compensation should separately reflect the adverse effect to the remaining land as well as the nuisance and inconvenience factors, both of which will be carried forward in the annual rental. For adverse effect to the remaining land the Board is persuaded that the effect of the Operator’s activities warrants compensation which is at the high end of the range reflected in the Operator’s comparables, and the Board is persuaded that \$3,300.00 is appropriate. For ongoing nuisance, inconvenience and noise that may arise in connection with the Operator’s operations the Board is persuaded that \$2,500.00 is appropriate.

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4. The Board is persuaded from the evidence of the Respondents that the breakdown in negotiations with the Operator and the risk to the Respondents' future plans has caused significant nuisance, inconvenience, disturbance and emotional anxiety to the Respondents. The Operator has offered to pay \$2,500.00 on a one-time basis towards what it considers "General Disturbance" during the initial planning, site preparation and drilling of the well. The Board is persuaded that these circumstances warrant "General Disturbance" compensation as part of the first year compensation in addition to the compensation provided under Adverse Effect. The Board is persuaded that the level of "General Disturbance" suffered by the Respondents exceeded that normally experienced by landowners in comparable cases, and the Board believes \$5,000.00 to be fair and reasonable compensation.
5. The Board is persuaded based on the evidence of the Respondents that the Respondents have intentions of subdividing the property and that such subdivision is not as remote a possibility as suggested by the Operator. The Respondents have already sub-divided two lots on the Land. They also engaged the services of a professional land surveyor to lay out a map of further sub-division and routing for a road to permit access to the sub-divided lots. Specifications were prepared to build the road to County standards.

Pursuant to the provisions of Section 25(1)(e) of the *Act*, the Board may consider an award of compensation for damage to the land in the area granted to the operator that might be caused by the operations of the operator. In this case the Board accepts the evidence of the Respondents that the hill adjacent to the well site has been severely disturbed and will affect development plans for that area. The Board is persuaded that although the Operator is responsible to reclaim the area to its former status, it is highly unlikely that the hill can be restored to its previous state and compensation is warranted. In the absence of specific evidence on this issue, but considering the potential loss in value of a subdivided lot in the area, the Board believes that damages in the sum of \$25,000.00 are appropriate.

Pursuant to the provisions of Section 25(1)(f) of the *Act*, the Board may consider an award of compensation for any other factors that the Board considers proper under the circumstances. The Board accepts the evidence of the Respondents that negotiations had identified the development of the access road as integral to the future development of the property, and the Operator, through its agents, had at one time verbally agreed to the needs of the Respondents in that respect. Although the access road was constructed in accordance with the plan provided by the Respondents, the failure of the Operator to construct the road to the standard stipulated by the Respondents has had a negative impact on the Respondents' plan to subdivide the property, and will result in a cost to the Respondents. Since the Operator has the obligation to reclaim the area of the access road to its prior condition, the Respondents should at the very least get the area of the access road in its predevelopment state without bearing the cost of remediation. However, the timing of such remediation is unknown and until it takes place the Respondents are unable to proceed with any plans for subdivision. Since the right of entry was consented to by the Respondents on the Respondents' understanding that the Operator would make a substantial contribution to the road construction costs, the Board is persuaded that the Operator is responsible to some degree for such costs in addition to the cost of remediation. The Board does not accept the Respondents' request for \$200,000.00 in damages but the Board believes that damages in the sum of \$100,000.00 are appropriate based on the cost estimates provided in evidence.

INTEREST

Under Section 25(9) of the *Act* the Board may make an order for the payment of interest as it considers appropriate. The Board awards interest on the balance of the compensation due from January 3, 2007, until payment is made in full at the rate of 4.50%.

COSTS

The Parties were unable to reach an agreement on the costs of and incidental to the proceedings. On March 10, 2008, the Respondents submitted their claim for the following costs and asked the Board to make a ruling:

Photocopying	\$ 100.00
Land Appraisal Fee	\$ 2,999.80
Land Appraiser Hearing Appearance.....	\$ 2,703.00
Preliminary Legal Advice	\$ 2,067.00
Land Surveyor Hearing Appearance.....	\$ 318.00
Legal Representation	<u>\$25,097.10</u>
 Total	 \$33,284.90

The Operator asserts that the Respondents’ presentation was not pertinent to the purpose of the hearing and they should only be entitled to nominal costs related to their personal appearances at the hearing. In the alternative, the Operator proposes that if the Board finds that costs are payable to the Respondents, the Board should award costs on the following basis:

Photocopying	\$ 100.00
Land Appraisal Fee	\$ 2,999.80
Land Appraiser Hearing Appearance.....	\$ 318.00
Land Surveyor Hearing Appearance.....	\$ 318.00
Legal Representation	<u>\$ 2,500.00</u>
 Total	 \$ 6,235.80

The fundamental principle in fixing costs is that a party 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 for what gave rise to the proceedings.

The Board disagrees with the Operator’s position that the Respondents’ presentation was not related to the purpose of the hearing. The Respondents’ written submissions and oral evidence from all their witnesses were integral to the presentation of their case. In particular, the Respondents’ history of their dealings with the Operator’s land agents was essential to explain the rationale for key elements of their compensation claim.

The Board determines that the Respondents’ costs are fair and reasonable and so fixes. The amount of \$33,284.90 is payable jointly to Jerry Lee and Violet Dorscheid.

ORDERS

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. 0009/2007 shall be as follows:

- (a) For the period January 3, 2007, to January 2, 2008, the sum of \$182,000.00, less \$35,600.00 part payment made;

TOGETHER WITH INTEREST calculated at the rate of 4.50% on any outstanding balance, from January 3, 2007, until paid in full;
- (b) For the period January 3, 2008, to January 2, 2009, the sum of \$10,000.00, TOGETHER WITH INTEREST calculated at the rate of 4.50% per annum until paid in full; and
- (c) After January 2, 2009, and so long as the said Order No. 0009/2007 is in effect, for each year or portion thereof, the sum of \$10,000.00, to be paid on or before January 3, 2009, and on or before the 3rd day of January in each year thereafter;

which amounts are payable to Jerry Lee Dorscheid and Violet Dorscheid, jointly.

THEREFORE, the Operator shall forthwith pay to Jerry Lee Dorscheid and Violet Dorscheid, jointly the sum of \$182,000.00, less any payment made, together with interest calculated as directed above, and the sum of \$10,000.00, less any payment made, together with interest calculated as directed above.

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Costs of and incidental to the proceedings under the *Act* are fixed in the sum of \$33,284.90, payable to Jerry Lee Dorscheid and Violet Dorscheid, jointly.

Dated at the City of Edmonton in the Province of Alberta this 22nd day of December, 2008.

SURFACE RIGHTS BOARD

MEMBER