File No. CR 739 Decision No. C46/78

THE SURFACE RIGHTS ACT

Before:	:	IN THE MATTER OF certain lands within
	:	the South East Quarter of Section 18,
The SURFACE RIGHTS BOARD,	:	Township 31, Range 1, West of the 5th
(hereinafter referred to	:	Meridian, in the Province of Alberta.
as "the Board").	:	Excepting thereout all Mines and
	:	Minerals.

B E T W E E N:

DYCO PETROLEUM CORPORATION,

Applicant,

- and -

HERMAN HUBERT DORIN,
and
SHIRLEY MAY DORIN,

Respondents.

D E C I S I O N

Upon the application by Dyco Petroleum Corporation, the Board by Order No. C263/77, dated August 5, 1977, granted to the Applicant the right of entry of a part of the surface of the South East Quarter of Section 18, Township 31, Range 1, West of the 5th Meridian, in the Province of Alberta (hereinafter referred to as "the said land"), for a well site and roadway for the Applicant's operations for or incidental to the drilling for and production of petroleum and natural gas.

The part of the said land granted to the Applicant is delineated and outlined in red on the plan attached to the Order and comprises 2.81 acres for a well site and 1.03 acres for a roadway thereto, a total of 3.84 acres.

A hearing to determine the compensation payable by the Applicant was held by the Board on June 6, 1978, at the County of Mountain View Administration Building in the presence of:

For the Applicant:

- A. G. Hobbs
  Tri-West Land Consultants Ltd.
  Calgary, Alberta
  Vice President

- J. Leslie, A.A.C.I.
  J. C. Leslie Appraisals Ltd.
  Calgary, Alberta
  President.

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For the Respondents:

- F. M. Saville, of the law firm
  Fenerty, Robertson, Prowse,
  Fraser & Hatch
  Calgary, Alberta
  Counsel

- J. R. Owsley, A.A.C.I.
  J. R. Owsley Consultants Ltd.
  Calgary, Alberta
  Appraiser

- H. H. Dorin and
  S. M. Dorin
  Didsbury, Alberta
  Registered Owners

- Mrs. Milna
  Didsbury, Alberta
  Member of Didsbury Town Council.

The following exhibits were filed with the Board during the course of the hearing:

EXHIBIT NO.

1. Appraisal Report, prepared and presented by J. C. Leslie.
2. Copy of Application for Annexation of the said land into the Town of Didsbury, presented by the Respondents.
3. Copies of Local Authorities Board Order No. 10174 and Order-In-Council 296/78 approving the annexation of the said land into the Town of Didsbury, presented by the Respondents.
4. Appraisal Report prepared and presented by J. R. Owsley.
5. Qualifications of the Appraiser J. R. Owsley.
6. Copy of Offer to Purchase 5.0 acres of the said land by Brenbur Holdings Ltd., presented by the Respondents.

The following facts, opinions and important conclusions were presented during the hearing:

(a) Drilling resulted in an oil well producing 48 barrels per day which is trucked from the site once a day.

(b) The access road and well site were fenced prior to drilling operations.

(c) The access road is not graded or gravelled.

(d) Topsoil on the well site has been stockpiled.

(e) The pumping unit is powered by propane, when the location of the access road is finalized electrical power will be installed.

(f) Annexation of the said land into the Town of Didsbury was approved by the Local Authorities Board on February 1, 1978, and approved by Order-In-Council 296/78 on March 7, 1978.

(g) The highest and best use of the said land as of the date right of entry was granted was for residential subdivision.

(h) The access road is temporary and will be located to coincide with final subdivision plans.

(i) The expected life of the well is anticipated to be from fifteen to twenty years.

(j) The future plans of the Applicant are to landscape the well site area, which has not been completed due to weather conditions. Trees will be planted to enhance the area.

(k) An advance of $2,000.00 was sent to Herman Hubert Dorin and Shirley May Dorin, jointly, on August 19, 1977.

Mr. Hobbs urged the Board to accept Mr. Leslie's Appraisal Report, Exhibit No. 1, contending that he is very knowledgeable of costs, etc. that are related to subdivisions as he deals with subdivisions throughout the Province. He advised the Board that when subdivision plans are finalized the access road will be included in the plans and the well site area will be landscaped to complement the subdivision.

Mr. Saville stated that the best evidence before the Board is contained in Mr. Owsley's Appraisal Report, Exhibit No. 4, as he has investigated the market, costs of subdivision, etc. as they exist in the Town of Didsbury, whereas Mr. Leslie has used costs, etc. that are general to subdivisions in the Province of Alberta.

Mrs. Milna advised the Board that she is Council Member of the Town of Didsbury and that on August 2, 1977, the Council approved the proposed annexation and stated that it was opposed to the well site being located on the said land. She contended that numerous persons in the immediate area have also voiced their disapproval of the location.

When considering damages, Mr. Hobbs urged the Board to duly consider the fact that by mutual consent the erection of the fence around the well site and access road was left to the discretion of the Respondents and they could have had an adequate fence erected and there would have been no problems with cattle escaping etc. if this had been done.

The issue before the Board is the determination of compensation and the factors which the Board may consider are set out in section 23 (2) of The Surface Rights Act, which reads:

> "(2) The Board, in determining pursuant to subsection (1) the amount of compensation payable, may consider
>
> (a) the value of the land,
>
> (b) the loss of use by the owner or occupant of the area granted to the operator,
>
> (c) 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,
>
> (d) the damage to the land in the area granted to the operator that might be caused by the operations of the operator, and
>
> (e) such other factors as the Board considers proper under the circumstances.".

Having inspected the premises and having considered the evidence adduced at the hearing, the Board makes the following findings on losses and damages and the compensation payable therefor:

COMPENSATION FOR AREA GRANTED AND RELATED DAMAGES

The said land lies within the boundary of the Town of Didsbury and from the evidence it is abundantly clear that plans to have it annexed into the Town occurred prior to the time the Respondents had knowledge that an oil well might be located on the said land.

The Board accepts the Appraisers' contentions that the highest and best use of the said land at the time right of entry was granted was for residential subdivision purposes. The evidence indicates that development will be commencing in the near future and that the well will be producing during the time of the development.

As the Applicant has been granted exclusive use of the area granted (3.84 acres) for an indefinite period of time, the physical damage done to the land is not of immediate consequence to the Respondents. Furthermore, since the said land is to be used for urban development, the physical damages at the time termination of the right of entry is effected will not be of consequence. Accordingly, the Board finds the physical damages to the land not to be a factor for consideration in assessing damages payable.

However, quite apart from the observable physical damages to the area granted, there is a further damage of an intangible nature, viz., a damage to the bundle of rights inherent in the ownership and right of use and quiet enjoyment of the said land. By the granting of the Right of Entry Order, a second right has been superimposed on the landowners existing rights and with that second right being dominant for the term of the Right of Entry Order (section 20 (1) (a) of The Surface Rights Act), it follows unequivocally that the existing rights of the Respondents have been diminished or diluted to some degree. Section 20 (1) (a) provides that a right of entry vests in the Applicant, unless otherwise provided, "the exclusive right, title and interest in the surface of the land in respect of which the order is granted other than (1) the right to a certificate of title (---)". The order of the Board "otherwise provides" that the Owner has the right to cross the area described in the order and to allow livestock to graze thereon, both related to a purely agricultural or concomitant use.

Clearly then, the rights of the Respondents have been diluted by virtue of the rights granted to the Applicant to the point where the rights remaining with the Respondents are to hold title to the area, to cross over the area, to allow livestock to graze on the area and to have the area revert back to the Owner upon termination of the right of entry. Having in mind the indefinite term of the Right of Entry Order, it is clear that the rights remaining vested in the Owner during the term of the order are of minimal value and the Board finds that compensation for the area granted and related damages resulting from this right of entry, damages being tangible and intangible in character, is to the full extent of the value of the area granted to the Owner based on its highest and best use during the term of the Right of Entry Order.

Mr. Owsley, in Exhibit No. 4, stated that the access road can be incorporated into a plan of subdivision and the Board accepts this contention. He further states that only the 2.81 acres in the well site will create a subdivision problem. It is his contention that in order to create a 2.81 acre site, 4.68 acres must be utilized and therefore the Board should base its compensation award on a loss of 4.68 acres.

Mr. Owsley has arrived at this conclusion by simply taking 60% of 4.68 acres to arrive at the 2.81 acre site, which in the Board's view is an erroneous assumption. By using the following simple mathematical calculations, the Board finds that Mr. Owsley's contention must be disregarded.

Assuming in this instance that 140 acres of the said land is the gross developable area, as shown by Mr. Owsley in Exhibit No. 4 and accepting a loss of 10% for community reserve and 30% for streets and roads, then the net developable area would be 88 acres. If the area of the well site (2.81 acres) is deleted from the gross area (140 acres) and using the same deduction 10% and 30%, we find that the net developable area to be approximately 86 acres, a loss of approximately 2 acres.

The Applicant has obtained specific rights to a part of the said land for a well site containing 2.81 acres and an access road containing 1.04 acres, a total of 3.84 acres and the Board finds it proper to base its compensation on the total acreage granted in the Right of Entry Order.

Mr. Leslie, in Exhibit No. 1, states that based on a proposed subdivision with development to commence in 1978, the value of the area granted as of May 1, 1978, was $6,167.00 per acre.

Mr. Owsley, in Exhibit No. 4, states that based on a proposed subdivision with development to commence two years after the date the right of entry was issued and having regard to the market approach to value, the per acre value of the developable portion of the said land as of August 5, 1977, was $11,600.00 per acre.

The Board, having inspected the said land, is of the opinion that Mr. Leslie's contention that development of the said land will commence in 1978 is premature and accepts Mr. Owsley's contention that development will commence not earlier than two years after the date the Right of Entry Order was issued.

In its determination of the value of the area granted, the Board is of the opinion that the market data approach, as illustrated by Mr. Owsley in Exhibit No. 4, is not applicable in this instance and that the development method should be utilized. After analyzing Exhibits Nos. 1 and 4, the Board finds that the following adjustments should be applied in order to determine the value of the area granted.

(a) The gross developable area is 125 acres.

(b) Average lot size will be 55 feet by 110 feet.

(c) One acre will produce an average of four lots.

(d) Service costs will be $8,250.00 per lot or $150.00 per front foot.

(e) Value of a serviced lot will be $13,500.00 or $245.00 per front foot.

(f) Discount factor will be 9%.

(g) Effective date will be the day the Right of Entry Order was issued, August 5, 1977.

(h) Development of the said land will commence two years after the date of the issuing of the Right of Entry Order.

Having utilized the aforementioned adjustments as they relate to each Appraisal Report, Exhibits Nos. 1 and 4, a value of $7,500.00 per acre is considered reasonable and after using a two year discount factor at 9%, the Board feels that $6,313.00 (rounded to the nearest dollar) per acre is fair and reasonable compensation for the area granted.

Accordingly, the Board finds that for the 3.84 acres granted, $24,242.00 (rounded to the nearest dollar) is fair and reasonable Compensation for Area Granted and Related Damages and will be so fixed.

INJURIOUS AFFECTION

Injurious affection in pure form is a loss or depreciation in value of the remainder of the said land attributable to the actual taking or acquisition and intended use of the land granted by the Right of Entry Order. Inherent in the present value of the said land is a reflection of the lands prime location and resultant potential for subdivision. The Board recognizes that this potential did exist at the time right of entry was granted and that some consideration

must be given to the injurious affection to the remainder of the said land by reason of the existence of the well site and access road. Compensation for this loss cannot be ascertained with any degree of mathematical certainty and must be largely a matter of conjecture and judgment.

Mr. Leslie, in Exhibit No. 1, estimated that twenty lots in the vicinity of the area granted will be injuriously affected and that a discount of 5% of the value of the lots ($13,500.00) would be the inducement needed to market these lots. His estimation for injurious affection is $13,500.00.

Mr. Owsley, in Exhibit No. 4, estimated that thirty-five lots would be injuriously affected and that a 10% reduction in their value of $1,500.00 per lot, a total of $52,500.00 would be the future loss. After discounting this loss for a period of five years at 11% (.593451) it is his opinion that the amount of injurious affection should be $31,156.00.

The Board, having reviewed the proposed plans of subdivision as submitted by Mr. Owsley in Exhibit No. 4, Appendix 4A, 4B and 4C, is of the opinion these suggestions would not be suitable for residential subdivision on the said land. The existing subdivision in the Town of Didsbury, shown in Exhibit No. 4, Appendix 1, identified as the Westhill Subdivision, would appear to be the type of a plan that would be suitable for the northerly portion of the said land. Having regard to this subdivision, the Board feels that Mr. Leslie's suggestion that twenty lots will be injuriously affected is reasonable. In addition, the Board, having regard to the Applicant's statement that it has no objection to its access road forming part of the plan of subdivision and that it intends to landscape the well site to enhance the area, is of the opinion that Mr. Leslie's estimate of $675.00 per lot for injurious affection is reasonable, a total of $13,500.00.

Mr. Owsley, in Exhibit No. 4, is claiming $86,511.00 for future servicing costs, contending that the well site may in the future cause these additional costs to the Owners when development occurs.

The Board accepts the concept that the well site will cause additional expenses to the Owners for extra design work and servicing costs, however feels that the amount claimed is excessive. No real evidence was produced to assist the Board in this regard, but it appears logical that some allowance must be made in this regard. Having found that twenty lots in the proximity of the well site will require special consideration prior to being sold, it seems reasonable that servicing and design costs will increase on these lots. Any figure used in this regard will, of necessity, be strictly arbitrary, however, the Board feels that a 5% increase in servicing costs on each of the twenty lots is reasonable ($8,250.00). As services will not occur for at least two years, the $8,250.00 will be discounted for two years at 9% (.8417), leaving an amount payable of $6,944.00 (rounded to the nearest dollar). In addition to this amount, the Board feels that an allowance of $1,000.00 for extra design costs is warranted.

Accordingly, the Board finds that a total of $21,444.00 for Injurious Affection is fair and reasonable and will be so fixed.

GENERAL DISTURBANCE

This expression is used to distinguish those nuisances, inconveniences, etc., which are peculiar to the first years operations.

The Respondents have had the inconvenience and time lost in negotiating with the Applicant's representative and attending the Board hearing. In addition, numerous other disturbances etc. were cited. As agreed to by both parties at the hearing, Mr. Dorin, on June 6, 1978, submitted the following list of claims:

Telephone calls during 1977 and 1978 - $50.00

Due to the said land being ripe for annexation into the Town of Didsbury, the Board feels the numerous telephone calls that must have been made were justifiable and the claim of $50.00 will be allowed.

Time spent preparing for hearing - 40 hours

Due to the complexity of the presentation that was created by the well site and access road, the Board finds the hours claimed to be reasonable and will be allowed. Mr. Dorin has made no claim in regard to a reasonable rate per hour other than to suggest that if he had not spent these hours preparing for the

hearing he would have been involved in matters of a more productive nature. The Board feels that $15.00 per hour would be reasonable for the 40 hours and will award $600.00 for this claim.

Inconvenience to cattle operation and nuisances caused by fence

As the well site and access road were fenced, Mr. Dorin is claiming that it required 20 to 30 hours of extra time to feed his cattle this spring as he had to travel around the area and this entailed an extra 1½ hours each day. He advised that as no gates were installed in the fence around the well site and access road, that he experienced a considerable amount of problems when herding his cattle to his buildings. He is also claiming that on twelve to sixteen different occasions his cattle escaped and that a considerable amount of time was spent returning them to the said land. He suggested that these problems would not have occurred had an adequate fence been erected by the Applicant.

The Board concurs that had an adequate fence been installed in the first instance the majority of these problems would not have occurred. The responsibility of this fence in the main is that of the Applicant. From the evidence presented it would appear that Mr. Dorin entered into an agreement with the Applicant to have the fencing done, therefore the Board feels that some of the problems experienced must be shared by the Respondents.

Accordingly, the Board will award $400.00 for the inconveniences etc. caused by the Applicant's operations.

Negotiations with Applicant - 12 hours

Mr. Hobbs, at the hearing, concurred that he visited the Respondents on six occasions and that he spent approximately 1½ hours each time trying to negotiate a settlement.

The Board will therefore award 9 hours at $15.00 per hour, a total of $135.00 for this claim.

By letter dated August 14, 1978, Mr. Hobbs commented on each of the claims as submitted by Mr. Dorin. Prior to rendering its decision on the aforementioned claims, the Board duly considered Mr. Hobbs' comments.

Accordingly, the Board finds that $1,185.00 for General Disturbance is fair and reasonable and will be so fixed.

INCIDENTAL DAMAGES

Mr. Dorin is claiming $80.00 per acre for loss of pasture for two months on the 3.84 acres granted.

The Board finds that the claim of $80.00 per acre for two months loss of pasture is excessive and that $40.00 per acre on the 3.84 acres, a total of $154.00 (rounded to the nearest dollar) is fair and reasonable and will be so fixed.

In addition to the aforementioned claims, Mr. Owsley, in Exhibit No. 4, is claiming $16,500.00 contending that the Respondents can reasonably be construed as the developer and as a result could expect to realize this future profit. Mr. Leslie stated that from the extensive experience he has had in the field of developing residential subdivisions, it would not be profitable for an inexperienced person to undertake the role of a developer and feels that no allowance in this regard is justifiable.

The Board agrees with Mr. Leslie that the problems associated with a development of this nature should be placed in the hands of experienced persons and therefore rejects this claim.

COMPENSATION FOR AGRICULTURAL LOSS

As the said land will be used for agricultural purposes until the development of the subdivision in 1979, the Board feels that the Respondents should be compensated for their agricultural loss for this interim period.

Having regard to the productive value of the land as determined under the heading "Incidental Damages", the Board finds that $500.00 for the year 1978 and part of 1979 is fair and reasonable and will be so fixed.

INTEREST

Section 23 (6) of The Surface Rights Act reads:

> "(6) The Board may order the operator to pay interest at such rate as the Board considers just with respect to all or any part of the compensation payable under the compensation order and any interest so payable is recoverable in the same manner as the compensation.".

The Board finds that interest should be awarded on the compensation payable under the headings "Compensation for Area Granted and Related Damages" and "Injurious Affection" and that the $2,000.00 advance should be taken into account when

calculating this interest. Also, the Board finds that a fair rate of interest is 9% per annum, payable from the date of the Right of Entry Order until date of payment of the advance and on the amount remaining until date of the Compensation Order.

The Board's award for Compensation for Area Granted and Related Damages and Injurious Affection is $45,686.00, which exceeds the advance made on August 19, 1977, by $43,686.00.

Accordingly, interest on the award will be calculated as follows:

1. On $2,000.00 at 9% per annum from August 5, 1977, to August 19, 1977, and
2. On $43,686.00 at 9% per annum from August 5, 1977, to the date of the Compensation Order.

COSTS

As the Applicant agreed to the costs as submitted by the Solicitor and the Appraiser in the amounts of $750.00 and $1,500.00 respectively, the Board is not required to make a finding on this aspect of compensation.

Accordingly, $2,250.00 will be awarded for Costs.

In summary, the amount of compensation payable by the Applicant for this right of entry will be:

Compensation for Area Granted and Related Damages	$ 24,242.00
Injurious Affection	21,444.00
General Disturbance	1,185.00
Incidental Damages	154.00
Compensation for Agricultural Loss	500.00
Costs	2,250.00
TOTAL	$ 49,775.00

Plus interest as follows:

- On $2,000.00 at 9% per annum from August 5, 1977, to August 19, 1977, and
- On $43,686.00 at 9% per annum from August 5, 1977, to the date of the Compensation Order,

which amounts shall be payable to Herman Hubert Dorin and Shirley May Dorin, jointly.

Dated at the City of Calgary, in the Province of Alberta, this 20th day of September, 1978.

SURFACE RIGHTS BOARD

MEMBER

MEMBER

MEMBER