

THE SURFACE RIGHTS ACT

Before: : IN THE MATTER OF certain lands within
: the South East Quarter of Section 5,
The SURFACE RIGHTS BOARD : Township 52, Range 25, West of the 4th
(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:

WESTHILL RESOURCES LIMITED,

Applicant,

- and -

IRENE EVELYN FRASER,
IMPERIAL PIPE LINE COMPANY LIMITED,
HERMAN EMIL PAHAL,
LIBRA HOLDINGS LIMITED
and
J.I.H. MANAGEMENT CONSULTANTS LTD.,

Respondents.

D E C I S I O N

Upon the application by Westhill Resources Limited ("the Applicant"), the Board by Order No. E1184/76, dated October 12, 1976, as amended by Order No. E659/77, dated June 23, 1977, granted to the Applicant the right of entry of a part of the surface of the South East Quarter of Section 5, Township 52, Range 25, West of the 4th 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 2.07 acres for a well site and 0.55 of an acre for a roadway thereto, a total of 2.62 acres.

A hearing to determine the compensation payable by the Applicant was held by the Board on November 17, 1977, at the offices of the Board, Edmonton, Alberta, in the presence of:

For the Applicant:

Mr. William Rodgers, President; and
Mr. Nello W. Marano, Secretary-Treasurer.

For the Respondents:

Ms. M. J. Trussler of the law firm of Parlee, Irving et al of
Edmonton, Counsel;
Mr. Jeff Saxton, Principal of Libra Holdings Limited, and also
appearing on behalf of J.I.H. Management Consultants Ltd.; and
Mr. Ed Shaske, A.A.C.I., of Edward J. Shaske & Associates.

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The other Respondents, Irene Evelyn Fraser, Imperial Pipe Line Company Limited and Herman Emil Pahal, were not represented although duly notified of the hearing.

Mr. Marano submitted that on his information as of November 15, last, the said land is zoned agricultural, there is no application for rezoning, and no subdivision plans have been approved; and it is his understanding that development of the said land for other than its present use is many years away. He said that there are presently two wells about 2,600 feet away and several pipelines in the area. He suggested that the land was purchased for speculation and that its true value is related to its present and allowable use, namely, agriculture. The agricultural value is the only value affected by the right of entry, and compensation should be on a rental basis rather than purchase or expropriation, with consideration for some inconvenience to the owners.

In further evidence, Mr. Marano referred to two recent surface leases acquired by Focus Resources in the area, being:
On LS6-25-51-25-W4 (2 miles from urban development) at \$4,000.00 first year and \$1,800.00 per year thereafter; and for a second well site on same LS6 at \$4,000.00 first year and \$1,000.00 per year thereafter. These leases were negotiated with Fehete Construction, and Fehete felt a well site would not hamper the proposed use and could be accommodated in the 30% reserve allotment.

In talking to the lessee of the said land (Pahal) he said that the said land produces, on the average, 50 bushels wheat per acre (at \$3.00 per bushel), 90 bushels barley per acre (at \$2.50 per bushel) and 2 tons hay per acre (at \$50.00 per ton). The land acquired (2.62 acres) will produce \$360.00 per year, and using a 250% reclaiming factor (100%, 75%, 50%, 25%) results in a total of \$900.00.

Mr. Marano suggested that consideration should also be given to the proximity of the said land to city development and inconvenience to the Respondent, but damages should be reasonable and conscionable. He said he felt strongly that a speculative value has no significance; that the only obligation of the Applicant is to pay adequate compensation having exercised its right to work the minerals; and that the price paid by Focus (supra) is reasonable and the Applicant is prepared to meet it.

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In connection with the site itself and installations thereon, Mr. Marano stated that the well is a shut-in gas well awaiting a market for the gas; that there will be no tanks or other large structures on the site as the gas and oil will be produced concurrently through a pipeline; and that clean-up was done immediately and the lessee was able to farm the surface this year.

Mr. Rodgers testified that the Applicant expects about 7 years production from the well, and hopes to begin production in April 1978 as there is a pipeline close by which hopefully can be used by the Applicant. In reply to questioning by Ms. Trussler, he said that the 7-year productive life is estimated from a decline curve based on test data and the Applicant is able to produce the well at an accelerated rate. Mr. Marano added that the well is a G.O.R. with oil and gas being produced together, and as the gas reserve is not large it is estimated to be depleted in 7 years.

As witness for the Respondents, Mr. Shaske introduced an appraisal report covering the said land (entered as Exhibit 1). The report is quite lengthy and has been studied in detail by the Board, and the Board will record hereunder only the most salient facts, opinions and conclusions as set out in that report:

1. The purpose of the appraisal is to estimate the compensation payable (by the Applicant).
2. The property rights appraised are those of the fee simple estate, and the effective date of the appraisal is October 12, 1976.
3. The said land is zoned AG, Agricultural District and is located within the boundaries of the City of Edmonton.
4. The soil is rated No. 1 (C.L.I.); and the land is gently sloping with a small ravine, extending from the Riverview Heights Residential Subdivision, encroaching into the property.
5. The trend in the area is for a change from agricultural and small holdings to residential subdivision, as installation of services takes place.
6. Lands in the area are being acquired at prices far above agricultural values in anticipation of a higher use, and it is the appraiser's opinion that the highest and best use of the said land is a continued agricultural use until such time as alternative uses may be approved.
7. Having analyzed data obtained from 9 "index" sales transactions of land zoned comparably to the said land, adjusting for time of sale and locational

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aspects, and weighting and correlating the results, it is the appraiser's opinion that the value of the said land is \$20,000.00 per acre taken on a basis comparable to the "Index sales". However, as the City of Edmonton has indicated that the "Index" properties should be fully serviced within 5 years and whereas the said land will not likely be serviced prior to 1987, it is necessary to discount the present worth of the said land an additional 5 years, and discounting at 11% (reversionary factor .593451) indicates a present value of the 2.62 acres at \$31,000.00.

8. As a check on the market analysis, and having consulted with the engineering firm of Stewart, Weir et al, it is concluded that the right of entry could result in the loss of two country residence lots on subdivision of the said land. Having analyzed 11 sales of lots in the area approximately 1 to 1½ acres in size, it is the appraiser's opinion that a typical country residential lot in this area would sell for about \$45,000.00. Deducting for subdivision and servicing costs of about \$25,000.00 per lot, as obtained from city engineering firms engaged in subdivision design and development, and discounting for an estimated 3 years before the lots could reach the market at 11% (reversionary factor .731191), indicates a present worth of \$29,000.00 for 2 lots.

9. Based on information garnered from the Federal and Provincial Departments of Agriculture and local grain elevator agents, the appraiser estimates the annual loss of production from the 2.62 acres, on barley yields of 80 bushels per acre at a price of \$2.50 per bushel, at \$524.00. The appraiser estimated a gross loss as in his view the cost of production would be offset by the additional costs of farming the remainder of the said land.

10. The appraiser suggested that a reasonable return to the owner on his investment should be considered and at 10% per annum this amounts to \$3,100.00.

11. Discussions with Stewart, Weir indicated that there probably would be no adverse effect on adjacent residential development on the remaining lands if there is only a well head on the site. However, the Energy Resources Conservation Board has indicated the possibility of a pump jack at the well at some later date, and in such event, having regard to the competitive nature of the Edmonton market as opposed to, say, Devon or Drayton Valley where producing wells coexist with residential development, there would be a depreciation (a form of economic obsolescence) in value of those subdivided lands immediately adjacent to the well site

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and road. Assuming 8 residential sites could be affected, at a total value of \$94,656.00, and being of the opinion that the depreciation in value would be not less than 10%, the appraiser estimates the damage caused through depreciation in the value of the remaining property to be \$9,465.00.

12. The appraiser has not considered the application of the principle that a small parcel normally sells at a higher price than the whole parcel.

13. The appraiser's estimate of the compensation payable is as follows:

Value of land.....	\$31,000.00
Loss of use by the owner (annual).....	524.00
Adverse effect on remaining lands.....	9,465.00
	<u>\$40,989.00</u>

In reply to a question from counsel, Mr. Shaske stated that the land acquired by Focus Resources (supra) is within the recently established R.D.A. and as such has no potential for residential development.

In answer to cross-examination by Marano, Shaske stated that the \$31,000.00 is his estimate of the value as of October 1976 if the land were purchased by a developer to wait for city servicing in 10 years, and on the question by Marano regarding his development time estimates he said that it usually takes longer than 3 or 4 years to get a development through city approval, etc. and onto the market, but developers control development and pattern of growth in a city and could do their own servicing.

Mr. Saxton testified that he has been investing in real estate since 1964 and purchased the said land through an option at \$6,875.00 per acre. He said he has spent about \$16,700.00 in engineering and legal fees in connection with possible development of the said land. In his opinion it is a unique parcel, being within the City of Edmonton but outside the R.D.A., and furthermore is in the choice south west area of the city. He testified also that he has received a commitment for the necessary financing when he decides to proceed with development. Mr. Saxton said that he has recently received two offers to purchase the said land, the first being for \$2,817,000.00, or \$18,000.00 per acre, and a later offer of \$3,600,000.00, or \$22,500.00 per acre; a copy of this latter offer to purchase and Interim Agreement was entered as Exhibit 2. Both offers were refused by him. In connection with the present use of the said land, he said that Pahal is farming the land on a cash rental basis and has no written or other form of lease, and

compensation should be made payable to Libra Holdings Limited.

When asked by Rodgers if Libra Holdings Limited is a land development company, Saxton replied that he has had experience in land development.

Mr. Marano submitted that by the evidence of these offers to purchase, it is demonstrated that others don't seem concerned about the well site on the said land.

In summation and concluding argument, Ms. Trussler submitted that the said land is in the city and has potential for development, and the existence of the well site and road will affect any development plans. The value depends on whether servicing is provided within 5 or within 10 years, and it must be presumed the land (2.62 acres) is lost in perpetuity as the life of the well is indefinite. She referred the Board to the case in re Dau v. Murphy Oil (1970) 73 W.W.R. 269, and the findings therein relative to "value to the owner". The quantum of injurious affection is also dependent on whether development proceeds within 5 or within 10 years time, and loss of use if considered on agricultural use only is \$500.00 - \$600.00 per year but it should be on a return on investment basis.

Compensation should be determined at between \$40,000.00 and \$70,000.00 depending on the availability of services and Saxton has indicated he is prepared to provide the services. Shaske has given evidence on proper compensation based on an appraisal of the said land, and reference is made in this respect to the case in re Great Plains Development v. Lyka (1972) 6 W.W.R. 321.

On costs, Ms. Trussler asked that costs be awarded as follows:

Legal fees for this hearing and the objection hearing.....	\$2,500.00
Appraisal fees.....	\$2,050.00
Saxton's fee and costs.....	\$2,375.00

Mr. Rodgers objected to the costs on the grounds that the Applicant didn't ask for the hearing and therefore shouldn't have to absorb these high costs as claimed.

The factors which the Board may consider in determining compensation 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,

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- (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 considered the evidence adduced, the Board makes the following findings on the compensation payable by the Applicant in connection with the subject right of entry:

It is clear to the Board in reading section 23 (2) (a) of the Act in context with the remainder of the Act and within the concept and intent of the said Act, that the value of the land to be considered is the "value to the owner". This view is supported by the findings of the Supreme Court of Canada in the case of *In re Dau v. Murphy Oil* (1970) 73 W.W.R. 269 at 271, wherein Martland, J., delivering the judgment of the Court, held that: "The value which the board may consider is in my opinion, value to the owner."

To what extent, or in what manner, should the Board consider the value of the land in determining fair and just compensation to the owner of the land? In the Board's opinion, compensation should be awarded on the value of the land only to the extent that the value has been damaged or diminished by reason of the superimposition of the right of entry on the owner's rights arising from his ownership of the said land. It is a well-established principle of compensation that a person suffering damage by reason of a statutory imposition on his rights is entitled to be fairly and justly compensated for that damage but is not entitled to become enriched thereby.

DAMAGE TO SURFACE AND RELATED DAMAGES:

The evidence before the Board on the value of the said land and the damage to that value is basically that the present value of the area acquired by the Applicant (2.62 acres); based on the estimated en bloc value of the said land and the assumption of the availability of services and development for residential

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purposes in about 10 years time, is \$31,000.00 (Shaske's evidence - Exhibit 1), and that the estimated life of the well is 7 years (the Applicant's evidence). Giving equal weight to these two estimates and opinions, there being no reason to attach greater cogency to either one, both having been stated by knowledgeable and expert persons in their respective fields of endeavor, it appears likely and reasonable to assume that the well's life will have expired sometime prior to the time at which development of the said land for a higher and better or more profitable use is likely to occur and it is on that potential higher and better future use that the \$31,000.00 estimate is predicated.

The Applicant has asserted, through the evidence of Rodgers and Marano, that no installations will be on the site other than the well head as the product will be piped out under gas pressure. Perhaps the statement by Shaske at page 38 of Exhibit 1, "Discussions with (Stewart, Weir et al)", indicate no adverse effect to the remaining lands as the well head exists. They suggest a proper and attractive subdivision could be designed around the works, which extends approximately 4' beyond ground level", although made in connection with adverse effect, is equally applicable to any effect on the value of the land for its subdivision potential. Surely, if there is no adverse effect on the remaining land, there should be no diminution of the value of the land apart from any area actually physically lost to development, and on the evidence it does not appear there will be any physical loss of developable area at the time of development. It is perhaps also pertinent that other persons interested in purchasing the said land do not appear to attach any significance to the existence of the Applicant's well site and road, as evidenced by the offers to purchase, one of which is entered as Exhibit 2, but this can only be a matter of speculation as any consideration the offerors may have given to the well site would be insignificant in relation to the multi-million dollar price offered for the said land.

On the evidence, the Board finds that the only damage to be considered is to the value and interim use of the said land for agricultural purposes, and there was no evidence on the probable value of the said land for such purpose placed before the Board. Having regard to agricultural land values in other areas of the Province for similar type lands, the Board estimates that the value of the said land in that location in use for agricultural purposes and having no potential for subdivision in the foreseeable future (a purely hypothetical assumption but

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in the Board's view a proper assumption having in mind the estimated life of the well) would not exceed \$1,000.00 per acre.

The Board finds that the owner's rights in the land for agricultural use have been damaged to the full extent of the value of the land to him for that purpose; namely, \$1,000.00 per acre, and accordingly compensation for damage to surface and related damages will be fixed in the amount of \$2,620.00.

The Board's determination above is predicated on the premise, that premise being basic to the Board's findings, that the well's production and effective life will have expired in about 7 year's time and the area will be restored and returned to the owner at that time, that subdivision of the said land will not be commenced until some time after that 7-year period, and that only a well head will be on the site during the term of production. Should the first two grounds, which are based on the evidence adduced, prove to be at fault, the right should be reserved to the Respondent Libra Holdings Ltd. to return the matter to the Board for review, and the Board so reserves.

LOSS OF USE OF THE LAND:

The Respondents are being deprived of the normal use of 2.62 acres of the said land for so long as the right of entry remains in effect. Compensation for this loss must be on an annual basis. In the Board's view, the compensation should approximate the value of the gross annual production reasonably expectable from the area lost, as the major farm operating expenses, those relating to capital, labour, equipment and overhead, are virtually unaffected by the loss of a small acreage.

Shaske estimated loss of production from 2.62 acres at \$200.00 per acre, or \$524.00 total, based on statistical information. Marano estimated the loss at about \$137.40 per acre, or \$360.00 total, based on information obtained from the user-occupant Pahal.

Shaske's estimate is a gross figure on the assumption that costs of production are offset by the added costs of farming the remaining land. As the Board has found the highest and best use to be for agriculture as an interim use during the life of the well, the Board will also consider as a damage the adverse effect on farming the remainder of the said land (clause (c) of section 23 (2) of the Act, supra), and as Marano's estimate appears to be in the nature of a net

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return the Board accepts his estimate as the most cogent evidence on loss of productive area.

Accordingly, annual loss of use will be fixed at \$360.00.

ADVERSE EFFECT:

Under this heading, the Board considers the adverse effect of a right of entry on the Respondents' remaining land; the nuisance and inconvenience created thereby to farming operations on the said land.

As no evidence was adduced on the adverse effect related to farming operations on the said land, the Board can only base its determination of compensation on its findings under other similar situations. Having regard to the location of the well site on the said land, in regard to extra maneuvering and turning with farm machinery, overlapping of operations with resultant loss of seed and spray and some undesirable soil compaction, and loss of small corners and strips around the right of entry area, the Board finds \$400.00 annually to be fair and reasonable for adverse effect.

The above two considerations, loss of use and adverse effect, constitute the annual compensation payable in respect of the losses and damages to the user of the land. As Mr. Saxton stated that the land is being farmed by Pahal on a cash payment basis, it follows that the said Pahal is suffering the total of the loss and inconvenience and should therefore be entitled to the said annual compensation for so long as he occupies and uses the said land for farming purposes.

Shaske, in his report, suggested that the owner is entitled to a reasonable return on his investment in the land, and the Board finds this suggestion to have merit. However, Shaske used as the investment \$31,000.00 or approximately \$11,832.00 per acre, whereas Mr. Saxton gave evidence that his actual investment was \$6,875.00 per acre paid for the said land in 1974. The Board feels that in the circumstances herein any return to be accorded consideration should be on the actual cash investment and not on the capital gains arising from inflation or appreciation of the value of the said land. There is however one other factor to be considered. The said land was purchased two years prior to the date of the right of entry, and it is only fair that a carrying or holding charge be applied to the actual cash investment to reflect the actual investment as of the above date. The Board

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considers 10% per annum to be a reasonable rate to apply as a holding charge and finds the Respondent Libra's actual investment in the said land as of October 12, 1976 to be about \$8,300.00 (in round figures) per acre. The Board also finds that the Respondent Libra is already receiving a return on that part of the investment which reflects an agricultural value, which the Board has estimated at \$1,000.00 per acre, and that any further consideration of a return on the investment should only be on the portion of the investment in excess of this \$1,000.00 per acre.

The Board is of the opinion that the Respondent Libra is entitled to expect a fair annual return on its investment in the land, and as 2.62 acres have been removed from the said Respondent's control and use, a return on this area should be paid by the Applicant in the form of compensation. The Board accepts Shaske's estimate of 10% as a fair rate of return on an investment of this nature; and based on an investment of \$7,300.00 per acre over and above the agricultural value, the Board finds the annual compensation payable to the Respondent Libra as a return on its investment in the land granted to the Applicant to be \$1,913.00 (to nearest dollar).

One issue raised in Shaske's report (Exhibit 1) remains to be considered. Shaske has estimated adverse effect on the remaining land in the amount of \$9,465.00 for the effect of the well site and road on 8 adjacent building sites of 1.0 to 1.5 acres each. It appears to be basic to this estimate that "subdivision of lands immediately adjacent to a producing oil well serviced with a pump jack in the City of Edmonton would (in the appraiser's opinion) depreciate in value to the extent of not less than 10% of established value". The evidence of the Applicant is that there will be no pump jack on the well site, and the only installations will be a well head assembly feeding a pipeline. It is set out in the same section of that report that Stewart, Weir indicated "no adverse effect to the remaining lands as the well head exists".

On the evidence, the Board holds that this finding on compensation by the appraiser has no merit, provided the facts regarding installations on the well site are as stated by the Applicant. However, in the event that the Applicant should for some reason find it necessary to install a pump jack or other large installation on the site, and that installation is still in existence at the time a development scheme for the said land is approved and commenced, the Board reserves

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the right to the Respondent Libra to return the matter of annual compensation to the Board for review as provided at section 35 (b) of The Surface Rights Act.

COSTS:

Costs are being claimed by the Respondents in the amount of \$6,925.00, broken down as follows:

Legal fees for both the compensation and the objection hearing.....	\$2,500.00
Appraiser's fees.....	2,050.00
Fees and costs to Saxton on behalf of Libra Holdings.....	2,375.00
	<u>\$6,925.00</u>

On the merits of the Respondent's case, the Board finds these costs to be unreasonable and exorbitant.

Mr. Saxton appeared as a witness at two hearings, being represented by counsel in both instances. His evidence related largely to his interest in the said and other lands as an investor in real property, and much of it had no real bearing on the issues before the Board and the determination of fair compensation. He produced a number of maps and plans during his evidence, but it must be assumed these had been prepared for some other purpose as they were not left with the Board as exhibits for the benefit of the Board in its deliberations.

Mr. Shaske presented most of the evidence brought before the Board through his comprehensive and well-prepared appraisal report. Although the Board has not accepted his estimates and opinions in total, the material in the report has proven very useful to the Board in arriving at its determination of compensation, and it must be admitted that Shaske was apparently not aware of the estimated short life of the well due to approval being given for an accelerated depletion rate. On the other hand, it could be said that the estimated life of the well was basic to the appraiser's findings and was therefore a matter which should have been investigated and determined by the appraiser. However, on the assumption that possibly only the Applicant was in possession of the knowledge relating to the projected productive life of the well, the Board believes the appraiser's assumptions and conclusions were reasonable within his knowledge of the facts, and the Respondent should not be unduly penalized in the matter of an award for appraisal costs.

In view of the amount of time consumed in attendance at the two hearings, and the necessary time for preparation for these hearings and other matters relative to the issues herein, the Board considers counsel fees in the amount of \$2,500.00 to be approximately double what could be considered reasonable.

The Board fixes reasonable costs for all matters relative to this right of entry in the amount of \$3,000.00 payable to the Respondent Libra Holdings Limited.

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

- (a) for the period from October 12, 1976 to October 11, 1977, the sum of EIGHT THOUSAND, TWO HUNDRED, NINETY-THREE and 00/100 DOLLARS (\$8,293.00), computed as follows:

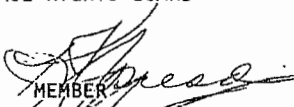
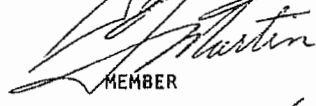

	<u>LIBRA</u>	<u>LESSEE</u>	<u>TOTAL</u>
Damage to surface and related damages	\$2,620.00	\$\$	\$2,620.00
Loss of use of the land (annual)		360.00	360.00
Adverse effect (annual)		400.00	400.00
Return on investment (annual)	1,913.00		1,913.00
Costs	3,000.00		3,000.00
	<u>\$7,533.00</u>	<u>\$760.00</u>	<u>\$8,293.00</u>

of which amount SEVEN THOUSAND, FIVE HUNDRED, THIRTY-THREE and 00/100 DOLLARS (\$7,533.00) is payable to Libra Holdings Limited, C/o Jeff Saxton, and SEVEN HUNDRED, SIXTY and 00/100 DOLLARS (\$760.00) is payable to Herman Emil Pahal,

- (b) for the period from October 12, 1977 to October 11, 1978, the sum of TWO THOUSAND, SIX HUNDRED, SEVENTY-THREE and 00/100 DOLLARS (\$2,673.00), of which amount ONE THOUSAND, NINE HUNDRED, THIRTEEN and 00/100 DOLLARS (\$1,913.00) is payable to Libra Holdings Limited C/o Jeff Saxton, and SEVEN HUNDRED, SIXTY and 00/100 DOLLARS (\$760.00) is payable to Herman Emil Pahal, and
- (c) after October 11, 1978, and so long as the said Order No. E1184/76 is in effect, for each year or portion thereof, the sum of TWO THOUSAND, SIX HUNDRED, SEVENTY-THREE and 00/100 DOLLARS (\$2,673.00), to be paid on or before October 12, 1978, and on or before the 12th day of October in each year thereafter, of which amount ONE THOUSAND, NINE HUNDRED, THIRTEEN and 00/100 DOLLARS (\$1,913.00) is payable to Libra Holdings Limited, C/o Jeff Saxton, and SEVEN HUNDRED, SIXTY and 00/100 DOLLARS (\$760.00) is payable to Herman Emil Pahal or such other party as may be the user-occupant of the said land from time to time.

Dated at the City of Edmonton in the Province of Alberta this 8th
day of February 1978.

SURFACE RIGHTS BOARD


MEMBER

MEMBER

MEMBER