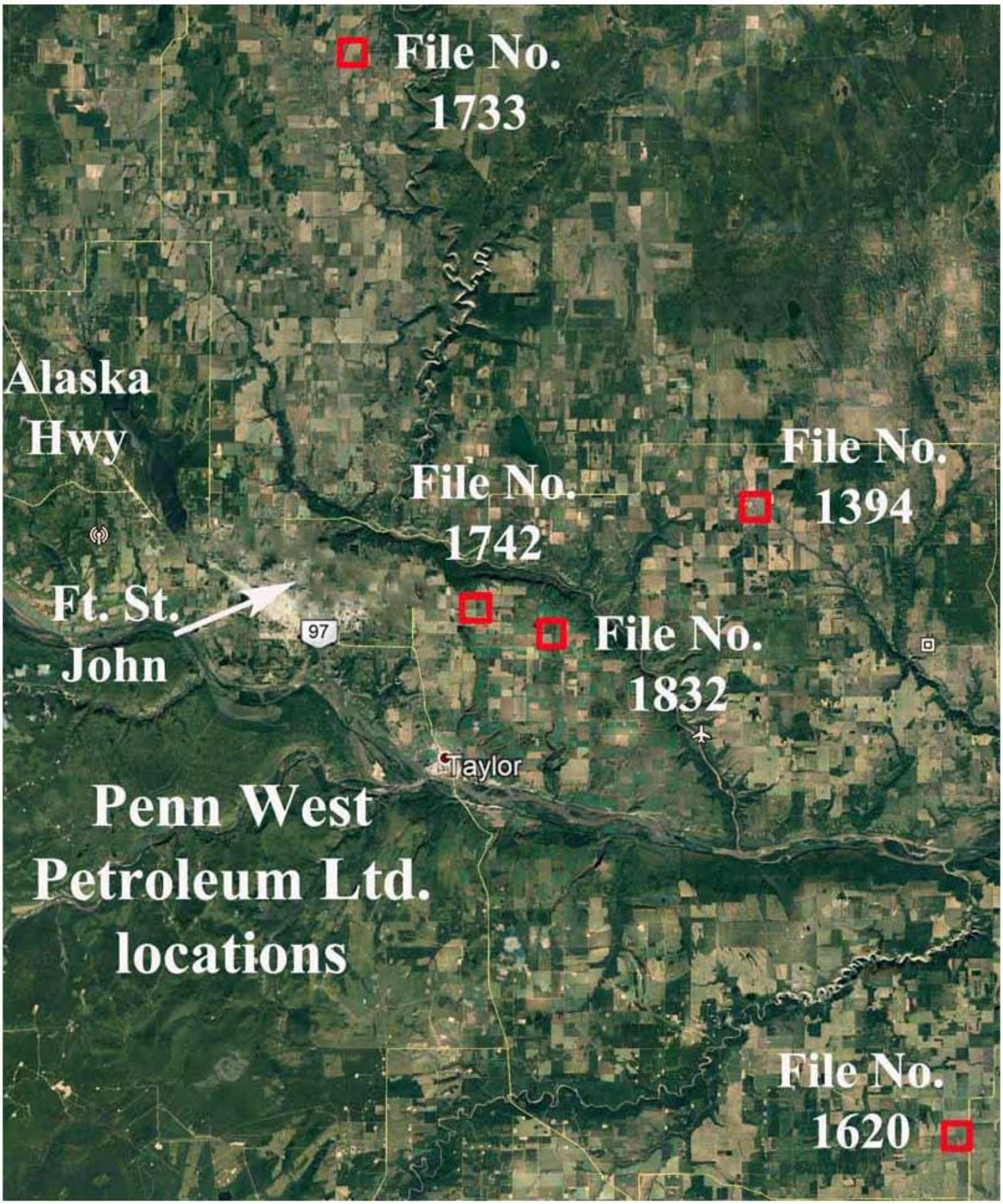

File No.
1733
Alaska
Hwy
File No.
1742
File No.
1394
Ft. St.
John
97
File No.
1832
Taylor
Penn West
Petroleum Ltd.
locations
File No.
1620

MEDIATION AND ARBITRATION BOARD
Under the Petroleum and Natural Gas Act
114, 10142 101 Avenue
Fort St. John, BC V1J 2B3

Date: May 30, 2000

File No. 1394 Board Order No. 308A

BEFORE THE MEDIATOR:

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT BEING CHAPTER 361 OF THE REVISED STATUTES OF BRITISH COLUMBIA AND AMENDMENTS THERETO:
(THE ACT)

AND IN THE MATTER OF NE ¼ SECTION NINETEEN, TOWNSHIP EIGHTY-FOUR, RANGE FIVETEEN WEST OF THE SIXTH MERIDIAN PEACE RIVER DISTRICT, EXCEPT PLAN 17817
(15-19-84-15 W6M)
(THE LANDS)

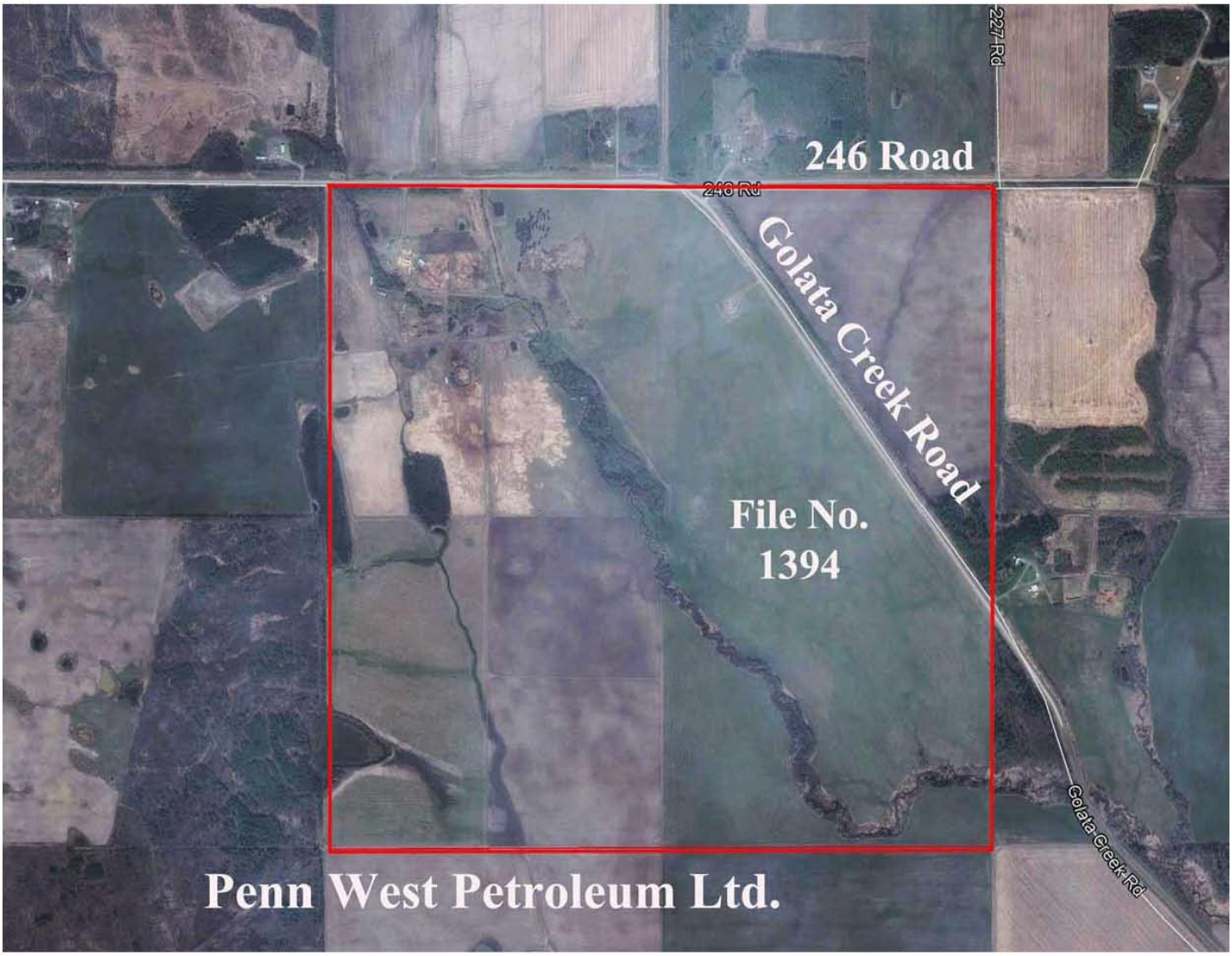
BETWEEN:

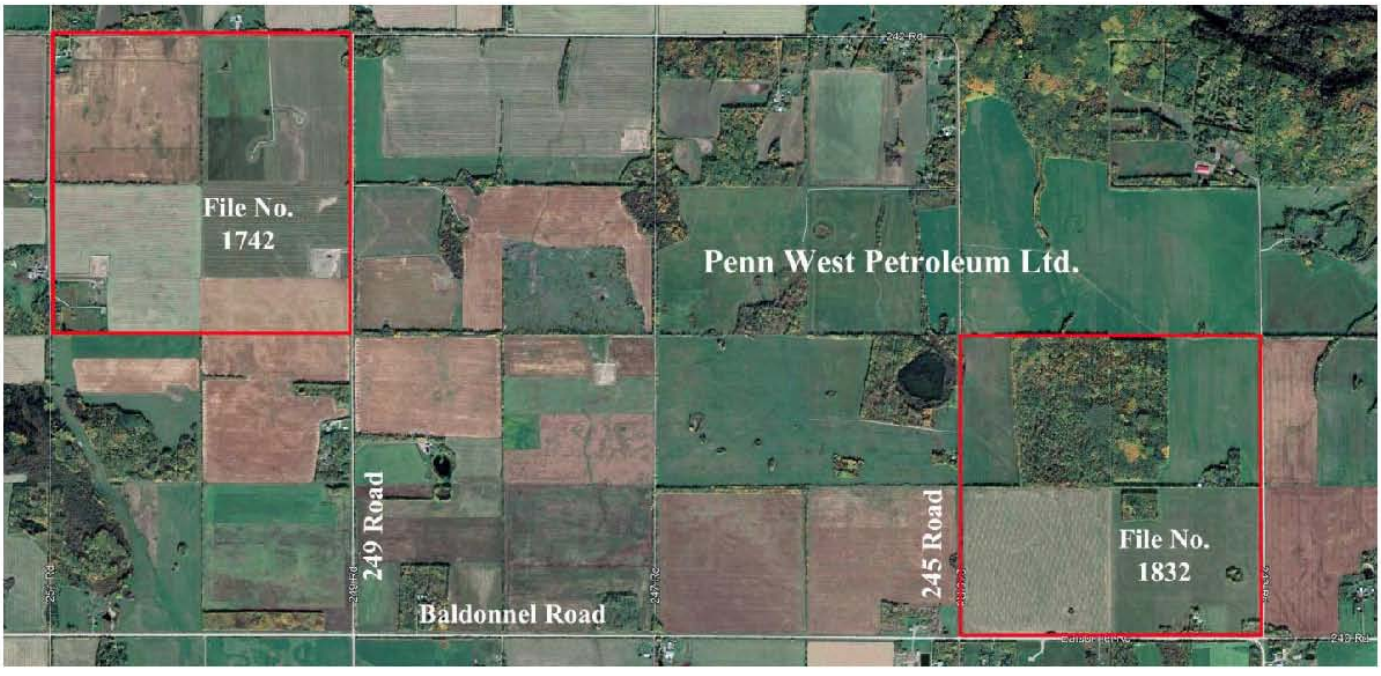
PENN WEST PETROLEUM LTD.
2300, 240 -4TH AVENUE, SW
CALGARY ALBERTA
T2P 4H4
(THE APPLICANT)

AND:

SILVER HAMMER FARMS INC. (THORHALD SKAFTE)
10206 10th STREET
DAWSON CREEK, BC
V1J 3T4
(THE RESPONDENT)

ARBITRATION ORDER


227 Rd
246 Road
246 Rd
Golata Creek Road
File No.
1394
Golata Creek Rd
Penn West Petroleum Ltd.


File No.
1742
Penn West Petroleum Ltd.
249 Road
Baldonnel Road
245 Road
File No.
1832

The Applicant , Penn West Petroleum Ltd. has made application to the Mediation and Arbitration Board to allow the Applicant to enter land owned by the Respondent, and to fix compensation payable as specified in the Application received by the Mediation and Arbitration Board on September 16, 1999.

BACKGROUND:

The Respondent, owns property located North East of Fort St. John, and the Applicant has applied to develop a well site described as "Penn West Flatrock 15-19-84-15." The Applicant wished to obtain access to the Respondent's property for the purpose of surveying the site, constructing a well site, drilling for natural gas and bringing a well into production if economically viable.

A Mediation Hearing was conducted by Board Member Ivor Miller on 4 October 1999. This matter did not resolve. No order was make under Section 16 of the Petroleum and Natural Gas Act.

THE HEARING

This Arbitration was heard before a panel of five members in Fort St. John on 25 April 2000. With the consent of all parties the Mediator, Ivor Miller, sat as a member of the Arbitration Panel. Representing the Mediation and Arbitration Board was Rodney Strandberg, Mavis Nelson, Frank Breault, Julie Hindbo and Ivor Miller.

Representing the Applicant , was Darren Rosie of Longstaff Land Surveying Ltd., Liz Zimmerman and Mike Williamson of Penn West Petroleum Ltd.; the Respondent was represented by J. Darryl Carter of Carter, Lock & Horrigan, and Thorhald Skafte.

After hearing the evidence and the submissions of the parties the Board Members reserved their decision to a later date. This is the decision.

Position of the Parties:

Applicant

The Applicant wishes to enter the Respondent's property to survey the proposed well site and then to develop the well site for the purpose of drilling for natural gas and, if appropriate, to construct necessary facilities for production purposes. The Applicant asks the Board to allow it to enter the Respondent's land for all purposes necessary and ancillary for the exploration, development and production of natural gas given the refusal of the Respondent to negotiate a satisfactory surface lease. The Board is asked to determine the rights of entry and the compensation due to the Respondent.

Respondent

The Respondent asks the Board to determine the rights of entry onto its land; to set an appropriate amount of compensation; including a direction that Mr. Thorhald Skafte, a principal of the Respondent, be hired to oversee all construction, drilling and bringing into production of any product; and for costs of this Arbitration on a solicitor and client basis.

The Respondent grows certified pedigree fescue on the land. In order to maintain this certification an isolation strip must be maintained around the proposed lease site which increases the amount of land disrupted by the proposed work. The crop grown is above average in value.

The Issues

The parties were able to agree on the following:

1. The lease site would extend to the road adjoining the property to encompass property between the lease site, as originally proposed, and the road. It was agreed that this area would not have been economically or easily maintained in any event;

2. The Respondent wishes that all drilling fluids be contained in mud tanks, that the drilling would be "sumpless" and that all shale piles be removed from the site;

3. The Respondent will be considered by the Applicant to carry out weed control;

4. The topsoil from the site will be stripped and separated for use in reclamation;

5. The final location of the well site might be altered based on the survey of the site and considerations of the Respondent regarding the location of the site giving consideration to the prevailing winds and the residence of Mr. Skafte.

The unresolved issues are as follows;

1. Should this Board, in the course of considering appropriate compensation pursuant to Section 2 of the Petroleum and Natural Gas Act, direct that the Applicant make use of the services of Mr. Skafte;

2. What, notwithstanding the decision on the first issue, is the appropriate amount of compensation due to the Respondent?;

3. What are the appropriate terms of any entry, use or occupation Order which may be pronounced?; and

4. Should the Board award the Respondent costs under Section 27 of the Petroleum and Natural Gas Act and, if so, how should these be determined?

Issue 1, Should the Board direct that the Applicant use the services of Mr. Skafte?

There was agreement between the parties that Mr. Skafte has the training, skills and experience to oversee the construction of the well site, any drilling operations on the well site and the bringing into production of any product discovered on the site.

The Respondent urges the Board to direct the Applicant to hire Mr. Skafte, presumably under either Section 21 (1) (g) or Section 9 of the Petroleum and Natural Gas Act. The Respondent suggests, and the Applicant does not seriously dispute, that because this development will take place on Mr. Skafte's property above average care and skill will be brought to bear on this development to the benefit of all concerned.

The Applicant says that notwithstanding the qualifications of Mr. Skafte that it has contractual arrangements and relationships with other equally qualified persons to whom it feels a duty is owed to offer this opportunity, in preference to Mr. Skafte.

DECISION:

Section 9 of the Petroleum and Natural Gas Act provides that the Board may specify the terms of entry, occupation or use of land after a hearing under Section 20 and, further, order a person to pay compensation for the purposes enumerated under Section 9 (2) of the Petroleum and Natural Gas Act.

Section 20 (3) of the Petroleum and Natural Gas Act provides that if the Mediator has not made an order under Section 18 (4) of the Petroleum and Natural Gas Act, that the Board must determine the amount of money to be paid to a person as rent for occupation, or use or for damage caused for the entry, occupation of use of the land. Section 21 of the Petroleum and Natural Gas Act direct the Board to consider a number of factors in determining the appropriate amount of compensation to be paid.

The Board has concluded that the issue of compensation is limited to the payment of money only. Although the Board recognizes that in freely negotiated contracts between landowners and companies there are often arrangements for compensation beyond money, it is beyond the scope of the statute for the Board to direct any Applicant to make use of the services of any specified individual.

If the Board is incorrect in its interpretation of the statute and it has the authority under Section 9 (1) (c) of the Petroleum and Natural Gas Act to direct the Applicant to employ Mr. Skafte, then the Board, after reviewing all of the evidence and submissions, has determined that this is not an appropriate case for such a direction to be made. Although the Board strongly recommends to the Applicant that serious consideration be given to engaging the services of Mr. Skafte in this matter, the Board does not feel that the evidence is sufficiently persuasive to justify intervening in the established contractual arrangements which the Applicant has with other persons who may provided to the Applicant services similar to those offered by Mr. Skafte.

Issue 2, The appropriate amount of compensation to be paid by the Applicant .

The Respondent is engaged in the agricultural activity of growing pedigreed fescue on the property, a portion of which is sought by the Applicant . Both parties presented evidence and made submissions on the appropriate amount of compensation which should be payable in both the initial year and in subsequent years, should a producing well be discovered on the well site. Both parties made extensive reference to the factors enumerated in Section 21 (1) of the Petroleum and Natural Gas Act, each stressing different of the factors to be considered by the Board.

The Board is cognizant of the need to deal with each case in accordance with the facts of the case; bearing in mind that the Board is attempting to determine the appropriate compensation due to the landowner for the landowner's rights of ownership which are often being influenced against the landowner's wishes.

After reviewing carefully all of the evidence and the submissions, including compensation which has either been negotiated or ordered by the Board in other circumstances, the Board has determined that the following is the appropriate amount of compensation in this case;

1. For the first year, which includes the annual payment for the first year; $ 10,000.00 and
2. In the second and subsequent years of occupation and use, until otherwise negotiated, ordered, the well site reclaimed and a certificate of restoration issued; $ 4,500.00

The anniversary date for the payment of annual rent shall be the date of this order.

As agreed between the parties, with the exception of necessary surveying work on the property, no further development will occur until the initial year's consideration has been paid to the Respondent.

Issue 3, The terms of entry, use and occupation

The Respondent submitted that as the parties had been unable to freely and voluntarily arrive at any agreements that the Board should specify for the parties these terms and, in effect, write a lease and impose it on both parties.

Pursuant to Section 9 (1) (c) of the Petroleum and Natural Gas Act, the Board specifies the following terms which shall govern the relationship between the Applicant and the Respondent:

1. USUAL TERMS;
2. All drilling fluids used by the Applicant will be contained in mud tanks;
3. There will be no sump;
4. All shale piles will be removed from the site;
5. With the exception of surveying the site, no work will be performed by the Applicant until the first year's compensation cheque is paid by the Applicant .

Issue 4, Costs

The Respondent submitted that the Board should exercise its jurisdiction under Section 27 of the Petroleum and Natural Gas Act, and award the Respondent its legal fees on a solicitor and client basis. The Applicant made no submissions on this point.

Having considered this matter, the Board finds that solicitor and client costs are not appropriate in this matter.

In the exercise of its discretion, the Board awards the Respondent Party and Party Costs at Scale 3 of Appendix B to the Supreme Court Rules. Having consideration to this matter, the Board awards the Respondents its costs, either to be agreed upon or assessed in the appropriate fashion, for Tariff items 1, 24 and 25 of the Tariff and disbursements at the appropriate allowed rates such disbursements not to include any disbursements relating to the fact that counsel for the Respondent does not ordinarily reside in the Peace River area of British Columbia.

This decision is, of course, subject to any other relevant legislation or regulations of the Province of British Columbia and does not vary, alter or supersede such legislation or regulations.

IT IS HEREBY ORDERED THAT:

1. The Board hereby orders the Applicant Penn West Petroleum Ltd. to pay to the Respondent, Silver Hammer Farms Inc. the amount of $ 10,000.00 for first year compensation, which includes the annual payment for the first year; which must be paid prior to the Applicant entering onto the land to construct the well site and access road. The Applicant or it's agent may enter for the purposes of surveying the well site and access road prior to the Respondent receiving the first year compensation.

2. The Board hereby orders the Applicant to pay to the Respondent the amount of $ 4,500.00 for annual compensation. The annual payment will be due and payable before or on the anniversary of this Order 30 May, until such time as this order may be canceled or amended pursuant to Section 26 (2) of the Petroleum and Natural Gas Act, or until such time an agreement is re-negotiated pursuant to Section 11 (2) of the Petroleum and Natural Gas Act, or until a date stated in the restoration certificate pursuant to Section 20 (3) of the Petroleum and Natural Gas Act. The next annual payment (of $ 4,500.00) shall be due on 30 May 2001.

3. Upon payment of the sum awarded in part 1 of this Order, the Applicant shall be entitled to all the rights of an operator, to enter, occupy or use of land granted under the provisions of the Petroleum and Natural Gas Act and Amendments thereto, upon the lands referred to in the survey plan.

4. The usual terms referred to on page 5 of this order are the terms of the Surface Lease "endorsed by the Surface Lease Committee", bearing C.A.P.L 1997 logo; and shall be in effect for the life of this Order, or until such time as the terms are re-negotiated and amended.

5. The Board hereby orders that all drilling fluids used by the Applicant will be contained in mud tanks; that there will be no sump; and that all shale piles will be removed from the site when drilling of the well has been completed.

6. This order is subject to the completion of the referral process, conducted by the Oil and Gas Commission and the issuance of the “Permission to construct Letter."

7. Nothing in this order is or operates as consent permit or authorization that by enactment a person is required to obtain in addition to this order.

Dated at the City of Fort St. John, British Columbia, this 30th day of May 2000.

MEDIATION AND ARBITRATION BOARD
UNDER THE
PETROLEUM AND NATURAL GAS ACT

_____
Rodney Strandberg, Chair

_____
Mavis Nelson, Member

_____
Ivor Miller, Member

_____
Frank Breault, Member

_____
Julie Hindbo, Member

File No. 1620
Board Order # 1620-1

February 17, 2010

MEDIATION AND ARBITRATION BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF
SE ¼, Section 17, Township 80, Range 14, W6M, Peace River District
(The "Lands")

BETWEEN:

John Miller and Mary Miller

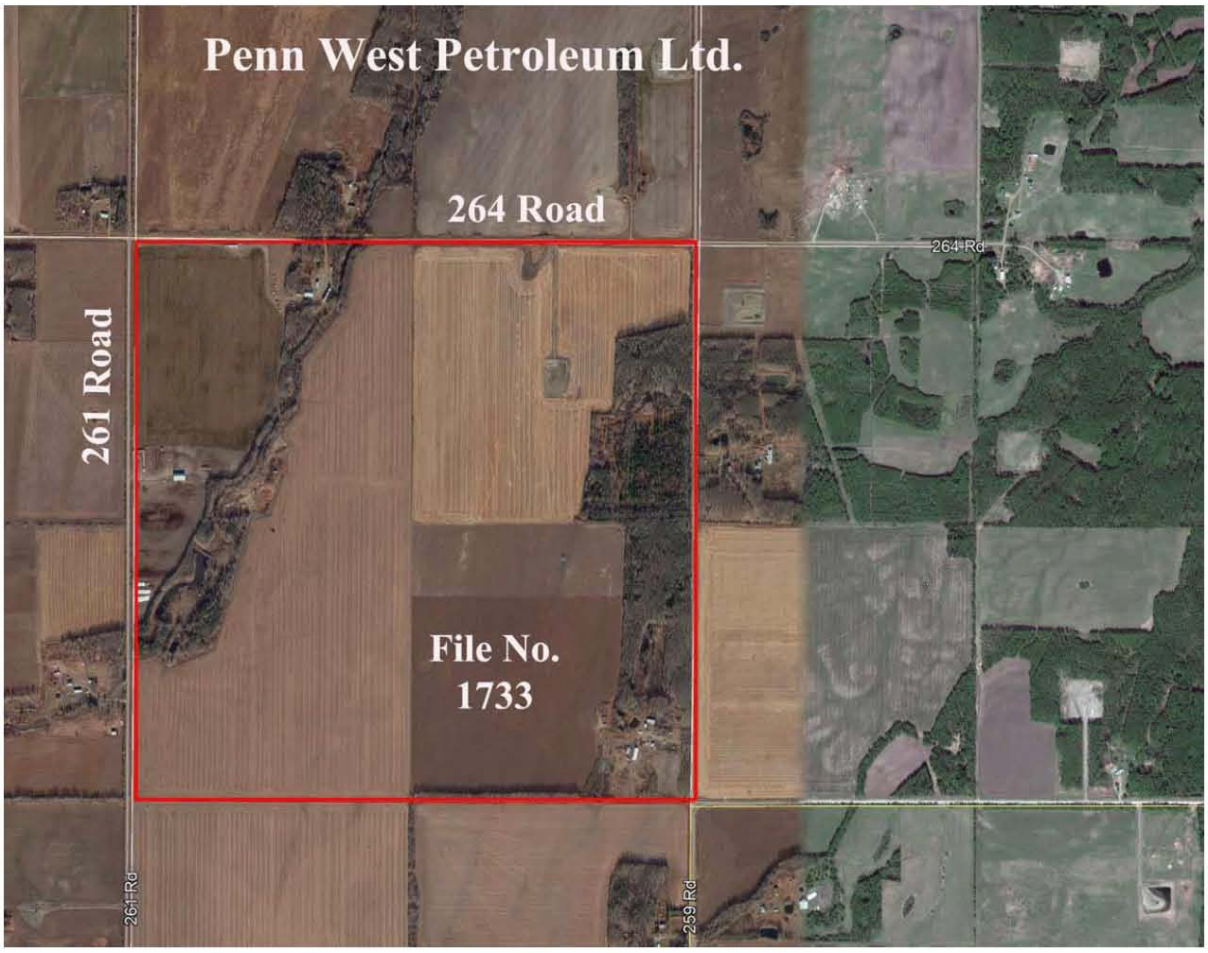
(APPLICANTS)

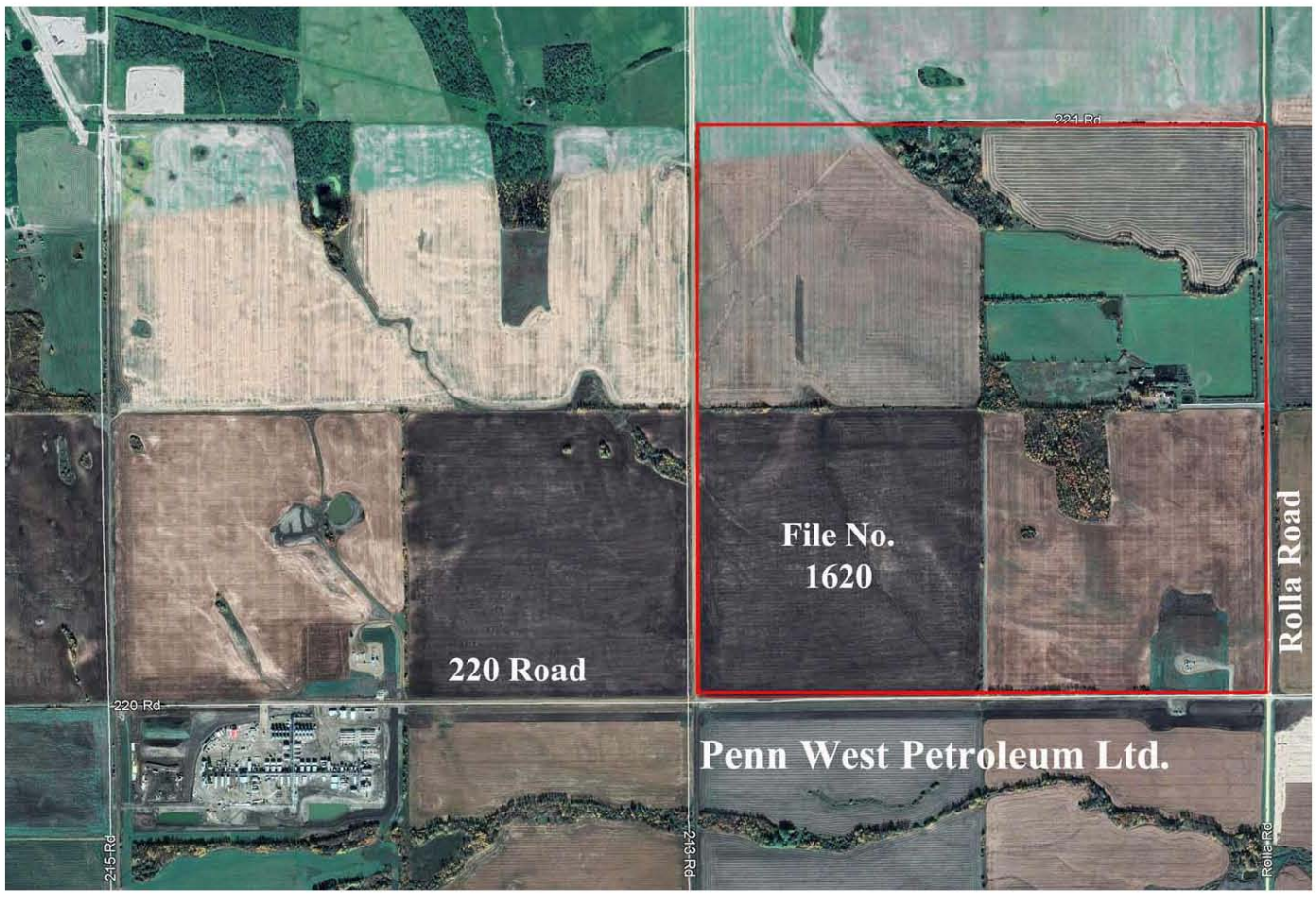
AND:

Penn West Petroleum Ltd.

(RESPONDENT)

BOARD ORDER


Penn West Petroleum Ltd.
264 Road
261 Road
File No.
1733
264 Rd
261 Rd
259 Rd


221 Rd
File No.
1620
Rolla Road
220 Road
220 Rd
Penn West Petroleum Ltd.
215 Rd
213 Rd
Rolla Rd

Mary Miller, for the Applicants
Keith Grainger, for the Respondent

[1] This is an application by the Applicant, Mary Miller, for costs of a mediation. Mr. and Mrs. Miller applied to the Board pursuant to section 12 of the *Petroleum and Natural Gas Act*, for review of the rent payable by the Respondent, Penn West Petroleum Ltd. (Penn West), pursuant to a Surface Lease with respect to its use and occupation of an area of the Miller's land for the operation of a wellsite. The Board mediated in an effort at resolving the application, but the parties were unable to agree on a revised rent. The Board refused further mediation and the application is proceeding to arbitration. Mrs. Miller seeks costs from Penn West for the mediation. Penn West is agreeable to paying Mrs. Miller's costs of the mediation, but the parties have been unable to resolve the amount payable.

[2] Mrs. Miller claims for time spent preparing for and attending the mediation, mileage costs associated with attending or preparing for the mediation, mileage and time for a consultant, and other incidental disbursements. She prepared a record of her activities itemizing her activities, and the various telephone calls and communications she had with other people to research and prepare for the mediation. I have reviewed Mrs. Miller's claim and the documentation in support, considered Penn West's position with respect to the claim and conclude that Penn West should pay Mrs. Miller $3,322.93 as costs of the mediation. This amount is calculated as follows:

Travel – 176 kms @ $0.50/km	$88.00
Time spent in preparing for and attending mediation – 60 hrs @ $50.00/hr	$3,000.00
Disbursements:	
• BC Assessment	$48.00
• Printer supplies	$178.49
• Registered mail Form 2	$8.44
Total	**$3,322.93**

[3] The travel claim allows for four return trips to Dawson Creek, three for preparation and research and one to attend the mediation. The rate of $0.50/km is equivalent to the rate paid by the BC Government for employee and contractor mileage. As for time, I appreciate that Mrs. Miller's time exceeded the 60 hours allowed for. Penn West offered compensation for 53 hours. Reviewing the itemization of time provided by Mrs. Miller I am satisfied that 60 hours is not unreasonable. What is reasonable will not necessarily be the same in every case. Where costs are payable, a company should anticipate compensating a landowner for a reasonable amount of time in preparation, but it will often be unrealistic for a landowner to expect that 100% of their time will be compensated for, particularly in an application for rent review where the presumption that a

landowner shall be entitled to their costs of mediation does not apply in the same way it does for an entry application.

[4] Mrs. Miller claimed time and mileage for Gwen Johansen who attended the mediation with her. Where costs are payable, companies should normally expect to reimburse landowners for reasonable costs of professional consultants. Mrs. Miller has not provided a copy of an invoice from Mrs. Johansen for her time and expenses, however, and it is not clear to me that Mrs. Johansen was acting in a professional paid capacity or in a volunteer capacity in offering assistance to Mrs. Miller.

ORDER

[5] The Board orders Penn West to pay Mary Miller $3,322.93 for costs of the mediation.

For the Board,

Cheryl Vickers,
Chair and Mediator

File No. 1620
Board Order # 1620-2

May 31, 2010

MEDIATION AND ARBITRATION BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF
SE ¼, Section 17, Township 80, Range 14, W6M, Peace River District
(The "Lands")

BETWEEN:

John Miller and Mary Miller

(APPLICANTS)

AND:

Penn West Petroleum Ltd.

(RESPONDENT)

BOARD ORDER

Heard:	April 27, 2010 at Dawson Creek, B.C.
Panel:	Simmi K. Sandhu and Bill Oppen
Appearances:	Elwin Gowman, for the Applicants
	Darron Naffin, for the Respondent

INTRODUCTION

[1] Mary and John Miller lease a portion of their Lands to Penn West Petroleum Ltd. ("Penn West") for a sweet gas well tied-in to a pipeline that is shut in with no future production potential. The leased areas comprise 3.56 acres for the wellsite, with an access road of 3.34 acres, for a total of 6.90 acres (the "Leased Area").

[2] The parties executed a surface lease for the Leased Area on or about November 25, 2003 and the Millers have been receiving $4,500 per year in compensation pursuant to that lease (the "Lease"). The Millers seek a renegotiation of the annual compensation under the Lease pursuant to section 12 of the *Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361 (the "Act").

ISSUE

[3] The issue before us is: what is the appropriate compensation to be paid to the Millers by Penn West under the existing Lease?

THE LEGISLATION

[4] Section 21 (1) of the *Act* set out factors the Board may consider in determining an amount to be paid as compensation under this application, including,

(a) the compulsory aspect of the entry, occupation or use,
(b) the value of the land and the owner's loss of a right or profit with respect to the land,
(c) temporary and permanent damage from the entry, occupation or use,
(d) compensation for severance,
(e) compensation for nuisance and disturbance from the entry, occupation or use,
(f) money previously paid to an owner for entry, occupation nor use,
(g) other factors the Board considers applicable, and

(h) other factors or criteria established by regulation.

[5] The factors in section 21(1) do not speak to speculative future loss or damage, and compensation under the *Act* is only intended to compensate for loss or damage that has occurred or is reasonably probable and foreseeable; it is inappropriate to make a speculative award *(Arc Petroleum Inc. v. Piper*, MAB Order 1598-2).

EVIDENCE AND ANALYSIS

[6] The parties take two fundamentally different approaches to determine compensation. The Millers presented a report from Anne Clayton, real estate appraiser, who relied on a method of determining compensation based on a comparison of comparable adjusted lease rates to the comparables' land values to arrive at a factor which is then applied to the subject's land value. Penn West presented a report from Robert Telford, real estate appraiser and land agent, who calculated compensation based only on the specific heads of compensation contained in section 21(1) of the *Act.* Neither party relied upon an analysis of a pattern of dealings for comparable properties and leases in the area.

[7] Ms. Clayton reviewed seven leases dated from 2000 to 2007, as well as the subject, that she "selected" on the basis that the lessors were reasonably well informed and negotiating in their best interests. We were not informed of the specifics of the leases discarded in her analysis.

[8] She then adjusted the lease rates for "compensation in kind" and for time. In terms of the "compensation in kind" adjustment, Ms. Clayton concluded that in certain leases, lessors agreed to a lower annual rental rate because they received other types of compensation, such as supplying water for drilling, or renting tanks and other material to the oil company. For the subject lease, there is a term that the lessee would hire Mrs. Miller's son, Rick Pavlis, to complete lease construction. Therefore, Ms. Clayton determined from Mr. Pavlis the profit from that construction work at $4,243.17 for each of the first five years of the lease, discounted it for present worth over the five year term, and then adjusted the lease rate for this. She also adjusted another lease comparable, which she says is the most similar to the subject, for "compensation in kind". There are no other adjustments for other characteristics, such as size or location. The sizes of the leased areas of the comparables range from 2.82 acres to 6.89 acres. She did not adjust for location because all the leases were located in the rural Dawson Creek area. She did not consider the nature of the land being leased, i.e. whether it was agricultural or used for another purpose, or whether the wellsite was at the outside boundary of the quarter section or in the middle, or whether the wellsite was on a home quarter or not.

[9] After adjustments for time and in kind compensation, the adjusted lease rates range from $1,999 to $623 per acre.

[10] She then determined a land value for the subject and each comparable. She reviewed 12 sales of quarter sections between 2008 and 2009 in the Rolla/Doe River area and concluded that the market value of the subject as of November, 2008 was within the range of $1,150-1,250 per acre based on the sales of properties with a soil rating similar to the subject of CLI2. She concluded the market value for the subject at $1,200 per acre.

[11] For the seven lease comparables, she determined land values for each comparable based on the sales of properties from 2006 to 2009, adjusted for time.

[12] She compared the adjusted lease rates of the seven comparables with the land values she had assigned to each comparable, as well as the subject, and obtained a lease rental to land value ratio, ranging from 3.08 to 1.64 with a median of 2.05. She applied this factor of 2.05 to the land value she assigned the subject of $1,200 per acre and arrived at an appropriate lease rate for the subject of $2,460 per acre, which she says should be the renegotiated lease rate.

[13] There are a number of problems with this analysis. Ms. Clayton did not provide any evidence to show that there is any link between the market value of the land and lease compensation. The lease rate to land value ratio can only be a statistically relevant relationship if each rate represents a common characteristic. For example, in property assessments, an Assessment to Sales Ratio is often used for analysis in which a property's assessment is compared to its selling price. However, both the assessment and the sale price represent a market value for the property and therefore, the ratio becomes a relevant method to analyze whether the assessment is accurate. However, in Ms. Clayton's analysis, the lease rates presumably represent compensation for factors relating to entry onto the land, nuisance, loss of profit or other factors, or a combination of those factors, and the land value represents the market value of the land: two very different concepts. In other words, the market value of the land represents the value of the fee simple interest in the land, while a lease rental rate does not attempt to value the fee simple interest, but is instead compensation for use of the land. Again, they represent two different concepts which, without evidence to the contrary, have no relationship to each other.

[14] Further, we do not have evidence as to how the lease rates for the comparables were negotiated, what each of the comparable lease rates were meant to compensate for, and whether or how those rates took into consideration the value of the land. Ms. Clayton confirmed in her testimony that there are often inducements not captured in the lease documents and side agreements. If so,

what the lease rate compensates for, and the myriad of factors that effect those rates, become more difficult to identify.

[15] Another difficulty with Ms. Clayton's evidence is that she provided insufficient evidence regarding the comparability of the leases relied upon. There were no adjustments made for location of the leased areas compared to the subject, the location of the wellsite within the quarter acre, whether or not the quarter section was a home site, or the use of the property. All of these factors presumably affect the amount of compensation received by a landowner under a lease, but these were not considered in determining comparability with the subject.

[16] Ms. Clayton's ultimate conclusion that the appropriate lease rate as a ratio of the land value should be over twice the market value of the land also undermines the usefulness of the analysis. As stated by the B.C. Supreme Court in *Western Industrial Clay Products Ltd. v. Mediation and Arbitration Board* (20 BCLR (4^{th}) 337 (affd by B.C.C.A. 35 B.C.L.R. (4^{th}) 205), in the absence of special circumstances, the upper limit of compensation is the value of the land. No evidence was provided that there are special factors warranting higher compensation to the Millers than indicated by the market value of the land. Awarding compensation that represents twice the value of the subject, with no evidence of special circumstances surrounding this property, is contrary to existing legal principles of compensation under the *Act* and beyond the jurisdiction of the Board.

[17] Conversely, Mr. Telford, for Penn West, presented a very different analysis to determine compensation, that only considered each of the enumerated factors set out in section 21(1) of the *Act*. He concluded that there should be no compensation for the compulsory aspect of the entry, occupation and use and the land value (section 21(1)(a) and (b)) because the one time lump sum payment that was made with the initial negotiation compensated for these factors. No evidence, however, was provided that the parties, when they negotiated the lump sum payment intended it to compensate for these factors nor does the lease state this.

[18] Mr. Telford determined that there could be compensation for nuisance and disturbance from the occupation and use (section 21(1)(e)), severance (section 21(1)(d)), and loss of a right or profit with respect to the land (section 21(1)(b)). However, he stated that the landowner would need to provide evidence of this loss and that the compensation should be for actual and reasonably foreseeable projected losses of the landowner. He concluded that the subject was being used for production of canola and wheat in 2008 and based on actual yields and a four year crop rotation, the crop loss would total $1,773 per year. As for severance, there is a 0.288 acre area that had been severed from the rest of the property that cannot be farmed due to the location of the wellsite, and he

estimated the crop loss from the severed area at $74.00 per year. As for nuisance, he tried to estimate any additional costs associated with the farming operations due to the wellsite and concluded that the owner would spend an additional day per year dealing with the oil company at $50 per hour, for a total of $400 per year. Therefore, he concluded the Millers were entitled to receive $2,250 per year as compensation under the Lease, less than what they currently receive. Mr. Telford confirmed he looked at four comparable leases of similar sites with shut-in lines and similar location around November, 2008 and determined that there was no pattern of dealings for lease renewals in the area. Evidence of these leases was not provided.

[19] Penn West and Mr. Telford say that in a rent review application under the *Act*, the Board is limited to determining actual or recurring losses sustained by the landowner, i.e. there must be evidence of probable or reasonably foreseeable ongoing losses and damages that can be reasonably quantified (*Arc v. Piper, supra*). They say that Ms. Clayton's evidence fails to do this.

[20] As with Ms. Clayton's evidence, there are difficulties with Mr. Telford's analysis. He ignored the current compensation under the Lease, $4,500 per year, and his conclusion that the compensation should be half of what is currently being paid is simply not reasonable. Section 21(1)(f) states that the Board may consider money previously paid to an owner for entry, occupation or use and section 21(1)(g) also references other factors. The existing compensation is an important factor to consider.

[21] The other factor that Mr. Telford has not adequately presented is the pattern of dealings in the area or the prevailing rates being paid for comparable leases. He stated that he found no pattern of dealings in the area, but did not provide evidence to support this conclusion.

DECISION

[22] There are difficulties with the evidence of both parties, however, we find that Ms. Clayton's analysis cannot be relied upon because she has not shown that a relationship exists between lease rates and land values and concluded a rate of compensation that goes well beyond the market value of the property. Based upon this and other difficulties set out above, we cannot rely upon Ms. Clayton's analysis to determine compensation.

[23] We would have preferred to see better evidence presented by both parties of comparable leases in the area and evidence of whether or not there was a pattern established within those comparable leases. Mr. Telford provided no evidence of this other than his statement that he considered some leases and found no pattern. Ms. Clayton provided seven lease comparables, however, we

have insufficient evidence on the comparability of those leases to the subject. Based on size of leased area, only three (comparables 1, 2 and 5) are close to the size of the subject's leased area, but the leases date from 2003, 2005 and 2007. We do not know precisely the location of these leases and other details to determine if those properties and leases are otherwise similar to the subject. As such, we have insufficient evidence to establish a pattern of dealings upon which we can base compensation for the subject.

[24] Therefore, we are left with Mr. Telford's evidence and his analysis based on the heads of compensation set out in section 21(1) of the *Act*. Although we have concerns with his evidence, we find his evidence is the best evidence that we have before us and we accept his evaluation of the heads of compensation set out in sections 21(1)(a) to (f).

[25] However, as stated by the B.C. Supreme Court in *Scurry Rainbow Oil Ltd. v. Lamoureaux*, 33 L.C.R. 65, having reviewed whether there was a pattern of agreed values and evaluating the various heads of compensation in section 21(1), the Board should then step back from its award and consider whether in its totality, it gives proper compensation in any case because there may be some cases where the sum of the parts exceeds, and some where it falls short of, proper compensation. In our opinion, this is a situation of the latter, particularly, in the circumstances where the sum of the parts falls short of the existing compensation. An analysis of compensation based on the heads of compensation arrives at a figure of $2,250 based on our acceptance of Mr. Telford's evidence. However, the global effect of this calculation results in a 50% reduction of the existing compensation being paid under the Lease.

[26] Having considered the global effect as well as other factors as set out in section 21(1)(g), including the existing compensation being paid, we find that the appropriate compensation should remain $4,500 per year. Added to this figure should be compensation for the severed areas of $74.00 (based on Mr. Telford's calculations), which compensation, both parties agreed, was not included in the existing compensation being paid.

[27] Another factor which has not been adequately considered by either appraiser is section 21(2) of the *Act*, which states that the Board must consider any change in the value of money and of land since the date the surface lease was originally granted. Penn West says that this does not relate to a simple increase in the market value of the land, but where the land use and impact of wellsite has changed since the date of the original lease. However, this interpretation does not reflect the language of section 21(2) which refers to any change in the value of money and of the value of land, not a change in use. The only reliable evidence before us on a change in value is Ms. Clayton's time adjustment of the subject's lease rate of about 9% to November, 2008, which we find is reasonable compared to the change in the value of farm land by way of

Ms. Clayton's paired sales analysis over time. We do not accept that the *Court Order Interest Act* applies in this instance to the statutory requirement set out in section 21(2). We would have preferred to see other evidence as well, including the consumer price index, however, in the absence of better evidence we accept Ms. Clayton's time adjustment analysis on this point. We find the lease rate reflecting change in the value of money and land since the Lease was originally negotiated is $711 per acre or $4,906 per year.

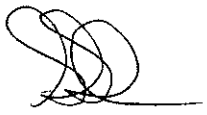
[28] We find the appropriate compensation to be $4,906 per year plus $74 per year for the severed areas, for a total of $4,980 per year, retroactive to November 25, 2008.

ORDER

[29] Pursuant to section 12(2) of the Petroleum and Natural Gas Act, the Board orders that the rental provision under the Lease be varied to $4,980 annually retroactive to November 25, 2008.

DATED May 31, 2010

FOR THE BOARD



Simmi K. Sandhu, Panel Chair

Bill Oppen, Member

File No. 1733
Board Order No. 1733-1

April 23, 2013

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF

THE NORTH EAST ¼ OF SECTION 22 TOWNSHIP 87 RANGE 18 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

Elysha Petersen

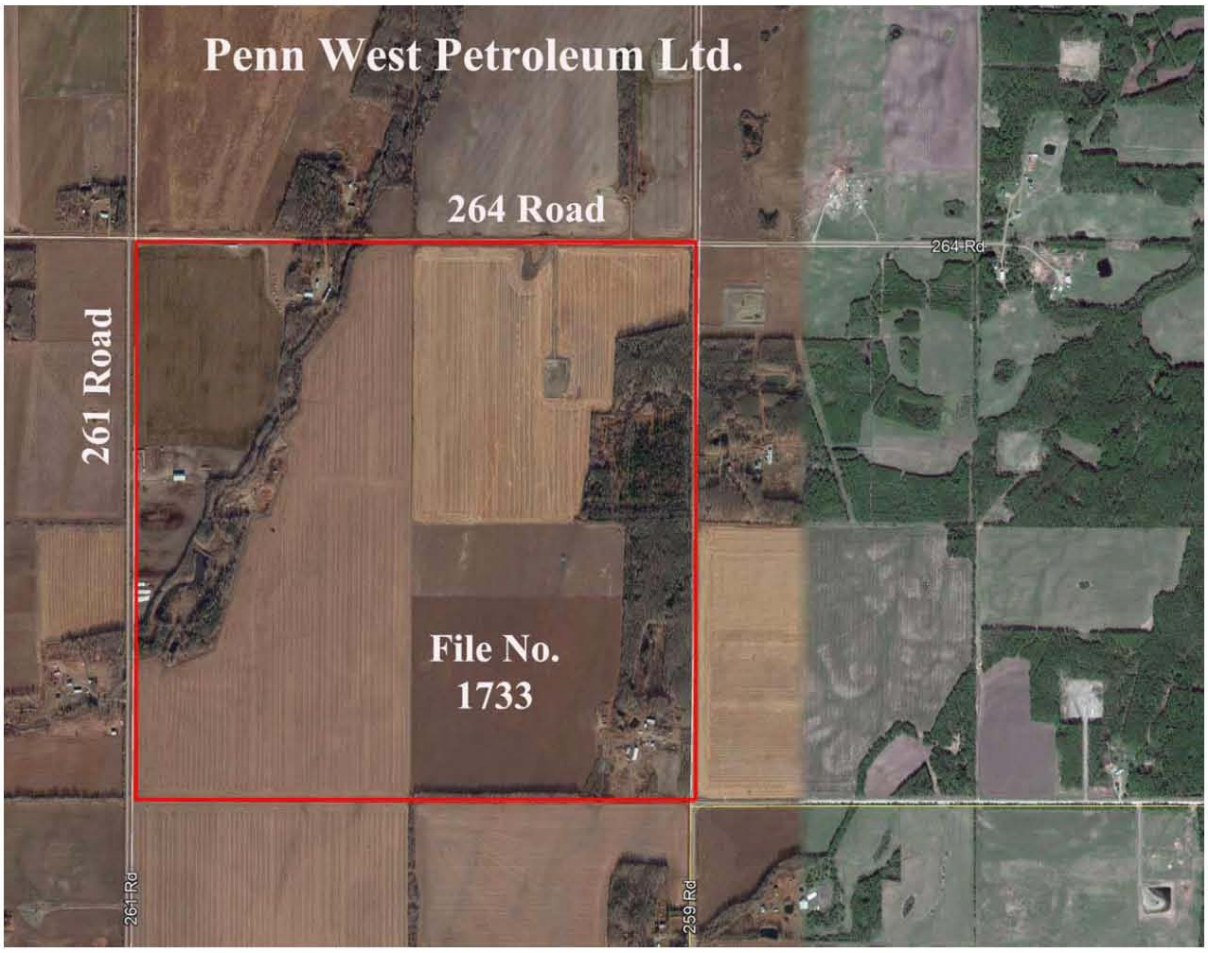
(APPLICANT)

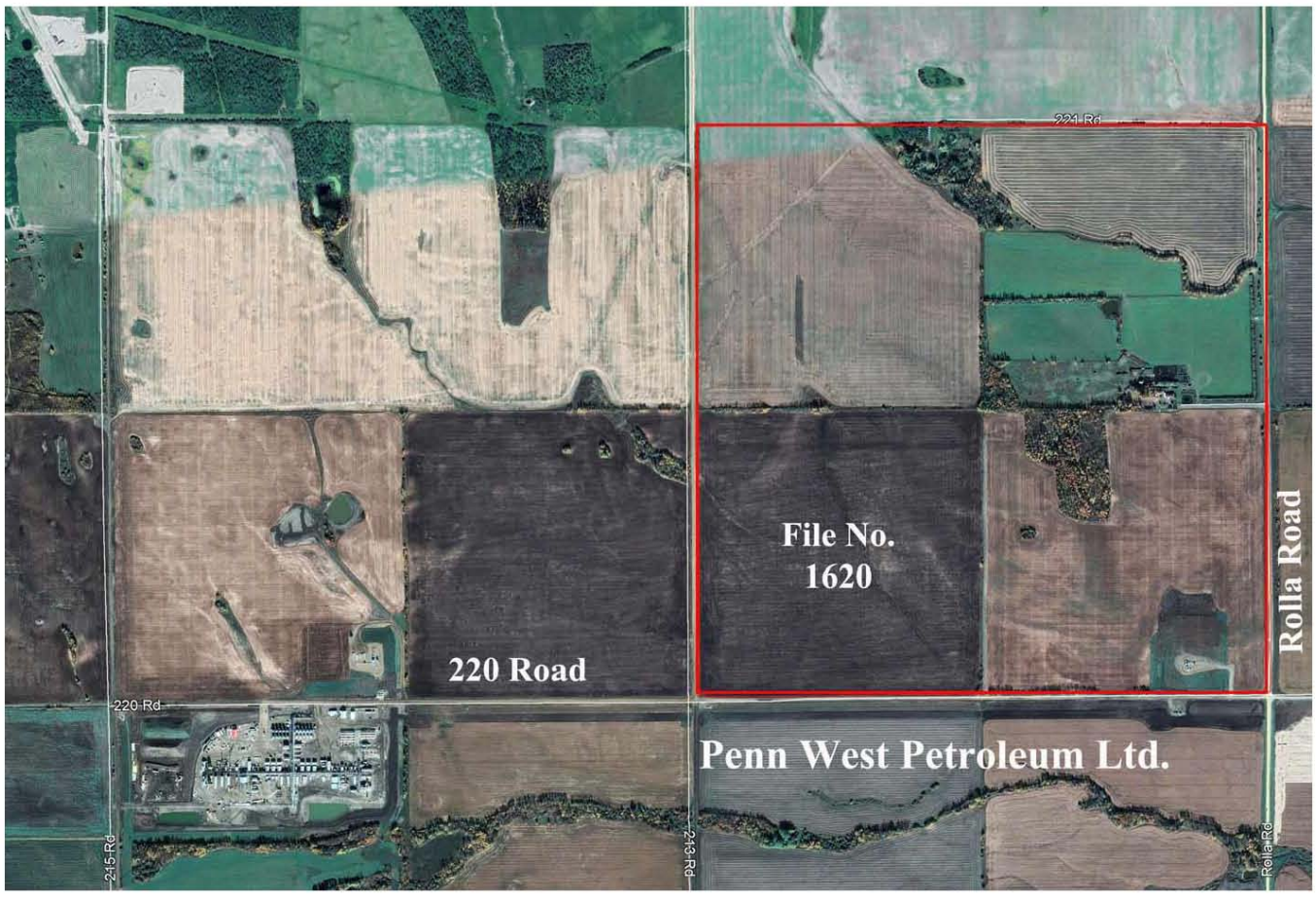
AND:

Penn West Petroleum Ltd.

(RESPONDENT)

BOARD ORDER


Penn West Petroleum Ltd.
264 Road
261 Road
File No.
1733
264 Rd
261 Rd
259 Rd


221 Rd
File No.
1620
Rolla Road
220 Road
220 Rd
Penn West Petroleum Ltd.
215 Rd
213 Rd
Rolla Rd

Heard: March 7, 2013 in Fort St. John
Appearances: Elvin Gowman, for the Applicant
Darron K. Naffin, Barrister and Solicitor, for the Respondent

---

INTRODUCTION

[1] This is an application for rent review pursuant to section 166 of the *Petroleum and Natural Gas Act* (*PNGA*).

[2] The surface lease, originally executed in 1988 between the then owner of the Lands and Encor Energy Corporation Inc., grants right of entry, occupation and use to 4.88 acres of the Lands for an access road and oil well. Penn West Petroleum Ltd. (Penn West) assumed the lease and the operations on the Lands in 2008. Mr. Elysha (Lysh) Peterson purchased the Lands in the spring of 2011, and later that year sought to review the annual rent of $3,000.00 last reviewed effective December 13, 2003. Lysh Peterson seeks to increase the annual rent to $8,805.00. Penn West submits the annual rent should be $3,778.00. The difference between the parties is attributed to their differing views on the compensation payable for loss of use or loss of profit, nuisance and disturbance, and severance.

ISSUE

[3] The issue is to determine the appropriate annual rent payable under the surface lease. The effective date of any revised rent is December 13, 2010, being the anniversary of the lease immediately prior to Lysh Peterson serving Penn West with a Notice to Negotiate.

FACTS

[4] The Lands are located approximately 35 kms north of Fort St John in the Rose Prairie area. They are used to grow crops, in particular canola, wheat, barley, and peas. The soil is classified as Class 2c, with moderately high to high productivity for a wide range of crops. The Lands slope from west to east.

[5] Lysh Peterson is a third generation farmer. He grew up farming, starting to assist his father at a young age. His father, Don Peterson, commenced renting the Lands in 1993 or 1994 making them part of the family farm. Lysh Peterson purchased the Lands for $160,000 in the spring of 2011. He planted and harvested his first crop as owner of the Lands that same year. He farms in partnership with his brother. Together they farm approximately 15 quarters of land generally in the Rose Prairie area.

[6] The lease area is not located on Lysh Peterson's home quarter.

[7] The lease area consists of a 3.27 acre well site and 1.61 acre access road, comprising in total 4.88 acres. The well site is located approximately in the centre of the quarter section with the access road effectively dividing the north portion of the quarter section in half. Approximately two thirds of the eastern half of the quarter section remains treed.

[8] The onsite equipment includes a well head and a fence. The well last produced in 1989 and was formally suspended in 2011. The fence is in poor repair, with parts of it broken and sagging, particularly on the west side of the lease area. The fence does not conform to the boundaries of the lease, effectively leaving part of the lease area available for cultivation. The access road is gated, but the gate is in poor repair and is generally left open.

[9] There used to be oil tanks on the leased area, but they were removed sometime during the 1990's.

[10] There is approximately 125 meters between the fence along the south east edge of the well site and the treed area. The area between the south east edge of the well site and the trees is wet in the spring. In some years, the wet area cannot be cultivated and divides the Lands into two fields, one comprising 33 acres in the north east of the Lands (the "little field") and one comprising 81 acres on the western portion of the Lands (the "big field"). In some years, the two fields are separately cultivated.

[11] There is a naturally occurring slough along the north boundary of the Lands abutting the road and just west of the access road.

[12] The site is rarely visited. Penn West or its contractor attended the site once during the summer of 2011 and once during the summer of 2012 to attend to weeds on the leased area.

EVIDENCE AND ANALYSIS

[13] Section 154(1) of the *PNGA* lists the various factors the Board may consider in determining an amount to be paid periodically or otherwise. Of the various factors enumerated in section 154(1) of the *PNGA*, those principally in issue in this application are:

(c) a person's loss of right or profit with respect to the land;
(e) compensation for severance; and
(f) compensation for nuisance and disturbance from the right of entry.

[14] I heard evidence from Lysh Peterson, Don Peterson, Robert Telford, and Nolan Treble with respect to the factors in issue. Additionally, I received evidence from Mr. Treble of other surface leases in the Rose Prairie area, and heard argument with respect to the applicability of the Board's decision in *McDonald v. Penn West Petroleum Ltd*, SRB Order 1742-1. I will, therefore, also consider the factors identified at section

154(1)(i) and (j), namely, terms of surface leases submitted to the Board and previous orders of the Board.

Loss of right or profit

[15] Although Lysh Peterson has only owned the Lands since 2011, he and his father have cultivated the lands since the early 1990's. In 2010, they grew barley in the big field and canola in the little field. I was not provided any evidence of actual yields or actual profits from the Lands or any other quarters farmed by the Petersons.

[16] Lysh Peterson claims $450 per acre based on the Board's description of evidence provided by Mr. Telford in the *McDonald* decision. In that case, Mr. Telford gave evidence that the rate paid for crop land is $450 per acre. Mr. Telford's evidence in this case was that his evidence of $450 per acre for cultivated lands in the *McDonald* case was based on a number of negotiated agreements that indicated payment of $450 per acre for loss of profit for cultivated land in the area of the McDonald land, located approximately 2.5 miles east of the Fort St. John airport. His evidence was further, that empirical data indicates that actual loss of profit is less than $450 per acre.

[17] Mr. Telford provided statistical data on the average five year yield, average market price between 2006 and 2010, and market price as of December 2010. On the basis of these statistics, he estimated the gross return per acre as of December 2010 for canola at $357.28, wheat at $286.52, barley at $225.09, and peas at $276.36. Mr. Telford estimated expenses associated with seed and fertilizer, potential pre-seed, post-emergent, and pre-harvest sprays at $120 to $150 per acre resulting in net returns per acre for canola of $207.28, for wheat of $166.52, for barley of $125.09, and for peas of $156.36. Based on a four year crop rotation, Mr. Telford's evidence was the average gross loss of use would be $286.31 per acre and the average net return would be $163.81 per acre. Based on Mr. Teldord's evidence, Penn West submits loss of profit should be calculated as follows:

4.88 acres @ $286.31 per acre = $1,397.19 per annum.

[18] While I accept Mr. Telford's, or anybody else's, ability to provide the Board with statistical data respecting average yields and prices, it is not evident from Mr. Telford's report the source of his expense estimates nor his professional qualifications that would enable him to provide an opinion on the average net return. Perhaps as a Professional Landman and Licensed Land Agent in Alberta he has experience with both negotiating and reviewing compensation packages that may enable him to form an opinion of amounts typically paid, but his qualifications do not identify any expertise in agriculture or as a farmer. Furthermore, $286.31 per acre does not seem reasonable when compared to amounts paid under other leases.

[19] Mr. Treble provided a binder of leases negotiated in the area and provided some evidence with which to compare these leases to the subject. Of the two leases that relate to cultivated land, the amount of the lease rate attributed to loss of profit is not

evident. The amount of the lease rate attributed to loss of profit is only evident in six of the 11 leases provided, and ranges from approximately $250 to approximately $450 per acre, averaging $327.55 per acre. The land use for these six leases is described as either pasture or hay. It is not possible to discern from the leases whether other factors, including possible other sources of income loss or factors not related to actual loss, contributed to negotiated amounts at these levels. Mr. Treble's evidence was that, generally speaking, he would expect to see higher compensation for loss of use in relation to land that is cultivated than for land used for hay or pasture. It is likely when the negotiated rates are compared to Mr. Telford's statistical evidence of average probable return, that negotiated crop loss rates are typically based on gross rather than net yields, and may often reflect factors not associated with actual crop loss.

[20] While the evidence indicates that sometimes landowners are compensated at a rate of $450 per acre for loss of profit, the evidence does not support that Lysh Peterson's actual or reasonably foreseeable loss of profit can be expected to be as high as $450 per acre. The statistical evidence suggests that the highest probable gross return from the leased area could be just over $350 per acre if planted in canola. Compensation at $450 per acre would over compensate Lysh Peterson for loss of profit from potential crop loss attributed to the leased area. While $350 an acre does not account for expenses or for crop rotation, I accept $350 per acre as reasonable given the evidence of other negotiated rates. I estimate Lysh Petersen's loss of profit as follows:

4.88 acres @ $350/acre = $1,708.00

Severance

[21] Lysh Peterson claims $1,600 per annum for severance. This figure reflects 1% of the price he paid for the Lands in 2011. He submits the leased area creates severance in two locations. One is the area between the access road and the slough and the other is the wet area between the south east boundary of the leased area and the treed area. Penn West submits there is no severance.

[22] Severance occurs where the landowner loses the use of land in addition to the land subject to a lease as a result of the presence of the lease.

[23] Lysh Peterson attributes the wet area to the presence of the lease. His evidence was the area becomes rutted with spring run-off from the lease area. Don Peterson's evidence was that the first spring he rented the Lands, the lease area was bermed and filled with water. The water was pumped out. At some point during the time Don Peterson rented the Lands, the berm was either breached or broken with the result that water washed into the field to the south east of the well site. The company operating the site at the time apologized. Don Peterson's evidence was that most of the time, the little field and the big field are cultivated separately because the wet area and the lease area together effectively create two separate fields.

[24] In some years, as is evident from the 2010 aerial photograph in Mr. Telford's report, the little field and the big field are separately cultivated and the wet area is either not seeded because it is too wet too late into the spring, or if it is seeded, the crop does not survive. In some years, however, as is evident from the 1998 aerial photograph also in Mr. Telford's report, and the 1997 aerial photograph filed as Exhibit 3, the entire field, including the wet area, can be cultivated as a single field with a single crop.

[25] The land slopes naturally from west to east. Water will therefore tend to run towards the treed area. Any berming on the leased area will result in the accumulation of water, and any break in the berm on the downslope side will cause the water to be directed through the break in a concentrated way into a particular area. On the basis of Don and Lysh Peterson's evidence of their observations of water flowing into the wet area from the leased area, which evidence was not contradicted by Penn West, I am satisfied that the presence of the lease likely contributes to making the area to the immediate south east of the lease wetter than it might otherwise naturally be in the absence of the lease. Even with the natural slope of the land, it is odd that the wet area would be concentrated where it is and not be more widespread on the eastern portion of the Lands if the presence of the lease does not contribute to directing water into the area.

[26] The evidence does not establish that the leased area creates a permanent severance of the wet area. In some years, the wet area dries sufficiently to enable cultivation and to allow the entire field to be cultivated as a single field, and there is no severance of this area. The evidence does establish, however, that in a wet year, the presence of the leased area together with the wet area effectively divides the field into two fields and necessitates their separate cultivation. In a wet year, the wet area cannot be cultivated and there is some severance. The size of the wet area has not been calculated in the evidence before me.

[27] As to the area between the slough and the access road, I accept Lysh Peterson's evidence that the presence of the access road creates a small space between the access road and the slough that is difficult to access with farm machinery, creating a small amount of severed land. The exact size of this area has not been calculated in the evidence before me.

[28] I do not accept Lysh Peterson's submission that severance should be calculated as 1% of the Land's value. The loss to a landowner from a severance will generally be the loss of profit from that area, in addition to any amounts for nuisance and disturbance attributed to a severance, and not a loss bearing any relationship to the property's market value.

[29] While I am satisfied there is some minimal permanent severance of a small area between the access road and the slough, and in some years there is severance of an area between the leased area and the trees to the south east of the leased area, I have insufficient evidence with which to determine the amount of any severed area either on

an annual or periodic basis. However, to acknowledge and compensate for some severance mostly of a periodic nature, I find it is not unreasonable to assume an average additional one acre loss, or $350.

Nuisance and Disturbance

[30] Nuisance and disturbance may be both tangible and intangible. Tangible nuisance and disturbance includes impacts on the landowner that are capable of quantification, typically in time or additional expense incurred by the landowner as a result of the presence of the lease. Intangible nuisance and disturbance accounts for impact on the landowner that is not capable of calculation and will necessarily be more subjective, such as the effect of noise or dust.

Tangible Nuisance and Disturbance

[31] Penn West does not dispute that the leased area causes nuisance and disturbance by making the Lands more difficult to farm and causing additional time to be spent on various farming activities. The parties disagree, however, on the extent of the nuisance and disturbance and the additional time required to farm around the leased area.

[32] Lysh Petersen provided drawings to illustrate the path the farm equipment must take as a result of the lease compared to the path it would take if the lease was not there. His evidence was that it is difficult to farm around the slough because of the access road. He explained how after doing the headlands, he had to work the fields inside of the headlands and showed, with the assistance of illustrations, the areas of inevitable overlap. He explained how sometimes he would have to make two trips to the quarter section with each piece of equipment, once to do the big field and again to do the little field, depending on conditions.

[33] Lysh Petersen's evidence was that in a typical year he would undertake seven to twelve passes of the field for the purpose of spraying, harrowing, fertilizing, seeding, swathing, combining, baling and discing. He estimated, on the basis of his own experience and discussions with his father and brother, that an additional one hour for each operation was required to farm around the leased area. Using a rate of $250 per hour, being the rate used in the *McDonald* decision, he calculated $3,000 attributable to the extra time required to farm around the lease.

[34] Lysh Petersen also calculated the expenses attributable to overlap as a result of farming around the lease including: the cost of spray, nitrogen fertilizer, phosphate fertilizer, and seed ranging collectively from $258.33 to $333.95 based on the cost of spray, fertilizer and seed, the size of his equipment and his calculated area of overlap. He also calculated an area of compaction arising from additional turns and travel on the headlands around the lease perimeter at 1.17 acres. He submitted loss should be based on ½ of his requested crop loss figure, or $225 (1.17 acres x ½ of $450/acre). He also sought an additional $250 for the difficulty farming into the corner between the lease road and the slough based on an additional five minutes per implement. He

claimed $3,808.95 as his total estimated annual loss attributable to the nuisance and disturbance of farming around the leased area.

[35] Mr. Telford's evidence was that a typical farming operation in the area consists of seven operations. He disagreed that 12 operations, as indicated by Lysh Petersen, was consistently necessary. Making various assumptions about the size of equipment and speed of travel he used a computer model to calculate additional farming time and losses attributable to overlap or from unseeded areas as a result of turns. The calculations indicated annual tangible loss related to farming around the lease area attributable to additional headlands, additional realignment, additional turns, crop loss due to unseeded area, additional inputs and compaction of $1,981.32. Mr. Telford provided a second calculation using the computer model based on Lysh Petersen's evidence respecting the number of operations and the size of equipment. This second calculation (Exhibit 6) was $2,799.41. In Mr. Telford's view, Lysh Petersen's estimate of one additional hour for each operation was excessive. He acknowledged that the computer model is based on numerous assumptions.

[36] For the most part, I accept Lysh Petersen's calculations of loss attributable to farming around the lease area over those provided by Mr. Telford. I accept Mr. Petersen's evidence with respect to the number of farming operations required on an annual basis and his estimate of additional time for each operation. Mr. Telford's qualifications to provide an opinion as to typical farming operations and time required for farming operations is not evident from his report. Mr. Telford is a real estate appraiser and land agent, not an agrologist or professional farmer. He does not appear to have the professional qualifications to provide the offered opinions. Mr. Petersen, on the other hand, has been farming for many years and has actual experience working this and other land. His calculations are based on his own experience using his own equipment. I accept Mr. Petersen's estimate of additional time for each operation to farm around the lease and his claim of $3,000 annual compensation attributable to this factor.

[37] I also accept Lysh Petersen's claims for additional expenses related to lost spray, fertilizer and seed of $333.95. I find it is not necessary to add the additional estimate of time to farm into the corner between the lease road and the slough, as that time is accounted for in the additional hour to farm around the lease for each operation. I accept it is appropriate to estimate loss due to compaction at one-half the rate of full crop loss. As I have allowed $350 acre for crop loss, I calculate the loss from compaction at $204.75 (1.17 acres x $350/acre x ½).

[38] Lysh Petersen claimed an additional $1,200.00 which he attributed to intangible nuisance arising from the presence of weeds, potential contamination, and the unsightly appearance of the lease.

[39] Penn West does not control weeds on the leased area to Lysh Peterson's satisfaction. He has to be vigilant to ensure that weeds, in particular scentless chamomile, do not spread into the fields. His evidence was that he has often needed to

rogue scentless chamomile that has spread from where it grows along the access road. To the extent Lysh Petersen has to spend time rogueing weeds, or incurs expense to manage weeds that have spread from the lease site, that time and expense may be compensated as tangible nuisance and disturbance. He ought not to have to incur time and expense dealing with weeds if Penn West is appropriately managing weeds on the lease. I do not have an estimate of Lysh Petersen's time spent dealing with weeds. Mr. Telford suggested one day on an annual basis for additional landowner's time associated with the presence of the lease, such as in dealing with contractors and the company. In the absence of other evidence of Mr. Petersen's time associated with the lease beyond his additional time in farming around the lease, I accept one day (8 hours at $50/hour = $400.00) as appropriate.

[40] I estimate the compensation payable for tangible nuisance and disturbance as follows:

Additional time to farm around lease	$3,000.00
Additional expenses	$333.95
Compaction	$204.75
Additional time generally	$400.00
Total	$3,938.70

Intangible Nuisance and Disturbance

[41] Lysh Peterson expressed concern about possible contamination of the Lands. Don Peterson's evidence was that on two occasions he observed oil within the berm around the storage tanks prior to their removal. His evidence was that there is "crusted stuff" there now. Lysh Peterson has concerns about contamination spreading from the leased area into the field with water run off and has concerns about potential liability. The evidence falls short of establishing that there is in fact contamination either on or off the leased area. I accept however, that Lysh Peterson is concerned about contamination and that his concern is not entirely groundless given the former presence of oil tanks combined with observations of oil within the bermed area and observed run off. I accept that the concern causes worry and stress. This worry and stress creates an intangible nuisance and disturbance.

[42] Lysh Peterson described the leased area as a blight. He expressed dissatisfaction with its unsightly appearance as it does not fit with the rest of the quarter. While the leased area was in its present state when Lysh Peterson purchased the Lands, he hoped he could get its unsightly and unkempt condition addressed. His evidence was that the previous owner lived in Edmonton and did not care about the appearance of the lease. While it is not clear from the evidence that Mr. Petersen actually brought his concern about the fence to the attention of Penn West, it is clear from the evidence that the fence is damaged, and has been for some time. I agree it is unsightly and unkempt, and therefore, causes intangible nuisance.

[43] There is little in the way of operator traffic to this wellsite due to the well being suspended. Just because a well is suspended, however, does not relieve the operator of the obligation to maintain the lease or minimize the impact of the lease on the landowner.

[44] The loss attributable to the intangible nuisance caused by this lease is incapable of calculation. Relative to other more invasive nuisances such as noise and dust, however, the intangible nuisance is somewhat minor. A small amount – say $500 – to acknowledge the intangible nuisance and disturbance is appropriate.

Other leases

[45] As discussed above under loss of profit, Mr. Treble provided a binder of other leases all negotiated in 2010 for comparable purposes. On a per acre basis, the 11 leases range from a low of $795 to a high of $1,197. He considered a lease of 4.89 acres approximately one mile away also with class 2 soil to be the best comparable. This lease is somewhat similarly positioned in the quarter section, but is on a home quarter and has a shorter access road. The land is used for hay. The rate per acre indicated by this lease is $981.

[46] The only other lease of cultivated land with class 2 soil is in the same section as the lease described above and also very close to the subject. The lease area is 3.8 acres. It is a suspended oil well with a much shorter access road, but is on a home quarter. This is the lease indicating the highest per acre rent at $1,197.

[47] While the leases provide some indication of what other landowners are receiving in rent in the Rose Prairie area, without a breakdown of how the rent is calculated and the particular losses accounted for in the rent, it is very difficult to compare other leases to the situation at hand.

Other Decisions

[48] Lysh Petersen relied extensively on the *McDonald* decision in advancing his claims. While the Board's determinations on matters of law or principle in one case might reasonable apply to another case, the Board's decisions on matters of fact determined from evidence will not apply unless the evidence in a subsequent case is the same. Loss attributable to a surface lease should be substantiated with evidence. Because one landowner is able to substantiate loss, does not mean that another landowner will necessarily experience the same loss. A number of factors go into establishing the appropriate annual compensation for a well site including the location, use and productivity of the Lands, and the nature and extent of any nuisance and disturbance. Much of the evidence in the *McDonald* case with respect to these factors was different than in this case, so the Board's findings in *McDonald* will not necessarily apply to the circumstances of this case.

Change in the value of money and of land

[49] Section 154(2) of the *PNGA* mandates that in reviewing the rent payable under a surface lease the Board must consider any change in the value of money or of land since the rent was last determined.

[50] The current rent of $3,000.00 was negotiated in December 2003. I have no evidence as to the change in the value of the Lands or other land in the area between December 2003 and December 2010. Lysh Petersen purchased the Lands for $160,000 in 2011, indicating market value of $1,000.00 per acre.

[51] As for the change in the value of money, Mr. Telford provided evidence indicating an increase of approximately 11.35% in the consumer price index between 2003 and 2010. Applying an 11.35% increase to the current rent would indicate rent of $3,341.00. This amount falls well below what I have determined above to be Lysh Petersen's actual anticipated reasonable losses attributable to the lease.

Determination of Global Sum

[52] Applying my findings discussed above in relation to the various factors in issue, I estimate Lysh Petersen's ongoing annual loss as follows:

Loss of profit	$1,708.00
Loss due to severance	$350.00
Tangible nuisance and disturbance	$3,978.70
Intangible nuisance and disturbance	$500.00
Total	$6,536.70

[53] Stepping back and considering the compensation globally in light of the evidence before me and the principles of compensation binding upon me, and acknowledging the subjective and necessarily arbitrary nature of some of the estimates, I round that figure down, and conclude that $6,500 per annum represents an appropriate rent to compensate Lysh Petersen for his reasonably anticipated loss arising from the lease. I acknowledge that on a per acre basis, this amount exceeds the highest rate indicated by the comparable leases provided in evidence before me. I am satisfied, however, that Lysh Petersen has demonstrated on a balance of probabilities the loss he is likely to incur as a result of the lease, and the impact of the lease to him. Some of these losses, such as loss of profit and tangible nuisance and disturbance can be reasonably estimated based on quantifiable measures and somewhat objective criteria. Some of the losses and impacts cannot be calculated on the basis of any quantifiable measure. They are impacts on the landowner nonetheless, and need to be acknowledged in the payment of annual rent.

ORDER

[54] The Surface Rights Board orders that effective December 13, 2010, the rental payment under the subject lease shall be $6,500.00 per annum. Penn West Petroleum Ltd. shall forthwith pay to Lysh Petersen the difference in annual rent paid since December 13, 2010 and the revised annual rent effective as of December 13, 2010.

DATED: April 23, 2013

FOR THE BOARD

Cheryl Vickers, Chair

File No. 1742
Board Order No. 1742-1

November 21, 2012

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF

THE NORTH EAST ¼ OF SECTION 32 TOWNSHIP 83 RANGE 17 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT, EXCEPT PLAN 8630

(The "Lands")

BETWEEN:

Laurie William McDonald

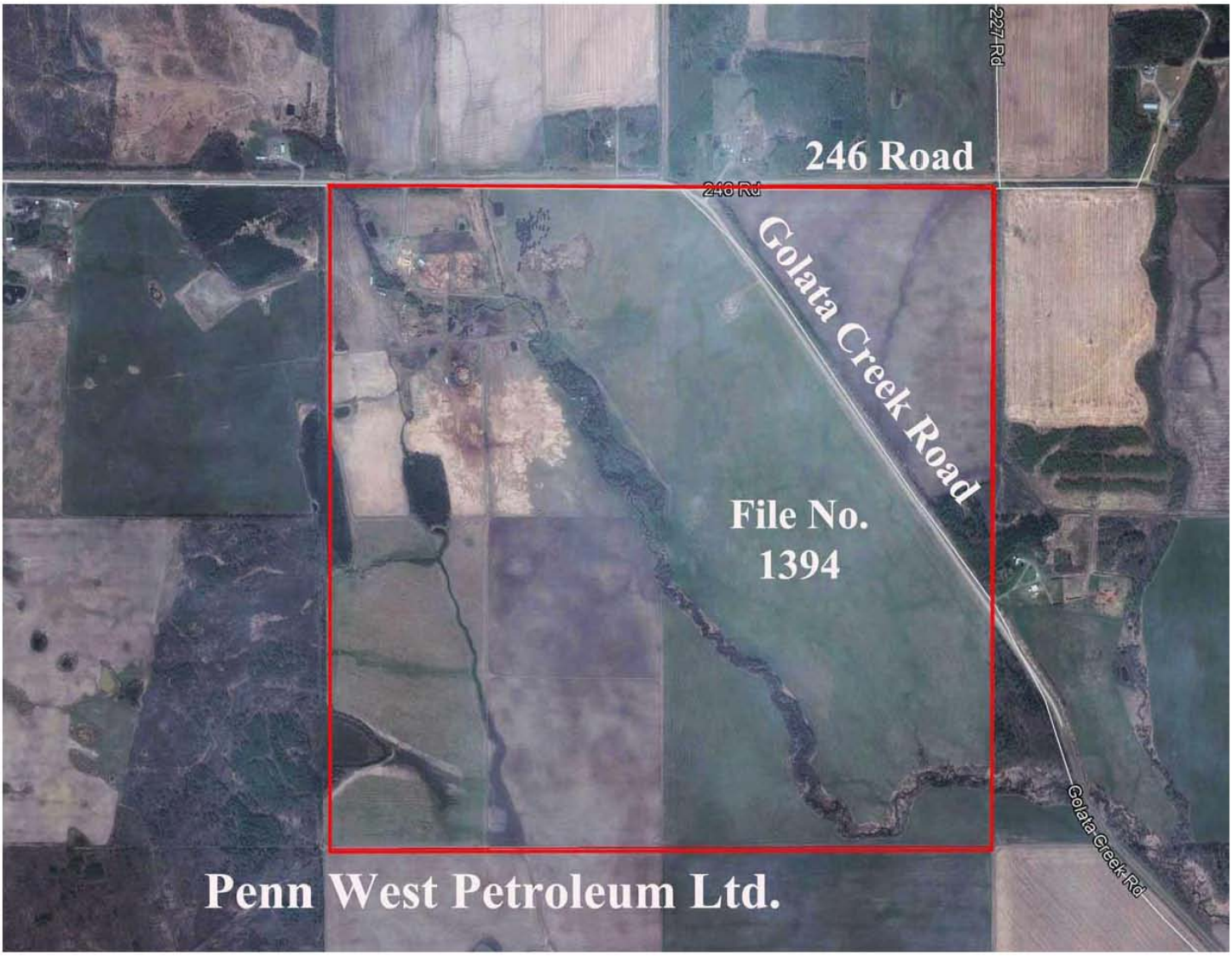
(APPLICANT)

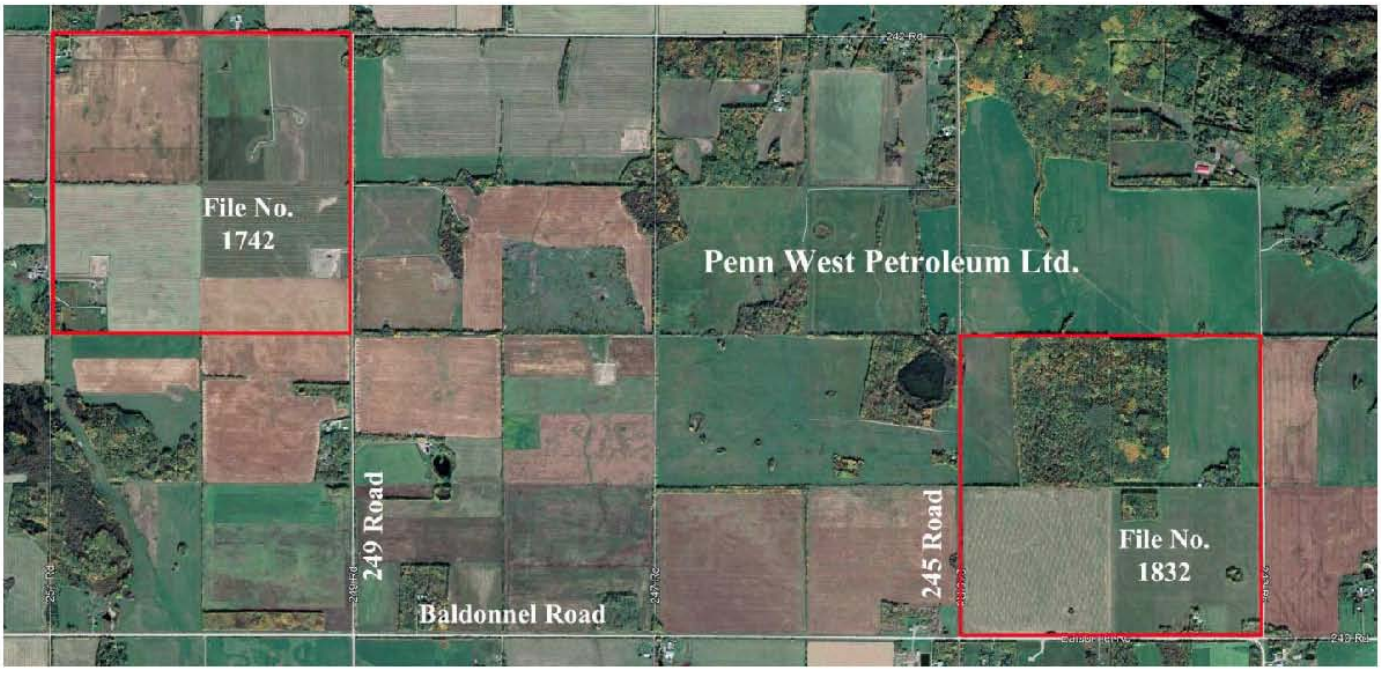
AND:

Penn West Petroleum Ltd.

(RESPONDENT)

BOARD ORDER


227 Rd
246 Road
246 Rd
Golata Creek Road
File No.
1394
Golata Creek Rd
Penn West Petroleum Ltd.


File No.
1742
Penn West Petroleum Ltd.
249 Road
Baldonnel Road
245 Road
File No.
1832

Heard:	July 31, 2012
Panel:	Valli Chettiar
Appearances:	Laurie William McDonald (the Applicant) Daron K. Naffin (for the Respondent)

INTRODUCTION

[1] The Applicant, Laurie McDonald, owns the Lands, which are located near Fort St. John, in the Peace River District. He granted a surface lease (the "Subject Lease") of a portion of the Lands (the "Leased Area") to Titan Exploration Ltd., a predecessor in interest to the Respondent, Penn West Petroleum Ltd. ("Penn West"), effective August 4, 2005. Under the Subject Lease, Penn West is entitled to use the Leased Area comprising approximately 4.0 acres for the drilling and operation of a single well, and all roadways on the Leased Area only for the rights granted under the Subject Lease. The Subject Lease provides for a one-time payment of $10,500 for the entry, and an annual compensation of $3,800 that Penn West has been paying Mr. McDonald to date.

[2] In addition to Penn West, another company, Twin Butte Energy Ltd. ("Twin Butte"), operates a wellsite and access road on the Lands. Twin Butte holds the rights to enter, occupy and use its wellsite and access road through a right of entry order dated February 21, 1978, as amended (the "Twin Butte Order"). By a Road Use Agreement made February 5, 2008 (with effect from July 13, 2005) between Twin Butte and Penn West, Penn West uses the Twin Butte access road to get to its own access road, for which it compensates Twin Butte.

[3] The following are Mr. McDonald's claims, and Penn West's response to them.

[4] Mr. McDonald says the annual compensation of $3,800 is inadequate compared to annual compensation being paid under comparable leases in the area. He claims $5,200 is more appropriate. Penn West disagrees with Mr. McDonald's figure, and maintains that $3,800 is the proper annual compensation.

[5] Mr. McDonald says Penn West is using the Twin Butte access road without any agreement with him or compensation to him, and he seeks compensation for Penn West's use of such access road. Penn West says the Surface Rights Board does not have jurisdiction to determine this issue in this proceeding, and even if it did, it is Twin Butte as operator of the Twin Butte access road, and not Penn West, that should be liable for any compensation to Mr. McDonald.

PRELIMINARY ISSUE

[6] Since Penn West questions the Board's jurisdiction to determine Mr. McDonald's second claim, I will deal with it first.

[7] On May 21, 2010, Mr. McDonald filed with the Board a "Form 2 – Notice to Lessee/Lessor for Rent Renegotiation" under section 11 [now subsection 165(2)] of the *Petroleum and Natural Gas Act,* RSBC 1996, c. 361 (the "Act"). The subject of this Notice is the Subject Lease between the parties to this proceeding, which deals only with the Leased Area and not with any area that Twin Butte operates.

[8] Since Mr. McDonald was not successful in negotiating an amendment of the rental provisions in the Subject Lease, he applied to the Board, under section 166 of the Act, to resolve the disagreement. In his application for rent review, dated December 12, 2011, he refers to the Subject Lease and summarizes the nature of his dispute as follows:

> "1) Penn West offer of $4,100 for surface lease rent appears to be somewhat low.
> 2) The use of road by Penn West without an agreement or remuneration with the landowner has to be addressed."

[9] The Board conducted mediation between the parties. On the first issue, the parties did not agree on an acceptable rent, and on the second issue, Penn West objected to the Board's jurisdiction. Therefore, the Board mediator referred both issues to the Board for arbitration.

[10] Penn West has continually maintained that the issue of compensation for the Twin Butte access road should be dealt with as part of the rent review between Mr. McDonald and Twin Butte when the Twin Butte Order comes up for renegotiation, and the proper forum is not this proceeding. Penn West says any compensation that may be payable is properly payable by Twin Butte, and not Penn West.

[11] The Subject Lease is the subject of Mr. McDonald's application under subsection 166(1). Subsection 166(3) provides that "[o]n an application under subsection (1) of this section, the board may make an order varying the rental provisions in the surface lease or order." The Twin Butte access road does not form part of the Subject Lease and, therefore, the Board has no authority to deal with any issue relating to the Twin Butte access road within the scope of this proceeding.

[12] I agree with Penn West that if Mr. McDonald chooses, he can certainly bring a separate application under section 163 (which deals with loss or damage caused by right of entry) or section 164 (which deals with disagreements or non-compliance with surface leases) to deal with the Twin Butte access road issue.

[13] It is, of course, critical that Twin Butte be properly served if either of these applications is brought to the Board, as Twin Butte will be directly affected by an order of the Board.

ISSUE

[14] The issue to be determined is the amount of annual compensation payable by Penn West to Mr. McDonald under the Subject Lease, effective August 4, 2009, for the continued use and occupation of the Leased Area.

FACTS

[15] Penn West presents the following information regarding the Lands and the Leased Area, which Mr. McDonald does not dispute. Therefore, I accept them as undisputed facts:

- The Lands are located approximately 2.5 miles east of Fort St. John.
- The Lands are designated Large Agricultural Holding Zone (A2).
- The current land use is agricultural – hay.
- The Canadian Land Inventory (CLI) soil classification is Class 3c.
- The Leased Area comprises a single well (at NE (9) 32-83-17-W6M) and an access road that are tied-in to a pipeline system. There is a small production building and some equipment including a pump jack, propane tank and methanol tank on site. Traffic on site consists of an operator visiting on a regular basis as part of the inspection of other wells in the area. The site is mowed and weeds are sprayed in the summer months, and snow is plowed in the winter months as required.

[16] Section 18 of the Subject Lease provides that notwithstanding anything contained in the Subject Lease to the contrary, upon the request of either party, the amount of annual compensation payable shall be subject to periodic review as provided for in applicable legislation. The applicable legislative provision is subsection 166(4) of the Act, which provides that "[a]n order . . . varying the rental provisions in the surface lease . . . is effective from the anniversary of the effective date of the surface lease . . . immediately preceding the date of the notice under section 165(2) and is retroactive to the extent necessary to give effect to this subsection."

[17] The Subject Lease is dated August 4, 2005 and its anniversary date is August 4. Mr. McDonald filed the subsection 165(2) notice on May 10, 2010. Therefore, the effective date of the rental review is August 4, 2009 (the "Effective Date"). The parties do not dispute this date.

[18] Mr. McDonald attempted to negotiate a higher annual compensation with Penn West, through its agents, without success. Penn West made an offer of $4,100, which Mr. McDonald declined. In the end, Mr. McDonald filed a section 166 application with the Board in December, 2011 for mediation and arbitration assistance.

EVIDENCE AND ANALYSIS

[19] In determining the annual compensation payable by Penn West to Mr. McDonald, I must look to section 154 of the Act, any binding authorities of our Courts, and any guidance from Board decisions respecting annual compensation under the Act.

[20] Section 154 of the Act provides as follows:

> **154** (1) In determining an amount to be paid periodically or otherwise on an application under this Part, the board may consider, without limitation, the following:
>
> (a) the compulsory aspect of the right of entry;
> (b) the value of the applicable land;
> (c) a person's loss of a right or profit with respect to the land;
> (d) temporary and permanent damage from the right of entry;
> (e) compensation for severance;
> (f) compensation for nuisance and disturbance from the right of entry;
> (g) the effect, if any, of one or more other rights of entry with respect to the land;
> (h) money previously paid for entry, occupation or use;
> (i) the terms of any surface lease or agreement submitted to the board or to which the board has access;
> (j) previous orders of the board;
> (k) other factors the board considers applicable;
> (l) other factors or criteria established by regulation.
>
> (2) In determining an amount to be paid on an application under section 166, the board must consider any change in the value of money and of land since the date the surface lease or order was originally or last granted.

[21] Since this is an application under section 166, I must consider any change in value of money and of land referred to in subsection 154(2). However, I do not have to consider all the factors listed in subsection 154(1); I will only discuss those factors relevant to the issue at hand, relating the applicable evidence before me. I will also discuss the applicable case authorities as I discuss the various factors. In my final analysis, I will consider whether the total award, comprising compensation for various components, does not exceed or fall below, but represents, proper compensation in all the circumstances of this case (*Scurry Rainbow Oil v. Lamoureux* [1985] B.C.J. No. 1430 (BCSC)).

[22] Both parties filed documentary evidence marked as Exhibits 1 through 9. Mr. McDonald gave evidence at the hearing. Mr. Robert J. Telford, Land Consultant & Appraiser, on behalf of Penn West, gave expert evidence through oral testimony and written expert report respecting estimate of annual compensation, going through the various factors listed in section 154.

[23] At the hearing I pointed out to Mr. Telford and the parties, and I emphasize here again, that the amount of annual compensation is for the Board to determine applying the criteria prescribed by section 154 of the Act. The amount of compensation is not a matter for another person (a land consultant, appraiser or anyone else) to conclude and present to the Board. Compensation determination is unlike an appraisal exercise where an appraiser, who is the expert, after analysis of the market, renders an opinion of value. In the compensation context under the Act, the Board is charged with determining the amount of compensation based on the evidence before it. Therefore, it is up to the parties to present relevant evidence with respect to the section 154 factors to assist the Board in determining the amount of compensation.

[24] Mr. McDonald, in his negotiations with Penn West, managed to obtain details of some leases (the "PW Leases"), which he says Penn West led him to believe are comparable to the Subject Lease, although Penn West now disagrees that they are comparable to the Subject Lease. He presents these details, including his proposed rent for the Leased Area, in a grid form as follows:

PROPERTY	1 14-4-83-17 5.0 acres	2 4-9-83-17 4.9 acres	3 6-31-83-17 6.0 acres	4 8-36-83-18 3.8 acres	5 10-23-83-18 6.4 acres	6 9-23-83-18 5.8 acres	SUBJECT A-9-32-83-17 4.0 acres	PROPOSED RENT FOR SUBJECT A-9-32-83-17 4.0 acres
LOSS OF USE	$1,250	$1,225	$2,700	$1,710	$960	$870	$1,000	$1,600
SEVERANCE	$1,200	$1,000	$800	$500	$500	$500	$500	$1,000
NUISANCE & DISTURBANCE	$1,500	$1,500	$1,500	$1,500	$2,500	$2,000	$1,500	$1,500
ADVERSE EFFECT	$850	$975	$400	$490	$940	$1,130	$1,100	$1,100
TOTAL	$4,800	$4,700	$5,400	$4,200	$4,900	$4,500	$4,100	$5,200

[25] Not all compensation factors noted in the first column directly coincide with the factors under section 154. Mr. McDonald says this is the breakdown that Penn West gave him.

Section 154 Analysis

[26] I now turn to the section 154 analysis.

[27] Mr. McDonald's general contention is that Penn West is paying him considerably less annual compensation than what it is paying other lessors in the area and also that it has not taken into consideration the rising land values in the area.

[28] As a general proposition, when determining annual compensation, the Board should consider only the actual and ongoing losses to the landowner; an amount that exceeds the loss sustained will no longer be compensation and the Board will have exceeded its jurisdiction (*Western Industrial Clay Products Ltd. v. British Columbia (Mediation & Arbitration Board)*, 2001 BCSC 1458).

Section 154(1)(a) – Compulsory aspect of right of entry

[29] Not applicable in this case.

Section 154(1)(b) – Value of land

[30] Typically, the value of the land is accounted for in determining the one-time payment for the initial entry. However, as the Board in *Helm v. Progress Energy Ltd.*, SRB Order 1634-1, December 2, 2010, at para. 24 noted, the value of the land may be a relevant consideration in determining annual compensation in the sense that land that is more valuable may command a higher rent than land that is less valuable.

[31] Mr. McDonald argues that the highest and best use of the Lands, including the Leased Area, is not agricultural or farming, but rather a home site. He says all of the quarter sections in the area, including the Lands, are home sites, and are worth more, and that he could develop the Lands at any time.

[32] Penn West submits that the concept of highest and best use is associated with market value; it is a prospective and future-looking phenomenon; and it does not relate to the actual loss or impacts arising from Penn West's use of the Leased Area, which are the focus of this proceeding.

[33] Under cross-examination, Mr. McDonald admitted that as at the Effective Date, no development of the Lands had taken place, and also, as at the hearing date, he had no plans for any future development.

[34] Regardless of the parties' submissions, I find that any amount of compensation under this heading may lead to overcompensation as the value of land will generally be accounted for under paragraph 154(1)(c) in determining ongoing annual loss of profit.

Section 154(1)(c) – Loss of a right or profit

[35] This factor is intended to compensate the landowner for loss of a right or profit (or use) relating to the subject site. An award for annual compensation would necessarily have to be based on evidence of probable and reasonably

foreseeable ongoing and recurring loss or damage that can be reasonably quantified (*Arc Petroleum Inc. v. Piper,* MAB Order 1598-2, December 5, 2008, at para. 51). Further, there is no right to remuneration beyond the loss or damage incurred (*Western Industrial, supra,* and *Arc Petroleum Inc. v. Miller,* SRB Order 1633-3, May 24, 2011, at para. 26).

[36] Penn West says, in the agricultural context, as is the case with the Leased Area, this compensation factor relates to loss of crop production caused by an operator's occupation of the wellsite area. It says compensation for such crop loss is payable annually and is set at the value per acre of the farmed crop times the number of acres lost as a result of the entry (*Terra Energy, Corp. v. Rhyason Ranch Ltd.,* MAB Order No. 403A, March 4, 2007, at pp. 31-32).

[37] Penn West also refers to *Piper, supra,* at para. 40, where the Board reasoned that an estimation of crop loss ought to be based on average yield and, in the absence of evidence of average crop prices in average yield years, the Board estimated crop loss based on the most recent prices.

[38] Penn West submits that in the absence of a statutorily mandated reference period for calculating compensation for loss of production, the Board should estimate crop loss based on crop prices as at the Effective Date.

[39] Mr. Telford testified that based on a review of air photos taken in 2010 and an inspection of the Lands on June 14, 2012, the Lands are primarily used for hay production. He says the CLI soil class of the Lands is Class 3c as there are some limitations that adversely affect the productive capability of the Lands, particularly for crop production.

[40] Mr. Telford says according to the British Columbia Forage Council 2009 data, hay yields range from 1.5 to 3.0 tonnes per acre, and the prices range from $65 to $100 per tonne. Based on this data, he suggests that a rate of 2.5 tonnes per acre at $100 per tonne, or $250 per acre, is reasonable compensation for any potential losses associated with hay production. Applying this rate, he concludes that loss of profits associated with the 4.0 acres of the Leased Area is $1,000 as at the Effective Date. He says the actual loss would be less because portions of the Leased Area are cropped. Mr. Naffin points out that this is supported by compensation for hay land in comparable lease agreements submitted by Penn West.

[41] Mr. McDonald disagrees with Mr. Telford's data and says they are highly speculative. He says he should receive $1,600 for loss of profits.

[42] Firstly, Mr. McDonald says even though the Leased Area is currently used for hay production, it could, at any time, be put into grain or seed production, and that good farming practice involves crop rotation. Mr. Telford testified that the rates for crop land is $450 per acre, for hay land in $250 per acre, and for mixed pasture and hay land is $200 per acre (midpoint between $150 for pasture and $250 for hay).

[43] Secondly, at the hearing, when asked on what basis Mr. McDonald arrived at the $1,600 figure, he said he averaged the loss of use amounts for the six PW Leases shown in the table above (which came to $1,452), and rounded it up to $1,600. He admitted that he had a hard time coming up with an appropriate figure, so he averaged the amounts for the six PW Leases, thinking that those were the leases Penn West considered comparable to the Subject Lease.

[44] Thirdly, Mr. McDonald points to the *Helm* decision, at para. 29, and says even though the Helm lands are inferior to the Lands, the Board awarded a higher amount ($2,000 for 4.79 acres) for loss of profits.

[45] With respect to Mr. McDonald's first point, Penn West says the Board should dismiss Mr. McDonald's claim for compensation respecting alleged losses that may result from prospective and speculative future land use. It says any such proposed change in land use, including the planting of seed crops had not arisen as at the Effective Date or even as at the hearing date. It says should Mr. McDonald ultimately plant seed crops leading to actual losses, he can seek compensation for such losses at the next rent review or potentially through an application under paragraph 163(1)(a) of the Act. I agree.

[46] With respect to Mr. McDonald's second point about averaging the loss of use amounts for the PW Leases, Penn West says those leases are not true comparables to the Subject Lease and it is inappropriate to consider those amounts. I will discuss the PW Leases in more detail below.

[47] With respect to Mr. McDonald's third point, Penn West submits that other Board decisions are for guidance only and specific awards in one case cannot be equally applied to another because of the unique circumstances of each case. It says the glaring difference between the *Helm* case and this case is the effective date: in Helm it was 2007 and here it is 2009; also, there are other factual differences between the two cases. I agree. It is highly unlikely that the factual circumstances of any two cases will be identical or even highly similar, lending to similar results.

[48] Having no information from Mr. McDonald to assist me in quantifying the probable and reasonably foreseeable ongoing loss or damage from Penn West's use of the Leased Area, I accept Mr. Telford's data and confirm the compensation for loss of profits payable by Penn West to Mr. McDonald at $1,000.

Section 154(1)(d) – Temporary and permanent damage from right of entry

[49] The parties did not identify any damage requiring compensation under this heading.

Section 154(1)(e) – Severance

[50] This factor is intended to compensate the landowner where land is severed as a result of an entry such that the landowner not only loses the use of the occupied land but also the use of other land; where there is loss of use of, and profit from, the severed land on an ongoing basis, compensation should be included in an annual payment (*Helm, supra,* at para. 34).

[51] Penn West submits that the Board in *Terra Energy, supra,* at pp. 34 – 35, accepted severance to mean "land that cannot be accessed by farm equipment."

[52] Mr. McDonald claims $1,000 for severance. He says the presence of the subject wellsite makes it difficult for him to farm the Leased Area and the adjacent 5.0 acre parcel to the south (the "Adjacent Parcel"), which he also owns. Furthermore, he says, it affects the development of the Adjacent Parcel into a home site, if he so chooses, as there used to be a residence on it before.

[53] Under cross-examination, Mr. McDonald agreed with the Board's definition of severance in *Terra Energy, supra.* He also agreed that no part of the Leased Area or the Adjacent Parcel is inaccessible by farm equipment, although it may take a bit longer to manouevre around the areas. He confirmed that: wellsite 9-32-83-17 on the Adjacent Parcel which Penn West's predecessor, Titan, used to operate has been abandoned; now there is no activity on that wellsite; and he signed a General Release of Claim, dated August 4, 2005, releasing Titan from any claims arising out of that wellsite.

[54] Mr. Telford concludes that there is no severance.

[55] Mr. Naffin says Penn West's current offer includes $500 for severance even though based on Mr. Telford's and Mr. McDonald's evidence, Mr. McDonald is not entitled to any compensation for severance. Mr. Naffin says the $500 Penn West offers is supported by the comparable leases Penn West submitted.

[56] I do not accept that there is no severance. The evidence appears to indicate minimal severance. So, the question is what is the appropriate compensation? The Board noted in *Helm, supra,* at para. 54, that the Act specifically allows the Board to consider other leases, implying there should be some sense of fairness or equity between landowners in compensation paid. Considering the minimal severance in this case and the fact that Penn West is offering to pay $500 (perhaps to maintain equity amongst all its leases), I accept that $500 is reasonable compensation for severance in this case.

Section 154(1)(f) – Nuisance and disturbance from right of entry

[57] This factor is intended to compensate the landowner for nuisance and disturbance arising from the operator's entry and use of the lands. Ongoing nuisance and disturbance is also compensable in an annual payment.

[58] Mr. McDonald says because of the wellsite, there is: a lot of trespass; a lot of kids and other people, including operators, drive up and down with their four-wheelers which cause a lot of noise and extra dust on the road, which in turn causes lower crop yields; and gas smell. He says also because of the presence of the wellsites, both on the Leased Area and on the Adjacent Parcel (even though the wellsite on this Parcel has been abandoned), there is additional nuisance as it is difficult to farm around these areas and it takes longer and more effort.

[59] Mr. Telford estimates that $1,475 should be attributed to nuisance and disturbance based on certain tangible and intangible factors.

[60] Penn West says tangible factors include increased time, costs and inconvenience associated with farming around the Subject Lease and intangible factors relate to Mr. McDonald's time spent dealing with Penn West on its visits to the Leased Area.

[61] Mr. Telford says the intangible factors may involve noise from the facilities, and dealing with surveyors, contractors and operators. Mr. Telford says there are fewer facilities on the Leased Area compared to some of the other leases Mr. McDonald referred to, and as a result, the level of noise, traffic and other impacts is lower.

[62] Mr. Telford calculates the *tangible* portion as follows:

> Premises: based on the cropping program and the typical farming patterns relating to the Leased Area, operations would involve six to eight passes over the Leased Area each crop season; for interior and midfield locations, the estimated additional operating time is 23 to 32 minutes depending on the size of equipment and rate of speed, taking into consideration the location of the wellsite, and the extra corners, inputs, and manoeuvres around the wellhead facilities; and from 2006 to 2010, custom equipment rates ranged from $150 to $375 per hour depending on the type and size of the equipment.
>
> Calculation:
> 23 min. x 6 passes = 2.3 hrs. @ an average rate of $250/hr. = $575
> 32 min. x 8 passes = 4.3 hrs. @ an average rate of $250/hr. = $1,075

[63] Mr. Telford calculates the *intangible* portion as follows:

> Premises: The Leased Area is considered to be low impact due to the limited visitation and activity; therefore, very little time and inconvenience would be associated with this site.
>
> Calculation:
> 1 day (8 hrs.)/year @ $50/hr. = $400

[64] Based on the above, he suggests a total of $1,475 for any nuisance and disturbance. Penn West's offer included $1,500 for nuisance and disturbance, and it also included $1,100 for "adverse effect."

[65] The term "adverse effect" is not one of the factors referenced in section 154. Interestingly, in cross-examination, Mr. Naffin questioned Mr. McDonald as to where he would find the term "adverse effect" in the Act, to which Mr. McDonald replied he does not know and that he was simply accepting the factors Penn West was using.

[66] Then in Mr. McDonald's cross-examination of Mr. Telford, he asked Mr. Telford why Penn West would use the factors shown in the table above, including "adverse effect" to allocate compensation. Mr. Telford says he does not know why Penn West uses these factors, but in his mind, "adverse effect" relates to nuisance and disturbance.

[67] Mr. McDonald also says that to him "adverse effect" fits in the same category as nuisance and disturbance.

[68] In his closing submissions, Mr. Naffin explained that the term "adverse effect" is used in the compensation context in Alberta, where tangible and intangible effects are considered, as Mr. Telford does in his report in quantifying compensation for "nuisance and disturbance" in the BC context.

[69] What is not clear is why Penn West offered $1,100 for "adverse effect" separate from "nuisance and disturbance" when both Mr. Telford and Mr. McDonald testified that they understood "adverse effect" to mean "nuisance and disturbance." While Mr. McDonald is agreeable to Penn West's offer of the $1,500 and $1,100, he did say that he does not know what "intangible" is in this context.

[70] While I have insufficient evidence to challenge Mr. Telford's $1,045 estimate for the tangible portion, I do have plenty of evidence to challenge the $400 estimate for the intangible portion.

[71] Even if the $1,100 can be said to be attributable to the extra noise, dust and traffic and other factors Mr. McDonald is referring to, no consideration has been given to Mr. McDonald's time, effort and frustration he has had to endure in dealing with Penn West with respect to this rent renewal.

[72] Mr. McDonald tried, without success, to negotiate with Penn West for more than a year and a half – from May 21, 2010 when he filed the Notice to Negotiate to December 12, 2011 when he filed his section 166 application to the Board.

[73] The email communication between Penn West's agents and Mr. McDonald shows that it took a lot of time, effort and persistence on the part of Mr. McDonald to extract lease information from Penn West. Mr. McDonald insisted that he wanted to compare "apples to apples" and yet he was given information

about the six PW Leases, which Penn West now says are not true comparables to the Subject Lease. Mr. McDonald relied on this information to his detriment. (Parenthetically, I add that this does not excuse Mr. McDonald from critically analyzing the evidence he intends to rely on.) At no point during this year and a half did Mr. Darren Rosie or Mr. Nolan Treble, with whom Mr. McDonald was dealing, say that the PW Leases were not proper comparables. This begs the question as to whether Penn West's representatives intentionally misled Mr. McDonald or they were not fully knowledgeable about the requirements of the Act. I rather suspect it is the latter, as they seem to allocate compensation to factors not referenced in the Act – such as "adverse effect."

[74] The renewal letters Mr. Rosie sends out to landowners still say "adverse effect." All of this can cause unnecessary confusion and frustration to landowners, and also waste their time, which could lead to additional compensation.

[75] Although Mr. McDonald, being a realtor and an appraiser, should have done his own independent research and questioned the information Penn West provided, I find Penn West's dealings in this respect less than forthcoming.

[76] Operators, such as Penn West, should ensure that their practices are transparent, forthright, and above all compliant with the Act (as opposed to legislation or practices of other jurisdictions).

[77] In light of all of the evidence before me, I find that $3,400 [$1,500+$1,100+$800 (16 hrs./yr. @ $50/hr.)] should be awarded as compensation under this factor, which works out to 2.0 hours per month at $50 per hour for the intangible portion.

[78] Since Penn West has not provided me with the breakdown of the compensation for the leases it says are comparable to the Subject Lease, I cannot make any comparison; however, I find that, in all the circumstances of this case, this award is reasonable.

Section 154(1)(g) – Effect of other rights of entry

[79] Not applicable in this case.

Section 154(1)(h) – Money previously paid for entry, occupation or use

[80] Not applicable in this case.

Section 154(1)(i) – Other leases

[81] Mr. McDonald says his rent increase represents only 8%, whereas the increases for some of the neighbouring leases (seven concluded renewals which include the six PW Leases and one 2012 offer) range between 10% and 45%.

[82] Penn West says simply comparing rent increases, without knowing the circumstances of the negotiations, is not helpful. It says perhaps the starting rental was low.

[83] In addition to the six PW Leases, Mr. McDonald references a few other leases showing the following information: total rental range: $2,220 to $6,000; size range: 2.5 acres to 5.4 acres; effective date range: Oct. 2001 to Oct. 2010 (none in 2009); and lease numbers. He does not provide the land use or the proximity of these properties to the Leased Area. Nor does he provide the breakdown of the compensation paid or any analysis of how all of this information relates to the issue at hand.

[84] Mr. Telford says he would not rely on any of the six PW Leases because the effective dates for four of them are in 2011 (two years after the Effective Date), and for two of them are in 2010; other than lease 4 which is 3.8 acres, they are all larger than the Subject Lease; only leases 1 and 2 are for hay, whereas leases 3 and 4 are for cultivated use, and leases 5 and 6 are a mixture of bush pasture.

[85] Mr. Telford completely dismisses the other leases Mr. McDonald references as there is insufficient information to determine whether they are comparable to the Subject Lease, and besides many of them are dated. I too find the limited information Mr. McDonald provides with respect to these other leases completely unhelpful.

[86] Penn West provides 22 other leases (the "PW Comparables") detailing the surface location, well site acreage, access road acreage, total acreage, total current rental , land use, original lease date, rental effective date (all in 2009), and well status. The lease sites range from 3.65 acres to 7.5 acres; annual rental ranges from $3,000 to $7,360; and the land use is described as one of hay/pasture, pasture, cultivation or hay.

[87] Mr. Telford says the largest driver of compensation is size and land use. Of the PW Comparables, he says leases D, I, K and O are all very close to the Subject Lease in terms of their size – around 4.0 acres; D is cultivated whereas the Subject Lease is not; and I, K and O are close in land use - being hay. He says lease I is the best indicator as it is 4.19 acres, with a rental of $4,000 for hay.

[88] Penn West complains that Mr. McDonald does not provide the breakdown or the circumstances of the other leases he refers to, but neither does Penn West provide any breakdown of the total rental in terms of the section 154 factors for any of the 22 PW Comparables. The breakdown it provided on the six PW Leases does not fully coincide with the section 154 factors. So, for any analysis of these leases, the only available point of comparison is the total rental.

[89] In analyzing the PW Comparables, the 14 leases with hay as their only land use indicate an average rental of $857 per acre. Two of the six PW Leases (with

effective dates in 2010, which are closer to the Effective Date) that have hay as their only land use indicate an average rental of $960 per acre. Applying these rates to the Subject Lease of 4.0 acres, which is currently used only for hay, produces $3,428 and $3,840 respectively. The current rental of $3,800 is higher than the 14 2009 leases and slightly lower than the two 2010 leases.

[90] This, of course, is a very rough estimation and does not reflect the individual circumstances of these leases. With respect to the Subject Lease, Penn West's offer of $4,100 is close, except that it does not take into account the intangible aspect of the additional nuisance Mr. McDonald experiences in dealing with the Subject Lease.

Section 154(1)(j) - Previous orders of the board

[91] The parties did not refer to any previous orders of the Board with respect to the Subject Lease.

[92] Mr. McDonald referred to the Board's order in *Helm*, *supra*, with respect to the quantum of the loss of profits. As I said earlier, the facts in that case are distinguishable, and, therefore, the Board's award in that case is not directly applicable in this case.

Section 154(1)(k) – Other factors the Board considers applicable

[93] The parties did not particularly point out any factors that I should consider under this heading.

[94] However, I consider the relationship between landowners and operators as an important factor in this context. This factor may not lead to direct compensation, but it may have an indirect influence on compensation under some of the other factors in subsection 154(1) – for example, if the parties' behavior exacerbates nuisance or disturbance.

[95] In this case, Mr. McDonald exclaimed that Penn West (through its agents) misled him on a number of occasions – for example, they gave him inapplicable leases for comparison, when he specifically informed them that he wanted to compare "apples to apples"; the heads of compensation they use to negotiate with landowners are not in line with the Act; they gave incorrect information on the process to deal with the Twin Butte road access issue; and they were very slow and unresponsive to Mr. McDonald's requests.

[96] I do not have sufficient evidence before me to determine whether Penn West intentionally led Mr. McDonald astray, and neither is that the focus of this proceeding.

[97] However, I do want to emphasize that it is incumbent upon every party to a transaction or process to act in good faith with the other parties, particularly when there may be, or may appear to be, power imbalance amongst the parties. Even

where there may be no legal duty to do so, parties should treat each other with respect and care, particularly where long-term relationships, such as those between landowners and operators, are at stake.

[98] On another note, it is also incumbent upon each party to seek their own independent advice to serve their best interest.

Section 154(1)(l) – Other factors or criteria established by regulation

[99] There are none.

Section 154(2) – Change in value of money and of land

Change in value of land:

[100] One of Mr. McDonald's main concerns is that Penn West has not taken into account the change in value of his Lands. Mr. McDonald argues that market value of farmland has continued to rise since the Subject Lease was signed in 2005. He provides some rudimentary data on resales (paired sales), between 2004 and 2011, of seven properties (which he characterizes as farmland/agricultural land) in the wider Fort St. John area indicating price increases in the range of 35% to 169%, without any source, analysis or conclusion as to how this information should be applied in this case – should it be in support of a change in value under paragraph 154(1)(b) or under subsection 154(2)? Mr. Naffin says it may be considered in support of one, but not both. There were also inaccuracies in Mr. McDonald's calculations that Mr. Naffin corrected.

[101] Mr. Telford testified that the properties Mr. McDonald refers to are not the same type of property as the Lands – they are recreational and not agricultural; many of them are much further away from the Lands – some 40 or 50 miles away and others near the Alberta border; and all of the resale dates are after the Effective Date.

[102] Mr. Telford says Farm Credit or MLS statistics would have been better.

[103] Mr. McDonald says there are no sales in the immediate vicinity of the Lands because "people hold onto their lands." Mr. Naffin argues that is the most compelling evidence that there has been no change in land value.

[104] As I indicated above, the value of the land is generally accounted for in the initial one-time payment. Mr. McDonald received $10,500 in this respect. I found that, for purposes of paragraph 154(1)(b), any compensation for change in land value may lead to overcompensation in determining annual compensation. For purposes of subsection 154(2), I do not find Mr. McDonald's evidence compelling or reliable.

Change in value of money:

[105] In determining the change in value of money, Mr. Telford applies the Consumer Price Index as the best indicator. He says the value of money has increased by 5.64% from 2005 (Subject Lease acquisition date) to 2009 (Effective Date). Therefore, he says the annual rental of $3,800 in 2005 would cost $4,014 in 2009. However, he concludes that because subsection 154(1) indicates an annual compensation of $2,475 and subsection 154(2) indicates $4,014 and the current annual compensation of $3,800 falls between these two amounts, it should not be adjusted upwards.

[106] I agree with Mr. Telford that the Consumer Price Index may be used to determine the change in value of money, but I do not agree with his conclusion because that is not what subsection 154(2) says.

[107] First of all, if subsection 154(1) only indicates an annual compensation of $2,475, as Mr. Telford opines, I question why Penn West has been paying $3,800 since the commencement of the Subject Lease in 2005. I have no evidence to suggest that this was an improper amount. The existing compensation is an important consideration, as the Board in *Miller, supra,* found.

[108] Secondly, subsection 154(2) mandates the Board to consider the change in value of money. The starting point for this in this case is the $3,800 that is being paid to Mr. McDonald. Therefore, as of the Effective Date, at least $4,014 should be paid to Mr. McDonald as annual compensation. Perhaps, that is why Penn West offered $4,100 to Mr. McDonald, which he refused to accept.

Determination of a global sum

[109] Based on the evidence in support of the various section 154 factors, the following breakdown results:

Section 154 Factor	**Annual Compensation**
Loss of profit	$1,000
Severance	$ 500
Nuisance and disturbance	$3,400
Total	**$4,900**

[110] As the Court pointed out in *Western Clay, supra,* and the Board reiterated in *Helm, supra,* the Board should not order an amount to be paid in excess of the actual, or probable, loss sustained by the landowner. However, the practical reality is that quantifying compensation for intangible loss, such as nuisance and disturbance, is unscientific and is incapable of formulaic determination as it depends on the unique circumstances of each case. In this respect, the Board, in *Helm, supra,* at para. 55, aptly said "calculating damages for intangible loss,

such as for nuisance and disturbance, is not a precise exercise but involves the exercise of judgment and discretion to determine what is appropriate and just in the circumstances of any particular case. . . .All in all, determining annual rent involves consideration of the evidence and all of the circumstances, coupled with the exercise of judgment."

[111] Based on the evidence before me, I find the annual compensation should be increased from $3,800 to $4,900 effective August 4, 2009. I am satisfied that, in the circumstances of this case, this total award, comprising compensation for the three factors listed above, does not exceed or fall below, but represents, proper compensation.

ORDER

[112] The Surface Rights Board orders that the rental provisions under the Subject Lease are amended to provide that effective August 4, 2009, the annual rent payable to Mr. McDonald is $4,900.00. Penn West Petroleum Ltd. shall forthwith pay to Mr. McDonald any difference in annual rent paid since August 4, 2009 and the revised annual rent effective August 4, 2009.

DATED: November 21, 2012.

FOR THE BOARD

V. Chettiar

Valli Chettiar, Arbitrator

File No. 1742
Board Order No. 1742-2

February 22, 2013

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF

THE NORTH EAST ¼ OF SECTION 32 TOWNSHIP 83 RANGE 17 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT, EXCEPT PLAN 8630

(The "Lands")

BETWEEN:

Laurie William McDonald

(APPLICANT)

AND:

Penn West Petroleum Ltd.

(RESPONDENT)

BOARD ORDER

[1] On November 21, 2012, the Board issued its decision in this application for rent review (Order 1742-1). The Board determined that the annual rent should be $4,900 effective August 4, 2009. Penn West Petroleum Ltd. (Penn West) applies pursuant to section 155 of the *Petroleum and Natural Gas Act* (*PNGA*) and Rule 17 of the Board's Rules of Practice and Procedure asking the Board to exercise its discretion to reconsider its decision.

[2] Rule 17(1) of the Board's Rules set out the circumstances that must exist to invoke the Board's discretion to reconsider an order. Those circumstances include at Rule 17(1)(c):

> (c) the Board made a jurisdictional error, including a breach of the duty of procedural fairness, or a patently unreasonable error of fact, law or exercise of discretion in respect of matters within the Board's jurisdiction.

[3] Penn West submits that the Board made a jurisdictional error consisting of a patently unreasonable error of fact, law, or an exercise of discretion in respect of matters within its jurisdiction in two portions of its decision, specifically its determination of $500 as compensation for severance and its determination of $3,400 as compensation for nuisance and disturbance.

[4] "Patent unreasonableness" is not defined in either the *PNGA* or the Board's Rules. It has been judicially defined as "clearly irrational" and "evidently not in accordance with reason" (See for example: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247). As recently articulated by the BC Court of Appeal, "If there is some evidence to support the findings and there is a tenable and not clearly irrational basis for the decision, it is not patently unreasonable" (*Phillips v. Workers' Compensation Appeal Tribunal* 2012 BCCA 304).

[5] With respect to the severance award, Penn West submits the Board had no evidentiary basis to find that severance had occurred as a result of the Lease. It submits for the Board to have concluded that "minimal severance" exists (para [56]) it must have based its decision on irrelevant factors or matters that were not in evidence, thereby making a jurisdictional error.

[6] As to the award for nuisance and disturbance, Penn West submits it includes compensation for time and expenditures more appropriately characterized as costs in relation to the application and not ongoing losses. Consequently, Penn West submits the Board made a jurisdictional error in making an award that exceeds the loss sustained.

[7] Penn West focusses on specific portions of the Board's reasons to challenge the result. In my view, these submissions parse the arbitrator's reasons too finely. A reconsideration based on a standard of patent unreasonableness, as with judicial review, does not permit me to review the evidence with a view to deciding whether I

would have made the same decision or whether I would have expressed the reasons differently, but involves a high level of deference. In reconsidering whether any particular findings meet the applicable standard, in this case patent unreasonableness, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes". (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* 2011 SCC 62).

[8] It is evident from the arbitrator's decision that compensation attributed to severance was based, at least in part, on consideration of Penn West's offer that included an amount for severance despite the evidence of its expert that there was no severance, and was supported by other leases in evidence. Penn West's own submissions acknowledged support for the original offer for severance. It cannot now be said that the arbitrator's determination of compensation for that factor falls outside of the range of reasonable possibilities in light of the whole of the record before her. As to the award for nuisance and disturbance, the arbitrator considered various factors including extra time and aggravation experienced by Mr. McDonald in his dealings generally with Penn West. The arbitrator was clearly of the view that on the whole of the evidence before her, significant recognition needed to be given for intangible nuisance. The arbitrator recognized the difficulty in compensating for intangible nuisance, and exercised her discretion and judgement in consideration of the whole of the evidence and the unique circumstances of this case. I find there was some evidence to support the arbitrator's findings, together with a tenable and not clearly irrational basis for her findings.

[9] The arbitrator's determination of compensation falls above that advocated by Penn West and below that advocated by Mr. McDonald. The arbitrator thoroughly canvassed and considered all of the factors set out in section 154 of the *PNGA* and the evidence before her, then stepped back to consider whether the award in its totality exceeded or fell below proper compensation. I am unable to conclude that her award as a whole, or any particular part of it, is "clearly irrational" or "evidently not in accordance with reason" in light of the evidence and record before her.

[10] The application is dismissed.

DATED: February 22, 2013

FOR THE BOARD

Cheryl Vickers, Chair

File No. 1832
Board Order No. 1832-1

November 6, 2014

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF

THE SOUTH WEST ¼ OF SECTION 26 TOWNSHIP 83 RANGE 17 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

Marty Kjos and Miriam Kjos

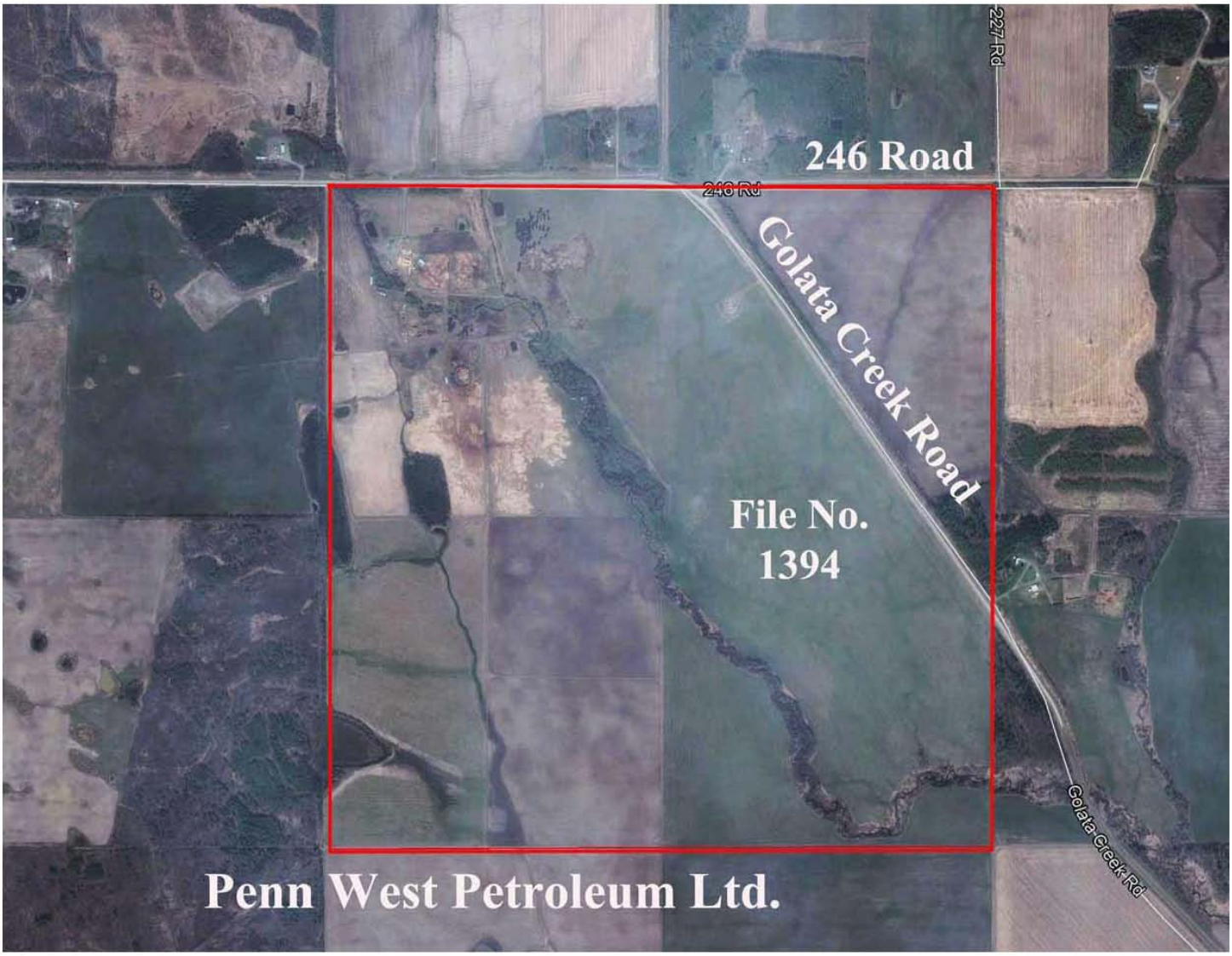
(APPLICANTS)

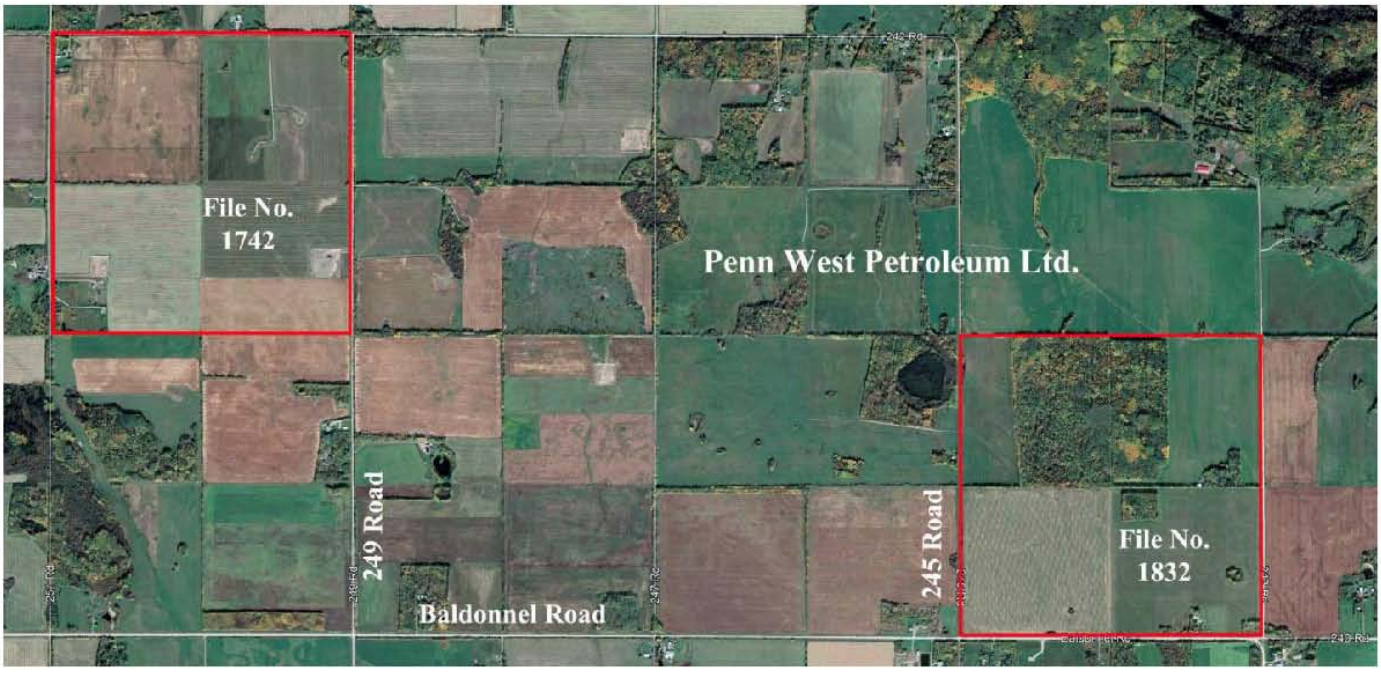
AND:

Penn West Petroleum Ltd.

(RESPONDENT)

BOARD ORDER


227 Rd
246 Road
246 Rd
Golata Creek Road
File No.
1394
Golata Creek Rd
Penn West Petroleum Ltd.


File No.
1742
Penn West Petroleum Ltd.
249 Road
Baldonnel Road
245 Road
File No.
1832

Heard by written submissions.

INTRODUCTION

[1] The Applicants, Marty and Miriam Kjos, own lands near Fort St. John legally described as the South West ¼ Section 36, Township 83, Range 17, West of the Sixth Meridian, Peace River District (the Lands). On February 13, 1984, previous owners of the Lands entered a surface lease with Petro Canada Inc. giving Petro Canada Inc. the right of entry to and use of a portion of the Lands for a well site and access road (the Lease). The Lease was registered against the title to the Lands. In 1991, the Lease was assigned to the Respondent, Penn West Petroleum Ltd. (Penn West), and the assignment was registered against the title to the Lands.

[2] The Lease is for a term of 25 years, with a right of extension including the following clause:

> The right provided herein shall expire unless exercised by the Lessee by notice in writing given to the Lessor before the commencement of the last SIX (6) MONTHS of the said TWENTY-FIVE (25) YEAR term.

[3] Penn West did not provide notice in writing to Mr. and Mrs. Kjos six months prior to the end of the first 25 year term as contemplated by the clause above. Penn West continued to make annual rental payments to Mr. and Mrs. Kjos, and Mr. and Mrs. Kjos continued to accept the rental payments.

[4] On April 14, 2014, Mr. and Mrs. Kjos applied to the Board using the Board's Form 1A – Right of Entry, Terms and Compensation. They submit that the Lease expired on February 13, 2009 and that Penn West refuses to negotiate a new lease. Penn West submits the lease is valid. It is my understanding that this dispute arose from the parties' disagreement as to how rent review should be handled. Mr. and Mrs. Kjos say the Lease expired and a new lease is required, Presumably, they wish to negotiate a revised annual rent in the context of a new lease. Penn West says any revised annual rent can be negotiated and dealt with as part of a rent review.

ISSUE

[5] The parties frame the issue as whether a lease exists. On reflection, having reviewed both parties' submissions and the relevant provisions of the *Petroleum and Natural Gas Act*, I find the issue of whether or not the Lease continues to exist or is valid and enforceable is no longer relevant. The issue is whether Penn West continues to have a valid right of entry for the use and occupation of the

Lands. If the answer to that question is no, and if Penn West continues to require use of the Lands for an oil and gas activity, then a new right of entry would be required either by way of a new surface lease between the parties or an order of the Board. If the answer to that question is yes, no new surface lease or order of the Board is required.

[6] For the reasons that follow, I find that Penn West continues to have a valid right of entry. Any entitlement to revision to the annual rent falls under the provisions of the *Petroleum and Natural Gas Act* for rent review.

ANALYSIS

[7] In accordance with section 142 of the *Petroleum and Natural Gas Act*, a person may not enter, occupy or use land to carry out an oil and gas or related activity unless the entry, occupation or use is authorized by a surface lease with the landowner or an order of the Board. Once authorized, by either a surface lease or order of the Board, a person's right to enter, occupy and use land to carry out an oil and gas or related activity becomes a "right of entry" in accordance with the legislated definition of "right of entry" provided in section 141(1) of the *Petroleum and Natural Gas Act.* A "right of entry" is subject to legislative provisions that may or may not accord with originally agreed upon terms in a surface lease.

[8] Section 143(1) of the *Petroleum and Natural Gas Act* legislates the "termination date" for a "right of entry". The "termination date" relevant to the circumstances of this case is "the date on which the commission has issued, under the *Oil and Gas Activities Act*, a certificate of restoration for the land. The "commission" is the Oil and Gas Commission.

[9] The Oil and Gas Commission has not issued a certificate of restoration with respect to Penn West's well on the Lands. Penn West's "right of entry" to use and occupy the Lands for its well and access road has, therefore, not terminated. As Penn West continues to have a "right of entry", no new surface lease or order of the Board is required to legitimize Penn West's access to and use of the Lands for a well and access road. The "right of entry" remains regardless of the terms in the Lease respecting expiry and renewal.

[10] Section 143(3) provides that if the term of a surface lease or Board order ends before the legislated termination date, the rental provisions continue to apply until the termination date unless the parties otherwise agree or the Board otherwise orders.

[11] Mr. and Mrs. Kjos argue that section 143 of the *Petroleum and Natural Gas Act* does not operate to validate the lease. They argue section 143(3) does not

resurrect an expired lease, but only ensures the payment of rent in the absence of an agreement between the parties or order of the Board. Section 143 of the *Petroleum and Natural Gas Act* may or may not resurrect an expired lease – I make no finding in that regard. It does not have to. What it does, however, is ensure that a "right of entry" continues regardless of the terms of a lease or Board order until the Oil and Gas Commission issues a certificate of restoration. As long as the "right of entry" continues, there is no need to negotiate a new lease.

[12] The parties made submissions respecting the interpretation of contracts, and the application of the doctrines of estoppel, waiver and laches. As I find the answer to the question of whether the parties need a new lease is answered by the provisions of the *Petroleum and Natural Gas Act*, there is no need to address these submissions.

CONCLUSION

[13] Penn West has a continuing "right of entry" within the meaning of the *Petroleum and Natural Gas Act.* Despite the provisions of the Lease, there is no need for a new lease or Board Order to legitimize Penn West's access to and use of the Lands. The provisions of the *Petroleum and Natural Gas Act* respecting rent review apply to the rent payable for the continuing "right of entry"

DATED: November 6, 2014

FOR THE BOARD

_____
Cheryl Vickers, Chair
.