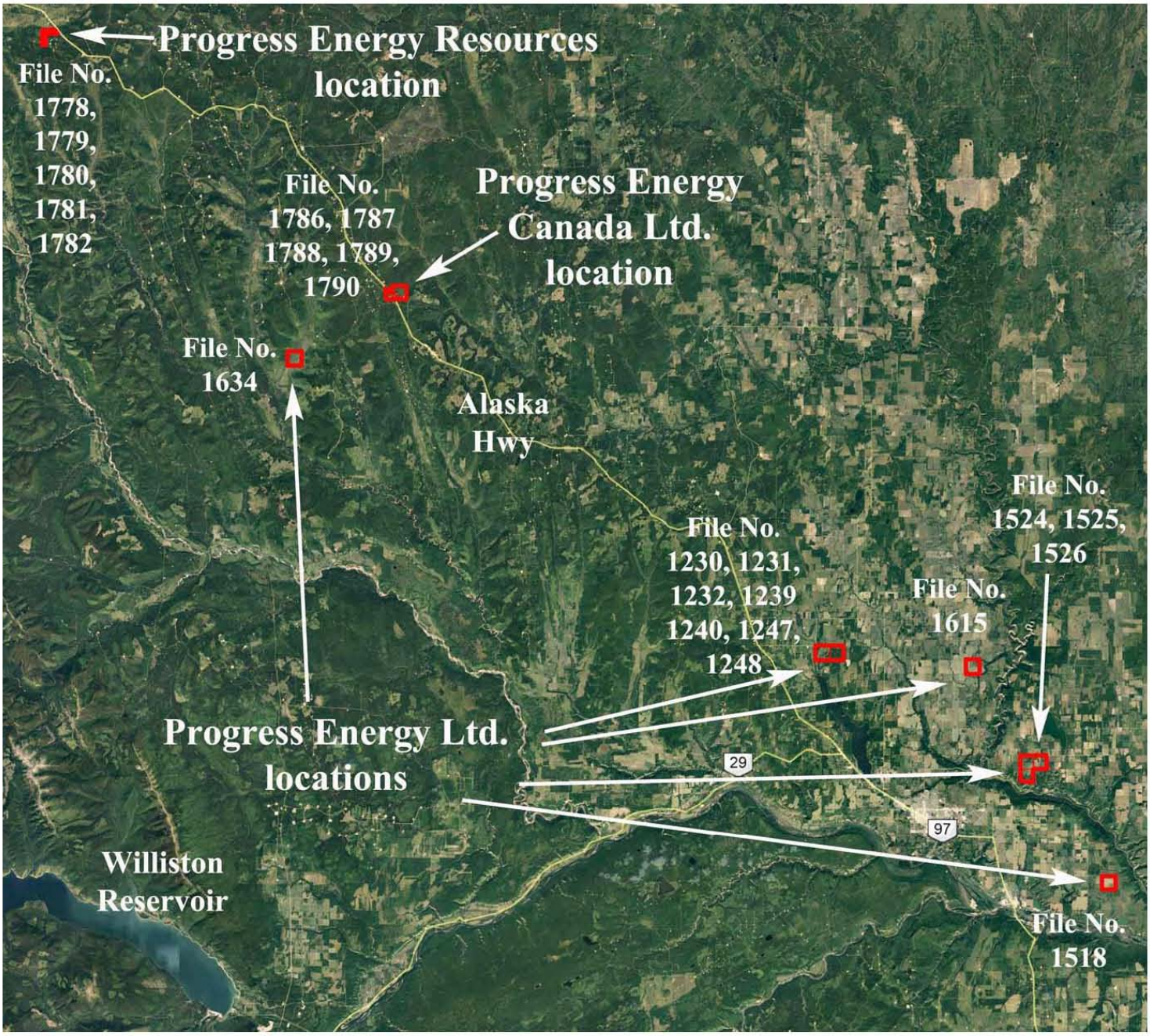

Progress Energy Resources location
File No. 1778, 1779, 1780, 1781, 1782
File No. 1786, 1787 1788, 1789, 1790
Progress Energy Canada Ltd. location
File No. 1634
Alaska Hwy
File No. 1230, 1231, 1232, 1239 1240, 1247, 1248
File No. 1524, 1525, 1526
File No. 1615
Progress Energy Ltd. locations
29
97
Williston Reservoir
File No. 1518

File Nos. 1778, 1779, 1780, 1781, 1782

Board Order No. 1778-82-1

October 18, 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

DISTRICT LOT 3263 PEACE RIVER DISTRICT
DISTRICT LOT 3264 PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

Silvio Salustro

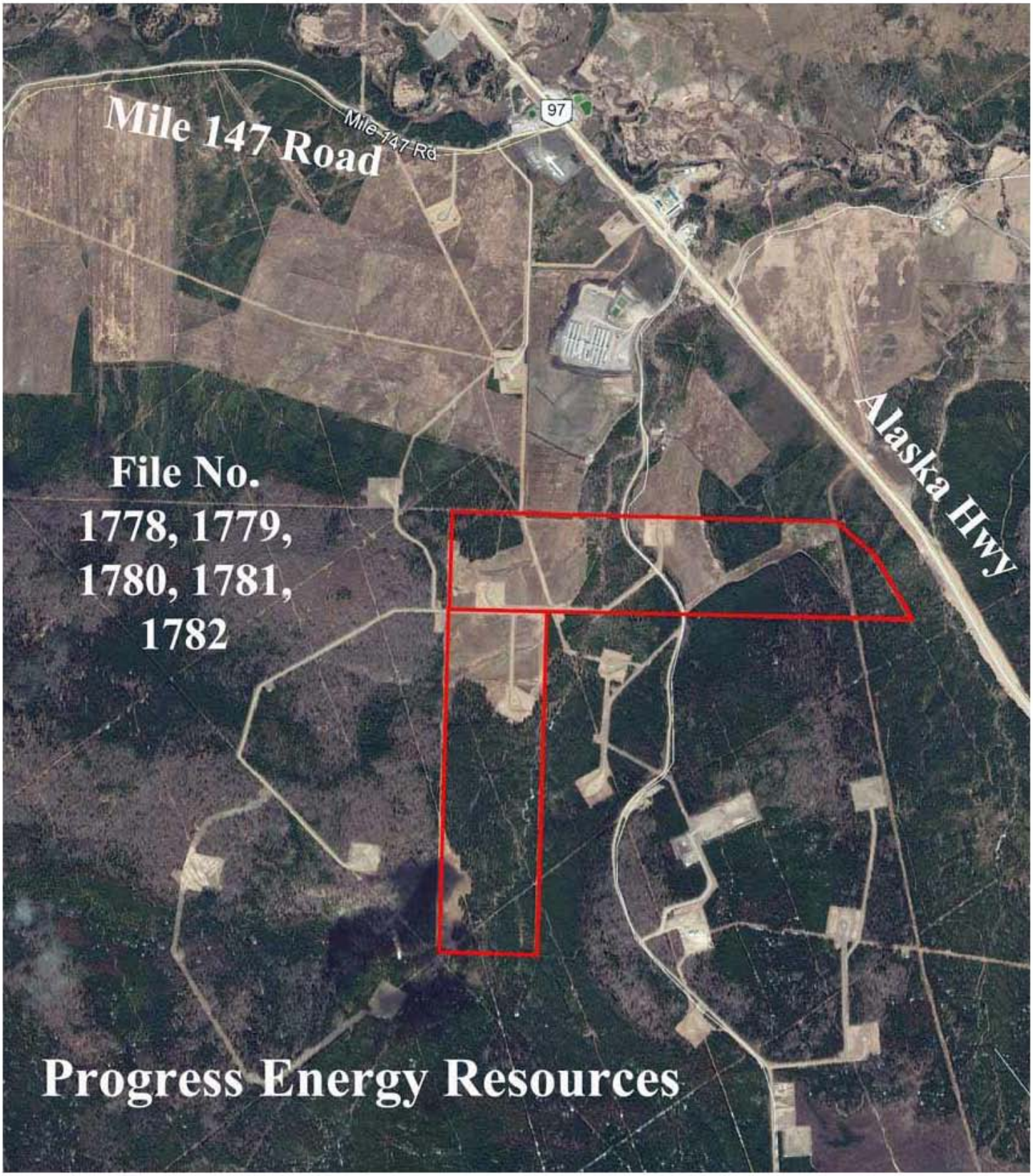
(APPLICANT)

AND:

Progress Energy Resources

(RESPONDENT)

BOARD ORDER


Mile 147 Road
Mile 147 Rd
97
Alaska Hwy
File No.
1778, 1779,
1780, 1781,
1782
Progress Energy Resources

Heard: May 14, 2013 in Dawson Creek, British Columbia, with subsequent communications ending June 28, 2013

Appearances: Silvio Salustro and Elvin Gowman, for the Applicant
Daron K. Naffin, Counsel for the Respondent

INTRODUCTION

[1] This is an arbitration of five rent review applications filed by Mr. Silvio Salustro under section 166 of the *Petroleum and Natural Gas Act*, RSBC 1996, c. 361 (the "Act").

[2] Mr. Salustro has granted the following surface leases to Progress Energy Canada Ltd. ("Progress") for the purposes of operating oil and gas well sites and associated dispositions:

Table 1

1	2	3	4	5	6	7	8
Ref. No.	**Lease Date**	**Effective Date**	**Lease Location**	**Disposition**	**Size (Acres)**	**Current Annual Compensation**	**SRB File No.**
1.	Sept. 8, 2006	Sept. 8, 2011	B-077-A-094-G-02	Well Site & Access Road	6.87	$3,500.00	1778
2.	Dec. 13, 2006	Dec. 13, 2010	C-067-A-094-G-02	Well Site & Access Road	5.29	$3,300.00	1779
3.	Dec. 13, 2006	Dec. 13, 2010	D-077-A-094-G-02	Well Site & Access Road	4.03	$2,700.00	1780
4.	Mar. 26, 2007	Mar. 26, 2011	Riser B-77-A	Valve Site	0.09	$250.00	1781
5.	June 30, 2007	June 30, 2011	Road B68-A	Access Road	1.31	$1,000.00	1782

[3] Mr. Salustro claims $1,200 per acre as fair annual compensation. Progress submits that a decrease, rather than an increase, in current annual compensation is warranted.

[4] At the hearing, Mr. Salustro raised concern about Progress' depiction of the location of the access road on District Lot 3264 leading to Reference No. 2 (the "Access Road"). Subsequent to the hearing, Progress addressed this issue, and the parties were invited to provide their submissions to the Board on the correct location of the Access Road and any impacts arising from it that are relevant to the compensation factors in section 154 of the Act. After some discussion amongst the parties and the Board, it was agreed that the Board would decide these applications based only on the evidence presented at the hearing and not on any information presented subsequent to the hearing.

ISSUE

[5] The issue is to determine the appropriate annual compensation that Progress must pay to Mr. Salustro with respect to each of the five leases.

FACTS

[6] The Lands on which the leases are located are about 135 kilometers north of the city of Fort St. John near Pink Mountain, within District Lots 3263 and 3264, in the Peace River District. Mr. Salustro has owned the Lands since 1962. He also owns other parcels in the area, which he acquired from the Crown by clearing 80% of the raw lands. He has worked in the area for about 45 years and is very familiar with it.

[7] The Pink Mountain area is a small farming community comprising farms, hotels, motels, private camps, a post office, and a small store. In terms of services, there is natural gas, but no power or water.

[8] Progress operates oil and gas facilities and associated dispositions on the Lands.

[9] The subject dispositions comprise well sites, access roads and a valve or riser site. The equipment on the well sites includes a well head, some minor production equipment and a fence. The same operator visits the sites on a regular basis using a half-ton truck. In the summer months, the leased areas are mowed and weeds are sprayed as required.

[10] The Lands are designated Agricultural – Rural, with their soil rated as a mixture of Class 5c. They are under the Agricultural Land Reserve ("ALR").

EVIDENCE AND ANALYSIS

Annual Compensation

[11] In determining annual compensation, the guiding provision is section 154 of the Act, which 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.

[12] Only the factors in paragraphs 154(1)(c) (loss of a right or profit), 154(1)(e) (severance), 154(1)(f) (nuisance and disturbance), and 154(1)(i) (other leases) are relevant to the applications before me. I will consider these factors, and subsection 154(2) which the Board must consider in every application under section 166. There are no other factors or criteria established by regulation. I will also consider whether the total award for each of the leases, comprising compensation for the various components reflects proper compensation in all of the circumstances of that application (*Scurry Rainbow Oil v. Lamoureux* [1985] B.C.J. No. 1430 (BCSC)).

[13] Subsection 166(4) of the Act provides that the effective date for varying the rental provisions in a surface lease is the anniversary of the effective date of the surface lease immediately preceding the date of the notice under subsection 165(2) of the Act.

[14] For each of the five leases, Mr. Salustro served Progress with a Notice to Negotiate dated September 21, 2011. The effective dates for all the leases are set out in Table 1 above. The parties do not dispute these dates.
The parties filed documentary evidence marked as Exhibits 1 through 6. Mr. Salustro gave evidence at the hearing. Mr. Robert J. Telford, Land Consultant & Appraiser, gave expert evidence on behalf of Progress through oral testimony and written report respecting estimates of annual compensation in light of the section 154 factors. Mr. Christopher Adkins, Senior Surface Landman, also gave evidence on behalf of Progress with respect to comparable leases.

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

[15] This factor is intended to compensate the landowner for loss of a right or profit (or use) relating to the subject site(s). The Board in the past has indicated that 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).

[16] Mr. Telford's evidence was, based on a review of air photos taken in 2008 the Lands were used for hay production and based on photos taken in September 2012 and a physical inspection in December 2012 the Lands do not appear to have been used recently for agriculture, although they retain the ability to produce forage crops if the owner chooses to do so. He concluded that the physical use of the Lands is for forage (hay) production and livestock grazing, and the highest and best use is for agricultural production.

[17] Mr. Telford tried to contact Mr. Gowman by email to confirm these assumptions, but there was no response. However, in cross-examination, Mr. Salustro said he last grew hay on the Lands in 1997 and last ran cattle on them in 1994. He explained that he stopped growing hay because the "cattle industry was bad" and there was "no market for hay", and he moved to Dawson Creek with his family to be closer to the schools. He confirmed that he does not live on the Lands.

[18] Progress submits that in the agricultural context this compensation factor typically relates to loss of crop production caused by an operator's occupation of the area under disposition. 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. 27 – 29).

[19] Progress also refers to *Piper, supra,* 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.

[20] Progress 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 of the effective date. It says using the effective date is beneficial because it provides an objective reference point for the parties when negotiating for compensation under this factor. It says absent a mandated reference point, compensation for loss of production will vary according to when renegotiations were concluded or when arbitration has been completed. Mr. Salustro provides no perspective on this point.

[21] Mr. Telford says according to the British Columbia Forage Council data, hay yields range from 1.5 to 3.0 tonnes per acre, with a price range of $65 to $100 per tonne. Based on this data, he suggests a rate of 2.0 tonnes per acre at $100 per tonne, or $200 per acre, is reasonable compensation for any "potential losses" associated with hay production. He says the actual loss would be less

than the surveyed acreage because a significant portion of the leased area is cropped.

[22] Mr. Telford also says the $200 per acre return is gross return and that farming operation costs for items such as seeds, fertilizer and chemicals should be deducted to determine the net return. He estimates $60 per acre for fertilizer and chemical costs for the Lands, stating that based on an expected productive life of nine years, the seed costs would be nominal.

[23] He concludes that based on these factors, "the average gross loss of use would be $200.00 and the net return would be $140.00 per acre. . . . the loss of profit would be: $140.00/ac if the property was utilized for hay." (my emphasis)

[24] Mr. Salustro disagrees with Mr. Teldford's data. He testified that the Lands are under the ALR and they are good quality cultivation lands, much better than the *Helm* and *Yorke/Bonavista* lands, whose annual rentals are higher than what he is receiving for his Lands. He said the *Yorke/Bonavista* lands are all bush and not one field in there is a hay field. With respect to the *Helm* lands, he said they have never been a hay field. His evidence was that he grew lots of hay on his lands, about 4.0 tonnes per acre, and he finds it hard to believe that he gets less rent than the other landowners. I will discuss the *Helm* and the *Yorke/Bonavista* leases in more detail under the "other leases" section below.

[25] I found Mr. Salustro to be a genuine and credible witness, and I accept that he grew about 4.0 tonnes of hay per acre on his lands. He did not provide any evidence on the rate that should be applied. Therefore, applying Mr. Telford's rate of $100 per tonne, I find the probable gross loss is $400 per acre.

[26] With respect to whether or not farming operations costs should be deducted from the gross return, I refer to *Canadian Natural Resources Ltd. v. Bennett & Bennett Holdings Ltd.,* 2008 ABQB 19, paras. 125 and 126, where Justice Langston said:

> One methodology which I do consider to be in error is the deduction of expenses from all crops grown, in the case of Mr. Hoover, and from all crops grown on irrigation, in the case of Mr. Thompson. In calculating loss of use, the Board has consistently stated that costs are only to be deducted in the case of specialty crops grown on irrigation. In fact, in *Talisman Energy Inc. v. Paziuk*, 2003/0161, the Board rejected Mr. Hoover's evidence because he took the same approach taken in this case:
>
> > . . . The Board does not accept his evidence regarding loss of use. It has been the Board's practice to award the gross amount except in cases of specialty crops wherein input costs may exceed net profit.

> In its decision in this case, the Board also stated expenses should be deducted from gross production when specialty crops are grown, and did not refer to deductions from any other production. I see no reason to depart from this methodology.

[27] Justice Langston concluded at para. 163(c) as follows:

> Mr. Hoover made deductions from gross revenue for all crops, and Mr. Thompson did the same for all crops grown on irrigation. The practice is to assess loss of use on the gross amount for all crops, regardless of where they are grown, except for specialty crops.

[28] In *Conocophillips Canada Resources Corp. v. Lemay,* 2009 ABQB 72, Mr. Justice Mason said, at paras. 207 and 208:

> . . . It is true that in the large majority of cases, the landowner will have the use of a portion of the acreage of the leased site, and will avail him or herself of any revenue produced from that portion. However, it is appropriate to determine compensation based on the premise that the entire wellsite is being used by the operator because at any time throughout the lease, the operator has the right to use the entire wellsite. Even if a landowner has costs for seed, fertilizer, chemical and equipment which have been expended to plant and nurture a crop on a wellsite, the operator may enter at any time and conduct its operations to the detriment of the growing crop. A landowner may therefore expend funds to produce revenue on the wellsite, but is risking receiving no profits from the expenditure because the operator has the right to enter at any time.
>
> This is consistent with several Board and court decisions which have not discounted the compensation payable by the revenue the landowner receives from production on the wellsite, and have awarded gross revenue as opposed to net revenue when, like here, the crop being grown is not a speciality [sic] crop.

[29] Based on the above discussion, I find that the probable gross loss, rather than the net return, rate should be applied in determining compensation under paragraph 154(1)(c) of the Act – in this case, $400 per acre.

[30] At this juncture, I would like to address Progress' repeated submission that there is no basis for any increase in the annual compensation payable to Mr. Salustro. It points to Mr. Salustro's evidence that there was "no market for hay" and that it is not a reasonable foreseeable use that he would put the Lands into hay production any time soon. Mr. Salustro's evidence was that he stopped growing hay in 1997 because, among other reasons I mentioned above, there was "no market for hay" at <u>that</u> time. It was not Mr. Salustro's evidence that there was "no market for hay" at the time he entered into the subject leases or at the effective dates. His evidence was that he has worked the Lands and other

parcels he owns in the area for about 45 years, and the Lands are "good lands" with "farm qualification", are under the ALR, and are centrally located. When comparing the *Helm* lands, he said "I feel my land is in the middle of Vancouver." So, it is not reasonably foreseeable that he would not put the Lands into hay or other crop production in the future. If that is not the case, then why is Progress offering any compensation at all?

[31] In awarding compensation for loss of profit, the Board can base its award not only on "actual, ongoing losses and impacts arising out of the presence of the Operations" as Progress insists, but also from "evidence of probable and reasonably foreseeable ongoing and recurring loss or damage that can be reasonably quantified" as the Board ruled in *Piper, supra*.

[32] In this case, the probable loss of profits is quantifiable by applying Mr. Salustro's evidence of 4.0 tonnes per acre and Mr. Telford's evidence of $100 per tonne.

[33] With respect to loss of profits, at $400 per acre except for Reference No. 4, I confirm as follows:

Reference No. 1 – $2,748.00 (6.87 ac)
Reference No. 2 – $2,116.00 (5.29 ac)
Reference No. 3 – $1,612.00 (4.03 ac)
Reference No. 4 – Nil
Reference No. 5 – $524.00 (1.31 ac)

[34] Because Reference No. 4 is a riser site and is very small, Progress appears to have allocated a nominal global sum as compensation. Mr. Gowman submits that typically with smaller sites, they will have to be differentiated from a pro-rated rate of the leased well site. He contends that the current compensation is probably arbitrary and established with the landowner having little input or advice at the time. However, Mr. Salustro provides no evidence to help me in reviewing this amount. I cannot pick another arbitrary amount. I will leave it at the current amount, only subject to the change in value of money applying the consumer price index factor (discussed later in this decision).

[35] I now digress to deal with the location of the Access Road issue based on the evidence before me as its determination will impact the compensation for the severance and nuisance and disturbance factors.

Location of the Access Road

[36] As I said at the outset, Mr. Salustro raised concern about Progress' depiction of the location of the Access Road. According to the lease document filed in evidence, the Access Road lies along the surveyed boundary line, which Progress relies on to estimate its compensation with respect to the severance and tangible impacts for Reference No. 2.

[37] Mr. Salustro's evidence was that the Access Road is located in the middle, parallel to and west of the surveyed boundary line. Mr. Salustro explained that if the Access Road was at the boundary, he would have "no control of the water going down to the creek"; so, he asked Progress to "put the road right across from this other lease and leave a field in between the two boundaries." In cross-examination, Mr. Telford confirmed that when he inspected the Lands in December, 2012, he did not see the road because of the snowy winter conditions. I notice that under Tab 5 of Mr. Telford's report (Exhibit 3), the sketch on the last page clearly shows the location of the Access Road in the middle and not along the surveyed boundary.

[38] So, based on the evidence before me, I am satisfied that the Access Road is located in the middle, as Mr. Salustro identified on the air photo at page 12 of Mr. Telford's report (Exhibit 3).

Section 154(1)(e) – Severance

[39] 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 v. Progress Energy Ltd.,* SRB Order 1634-1, December 2, 2010, at para. 34).

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

[41] Mr. Telford gave evidence that, based on a review of the photographs mentioned earlier, in the past and as of the applicable effective date, the lands surrounding the dispositions, other than a small portion in Reference No. 2, had been farmed. Relying on the Access Road being along the boundary line, Mr. Telford says with respect to Reference No. 2 a portion of the Access Road cuts off a portion of the field on the east side severing approximately 0.5 acres, thereby equipment cannot get in between the trees and the surveyed area. He concludes that this would lead to a loss of $70.00 based on his net loss rate of $140.00 per acre.

[42] In cross-examination, Mr. Gowman put to Mr. Telford that with respect to Reference No. 3 because the well is teared off, the area to the west is cut-off (to a pie shape in the corner) and if the site was fenced off on the boundaries, there would be no access. Mr. Telford disagreed and explained that even if there was fencing, there would be more than 60 feet between the fencing and the road, and equipment could get through, even though extra turns and time may be involved in farming the area. Mr. Telford said he has captured the additional time involved in farming around the various dispositions under the nuisance and disturbance factor.

[43] Progress argued that Mr. Gowman cannot have it both ways: on the one hand, he says you cannot rely on the lease boundaries (in the case of Reference No. 2) and then on the other hand he says you can rely on the lease boundaries (in the case of Reference No. 3) to support severance.

[44] With respect to Reference No. 3, there is no dispute as to the location of the access road or the lease boundaries. The only question is whether or not there is severance. I accept Mr. Telford's evidence that there is sufficient room for equipment to access the pie-shaped area in question. Therefore, I find no severance with respect to Reference No. 3.

[45] With respect to Reference No. 2, having found that the Access Road is not along the lease boundary, but rather is in the middle of the property, I find it is not unreasonable to conclude that there is no severance associated with Reference No. 2.

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

[46] 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, including tangible and intangible impacts, is also compensable in an annual payment.

Tangible Impacts:

[47] Mr. Telford describes the tangible impacts as including extra time, turns, inputs and potential crop yield reductions as a result of having to deal with additional headlands in farming around an obstruction, namely the disposition, in the Lands. Additional time is calculated by estimating the reduction in speed necessary to establish the headlands and the additional time required to make the additional turns for the change in farming alignment.

[48] In his report, Mr. Telford goes into considerable detail about the process he employs and the data (including type, size and speed of equipment) he uses in estimating the tangible impacts of farming around the various leases. His calculations are premised on six operations typically associated with establishment of hay based on a nine-year productive hay cycle. Based on a 1980's study (which Mr. Telford explained is still the best study used in Alberta and Saskatchewan, and to which Mr. Salustro did not object), Mr. Telford applies a 20% loss in crops due to overlap, including potential compaction. He points out that the valve or riser site (Reference No. 4) is located within Reference No. 1 and any impact from its presence is reflected in Reference No. 1.

[49] Mr. Gowman objects to Mr. Telford's data and his methodology (the empirical approach). He says the Lands are rather small and one would never use the kind of large equipment that Mr. Telford has used in his calculations. To

this, in cross-examination, Mr. Telford explained that he used larger equipment (assuming they are all new in 2011) to give higher costs, which only benefits Mr. Salustro. Furthermore, he said if he had received a response to his request for details of Mr. Salustro's specific equipment, he could have customized his calculations.

[50] Since Mr. Salustro did not provide any further details at the hearing, I accept Mr. Telford's data and calculations, except for his calculation with respect to Reference No. 2.

[51] Mr. Gowman submitted that if the Access Road is in the middle of the property, then the analysis of how one would work the field would be different than the model Mr. Telford has presented – the distances are cut up, are much shorter and not practical and is an imposition.

[52] Having found that the Access Road is in the middle of the property, I agree with Mr. Gowman that there would be additional tangible impacts. Mr. Salustro does not offer any evidence and neither does Mr. Gowman offer any guidance in quantifying the additional tangible impacts.

[53] Generally, the whole exercise of determining annual compensation involves estimations to a large degree, and in order to keep the calculations simple, I will simply double Mr. Telford's estimate of $258.89, as the field surrounding Reference No. 2 is essentially split into two as a result of the Access Road running in the middle. I recognize that this is not a precise amount as there may be some overlap in the distances covered across the field, but it is not an unreasonable amount as there will be additional headlands and additional turns requiring more time and effort.

[54] Mr. Salustro complained of another impact – water damage to the Lands. His evidence was: Progress was given a permit to construct a small road (approximately 300 feet) to survey some Crown lands for three leases, which they did using existing access on the Lands; then they went west on District Lot 3264 and built their own road on good ground where there were trees, moss, etc. to hold the water pressure back; but now, there is water everywhere; on Mr. Salustro's foreman's intimation, on May 10, 2013, Mr. Salustro went to take photographs of the water washing down the road on the Lands. He said the culverts get full and there is "humungous amounts of water" causing damage to his Lands.

[55] Mr. Telford did not address the water damage issue in his written report or in his oral testimony, nor was he cross-examined on it. In its closing submissions, Progress submitted that although there was some evidence of water impacts on the Lands, there was no evidence that they are attributable to Progress and there is no quantification of the water impacts in terms of potential loss to Mr. Salustro.

[56] It is not clear from the evidence whether this was a one-off incident or is a recurring problem, and which of the subject leases are affected by the damage. Was this an issue at the effective dates and how long has this been going on? It appears that Mr. Salustro has not approached Progress to deal with this issue.

[57] Considering the lack of evidence surrounding this issue, I am unable to determine whether any compensation ought to be included in an annual payment. It is best that Mr. Salustro first approach Progress to resolve this issue, and if he is unable to, then he can apply to the Board to mediate or arbitrate it.

[58] With respect to the tangible impacts, I confirm as follows:

Reference No. 1 – $521.13
Reference No. 2 – $517.78
Reference No. 3 – $529.32
Reference No. 4 – Nil
Reference No. 5 – $182.65

Intangible Impacts:

[59] Intangible impacts include traffic, noise, dust, and other disturbances arising from the operations on the lands, and the landowner's time and effort involved in the ongoing dealings with the operator and others including surveyors and contractors.

[60] Progress acknowledges that some compensation ought to be paid to Mr. Salustro for the intangible impacts arising from Progress' operations on the Lands. In this respect, Mr. Telford estimates that if Mr. Salustro spent one day a year dealing with the intangible impacts, compensation would amount to $400, based on eight hours at $50 per hour. As mentioned above, since the valve or riser site (Reference No. 4) is located within Reference No. 1, Mr. Telford says compensation for any intangible impacts will be included in the compensation for Reference No. 1. He also says the access road (Reference No. 5) is part of the access to the well site at B-68-A and any compensation must be reduced by one-half since there are two dispositions associated with the single well site.

[61] Mr. Telford suggests it would only take eight hours per year for Mr. Salustro to deal with all nuisance and disturbance from Progress' operations on the Lands – this works out to 40 minutes per month.

[62] Mr. Telford's evidence was that the same operator visited the sites on a regular basis using a half-ton truck, and in the summer months, the leased areas were mowed and weeds were sprayed as required. I have no evidence to explain what is meant by "on a regular basis" –could it have been once a month, once a quarter, once a year, or some other periodic basis? I do not know. I would think it would have been definitely more than once a year and probably more than once a quarter because in the summer months the leased areas were

mowed and weeds were sprayed. At least in the summer months there would have been more frequent visits. So, there would have been nuisance and disturbance from these visits.

[63] Mr. Salustro's evidence was that Progress had become "more active than when they started in 2005." He said "I gave them rights; they took over more than the rights I gave them." He referred to "trespass" (although he is not making a claim for trespass) and Progress using existing roads on his Lands to survey other leases. These activities, no doubt, would have caused nuisance and disturbance for him.

[64] Mr. Telford's estimate of 40 minutes per month on average does not seem reasonable to me. Mr. Salustro gave evidence that he lives in Dawson Creek. Leaving aside all other nuisance and disturbance that Mr. Salustro may have suffered, I would think that for him to oversee the operator's visits alone would have taken on average more than 40 minutes per month. There is no question that he has suffered other nuisance and disturbance as he expressed frustration in his testimony when describing Progress' activities using his Lands. I have not taken into account any nuisance arising from the water damage he mentioned as it is not clear this was an issue at the effective dates.

[65] In light of the evidence before me, I find that Mr. Salustro should be compensated for at least two hours per month. I accept the $50 per hour rate as the Board has applied this rate on numerous occasions, and I do not have any evidence before me to suggest that the rate should be higher.
On this basis, I find that the annual award for intangible impacts should be $1,200 (2 hrs. x 12 mos. x $50/hr.). I agree that no compensation is warranted for this factor for Reference No. 4 and only 50% should be awarded for Reference No. 5, with the following results for all the leases:

Reference No. 1 – $1,200.00
Reference No. 2 – $1,200.00
Reference No. 3 – $1,200.00
Reference No. 4 – Nil
Reference No. 5 – $600.00

Section 154(1)(i) – Other leases

[66] Under paragraph 154(1)(i) of the Act, the Board may consider the terms of any surface lease or agreement submitted to the Board or to which the Board has access.

[67] Mr. Salustro submitted a chart headed "Comparable Leases". On it, he lists 13 leases with six different operators. There is a column showing dates ranging from 1987 to 2007. There is no indication as to what these dates refer to – date of the lease, effective date of renewal, or some other date? I assume they are

the effective dates. The size of these leases ranges from 3.064 acres to 16.22 acres. The annual rent ranges from $3,940 to $14,598 with the rent per acre ranging from $900 to $1,399. There is another column showing the rent per acre time adjusted to 2011, which ranges from $967 to $1,538. There is no indication as to the basis of the time adjustment. Only leases 5 and 7 show the land use as "bush" and "bush and pasture", respectively. There is no indication as to what the other lands are used for.

[68] Mr. Salustro did not provide copies of any of these leases, the breakdown of the compensation by the section 154 factors, any information surrounding the negotiation of these leases, the proximity of these leases to the subject leases, or, most importantly, the land use (other than for leases 5 and 7).

[69] Progress says the leases referenced in Mr. Salustro's chart have been drawn from the *Helm* decision and they are neither comparable nor reliable for a number of reasons including: the effective dates are different; the locations are 63 to 114 kilometers away from the subject leases; there is no basis for the time adjustments and there are discrepancies in the calculations and moreover time adjustment has no place or bearing on a rent review; and there is no supporting documentation to verify the information presented. Therefore, Progress says, the Board should put very little weight on it.

[70] Other than for leases 5 and 7, I do not have sufficient evidence to determine whether these leases are comparable to the subject leases. Therefore, I will not rely on them as comparables. Lease 5 and 7 with a similar land use, although a bit dated (2006 and 2002) and some distances away (69.10 km and 114.30 km) from the subject leases, indicate a per acre rate of $1,031 and $1,112.

[71] Progress submitted two leases, which Mr. Adkins discussed in his oral testimony. Mr. Adkins' evidence was that Progress is the only operator that has any leases comparable to the subject leases within the geographic location of the subject leases, which he identified as a 12-mile radius from the subject locations as a center point. Mr. Salustro objected to this narrow search, but Mr. Adkins explained that there are other operators beyond this 12-mile radius but that those lands are Crown lands and are not comparable to the Lands as the compensation regime for Crown lands is different.

[72] In choosing the two leases as comparables, Mr. Adkins considered many factors, including effective review date, acreage of location, home quarter versus non-home quarter, well status, overhead power, onsite equipment, land use, access road profile (built up versus field level) and total annual rental.

[73] Some of the details of the two leases are as follows: effective review date – 2012/2010; size – 3.44/6.89 acres; land use – bush; annual compensation – $4,000/$3,900. This translates to $1,163 and $566 per acre respectively.

[74] With respect to comparable 1, Mr. Salustro's evidence was: this property is the adjoining parcel to his District Lot 3263; it is in District Lot 1371 and was always wet and swampy, and the owner could never say that there was a hay crop on it; it would never be cultivatable land; and the owner works for Progress doing road maintenance, ditching, and all that needs to be done around the wellhead.

[75] With respect to comparable 2, Mr. Salustro's evidence was: this property is in District Lot 3087 (west of District Lot 1371); it was always swampy and it never had farm qualification soil; and the owner was a field foreman for Progress assessing seismic projects.

[76] Compared to these two properties, Mr. Salustro says his Lands and soil are much better and that is why they are under the ALR and the two properties are not. Furthermore, these landowners worked for Progress and as a result may have achieved a more favourable rate. He said he did some road work for Progress when they first came, but he has not done any work or sold any gravel to them since 2006.

[77] At the hearing, Mr. Salustro said he spoke with Mr. Yorke about his recent negotiations with Progress and Bonavista which resulted in Progress agreeing to a rent of $1,075 per acre and Bonavista agreeing to $1,400 per acre. He pointed out that the *Yorke* lands are inferior to his Lands and yet Progress agreed to pay a much higher rate to Mr. Yorke. In this respect, Mr. Adkins and Progress say that in dealing with Mr. Yorke, Progress did not focus on a per acre basis, but rather on a global basis based on the Bonavista comparables and certain site specific information. They say Progress paid a premium to Mr. Yorke for resolving issues into the future – the agreement for the current rent review (2010) and up to the 2017/2018 effective dates. So, they say no guidance can be taken from this because the circumstances were different.

[78] As Progress points out, there may be circumstances that are particular to a lease which may affect the compensation an operator would be willing to pay to a landowner. Also, it is not always possible to find a perfect set of comparables. I will have to work with the few leases before me.

[79] So, even leaving aside the *Helm* comparable lease 5 at $1,031 (which is closer in time and distance than lease 7 to the subject leases), *Yorke/Progress* lease at $1,075, and *Yorke/Bonavista* lease at $1,400, and considering only Progress' comparables, the $1,200 rate that Mr. Salustro is claiming is not that far off from Progress' comparable 1 at $1,163, and it is not that unreasonable considering the quality of Mr. Salustro's Lands is much better (agricultural, ALR vs. swampy, non-ALR) and also there may be other monetary or non-monetary value associated with comparable 1 by virtue of that landowner being employed by Progress to do other work.

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

[80] Subsection 154(2) of the Act requires the Board to consider "any change in the value of money and of land since the date the surface lease or order was originally or last granted."

Change in value of money:

[81] In determining the change in value of money from the time the subject leases were last reviewed (2006/2007) to the effective date (2010/2011), Mr. Telford applies the Consumer Price Index as the best indicator. His calculations are as follows:

Table 2

1	2	3	4	5	6
Ref. No.	**Lease Date**	**Effective Date**	**Annual % Change**	**Current Annual Compensation**	**Change in Value of Money**
1.	Sept. 8, 2006	Sept. 8, 2011	(116.5-108.1) / 108.1 x 100 = 7.78	$3,500.00	$3,773.00
2.	Dec. 13, 2006	Dec. 13, 2010	(113.8-108.1) / 108.1 x 100 = 5.27	$3,300.00	$3,475.00
3.	Dec. 13, 2006	Dec. 13, 2010	(113.8-108.1) / 108.1 x 100 = 5.27	$2,700.00	$2,842.00
4.	Mar. 26, 2007	Mar. 26, 2011	(116.5-110.0) / 110.0 x 100 = 5.91	$250.00	$265.00
5.	Jun. 30, 2007	Jun. 30, 2011	(116.5-110.0) / 110.0 x 100 = 5.91	$1,000.00	$1,059.00

[82] Progress submits that Mr. Telford's estimates of compensation under paragraphs 154(1)(c) and (f) include increases in the value of agricultural outputs and the cost of agricultural inputs, thereby reflecting the increases in the value of money or land, and that no further adjustments are required under subsection 154(2). It further submits that in light of *Miller v. Penn West*, MAB Order 1620-2 (May 31, 2010), if the Board chooses to make any award based on subsection 154(2), it should rely on Mr. Telford's evidence as presented above.

[83] Mr. Salustro does not challenge Mr. Telford's evidence nor does he provide any evidence with respect to the change in value of money. I accept Mr. Telford's application of the Consumer Price Index factor in determining the change in value of money.

Change in value of land:

[84] Mr. Telford's evidence was that there were very few sales in the subject area, and there is insufficient data concerning the general value trends of similar lands in the subject area.

[85] Progress submits that the reference to change in the value of land in subsection 154(2) relates to land value trends on a broader, regional scale rather

than to changes in the value of the Lands, as the latter changes are addressed by paragraph 154(1)(b) of the Act at the time of entry.

[86] Although Mr. Salustro questioned why Mr. Telford did not refer to some land sales about six years ago that sold for $1,100 per acre, he did not provide any evidence or analysis that I could consider.

[87] Having no evidence from either party, I am unable to determine whether any award based on this aspect is warranted.

Determination of a global sum

[88] Progress submits that a reduction in compensation is warranted, or alternatively, there is no basis for any increase in compensation. I disagree. Although Mr. Salustro did not neatly articulate his evidence and submissions in terms of the section 154 factors, as perhaps Mr. Telford and Progress' counsel did, he did provide evidence in his own way which forms the basis of the support for an increase in compensation under the various section 154 factors. The following is the breakdown based on the evidence before me:

Table 3

1	2	3	4	5		6
Ref. No.	**Lease Location**	**Loss of Profit** **s.154(1)(c)**	**Severance** **s.154(1)(e)**	**Nuisance and Disturbance** **s.154(1)(f)**		**Total Annual Compensation**
		@ $400/ac Except for Ref. No. 4		Tangible	Intangible	
1.	B-077-A-094-G-02	$2,748	Nil	$521	$1,200	$4,469 ($651/ac)
2.	C-067-A-094-G-02	$2,116	Nil	$518	$1,200	$3,834 ($725/ac)
3.	D-077-A-094-G-02	$1,612	Nil	$529	$1,200	$3,341 ($829/ac)
4.	Riser B-77-A	-	-	-	-	$250
5.	Road B68-A	$524	Nil	$183	$600	$1,307 ($998/ac)

[89] Progress says that it "acknowledges that the Board has recognized that evidence of compensation paid to other landowners under comparable leases in a given area may be relevant to setting compensation. This principle is reflected in section 154(1)(i) of the Act. As set out in *Velander v. Imperial Oil Resources Limited,* SRB Order 1726-2 (December 11, 2012), at para. 27, 'the terms of other surface leases or agreements' are one factor that the Board may consider in making a compensation determination."

[90] Progress submits that " should the Board choose to rely upon comparable agreements, only those presented by Progress warrant consideration, given their comparability, as established by Mr. Adkins."

[91] The per acre rates in column 6, in Table 3 above, are below the rates of the various leases I have discussed above. They are also below the rate of Progress' comparable 1, and yet the Lands are of better quality and are more valuable than comparable 1, and also there may have been other value associated with comparable 1.

[92] The Board in *Helm, supra,* at para. 54, pointed out that "[t]he legislation specifically allows the Board to consider other leases, implying there should be some sense of fairness or equity between landowners in compensation paid." On this note, it would not be unreasonable to set Mr. Salustro's compensation at least at the same rate as Progress' comparable 1 –$1,163 per acre.

[93] As I have said before, in determining compensation, particularly when there is inadequate or imperfect comparables, the Board is faced with the challenge of arriving at an appropriate amount that is fair and equitable in all the circumstances of the particular case. This involves assessing the evidence and the unique circumstances of each case, and invariably exercising judgment and discretion to determine the proper amount, without compromising fairness and equity. That is what I have attempted to do here.

[94] Based on the evidence before me and all of the circumstances of the subject applications, and my analysis of the section 154 factors as discussed above, I find the annual compensation for the five leases as shown below in Table 4 reflects proper compensation:

Table 4

1	2	3	4	5	6	7
Ref. No.	**Lease Date**	**Effective Date**	**Lease Location**	**Disposition**	**Size (Acres)**	**Revised Annual Compensation**
1.	Sept. 8, 2006	Sept. 8, 2011	B-077-A-094-G-02	Well Site & Access Road	6.87	$7,990
2.	Dec. 13, 2006	Dec. 13, 2010	C-067-A-094-G-02	Well Site & Access Road	5.29	$6,152
3.	Dec. 13, 2006	Dec. 13, 2010	D-077-A-094-G-02	Well Site & Access Road	4.03	$4,687
4.	Mar. 26, 2007	Mar. 26, 2011	Riser B-77-A	Valve Site	0.09	$265
5.	June 30, 2007	June 30, 2011	Road B68-A	Access Road	1.31	$1,524

ORDER

[95] The Surface Rights Board orders that the rental provisions under the five leases are amended to provide those amounts, effective those dates, as the annual compensation payable to Mr. Salustro as shown in Table 4 above. Progress shall forthwith pay to Mr. Salustro any difference in annual compensation paid since the effective dates and the revised annual compensation as of the effective dates.

DATED: October 18, 2013.

FOR THE BOARD

V. Chettiar

Valli Chettiar, Member and Arbitrator

File Nos. 1778, 1779, 1780, 1781, 1782

Board Order No.1778-82-2

December 23, 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

DISTRICT LOT 3263 PEACE RIVER DISTRICT
DISTRICT LOT 3264 PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

Silvio Salustro

(APPLICANT)

AND:

Progress Energy Canada Ltd.

(RESPONDENT)

BOARD ORDER

Reconsideration: Written submissions closing October 24, 2014

Written Submissions: From Silvio Salustro and Elvin Gowman, for the Applicant, and Darron K. Naffin, Counsel for the Respondent

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INTRODUCTION

[1] This is a reconsideration of Board Order No. 1778-82-1 dated October 18, 2013 (the "Original Board Order"), as directed by the Supreme Court of British Columbia (the "Court") in its decision (the "Decision") in *Progress Energy Canada Ltd. v. Salustro,* 2014 BCSC 960.

[2] The Original Board Order was issued upon arbitration of five rent review applications filed by Mr. Silvio Salustro under Section 166 of the *Petroleum and Natural Gas Act*, RSBC 1996, c. 361 (the "Act") with respect to the following surface leases (collectively, the "Leases") Mr. Salustro granted to Progress Energy Canada Ltd. ("Progress") for the purposes of operating oil and gas well sites and associated dispositions:

Table 1

1	2	3	4	5	6	7	8
Lease Reference No.	**Lease Date**	**Effective Date**	**Lease Location**	**Disposition**	**Size (Acres)**	**Annual Compensation (Current)**	**Board File No.**
1.	Sept. 8, 2006	Sept. 8, 2011	B-077-A-094-G-02	Well Site & Access Road	6.87	$3,500.00	1778
2.	Dec. 13, 2006	Dec. 13, 2010	C-067-A-094-G-02	Well Site & Access Road	5.29	$3,300.00	1779
3.	Dec. 13, 2006	Dec. 13, 2010	D-077-A-094-G-02	Well Site & Access Road	4.03	$2,700.00	1780
4.	Mar. 26, 2007	Mar. 26, 2011	Riser B-77-A	Valve Site	0.09	$250.00	1781
5.	June 30, 2007	June 30, 2011	Road B-68-A	Access Road	1.31	$1,000.00	1782

[3] The Original Board Order increased the annual compensation due to Mr. Salustro in respect of the Leases.

[4] Progress applied to the Court for judicial review of the Original Board Order, which application was heard on March 21, 2014 with reasons for judgment (the "Reasons for Judgement") delivered on May 30, 2014.

[5] The Order of the Court was entered on July 29, 2014 (the "Court Order") and it, in part, states as follows:

> 2. The Board's finding that it was reasonably probable and foreseeable that Mr. Salustro would bring the lands in District Lots 2363 and 3264 of the Peace River District, British Columbia subject to the leases described in the table below . . . into hay production in the future, and its decision as to tangible impacts, are patently unreasonable and therefore set aside: . . .
> 3. The Board's award for annual compensation under the Leases is set aside;
> 4. The Board is directed to reconsider on the record the amount of compensation payable under the Leases in light of paragraph 2 above and in accordance with the Reasons for Judgment herein;

[6] According to the Board's direction, the parties then filed written submissions with respect to this reconsideration.

ISSUE

[7] The issue is to reconsider the annual compensation that Progress must pay to Mr. Salustro with respect to each of the Leases.

[8] This reconsideration is to be based on the record (the evidence before the Board at the initial hearing on May 14, 2013) and in accordance with the Court Order and the Reasons for Judgment.

ANALYSIS

Annual Compensation

[9] In determining annual compensation, the guiding provision is Section 154 of the Act, which 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.

[10] Only the factors in Sections 154(1)(c) (loss of a right or profit), 154(1)(e) (severance), 154(1)(f) (nuisance and disturbance), and 154(1)(i) (other leases) are relevant in this case. I will address these factors and the global amount of compensation in light of the Decision. I will also consider Section 154(2) which the Board must consider in every application under Section 166.

[11] The Court's conclusions with respect to these factors are as follows:

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

- "it is well-established that a party making an application has the onus of proof (subject to any reverse onus requirements)" and in this case the onus "was on Mr. Salustro to establish his ongoing prospective losses and to establish that any increase is warranted" (para. 66)
- "there was no evidence that Mr. Salustro farmed, or intended to farm, the property" (para. 75)
- "on the issue of whether it was reasonably probable and foreseeable that Mr. Salustro would bring the property into hay production in the future is unreasonable in light of all of the evidence" (para. 89)

(b) Section 154(1)(e) – severance:

- the Court did not take issue with the Board's finding that there was no severance with respect to any of the Leases

(c) Section 154(1)(f) – nuisance and disturbance:

- **Tangible impacts:**
  - the Court questioned the presence of any tangible impacts "for farming that is foreseeable but not actually taking place" (para. 94), and set aside the Board's decision on tangible impacts (para. 95)

- **Intangible impacts:**
  - "intangible impacts can occur in the absence of farming activity" (para. 96) and the Court found "no error on the part of the Board on the issue of intangible impacts" (para. 104)

(d) Section 154(1)(i) – other leases:

- The Court found "no basis for finding that the Board made its determination on this issue [use of Progress' lease comparable 1] on the basis of a pattern of dealings approach" (para. 107) and denied Progress' "application for review of the Board's decision on the issue of the use of Progress Comparable 1/pattern of dealing" (para. 110)

(e) Section 154(2) – change in value of money and of land:

- The Court did not take issue with the Board's acceptance of Mr. Telford's application of the Consumer Price Index ("CPI") factor in determining the change in value of money and the Board's finding that there was no evidence from either party to determine whether there should be a change to compensation based on a change in the value of land (para. 44)

[12] So, I am now directed to reconsider on the record the amount of compensation payable under the Leases in light of the Court's Order No. 2 set out above and in accordance with the Reasons for Judgment.

[13] The effective date for annual compensation is determined pursuant to Section 166(4) of the Act. It provides that the effective date for varying the rental provisions in a surface lease is the anniversary of the effective date of the surface lease immediately preceding the date of the notice under Section 165(2) of the Act. For each of the Leases, Mr. Salustro served Progress with a Notice to Negotiate dated September 21, 2011. The effective dates for the Leases are set out in Table 1 above, and the parties do not dispute these dates.

[14] When conducting a rent review, the Board on numerous occasions has indicated that 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; *McDonald v. Penn West Petroleum Ltd.,* SRB Order 1742-1, November 21, 2012).

[15] As stated above, the Court in its Decision concluded that the onus was on Mr. Salustro to establish his ongoing prospective losses and to establish that any increase is warranted. It also concluded that it was not reasonably probable and foreseeable that Mr. Salustro would bring the property into hay production in the

future, and that because no farming was actually taking place, there can be no tangible impacts.

[16] I am, of course, bound by the Decision, and since the reconsideration is on the record, there is no further evidence to consider.

[17] In his submissions on the reconsideration, Mr. Salustro argues that his evidence at the initial Board hearing included the "history of his acquisition of the lands by way of agriculture leases from the Crown and his subsequent investment to develop the lands, in accordance with the lease requirements, leading to the issuance of Crown Grants. Given the nature of his development in the form of cultivated land . . . it would be unreasonable to conclude that he would simply abandon his investment and let the land revert to its native state of brush and trees." He also refers to Mr. Teldford's evidence that the "Lands do not appear to have been used recently for agriculture, although they retain the ability to produce forage crops if the owner chooses to do so." He submits that he "gave no evidence that agricultural use of the lands was abandoned" and that the Lands "remain available for cropping."

[18] Progress objects to this argument. It says "the Board is not tasked with finding rationality in a given landowner's chosen use of their property (i.e. consideration of the potential "abandon[ment]" of an "investment"). It is the "reasonably probabl[e] and foreseeable use of the lands", as borne out by the evidence, that guides the Board's analysis, not any assessment of the reasonableness of those actions."

[19] The Court, at para. 85, said "the parcels making up the property are "good lands" with ALR qualification and they are centrally located. However, that speaks to the potential rather than the foreseeability of farming. . . . whether farming is reasonably probable and foreseeable must surely be an objective test. The subjective intention of a landowner is a relevant factor but other evidence is required."

[20] Unfortunately, Mr. Salustro has not pointed me to any "other evidence," and I am otherwise bound by the Decision.

[21] On the reconsideration, Progress submits that where the landowner fails to meet the burden of establishing ongoing prospective losses and present a quantifiable claim to the Board, the Board may order that annual compensation should not change. It refers to the following passage from the Board's decision in *Velander v. Imperial Oil Resources Limited,* SRB Order No. 1726-2 (December 11, 2012), at para 42:

> Just because a party is entitled to request a review of annual rent, does not mean annual rent must automatically be increased. It is incumbent on a landowner when requesting a rent review to establish his or her ongoing prospective losses arising from the entry and to establish that an increase is warranted to adequately compensate for ongoing losses. . . . But for

> Imperial's offer to continue to pay $1,000/acre, I would be hard pressed to find evidence to support the current rent, let alone increase it. . . .

[22] Progress submits the same reasoning was applied in *Encana Corporation v. Piper and Dowd,* SRB Order No. 1803/1810-2, August 25, 2014 ("*Piper*").

[23] However, the Court, at para. 115, said that the Board may reconsider "[t]he issue of a global amount of compensation . . . if it decides it is appropriate in light of any reasonably probable and foreseeable use of the property and any tangible impacts."

[24] To this, Progress submits that the evidence of Mr. Salustro and Progress in the arbitration hearing was based on the fundamental assumption that hay was being grown on the Lands, but that the Court has overturned this assumption with the result that there is no credible evidence remaining on the record with respect to Mr. Salustro's actual use of the Lands or any tangible impacts arising from such use. Therefore, Progress submits that Mr. Salustro cannot satisfy the burden of demonstrating a basis for annual compensation, and in keeping with the authority of *Velander* and *Piper,* Mr. Salustro's application for an increase in compensation should be dismissed, and the current rentals confirmed.

[25] In light of the Decision, I have no option but to dismiss Mr. Salustro's application for an increase in compensation and confirm the current rentals for the Leases, subject only to the adjustment pursuant to Section 154(2) discussed below.

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

[26] Subsection 154(2) of the Act requires the Board to consider "any change in the value of money and of land since the date the surface lease or order was originally or last granted."

Change in value of money:

[27] Neither the Court nor Progress objects to the Board applying the CPI factor as the best indicator in determining the change in value of money from the time the Leases were last reviewed (2006/2007) to the effective date (2010/2011). Mr. Telford's evidence indicates an increase of 5.27% to 7.78% for the Leases. Applying these rates to the reconsidered annual compensation indicates the following change in value of money:

Table 2

1 Lease Ref. No.	2 Lease Date	3 Effective Date	4 Annual % Change	5 Reconsidered Annual Compensation under S.154(1)	6 Change in Value of Money under S.154(2)
1.	Sept. 8, 2006	Sept. 8, 2011	7.78	$3,500.00	$3,773.00
2.	Dec. 13, 2006	Dec. 13, 2010	5.27	$3,300.00	$3,475.00
3.	Dec. 13, 2006	Dec. 13, 2010	5.27	$2,700.00	$2,842.00
4.	Mar. 26, 2007	Mar. 26, 2011	5.91	$250.00	$265.00
5.	Jun. 30, 2007	Jun. 30, 2011	5.91	$1,000.00	$1,059.00

Change in value of land:

[28] There is no evidence to support any award based on this factor.

CONCLUSION

[29] Based on the Court Order, the Reasons for Judgement, and the parties' submissions on the reconsideration, I have determined that the annual compensation that Progress must pay to Mr. Salustro with respect to each of the Leases is as shown in Column 6 of Table 2 above.

ORDER

[30] The Surface Rights Board orders that the rental provisions under the Leases are amended to provide those amounts, effective those dates, as the annual compensation payable to Mr. Salustro as shown in Column 6 of Table 2 above. Progress shall forthwith pay to Mr. Salustro any difference in annual compensation paid since the effective dates and the reconsidered annual compensation as of the effective dates.

DATED: December 23, 2014.

FOR THE BOARD

V. Chettiar

Valli Chettiar, Member and Arbitrator