

*SURFACE RIGHTS ACT RSA 2000 Chapter S-24*  
(the "Act")

Before:

SURFACE RIGHTS BOARD  
(the "Board")

IN THE MATTER OF certain lands subject to a surface lease and an easement in the Province of Alberta described as the SW ¼, Sec. 36, Twp. 3, Rge. 29, W4M (the "Land").

**BETWEEN:**

BUFFALO RESOURCES CORP.  
and  
TWIN BUTTE ENERGY LTD.,

Operator/Applicant

-and-

TERRENCE ERNEST WINKLER, (owner)  
URSULA ANNA-MARIE WINKLER, (owner)  
ADVANTAGE OIL & GAS LTD.,  
CHIEF MOUNTAIN GAS CO-OP LTD.,  
FORTISALBERTA INC.  
and  
BUFFALO RESOURCES CORP.,

Lessors/Respondents.

**DECISION**

A Panel of the Board convened on January 7 and 8, 2010, in Calgary, Alberta to hear applications by Terrence Ernest Winkler and Ursula Anna-Marie Winkler (the "Landowners" or the "Respondent Landowners" or the "Lessors") and Twin Butte Energy Ltd. ("Twin Butte"), formerly Buffalo Resources Corp., pursuant to sections 27, 30, and 36 of the *Act*. The application was for a review and determination of the rate of compensation payable with respect to an Alberta surface lease and other matters.

**PRESIDING PANEL:**

John Mah  
Karen Fraser  
E. Gordon Chapman

Presiding Chair

**APPEARANCES:**

For the Respondent:                   --     Terry Winkler, Landowner  
  --     Larry Frith, Neighbour of the Landowner  
  --     Debbie Bishop, Counsel for the Landowner  
  --     Daryl Bennett, My Landman Group Inc.



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On August 11, 2009, a panel of the Board ("Panel A") convened to determine whether a right of entry order should be granted or whether to hold a hearing. It is noted that Panel A was composed of different Members than the panel who subsequently heard matters on January 7 and 8, 2010. After Panel A convened, Buffalo and the Respondent Landowners were asked by letter dated June 30, 2009 (Exhibit 1, Tab15), to provide written submissions on a number of matters, including whether the surface lease was effectively surrendered by virtue of Section 144 of the *Alberta Environmental Protection and Enhancement Act* (AEPEA). These submissions were received from both parties on July 30, 2009 (Exhibit 1, Tabs 16 and 17). Panel A determined that the issues before the SRB were complex and a hearing should be held to hear evidence, argument and submissions before any decision could be rendered. Notice of Decision No.2009/0313 was issued in this regard.

On November 2, 2009, and November 13, 2009, Dispute Resolution Conferences (DRC's) were held. Preliminary issues were identified and the Parties agreed that a hearing to settle matters relating to the Board's jurisdiction would be held in Calgary, Alberta, on January 7 and 8, 2010. The Parties also agreed to endeavour to enter into an agreed statement of facts and to an exchange of the Parties' documents, including earlier material provided to the Board, and a written outline of their arguments.

Twin Butte requested that the applications be amended to reflect the correct Applicant/Operator as there had been a corporate amalgamation between Twin Butte and Buffalo (Certificate of Amalgamation, Exhibit 1, Tab 1)

A preliminary hearing before the above-noted newly constituted Panel took place in Calgary on January 7 and 8, 2010.

**ISSUES:**

**(1) File No. RE2009.0105**

Does the Board have the authority to grant a right of entry order given the existence of the surface lease dated April 23, 1959, that, on the face of it, expired on April 23, 2009?

- a. Was the surface lease effectively surrendered by virtue of the April 23, 2009, expiry?
- b. What is the effect of Section 144 of the AEPEA? Is there a valid and enforceable surface lease since the lands have not yet been reclaimed?

**(2) File No. SL2009.0135**

Does the Board have the authority to determine the rate of compensation payable under the surface lease dated April 23, 1959, that, on the face of it, expired on April 23, 2009?

- a. Was the notice by the Lessor, which was given on November 19, 2007, given within a reasonable time as required under Section 27(15) of the *Act*?
- b. What is the effective date for the rate of compensation under section 27?

**(3) File No. SL2009.0136**

Does the Board have authority to determine the rate of compensation payable for the easement dated May, 24, 1958?

- a. Is the easement a surface lease within the meaning of section 27(3) of the *Act*?

**(4) Should the Board make an award of interim costs?**

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**RELEVANT LEGISLATION:**

***Surface Rights Act, R.S.A. 2000, c. S-24***

***Definitions***

**1** *In this Act,*

...

**(o)** *“surface lease” means a lease or other instrument under which the surface of land is being held for any purpose for which a right of entry order may be made under this Act and that provides for payment of compensation;*

***Right of entry***

**12(1)** *No operator has a right of entry in respect of the surface of any land*

- (a) for the removal of minerals contained in or underlying the surface of that land or for or incidental to any mining or drilling operations,*
- (b) for the construction of tanks, stations and structures for or in connection with a mining or drilling operation, or the production of minerals, or for or incidental to the operation of those tanks, stations and structures,*
- (c) for or incidental to the construction, operation or removal of a pipeline,*
- (d) for or incidental to the construction, operation or removal of a power transmission line, or*
- (e) for or incidental to the construction, operation or removal of a telephone line,*

*until the operator has obtained the consent of the owner and the occupant of the surface of the land or has become entitled to right of entry by reason of an order of the Board pursuant to this Act.*

**(2)** *Notwithstanding anything contained in a grant, conveyance, lease, licence or other instrument, whether made before or after the commencement of this Act, and pertaining to the acquisition of an interest in a mineral, an operator does not obtain the right of entry in respect of the surface of any land unless the grant, conveyance, lease, licence or other instrument provides a specific separate sum in consideration for the right of entry of the surface required for the operator’s operations, but this subsection does not apply in a case where the operator, prior to July 1, 1952, has for any of the purposes referred to in subsection (1) exercised the right of entry in respect of the surface of land in accordance with the provisions of a grant, conveyance, lease, licence or other instrument.*

**(3)** *The Board may make an order granting right of entry in respect of the surface of*

- (a) the land in which the operator or the operator’s principal has the right to a mineral or the right to work a mineral, and*
- (b) any other land that is necessary*
  - (i) for a road to connect the operator’s mining or drilling operations located on adjacent land and to permit the operations to be operated jointly, and for the tanks, stations and structures to be used in the operations,*
  - (ii) to give the operator access to the operator’s mining or drilling operations from a public roadway or other public way, and egress from the operations to the public roadway or other public way, or*
  - (iii) in the case of oil sands operations,*
    - (A) for a road or roads to give the operator additional access to and egress from the operations,*
    - (B) for the disposal of overburden incidental to the operations, or*
    - (C) for the disposal of tailings and other materials resulting from the operations,*

*irrespective of whether the owner or occupant of the other land is the owner or occupant of the surface of the land in which the operator or the operator’s principal has the right to the mineral or the right to work the mineral.*

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**Application for right of entry order**

**15(1)** *When the surface of any land required by an operator for any of the purposes mentioned in this Act is owned by the Crown or any other person, and the operator cannot acquire the consent of the owner and the occupant as required by section 12, the operator may apply to the Board for a right of entry order in respect of the surface of the land that may be necessary for the performance of the operator's operations.*

**(2)** *An application for a right of entry order must be in the prescribed form and be accompanied with*

*(a) a copy of the most recent written offer made by the operator to the respondent and evidence satisfactory to the Board that the offer has been refused, and*

*(b) any other information required by the regulations.*

**(3)** *Where the Board receives an application and the operations in respect of which the application is made require a licence, permit or other approval from the Alberta Utilities Commission or the Energy Resources Conservation Board, the Surface Rights Board may request the Alberta Utilities Commission or the Energy Resources Conservation Board to provide it with a copy of the licence, permit or other approval together with any other information in the possession of the Alberta Utilities Commission or the Energy Resources Conservation Board that is relevant to the right of entry, and the Alberta Utilities Commission or the Energy Resources Conservation Board, as the case may be, shall forthwith comply with the request.*

**(4)** *On receipt of an application under subsection (1), the Surface Rights Board may, if it considers it appropriate to do so, make a right of entry order*

*(a) on the operator filing with the Board a letter of consent in the prescribed form signed by the respondents, or*

*(b) not less than 14 days after the date of service by or on behalf of the Board on the respondents of*

*(i) a notice in the prescribed form, and*

*(ii) a copy of the application.*

**(5)** *When the Board receives an objection after the serving of the notice referred to in subsection (4)(b)(i), the Board may hold a hearing with respect to the application and objection at a time and place that the Board considers advisable.*

**(6)** *Where the Board makes a right of entry order under this section, it*

*(a) shall describe the portion of the surface of the land that is necessary for the performance of the operator's operations, and*

*(b) may make the order subject to any conditions it considers appropriate,*

*but where the activity the operator proposes to engage in is the subject of a licence, permit or other approval granted by the Alberta Utilities Commission or the Energy Resources Conservation Board, and a copy of the licence, permit or other approval has been provided to the Surface Rights Board pursuant to subsection (3), the Surface Rights Board shall ensure that the right of entry order is not inconsistent with the licence, permit or other approval.*

RSA 2000 cS-24 s15; 2007 cA-37.2 s82(29)

**Review of rate of compensation**

**27(1)** *In this section,*

*(a) "lessor" means a party to a surface lease who is entitled to receive compensation under that surface lease;*

*(b) "operator" means an operator who is obligated to pay compensation under a surface lease to a lessor, or who is obligated to pay compensation under a compensation order to a respondent;*

*(c) "parties" means,*

*(i) with respect to the review or fixing of a rate of compensation under a surface lease, the operator and the lessor, and*

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(ii) *with respect to the review or fixing of a rate of compensation under a right of entry order, the operator and the respondent;*

(d) *“rate of compensation” means the amount of compensation payable on an annual or other periodic basis under a surface lease or compensation order in respect of the matters referred to in section 25(1)(c) and (d).*

(2) *For the purposes of this section,*

(a) *the term of a compensation order shall be computed from the date the original right of entry order to which it relates was made, and*

(b) *the term of a surface lease shall be computed from the effective date of the lease.*

(3) *This section applies to compensation orders and surface leases*

(a) *that provide for the payment of compensation on an annual or other periodic basis, or*

(b) *that do not provide for the payment of compensation on an annual or other periodic basis but relate to major power transmission line structures as defined or designated in the regulations.*

(4) *An operator shall give a notice to the lessor or respondent, as the case may be,*

(a) *on or within 30 days after the 4th anniversary of the date the term of the surface lease commenced or the right of entry order was made, as the case may be, where the term of the surface lease commenced or the right of entry order was made on or after July 1, 1983, or*

(b) *where the term of the surface lease commenced or the right of entry order was made before July 1, 1983, on or within 30 days after July 1, 1987.*

(5) *A notice under subsection (4) shall state*

(a) *that the operator wishes to have the rate of compensation reviewed,*

(b) *that the lessor or respondent, as the case may be, has a right to have the rate of compensation reviewed, or*

(c) *where no rate of compensation has been fixed, that the lessor or respondent, as the case may be, has a right to have a rate of annual compensation fixed,*

*in respect of the compensation years of the term subsequent to the year in which notice is given.*

(6) *If either party indicates pursuant to a notice under subsection (4) that that party wishes to have the rate of compensation reviewed or fixed, the parties shall enter into negotiations in good faith for this purpose.*

(7) *When the parties agree on a rate of compensation*

(a) *under a surface lease, the parties shall amend the lease in accordance with their agreement or enter into a new lease, and*

(b) *under a compensation order, the parties shall notify the Board in writing of the rate agreed on and the Board shall vary the compensation order accordingly.*

(8) *If, by the end of the compensation year in which the notice is given, the parties cannot agree on a rate of compensation, the party desiring to have the rate of compensation reviewed or fixed may make an application to the Board for proceedings to be held to determine the rate of compensation.*

(9) *An application pursuant to subsection (8) shall set out*

(a) *the name and address of the operator,*

(b) *the name and address of the lessor or respondent, as the case may be,*

(c) *the rate of compensation under the surface lease or compensation order, and*

(d) *the amount the applicant believes to be a reasonable and fair rate of compensation,*

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*and the application shall be accompanied with a copy of the surface lease, if applicable, and any other documents or material the applicant considers to be relevant to the application.*

*(9.1) The Board may by notice in writing require an applicant to provide any additional information that the Board considers necessary for its proceedings by the time specified in the notice.*

*(10) Repealed 2009 c31 s11.*

*(11) The Board shall hold proceedings to determine the rate of compensation and, as soon as it is convenient afterwards, shall make an order fixing, confirming or varying the rate of compensation payable commencing on the anniversary date of the surface lease or compensation order, as the case may be, next following the date notice was given under subsection (4).*

*(12) An order under subsection (11) may be appealed as though it were a compensation order under section 23.*

*(13) With respect to the review or fixing of a rate of compensation under a surface lease, when the Board makes an order varying or fixing the rate of compensation, the order operates to amend the surface lease in respect of the rate of compensation under it, notwithstanding anything contained in the surface lease.*

*(14) The operator shall give a notice that complies with subsection (5) to the other party on or within 30 days after every 5th anniversary date after the date notice should have been given under subsection (4) for as long as the surface lease or right of entry order, as the case may be, is in effect and subsections (6) to (13) apply to that notice.*

*(15) If the operator fails to give a notice required by subsection (4) or (14), the lessor or respondent, as the case may be, may within a reasonable time after the failure, give a notice to the operator stating that the lessor or respondent wishes to have the rate of compensation reviewed or fixed and in that case*

*(a) subsections (6) to (13) apply,*

*(b) the Board may, notwithstanding subsection (11), make its order as to the rate of compensation effective from the same date it would have been effective if the operator had given notice as required by subsection (4) or (14), and*

*(c) the Board may make any order regarding the payment of interest that it considers appropriate.*

**DECISION:**

**(1) File No. RE2009.0105**

The Panel has the authority to determine whether to grant a right of entry for the Lands. A hearing will be held to further consider the objection and the application for issuance of a right of entry order, and the Panel directs the Board's administration to schedule a hearing on this matter. The application is considered to be amended with respect to the Applicant from Buffalo Resources Corp. to Twin Butte Energy Ltd.

**(2) File No. SL2009.0135**

The Board has the authority to determine the rate of compensation payable under the surface lease dated April 23, 1959. The Panel finds the effective date of review is April 23, 2004. The Operator on this application is amended from Buffalo Resources Corp. to Twin Butte Energy Ltd.

**(3) File No. SL2009.0136**

The Board does not have the authority to determine the rate of compensation payable for the easement dated May 24, 1958, as the easement is not a surface lease pursuant to section 27(3) of the *Act*. The application made pursuant to section 27 is dismissed.

**(4)** The Panel reserves its decision on the issue of interim costs which will be addressed in separate reasons for decision and decisions.

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**REASONS FOR THE DECISION:**

It is appropriate that the applications be amended to reflect the correct Applicant/Operator as there was a corporate amalgamation between Twin Butte Energy Ltd. and Buffalo Resources Corp.

On January 4, 2010, solicitors for Twin Butte and for the Landowners signed an Agreed Statement of Facts and provided exhibits for the SRB hearing of January 7 and 8, 2010. This document was entered as Exhibit 1 (Tabs 1-20) of the hearing. In the agreement the Parties provided *inter alia* a description of the surface lease, surface structures, and easements involved in this matter.

Terrence and Ursula Winkler's Supplemental Statement of Facts and Exhibits were entered as Exhibit 3.

During the hearing Terrence Winkler, his neighbour Larry Frith, and Daryl Bennett gave oral testimony under oath on behalf of the Landowners.

Mr. Winkler testified that he and Ursula Winkler purchased the property in August 1997, that they do not live on the land and that the land is used for grain, green feed, grazing and hay. He also provided some testimony regarding his communication with the Operator and its predecessors since the time of the purchase to support the evidence submitted as Exhibit 3.

Mr. Frith testified regarding the existence of Surface Installation Agreements regarding power poles and a valve station on his own lands for which Twin Butte currently pays annual rentals. He opined that the valve heater on the Winklers' property is larger than the valve on his property.

Mr. Bennett provided two photographs and spoke to CADD diagrams which he had obtained but did not produce. He also provided information about his relationship and negotiations with Deanna Lee of Buffalo Resources Corp in 2008 or 2009.

The Operator, Twin Butte did not call witnesses at the hearing.

**ISSUE 1      File No. RE2009.0105**

*Does the Board have the authority to grant a right of entry order given the existence of the surface lease dated April 23, 1959, which, on the face of it, expired on April 23, 2009?*

- a. Has the surface lease expired?*
- b. Was the surface lease effectively surrendered by virtue of Section 144 of the AEPEA?*

The evidence before the Panel is that a surface lease regarding the Land was entered into on April 23, 1959, by predecessors in interest to Twin Butte for an initial term of 20 years, with the option to extend the lease for another three consecutive ten-year terms. The parties concur that this surface lease ultimately expired according to its terms on April 23, 2009.

Negotiations for a new, replacement surface lease were unsuccessful. The Landowners advised Twin Butte by letter dated May 15, 2009 (Exhibit 1, Tab 5), that as the lease had expired, access to the well site was denied, and by email dated May 28, 2009 (Exhibit 1, Tab 6) that access would be granted for emergency purposes, and that the well is nonproducing

On May 21, 2009, Twin Butte applied for a right of entry order in order to have access to the well site for which it holds a well licence. The Landowners objected to the application for right of entry in a letter to the SRB which was received on June 1, 2009 (Exhibit 1, Tab 13). In the letter Mr. Winkler outlined the positions that the right of entry order should not be granted until a number of ongoing issues are settled and that several items, which he outlines in the letter, should be reflected in the right of entry order.

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The Landowners would also like issues relating to an outstanding rent review application pertaining to the surface lease to be resolved before a right of entry is granted. The Panel notes that while the surface lease has expired, the uncontroverted evidence is that a reclamation certificate pursuant to Section 144 of the AEPEA has not been issued.

**RESPONDENT LANDOWNERS' POSITION:**

The Landowners submit that the surface lease has expired and the Operator has no right to access the lease site for the purpose of operating the well. This assertion is based on the Landowners' interpretation of Section 12 of the *Act* which states that "no operator has right of entry in respect of the surface of any land until the operator has obtained the consent of the owner...or has become entitled to right of entry by reason of an order of the Board." The Operator does not have a current lease, consent of the owners, or a right of entry order.

The Landowners also argue that section 144 of the AEPEA creates an ongoing obligation on behalf of the Operator to compensate the Landowner until the land is reclaimed.

The Landowners submit that in accordance with *Pennine Petroleum Corporation v. Anthony J. Bruder and Lorraine E. Bruder*, ACQB Action No.: 0806 00757 and *Arc Resources Ltd. v. MacKenzie*, SRB Decision No. 2008/0003, the Operator's ongoing obligation to compensate the Landowner until the land is reclaimed does not extend or renew the lease beyond its expiry for use by the Operator.

The case of *Todd Ranch Ltd. v. Alberta (Surface Rights Board)*, 170 A.R. 170, was also cited by the Landowners in relation to the authority of the Board to grant a right of entry over the land of the expired lease.

The Respondent Landowners submit that the surface lease has expired with a remaining obligation to compensate the Landowners and the Board has the authority to determine whether or not a right of entry order should be issued.

**OPERATOR'S POSITION:**

The Operator submits that the Board has the authority to grant the right of entry order for which it applied. The Operator has a valid licence for the extraction of natural gas underlying the Land. The Operator agrees that the surface lease has expired. Because the Operator has been unable to renew the surface lease with the Respondent Landowner, the Operator no longer has access to the well site.

Furthermore, the Operator submits that it has met the requirements of Section 15 of the *Act* which outlines the necessary steps a party must take to be eligible for a right of entry order. For these reasons the Operator submits that it is entitled to a right of entry order.

The Operator also submits that previously when the board has been faced with whether to issue a right of entry over lands previously held under an expired surface lease, the Board has found that it has the authority to issue a new right of entry order.

**ANALYSIS:**

The evidence before the Panel is that a surface lease regarding the Land was entered into on April 23, 1959, by predecessors in interest to Twin Butte for an initial term of 20 years, with the option to extend the lease for another three consecutive ten-year terms. On the face of the lease, it expired on April 23, 2009. The parties agree and the Panel concurs that this surface lease expired according to its terms on April 23, 2009.

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The Panel also accepts the arguments from both parties that the right of the Operator to enter onto the leased land for the purpose of operating the well site expired on April 23, 2009. In coming to this conclusion, the Panel has reviewed the case of *Pennine Petroleum Corporation v. Anthony J. Bruder and Lorraine E. Bruder*, ACQB Action No.: 0806 00757 (Exhibit 2, Tab1) and was guided by the decision of the Honourable Mr. Justice Miller who held that Section 144 of the *Environmental Protection and Enhancement Act* would not automatically extend or renew the lease (Lines 25-28, page 18).

Further, the Board finds that the Operator's obligations under the surface lease did not expire on April 23, 2009. This is consistent with *Pennine v. Bruder* where it was found that Section 144 of the EPEA maintains the obligation on the Operator to obtain a reclamation certificate. All parties acknowledge that the general obligation of an Operator to reclaim leased land persists even after the lease has expired or is no longer being used by the Operator.

By extension, the Panel finds that where a surface lease has expired, the obligation of the Operator to pay compensation under the surface lease will persist until the Land is reclaimed or a new right of entry is granted over the same land and compensation becomes payable under that right of entry. To do otherwise would in effect deny landowners the full and complete protections granted to them by Section 144 of the AEPEA. In coming to this conclusion the Panel attaches significant weight to the Landowner's argument that without a continuing obligation to pay compensation the Operator would not be compelled to reclaim the leased land. As a result, this would in effect leave the landowner responsible for such measures.

With respect to the authority of the Panel to grant the right of entry the Panel makes the following findings based upon uncontroverted evidence.

- The Applicant requires the surface of the land for a purpose mentioned in the *Act*.
- The Operator has provided evidence that it possess a valid licence from the Energy Resources Conservation Board (the "ERCB").
- The Operator has been unable to obtain the consent of the Landowner.
- The Operator has met the requirements of Section 15 of the *Act*, and

As a result, the Panel concludes that it has the jurisdiction and authority to determine whether a right of entry order should be issued.

Both the Landowners and Operator acknowledge the authority of the Panel to determine whether to issue a right of entry order in this matter. The Panel also attaches weight to the cases submitted by both parties which demonstrate that where an Operator's rights under a surface lease have expired the Board may issue a right of entry order.

For these reasons the Panel finds that the interests of the Operator under the surface lease have expired while the obligations of the Operator to pay compensation persist until such time as a reclamation certificate is issued or a new right of entry over the land is granted.

As the preliminary issue of the Board's authority to grant the right of entry was all that was before this Panel, a hearing will be held to further consider the objection and the application for issuance of a right of entry order and the Panel directs the Board's administration to schedule a hearing on this matter.

The Panel notes in making this decision that, the Parties agree and have submitted in their Agreed Statement of Facts that by letter dated October 2, 2009, the ERCB denied the Winkler's request for a review and variance of the well licence (Exhibit 1, Tab 10) and that the Well Licence (Licence No. 022216) for Well 04-36-003-29-W4M is valid and subsisting.)

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**ISSUE 2: File No. SL2009.0135**

*Does the Board have the authority to determine the rate of compensation payable under the surface lease dated April 23, 1959, which, on the face of it, expired on April 23, 2009?*

**RESPONDENT LANDOWNERS' POSITION:**

The Respondent Landowner submits that the Board has authority to determine the rate of compensation payable under the lease. This authority is derived from Section 27 of the *Act*. Section 27 provides for the Board to hear an application and to review the rate of compensation where an application is made to the Board.

**OPERATOR'S POSITION:**

The Operator submits that the surface lease has expired in accordance with its terms, on April 23, 2009. As a result, the surface lease no longer exists and cannot be subject to a compensation review application pursuant to Section 27 of the *Act*.

Likewise, the Operator submits that section 144 of the AEPEA only applies in situations where the Operator attempts to surrender or terminate a lease. However, the Operator submits that they are not attempting to do either of these two things; instead, the Operator is seeking to maintain its right of access to the well site.

The Operator agrees that the Board has the authority to use Section 144 of the AEPEA to extend the expired lease for the purpose of reclamation. Given that the Operator is requesting a right of entry over the same area, a reclamation certificate is unnecessary, as the concerns addressed by Section 144 of the AEPEA are not triggered.

**ANALYSIS:**

The Board has the authority to determine the rate of compensation pursuant to Section 27 of the *Act*, as the obligation of the Operator to pay annual compensation under the surface lease persists. This is the position of the Lessor, and the Operator has acknowledged that if the Panel finds compensation is still payable under the surface lease, the Board would have the authority to determine the rate of compensation payable.

Furthermore, the Panel found guidance in the case of *Canadian Crude Separators Inc. v. Mychaluk* which recognizes the authority of the Board to adjudicate on compensation payable. In the case, Justice McBain stated at paragraph 127:

The effect of section 129 is modified by the definition of "surrender" contained in paragraph 119(h) of the same Act (now section 134(h) and 144 of the EPEA). It can be seen that definition that it is extremely broad and includes "any instrument by which a surface lease is discharged or otherwise terminated". Even if the Respondents are correct that the transfer of the surface title to CSCI operates to terminate the Lease, which is not accepted by the Respondents, the obligation to make payments continues. **As long as such obligation continues, the Surface Rights Board has jurisdiction to adjudicate upon the compensation payable from time to time.** (Emphasis added)

For these reasons the Panel finds that it has the authority to determine the rate of compensation payable under the surface lease.

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**ISSUE 2: File No. SL2009.0135**

- a. *Was the notice by the Lessor, which was given on November 19, 2007, given within a reasonable time as required under Section 27(15) of the Act?*

**LESSORS' POSITION:**

Mr. Winkler provided sworn testimony during the hearing to support the evidence submitted as Exhibit 3 regarding his communication with the Operator and its predecessors since the time he and Ursula Winkler purchased the property in August 1997. He advised that he learned of their right, as Lessors, to a rental review after a meeting with other landowners and MSL Land Services Ltd. ("MSL"), agent for Twin Butte, in November 2007. The Landowners gave notice to the Operator on November 19, 2007, that the rent needed to be reviewed.

Mr. Winkler's evidence from Exhibit 3 is reproduced below.

**HISTORY OF COMMUNICATION BETWEEN THE PARTIES**

- The last compensation review regarding the surface lease was conducted April 1, 1982, the date of the second amendment to the surface lease. Since this compensation review, neither Buffalo nor its predecessors have initiated a compensation review or given notice to the Winklers of their right to have a compensation review in accordance with the Act.
- On August 7, 1997, after the Winklers' purchased the Lands, a letter was sent by the Winklers' real estate lawyer to Palmer Ranch ("Palmer") advising that the property had been transferred. (Exhibit 3, Tab 3)
- In or about September 1997 the Winklers contacted Palmer by phone asking for documentation for the well site, and they were referred to McNally Land Services Ltd. The Winklers contacted Norm McNally at McNally Land Services Ltd. ("McNally") and requested copies of all documents relating to the property. The Winklers were advised by McNally that the annual rent would be forwarded in April 1998. The Winklers did not receive the surface lease until November 2001, four years later. The Winklers' phone notes from this location are attached (Exhibit 3, Tab 4)
- In early 1998, the Winklers realized that the annual payment for the lease had not arrived.
- The Winklers phoned Palmer and were advised that the rent had been sent to the previous owners. The Palmer representative advised that they would need a confirmation letter from a lawyer that the property had been transferred.
- On May 4, 1998, the Winklers had a letter sent again to Palmer advising of the transfer the previous year. (Exhibit 3, Tab 5)
- On or around November 14, 2001, the Winklers contacted Palmer a second time asking for copies of agreements and were once again referred to McNally. The Winklers contacted McNally again for a copy of the surface leases and all other documents related to Palmer's operation on their property. The Winklers' phone notes are attached. (Exhibit 3, Tab 6)
- On November 30, 2001, the Winklers received a letter from McNally (agent for Palmer), including a copy of the original surface lease for the well site included in the Agreed Statement of Facts. (Exhibit 3, Tab 7)
- The correspondence of November 30, 2001, did not include any information related to the 1974 or 1982 rent reviews, the pipelines, or any notice of the Winklers' right for a compensation increase.
- The Winklers had no contact nor did they receive any further documents from the operator until March 2007 when they were contacted by Choice regarding changes to the fencing on the lease site.

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- In November 2007 Mr. Winkler, Dave Barons, and Larry Frith met with Jim Williams of MSL. MSL was to bring updated files for all the landowners; however, no documentation for the Winklers' lands at SW 36-3-29-W4M was provided.
- By letter dated November 19, 2007, to Buffalo the Winklers requested a formal annual compensation review. (Exhibit 3, Tab 8)
- On January 16, 2008, the Winklers sent a letter to Buffalo requesting all the documentation relating to operations on the Lands. The Winklers specifically requested copies of right-of-way agreements, easements, pipeline plans, locations and agreements relating to facilities such as valves, heaters and power poles. (Exhibit 3, Tab 9)
- In April 2008 after still not receiving a response from Buffalo, Mr. Winkler phoned the land department at Buffalo describing the lack of follow-up with respect to his past requests for information and again asked for copies of the documentation.
- On April 28, 2008, Mr. Winkler received a package from Buffalo which included:
  - a copy of the original well site lease
  - a copy of the pipeline easement for SW  $\frac{1}{4}$
  - letters regarding well site fencing
  - annual rental rate and rent adjustments from April 1982 and September 1974.
  - a letter from Buffalo to Jim Gunn of MSL dated November 23, 2007, instructing MSL to commence negotiations with the Winklers. (Exhibit 3, Tab 10)
- The package did not include any information for the pipeline easement on the NW  $\frac{1}{4}$  of Section 36 nor any surface agreements for power poles, heaters, valves, etc. Both rate adjustments from 1982 and Sept 1974 that were included in the package refer to a five-year review of rental rates upon request of parties. This was the first instance of the Winklers receiving any information from the operator regarding the Winklers' eligibility to have the rent reviewed.
- In early May 2008 the Winklers were contacted by Jim Gunn of MSL requesting a meeting to discuss a rent review, compensation for surface structures, and the expiry of the lease. Mr. Winkler advised that he still had not received the information regarding the pipeline easement for the NW  $\frac{1}{4}$  of Section 36.
- On May 14, 2008, the Winklers received a call from Jim Gunn asking if they had received a package from MSL. The Winklers advised Mr. Gunn that none had arrived. Mr. Gunn stated he would look into it and would bring it to the meeting.
- On May 21, 2008, the parties met and Buffalo provided the information with respect to the pipeline easements.
- Neither Buffalo nor their predecessors gave notice to the Winklers in accordance with the *Act*.
- Between 2007 and 2009 the Winklers and Buffalo had discussions about a number of issues including:
  - Compensation review,
  - Off-lease damages,
  - a new surface lease to replace the expired lease,
  - a surface lease for the power poles and the valve riser.
- The Winklers submitted damage claims under Section 30 and Section 36 of the *Act* related to these matters and request that those files be included in correspondence to the Board. This was brought to the attention of the Board upon receiving the Notice of Hearing in this matter. (Exhibit 3, Tab 11)

The Panel notes that none of this evidence was challenged at the hearing.

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Counsel for the Landowners submits that the Operator failed to provide the required notice pursuant to section 27(4) of the *Act*. Further, counsel submits that the Landowners gave notice to the Operator on November 19, 2007, that they wished to have compensation review and that this was done in a reasonable period of time pursuant to Section 27(15) of the *Act*.

In making this submission, counsel for the Landowners relied on unchallenged evidence that they submit demonstrates that the Operator failed to provide the Landowner with any notice for review of compensation since the Landowners purchased the property in 1997. The Landowners had requested information from the Operator relating to the surface lease but were not provided with such until April 2008.

On learning of their right to a rental review after a meeting with other Landowners and MSL, agent for Twin Butte, the Landowners gave notice to the Operator, on November 19, 2007, that the rent needed to be reviewed. Following this, the parties entered into a period of unsuccessful negotiation. Given the circumstances surrounding the provision of notice regarding the rental review, counsel submits that the Landowners provided notice in a reasonable period of time.

#### **OPERATOR'S POSITION:**

The Operator has also submitted to the Board that Section 27 of the *Act* requires the Landowner to submit notice to the Operator or commence a rental review within a reasonable period of time. It is the Operator's position that the notice provided by the Landowners and the subsequent application for review was not submitted within a reasonable period of time.

In making this assertion, the Operator referenced Board Decision 2007/0140 *Penn West Petroleum Ltd v. Saraswati Prasad Singh* in which the Panel found that three years and eight months into a five-year period does not constitute reasonable time.

The Operator also referenced the case of *Fishing Lake Métis Settlement v. Métis Settlements Appeal Tribunal Land Access Panel*, 2003 ABCA 143, in which it was held that the appeal tribunal's decision that it was not reasonable to review rates once a five year compensation period had passed and its finding that "...it was not reasonable to go back four years because this would defeat the purpose of certainty in the five year compensation rate contract between the Operator and the occupant" was not patently unreasonable and hence insulated from review.

For these reasons the Operator argues that notice by the Lessor was not given in a reasonable period of time.

#### **ANALYSIS:**

Both the Operator and the Landowner agree that the Lessor may within a reasonable time after the failure give the Operator notice of the intention to request a compensation review pursuant to s. 27 (15) of the *Act*.

The evidence is clear and the Panel finds that the Operator Buffalo, being the predecessors to Twin Butte, failed to provide the Winklers with notice as required by s. 27, subsection (4) or (14) of the *Act* at any time after the Winklers' purchase of the Lands in 1997.

The evidence is also clear that the Winklers, who had not received notice from the Operator, notified the Operator on November 19, 2007, that the rent needed to be reviewed. Indeed, the first time that the Winklers' received any information from the Operator regarding their eligibility to have the rent reviewed was April 28, 2008 (Exhibit 3, Items 18-20)

The Panel considered whether the Lessors' notice given over ten years after the purchase of the Lands was given within a reasonable time after the Operator's failure to provide the Winklers with notice pursuant to s.27 subsection (4) or (14).

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In its deliberations about this issue the Panel took into account the following:

- the Lessors' (Winklers') notice was given over ten years after the purchase of the lands
- the Winklers' evidence in Exhibit 3, Item 11, that "on November 30, 2001, the Winklers received a letter from McNally Land Services Ltd. (agent for Palmer), including a copy of the original surface lease for the well site included in the Agreed Statement of Facts." (copy of original surface lease included in Exhibit 1, Tab 7)
- this letter of November 30, 2001, stated that the then current annual rental was \$2,200.00 per annum
- this letter of November 30, 2001, did not include any information related to the 1974 or 1982 rent reviews, the pipelines, nor any notice of the Winklers' right for a review of the rate of compensation.
- the Winklers' statement in their notice of November 19, 2007, to the Operator that it had never been contacted by the Operator or its predecessors, and they regarded that the Operator and its predecessors "...have been remiss in your responsibilities to landowners and have failed to forward notice of review and to enter into negotiations with landowners."
- the Winklers had no contact with the Operator nor did they receive any further documents from the Operator between November 30, 2001, and March 2007 when the then Operator contacted them regarding changes to the fencing on the lease site.
- even after giving notice on November 19, 2007, that they wished a formal compensation review, the Winklers did not receive the documents and, subsequently, had difficulty obtaining the documents despite a letter requesting documents on January 16, 2008, and a follow-up phone call in April 2008.
- the first time that the Winklers received any information from the Operator regarding their eligibility to have the rent reviewed was April 28, 2008 (Exhibit 3, Items 18-20) when they received copies of rate adjustments from 1982 and September 1974 which refer to a five-year review of rental rates upon the request of the parties

The Operator has provided cases which offer guidance on what is meant by the term "within a reasonable time."

The Panel notes that although it recognizes that consistency in Board decisions is important and even necessary, it is not bound by decisions of its colleagues. Nevertheless, it is able to distinguish Board Decision 2007/0140 *Penn West Petroleum Ltd v. Saraswati Prasad Singh*, where the Panel found that three years and eight months into a five-year period does not constitute reasonable time. There is no indication in that decision that the facts are the same or similar to the facts in this case, where the Operator has completely ignored its obligations under the *Act*.

With respect to *Fishing Lake Métis Settlement v. Métis Settlements Appeal Tribunal Land Access Panel*, 2003 ABCA 143, the Panel notes that the legislation considered in that matter is similar but not identical to the *Surface Rights Act*. Of interest to the Board is the Court of Appeal's finding that:

Reasonable time is a question of fact, depending on all of the circumstances, including the scheme set out in the statute. The question is an exercise of statutory discretion and falls squarely within the Panel's jurisdiction. The Panel can decide what is reasonable, and the mere fact it considers reasonable time in general terms does not amount to declining jurisdiction.

In coming to its determination, this Panel took note of the unique circumstances of the case. In particular, the Panel finds that since purchasing the Land many attempts have been made by the Landowners to acquire all of the documents and information relating to the surface lease to no avail. The Panel also notes that the identity of the Operator changed frequently. Accordingly, based upon this evidence, the Panel finds that the Operator and its predecessors who have held the surface lease have not been co-operative with respect to providing the Landowners with all the information requested. The evidence supports a finding that since 1997 when the Land was

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purchased, the Operator and its predecessors have failed in their obligations pursuant to Section 27 of the *Act* to notify the Landowners of the right to have annual compensation payable under the surface lease reviewed.

On the other hand, the only reason put forward for the Winklers' delay has been their lack of knowledge of their right for a compensation increase and/or the timelines set out in the *Act*. The Panel questioned whether it would be reasonable to expect the Landowners to have possessed full or even adequate knowledge of their rights and obligations under the surface lease.

Although the Winklers blame the Operator for its failure to provide such information, it is the view of this Panel that there is also an obligation on the Winklers to inform themselves of the relevant law affecting them and their remedies and responsibilities according to the *Act*.

In order to accept that the review date should be in April 1999, the Panel would have to conclude that the nine-plus-year period from April 1998, being one year before the review date in 1999, to the Lessors' notice of November 19, 2007, is a reasonable time.

Although the Panel has a great deal of sympathy and appreciation for the difficulties that the Winklers experienced in trying to obtain information from the Operator, it cannot ignore the requirements of the *Act*, as enacted by the Legislature, that the Lessor may within a reasonable time give notice that it wishes to have the rate of compensation reviewed. In the Panel's view, a period of over nine years, which is after the five year compensation period from 1994 to 1999 had passed, cannot be considered a reasonable time. On the other hand, given the circumstances and that the notice on November 19, 2007, was provided before the expiry of the compensation period (and indeed the lease) in April 2009, the Panel is prepared to find that a period of up to five years after the Operator's failure to fulfill its obligations under Section 27 of the *Act* can in these circumstances be considered reasonable.

For all of the foregoing reasons the panel can not accept that nine years is a reasonable time.

## **ISSUE 2      SL2009.0135**

*b.      What is the effective date for the rate of compensation under section 27?*

The history of communication between the parties regarding the surface lease is outlined by the Landowners in Exhibit 3, p 2 - 4. After purchasing the Land in August 1997, the Winklers made several attempts to obtain information in 1997, 1998, 2001, 2007, and 2008.

The first time that the Winklers received any information from the Operator regarding their eligibility to have the rent reviewed was April 28, 2008 (Exhibit 3, Items 18-20)

### **LESSORS' POSITION:**

The Landowners submit that the obligations created by section 27 of the *Act* are mandatory and must be met by the Operator to ensure that Landowners are aware of their rights. The Landowner submits that notice should have been given in April 1998. As no notice was provided, pursuant to Section 5 of the *Act* the Landowner submits that the next date for the rate of compensation to be set is April 1999.

The Landowners submit that the purpose of the Board is to ensure that Landowners are fairly compensated for disturbances to their surface rights. Where the Landowner is not being paid at the current market rate, they are not being fairly compensated for disturbances to their surface rights. As a result, it is consistent with the purpose of the Board to order retroactive rental payments to ensure Landowners are fairly compensated.

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The Landowner submits that there is no limitation period for submitting a compensation review request in the *Act* and pursuant to *Provident v. O'Hare*, they should not be prevented from requesting the review to be effective as of April 1999.

As a result, the Landowners submit that the effective date for review under section 27 of the *Act* is April 23, 1999.

**OPERATOR'S POSITION:**

The Operator submits that if the Board determines that Section 144 of the *Environmental Protection and Enhancement Act* extends the lease such that the Board has the right to review the rate of compensation, the effective date of review should be April 2009.

The Operator makes this submission as April 2009 is the last anniversary of the surface lease pursuant to section 27(11). The application for review was made over three years into the five-year lease period and, as a result, it would not be reasonable to make the effective date any earlier than April 2009.

The Operator also submits that the only other alternate date for an effective date of review is April 23, 2004. Likewise, regardless of which date the board chooses to make the effective date of review the Board cannot issue retroactive compensation stretching beyond April 2009.

**ANALYSIS:**

Section 27(11) is the section that directs the effective date.

*(11) The Board shall hold proceedings to determine the rate of compensation and, as soon as it is convenient afterwards, shall make an order fixing, confirming or varying the rate of compensation payable commencing on the anniversary date of the surface lease or compensation order, as the case may be, next following the date notice was given under subsection (4).*

The Panel finds that April 23, 2004, is the effective date as it is the anniversary date of the surface lease next following the date notice was given under section 27(4). Section 27(15)(b) gives the Board the authority to make an order setting the rate of compensation under the surface lease effective as of the date it would have been effective "if the Operator had given notice as required by subsection (4) or (14)."

In this case the Panel has concluded above that the Landowners' notice of November 19, 2007, would be a reasonable time period after the failure of the Operator to provide notice for a review of within approximately five years. The Operator failed to fulfill its obligations under Section 27 of the Act, which required the Operator to provide notice in April 2003 of the Lessors' entitlement to a review of compensation effective April 23, 2004. The notice on November 2007 is also within the five-year compensation period.

The Panel finds that if the Lessor had been provided with such notice the Lessor would have had an opportunity to apply to the Board seeking an order changing the rate of compensation as of April 23, 2004.

For all of the foregoing reasons the effective date for the review of the rate of compensation shall be April 23, 2004.

**ISSUE 3      File No. SL2009.0136**

*Does the Board have authority to determine the rate of compensation payable for the easement dated May, 24, 1958?*

*a.      Is the easement a surface lease within the meaning of section 27(3) of the Act?*

On May 19, 2009, the Winklers also applied for a Section 27 compensation review of a pipeline easement on the Lands dated May 24, 1958. They asked for an annual compensation increase from \$0 to \$1,000.00 for the valve and heater, and \$25.00 per pole or guy wire. The requested effective date of review is August 1997.

**RESPONDENT LANDOWNERS' POSITION:**

In making their submission the Landowners reference Section 1(o) of the *Act*, which reads:

*(o) "surface lease" means a lease or other instrument under which the surface of land is being held for any purpose for which a right of entry order may be made under this Act and that provides for payment of compensation;*

The Landowners submit that the easement, dated May 24, 1958, which allows that the Grantee may install a pipe and other equipment including a valve and power poles on the right-of-way, meets the requirement under this section, as it is an instrument registered on the title to the land by way of a caveat, and the equipment on the easement is related to the removal of minerals for or incidental to any mining or drilling operation pursuant to s. 12(1)(a) or for or incidental to the construction, operation or removal of a pipeline pursuant to s. 12(1)(c) of the *Act*. Accordingly, this qualifies the easement as a surface lease under this section of the *Act*.

The Landowner also submits that the Board has authority to review compensation payable under the easement pursuant to Section 27 of the *Act* as this section provides the board with jurisdiction to review compensation under a surface lease where payment of compensation is made on an annual or periodic basis s. 27(3)(a), or that do not provide for the payment of compensation on an annual or other periodic basis but relate to major power transmission line structures as defined or designated in the regulation s. 27(3)(b).

The Landowners submit that the easement gives the grantee the right to install pipe and other equipment including a valve riser and power poles. As the easement provides compensation for damages to any crops, fences, livestock on the right-of-way ("ROW") by reason of the exercise of the rights under the easement, the Landowners submit that the easement meets the criteria as set out in s. 27(3) and, as a result, the Panel has the proper authority to determine the rate of compensation payable for the easement.

**OPERATOR'S POSITION:**

The Operator submits that the May 24, 1958, easement is not a surface lease capable of being reviewed by the Board under a Section 27 compensation review. The Operator's argument is based on the understanding that the Winklers have never received compensation for the easement and, as a result, the easement does not provide for annual or periodic payments as required by Section 27 of the *Act*.

**ANALYSIS:**

Section 1(o) of the *Act* defines a surface lease as "a lease or other instrument under which the surface of land is being held for any purpose for which a right of entry order may be made under this Act and that provides for payment of compensation."

In this matter the Panel may be able to find that the surface of the land is being held for a purpose for which the Board may grant a right of entry order. The easement provides for consideration of \$31.00 (Feb 15, 1963) and also provides for compensation for damages to crops.

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Counsel for the Landowners submitted that this qualifies as compensation as contemplated in the *Act*. However, even if the Panel were to find that this easement is a surface lease as defined in Section 1(o) of the *Act*, the Panel is unable to find that the easement meets the requirements of Section 27 of the *Act* for a review of compensation; namely, that it must provide for the payment of compensation on an annual or periodic basis.

Counsel for the Landowners submitted that since the easement allows for compensation for damages to any crops, fences or livestock on the right-of-way, it allows for payments on an other periodic basis. The Panel is not persuaded by this argument. The Panel finds that the evidence establishes that these payments are not rental for the right-of-way; rather, they are payments for actual damages that could be caused by the Operator's operations. The Panel also finds that the easement does not provide for the payment of compensation on an annual or other periodic basis.

Although the Landowners submitted that the easement gives the grantee the right to install pipe and other equipment, including a valve riser and power poles, no submissions or argument were given to suggest that the easement is a surface lease that does not provide for the payment of compensation on an annual or other periodic basis but relates to major power transmission line structures as defined or designated in the regulations pursuant to s. 27(3)(b). Indeed, the Panel finds that there is insufficient evidence before it to establish, on a balance of probabilities, that any power poles allowed or existing on the right-of-way constitute major power transmission line structures as defined or designated in the regulations.

Given the foregoing, the Panel determines that the easement, dated May 24, 1958, is not a surface lease for which compensation may be reviewed within the meaning of section 27(3) of the Act. The Panel does not have the jurisdiction to review the compensation and does not have the authority to determine the rate of compensation payable. Accordingly, the evidence regarding notice was not considered and the Panel makes no findings with respect to notice.

#### ISSUE 4

*Should the Board make an award of interim costs?*

In order to avoid further delay the Panel reserves on the issue of costs. Costs will be addressed in a separate decision with reasons being given.

Dated at the City of Edmonton in the Province of Alberta on December 6, 2010.

SURFACE RIGHTS BOARD

MEMBER