

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

Before:

SURFACE RIGHTS BOARD  
("the Board")

IN THE MATTER OF certain lands in the Province of Alberta subject to a surface lease described as the SE ¼, Sec. 16, Twp. 14, Rge. 15, W4M, Certificate of Title No. 041 028 561 +1("the Lands").

BETWEEN:

CANADIAN NATURAL RESOURCES LIMITED,

Operator,

-and-

JANIDA FARMS LTD.,

Lessor,

DECISION

Upon application by the Lessor for review of the rate of compensation payable in respect of a surface lease in the said land and upon the Board being satisfied that conditions precedent to the application had been met, the Board convened a hearing at Lethbridge, Alberta on May 26, 2009, with respect to a review of the rate of compensation payable annually under a surface lease dated January 9, 2001.

PRESIDING PANEL

Leonard Dunn, Presiding Chair  
Karen R. Fraser  
Terry Usselman

APPEARANCES

For the Operator:	-- Leslie Scory, Area Surface Landman
	-- Lance Schelske, Surface Landman
	-- Justin Edwards, Land Agent Edwards Land Services Ltd.
For the Lessor:	-- Jan Bennen, Director, Janida Farms
	-- Daryl Bennett (Representative) Althing Consulting Services

BACKGROUND

On May 28, 2007, Jan Bennen ("Bennen"), Director of Janida Farms ("Landowner" or "Janida") advised that he was unable to come to an agreement with Canadian Natural Resources Limited ("CNRL" or the "Operator"), (collectively, the "Parties") regarding annual compensation payable under a surface lease and requested a review by the Board. The lease, dated January 9, 2001, pertains to a well site and access road on 2.79 acres of the SE ¼ -16-14-15-W4M. The

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surface lease was entered into on January 9, 2001, by predecessors in interest to CNRL and Janida. The Parties agree and the Panel concurs that the effective anniversary date for this review of compensation is January 9, 2006.

A hearing was initially scheduled by the Board but was cancelled in favour of mediation. As this matter was not settled during a Board facilitated mediation session, a hearing was subsequently held by the Board to consider this application for review under Section 27(8) of the Act on May 26, 2009, in Lethbridge.

Both Mr. Bennen and Mr. Bennett testified on behalf of the Landowner. Mr. Scory, Mr. Schelske, and Mr. Edwards testified on behalf of the Operator. All testimony was given under oath.

During the hearing, the Operator advised that they wished to provide surface leases and rent review information as backup for the summary evidence provided in Exhibit 3, Appendix 5 regarding approximately 20 direct comparables. However, the Operator did not provide the evidence at the hearing because it contained personal information and identification of parties which needed to be blacked out. They suggested that information could be provided to the Panel via the Board offices and to Janida through Mr. Bennett. As Janida had no objection to the Operator providing this evidence after the hearing, the Panel agreed with this procedure and advised the Parties during the hearing that this evidence would be accepted and considered upon receipt.

This information has not been received by the Board's offices. The Panel has decided that it will proceed with issuing a decision notwithstanding that this evidence was not received.

## **RELEVANT LEGISLATION**

### ***Compensation***

*25(1) The Board, in determining the amount of compensation payable, may consider*

- (a) the amount the land granted to the operator might be expected to realize if sold in the open market by a willing seller to a willing buyer on the date the right of entry order was made,*
- (b) the per acre value, on the date the right of entry order was made, of the titled unit in which the land granted to the operator is located, based on the highest approved use of the land,*
- (c) the loss of use by the owner or occupant of the area granted to the operator,*
- (d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,*
- (e) the damage to the land in the area granted to the operator that might be caused by the operations of the operator, and*
- (f) any other factors that the Board considers proper under the circumstances.*

### ***Review of rate of compensation***

*(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.*

*(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).*

*(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*

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*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.*

**Costs**

*39(1) The costs of and incidental to proceedings under this Act are in the discretion of the Board...*

*(4) The costs may include all preliminary costs of the respondent necessarily incurred in reaching a decision whether to accept the compensation offered by the operator...*

**EXHIBITS FILED**

Exhibit 1 – Applicant’s Red Binder of Evidence and Submissions

Exhibit 2 – Applicant’s Clipboard with Comparables

Exhibit 3 – Booklet of Evidence and Submissions of CNRL

Exhibits 1 and 2 were filed by the Landowner. Exhibit 3 was filed by the Operator.

**ISSUES**

- (1) What is the rate of compensation payable for the area granted to the Operator?
  - a. Is there a pattern of dealings applicable to this matter?
    - i. If not, what is the rate of compensation for loss of use of the area granted to the Operator?
    - ii. If not, what is the rate of compensation for the adverse effect of the area granted to the Operator on the remaining land of the owner and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the Operator?
    - iii. If so, has the Landowner demonstrated that it incurs additional adverse effect, nuisance, inconvenience and noise such that it is entitled to receive compensation above the pattern of dealings?
- (2) What costs, if any, should the Panel award?

**AGREED FACTS**

The effective date for this rent review determination is January 9, 2006.

The land is located in the Municipal District of Taber in the Vauxhall area of the Province of Alberta. The farmed land on the subject quarter is irrigated using a pivot irrigation system.

The lease, which is located partly in a dry pivot corner, consists of a sweet gas wellsite and a minimal grade access road on 2.79 acres. The well has a plunger lift system on it. The gas production flows through a separator package and then to the sales pipeline. The separator is used to segregate the water from the gas and then transfer the water to a 400-barrel (“bbl”) storage tank located on the lease.

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The equipment consists of a 2.5 x 2.75 meter wellhead, an adjacent small tank, and a 400 bbl storage tank situated northeast of the wellhead. The Panel notes that distance between the well head and the large tank is in dispute (Landowner claims 300 ft., the Operator 160 ft.).

All operational equipment pertaining to the gas production including the 400 bbl tank is located outside of the pivot circle irrigated area in a seeded grassland corner. Approximately 1.25 acres, or 45 per cent, of the wellsite area is irrigated; the remaining 1.54 acres, or 55 per cent, of the site and access road is on dry land and is seeded grass.

The Landowner farms about 20 quarter sections on irrigated land in the Vauxhall area and grows potatoes, seed canola, beans and wheat in a four-year rotation. This is a specialty operation which makes use of a Global Positioning System and 129.60 acres of irrigated land on the subject quarter section.

The current annual rental payment, the Operator's final offer, and the annual rental payments requested by Janida Farms are summarized in the following chart.

	<b>Adverse Effect</b>	<b>Loss of Use (per acre)</b>	<b>Loss of Use ( for 2.79 acres)</b>	<b>Total</b>
Current Rental	\$2,000.00	\$ 501.79	\$1,400.00	\$3400.00
Operator's Final Offer	\$2,500.00	\$ 500.00	\$1,395.00	\$3,895.00
Landowner	\$4,500.00 ((\$3,000 tangible, \$1,000 intangible)	\$1,075.00	\$3,000.00	\$7,500.00

In 2008, CNRL and the Taber Surface Rights Association negotiated an agreement, effective January 1, 2008, to December 31, 2013, entitled *Compensation Schedule for Adverse Effect and Loss of Use rates on reviews of annual compensation and new Surface Lease Acquisitions within the M.D. of Taber and with Taber Surface Rights Association Members* ("CNRL Compensation Schedule"). (Copies can be found at Exhibit 1, unnumbered page, or Exhibit 3, Appendix 9). The Operator's final offer is that specified for Partially Irrigated Corner Pivot Irrigation in the CNRL Compensation Schedule.

### **SUMMARY OF THE LESSOR'S KEY EVIDENCE AND SUBMISSIONS**

Both Mr. Bennen and Mr. Bennett testified on behalf of Janida. Their evidence is that there is a pattern of dealings in the Municipal District of Taber ("MD"). This pattern of dealings includes, but is not limited to (emphasis added), agreements made in accordance with the CNRL Compensation Schedule.

Mr. Bennett testified that he is a director of the Taber Surface Rights Association (the Association) and was personally involved in negotiating the CNRL Compensation Schedule, he is familiar with leases and rent reviews throughout the MD, CNRL holds more than half the leases in the MD, and the schedule is a good deal for the MD and should apply to 95 per cent of all farmers in the MD with respect to their leases with CNRL.

Mr. Bennen also acknowledged that he is a director of the Association.

Mr. Bennett also provided evidence in the form of copies of surface leases and information regarding surface lease agreements from CNRL and 27 other operators (Exhibits 1 and 2). He testified that, as a director of the Association, he reviewed rates paid by Operators on leases in the MD. He gave evidence including summary evidence and charts contained in Exhibit 1, Tab 2, regarding surface compensation throughout the MD. His evidence is that the CNRL Compensation Schedule is on the low end of the pattern of dealings representing the floor of the pattern and that many smaller players pay higher rates. Further, Operators in the Vauxhall area are paying in the range of \$650.00 per acre to \$1000.00 per acre for loss of use on similar, partially irrigated land, which is higher than the \$500.00 per acre pattern in the entire MD.

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Janida's submission regarding the pattern of dealings is that the CNRL pattern is not the full pattern of dealings in the MD and that, because even the full pattern does not reflect its particular situation, there are cogent reasons to depart from the pattern. These include the location, better than average production and yields, and the specific nature of the operation. These matters will be discussed under the headings dealing with loss of use and adverse effect.

Mr. Bennett provided testimony and documentary evidence, including copies of surface leases, rent review requests and other information and photographs (Exhibit 1, last 7 pages of Tab 1) regarding what Janida considers to be key comparables of surface land leases on partially irrigated land in the Vauxhall area. These leases come from three landowners in addition to Mr. Bennen. The farmers who farm these lands are potato growers. In Janida's view these key comparables are more relevant and more comparable to the subject site than leases on other lands in the MD.

Janida also submits that this evidence demonstrates that other companies in the Vauxhall area are paying higher rates of compensation than the CNRL Compensation Schedule and that CNRL is itself paying higher than their offer for the subject lease on adjoining surface leases. The Panel has created the following chart to summarize the oral and written evidence which was adduced regarding these comparables.

Chart of Landowners Key Comparables

Photo	Operator	Location	Acres	Land Use, Status	Adverse Effect	Loss of Use (\$/acre)	Rent	Effective Date	Notes
	CNRL	14-2-13-16	4.53	corner	2000	650	4945	2005	
	CNRL	16-2-13-16	2.02	P.I. *	2000	802	3620	2005	
	Enermark	7-12-13-17	5.31	P.I.	2000	850	6520	2006	
	Hunt	12-26-13-17	3.87	dry	2700	300	3860	2006	\$900 for second well
	Provident	8-25-13-17	3.08	P.I.	2000	800	4465	2006	
1	Vault	6-27-12-16 (Within 8 miles)	5.59	P.I. potatoes	2000	600	5355	2005	
2	Vault	16-28-12-16 (Within 8 miles)	3.19	P.I. Potatoes	2000	752	4400	2004	Corners not farmed One well head surrounded by cage; no tank; no berms
	Baytex	2/8-34-12-16	4.78	P.I.	2000	707	5380	2005	
3	CNRL	6-34-12-16	4.49	P.I. Land grass lease, Not farmed	2000	650 (for dry grass)	4920	2005	
4(a)	Pengrowth	9D-34-12-16	5.05	P.I. pivot prevented from going around b/c wellhead and tank	3500	1000 Home quarter	8550	2005	Home quarter Some land which can not be irrigated
4 (b)	Pengrowth	9D-34-12-16	.04	P.I. (as above) Note: area under tank not irrigated but could be with pivot arm	1750 for additional tank	1000	2150	2006	1750 for additional tank  Important comparable; Well head and tanks similar to Bennen
5	CNRL	8-35-12-16	1.98	P.I. Grass Not farmed equipment stored	2000	800	3600	2005	
	CNRL	16-35-12-16/3	2.19	P.I.	2000	804	3760	2005	
6	Paramount	14-5-14-15	5.56	P.I. Not farmed	3550	800	8000	2006	

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Photo	Operator	Location	Acres	Land Use, Status	Adverse Effect	Loss of Use (\$/acre)	Rent	Effective Date	Notes
7	Hunt	13-12-13-17	2.82	P.I. Dry corners not in use	2500	850	4897	2007	(in 2003, 2700 AE; 300 loss of use because dry)
8	Bowood	2-1-13-17	2.28	P.I. Fence to protect pipeline going over to 2 <sup>nd</sup> wellhead)	2500 Extra well 1562	850	6000	2008	Extra Well 1562
	CNRL	2-8-14-15	4.63	P.I.	2000	800	5705	2007	
9	CNRL	13-10-14-15 (neighbour, right across the corner from subject land; about 200 yards away)	2.47	P.I. Facilities outside of corner, not farmed, needs some recon- struction. Will probably farm in future	2500 Tank farm battery; two tanks,	800	4476	2008	Home quarter, 500
10	CNRL	3-8-14-15 (beside Paramount site)	2.14	P.I.	2000	800	3715	2007	
11	CNRL	8-8-14-15	3.29	P.I. Not farmed, grass	2400 Some more facilities , same width of headland as subject site	800	5000	2007	
	CNRL	2/14-10-14-15	3.32	P.I.	2714	800	5370	2006	Home quarter
	Paramount	14-5-14-15	5.56	P.I.	3550	800	8000	2006	
	Bonavista	8-17-14-15	3.31	P.I.			8000	2007	
	Bonavista	5-18-14-15		P.I.			7000	2008	2 wellheads
12	CNRL	4-16-14-15		Inactive wellhead barely into pivot circle	much higher than pattern, far less nuisance than working around a corner		8500		Bennen is the landowner

\* Partially Irrigated

### Loss of Use

Mr. Bennen's testimony was that his costs per acre are about average, but he has higher annual yields than the average farmer in the MD due to his farming practices. In support of this contention he provided yield record data from crop insurance. He testified that this measure of his potential yield is the most accurate because rent review is for a future period and crop insurance projects into the future on the basis of his actual past yield history.

Further, Mr. Bennen contends that because he raises specialty crops, including potatoes and seed canola, he derives a much higher loss of use from his land than the normal landowner in the MD who does not grow specialty crops.

Janida provided statistics from 2001 to 2008 in Exhibit 1. Mr. Bennen's testimony at hearing was that during this period the crop rotation included potatoes (2001), hard wheat (2002), GN beans (2003), hard wheat (2004), potatoes (2005), hard wheat (2006), GN beans (2007) and Hi Bred seed canola (2008), and together they produced a yearly average of \$1,433.61 gross value per acre. However, because he considers potatoes and seed canola as specialty crops, this figure was then recalculated and adjusted using Mr. Bennen's estimates of input costs for potatoes and seed canola. This gave an adjusted reduced value per acre per year over this period of \$1,160.70.

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Janida has also provided statistics which look only at the 2008 year. Janida's statistics and witness testimony indicate a gross crop value average between the four crops of \$1927.60 per acre and an adjusted value, which took into account estimated input costs for specialty crops of potatoes and seed canola, of \$1,567.41. Mr. Bennen testified that if he used 2009 values the numbers would be even higher.

Mr. Bennett, on behalf of Janida, also testified that the bottom per acre value for Janida's loss of use based upon their production values would be \$958.50 per acre, still much higher than the Operator's last offer of \$500.00 per acre for loss of use. In order to calculate this figure, Janida used the 2008 values, including net values for specialty crops of potatoes and seed canola, and averaged them with the CNRL Compensation Schedule level of \$350.00 for dry land, half irrigated, half dry. It is Janida's position that the Panel should take into account that, at a minimum, Janida is entitled to that amount of yearly compensation for loss of use.

Ultimately, it is Janida's position that their data is superior to that of the Operator's as it provides Janida's actual production values on the farm and is not based on provincial or local averages which do not provide an accurate reflection and understanding of Janida's operation. It is the Landowner's position that this alone makes it reasonable to compensate Janida at a rate higher than that outlined in the CNRL Compensation Schedule.

Further, Janida accepts that the CNRL Compensation Schedule for loss of use is a part of the pattern of dealings in the MD. However, they believe their key comparables and other evidence demonstrates that other companies, particularly those operating in the Vauxhall area, do pay greater than \$500.00 per acre on partially irrigated land. The Landowner's key comparables show compensation rates per acre range from \$650.00 to \$1,000.00. Ultimately, it is Janida's contention that the CNRL Compensation Schedule for partially irrigated land is not applicable to their farming operation.

Janida submits that they are entitled to receive loss of use compensation in the amount of \$1,075.00 per acre of land.

### **Adverse Effect**

Janida's evidence is that past Surface Rights Board decisions such as 2003/0160 and 2003/0161 and court decisions such as *Canadian Natural Resources Ltd. v. Bennett & Bennett Holdings Ltd.*, (2008 ABQB 19) have quantified the intangible portion of adverse effect to be \$1,000.00 on a well-kept dry land lease.

Mr. Bennett's unchallenged testimony is that intangible adverse effect would be at least as high if not higher for the subject partially irrigated site used for specialty crops and seed production than for a well-kept dry land lease. For the purposes of this matter Janida submitted that they considered the intangible portion of adverse effect to be approximately \$1,000.00.

With respect to tangible adverse effect, Mr. Bennen testified that, as a specialty crop grower who grows potatoes and seed canola, he has more issues, concerns, and adverse effect than the average farmer in the MD who does not grow these specialty crops.

Mr. Bennen testified that these include the following:

- 1) Phyto-Sanitary Issues
  - Glass

Mr. Bennen testified that he is concerned about people parking, drinking and partying on the lease who leave glass bottles. These bottles can break and pieces of glass can be carried into the farmed areas of the lease and be absorbed by the potatoes causing safety and liability issues.

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The Landowner submits that if contaminated potatoes were sold to a factory, he could face potential liability for contaminating an entire storage facility. Likewise, the Landowner has submitted that if just a few potatoes are found to be contaminated the purchaser may reject the entire bin of potatoes.

- Club root

He also testified that he is concerned about the transmission of club root and infection being transferred from field to field from service rigs and operators accessing the site. He maintains that his land is currently free from club root and his farming operation faces an extra risk from the oil company's equipment and service rigs. He must take special precautions with farming equipment. His concerns about contamination are so high.

- Oil/pipeline spills

Mr. Bennen testified that there are additional food safety concerns and potential liability issues with respect to contaminants left on the lease and the possibility of wellsite and pipeline spills and hydrocarbons and other contaminants being carried into the root zone and being absorbed by the potatoes. Root crops like potatoes are more susceptible to these concerns, as contaminants are transferred to the root zone where they can be absorbed by the potatoes. These are not concerns held by ordinary irrigation farmers, as aboveground crops would not absorb contaminants in the root zone.

## 2) Manoeuvring Around the Site

Another key concern held by the Landowner is how the obstacles on the leased land, like the wellhead and water tank, impact his specialty farming equipment. In particular, the Landowner has raised concerns relating to the adverse effect of having to manoeuvre around the tank and the wellhead. According to the Landowner, this effect is particularly relevant to specialty crop growers due to the extra size of the machinery and the limitations on where the tractor can be placed when navigating through row crops where you have to be able to drive in and out of the crop to move to the next row. According to the Landowner's calculations, he approaches the well site area twice as much as a regular wheat farmer would approach the well site area averaged out over a four-year rotation.

<b>Crop</b>	<b>Passes Effected</b>
Wheat	65
Canola	88
Beans	117
Potatoes	187
Average	114

\* Note: Calculations are based on a 300 ft. distance between the well head and water tank.

Janida submits that it is more difficult and time consuming to manoeuvre and realign the farming equipment being used by his operation when compared to a normal irrigation farmer. In addition to the extra time required to realign the specialty equipment, the Landowner also submitted that the extra turning distance required by the machinery results in less farmable land on the Lands and crops being trampled. If the well site and water tank were not present the Landowner could drive out onto the land which is not being farmed before turning around. Similarly, the Landowner has indicated that complications arising from navigating around the well site and water tank also include interference with the GPS auto steering system and the loss of or overlapping use of product, fertilizers and chemicals. Janida submits that the adverse effect arising from this is three times greater than that felt by an ordinary farmer.

In Janida's oral submissions before the Panel they also argued that the water tank can be likened to and should be treated similarly to a wellhead because the landowner is forced to farm around the water tank in a similar manner to that of a wellhead. The Landowner argues that if the water

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tank were treated like a wellhead he would already be entitled to receive additional compensation for adverse effect under the CNRL Compensation Schedule.

#### 4) Mowing the Site

Mr. Bennen testified that it is not economic or efficient to grow a dry land crop in the corner where the surface lease is located. The area is too narrow and small to turn around in and grass is better at controlling weeds. Although CNRL does do some weed control, because this can sometimes be a bit late and because of his concern about weeds, he mows this grass three times a year and has an employee going around every week to keep everything under control.

Janida submits that in the past the Board has calculated the cost of taking care of weeds on a surface lease to be \$300.00 per year. Although his costs for mowing are much higher, Mr. Bennen testified that he is willing to accept the value of \$300.00 as part of his calculation for adverse effect.

#### 5) Other Lost Uses of the Pivot Corner

Mr. Bennen testified that pivot corner irrigation systems are in place on the majority of his farmed lands. Currently, of his 27 fields 16 have corner-arm irrigation on the pivot corners. He pays water rights on the entire area. With respect to this lease, the equipment on the lease, including the large tank which is too high for a corner arm to go over, prevents such implementation. Further, even if the water tank were removed he would not install a corner system on this lease because there is still a risk that the tracking system for the pivot may fail, causing the pivot to crash into the wellhead. This risk is too great to bear. He further testified that in order for an irrigation corner system to be profitable, a corner pivot must be placed on at least three corners. Given that he parks equipment and tractors in another corner this only leaves two corners available, which would be unprofitable

Janida submits that because of the effect of the leased land they are losing three corners of irrigated land, each corner consisting of six acres for a total of eighteen acres. Even using the rate of \$500.00 per acre, as per the CNRL Compensation Schedule for a partially irrigated corner pivot, this amounts to \$9,000.00 of additional adverse effect each year.

Janida has provided an adverse effect calculation in its written submissions as follows:

<b>Adverse Effect</b>	
Intangible	\$ 1,000.00+
Tangible (3 times \$1500 pattern rate)	\$ 4,500.00
Mowing the Grass	\$ 300.00
Subtotal	\$ 5,800.00
Lost Profit from lack of corner arm	\$ 9,000.00
Total Adverse Effect	\$14,800.00

Accordingly, Janida submits that it should receive payment in excess of the Operator's offer of \$2,500.00 to compensate for additional adverse effect. Janida has calculated the total monetary adverse effect of the leased lands as \$14,800.00; however, they are requesting an adjustment of compensation for tangible and intangible adverse effect in the amount of \$4,500.00.

### **SUMMARY OF THE OPERATOR'S KEY EVIDENCE AND SUBMISSIONS**

The Operator has submitted that the Panel should follow the schedule of payments negotiated between CNRL and the Taber Surface Rights Association which forms a pattern within the MD. This agreement was signed July 8, 2008, and provides payment of \$2500.00 for adverse effect and \$500.00 per acre for loss of use on partially irrigated lands. In its evidence, the Operator

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submitted summary information from a number of lands on which CNRL also holds surface leases; other comparables submitted include some lands on which Husky holds surface leases.

According to the Operator these comparables demonstrate that compensation for adverse effect on irrigated lands consistently ranges from \$2,000.00. According to the Operator this pattern has been established by holders of similar land agreeing to accept such payments for their land. Likewise, it is supported by the CNRL Compensation Schedule, an agreement signed with the Taber Surface Rights Association. The agreement does allow for additional compensation for adverse effect to be paid out to owners of partially irrigated corner land where additional wellheads are placed on the leased land. However, no additional wellheads are located on the subject Lands.

With respect to loss of use, the Operator has offered to pay \$500.00 per acre. This amount is taken from the CNRL Compensation Schedule, and according to the Operator, this amount is consistent with the pattern of dealings in the MD. The Operator's summary of direct comparables in Exhibit 3, at Tab 5, indicates loss of use compensation on irrigated and partially irrigated leases which ranges from \$350.00 per acre to \$600.00 per acre. Similarly, the Operator's summary of comparables (Exhibit 3, Tab 5 p. 40 – 51) under the CNRL Compensation Schedule demonstrates payments ranging from \$450.00 to \$600.00 for land partially irrigated by a pivot system and up to \$800.00 for full pivot irrigation. According to the Operator, even if only a small portion of the land is irrigated, it will be considered partially irrigated under their pattern of dealings.

The Operator submits that this rental review was to be negotiated in 2005 and effective 2006, and that, accordingly, some of the comparables from 2005 in Exhibit 3, Appendix 5, may be more relevant for the time period for which this location was due to be reviewed. Notwithstanding this, however, they are basing their offer on compensation rates in 2008/2009 and are compensating the Landowner 2008/2009 compensation rates for the years 2006 to 2009.

The Operator believes that if the CNRL Compensation Schedule is not followed then eventually it will no longer be worth the paper on which it is written. The Operator believes that the amounts and figures contained in the schedule constitute a fair deal that works for all parties involved. The Operator submits that the CNRL Compensation Schedule is flexible enough to accommodate specialty crop growers and points to the fact that potato growers are included in the CNRL Compensation Schedule for loss of use on irrigated land.

It is the Operator's position that the CNRL Compensation Schedule should carry significant weight because it is an important, freely negotiated agreement between one of the largest operators in the MD and an association of landowners within the MD. The Operator opined that the compensation decision in this matter should reflect the guidelines negotiated in the agreement. The Operator does recognize that it is possible to deviate from the CNRL Compensation Schedule where there are cogent reasons to do so; however, it does not recognize cogent reasons in this matter.

### **Loss of Use**

The Operator's evidence is that the wellsite was strategically placed in the most effective location to reduce the impact on the farming operation. Only 45 per cent (approximately) of the wellsite sits within the irrigated pivot circle, and that portion of the site does not have any obstructions to farm around. Janida is able to farm virtually up to the edge of the pivot circle (Exhibit 3, Appendix 2.7 – 2.9). The minimal grade access road to the wellsite and all well facilities are located within the dry corner which the Landowner has seeded to grass.

According to the Operator, 1.25 acres of the surface lease is irrigated land and 1.54 acres is seeded grass with no production revenue. Based upon the Operator's calculations, which are found in Exhibit 3, p 6-7 and Appendix 6, a five-year average of a crop rotation from 2004 to 2008 which includes two years of hard wheat, GN beans, potatoes, and hi bred seed canola and using all net local production averages from data supplied by AgriProfit\$ Business Analysis and Research Program, Alberta Agriculture Food and Rural Development, and Alberta Financial

Services Corporation, the Operator calculates Janida would suffer a total average net loss production of \$416.00 per year based upon 1.25 acres, or a per-acre net loss of use of \$332.89. The Operator's position is that this demonstrates that the Landowner's net loss of use is less than CNLR's offer of \$500.00 per acre.

The Operator argues that it is important to use data which is accurate and supportable. It is the opinion of the Operator that their data is superior to the Landowner's, as it is based on a five-year average like the lease period and not an eight-year average, and it provides a good and accurate picture from independent sources of what is being produced in the region.

### **Adverse Effect**

The Operator provided the following evidence:

- The well is checked daily if the weather conditions permit.
- A tank truck hauls the water from the tank approximately twice a year.
- The Operator's frequency of high impact servicing of the wellsite is minimal, i.e. a service crew enters the site once a year to service the plunger lift.
- Weed control application to subdue weeds is done between two and three times per year.
- The wellsite has been positioned strategically in the most effective location to reduce impact to the farming position.
- The well centre sits on the boundary of the irrigated area of the quarter section (Exhibit 3, Appendix 2, photos).
- Only 45 per cent of the wellsite sits within the watered area and this portion of the site does not have any obstructions to farm around.
- All well facilities have been placed within the dry portion of the quarter to minimize impact. Operational equipment pertaining to the gas production (wellhead, 2.5m X 2.75 m shack, small tank adjacent to the shack, and 400 bbl tank NE of the wellhead) is located outside the pivot area on dry land on the corner which the farmer has seeded to grass.
- There is a minimal grade access road also located on the dry corner outside of the pivot area.
- Facilities on the site are relatively minimal because this is a sweet gas well with minimal quantities of water.
- Observation of the site indicates that the irrigable acres have not been increased since the last review and further it would not be feasible to add a corner system for three potential productive corners because the SW corner has a dugout and farm equipment storage.
- Observation of the site indicates that the Landowner does not seek actual production value from the dry pivot corners. Rather, they are mowed as a maintenance practice which appears to be consistent with other areas under the Landowner's farming operation.
- The risk of club root is minimal because the Operator follows proper cleaning procedures of its equipment. The witness also opined that oil companies provide greater support to stop the spread of club root than the actual farmers. In support of this view he testified about an industry/farmer meeting with club root expert Dr. Howard, which was attended by industry representatives but not by the Landowner or many other farmers.
- The risk of contamination from spills from gas wells is not as great as with oil wells. Additionally, industry is required to follow strict standards.
- The problem raised by the Landowner of safety and liability issues created by the possibility of people parking, drinking and partying on the lease who leave glass bottles, broken glass, and other contaminants which can be absorbed by root crops such as potatoes is more likely to be created by people on the main road which runs by the farm

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depositing bottles on the land than by the fact that there is a wellhead, access road, and equipment on the dry corner.

- Photographs in Exhibit 3, Appendix 2, show that the well and water tank had no impact on where or how the Landowner was turning his equipment. The photographs indicate that there is no difference between the techniques and land used on the Lands and other land used in the farming operation.
- The distance between the well and the water tank is about 50 metres or 160 feet, this estimate is lower than that provided by the Landowner and accordingly the Landowner's estimate of adverse effect from the well and water tank should be reduced.
- The relationship between the Landowner and the Operator is very positive thus limiting intangible adverse effect.

The Operator submitted that the Landowner should not be entitled to receive any additional compensation for adverse effect beyond the \$2,500.00 for partially irrigated land as laid out in the CNRL Compensation Schedule. The Operator is of the opinion that this land is not unique and the adverse effect felt by the Landowner is no greater or different than the effect felt by other local farmers who have accepted the level of compensation in the CNRL Compensation Schedule.

Further, because the placement of the well site and equipment was done in such a way as to minimise the impact of the facilities on the farmed land, the Landowner is able to gain almost full production from the areas contained within the lease, and this makes the compensation nearly 100 per cent additional revenue.

The Operator also addressed the issue of the distance between the well and the water tank, which it believes to be close to 160 feet based upon photographs and the site plan. The Operator argued that because the distance is lower than the figure used by the Landowner, the Landowner's calculations of the amount of adverse effect should decrease.

As a result, the Operator has concluded that the adverse effect of the area granted to the Operator on the remaining land of the owner and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the Operator is not beyond that set out in the CNRL Compensation Schedule for partially irrigated corner pivot irrigation which is \$2,500.00. The Operator submits that the Landowner is entitled to receive no more than their offer of \$2,500.00 for adverse effect.

## **DECISION**

It is the decision of the Panel to order the rate of compensation for the surface lease to be in the amount of \$5,290.00. This amount is comprised of \$1,000.00 per acre for loss of use of the 2.79 acre area granted to the Operator and \$2,500.00 for the adverse effect of the area granted to the operator on the remaining land of the owner and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the Operator.

An Order will be issued varying the rate of compensation payable under the surface lease from \$3,400.00 to \$5,290.00 effective January 9, 2006, and payable on that date each year thereafter unless and until varied by a further review.

**REASONS**

(1) *What is the rate of compensation payable for the area granted to the Operator?*

a. *Is there a pattern of dealings applicable to this matter?*

The Courts have repeatedly directed that when considering compensation the Board should first determine if a pattern of dealings exists (see *ConocoPhillips v. Lemay et al*, 2009 ABQB 72 at page 39). If so, subject to cogent reasons existing to deviate from that pattern, the pattern should be used as the proper measure for compensation.

In assessing whether a pattern exists, the Panel considered the factors set out by the Court of Appeal in *Imperial Oil Resources v. 82167 Alberta*, 2007 ABCA 131 at paragraph 21 being “the rights granted, the type of land, proximity, date, acreage and the nature of the parties.” It also relied on the guidance provided in *Canadian Natural Resources Ltd. v. Bennett & Bennett Holdings Ltd.*, 2008 ABQB 19.

Janida's submission regarding the pattern of dealings is that the pattern created by the CNRL Compensation Schedule is part of but not the full pattern of dealings in the MD. It further submits that because even the full pattern does not reflect its particular situation there are cogent reasons to depart from the pattern. These include the location, better than average production and yields, and the specific nature of the operation.

It is the Operator's position that the CNRL Compensation Schedule should carry significant weight because it is an important freely negotiated agreement between one of the largest operators in the MD and an association of landowners within the MD. The Operator opined that the compensation decision in this matter should reflect the guidelines negotiated in the agreement. The Operator does recognize that it is possible to deviate from the CNRL Compensation Schedule where there are cogent reasons to do so; however, it does not recognize cogent reasons in this matter.

It is clear to the Panel that the CNRL Compensation Schedule is currently in effect and forms a significant part of the pattern of dealings within the MD. The panel concurs with the Operator that it should be given significant weight. However, upon a review of the documentary evidence before the Panel, including leases, rent review information, and summaries, the Panel finds that the CNRL Compensation Schedule does not completely reflect the full pattern in the MD.

Of particular concern in this matter, is Landowner's evidence regarding its key comparables in the Vauxhall area. The Landowner has provided evidence from three farmers in the Vauxhall area who, like Mr. Bennen, grow specialty crops including potatoes on partially irrigated land. The Panel considered whether this constitutes a pattern and determined that in the absence of evidence of how many sites overall are within the area, an indication of how many sites were reviewed in order to ascertain the comparable, any indication of why other sites reviewed were not comparable, nor an explanation of why this pattern was applicable to this area, the Panel was unable to conclude that this evidence constituted a pattern.

In making this decision, however, the panel notes that although there is insufficient credible and specific evidence to establish there is a pattern of dealings among the Landowner's key comparables of farmers who grow specialty crops including potatoes in the Vauxhall area. Janida through its key comparables evidence has provided significant evidence that some farmers in this area are being compensated at higher rates than the CNRL Compensation Schedule for both loss of use and adverse effect.

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- i. *If not, what is the rate of compensation for loss of use of the area granted to the Operator?*

Given that the Panel is of the view that there is no comprehensive pattern of dealings for the Vauxhall area, the Panel went on to assess the evidence related to this particular site to determine the rate of compensation

The Operator submits that the CNRL Compensation Schedule is flexible enough to accommodate specialty crop growers and points to the fact that potato growers are included in the CNRL Compensation Schedule for loss of use on irrigated land at the higher loss of use rate of \$800.00. The Panel notes this recognition of the special nature of potato growers and specialty crops.

Although Janida is able to farm the irrigated portion of the surface, the Panel finds that loss of use should be calculated on the basis that the entire wellsite was unused by the Landowner. The justification that this is appropriate is that the surface rights leaseholder, CNRL, has the right to the use of the entire well site at any time and without first notifying the Landowner. This approach is supported by case law such as *Canadian Natural Resources Ltd. v. Bennett & Bennett Holdings Ltd., 2008 ABQB 19* at p. 20.

CNRL's calculation of loss of use and its justification that its loss of use figure is less than CNRL's offer of \$500.00 per acre is based upon net loss figures. It is the view of this Panel, supported by consistent Board decisions and case law, that operating expenses should only be deducted in the case of specialty crops grown on irrigation and that otherwise gross loss of use figures should be used.

In *Canadian Natural Resources Ltd. v. Bennett & Bennett Holdings Ltd., 2008 ABQB 19* para 124 -126, Langston J., advises that he considers the deduction of expenses from all crops grown and/or from all crops grown on irrigation to be in error and indicates support this approach as follows:

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.

In the absence of other evidence the panel accepts the evidence from Janida that potatoes and seed canola are specialty crops grown on irrigation with significant input costs.

The Panel notes that if CNRL had used this methodology with its figures for crop loss average loss of use for the years 2004 to 2008 would be \$688.37 or \$550.69 per acre which is higher than its offer of \$500.00 per acre.

The panel also notes that the crop rotation used by CNRL does not match the Landowner's evidence regarding his actual crop rotation for this period and is not as favourable. Neither are their production figures which are based upon data supplied by AgriProfit\$ Business Analysis and Research Program, Alberta Agriculture Food and Rural Development, and Alberta Financial Services Corporation.

Ultimately, it is Janida's position that their data is superior to that of the Operator as it provides Janida's actual production values on the farm and is not based on provincial or local averages which do not provide an accurate reflection and understanding of Janida's operation. It is the Landowner's position that this alone makes it reasonable to compensate Janida at a rate higher than that outlined in the CNRL Compensation Schedule. The Panel concurs with this reasoning and assigns greater evidentiary weight to the comparables put forward by the Landowner.

In making this determination the Panel also relied upon the following information. The Panel and the Parties agree that the effective date for this rent review is January 9, 2006. Accordingly the task of this Panel is to determine appropriate rate of compensation for the five-year period between January 9, 2006, and January 9, 2011. Given that compensation is to be paid for a future period the Panel is guided by the principle articulated by Mason, J. in *ConocoPhillips*

*Canada Resources Corp. v. Lemay, 2009 ABQB 72*, para 194 that the most useful information for a future forecast is the most recent data from the Landowner's farming operation.

Janida provided statistics from 2001 to 2008 in Exhibit 1. The crop rotation produced a yearly average of \$1,433.61 gross value per acre. However, this figure was then recalculated and adjusted using Mr. Bennen's estimates of input costs for the specialty crops of potatoes and seed canola. This gave an adjusted reduced value per acre per year over this period of \$1,160.70.

Janida also submitted that the bottom or net per-acre value for loss of use based upon their 2008 production values, which were adjusted for specialty crops and averaged with CNRL's figure for dry land production, would still be \$958.50 per acre.

Ultimately, Janida submits that they are entitled to receive loss of use compensation in the amount of \$1,075.00 per acre of land.

There is no question that Janida is a good producer and has higher than average yields. However, the Panel notes that Janida's adjusted calculations provided a cost factor estimate of their input costs on their specialty crops as opposed to providing actual amounts and evidence of actual amounts. Although they may have good reasons for not wishing to provide detailed and potentially sensitive business information, and although these estimates were not challenged, the Panel notes that an estimate is by its very nature, imprecise.

Given this and that the Landowner's key comparables show compensation rates per acre range from \$650.00 to \$1,000.00, the Panel awards loss of use compensation in the amount of \$1,000.00 per acre, the same amount as the highest end of the range of Janida's key comparables.

#### Adverse Effect

- ii. *If not, what is the rate of compensation for the adverse effect of the area granted to the Operator on the remaining land of the owner and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator?*

As discussed above, the Panel recognises that the CNRL Compensation Schedule is part of a wider pattern of dealings in the MD and that there is insufficient evidence before the Panel to establish that there is a pattern of dealings among the Landowner's key comparables of farmers in the Vauxhall area who grow specialty crops including potatoes. However, the key comparables evidence is significant evidence to establish that at least some leases in this area are being compensated at higher rates than the CNRL Compensation Schedule.

According to the Landowner the CNRL Compensation Schedule is on the low end of the compensation paid in the area. The Landowner believes that the comparables contained in their evidence provide a more accurate picture of the compensation paid in the Vauxhall area. With respect to adverse effect on partially irrigated lands the Landowner's comparables demonstrate that the Operator generally pays lower compensation for adverse effect in comparison to other companies operating in the area.

Despite this the Landowner used the \$2,500.00 offer for adverse effect as a baseline for their calculations when demonstrating their entitlement to a greater amount of compensation due to special circumstances. The Panel notes that this is the Operator's last offer for the value of adverse effect on partially irrigated land with corner pivot irrigation. It is also the value for adverse effect in the CNRL Compensation Schedule for Partially Irrigated Corner Pivot Irrigation (pivot arm extension).

There are both tangible and intangible factors to consider in assessing this head of compensation. The Landowner has valued the intangible aspect of adverse effect in this circumstance to be at least \$1,000.00 on the basis that this amount for adverse affect has been quantified by the Board and the courts on well-kept dry leases and would be at least as high if not higher on the subject

partially irrigated site used for specialty crops and seed production. The Panel finds this analysis to be logical and reasonable.

With respect to tangible adverse effect, Mr. Bennen testified that as a specialty crop grower, who grows potatoes and seed canola, he has more issues, concerns, and adverse effect than the average farmer in the MD who does not grow these specialty crops and has identified four elements which he has attempted to quantify. They are Phyto-sanitary issues, including glass and club root and oil/pipeline spills, and issues related to manoeuvring around the site, mowing the site, and other lost uses of the pivot corner.

The Operator submitted that the Landowner should not be entitled to receive any additional compensation for adverse effect beyond the \$2,500.00 for partially irrigated land as laid out in the CNRL Compensation Schedule. The Operator is of the opinion that this land is not unique and the adverse effect felt by the Landowner is no greater or different than the effect felt by other local farmers who have accepted the level of compensation in the CNRL Compensation Schedule.

The Panel finds the Operator's analysis to be logical and compelling with respect to the Phyto-sanitary issues and mowing of the lease for weed control. The Panel has not been persuaded that the Landowner faces any different issues than other similarly situated farmers who have accepted the adverse effect compensation in the CNRL Compensation Schedule.

With respect to issues related to manoeuvring around the site the Panel notes that the placement of the well site and equipment was done in such a way as to minimise the impact of the facilities on the farmed land. It acknowledges that the presence of equipment, including the large water tank, does impede the Landowner's farming operation and means that it is more difficult and time consuming to realign farming equipment and/or turn around.

In the Panel's view the dispute about the actual distance between the wellsite and water tank was resolved in favour of the Operator's estimate by reference to distances in the measurement on the plan. Accordingly, the Operator has successfully argued that because the distance is lower than the figure used by the Landowner, the Landowner's calculations of the amount of adverse effect should decrease. Given this, the Panel cannot accept the Landowner's contention that the adverse effect arising from the equipment on the lease is three times greater than that faced by an ordinary farmer.

The Panel is also of the view that in terms of compensation the water tank cannot, as the Landowner submits, be likened to and be treated similarly to a wellhead because the Landowner is forced to farm around the water tank in a similar manner to that of a wellhead. In the Panel's view the significant difference between another well and the water tank is that another well would also be accompanied by additional equipment, whereas the tank is a single piece of equipment.

Finally, the Panel considered the Landowner's submissions that the large water tank prevents the implementation of a corner pivot in the corner where the leased land is located because the tank is too tall for a pivot arm to go over, and further prevents irrigation on other corners because it is not economic to install expensive systems unless three corners are available. Accordingly, the Landlord seeks adverse effect compensation on the remaining land of \$9,000.00 for the inability to use a pivot arm and irrigate three corners.

The Panel notes that the range for awards for adverse effect in the Landowner's 25 key comparables is \$2,000.00 to \$3,500.00 with \$2,000.00 being awarded 12 times. This is the most common award and is below the Operator's last offer of \$2,500.00 per acre.

Given the foregoing and noting that the Landowner has chosen to use one of the other corners to park/store farming equipment, the Panel finds that the Operator's last offer for the value of adverse effect on partially irrigated land with corner pivot irrigation of \$2,500.00 per acre is applicable to this lease. The Panel finds that the evidence before it does not establish on a balance of probabilities that this land is sufficiently unique nor that the adverse effect felt by the

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Landowner is significantly different than the adverse effect felt by other local farmers who have accepted the level of compensation in the CNRL Compensation Schedule.

### **INTEREST**

The operator provided notice of the compensation review as required by section 27(4). Accordingly, *Section 27 (15) of the Surface Rights Act* does not apply, and there will be no award of interest.

### **COSTS**

Mr. Bennen is claiming \$2,000.00 for his personal costs inclusive of preparation time, attendance at Board proceedings, travel time and any disbursements. In justifying this amount he argued that as the owner of a company his time is valuable. He testified that he spent a large portion of time, approximately 100 hours, preparing for and attending the Board facilitated mediation session, the Dispute Resolution Conference (DRC) and the hearing. This time estimate included at least two days of office work in preparation and review of records and time spent taking photographs on the land which were used in the proceedings. He also had a \$600.00 phone bill arising from out of country roaming charges for the hour and a half DRC telephone conference call.

The Landowner's representative, Mr. Bennett, has also submitted his costs regarding attendance, preparation and travel for a DRC, an initial meeting, and the hearing as well as \$330.11 in disbursements for binders and photocopies. He testified that he is billing at his hourly rate of \$100.00 per hour for nine hours for attendance at the initial meeting (two hours), DRC (two hours), and the hearing (five hours), and a further 20.5 hours for preparation. Additionally he is charging \$25.00 per hour for four hours of travel and is requesting reimbursement for 381 km of travel at the rate of \$0.60 per km.

Item billed for	Hours	Mileage	Rate		Totals
Board Proceedings	9		\$100.00/hr	\$ 900.00	
Preparation	20.5		\$100.00/hr	\$2,050.00	
TOTAL (Hours)	29.5				\$2,950.00
Travel time	4		\$ 25.00/hr	\$ 100.00	\$ 100.00
Travel		381 km	\$ 0.60/km	\$ 228.60	\$ 228.60
Disbursements					
Binders and Photocopies			At cost	\$ 330.11	
TOTAL (Disbursements)					\$ 330.11
TOTAL					\$3,608.71

### **SUBMISSIONS FROM THE OPERATOR REGARDING COSTS CLAIMED:**

It is the position of the Operator that while it is understandable that people incur costs to attend hearings, this particular hearing was unnecessary. Further, the Representative's rate of \$100.00 per hour is excessive.

### **REASONS FOR DECISION REGARDING COSTS**

Section 39 of the Act states that costs are in the discretion of the Board. In considering costs, the fundamental principle is that a party entitled to an award of costs is entitled to be reimbursed for

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any reasonable costs reasonably incurred in and incidental to the proceedings before the Board, and necessary to the determination of fair compensation payable for that which gave rise to the proceedings.

The Panel considered and rejected the Operator's submission that costs should not be paid because the hearing was unnecessary. The hearing took place because settlement was not possible. In the Panel's view there is insufficient evidence to establish that the hearing was unnecessary. In making this determination the Panel notes that the Operator's offer of compensation was not accepted by the Panel in its entirety and that result of the hearing is not clearly favorable to the Operator. Indeed, neither the Operator's final offer nor the annual rental payments requested by Janida were upheld in the determination of fair compensation payable.

1) Mr. Bennen

There is some lack of clarity to Mr. Bennen's personal claim for costs, including the rate that he is charging for his time as the business owner, and the actual number of hours being claimed. Although he indicated that his time estimate for preparation and attending Board proceedings was approximately 100 hours, the only specific information that he gave during his testimony was that his time estimate included at least two days of office work (Panel estimate of approximately 15 hours) in preparation, including review of records and taking photographs on the land for use in the proceedings. The actual time for attendance at Board proceedings is approximately nine hours but no amount was given for travel time. Mr. Bennen also testified that he was charged \$600.00 for telephone roaming charges associated with long distance, out of country telephone attendance at the DRC.

The Panel notes that no receipt for the telephone disbursement was provided, and it questions whether the full telephone charges are excessive and 100 hours for preparation and attendance time are reasonable. However, the Panel notes that Mr. Bennen is not making a claim for the full amount of time or telephone disbursement. Rather, he is claiming \$2,000.00 for all of his costs. The Panel is satisfied that on balance, his claim for \$2,000.00 inclusive of time spent in preparation and attendance at Board proceedings (approximately 24 hours are accounted for) and some disbursement for telephone charges and travel is reasonable. In making this determination the Panel also acknowledges Mr. Bennen's claim that as a business owner, his time is valuable.

Accordingly, the Panel awards the sum of \$2,000.00 inclusive of GST for Mr. Bennen's personal claim for costs.

2) Mr. Bennett

The Panel considered the submission of the Operator that Mr. Bennett's rate of \$100.00 per hour, as the representative for Janida Farms, is excessive. The Panel notes that although Mr. Bennett is neither a trained lawyer nor a land agent, he has appeared before the Board on many occasions over the last several years as a representative of various landowners. Over this time he has increased his advocacy skills and knowledge about surface rights issues.

Given this knowledge and experience, and that his representation was of assistance to the Panel in this matter, the Panel finds that his hourly rate of \$100.00 is reasonable. The Panel notes that Mr. Bennett has also charged a lower rate of \$25.00 per hour for his travel time. Again, the Panel finds this to be reasonable.

The Panel considered the number of hours that Mr. Bennett charged for his preparation time. Given his experience with surface rights issues the Panel finds that three hours spent researching relevant SRB and Court precedent to be somewhat high. It also finds two and a half hours taking photographs of comparables to be high particularly given that Mr. Bennen also spent time taking photos in preparation for the hearing. Accordingly, the Panel reduces the number of paid hours spent in preparation by one and one half hours. Accordingly, the Panel awards \$3,458.71 inclusive of GST for the representation by Mr. Bennett.

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The Panel is satisfied that, on balance, with the exception of the number of hours for preparation, the amounts claimed are reasonable. Therefore, an award of \$5,458.71 is made.

In summary, the Panel awards costs payable to Janida Farms Ltd. as follows:

Mr. Bennen	\$2,000.00
Mr. Bennett	<u>3,458.71</u>
	\$5,458.71

**ORDERS**

An order will issue

- (a) varying the rate of compensation from \$3,400.00 annually to \$5,290.00 annually, effective on and after January 9, 2006, and
- (b) fixing costs incidental to these proceedings in the amount of \$5,458.71 payable by the Operator to Janida Farms Ltd.

Dated at the City of Edmonton in the Province of Alberta on November 25, 2010.

SURFACE RIGHTS BOARD

MEMBER