Action Surface Rights Association members,

ASRA has been granted Intervenor status in the Redwater appeal before the Supreme Court of Canada. In the Redwater Court of Appeal decision the Court ruled that creditors (the "ATB") come first and that Operators can dump unproductive assets onto the Orphan Well Association and that they don't have to use cash-on-hand to obey the AER's order to properly abandon the oil/gas wells that they are dumping. The University of Calgary's Public Interest Law Clinic has graciously assisted us and is representing us before the Supreme Court. This has allowed us to intervene at minimal cost.

In addition, we're seeing the following problems occur:

1) The Court of Appeal basically stated that the **Alberta Energy Regulator** was incompetent and should have required Industry to put funds aside for reclamation.

   Ironically, the AER still values oil at over $100/barrel which enables Operators to avoid having to make LMR deposits for reclamation. ASRA has been involved in meetings with the AER in discussing how the Licence Management Rating program can be improved.

   Industry estimates that it will take between $80-300 Billion to reclaim all the wells in Alberta. There are around 150,000 abandoned or inactive wells and another 140,000 that are not very productive. If the Redwater decision stands, it will create an incentive for Industry to dump these wells onto the Orphan Well Association.

2) The **Orphan Well Association** Levy is $30 million/year. It was recently increased from $15 million. There are about 3500 wells in the OWA due to over 1000 wells being dumped on them this last year. The OWA normally reclaims around 50-100 wells per year. It is woefully underfunded to handle the number of Orphans that are being dumped on it.

ASRA recently released a Press Release supporting the NDP's decision to lend the OWA a 10-year $235 million loan which will be spent generating efficiencies in reclaiming Orphan wells. The Federal government's grant of $30 million will be used to pay the interest on this loan. The Orphan Well Levy is supposed to be raised to $60 million a year which will allow the OWA to continue spending $30 million per year on top of the $235 million which is supposed to be spent during the next 3 years. The extra $30 million per year will be used to pay back the loan. Some have criticized this as being a Taxpayer Pay model instead of a Polluter Pay model; however, the legislation as written will require Industry's increased contribution to pay off the loan.

We believe that the Social Contract requires Industry and the Public to make the landowner whole and to restore our lands to us with good productivity. If the Public is unable to require Industry to do so, the Public ultimately bears final responsibility.

We are concerned that there are currently around 128 companies that owe $3.78 million in Orphan Well levies to the OWA. It looks like many of them also owe the AER LMR deposits as well. The AER currently has about $250 million in LMR deposits on hand that are available for Reclamation in some circumstances.

When the OWA contacts landowners, landowners often complain that they haven't been paid by the Operator. The OWA has responded that they don't have anything to do with compensation and that the landowner should contact the Surface Rights Board. <u>However, the OWA has recently indicated that they will appear at the SRB as well and may challenge the landowner's rights to proper compensation</u>.

3) The **SRB** is backlogged with Section 36 applications to recover unpaid rentals. The Board handles over 3500 applications a year and this number is growing, it is also likely that the Board is also only handling about half of the claims that are out there. The Board has revamped their Section 36 process but they still require annual applications. We've asked that the government set up a system where landowners are paid annually until a Reclamation Certificate is granted.

The Board says that the application process is simple and they are only awarding around $100 in representation costs if the landowner seeks legal help. Landowners can also face up to a 2 year delay in having the Board handle the initial application.

Some landowners have asked for Section 27 Compensation Reviews on Orphan Wells. The Board has asked landowners to tell them how much of the surface lease is being farmed and seems to be contemplating using the discredited "Foot Print" argument to limit landowner compensation on Orphan sites.

The Board has also indicated that if landowners do not participate in the Bankruptcy proceedings and file Statements of Claim in court, that they will not be eligible for the compensation for those years under the Bankruptcy protection. We believe this violates how the *Surface Rights Act* is to be interpreted.

4) The **Department of Environment** moved to a self-inspection Reclamation Certificate process a few years ago. They also introduced a "Fast-track" application process and approved around 3400 Reclamation Certificates last year. Ironically, the AER has now revoked a number of those Certificates as the Operators did not restore the lands to Reclamation Certificate Criteria standards.

   We are very concerned that it looks like the AER, OWA, SRB and the Department of Environment are failing in their responsibilities to make the landowner whole and to require Industry to abide by the Social Contract.

This is described below.

Background and History

The current energy development system in Alberta utilizes the *Surface Rights Act* ("*SRA*") to give Industry Operators the "dominant and exclusive" rights to the surface of private lands to develop the underlying energy resource on behalf of all Albertans. Although

most oil/gas surface leases and pipeline right-of-ways are acquired through private negotiations, the Operator always has the ability to acquire access to the surface of the

land through a "forced taking" process by applying for a Right of Entry Order from the *Surface Rights Board*. The landowner does not have any say in which Oil/Gas Company is granted these rights and cannot refuse "bad Operators" access to their lands.

The possibility of a "forced taking" is offset by an acknowledged "Social Contract" and accompanying regulations which supposedly ensure that the landowner will not suffer harm due to Society benefitting from Industry access to the lands through cheaper and more efficient development of the underlying resource.

This **Social Contract also ensures/requires that**:

a) The Operator reclaims the lands at the end of production. (Section 144 of *EPEA*)
b) The land is restored to 60-90% of the original productive capability (dependent upon the date of the surface lease).
c) The Orphan Well Association ("OWA") reclaims orphan wells.
d) General Tax Revenues pay landowner annual compensation if the Operator is unable to.

However, the reality is that landowners are burdened by:

1) A permanent setback around the wellhead and access to the wellhead even after reclamation in case something goes wrong.
2) Possible lending restrictions due to environmental contamination.
3) Potential liens placed upon the land due to unpaid Operator debts (utilities, contractors, taxes).
4) Lengthy time delays for SRB proceedings.
5) Cost haircuts before the regulatory Boards requiring out-of-pocket representation fees.

6) Burdensome regulatory procedures failing to redress landowner concerns, while Industry is afforded quick access to the land.
7) Cross-jurisdictional deficiencies wherein regulatory agencies claim that they're not the agency responsible to rectify the problem.
8) Legacy issues due to lack of documentation, or relaxed historical requirements.
9) Inadequate regulations or legislation.
10) Intimidation from Industry compounded by landowner lack of knowledge.
11) A court recognized "uneven playing field" which pits the financial resources and experts of Industry against landowners who are unfamiliar with the system and an imposed unwanted relationship.
12) With no legislated requirement to reclaim non-productive wells within a certain time frame, the number of them has greatly increased over time. The landowner cannot force the operator to reclaim it so he can regain the full use of his land, while the operator often finds it cheaper to pay the annual compensation to the landowner than to reclaim it. Such wells are often transferred into weaker and weaker hands.

Roles of Government Agencies

Department of Energy	Grants mineral rights to the highest bidder
Alberta Energy Regulator	Approves license, mandate to develop resource
Surface Rights Board	Grants ROE, determines landowner compensation
Minister of AEP	Pays annual rentals for Orphan wells - actually pays on a fraction of existing Orphans
Orphan Well Association	Reclaims Orphans Funded by the Orphan Levy and LMR deposits

Current State of Industry

The AER regulates approximately 446 000 wells in Alberta:

- **186 000 are active**
- **82 000 are inactive**
- **66 000 are abandoned**
- **68 000 are reclamation certified**
- **37 000 are reclamation certificate exempt as they were abandoned prior to the legislative requirement to obtain a reclamation certificate.**

	2016	**2017**
Orphan Wells to be Abandoned	695	1529
Orphan Well Reclamation Sites	503	697
Orphan Well sites to be Suspended (Lexin)		1087

The Oil/Gas Industry has estimated that it will cost between **$80 and 300 Billion to reclaim all these wells** (with the possible exception of the reclamation exempt wells).

One element of Canadian Jurisprudence is the ***Polluter Pay principle*** which requires the "polluter" to pay for the cleanup costs of its Industrial activities. In the past, the courts have stated that these "cleanup responsibilities" have a super-priority status and must be paid before all other financial obligations.

However, this is no longer true as the recent *Redwater* court decision has determined that Lenders have first claim on the assets of bankrupt Operators instead of first being used to rectify reclamational responsibilities. The 1997 lobbying of Industry and the banks resulted in the federal *Bankruptcy and Insolvency Act* ("*BIA*"), being amended to remove this responsibility and due to the fact that federal legislation trumps provincial, it appears that the AER and the Alberta government face a significant challenge in revamping regulations to remain on-side of the *BIA*'s restrictions.

For example, the recent Lexin situation (which added 1100 wells to the OWA) illustrated how an Operator was able to stop paying landowner compensation, stall the SRB process, utilize delays in the AER taking action to comply with SRB the resulting termination orders and capitalize on AER uncertainty on how to rectify an Operator's refusal to follow regulations. As a result, the AER is left being owed millions of dollars and the OWA/taxpayer will likely be responsible for hundreds of millions of dollars of reclamation costs. Coordination between the AER and the SRB would have resulted in more timely action and an Operator's refusal to abide by AER and SRB sanctions should allow the Department of Energy to terminate Crown mineral leases and to prohibit the individuals responsible from ever participating in the Energy Industry again. Furthermore, restraining the SRB to an ancillary role allows Operators to ignore landowner concerns since they know that the AER is unlikely to take actions jeopardizing the underlying license for mere landowner concerns.

The Receiver is now allowed to sell any "good assets" to satisfy creditor claims instead of keeping that money to reclaim surface leases. The "bad assets" are dumped onto the OWA. *Redwater* states that the federal *Bankruptcy Insolvency Act* "the *BIA"* trumps provincial reclamation legislation and gives lenders a stronger claim on the failed Operator's assets than the AER has.

Another conflict of interest is the fact that Industry influence has ensured that the OWA's budget is far less than what the OWA has requested. $30 million per year is grossly insufficient to fund outstanding reclamational requirements.

Lax AER rules on well license transfers have also allowed unscrupulous Operators to off-load unproductive assets onto entities which are clearly destined to go bankrupt, thus ensuring that the shareholders and management of those companies are allowed to siphon funds which should have been set aside for reclamation. <u>The AER is now stating that they will review the ownership structure of companies to prevent repeat offenders but *Redwater* will create an incentive for Operators to disguise ownership structures to make it more difficult to discern who is actually responsible for reclamation and to stall enforcement actions</u>. The AER has also known of this problem for years so why has it waited so long to act?

These inadequacies and slack AER enforcement have allowed Unscrupulous Operators to "game" the system and privatize the profits while socializing the losses, leaving the OWA to clean up their mess and the government to pay the landowner's annual compensation.

This situation is compounded by the fact that the government doesn't seem to prosecute these Chronic violators and some of these individuals have moved on to their second and third companies, carrying on this type of unethical behavior simply because the government doesn't utilize existing regulations to stop it.
The system isn't necessarily broken, the government and the AER are simply refusing to enforce the existing legislation and regulations that were put in place to prevent this type of behavior.

The **Responsible Energy Development Act** "***REDA***" which was passed a few years ago by the Conservative government removed the AER's requirement to act in the Public Interest, made it much harder to appeal the AER's decisions and lessened the landowner's right to a hearing. Ironically the AER has stated in a number of situations, "that it is not in the Public Interest for the AER to follow the law". That doesn't seem responsible. Many believe that the AER is a regulator that has been "captured by Industry" and its lack of transparency along with its refusal to abide by some existing laws, rules and regulations have led to a flawed decision making process.

Landowners are intervening in the *Redwater* case because it essentially states that Banks should be rewarded for financing Industry's pollution of the environment and our lands. However, landowners agreed with much of the Redwater decision, in that the judiciary pointed out that the AER's poor management was the cause of many of the problems that we are seeing today. The Property Rights Advocate Office, the Farmer's Advocate Office and Landowner groups have pointed this out for years and the government and the regulators have ignored our suggestions on how to improve the system. The AER's continued abuse of landowner rights and the past government's desire to "streamline the regulatory process" guarantees that the problem will simply get worse.

Conclusion

The Province of Alberta faces a serious situation with an under-estimated backlog of "orphan wells" and a very large inventory of inactive wells. The current security program has proven woefully inadequate in securing funds for the reclamation of these wells and as a result it is likely that the taxpayer will be required to foot most of the bill.

The Chairman of the AER, Jim Ellis, has stated that if *Redwater* stands, the entire system is broken. We then ask why the AER continues to grant licenses and to impose a broken system upon landowners. In *Redwater* the justices stated that much of the fault lies at the AER's door. Overturning *Redwater* will not solve all the problems burdening landowners but it would suggest that the Banks should not expect to take advantage of those problems.

Due to the fact that landowners cannot prevent the Energy Industry from accessing their lands, society has an obligation to ensure that reclamation takes place in a timely manner and that the lands are restored to a useable and productive state. We request that the "security" program not be looked at in isolation and suggest that now is the perfect time to identify, and rectify, the many cross-jurisdictional deficiencies that exist between the Department of Energy, the AER, the SRB, and Alberta Environment.

For many years, the Action Surface Rights Association has suggested that the SRB's Section 36 application process be streamlined and that the Minister of Finance institute an inventory of leases where annual compensation is paid AUTOMATICALLY, in all "orphan situations" until a reclamation certificate is obtained, removing the need to apply annually. More clarity from the AER and the SRB on what exactly goes on behind the scenes on Section 36 payments, Termination Orders, Reclamation Orders, etc., would alleviate many landowner concerns.

Failure to address landowner concerns is likely to lead to uncooperative landowners and delays in the timely approval of future Energy Development in the province.

The AER is also hindered by a lack of tools in its regulatory toolbox and legislation and regulation needs to be amended to ensure that the current problems do not continue. Lack of action on the part of the AER, will suggest that a conflict of interest exists as the AER will appear to favor Industry over the taxpayer and landowners. While the lack of foresight to prepare for the reclamational liability existing in the province is not the fault of the current government, legislation must be introduced to ensure that "polluters pay for the liability that they create". The AER and the current government must act to resolve the current conflict existing between provincial legislation and the federal *BIA*. If this task is unsuccessful, then provincial legislation must be amended to restrict all future Energy development to those Operators who agree to operate in a responsible manner. It should not be the fate of the taxpayer, and the landowner, to suffer the consequences of improper, and untimely, reclamation.

Submitted on behalf of the members of the Action Surface Rights Association by,
It's Directors.