

Advisory 2020-3

Farmers' Advocate Office cautions landowners on the proposed "Surface Rights Review" initiated by Ember Resources Inc.

The Farmers' Advocate Office (FAO) has learned that Ember Resources Inc. (Ember) is carrying out a review of the annual compensation payments that it pays to landowners on Ember well sites and is seeking reductions to "better reflect the conditions on the ground."

It is important for rural Albertans to know that energy companies cannot unilaterally reduce annual well site compensation payments with first having negotiations to reach agreement with landowners or obtaining a ruling from the Surface Rights Board. Section 27 of the *Surface Rights Act* (SRA) mandates landowners and energy companies are to negotiate in good faith every four (4) years. The landowner and energy company are expected to agree on the annual compensation for the landowner's Loss of Use and Adverse Effect caused by the well site.

Alberta law does not allow an energy company to unilaterally reduce the amount of compensation for well sites. Section 27 of the SRA requires the parties to negotiate in good faith or to apply to the Surface Rights Board for a hearing if an agreement cannot be reached.

The Section 27 process for reviewing the rate of compensation is as follows:

- This section applies to surface leases and right of entry order compensation orders.
- An operator shall give notice on or within 30 days after the 4th anniversary of the date the term of the surface lease commenced or right of entry order was made.
- The notice shall state that the operator wishes to have the rate of compensation reviewed, or that the lessor or respondent has the right to have the rate of compensation reviewed, and, if no rate of compensation has been fixed, the lessor or operator has the right to have the rate of compensation fixed by application to the Surface Rights Board (SRB).
- If either party indicates pursuant to a notice under the *Surface Rights Act*, that a party wishes to have the rate of compensation reviewed or fixed, **the parties shall enter into negotiations in good faith for this purpose.**
- If by the end of the compensation year, the parties cannot agree on a rate of compensation, either party can make an application to the SRB for a hearing for the new rate of annual compensation.
- The SRB may, in its discretion, award reasonable costs that the landowner incurs related to the SRB hearing.

Ember Resources Inc. is not following the process required by the SRA. The information sent to landowners provides as follows:

“Ember is sending out lease payment assessments to all affected lessors in their year of review.

The assessment package will include an offer in line [sic] with the calculations contained in this presentation, a site specific areal [sic] photo and a cheque, unless direct deposit has been arranged.

If this is unsatisfactory, you have the right to appeal to the Surface Rights Board.

However, you should be advised that if you choose to take that route, Ember will endeavor to use evidence, including aerial photography, to win our case, resulting in the minimum possible payment to you.”

The letters Ember is sending to landowners does not meet the requirements of the *Surface Rights Act* as Section 27 of the SRA entitles landowners the opportunity to negotiate with industry in good faith.

In the view of the FAO, this approach does not meet the statutory requirement of good faith negotiations, and we have recently met with senior Ember Resources Inc. management to advise them of our opinion. We understand from our meeting that Ember Resources Inc. will review its correspondence and information package being sent to landowners. Ember Resources Inc. may revise the materials to address the concerns that we have raised. In the interim, it is important for landowners to be aware of their rights and options.

Cashing a cheque for a reduced rental amount does not imply acceptance of the amount. The FAO has developed template letters to assist landowners asserting their rights when energy companies do not pay what is owed. Copies are available on the FAO website at www.farmersadvocate.gov.ab.ca or by calling 310-FARM (3276).

It is the opinion of the FAO that Ember Resources Inc. is in default of the performance of its covenants or obligations under the Lease Agreement. This default includes the failure to pay annual rental compensation as per the negotiated and agreed upon rental amount. The FAO template letter will serve as 30-day notice to Ember Resources Inc. to remedy the default. Neither party of the Lease Agreement have the ability to unilaterally change the amount of payment without agreement or the Surface Rights Board commencing a proceeding under Section 27 of the *Surface Rights Act*.

The FAO recommends that landowners contact Ember directly to assert their right to good faith negotiations and required notification. This can be done by contacting Ember directly at:

Phone: 1-888-603-6066

E-mail: surfacereviews@emberresources.com

Website: www.surfaceleaseinfo.com

Be prepared to discuss the evidence that will support your case to negotiate the rental amount.

Adverse Effect reflects the alterations made to a landowner's business practices as well as the time, stress, and inconvenience experienced by a landowner as a result of the presence of an energy surface disturbance.

Loss of Use is provided to compensate a landowner for the inability to use and benefit from a portion of their land being leased by the energy company on an ongoing basis.

- Location of the surface lease and access road – corner, midfield, home quarter, connecting to another lease
- Use of the land – annual crop, hay, pasture
- Crop Rotation
- Typical crop yields and loss of production
- Potential compaction on access roads and surface lease from operator access due to “zero till” farming operations
- Good farming practices – weed control, club root protocol, noxious weeds
- Additional costs for seed and weed control making turns around the wellsite
- Size of equipment and difficulty to farm in confined spaces
- Specific examples of nuisance and inconvenience and how it impacts the remainder of the farming operation
- Review your original agreements that might have specific reference to the use of the land or any provisions for farming portions of the surface lease
- Discuss the “Default Clause” of the surface lease agreement
- Understand what makes your land or production unique

If your negotiations are not successful, either party (lessor or operator) can make a *Surface Rights Act* Section 27 application for Review of Rate of Compensation. The Surface Rights Board is a quasi-judicial tribunal that assists landowners/occupants and operators to resolve disputes about compensation and a Section 27 proceeding would be a formal hearing in front of the tribunal. At this time, Ember Resources has not made an application to the SRB to Review the Rate of Compensation; they have just unilaterally reduced the payment.

As a landowner, you do not need to make a Section 27 application to Review the Rate of Compensation if you are satisfied with the original amount dated in the Surface Lease. A landowner can make a *Surface Rights Act* Section 36 Recovery of Compensation application to recover the reduced rental paid by Ember Resources Inc. The energy company will be served with a demand letter for payment and will have to justify the unilateral rental deduction to the Surface Rights Board.

If Ember Resources Inc. is not willing to rectify the default of the Surface Lease and pay the agreed upon compensation the FAO will be able to assist with providing a “model argument” to support your case.

For more information, contact the FAO through the AG Info Centre at 310-FARM (3276) or by email at farmers.advocate@gov.ab.ca

For more information on the *SRA* Section 36 Recovery of Compensation, you can reach the **Surface Rights Board at 780-427-2444** or by email at srbxcb@gov.ab.ca or visit their website at <https://surfacerights.alberta.ca/>

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