

RECEIVED



Deputy Minister's Office
#300, 7000 – 113 Street
Edmonton, Alberta T6H 5T6
Canada
Telephone: 780-427-2145
www.agriculture.alberta.ca

AR-57562

September 26, 2016

Mr. Bruce Robertson, Chair
Explorers and Producers Association of Canada
1060, 717 Seventh Avenue SW
Calgary, AB T2P 0Z3

RE: Unilateral Surface Lease Payment Changes – Conflict with Alberta Legislation

Dear Mr. Robertson:

The Farmers' Advocate Office (FAO) is concerned about multiple reports they have received from landowners regarding recent actions taken by various energy companies relating to unilateral changes to surface lease payments. The FAO presented on this issue at the board meeting of the Canadian Association of Petroleum Producers on September 7, 2016, and would like to take this opportunity to bring awareness of this issue to your organization as well.

Landowners have reported receiving letters providing notice for reduced annual rentals due to difficult economic times. These letters and/or cheques are apparently being delivered both mid-term, and on the five-year anniversary date. Some landowners have also reported receiving unilaterally reduced rentals based upon a company commencing (or claiming to have commenced) the reclamation process, or just due to the change with industry economics.

Energy companies' efforts to reduce costs and achieve efficiencies cannot be undertaken in contravention of its legislative compliance obligations. Relationships among landowners and industry are governed, in part, by the current *Surface Rights Act*, the *Environmental Protection and Enhancement Act*, and the *Land Agents Licensing Act*. In our view, the legislation relating to payment and compensation to landowners supersedes terms that may have been drafted into private surface agreements.

We draw your attention to the following specific provisions:

- Annual Compensation under the *Surface Rights Act*
Section 25 of the *Surface Rights Act* provides that a landowner's annual rental is based upon their Loss of Use and Adverse Effect, not the state of the industry or the value of the asset to the operator. Landowners are under no obligation to accept an operator's unilateral change to the annual consideration paid.

.../2

- Anniversary Reviews under the *Surface Rights Act*

The *Surface Rights Act* entitles landowners to the opportunity to negotiate with operators in good faith on the five-year anniversary. Section 27 (6) of the Act provides that: "27 (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."

Good faith negotiations mean, among other things, that the discussion is undertaken in a manner that is open, honest, and fair. Landowners cannot be unilaterally instructed that their annual compensation will be reduced. Furthermore, a landowner has no obligation to entertain a review of the rate of compensation prior to the five-year term.

This is reiterated in the recent decision from the Surface Rights Board (SRB) concerning an operator who refused to pay rentals on an inactive site. In *Duel Energy Inc. v Gallagher*, 2016 ABSRB 688, the panel stated that: "*Payment of compensation is not at the discretion of the operator. The Panel directs the parties to Section 27 of the Surface Rights Act. When lessors and operators enter into surface lease agreements, lessors are entitled to five-year reviews. Compensation is to be negotiated—and if the parties cannot agree, the party desiring to have the compensation reviewed or fixed may make an application to the Board for proceedings to be held...*"

- Reclamation under the *Environmental Protection and Enhancement Act*

Section 144 of the *Environmental Protection and Enhancement Act* provides that full compensation must be paid until the Reclamation Certificate is issued.

"144(1) Notwithstanding anything in any other Act or any surface lease or right of entry order, (a) no surrender of a surface lease is effective or binding on any person, and (b) no expropriation board shall order the termination of a right of entry order insofar as the surrender or termination relates to any interest of the registered owner, until a reclamation certificate has been issued in respect of the specified land affected by the surrender or termination."

Reclamation does not constitute Change of Use or Surrender. A landowner's Adverse Effect and Loss of Use do not decrease when reclamation commences.

Some landowners have reported no notice, and being unaware that the reclamation process was started or completed. This appears to be in conflict with the regulated process established by the Alberta Energy Regulator, which incorporates extensive engagement with landowners.

- Land Agent Conduct

The *Land Agents Licensing Regulation* AR 224/82 stipulates that:

"When negotiating for or acquiring an interest in land, land agents must conduct themselves in a professional and ethical manner, and in accordance with any standards of conduct established by the Registrar."

The Code of Conduct for Alberta's land agents is established by the Land Agents Advisory Committee. The actions taken by energy companies' land agents may not have been consistent with the Code of Conduct. Specifically, the Code of Conduct states that land agents must:

- Carry out all duties with honesty and integrity;
- Act in good faith;

- Act in the client's best interests, subject to any limitations imposed by law or professional ethics; and
- Follow all applicable Statutes and Regulations.

We are advising landowners of their right to submit complaints relating to a land agent's conduct to the Land Agents Advisory Committee for review.

The FAO issued a general advisory in February 2016 to notify landowners who may have been affected by the above described actions. We have advised landowners to both understand and affirm their rights, and to reject unilateral reductions in annual surface lease rental payments.

Landowners have recourse for unpaid or underpaid rentals through applications to the Surface Rights Board under section 36 of the *Surface Rights Act*, but we would encourage all energy companies to address these issues promptly, and to operate in full compliance with provincial legislation.

Together with the FAO, we welcome the opportunity to present this information to your executive or discuss this further at your convenience. We trust that raising this issue directly with you will allow you to direct a change to the practices described above with your membership.

Sincerely,



Bev Yee
Deputy Minister