

**FACT SHEET:
Oil and Gas Development and Surface Rights**

This fact sheet is intended to answer common questions landowners may have about negotiating a surface lease agreement or pipeline right-of-way agreement in Alberta. This fact sheet focuses on the rights of surface owners.

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What are freehold owners?

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Who owns the rights to oil and gas in Alberta?

The Alberta government owns 81 percent of the province's oil, natural gas and other mineral resources. Therefore, most landowners in Alberta do not own the minerals below the surface of their land. These landowners are generally called "surface owners" or landowners with "surface rights."

The province owns the minerals unless otherwise indicated on the legal title of your property (also called the certificate of title). If you do not own the minerals,

your certificate of title will include the phrase “excepting thereout all mines and minerals” after the legal description of your property.

What are freehold owners?

There are some landowners in the province who own the minerals below the surface of the land. These landowners are called “freehold owners.” If the title includes both surface and minerals, the certificate of title will not have the phrase “excepting thereout all mines and minerals.” If the title is for minerals only, the minerals will be named in a phrase like "all coal, petroleum and natural gas" or "all mines and minerals."

This fact sheet focuses on the rights of surface owners. For further information on freehold rights, you can contact the Environmental Law Centre or the Freehold Owners Association at (403) 245-4438, website <www.fhoa.ca>.

Who is an operator?

An operator is a person or company that has the right to conduct exploration and extract the oil, gas or other mineral from the land.

How does an operator obtain the right to extract oil and gas?

If the province owns the minerals, the province leases the rights to the minerals through a closed auction. The highest bidder is awarded the right to explore for and develop oil and gas for that parcel of land.

Notice of parcels of land being offered at auction are posted on the Department of Alberta Energy website at <<http://www.energy.gov.ab.ca/1051.asp>> and are published in paper copy about eight weeks before the auction. The parcels of land are identified by their legal land description (township, range and meridian). There is no direct notice to potentially affected surface owners or occupiers when minerals are posted and sold.

What kind of access to land does the law permit?

Along with the right to the minerals come certain rights to access the land in order to extract the oil and gas. Generally, your land will be accessed for three types of activities related to oil and gas development:

- exploration (including seismic surveys);
- surveying; and
- resource development.

For more information on exploration and surveying, please see the Environmental Law Centre's fact sheet on Exploration for Oil and Gas.

As a landowner, what are my rights when the land agent calls?

Before an operator can apply for a licence from the Alberta Energy and Utilities Board (EUB) to drill a well or construct a pipeline, the operator will send a land agent to negotiate a "surface lease agreement" in order to place a well or other surface structure on your land. In the case of a pipeline, the land agent will negotiate a "pipeline right-of-way agreement."

Under the *Land Agents Licensing Act*, any agreement must be left in your possession for at least 48 hours (not including Sundays or legal holidays) before negotiations begin. 48 hours is the minimum amount of time required to review the agreement. If you require more time to review the agreement, tell the land agent and the operator that you require more time.

What do I need to know when negotiating a surface lease agreement?

The surface lease is the document used by the operator to legally secure its interest in the surface of the land for the purpose of extracting the oil or gas. A surface lease is required for any above surface structure which typically includes wells, access roads and other oil and gas facilities. These structures are usually subject to annual rents for use of the land surface.

To speed up the process, most companies present a proposed form of surface lease to the landowner. Different companies may use similar surface lease agreements but not all agreements contain the same clauses. It is important that you read the entire surface lease agreement carefully. If you have questions after reading the agreement, write down your questions and ask the land agent to answer them.

Terms of the surface lease agreement are a matter of negotiation. You and the operator can negotiate to add, delete or modify clauses in the surface lease. For example, if the location of the well or an access road will have an adverse effect on your land use, you can negotiate with the operator to change the location. You can also negotiate other issues such as how the topsoil will be protected, how weeds will be managed, and how drilling wastes will be disposed of from the site. You may request that the surface lease be limited to one well by adding a clause similar to the following: "This surface lease agreement is for the construction of one (1) oil or gas well." Should the operator come back and request an additional well or surface structure, it would have to negotiate a separate surface lease agreement.

You may want a lawyer or consultant who is knowledgeable about surface rights issues to help you in the negotiations. If you do this, you should ask the operator if they would cover the costs of your representation. It can also be helpful to discuss these issues with experienced neighbours or landowner groups.

Review the surface lease agreement closely before you sign it. Be sure that the survey plan is attached to the agreement. The survey plan shows where the well site and access road will be located. Make sure all additions, deletions or modifications to the surface lease are made in writing.

What do I need to know when negotiating a pipeline right-of-way agreement?

The pipeline right-of-way agreement (sometimes called a pipeline easement) is the legal document that grants the operator an interest in your land. The operator registers this interest against your land by registering a caveat on your



land title. Similar to a surface lease agreement, the operator typically presents a proposed form of right-of-way agreement to the landowner.

Terms of the right-of-way agreement are a matter of negotiation. For pipelines, a key consideration should be the pipeline route. Pipelines may impose limitations on the future use of the land, such as restricting options for subdivision or other development, so consider the route carefully. You can also negotiate other issues such as how the topsoil will be removed and replaced, how deep the pipeline will be buried, and how the pipeline will be abandoned. You may request that the right-of-way agreement be limited to one pipeline by adding a clause similar to the following: "This right-of-way agreement is for the construction and laying of one (1) pipeline." Should the operator come back and request an additional pipeline, it would have to negotiate a separate right-of-way agreement.

You should also be aware that compensation for pipelines is generally a one-time payment. Unlike wells, landowners do not generally receive annual rental payments for pipelines.

Sometimes the operator may require temporary workspace adjacent to the right-of-way while the pipeline is being constructed. This should be subject to a special agreement and appropriate compensation should be negotiated. Any above ground structure relating to the pipeline also requires a separate surface lease agreement to be signed.

Again, you may want a lawyer or consultant who is knowledgeable about surface rights issues to help you in the negotiations. Ask the operator if they would cover the costs of your representation.

Where can I get help in negotiating a surface lease or pipeline agreement?

If you have not retained your own lawyer or consultant, there are other resources that can assist you in deciding what to consider before signing a surface lease or pipeline agreement. The following resources may provide additional help to you:

- The Pembina Institute published a book entitled *When the Oilpatch Comes to Your Backyard* (2nd edition). This book includes checklists of questions to ask when negotiating a surface lease agreement or pipeline right-of-way agreement. The book is available by contacting the Pembina Institute at (780) 542-6272.
- The Office of the Farmers' Advocate developed a surface lease agreement called the *FAO 1998 Surface Lease Agreement*. The Farmers' Advocate also has publications called *Negotiating Surface Rights* and *Pipelines in Alberta* which may assist landowners. These resources are available by contacting the Farmers' Advocate at (780) 427-2433.
- The Alberta Surface Rights Federation has developed addendums or clauses that can be added to your surface lease agreement or pipeline right-of-way agreement. The addendums are available by contacting the Alberta Surface Rights Federation at (780) 672-6021.

If you cannot locate any of the above resources, please contact the Environmental Law Centre to assist you in obtaining a copy. The Environmental Law Centre also has copies of these resources in its library. Library materials can be borrowed by any member of the public free-of-charge.

What about compensation?

The appropriate level of compensation for each parcel of land will be unique, and will depend on a number of considerations. The *Surface Rights Act* sets out the general categories or "heads" of compensation for the first year of the agreement. In the first year, compensation must take into account:

- (1) an entry fee, which is set at \$500 per acre of land granted to the operator to a maximum of \$5,000; the fee is \$250 for less than an acre;
- (2) the value of the land;
- (3) initial nuisance, inconvenience and noise;

(4) loss of use of the land; and

(5) adverse effects.

Annual compensation is normally available for wells and other surface structures. After the first year of the surface lease, annual compensation is based on loss of use and adverse effects only (categories #4 and #5 listed above). Under the *Surface Rights Act*, the annual compensation is reviewed every five years during the life of the well site or other surface facility. The operator must make annual payments until a reclamation certificate has been issued for the site and the lease is terminated.

Annual compensation is not normally available for pipelines. The reason is because pipeline compensation is traditionally based on the operator taking an interest in your land through the right-of-way agreement, rather than leasing the surface of the land. As such, there is no interest leftover for the landowner to collect rent upon after the initial payment. Compensation for the adverse effects and loss of use from a pipeline is calculated and paid once the line is complete and a crop has been grown on the land so that the full extent of any damage can be assessed.

How do I know if the amount of compensation offered is fair?

The appropriate level of compensation is a matter of negotiation. If there is oil and gas development in your area, you may want to ask your neighbours about the amount of compensation they negotiated. You can also check the Alberta Surface Rights Board to see if there have been any decisions on compensation made in your area that are comparable. These decisions are available on the Surface Rights Board website at <http://www.surfacerights.gov.ab.ca/> or by contacting the Surface Rights Board at (780) 427-2444.

Real estate agents can be contacted regarding market values of the land. Local crop adjusters, elevators or district agrologists may be contacted for information on typical yields and prices of crops in the area.

What happens if we cannot agree on compensation?

If you cannot agree on compensation, either party can apply to the Surface Rights Board to determine the amount of compensation. This type of hearing before the Surface Rights Board is called a compensation hearing.

In the hearing, you will need to tell the Surface Rights Board why you think the compensation being offered by the operator is insufficient. You must be prepared to provide the Board with evidence that supports your claim for compensation. This can include recent land sales in the area, copies of other agreements or Surface Rights Board decisions on compensation that have been made in the area, or receipts from crop sales or estimated crop returns.

If you are not planning on retaining a lawyer or professional advisor to represent you before the Surface Rights Board, you should familiarize yourself with the Board's process before participating in the hearing. More information on the hearing process is set out under *Surface Rights Act* and the regulation *Rules of Procedure and Practice of the Surface Rights Board*, Alta. Reg. 190/2001.

What if negotiations fail?

Either party can ask the Alberta Energy and Utilities Board (EUB) to send EUB staff or an independent mediator to assist with negotiations. If an agreement cannot be reached, the operator must make a "non-routine application" to the EUB to apply for a licence. A non-routine application means that the operator must provide the EUB with a written summary of the outstanding concerns. At this time, the operator may request an EUB hearing to resolve the issues before a licence is granted to the operator. For more information on the EUB process, please see the Environmental Law Centre's fact sheet on the Alberta Energy and Utilities Board.

Once the EUB grants a licence, the operator can apply to the Surface Rights Board for a right-of-entry order to gain access to your land. If you receive an operator's application for a right-of-entry order and you believe that the EUB wrongly issued the licence, you should:

- file an objection with the EUB, asking them to rescind (cancel) the licence and list your outstanding concerns;
- file an objection with the Surface Rights Board with respect to the right-of-entry order; and
- ask the Surface Rights Board to hold an objection hearing on the issue of entry.

Objection hearings before the Surface Rights Board are rare. Once the EUB has issued a licence, an application for a right-of-entry order is usually a formality because the Surface Rights Board rarely refuses entry.

Why might I want a right-of-entry order?

Some landowners reach agreement with the operator on the surface lease or pipeline agreement but still want a right-of-entry order from the Surface Rights Board. Some landowners prefer this option because they feel that a right-of-entry order protects their rights better than just signing a surface lease or pipeline right-of-way. Some of the reasons why people prefer a right-of-entry order are as follows:

- a right-of-entry order is always open to review. The *Surface Rights Act* provides that the Surface Rights Board may "review, rescind, amend, or replace a decision or order made by the Board." This means that if the operator does not abide by the terms of the order, the landowner should be able to ask the Surface Rights Board for a review, instead of having to go to arbitration or the courts;
- surface leases or right-of-way agreements often include an arbitration clause to resolve disputes, where each side appoints an arbitrator. Either side can delay arbitration under a private agreement by refusing to appoint an arbitrator. Under a right of entry order, the decision-maker (the Surface Rights Board) is already appointed;

- if an operator fails to pay the required compensation, the landowner would have to sue in court to recover this amount. A right-of-entry order can be filed directly as a judgment with the court; and
- in pipeline cases, the Surface Rights Board will not hold a hearing on the issue of damages if there is an arbitration clause in the right-of-way agreement. The landowner is therefore faced with costs of private arbitration. Under a right-of-entry order, the Surface Rights Board can hear the issue of damages.

Other landowners prefer not to involve the Surface Rights Board in matters that they can successfully negotiate with the operator.

Does the operator have to test my water well?

If the operator is drilling for coalbed methane, there is a requirement for the operator to test your water well before drilling begins. This requirement is set out in Alberta Environment's document entitled the *Standard for Baseline Water-Well Testing for Coalbed Methane/Natural Gas in Coal Operations*.

For other oil and gas activity, there is no requirement for an operator to test your water well. If you have concerns about potential impacts on your water well, you should ask the operator to test your well before drilling begins. This will provide you with baseline data on the quality and flow rate of your well. It is important to have baseline data in case there is a problem later on with your water well. Ensure an accredited laboratory analyzes the water samples and that the results of those tests are provided to you.

Where can I get more information?

For general information about legal rights and processes related to oil and gas development, please contact the Environmental Law Centre. Further resources are included below.

Environmental Law Centre Library Resources and Online Catalogue:

Alberta Agriculture, Food and Rural Development, Farmers' Advocate. *Negotiating Surface Rights* (Edmonton: Alberta Agriculture, Food and Rural Development, 2000).

Alberta Agriculture, Food and Rural Development, Farmers' Advocate. *Pipelines in Alberta* (Edmonton: Alberta Agriculture, Food and Rural Development, 1993).

Griffiths, Mary, Chris Severson-Baker & Tom Marr-Laing. *When the Oilpatch Comes to Your Backyard: A Citizens' Guide*, 2nd ed. (Drayton Valley: The Pembina Institute, 2004).

Online Articles:

Alberta Agriculture, Food and Rural Development, Farmers' Advocate. *Negotiating Surface Rights*, online: Alberta Agriculture, Food and Rural Development
<[http://www1.agric.gov.ab.ca/\\$department/deptdocs.nsf/all/agdex1126?opendocument](http://www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/agdex1126?opendocument)>.

Alberta Agriculture, Food and Rural Development, Farmers' Advocate. *Pipelines in Alberta*, online: Alberta Agriculture, Food and Rural Development
<[http://www1.agric.gov.ab.ca/\\$department/deptdocs.nsf/all/agdex1125?opendocument](http://www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/agdex1125?opendocument)>.

Barringer, Keri. "Landowners and oil and gas interests: issues to consider" (2004) 19:2 *Environmental Law Centre News Brief* 11, online: Environmental Law Centre
<<http://www.elc.ab.ca/publications/NewsBriefDetails.cfm?ID=814>>.

Additional Online Resources:

Alberta Surface Rights Board, online
<<http://www.surfacerights.gov.ab.ca/>> - this website provides access to Surface Rights Board decisions and Board contact information.

A word of caution about your use of this material

The information provided in this fact sheet is current to July 31, 2006. While every effort has been made to ensure the accuracy and timeliness of the information, the information provided is of a general nature and is not a substitute for legal advice. The Environmental Law Centre encourages individuals to seek specific advice on matters of concern and not to rely solely on the information in this document.

The Environmental Law Centre

The Environmental Law Centre (Alberta) Society is a registered charitable organization that was incorporated in 1982 to provide Albertans with an objective source of information on environmental and natural resources law. The Centre, which is staffed by four full-time lawyers, a librarian and a small support staff, provides services in environmental law education, assistance, research and law reform. The Centre maintains an extensive library and online catalogue of environmental law materials that is accessible by the public free of charge.

Funding for the Environmental Law Centre is provided by the Alberta Law Foundation and through the generous support of the public. The Centre also accepts private and government research contracts for work relevant to and consistent with the Centre's objectives.

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