

ALBERTA SURFACE RIGHTS BOARD
(the "Board")

Citation: Canadian Natural Resources Limited v. Babb 2013 ABSRB 618

Date: 2013-08-29

File Nos.: RE2011.0157, RE2011.0158, RE2011.0159, RE2011.0160, RE2011.0161, RE2011.0162, RE2011.0164, and RE2011.0165

Decision No. 2013/0618

In the matter of the *Surface Rights Act*, RSA 2000, c S-24 (the "Act")

And in the matter of land in the Province of Alberta within the:

SW ¼-2-63-5-W4M as described in Certificate of Title No. 882 216 764
NW ¼-2-63-5-W4M as described in Certificate of Title No. 882 216 766
SE ¼-2-63-5-W4M as described in Certificate of Title No. 102 191 898
NE ¼-2-63-5-W4M as described in Certificate of Title No. 772 086 386
NW ¼-35-62-5-W4M as described in Certificate of Title No. 042 439 622
(the "Land")

BETWEEN:

CANADIAN NATURAL RESOURCES LIMITED,

Operator ,

- and -

BRIAN VICTOR BABB, (owner)
RITA ALINE BABB, (owner)
DEREK ALBERT BABB, (owner)
NORVAL A BABB, (owner)
ALBERTA POWER LIMITED,
NORTH EAST GAS CO-OP LTD.,
THE TORONTO DOMINION BANK,
CANADIAN UTILITIES LIMITED,
LAKELAND CREDIT UNION LTD.,
ATCO ELECTRIC LTD.

and

CANADIAN NATURAL RESOURCES LIMITED,

Respondents.

BEFORE: Gordon Chapman, Presiding Chair
 David McDonald
 D. A. Sibbald, Q.C.
 (the "Panel")

DECISION

APPEARANCES:

For the Operator:

- Heidi Meldrum, Counsel, Parlee McLaws LLP
- Wayne Nielsen, Landman, Canadian Natural Resources Limited
- Lawrence Ference, Landman, Canadian Natural Resources Limited

For the Respondents,
Brian Victor Babb, Rita Aline Babb,
Derek Albert Babb
and Norval A. Babb:

- Richard C. Secord, Counsel, Ackroyd LLP,
- Ifeoma Okeye, Student at Law, Ackroyd LLP,
- Brian Victor Babb, Landowner
- Rita Aline Babb, Landowner
- Ivan Weleschuk, Weleschuk Associates Ltd.

No other Respondents appeared although all were duly notified of the time and location of the hearing.

EXHIBITS

The documents entered as Exhibits are listed in Appendix A to this decision.

Additional documents related to the payments under Section 20 of the *Act* and the written submissions of counsel were marked as "Information Received."

1.0 BACKGROUND

The Operator, Canadian Natural Resources Limited (CNRL), applied to the Board for and was granted right of entry orders (the Orders) onto land owned in various combinations by the Respondents Brian Babb, Rita Babb, Derek Babb, and Norval Babb (collectively referred to as the Babb Family or the Babbs). The ownership of each individual parcel of the Land is set out in Table 1 together with the size and type of taking and each relevant right of entry order number and its date of issue.

This hearing was held on February 13 and 14, 2013, at Bonnyville, Alberta, to determine the amount of and to whom compensation is payable for the rights granted by the Orders issued by the Board pursuant to Section 23 of the *Act*.

The effective date for the determination of compensation is the date of each Order.

The amount of the entry fees paid under Section 19 of the *Act* and the payment under Section 20 required clarification. After the hearing, those amounts were reconciled. The parties agreed that CNRL paid the proper amounts under Section 19. The parties also agreed on the payments by CNRL pursuant to Section 20 of the *Act*. The details of the Section 20 payments are summarized in the Table 1. Under Section 25(6) of the *Act*, the amount of those payments is to be offset from the total compensation determined by the Panel to be payable.

Table 1

Board File No.	Landowner(s)/ Occupant(s)	Land Description	Site/Road Description	Right of Entry Order No. and Date	Acreage of Area Granted	Type of Taking	Section 20 Payment
RE2011.0157	Brian Victor Babb and Rita Aline Babb Owners	NW ¼-2-63-5-W4M	11-2 Site	1491/2011 dated Dec. 2/11	9.01	Pad Site (11 wells) and Roadway	\$26,378.00
RE2011.0158	Derek Albert Babb, Owner Brian Babb Occupant	SE ¼-2-63-5-W4M	SE 2a Road	1484/2011 dated Dec. 2/11	4.35	Roadway	\$3,980.00
RE2011.0159	Brian Victor Babb and Rita Aline Babb Owners	NW ¼-35-62-5-W4M	NW 35 Site	1406/2011 dated Nov. 21/11	4.24	Pad Site (3 wells)	\$11,040.00
RE2011.0160	Derek Albert Babb Owner Brian Babb Occupant	SE ¼-2-63-5-W4M	7-2 Site	1408/2011 dated Nov. 21/11	10.77	Pad Site (7 wells) and Roadway	\$24,945.00
RE2011.0161	Norval A. Babb and Brian V Babb Owners	NE ¼-2-63-5-W4M	9-2 Site	1469/2011 dated Nov. 29/11	8.40	Pad Site (10 wells) and Roadway	\$24,750.00
RE2011.0162	Derek Albert Babb, Owner Brian Babb, Occupant	SE ¼-2-63-5-W4M	SE 2b Road	1485/2011 dated Dec. 2/11	4.35	Roadway	\$186.00
RE2011.0164	Brian Victor Babb and Rita Aline Babb Owners	SW ¼-2-63-5-W4M	5-2 Site	1492/2011 dated Dec. 2/11	12.63	Pad Site (10 wells) and Roadway	\$29,554.00
RE2011.0165	Brian Victor Babb and Rita Aline Babb Owners	SW ¼-2-63-5-W4M	SW 2 Road	1493/2011 dated Dec. 2/11	1.88	Roadway	\$1,000.00

The testimony at the hearing was given under oath.

2.0 ISSUES

1. What compensation is payable under each of the Orders granting entry for pad sites for the first year and on an annual basis?
 - a) Does the evidence establish an applicable pattern of dealings and, if so, is there a cogent reason to depart from the pattern?
 - b) What compensation is payable for value for the land granted?
 - c) What compensation is payable for the loss of use of the area granted?
 - d) What compensation is payable for first year nuisance, inconvenience and noise associated with the operations of CNRL?
 - e) What compensation is payable for adverse effect on the remaining land and for nuisance, noise and inconvenience?

- f) What compensation is payable for additional wells on the pad sites?
 - g) What compensation is payable for additional adverse effect?
2. What compensation is payable under each of the Orders granting entry for a roadway only for the first year and on an annual basis?
- a) Does the evidence establish an applicable pattern of dealings and, if so, is there a cogent reason to depart from the pattern?
 - b) What compensation is payable for value for the land granted?
 - c) What compensation is payable for the loss of use of the area granted?
 - d) What compensation is payable for first year nuisance, inconvenience and noise associated with the operations of CNRL?
 - e) What compensation is payable for adverse effect on the remaining land and for nuisance, noise and inconvenience?
 - f) What compensation is payable for additional adverse effect?
3. To whom is the compensation payable?
4. Is interest payable and, if so, at what rate and for what time?
5. To whom and in what amount are costs payable?

3.0 RELEVANT LEGISLATION

The relevant provisions of the *Act* are set out in Appendix B.

4.0 FACTUAL OVERVIEW OF THE LAND, THE PAD SITES, AND THE ROADWAYS

A general description of the Land, pad sites, and roadways is set out here in order to provide context for the discussion that follows.

The Land is located approximately 20 kilometers north of Bonnyville, Alberta, and is made up of all of Section 2-63-5-W4M, less some subdivided portions, and of NW $\frac{1}{4}$ -35-62-5-W4M, immediately to the south. Including the Land, the Babb Family owns or leases approximately 4,000 acres of land in the area.

Brian and Rita Babb carry on a large cattle and grain operation centered on Section 2 of the Land. Their home and the main farmyard are located in the northwest corner of the NW quarter of section 2. The farmyard includes several buildings and corrals.

Norval Babb and his son Brian Babb are owners of a portion of the NE 2. Chris Babb, son of Brian and Rita, resides on a two-acre, subdivided parcel in the northeast corner of NE 2.

Derek Babb, another of Brian and Rita's sons, is the owner of SE 2, another portion of the Land. He lives on a subdivided portion of that quarter to the east of a municipal road which severs the quarter. Brian Babb is the occupant of the SE 2, excepting the subdivided parcel.

The Babbs' entire cattle herd winters on Section 2. The total number of cattle varies from year to year and season to season but, typically, is in the range of about 1,700 to 2,500 head. Calving occurs in May/June and most of the cow/calf pairs are moved to various pasture locations in the area. Some cattle are kept on

Section 2 year round. In the fall, the calves are weaned and put in the feedlot corrals south of the farm yard. Calves are typically sold in the spring.

Water is available for the cattle on Section 2 from automatic waterers in the corral area in NW 2 and near the acreage in NE 2. Ponds behind beaver dams in a creek that crosses the southern portion of Section 2 in a more or less east/west direction also provide year-round water.

Approximately 130 acres of the E ½ of 2 have been used for swath grazing. The cattle typically grazed this land from about mid-December until about early April.

Before the development of the wellsites in question, there was fencing for the corrals in NW 2, and along the north/south quarter line from the northern boundary to the southern edge of the area which is swath grazed on the E ½ of 2. There was also a fence line from the southern end of that fence to the eastern boundary of Section 2.

In addition to the cattle operation on Section 2, the Babbs also cultivate about 1,440 acres with barley and canola.

Under a September 20, 2007, surface lease with Brian and Rita Babb, CNRL developed a well site with a single well in NW 2, the 13-2 Site. Under an August 7, 2009, surface lease with the Babbs, CNRL developed a pad site with six wells on NE 2, the 15-2 Site, with a 0.52 acre roadway under a separate surface lease on NW 2.¹ The compensation payable under those three leases is not the subject of these proceedings.

The development under the Orders consists of five well/pad sites and associated common roads. These may be briefly summarized as follows:

- RE2011.0157 (11-2 Site) –The pad site contains 11 wellheads/pumps, 11 silent shacks, 11 1,000-barrel tanks, and one large propane bullet tank. The road is high grade gravel. The pad site and road are fenced along the surveyed boundaries. This site is located on the home quarter.
- RE2011.0158 (SE 2a Road) – This high grade gravel road is used to access the 11-2 Site and is fenced on both sides with gates to allow livestock to cross.
- RE2011.0159 (NW 35 Site) – This site is adjacent to a municipal road, thus there is no access road. The site is licensed for three wells but has not yet been constructed. The site is on cultivated land.
- RE2011.0160 (7-2 Site) – None of the seven wells licensed for this site have been drilled, but the high-grade road portion has been developed to access the 11-2 Site. The well site portion is on cultivated land.
- RE2011.0161 (9-2 Site) – Four of the 10 licensed wells have been drilled. The pad site contains four wellheads/pumps, four silent shacks, four 1,000-barrel tanks, and eight small propane tanks. The road is high-grade gravel. The pad site and road are fenced along the surveyed boundaries. The site is located on cultivated land.

¹ See Exhibit 1 at paragraphs 6 and 7 and Exhibit 2 at Tabs 6 and 8

- RE2011.0162 (SE 2b Road) – The site consists of a high-grade road used to access the 11-2 Site and the 5-2 Site. The road was developed in connection with the drilling of the wells on the 11-2 Site.
- RE2011.0164 (5-2 Site) – This site consists of both a pad site, licensed for 10 wells, and a roadway. Construction has not commenced on this site.
- RE2011.0165 (SW 2 Road) - The site consists of a high-grade road used to access the 11-2 Site and the 5-2 Site. The road was developed in connection with the drilling of the wells on the 11-2 Site.

In summary, the development consists of five multi-well pad sites with associated roads. Three of those pad sites, being 7-2 Site, 11-2 Site and 5-2 Site, are connected by rights of entry for overlapping roads which lead from the municipal road on the eastern boundary of Section 2 in a generally westerly direction. To date, a total of 15 of the 41 licensed wells on the subject sites in Section 2 have been drilled and are in production. This is in addition to the seven wells drilled and in production under the earlier surface leases.

Three of the Orders grant right of entry for use only as roads – Order No. 1493/2011 for SW 2 Road, Order No. 1484/2011 for SE 2a Road and Order No. 1485/2011 for SE 2b Road. In order to provide access to each pad site from a public road, the road-only sites overlap with the areas granted for roads under other orders. SE 2a Road completely overlaps with SE 2b Road.² The roadway granted for the 7-2 Site completely overlaps with the SE 2a Road and the SE 2b Road.³ A portion of the roadway granted for the 5-2 Site completely overlaps with the SW 2 Road.⁴

With one exception, the roadway-only sites overlap with the portion of the area granted for access roads under the orders for sites 7-2 and 11-2. The exception is a portion of the roadway in SE 2 - approximately 1.5 acres - from the west boundary of the 7-2 Site to the west boundary of SE 2 which does not overlap with the area granted for use as a roadway under one of the pad site orders.

The amount of vehicle traffic accessing the constructed sites was a matter of some conflicting evidence. The amount of traffic will increase when the licensed but as-yet-undrilled wells are completed. An Operator's employee visits each site once a day. It is also clear that tanker trucks access each of the sites in production to haul away oil, water, and sand. Service rigs are also regularly at each of the activities. The number of times such units come and go varies depending on the volume and quality of production from each well. Oil tanker trucks access the 9-2 Site at least two or three times per day and the 11-2 Site at least five or six times per day. Services truck are at each well about once per month. While no precise number of visits was established, it was clear that various units are coming and going at virtually all hours of the day and night.

5.0 POSITIONS AND KEY SUBMISSIONS OF THE PARTIES

It is not intended that all of the details of the evidence presented by each party will be summarized in this section; rather, only each party's position and the main basis for that position will be described. A more detailed analysis is provided in the Analysis and Findings section below.

² Exhibit 1 – Agreed Statement of Facts at paragraphs 16 and 35.

³ Exhibit 1 – Agreed Statement of Facts at paragraph 26.

⁴ Exhibit 1 – Agreed Statement of Facts at paragraph 39.

5.1 The Operator – CNRL

A summary of CNRL’s position is set out in the following table:

Table 2.

Board File No.	Site/Road Description	Land Value	General Disturbance	Adverse Effect	Loss of Use
RE2011.0157	11-2 Site	\$1,270.00 per acre	\$1,900.00	\$2,500.00	\$350.00 per acre
RE2011.0158	SE 2a Road	\$0.00	\$350.00	\$600.00	\$0.00
RE2011.0159	NW 35 Site	\$1,270.00 per acre	\$1,900.00	\$2,200.00	\$350.00 per acre
RE2011.0160	7-2 Site	\$1,270.00 per acre	\$1,900.00	\$2,200.00	\$350.00 per acre
RE2011.0161	9-2 Site	\$1,270.00 per acre	\$1,900.00	\$2,200.00	\$350.00 per acre
RE2011.0162	SE 2b Road	\$0.00	\$350.00	\$600.00	\$0.00
RE2011.0164	5-2 Site	\$1,270.00 per acre	\$1,900.00	\$2,200.00	\$350.00 per acre
RE2011.0165	SW 2 Road	\$0.00	\$350.00	\$600.00	\$0.00

Wayne Nielsen and Lawrence Ference, two of its landmen, presented evidence on behalf of CNRL.

CNRL submits that the 38 compensation agreements presented⁵ for land within four townships of the Land support a finding that there is a pattern of dealings or, alternatively, are the most relevant evidence on which to base a determination of compensation for the subject sites. The comparable sites presented are described as all being pad sites with multiple well heads. The compensation payable under those agreements is said to be within a relatively narrow range across various land uses and site sizes and number of wells on each pad.

CNRL acknowledged that none of its comparables are on land used for a large livestock operation, such as is carried on by the Babb Family. It was submitted that some of the comparables are for livestock operations and that the Babbs have not established that they are suffering impacts greater than those suffered by any other livestock operator.

The compensation payable under two earlier surface leases for the 13-2 Site and 15-2 Site referenced above is said to have been agreed on based on comparable compensation being paid in the area. While agreeing that the dates of those leases makes the actual amounts payable irrelevant, it is argued that these leases support the use of determining compensation based on comparables rather than the methodology advanced by the Babb Family at the hearing.

The basis for CNRL’s position on land value was \$1,270.00 per acre based on a purchase⁶ by other members of the Babb Family of approximately 145 acres located at SE 8-63-4-W4M in October 2012 for about that amount. It was acknowledged that the consideration for that acquisition supported a land value above the lower range of \$1,000.00 to \$1,200.00 payable under the 38 comparables CNRL presented.

⁵ Exhibit 3

⁶ Exhibit 2 at Tab 3

The position of the Babbs that land value should be \$2,000.00 based on a report authored by Ivan Weleschuk⁷ (Weleschuk) of Weleschuk Associates Ltd. titled *Estimate of Compensation Canadian Natural Resources Limited Leases* is rejected. It is noted that it was acknowledged that the report was not an appraisal and several of the prices for comparable land sales used had not been adjusted for factors such as time of sale.

The CNRL comparables indicated that additional compensation is payable for each extra well on a pad site. CNRL submitted that this additional compensation is consistently \$1,000.00 for the first year and \$500.00 per year thereafter; thus for example, if there are three wells on a pad site, there would be an additional payment of \$2,000.00 in the first year and \$1,000.00 each year thereafter.

CNRL submits that no compensation should be payable for SW 2 Road, SE 2a Road and SE 2b Road. The basis for that position is that if entry had been granted under a surface lease there would have been no overlap since the roadway and pad site would have been contained in a single surface lease, except for the different owners of SE 2 and SW 2.

Alternatively, CNRL submits that compensation for the roadway-only sites should be limited to \$350.00 for general disturbance and \$600.00 for adverse effect with no compensation payable for land value or loss of use.

CNRL takes the position that the evidence presented by the Babb Family failed to provide evidence of actual losses. CNRL noted that the Babbs' position on loss of use was not based on their actual data but rather on projections from an "historic high" without evidence that the Babbs have actually received those prices for their crops.

It was also argued that the Babbs' position that they are unique is not supported by the evidence. The claimed impacts such as dust from roads and altered routes to access land are said to be common to most sites. Similarly, it is submitted that when claiming impacts from fencing, the Babbs have failed to take into consideration that the location of the fencing was determined in consultation with the Babbs and was largely along the same east-west line that pre-existed the Orders. CNRL also points out that it has agreed to take care of the fencing if it needs repair.

With respect to general disturbance compensation, CNRL argues that since the Babbs have already been paid for all of their time spent in negotiations, the only other factor to consider would be the impact of site construction. It is submitted that the comparables presented by CNRL establish a narrow range for such compensation whether or not on a home quarter.

5.2 The Babb Family

A summary of the Babbs' position is set out in Table 3, as outlined in *Final Argument on behalf of Brian Victor Babb, Rita Aline Babb, Derek Albert Babb and Norval A. Babb* prepared by Richard C. Secord, Ackroyd LLP

⁷ Exhibit 5

Table 3

Board File No.	Site/Road Description	Land Value	General Disturbance	Adverse Effect	Loss of Use
RE2011.0157	11-2 Site	\$2,000.00 per acre	\$3,800.00 site and \$7,500.00 wells	\$38,515.00 site and \$7,500.00 wells	\$440.00 per acre
RE2011.0158	SE 2a Road	\$2,000.00 per acre	\$1,900.00	\$2,100.00 site	\$440.00 per acre
RE2011.0159 ⁸	NW 35 Site	\$2,000.00 per acre	\$3,800.00 site ⁹ and \$1,000.00 wells	\$4,340.00 site and \$1,000.00 wells	\$440.00 per acre
RE2011.0160	7-2 Site	\$2,000.00 per acre	\$3,800.00 site and \$4,500.00 wells	\$28,980.00 site and \$4,500.00 wells	\$440.00 per acre
RE2011.0161	9-2 Site	\$2,000.00 per acre	\$3,800.00 site and \$6,750.00 wells	\$22,885.00 site and \$6,750.00 wells	\$440.00 per acre
RE2011.0162	SE 2b Road	\$2,000.00 per acre	\$1,900.00	\$2,100.00 site	\$440.00 per acre
RE2011.0164	5-2 Site	\$2,000.00 per acre	\$3,800.00 site and \$6,750.00 wells	\$38,515.00 site and \$6,750.00 wells	\$440.00 per acre
RE2011.0165	SW 2 Road	\$2,000.00 per acre	\$1,900.00	\$2,100.00 site	\$440.00 per acre

The evidence for the Babb Family was presented by Ivan Weleschuk and Brian and Rita Babb. Weleschuk is an appraiser and agrolgist. He provided a report setting out his opinion on the appropriate amount of compensation as well as a rebuttal opinion in response to CNRL's production.¹⁰

The Babbs argue that the pattern of dealings approach should not be followed in this case. The basis for that position includes the following:

- CNRL comparables do not include a large cattle operation, particularly on a home quarter;
- Unlike the subject sites, several of the CNRL comparables are for situations where the original taking was for a single well site which was later expanded to a pad site;
- The CNRL comparables tend to be for smaller sites than the subject sites;
- The comparables are from only two operators, being Devon and CNRL;
- All of the Devon agreements include payment of "additional consideration" above that for the generally accepted four categories of compensation. CNRL has not included any similar amount in its "pattern" position;

⁸ The table provided at pages 8 and 9 of the Babbs' written Final Argument does not include reference to this site but it is understood that the last site in the Table is intended to provide the position for this site.

⁹ This is the amount set out in the Table in the Babbs' written Final Argument... but does not reflect the acknowledgement by Weleschuk that the compensation should be \$1,900.00 as discussed below.

¹⁰ Exhibits 5 and 6

- The impact of the multi-well development on Section 2 is unique in the area. Section 2 is used not only as the home base for the large cattle operation but was also used for rotational crop cultivation and swath grazing. The location of the pad sites, roadways, and fences effectively “butchers”¹¹ the Land.

The Babbs rely on Weleschuk’s opinion assessing land value at \$2,000.00 per acre.¹² It was submitted that the \$1,270.00 per-acre-price paid by the Babbs¹³ requires an adjustment to reflect the fact that the vendor kept two small subdivided parcels and that the sale was not advertised but rather between parties with a longstanding commercial relationship.

Weleschuk’s opinion is also relied upon for the position that compensation for loss of use should be \$440.00 per acre.¹⁴ He presented a summary of the Babbs’ barley and canola yields for the years 2010 to 2012.¹⁵ He then applied the “current pricing” from the *Weekly Crop Market Review -- November 2, 2012*. Based on a rotation of three years of barley and one year of canola, he calculated revenue stream of \$440.00 per acre. Weleschuk also referred to forecasts for positive farm income in the future.¹⁶

The Babbs’ position on compensation for adverse effect for the Section 2 sites is based on Weleschuk’s estimates of the impact of the following factors:

- Increased cost of managing livestock;
- Increased costs associated with moving fences and fence maintenance;
- Increased feeding costs - swath grazing;
- Increased feeding costs - bales;
- Loss of grazing adjacent to roads;
- Loss of livestock production performance (herd health program);
- Loss of value of subdivisions; and
- Compensation for each additional well on the pad sites at \$750.00 based on the impact being similar to that on a home quarter.

Weleschuk used a rate of \$180.00 per hour when assessing the loss arising from the increased time spent by the Babbs. He relied on the agreement between the Babbs and CNRL for the compensation that was paid for time spent “...on negotiating the terms of this Agreement and on engaging the services of service providers in relation to this Agreement....”¹⁷

In light of the use of NW 35 as a cultivated field, Weleschuk’s estimate of the adverse effect of the NW 35 site did not include the following factors: increased cost of managing livestock, increased costs for fence moving, increased feeding costs due to loss of swath grazing, increased feeding costs for bales and bale handling, and loss of grazing adjacent to roads. He did estimate that there would be new corners required in the field operations with an associated loss of production.

¹¹ Closing oral submission of Counsel for the Babbs

¹² Exhibit 5 at page 27

¹³ Exhibit 2 at Tab 3

¹⁴ Exhibit 5 at page 30

¹⁵ Exhibit 5 at page 14

¹⁶ Exhibit 6

¹⁷ Exhibit 5 at Tab 7

Weleschuk based his assessment of the compensation for general disturbance on the “typical rate in the area, based on single well leases”¹⁸ being \$1,900.00. He opined that twice that rate should be used for the pad sites located in Section 2 – the basis being that all of the sites are equivalent to home-quarter sites because they are visible from the yard and house and “...there is very little sound attenuation, no visual screening especially during night time drilling hours, and little difference in the dust and odours at the yard site emanating from the other three pad sites.”¹⁹ In addition, it is suggested that the construction activity for the multiwell pad sites would be double that for a single well.

Weleschuk used the same \$750.00 rate for general disturbance compensation for additional wells in Section 2 that he utilized for adverse effect. He again relied on the similarity to home-quarter impact for the whole of Section 2.

In his oral evidence he acknowledged that the home quarter analysis did not apply to NW 35 and the rates should be reduced to \$1,900.00 for that site and \$500.00 for each additional well.

The Babbs acknowledge that the roadway sites overlap, for the large part, with the areas granted for roads under one or more of the orders for pad sites. It is their position that compensation should be payable for roadway-only sites for land value, loss of use, general disturbance, and adverse effect. The basis for that position is that if compensation is not payable for all categories and one of the pad sites is abandoned and the relevant order revoked, compensation would not be payable for the ongoing use of the road.

6.0 DECISION

6.1 The compensation payable under the Orders shall be payable based on the following:

Table 4 – Summary of Compensation Findings by Category

Board File	Site/Road Description	Acreage of Area Granted	Land Value at \$1,270.00 per acre	Loss of Use at \$350.00 per acre	General Disturbance	Adverse Effect	Additional Wells for 1 st year/ for each subsequent year
RE2011.0157	11-2 Site 11 wells	9.01	\$11,442.70	\$3,153.50	\$2,200.00	\$3,380.00	\$12,500.00/\$6,250.00
RE2011.0158	SE 2a Road	4.35	\$1,905.00	\$525.00	\$600.00	\$600.00	\$0.00/\$0.00
RE2011.0159	NW 35 Site 3 wells	4.24	\$5,384.80	\$1,484.00	\$1,900.00	\$2,200.00	\$2,000.00/\$1,000.00
RE2011.0160	7-2 Site 7 wells	10.77	\$13,677.90	\$3,769.50	\$1,900.00	\$2,980.00	\$7,500.00/\$3,750.00
RE2011.0161	9-2 Site 10 wells	8.40	\$10,668.00	\$2,940.00	\$1,900.00	\$3,180.00	\$11,250.00/\$5,625.00
RE2011.0162	SE 2b Road	4.35	\$0.00	\$0.00	\$600.00	\$600.00	\$0.00/\$0.00
RE2011.0164	5-2 Site 10 wells	12.63	\$16,040.10	\$4,420.50	\$1,900.00	\$2,980.00	\$11,250.00/\$5,625.00
RE2011.0165	SW 2 Road	1.88	\$0.00	\$0.00	\$600.00	\$600.00	\$0.00/\$0.00

¹⁸ Exhibit 5 at page 28

¹⁹ As above

6.2 The first year compensation and annual rate of compensation payable under the Orders is as follows:

Table 5 – Summary of First Year and Annual Rate of Compensation Payable²⁰

Order No.	Site/Road Description	Acreage of Area Granted	First Year Compensation	Annual Rate of Compensation for each subsequent year
RE2011.0157	11-2 Site	9.01	\$32,676.20	\$12,783.50
RE2011.0158	SE 2a Road	4.35	\$3,630.00	\$1,125.00
RE2011.0159	NW 35 Site	4.24	\$12,968.80	\$4,684.00
RE2011.0160	7-2 Site	10.77	\$29,827.40	\$10,499.50
RE2011.0161	9-2 Site	8.40	\$29,938.00	\$11,745.00
RE2011.0162	SE 2b Road	4.35	\$1,200.00	\$600.00
RE2011.0164	5-2 Site	12.63	\$36,590.60	\$13,025.50
RE2011.0165	SW-2 Road	1.88	\$1,200.00	\$600.00

6.3 The compensation is payable to the respective owners of the Land under each order as set out in Table 1.

6.4 Interest is payable on any outstanding compensation payable on and from the date of the right of entry order at the Bank of Canada rate in effect on the date the right of entry order was made.

6.5 The determination of what costs are payable is reserved.

7.0 ANALYSIS AND FINDINGS

It is generally accepted that the Panel should assess the appropriate first-year compensation under four categories of compensation, being:

- a. Value of the land in the area granted (Land Value) – Section 25 (a) and (b) of the *Act*;
- b. Loss of use of the area granted (Loss of Use) – Section 25 (c) of the *Act*;
- c. Adverse effect of the area granted on the remaining land and the nuisance, noise and inconvenience associated with the operations of the operator (Adverse Effect) –Section 25 (d) of the *Act*; and
- d. Nuisance, noise, and inconvenience in the first year (General Disturbance).

Section 25(1)(f) of the *Act* allows the Panel to consider other factors when determining compensation. This provision is typically used when there are unique or unusual circumstances to consider. Section 25(6) of the *Act* provides for the reduction of the amount payable for first year compensation by the amount paid under Section 20 of the *Act*.

²⁰ First Year Compensation is based on the total of each category. The rate of compensation payable in subsequent years does not include the compensation for land value or general disturbance.

The Board is obligated to determine compensation for ongoing losses by setting the rate of compensation to be paid on an annual or other periodic basis. Typically that rate is the sum of the compensation for Loss of Use and Adverse Effect.

The Courts have repeatedly stated that the greatest weight should be placed on evidence which establishes a pattern of dealings for the compensation payable under surface leases and right of entry orders (see, for example, *Enbridge Pipelines (Athabasca) Inc. v. Karpetz*²¹). If such a pattern is established, then there must be cogent reasons to depart from the pattern when determining compensation, in which case compensation is to be determined based on the site-specific evidence presented at the hearing.

7.1 Issue 1 – Compensation for Pad sites

a. Pattern of Dealings

As stated in *Conocophillips Canada Resources Corp. v. Lemay*²²:

Our Court of Appeal continues to reaffirm the pattern of dealings methodology, as recently as in *Imperial*, where at para. 21 the court states:

The meaning and import of pattern of dealings is well established. A pattern of dealings arises “where there are such a number of deals established so that it may be said that a pattern has been established by negotiation between the landowners and oil companies in a district”. The Board should depart from such a pattern for only the most cogent reasons: see *Livingston v. Siebens Oil & Gas Ltd.* (1978), 8 A.R. 439 (C.A.) at para. 11; *Petryshen v. Nova* (1982), 23 Alta. L.R. (2d) 193 (C.A.). The principle contemplates “comparable” patterns of dealings, in terms of the rights granted, the type of land, proximity, date, acreage and the nature of the parties.

The evidence CNRL presented in support of a pattern consists of 38 agreements for pad sites (the Comparables) within a four-township area near the Land²³.

The Panel finds that an applicable pattern was not established for the following reasons:

- i. The Land is used as part of a large cattle operation. The Comparables do not include an agreement for a similar use of land, let alone a “number of deals” with a similar use.
- ii. The compensation payable under the Comparables is not consistent:
 - Land Value ranges from \$1,000.00 to \$1,200.00;
 - Loss of Use ranges from \$250.00 to \$350.00;
 - Adverse Effect ranges from \$1,860.00 to \$2,520.00;
 - General Disturbance ranges from \$535.00 to \$2,000.00.
- iii. The agreements are with only two operators: CNRL and Devon Canada Corporation (Devon). All of the Devon agreements include payment of “additional compensation” ranging from \$1,100.00 to \$1,565.00. No satisfactory explanation of the reason for such payments was provided. The CNRL agreements did not include such a payment.

²¹ 2010 ABQB 108 at para 165

²² 2009 ABQB 72 at page 39

²³ Exhibit 3

Having found that an applicable pattern was not established, the Panel considered the site-specific information presented with respect to each category of compensation.

b. Land Value

CNRL proposed an allocation for Land Value of \$1,270.00 per acre based on the price paid by the Babbs for approximately 145 acres located at SE 8-63-4-W4M in October 2012. That date is almost a year after the effective date for this determination. Weleschuk presented evidence of increasing farmland values through 2011.²⁴

The Panel considered Weleschuk's opinion that compensation for Land Value should be \$2,000.00 per acre to be unreliable and placed essentially no weight on his evidence. He is an appraiser but specifically stated that his report was not an appraisal. He did not provide a reason for not preparing an appraisal. As a result, the comparable land sales he selected were not adjusted for such standard factors as time, location and size. He did not conduct the due diligence that would be undertaken for an appraisal. He initially concluded that the unadjusted sales data supported a value of \$1,600.00 per acre but then increased that to \$2,000.00 relying on a comment apparently made during a panel discussion at a conference that "... energy companies typically pay a rate for land value at the upper end of the price range in the area."²⁵ He also comments that \$2,000.00 per acre value would be for "... pure agricultural quarter sections without a subdivision" apparently ignoring the subdivisions taken from several of the parcels in question.

The Panel acknowledges the information that the purchase price of the land at SE 8-63-4-W4M should be adjusted upwards because of the circumstances surrounding the sale. The Babbs had rented the land for several years and thus had a relationship with the vendor. The price was agreed to without the land being advertised. The sale did not include two subdivisions from the land, one of which subsequently sold for a much higher price. Weleschuk did not provide an opinion on the appropriate quantum of such an adjustment.

The Panel was not provided with sufficiently precise information to calculate an adjustment for time to account for the sale date being after the effective date of this determination. The evidence did not provide information on when the agreement was reached as opposed to when it was registered. In light of the evidence of a rising market, the earlier the agreement was reached, the smaller the adjustment for the time difference.

CNRL's acknowledgment that the \$1,270.00 per acre price is the proper amount of compensation supports a conclusion that the values in the Comparables in the \$1,000.00 to \$1,200.00 per acre range are too low.

The Panel considered the fact that the use of the Land varies from site to site, which could lead to a conclusion that the value for the Land should also vary. In light of the fact that the position of both parties was that the same value should apply to all the sites, the Panel determined that one land value for all of the sites was appropriate.

On balance, the Panel finds the upward adjustment for the circumstances surrounding the sale of the land at SE 8-63-4-W4M and the negative adjustment for the post-effective-date sale in a rising market result in an offset. Compensation for Land Value is payable based on \$1,270.00 per acre.

²⁴ Exhibit 7

²⁵ Exhibit 5 at page 27

c. Loss of Use

This category is intended to compensate for the loss arising from a reduction of the acreage available for use, being the area granted.

Weleschuk proposed that compensation for Loss of Use should be based on \$440.00 per acre. The evidentiary foundation for that assessment makes it unreliable.

He used yield and pricing data for rotational crop production, even though four of the five pad sites are located on land that is not used for that purpose. The yield data was said to be based on the Babbs' actual production, but little, if any, supporting information was provided. The pricing information was not based on sales by the Babbs but taken from what Weleschuk described as "Current prices quoted in the November 2, 2012 Crop Market Review...."²⁶ He did not use any historical averaging but used what he said was a historic high.

As with land value, the parties both proposed using one rate for Loss of Use compensation. Although the use varied from one location to another, there was insufficient evidence from which separate rates for each site could be determined.

The compensation for Loss of Use in the Comparables ranges from \$250.00 to \$350.00 per acre. As set out above, the Panel does not accept that an applicable pattern exists. There is insufficient reliable evidence of the revenue from the Babbs' operation upon which to base the determination of compensation for Loss of Use. The Comparables provide the best information for this determination. CNRL proposed using \$350.00 per acre, which is the rate at the top of the range of the Comparables. The Panel finds that compensation for Loss of Use is payable based on \$350.00 per acre.

d. General Disturbance

Compensation under this category is to account for the additional activity in the first year after the taking and the resulting increase in nuisance, noise, and inconvenience. It recognizes that there is more time spent by landowners and occupants interacting with operators and that construction typically occurs during that time period.

CNRL proposes compensation of \$1,900.00 for each of the pad sites based on the Comparables.

With little, if any, supporting information, Weleschuk suggested that \$1,900.00 was the "...typical rate in the area, based on single well leases."²⁷ He then doubles the compensation to \$3,800.00 for several factors including:

- the size of the pad sites compared to single well leases;
- recognition of the whole of Section 2 being impacted as a home quarter since CNRL's activity affects the entire area; and
- "...the construction activity is easily double"²⁸ on the pad sites compared to single well sites.

²⁶ Exhibit 5 at page 30

²⁷ Exhibit 5 at page 28

²⁸ Same as note 25

In his oral evidence, Weleschuk acknowledged that those factors do not apply to the NW 35 Site and that the compensation should be \$1,900.00.

The Panel was provided with insufficient information to support the position that \$1,900.00 is the typical compensation for General Disturbance for a single-well site in the area. The Comparables are all for multiple well pad sites. Only three of those agreements allocate compensation for this category at \$1,900.00 or more.

The Panel addresses the site-specific impact of the multiple well pad sites on Section 2 below under Compensation for Additional Wells. To do so here as well would result in overcompensation.

Compensation for General Disturbance of \$1,900.00, without consideration of the additional well compensation, is at the higher end of the range for pad sites in the area. Compensation at that higher level is supported by the fact that, in its position, CNRL acknowledged that this was the amount for compensation for General Disturbance and the activity associated with the first year of operations. Based on the information provided, the Panel finds that \$1,900.00 is payable for each of the subject pad sites, except the 11-2 Site.

CNRL submitted that the Comparables support a conclusion that compensation for General Disturbance is not different for home quarter sites. A review of the Comparables provides some support for that position, but there is insufficient information available about the proximity of those sites to the residences and farmyards to allow for a true comparison to the 11-2 Site. Considering the information about the sight-lines between the Babbs' home and the site, particularly the photograph at page 10 of Exhibit 5, the Panel finds that the compensation for General Disturbance for the 11-2 Site should be \$2,200.00.

e. Adverse Effect

This category is intended to provide compensation for the nuisance, noise and inconvenience associated with CNRL's operations and for the negative impact on the remaining land outside the area granted.

The position of the Babbs is based on Weleschuk's assessment. He started from what he called a base rate of \$2,400.00 and then added additional compensation for various factors.

To support his base rate, Weleschuk relied on Board decisions, No. 2011/0583 and No. 2011/0940, and the compensation payable under the leases on 15-2, at \$2,610.00 for a multi-well pad site, and on 13-2, at \$1,932.00 for a single-well site. The decisions are of little assistance, since they deal with land located near Irma and Wainwright, respectively, and are based on evidence pertinent to that area. Both of the leases referred to are on land much closer to Brian and Rita Babb's residence and farm yard than the sites in question.

The range of compensation for Adverse Effect in the Comparables provided by CNRL is from \$1,860.00 to \$2,645.00. The most common amount was \$2,100.00, with home quarter sites being higher. As noted above, all of those agreements are for multiple well pad sites located within four townships of the Land. The agreements are dated between October 2010 and January 2012. The Panel considers the Comparables to be much better indicators of the compensation being paid in the area than the information relied upon by Weleschuk.

i) NW 35 Site

This site is different in many respects from those located in Section 2. The land is used for rotational crop production, and the site has no access road, since it abuts the municipal roadway. It is separated from the cattle operation in Section 2, and it is distant from the residence and farmyard located in the northwest corner of NW 2. The area of 4.24 acres granted is significantly smaller than the other pad sites, which range from 8.4 to 12.63 acres.

Weleschuk proposed increases to his base rate for this site based on three factors: land loss due to new corners, increased fence maintenance, and loss of subdivision value.

This is cultivated land. New corners, especially on a boundary site without a road, are the reality of all well sites. There was insufficient information provided to support any additional compensation. No reason was provided why the site needed to be fenced; CNRL did so at the request of the Babbs, and CNRL agreed to provide fence maintenance.

There was evidence of the M.D. of Bonnyville's subdivision policy²⁹. Insufficient information was provided to find that this location is any more likely to be subdivided than any other rural parcel.

The Panel considers the Adverse Effect of this site to be the smallest of the subject pad sites. CNRL proposes compensation for adverse effect at \$2,200.00 for this site. From a review of the Comparables, \$2,100.00 is the most common amount allocated for Adverse Effect. Based on the information provided and the limited impact of this site, the Panel finds that compensation for adverse effect of \$2,200.00 – the amount proposed by CNRL – is appropriate.

ii) 11-2 Site, 7-2 Site, and 5-2 Site

All of these sites are located on Section 2. The 11-2 Site is on the home quarter. The sites are all connected by a roadway leading from the municipal road on the eastern boundary of Section 2.

The Panel's consideration of each of the factors which Weleschuk advanced as the basis for increasing compensation on these sites resulted in the following findings:

- Increased cost of managing livestock

Weleschuk suggested that additional time would be required to move cattle due to the presence of the sites and additional fencing. He advanced a claim based on 136.25 hours of increased labour to be compensated at \$180.00 per hour.

The Panel accepts that some extra time may be required. Weleschuk did not provide any support for the amount of increased time claimed. The Babbs did not provide an estimate based on their experience. The hourly rate proposed is that agreed to for negotiating with CNRL³⁰. It is not a rate for moving cattle.

The Panel finds that the quantum of compensation for this factor has not been established. The Panel has however taken this factor into account when determining compensation for adverse effect.

²⁹ Exhibit 5 at pages 41 - 42

³⁰ Exhibit 5 at Tab 7

- Increased costs associated with moving fences and fence maintenance

Weleschuk acknowledged that he did not take into consideration the presence of existing fencing when he assessed this factor. He also did not consider CNRL's agreement to repair fences nor the condition of the older fences which were replaced with new fencing. He uses custom rates which includes a profit component which is not compensable. He did not provide satisfactory support for the amount of time he suggested would be required. The Babbs did not provide an estimate based on their experience.

The Panel finds that the quantum of the compensation for this factor has not been established.

- Increased feeding costs due to loss of swath grazing

Weleschuk based the compensation for this factor on there being about 23.5 fewer acres available in the E 1/2 – 2 for swath grazing. He then attempted to calculate the incremental cost of having to feed silage which was not necessary when those acres could be swath grazed. The evidence did not establish what amount, if any, additional silage has been required. The quantification was based on data from Alberta Agriculture, including custom rates with a profit component.

The Panel finds that the quantum of the compensation for this factor has not been established. The Panel has however taken this factor into account when determining compensation for adverse effect.

- Increased feeding costs for bales and bale handling

Weleschuk based the compensation for this factor on two components. First, he maintained, with very little if any supporting evidence, that five extra hours would be required each year to replace the practice of unrolling bales on the slope on SW 2. Second, he "... assumed that an additional ten hours per year will be required to haul feed out to SE ¼ 2 to attract cattle to that pasture area."³¹ The Babbs did not provide convincing supporting evidence based on their experience. The Panel has however taken this factor into account when determining compensation for adverse effect.

The Panel finds that the quantum of the compensation for this factor has not been established.

- Loss of grazing adjacent to roads

Weleschuk based the compensation for this factor on dust from the access road on Section 2 settling on both sides of the road resulting in the grass being unpalatable. Again without supporting information, he estimated that an area of 150 feet on each side of the road would be impacted and would be lost from production.

Weleschuk's analysis did not mention variables such as rainfall and prevailing winds. He provided no support for his assumption that the entire area would not have any utility for grazing. He then applied a rate for the cost of silage which is not based on the Babbs'

³¹ Exhibit 5 at page 36

experience but on statistical averages. The Panel considers this analysis, like the others above, to be essentially hypothetical.

As discussed above, the roadway connecting the 11-2 Site, 7-2 Site, and 5-2 Site will be heavily used. The Panel has no doubt, as confirmed by Brian and Rita Babb, that there is a considerable amount of dust generated by that use. The extent to which there is more dust resulting in a quantifiable loss greater than that associated with other sites was not established.

- Loss of livestock production performance (Herd Health Program)

This factor is addressed separately in this decision.

- Loss of value of subdivisions

Weleschuk postulated that the presence of the pad sites would reduce the likelihood of selling a subdivision of out each quarter section. He attempted to quantify the "... option of selling this parcel"³² by an estimated value on land adjacent to a creek in NW 25 which is not subject to this proceeding. The basis of that estimated value is not provided. He then annualized the loss by applying the rate of the Babbs' operating loan.

As discussed above when addressing adverse effect compensation for the NW 35 Site, the evidence does not support an increase in compensation for this factor. It is seen by the Panel as being, at best, hypothetical.

In summary, the Panel finds that the quantum of the compensation for these factors has not been established, which does not mean the cumulative impact of these multiple well sites on the operation carried out on Section 2 is not greater than if only one such site had been established. The Panel addresses that issue below in the Additional Wells and Additional Adverse Effect sections.

The most common allocation of compensation for adverse effect in the Comparables was \$2,100.00. The Panel finds that CNRL's proposal of \$2,200.00 for each of the 7-2 Site and 5-2 Site is appropriate. This reflects the individual impact of each site on a stand-alone basis without addressing the cumulative effects of four multi-well pad sites on the Babbs' cattle operation on Section 2.

The 11-2 Site is on the home quarter. In Exhibit 3, under Tab B, the Operator provides a chart overview of home quarter sites which shows compensation for Adverse Effect ranging from \$1,945.00 to \$2,610.00. The information about those sites makes it difficult to determine the extent of the impact in comparison to the 11-2 Site. Weleschuk estimated that Brian and Rita Babb's residence is approximately 600 meters from the site³³. CNRL provided a shorter estimate of about 330 meters. A photograph depicting the view of the site, including the large black tanks, shacks, and bullet propane tank provides clear visual evidence of the impact of this site on the Babbs.³⁴ The Babbs also testified about noise and smell, which they frequently experience in the area round the farmyard. After considering those additional factors associated with this site, the Panel determines that compensation for adverse effect is \$2,600.00.

³² Exhibit 5 at page 41

³³ Exhibit 5 at page 28

³⁴ Exhibit 5 at page 10

iii) 9-2 Site

This site is located on land used for swath grazing. It is physically removed from the road connecting the 11-2 Site, 7-2 Site and 5-2 Site. As such, it has less impact on the cattle operation. Part of the site is a short road at the north end of the site from the municipal road on the east side of Section 2. This creates a narrow 'neck' area between the site and the municipal road which Brian Babb testified cannot be accessed with his farm equipment. No reliable information on the size of that area was provided.

In the comparable the loss of cultivation and need to control weeds in that area are factors supporting compensation above the more common level of \$2,100.00. No reliable estimate of that loss was provided, but the Panel finds compensation of \$2,400.00 for adverse effect for this site is appropriate.

f. Additional Wells

Both parties acknowledged that it is common practice in the area for compensation of \$1,000.00 in the first year and \$500.00 in each year thereafter to be paid for additional wells. This compensation is intended to reflect the increased impact of having multiple wells located on a pad site. Those amounts are consistently used in the Comparables to the extent that a pattern of dealings for that specific category can be said to have been established.

As acknowledged by Weleschuk³⁵, there is no basis to deviate from that compensation for the NW-35 Site.

The Babbs submit that the subsequent year compensation should be increased to \$750.00 for each of the other pad sites. The basis of that position is that the entirety of Section 2 should be considered as home quarter to account for the intrusion of the sites into the entire cattle operation on Section 2.

The Panel views the development of these four pad sites with licensing for 38 wells on land used for a large cattle operation to be atypical, if not unique. The impact, especially in the winter/spring non-grazing seasons, is significant. To a large extent, that impact is not from the presence of the sites themselves but rather from the number of wells and the activity arising from them.

CNRL submits that since the Babbs asked for fences to be installed around the roads and pad sites, little or no compensation should be payable for any additional impact arising from the fencing. Brian Babb explained that the reason he wanted the fencing is the safety of his herd. The traffic required to service 38 wells, most of which is travelling on one road, creates a major hazard.

Mr. Babb went on to explain that he now encounters challenges when attempting to move cattle and machinery through the gates in the fences on both sides of the road connecting the 11-2 Site, 7-2 Site, and 5-2 Site. Extra time and manpower are required.

The presence of that number of wells is going to increase the level of dust and noise beyond what would be created by one multiple-well pad site.

The Panel was not satisfied that the amount of compensation for the factors set out by Weleschuk had been proven on an empirical basis. The intrusion into the Babbs' everyday life and cattle operation is worthy of compensation. A more global approach of increasing the compensation for each additional well is the method chosen by the Panel to achieve that goal.

³⁵ Exhibit 5 at page 28

Weleschuk proposed an increase of 50 percent from \$500.00 to \$750.00 per additional well for the wells in Section 2. Given that when all of the licensed wells have been completed, there will be 34 additional wells in Section 2 that would equate to compensation each year of \$8,500.00 more than that based on the standard rate of \$500.00 per additional well.

On balance, the Panel finds that increasing the compensation for each additional well to \$1,250.00 in the first year and to \$625.00 in each year thereafter provides for adequate compensation for the increased impact arising in this unusual circumstance. As stated above, the factual basis for that level of compensation does not apply to the NW 35 Site for which compensation of \$1,000.00 per additional well is payable for the first year and \$500.00 for each additional well for each subsequent year is payable.

g. Additional Adverse Effect

The Babbs provided a report from W.R. Prybysh, DVM in which that veterinarian opined that "... the oil pads have had a considerable effect on [the Babbs'] cows' production."³⁶ He has provided veterinary services to the Babbs for several years. Following an examination of some of the Babbs' calves on January 2, 2013, he stated that the calves "... appear stunted, with rough hair coats, and their heads larger than normal in comparison to their body size."

He then went on to state:

The only difference in [the Babbs'] operation this past year has been the construction of several oil pads on their property. This has led to a great deal of activity, with an increase in heavy traffic, noise, dust, and often a very noticeable smell of volatile naphthalene in the air. On one occasion, when the Babbs tried to move these cows past the pad to a new pasture the cattle refused to go.

It is well known, that sudden loud noises may disturb cattle and lead to decreased milk production. More truck traffic leads to more dust which decreases the palatability of the grass. With a long road running through their low land pasture there can be less production from the cows. Volatile naphthalenes can be toxic when they are inhaled or ingested, but I do not know of any research to show at what level this toxicity occurs.³⁷

The Panel recognizes that Dr. Prybysh did not appear at the hearing, and, thus, his opinion was not subjected to questioning. CNRL did not present evidence contrary to nor challenge his opinion. We also note that the opinion is far from definitive and uses the words "... cannot say with 100%, certainty". He relies on information from the Babbs, such as the feeding program, which was not presented at the hearing by the Babbs.

It is, however, the only evidence provided on this issue. Although Dr. Prybysh's opinion is not sufficient to find a causal connection between CNRL's activities and a reduction in the size or quality of the Babbs' calves, it is sufficient to warrant further study. The reasonable costs of that study should be borne by CNRL.

The Panel is persuaded, based on Dr. Prybysh's opinion and the factual information presented, that such a study is required because of the increased activity on Section 2 associated with CNRL's operations. Moreover, the Panel finds that the requirement to undertake such additional monitoring activities is compensable as a nuisance and inconvenience as contemplated under Section 25(1)(d) of the *Act*. In

³⁶ Exhibit 5 at Tab 14

³⁷ Same as note 39 above

making that determination, the Panel is cognizant that Section 25(1)(f) provides an alternate basis upon which to base the compensation being “any other factors which the Board considers proper under the circumstances.”

Dr. Prybysh recommends “constant surveillance” and suggests some possible steps. As set out in his report, Weleschuk consulted with another veterinarian who also made similar recommendations. Then, based on the information provided to Weleschuk, he proposed several activities to create what may best be described as a herd health monitoring program. He provided an estimate of the time each step would take on an annual basis. He applied an hourly rate for the time estimated for both the Babbs and a veterinarian to calculate a yearly cost. The annual cost he proposed was \$58,080.00 to be allocated equally to each of the four subject pad sites in Section 2.

The Panel considers several of those activities to be part of a typical cattle management program. For example, the tagging of calves and recording birth dates are standard practice. As a result, the Panel eliminated some of the activities proposed by Weleschuk.

The following activities were found by the Panel to be steps that are in addition to standard practice and associated with the concern identified by Dr. Prybysh and required as a result of CNRL’s operations:

- A veterinarian inspecting weaned calves and providing advice on feed rations;
- A veterinarian conducting four inspections during feeding period to monitor health and productivity;
- A veterinarian monitoring and analyzing data on a quarterly basis.

Weleschuk estimated that those activities would take 42 hours per year. Applying a rate of \$300.00 per hour, as proposed by Weleschuk, results in an annual cost of \$12,600.00.

The Panel recognizes some latitude must be given to the applicable experts, such as a veterinarian and feed analyst, but suggests consideration be given to the program including the following:

- Annual feed analysis including micro nutrients;
- Annual pregnancy checking of bred females;
- Random blood and tissue sampling by veterinarian;
- Annual semen testing of bull battery;
- Annual inspection of calves at weaning time by a veterinarian and advice on feed rations by veterinarian/feed analyst;
- Four inspections by a veterinarian during feeding/calving period. It should be possible to conduct at least two of these in conjunction with previous veterinarian required visits; and
- A veterinarian monitoring and analyzing data on a quarterly basis

In the absence of any further information about the projected costs of such a program, the Panel finds that compensation of \$12,600.00 based on Weleschuk’s estimates is payable.

Weleschuk included in his proposal 112.5 hours for the Babbs to enter data into a spreadsheet. He then applied the \$180.00 per hour rate referenced above from Exhibit 5 at Tab 7. The Panel acknowledges that some extra time will be incurred by the Babbs but considers that tracking of most of this data is part of a well-administered cattle operation. The use of \$180.00 per hour for data entry is excessive. An allocation of \$3,000.00 is considered reasonable.

The total of \$15,600.00 will be divided equally between the 9-2 Site, the 11-2 Site, the 7-2 Site and the 5-2 Site for the first five year period, which on an annual basis adds \$780.00 per year compensation for Additional Adverse Effect.

The Panel recognizes that it is basing its findings on less than perfect information. It is also recognized that there is no authority to direct the Babbs to proceed with a herd health monitoring program. A review under Section 27 will allow the parties the opportunity to present information on the extent to which such a program should be continued or varied.

Summary of Compensation Payable for the Pad sites

The compensation payable for the pad sites is set out in the following table:

Table 6

Board File No.	Site Description	Land Value	General Disturbance	Loss of Use	Adverse Effect	Each Additional Well First year/each subsequent year
RE2011.0157	11-2 Site	\$1,270.00/acre	\$2,200.00	\$350.00/ acre	\$3,380.00	\$1,250.00/ \$625.00
RE2011.0159	NW 35 Site	\$1,270.00/ acre	\$1,900.00	\$350.00/acre	\$2,200.00	\$1,000.00/ \$500.00
RE2011.0160	7-2 Site	\$1,270.00/acre	\$1,900.00	\$350.00/acre	\$2,980.00	\$1,250.00/ \$625.00
RE2011.0161	9-2 Site	\$1,270.00/acre	\$1,900.00	\$350.00/acre	\$3,180.00	\$1,250.00/ \$625.00
RE2011.0164	5-2 Site	\$1,270.00/acre	\$1,900.00	\$350.00/acre	\$2,980.00	\$1,250.00/ \$625.00

7.2 Issue 2 – Compensation for Roadway-Only Sites

Three of the Orders grant rights of entry for roadways only with no wells. With one exception, the area granted under each of those Orders overlaps with the area granted under one or more of the areas granted for the pad sites. The exception is a portion of the roadway in the SE quarter section (approximately 1.5 acres) (the Exception) from the west boundary of the 7-2 Site to the west boundary of the SE quarter section, which does not overlap area granted under any of the pad site Orders, but is part of the area granted under the Orders for both the SE 2a Road and the SE 2b Road.

The Panel finds that compensation is only payable once for Land Value and Loss of Use on any area granted under the Orders. To base compensation for those categories twice would result in overcompensation since the same area is granted twice. Therefore, other than for the 1.5 acre Exception which will be allocated to the SE 2a Road, no compensation will be payable for Land Value or Loss of Use on the roadway only sites.

There is, however, an incremental increase in the nuisance, inconvenience and noise to support compensation being payable for Adverse Effect and General Disturbance under the orders granting entry for a road only.

The Panel does not accept the Babbs' submission that there will be a shortfall in compensation if one of the Orders is revoked. If there is no longer an overlap, a Respondent would be able to apply for a reconsideration of the compensation payable under the surviving Order.

a. Pattern of Dealings

There is a limited amount of evidence about compensation payable for road-only sites. CNRL provided four road-only agreements, none of which are overlapping sites.³⁸ The Babbs referenced the agreement for the access road for the 15-2 Site mentioned previously. Neither party argued that a pattern had been established and the Panel finds that there is insufficient evidence upon which to make such a finding.

b. Land Value

As determined above, no compensation is payable for this category, except for the 1.5-acre Exception on the SE 2a Road. The same compensation of \$1,270.00 per acre determined for the pad sites will be applied.

c. Loss of Use

As determined above, no compensation is payable for this category, except for the 1.5 acre Exception on the SE 2a Road. The same compensation of \$350.00 per acre determined for the pad sites will be applied.

d. General Disturbance

Compensation is already being awarded for the underlying right of entry. Any additional compensation is only for the additional or incremental impact from the overlapping road. There is essentially no evidence of the amount or nature of such an increase.

The Babbs did not provide evidence of compensation payable in similar circumstances.

There was an allocation for this category under only two of the four road-only agreements provided by CNRL, being \$600.00 and \$1,200.00.³⁹ Neither of those involved overlapping areas.

CNRL proposed using the amount of \$350.00 payable under the agreement for the 0.52 acre access road to the 15-2 Site. The area granted on the subject road-only sites ranges from 1.88 acres to 4.35 acres; thus supporting a greater impact.

In the absence of any other cogent evidence, the Panel finds that basing compensation on the amount equivalent to the lower amount payable under the road-only agreements is appropriate.

Compensation of \$600.00 is payable for General Disturbance on each of the three road-only sites.

e. Adverse Effect

This compensation is also only for the incremental impact. The adverse effect of the roadway has been compensated under the Orders for the associated overlapping land taken. Additional compensation would

³⁸ Exhibit 4

³⁹ Exhibit 4

result in overcompensation. The allocation under the road-only but not overlapping agreements presented by CNRL ranged from \$600.00 to \$2,025.00.

The Babbs did not provide evidence of compensation payable in similar circumstances.

As with the compensation for General Disturbance, the Panel concludes the low end of the range payable under the road-only agreements is appropriate.

Compensation of \$600.00 is payable for Adverse Effect on each of the three road-only sites.

Summary of Compensation for Road-Only Sites

The compensation payable for the road-only sites is set out in the following table:

Table 7

Board File No.	Site/Road Description	Land Value	General Disturbance	Adverse Effect	Loss of Use
RE2011.0158	SE 2a Road	\$1,905.00 (1.5 acres @\$1,270.00)	\$600.00	\$600.00	\$525.00 (1.5 acres at \$350.00)
RE2011.0162	SE 2b Road	\$0.00	\$600.00	\$600.00	\$0.00
RE2011.0165	SW 2 Road	\$0.00	\$600.00	\$600.00	\$0.00

7.3 Issue 3 – To Whom is the Compensation Payable

In addition to determining the compensation payable, Section 23 of the *Act* directs the Board to determine to whom the compensation is payable.

The parties did not make submissions on this issue.

In the absence of reasons to determine otherwise, the Panel finds that the compensation is payable to the registered owners of the land at the date of the respective Orders as set out in Table 1.

7.4 Issue 4 – Interest

The Babbs sought payment of interest “on the initial compensation at the Bank of Canada interest rate from the date of the Right of Entry Orders to the date of the Board’s decision.”⁴⁰

CNRL did not make a submission on this issue.

The Board’s authority to order CNRL to pay interest is set out in Section 25(9).

Interest is payable on any outstanding compensation payable on and from the date of the right of entry order at the Bank of Canada rate in effect on the date the right of entry order was made.

⁴⁰ Written Submission at para 31

7.5 Issue 5 – Costs

At the close of the hearing, the parties requested the Panel to reserve on the issue of costs payable under Section 39 of the *Act* to allow them an opportunity to resolve that issue.

In the event the parties have not reached an agreement on the costs that are payable, the Panel directs that written submissions on costs be provided to the Board (five copies) and the opposing party in accordance with the following timelines:

- the Babbs – within two weeks of the date of the decisions;
- CNRL – within two weeks of receiving the submission of the Babbs; and
- the Babbs' Reply – within one week of receiving the submission of CNRL.

Leave is granted to request a change to those timelines in the event they cannot be met.

8.0 ORDERS

Orders will issue setting out the compensation as determined in this decision.

Dated at the City of Edmonton in the Province of Alberta on August 29, 2013

SURFACE RIGHTS BOARD

MEMBER
E. GORDON CHAPMAN



APPENDIX A

The following documents were entered as exhibits during the hearing:

Number	Description	Entered by:
1	Agreed Statement of Facts	Agreement
2	Evidence of CNRL – Volume 1	CNRL
3	Evidence of CNRL – Volume 2	CNRL
4	Evidence of CNRL – Volume 3	CNRL
5	Report of Weleschuk Associates Ltd., dated January 2013	Babb Family
6	Canada's Farm Income Forecast for 2011 and 2012	Babb Family
7	Farm Credit Canada – Spring 2012 Farmland Values Report	Babb Family
8	Weleschuk Associates Ltd. comments on CNRL Information Disclosure	Babb Family

APPENDIX B

Compensation

23 On making a right of entry order, the Board shall, in accordance with its rules, hold proceedings to determine the amount of compensation payable and the person to whom it is payable.

RSA 2000 cS-24 s23;2009 31 s8

Determining 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....*

(6) When the Board makes a compensation order, it shall offset the amount paid as part payment of compensation to the respondent under section 20 or to the Board under section 22 against the total compensation it determines to be payable to the respondent, and....

(7) In determining the amount of compensation payable, the Board may fix certain amounts payable in the manner and over the periods the Board decides.

...

(9) The Board may order the operator to pay interest on any or all of the compensation payable on and from the date the right of entry order was made, at the Bank of Canada rate on the date the right of entry order was made.

1983 cS-27,1 s25