File No. RE 2005.0161 Decision No. 2007/0037

SURFACE RIGHTS ACT
RSA 2000
Chapter S-24
(hereinafter "the *Act*")

Before:

SURFACE RIGHTS BOARD
(hereinafter "the Board").

IN THE MATTER OF certain lands within the South East Quarter of Section 34, Township 51, Range 4, West of the 5th Meridian, in the Province of Alberta (hereinafter referred to as "the said land").
Excepting thereout all Mines and Minerals.

B E T W E E N:

TRANSALTA UTILITIES CORPORATION,

Operator,

- and -

FERNE CYMBALUK,
PHILIP CYMBALUK,
DAVID CYMBALUK,
ALTALINK MANAGEMENT LTD.
and
CANADIAN IMPERIAL BANK OF COMMERCE,

Respondents.

D E C I S I O N

Order No. 1649/2005 granting right of entry to the Operator was issued by the Board November 8, 2005.

The land subject to the said Order is 161 acres for a coal mine in the said land.

A hearing was held by the Board on June 1, 2006, at Edmonton, Alberta.

The Board inspected the area subject to the said Order on July 17, 2006.

PRESIDING BOARD:

- D. M. Broda, Presiding Chair
- C. W. Downey
- D. Clarke

APPEARANCES:

For the Operator:

- John A. Kosolowski, with the law firm Duncan & Craig LLP, Legal Counsel;
- Bruce Simpson, AACI, P.Ag., with Serecon Valuation & Agricultural Consulting Inc.
- Cam Bateman, M.Sc., R.P.F., Manager, Technical Services, with TransAlta Utilities Corporation; and
- Gordon McCormick, SR/WA, Consultant, Land Admin., with TransAlta Utilities Corporation.

For the Respondents:

- Richard C. Secord, with the law firm Ackroyd, Piasta, Roth & Day LLP, Legal Counsel;
- Robert A. Berrien, P.Ag., A.R.A., President, Berrien Associates Ltd., Appraisers; and
- Ferne Cymbaluk, Philip Cymbaluk and David Cymbaluk, Landowners.

AltaLink Management Ltd. and the Canadian Imperial Bank of Commerce were not represented although duly notified of the hearing.

EXHIBITS FILED:

Exhibit 1: Book of Documents.

Exhibit 2: Berrien Associates Ltd.'s Report.

Exhibit 3: Operator's written submission.

Exhibit 4: Case Law and Mine Plan.

Exhibit 5: Appraisal Report prepared by Serecon Valuation & Agricultural Consulting Inc.

Exhibit 6: Pictures and production data.

Footnote: It is noted that since time did not permit the finalization of the hearing on June 1, 2006, both parties provided written submissions to the Board relative to their rebuttals. This material came into the Board's hands approximately three weeks after the hearing.

Exhibit number 2 was filed for the Respondents. Exhibit numbers 1, 3, 4, 5 and 6, were filed for the Operator.

The meeting was called to order, introductions were made and the oath administered.

Preliminary Matters:

Mr. Bruce Simpson, consultant for the Operator, had placed a market value of $234,425.00 on the subject quarter of land. Mr. Berrien, acting for the Respondents, had valued the subject property at $177,000.00. By agreement of both parties, $220,000.00 was ascertained to be the correct valuation and the one to be used for the purposes of evidence. It was noted that $8,456.00, representing 80% of TransAlta's last offer plus the entry fee, had been paid to the Respondents Ferne Cymbaluk, Philip Cymbaluk and David Cymbaluk.

SUMMARY OF THE EVIDENCE:

The bulk of the evidence and argument was provided to the Board by way of Exhibits and written rebuttals. What follows is a summary of that evidence.

Operator's Evidence:

Mr. Gordon McCormick, speaking for the Operator, related for the Board a description of the subject quarter and a history of their negotiations with the Respondents. The quarter is comprised of 161 acres, made up of approximately 100 acres of cropland or cultivated pasture land and 60 acres of bush and wildlife habitat. The lands had been purchases by the Respondents in late 2001, at which time it was located within the mining permit area. The SE ¼-34 is the southern limit

of their permit area, so mining will cease at some point within its boundaries. Since mining will cease within the SE ¼-34, no haul roads or other additional infrastructure will be located there. Two water wells are located on the property, one being currently in use, and this will be replaced as part of their reclamation obligations. They estimate that mining and reclamation will be complete in approximately 15 years, at which time the lands would be returned to the Respondents in a condition equivalent to that which existed prior to mining and in accordance with Alberta Environment standards.

Mr. McCormick described the history of their negotiations with the Respondents.

- Offer to purchase for $250,000.00 for fee simple title was their first choice.

- Offer to the Respondents to lease the W ½-27-51-4-W5M for $1.00 for the life of the right of entry, plus a one time lump sum payment of $81,625.00, or alternatively, a $5,000.00 per year annual payment. Further, if a lump sum payment or an annual loss of use payment is awarded, the W ½-27 will be made available to the Respondents at the rate of $20.00 per arable acre, of which there are 144.

The W ½-27 was described as having 144 farmable acres on it as well as a small lake, which constitutes a reliable water supply. It was noted that this property was diagonally adjoining the SE ¼-34 and was immediately south of the SW ¼-34, a quarter currently owned by the Respondents' family.

Mr. McCormick then apprised the Board of their position relative to residual and reversionary values, citing that in this case no residual value will rest with the taking of the SE ¼-34 as it is a complete taking of the entire quarter. The reversionary value, on the other hand, is a very dominant consideration, and in support of this contention the Operator referenced Justice Dea's remarks in *Cabre Exploration Ltd. v. Arndt (1986) AJ 335 (Alberta Court of Queen's Bench)*, where Justice Dea states: *"Were I to value a 20 year reversionary interest, I would fix it at one third of the fair market value...".*

Mr. McCormick referenced several other court cases and Surface Rights Board decisions and summarized as follows:

...the Board must not disregard the reversionary interest identified by Mr. Simpson and ought to award either the difference between the fair market value and the reversionary interest or annual compensation in the Cymbaluk's case. To do otherwise, would perpetuate a growing belief in landowners that forcing companies such as TransAlta to undertake the Right of Entry Order process will bring about a windfall for the landowner. If a landowner thinks he can get full fair market value for his land and retain the right to the full fee simple title which he will get back in the not to distant future, why would he be interested in selling his land even if the price offered is greater than fair market value? The interest of the ***Act*** *is to compensate the landowner fairly; not to overcompensate him.*

Mr. McCormick then brought to the Board's attention some case law bearing on a landowner's responsibility to mitigate damages. The W ½-27, which was adjoining land and determined to be of greater value than the SE ¼-34, was being made available to the Respondents for the duration of the Right of Entry for the sum of $1.00 per year rent. This, the Operator reasoned, was an attractive substitute property.

Speaking to the adverse effects, the Operator opined that this should not be given consideration, given that the Landowners do not reside on the property and the Right of Entry constitutes a complete taking. In addressing intangible adverse effects, Mr. Simpson further expanded on Mr. McCormick's description of the SE ¼-34, indicating that land quality and topography are not very conducive to annual crop production, but the land lends itself well to perennial forage and grass production. Mr. Simpson indicated that the lands were somewhat beyond commuting distance from Edmonton but well within an area where demand could exist for hobby farm parcels.

Mr. Simpson's summary for compensation for the subject taking is as follows:

Value of land	$229,425.00
Depreciated value of capital improvements (well)	$ 5,000.00
Total value	$234,425.00

Value of reversionary interest......................................$152,800.00
Loss of use per year, based on
203.2 AUM x $18.00 per AUM (rounded).................$ 3,660.00

Adverse effect .... Nil
Intangible adverse effect... Nil
Damage to land .... Nil

Transitional impact ....$ 7,000.00
(This amount was arrived at on the basis of the Respondents' land base being reduced by 161 acres. Since fixed costs would apply to capital cost investment, depreciation, insurance, and management, this impact was calculated at the rate of $60.00 per acre on cultivated land and $20.00 per acre on pasture land.)

<u>Respondents' Evidence</u>:

Mr. Berrien indicated that his date of appraisal coincided with the issuance of the Right of Entry Order, that being November 2005. He indicated that the Respondents acquired their original land in the area in 1958 but did not take up residency until 1974, which was the year that the power plant was being built. Their residence is on the SE ¼-10-52-4-W5M. At their closest point the SE-10 and the SE-34 are 1 ½ miles apart.

Mr. Berrien described the land in much the same way as did the Operator and added that the Respondents have a 220 cow herd, grow most of their own feed, and currently rent 826 acres from the Operator. It was noted that since mine expansion has occurred, it has not been practical to access the SE-34 directly from the E ½-10, the home place, since 2003. Access now entails traversing approximately six miles on local roads.

Mr. Berrien reviewed the various methods that an appraiser can utilize to arrive at the market value of the land, which he originally concluded to be $177,000.00. His calculations, relative to the Respondents' transitional and ongoing costs, are reprinted below.

Estimate of market value of land and damages for disturbance:

Annual Payment Option		**Yr 1**	**Yr 2**	**Yr 3 - 5**
Market Value of Land		$177,000		
Loss of Use		Nil		
Adverse Effect				
Pasture Rental	$6,500			
Move Cattle	$5,400	$11,900	$11,900	
Checking Cows	$2,200			
Intangibles	$2,000	$ 4,200	$ 4,200	$ 4,200
Damage to Land	Nil			
Other Factors				
General Disturbance	$5,000			
Legal Fees	$1,000			
Water Well	$8,100			
Pumping Equipment	$3,200	$17,300	Nil	Nil
Total		**$210,400**	**$16,100**	**$ 4,200**

Mr. Berrien described these items as follows:

- In view of the indefinite nature of the term of the taking, the Respondents should be reimbursed for the appraised value of the land.

- Reimbursement for two years' interim pasture rental until lands in close proximity to their ranch are secured on a permanent basis.

- Trucking costs for moving cattle for two more years.

- Checking cattle regularly, extra time and travel considerations.

- Portable corral rental to enable trucking of cattle.

- Compensation for general disturbance, which Mr. Berrien refers to as the "hassle factor", which includes making alternative arrangements for the cow herd.

- Legal fees may be incurred in acquiring replacement land.

- There were two wells on the SE-34, one of which was in current use. A logical presumption is that a well complete with pumping equipment will be required on the replacement property.

- A single up-front payment option in the amount of $280,000.00 was presented for the Board's consideration.

The following concerns or observations were advanced by the **Respondents**. These are not listed in any particular order.

- Since the Operator would not put a definite term on a lease, it follows that it is only an educated guess that the right of entry will be for 15 years.

- Concerns that the lands will not be returned to the Respondents in as good a condition as prior to mining.

- With mining taking place to a depth of 150 feet, concerns that slumping of earth may occur long after the land is reclaimed. This would diminish the desirability and value of the property for potential subdivision in the future.

- The dewatering of the mined area approximates the existing depth of the water wells; area water wells not destroyed would have diminished pressure.

- Concerns over coal ash being dumped in with the overburden affecting future water quality.

- Relative to the land swap with the W ½-27 for the duration of the right of entry, the Respondents do not want to have business choices limited for the term of the right of entry.

The following was placed on the record for the Board's consideration by the **Operator.**

- The lands will be reclaimed as required by the very stringent requirements of the *Environmental Protection Act.*

- The Respondents purchased the subject lands with full knowledge of the area mining plan.

- Since the SE-34 is the south perimeter of the mining permit, it may not all be disturbed, and since it will have no infrastructure on it — roads, etc. — this will add some certainty to complete reclamation occurring in the planned 15 years.

- The 15-year term for the right of entry is an educated guess.

- Strip-mining often does have a negative effect on nearby water wells by way of reducing pressure.

FINDINGS OF FACT:

The following are:

- The property was as described by the consultants.
- A small area in the northeast corner of the subject quarter had been cleared of brush.
- The two water wells were noted, but no corrals were seen.
- Growing conditions were good, an excellent unharvested crop of alfalfa was growing on the northern portion of the SE-34, and a mixture of volunteer oats, weeds, and grasses were growing on the southern portion.
- The field was fenced and cross-fenced, and it seemed that it was accessed for the most part through the laterally adjoining SW-34.
- The Respondents indicated that their two daughters owned the SW-34 and that his son-in-law et al. owned their own cattle but they were mixed with their cattle and managed as one unit.
- The W ½-27, it seemed to the Board, constituted lands of a similar nature as the SE-34.
- The small lake referenced by the Operator as a stable stock water supply was witnessed and appeared to be located primarily on the NW-27.
- The Respondents noted and the Operator concurred that access to the SE-34 from the home farm had been restricted by mining since 2003. It was noted that access was possible, but hazards created by mine traffic and topographical hazards created by strip-mining rendered this option impractical. The Respondents indicated that the cattle had been moved by a trailer since that time.

DETERMINATION OF COMPENSATION:

Land Value:

The appraisers representing the parties to the hearing came to different conclusions on the value of the subject quarter section. The appraiser for the Operator established a Market Value of Land and Improvements to be $234,425.00 whereas the appraiser for the Landowner established the value to be $177,000.00.

At the hearing there was a meeting of the minds and both parties agreed to accept a compromised value of $220,000.00. The Board did not find any cogent reason to depart from this newly established value and submits the amount of $220,000.00 to be fair and reasonable.

Both parties to the hearing can be congratulated on the completeness of their evidence and the manner in which it was presented.

Reversionary Value of Lands Subject to a Taking by Way of Right of Entry as Mandated by the Alberta *Surface Rights Act*.

This is a major factor in this decision, and both parties presented a wealth of material for review. The material had a substantial component of previous Board decisions and court appeals to those decisions. Argument was made that in the event of a taking under the *Surface Rights Act*, which was of an indefinite time and for an undoubtedly lengthy period, reversionary interest should be ignored.

On the other hand, a convincing argument was made that the significant difference, and one that must be maintained between an expropriation or a fee simple sale of land and a right of entry, is the fact that in the latter the property reverts to the grantor of the right of entry, and his bundle of rights is again made whole for the most part. That the Respondents greatly value these reversionary rights is witnessed by the fact that they did not seize the opportunity to sell to the Operator at a substantial amount over the appraised valuation as evidence in Exhibit 1, Tab 2.

Further, this strip-mining operation was not thrust upon the Respondents as a surprise or unforeseen event in the planning of their operation. When their purchase of the SE-34 took place in late 2001, the area permitted mining plan was in place. Since the Respondents moved their home to this general area the year that the Keephills plant was being built, in 1974, it can logically be assumed that they were abreast of events in the area.

The Board puts stock in the educated estimate of the Operator when they say that the land will be reclaimed and returned to the Landowners in approximately 15 years. In their testimony, the Operator was optimistic that the mining and reclamation would be completed in approximately 15 years. They have the mining expertise and have been successful in reclamation of other mining sites in the area. The other parties to the hearing did not provide evidence that the proposed time frame was not achievable, other than to cite other mining operations which took longer to complete. Reasons for the delays were not provided. However, the securing of a reclamation certificate from Alberta Environment is always an uncertainty, as can be attested to by those dealing with well sites and other energy facilities. The Board appreciates that some problems may occur subsequent to reclamation and that if the lands are to be used for subdivision or building of any nature, then extra precautions may have to be observed.

Section 25(2) of the *Surface Rights Act* indicates that in determining compensation payable, the Board "may" ignore the residual and reversionary value to the owner. In many cases involving well sites and access roads the Board has ignored the reversionary value of a taking. However, for the most part, these were partial takings, the disturbance of which could not be foreseen, takings creating ongoing expense and inconvenience associated with them. The potential for soil pollution was often present, and often hazards to livestock are created. Takings have regularly been for 30 years. Many exist that date back 40 or 50 years.

The subject right of entry is a total taking of the SE-34. Transitional problems will occur, but a direct comparison between this taking and those of the petroleum industry cannot be logically made.

The Board has reviewed all evidence presented as well as the final written submissions of the parties.

The final argument submitted by the Respondents, items 40 to 46, pages 11 and 12, follows:

40. The Board will have to weigh the expert evidence. Given Mr. Berrien's experience before the Board, it is submitted that his evidence is to be preferred over Mr. Simpson's evidence.

41. In this case, the Board should exercise its discretion pursuant to s. 25(2) of the Act and ignore any reversionary value in its calculation of compensation under sections 25(1)(a) and (b) in determining the appropriate compensation payable to the Cymbaluks.

4.2 The Mining Cases

42. On page 9 of TransAlta's Final Argument, it refers to Calgary Power Ltd. v. Max Polischuk (1977), Decision Number E15/77 (SRB). In this case an entire quarter section of land was being taken for a period of 15 years for coal mining. The Board may want to take notice of the fact that nearly 30 years later the land has still not been reclaimed.

*43. On page 9 of TransAlta's Final Argument, it refers to the Kneeland decision [**Exhibit 4, Tab 5**]. On page 11 of Kneeland, there are matters the Board noted as important in the consideration of the residual value. Some of those items were directly referenced in Mr. Berrien's evidence. These are paraphrased below:*

(a) *Page 11 paragraph 4: the owner has the right to expect the property to be returned to him undamaged. The evidence is that this will not happen in this case. See the drawing dated 2005/01/31 (Post Mine Topography and Agricultural Land Classification) [**Exhibit 1, Tab 11**], showing the location of the "ski hill" on SE 34. Mr. Berrien noted that this steeply sloped area will have a 40 m rise over a 100 m run, that the soil classification of SE 34 will change for the worse and that the zoning on the "ski hill" area will be more restrictive, in short that SE 34 will be "damaged goods".*

(b) *Page 12, paragraph 2: the reversion will have a subjective value, but if that value is too vague, nebulous, or indefinite, it is not possible to reach an objective value. The evidence is that the term of the "taking" cannot be reasonably forecast, and the rates to apply to any cash flow are very subjective. Mr. Berrien gave evidence that, "Uncertainty is the enemy of an estimate of a residual value." In this case, we have no certainty at all on this reversion. Note also **Exhibit 4, Tab 8**, which suggests varying intervals of 20 to 30 years prior to the return of the land. Note also, **Exhibit 3**, which warned against a 15 or 20 year **fixed term** lease.*

44. *The consideration of residual and reversionary values was well decided by the Board in the Kneeland decision [**Exhibit 4, Tab 5**], which is very similar to the Cymbaluk case.*

45. *In this case, TransAlta refuses to acknowledge that 15 years is not the right or appropriate time frame. TransAlta refuses to make allowance for any other way of dealing with the uncertainty surrounding the calculation of that value. Indeed, TransAlta's submission at the top of page 9, that "where the time frame... is reasonably ascertainable" should alert everyone that when the time frame is <u>not</u> reasonably ascertainable, the reversionary value cannot be reasonably estimated or ascertained.*

46. *The Board's caution in Kneeland about the reversionary value being "too vague, nebulous, and indefinite as of the date of the grant of right of entry to be capable of objective consideration" applies here in spades. The evidence of the length of the right of entry is all over the map. That alone should be the end of it.*

The Operator's rebuttal, items 25 to 28, page 7, cites as follows:

25. *The Cymbaluks' counsel relies heavily on the Board's decision in <u>Kneeland</u>, and claims that because the reversionary value is "to vague, nebulous, and indefinite" it ought not to be considered. It is submitted that this is contrary to subsequent decisions including the Court of Queen's Bench which considered an appeal from the <u>Kneeland</u> decision, focusing on the very narrow question put to it:*

> *"The appeal resolved itself to one issue: namely is it proper for the Board to award lump sum compensation for the taking of the land as well as annual compensation."*

It is important to note that the issue of reversionary value was not considered in the appeal and therefore this case cannot be relied upon as support for the Board's analysis regarding reversionary value.

26. *In a later decision the Board makes mention of the <u>Kneeland</u> case in the context of reversionary values, in <u>Alberta Power Limited v. Coulthard</u>, (1989) decision number 89/0022 (SRB) (Tab 8 of TransAlta's Written Submission). The Board states on page 7:*

> *"Mr. O'Ferrall correctly argues that the Board's decision in the Kneeland case as amended by the Court decision must form the basis for a determination in this case, and additionally the residual/reversionary interest must be taken into account."*

27. *The Cymbaluks' counsel cites Justice Crossley's reasons in* *Cabre Exploration v. Arndt**, dated January 7, 1988 (Exhibit 4, Tab 2) as support for the Court declining to consider reversionary value. In this case it is relatively unclear if Justice Crossley is actually referring to reversionary value, as he mentions only residual value. Further, subsequent decisions have specifically taken reversionary value into account in determining the value of the interest taken by the operator.*

28. *It is respectfully submitted that the Board must take into consideration the reversionary value of the interest the Cymbaluks retain and prescribe to it a value that must be deducted from the fair market value in determining what the appropriate amount of lump sum compensation is in the Cymbaluks' case. To do otherwise, would be to over-compensate the Cymbaluks.*

The Board, in the *Kneeland* decision, awarded the full market value for the land, 1st and 2nd year adverse effect of $12,000.00 per year, plus an annual payment of $5,500.00 for loss of use thereafter.

This decision was appealed to the Alberta Court of Queen's Bench. The Court stated: (p. 3 of 4)

> *In my opinion it would be unfair and indeed be double compensation to award the respondent the $5,500 annual compensation for rental of replacement land.*

In this case the Board considers the reversionary value of the land (SE-34) to the Respondents to be at 50% of its appraised value plus an annual payment of $5,635.00 for the owners loss of the area granted. This the Board finds to be fair and equitable and does not over compensate the Landowners and would not result in double compensation.

Mr. Berrien, speaking for the Respondents, cited a number of compensable items due the Landowners. It was acknowledged by all parties that residual values could not apply on a complete taking of the subject parcel nor would normal factors of adverse effect. Intangible adverse effect, however, was listed as a compensable factor, citing dust, noise, and traffic as considerations. The Board will not consider this, however, as the Respondents occupy this area by choice and have for some time. Further, their residence is several miles away.

Mr. Berrien allows a considerable sum of money for the moving of cattle, both this year and two years beyond, in total, $29,200.00.

The Board notes that at the time of their inspection the SE-34, while subject to a Right of Entry Order, was still available for haying or pasturing. So the opportunity was there for the Respondents to mitigate their losses, a concept cited in court judgments:

- *Palley v. Sulpetro of Canada Ltd. (1981) Court of Queen's Bench, Crossley J.* — the owner had duty to mitigate his losses and did not do so.

- *Dixson v. Canadian Hunter Exploration Ltd. (1981) Court of Queen's Bench, Hope J.* — the Board's award was reduced because Dixson did not mitigate their actual or potential loss.

The Board further notes that equivalent pasture with a perimeter fence and a water source on adjacent land is immediately available for rent for $20.00 per arable acre. With 144 arable acres in the W ½-27, this amounts to a rent of $2,880.00 per year.

Relative to the costs for trucking livestock, it must be noted that evidence suggests that the cattle were being trucked to the subject quarter or the SW-34 for some years before the subject Right of Entry was issued. Further, the trip by road from the Respondents' home farm to the available rental property is half a mile closer than the SE-34.

In its decision on *Kneeland v. Alberta Power Limited* (Decision No. E281/85), the Board stated (Exhibit 4, tab 5, page 13):

> *The "Principle of Substitution", a long-accepted principle of valuation shall apply in the subject instance. It has been held that the worth of a commodity can be no greater than the value of an equally desirable substitute commodity, provided no costly delay or other association expense is encountered in the substitution.*

Points to consider in finalizing the award:

- Does the Board award the requested trucking costs for moving the cattle when conditions for pasture access are the same as they were prior to the issuance of the right of entry? The Board thinks not.

- Does the Board award interim pasture costs, costs for searching for pasture, costs for checking cattle, and costs for water well construction and pumping equipment when water-serviced pasture, priced at $20.00 per arable acre per year's rent, is available on adjacent land? The Board thinks not.

- The Respondents informed the Board that the quarter adjacent to the SE-34 and the W ½-27 is owned by family members, who also have cattle. Further, these cattle, along with their own, are managed as one herd. The Board, during its on-site inspection on July 17, 2006, did not see any corral facilities on the SE-34, nor were any drawn to their attention. The Board can but assume, but did not confirm, that transported cattle may be loaded or unloaded at a facility on the SW-34. Under these circumstances the Board cannot ignore the "principles of substitution".

The Board does not wish to limit, nor does the Board believe that its role is to limit the future business choices of the Respondents. However, the Board cannot award large transitional costs for which there is no need when an attractive pasture substitute is at hand.

The Board would consider that in order to make the Respondents whole, they will require the following:

- material and labour for a cross-fence on the W ½-27,
- a portable pumping unit and plastic pipe in the event they wish to pump water from the small lake to a divided south field or remote water trough,
- installation of two-wire gates to cross TransAlta's service road into SW-34 or TransAlta could install two Texas gates creating an ally way for cattle passage, and
- allowance for corral construction or panel rental in the event they want to by-pass the use of the family holding of the SW-34.

The Board finds Mr. Berrien's calculations relative to the Respondents' transitional and ongoing costs to be excessive. The Board has placed a value for the above at $7,000.00.

Mr. Berrien has requested that $5,000.00 be added as general disturbance, to which he referred to as the "hassle factor". The Board agrees there is a 1st year adverse effect (general disturbance) to the Landowner. The Landowner has the nuisance and inconvenience in dealing with the Operator and their various representatives. The Board finds $5,000.00 to be fair and reasonable and so fixes.

The Operator has offered the Respondents several options. One, if a lump sum payment or an annual loss of use payment is awarded, the W ½-27 will be made available to the Respondents at the rate of $20.00 per arable acre. In Mr. Simpson's summary for compensation, in calculating the transitional impact, $20.00 per acre on pasture land was used.

The Board, in their inspection of the subject land SE-34 on July 17, 2006, noted there was a good unharvested crop of hay, approximately 100 acres. The subject land was used by the Respondents for both hay and pasture use. The Board considers $20.00 per acre to be on the low side and will increase that amount to $35.00 per acre in the annual compensation.

In the event that the Respondents do not wish to exercise the option extended to them by the Operator, then they may utilize the award in any way they wish. The award, however, will be based on this readily available and attractive substitute property.

The Board Awards:

The award is based on the Board's own interpretation and adjustments as follows:

50% of the established market value of the land of $220,000.00	$110,000.00
Fencing material, pumping equipment and pipe, labour to install, and corral material	$ 7,000.00
General disturbance	$ 5,000.00
Annual Compensation: based on 161 acres x $35.00 per acre	$ 5,635.00
Total first year's payment	**$127,635.00**
Annual payment	**$ 5,635.00**

The amount of $119,179.00 ($127,635.00, less $8,456.00 already paid to the Respondents by TransAlta Utilities Corporation) will be paid to the Respondents with interest.

TO WHOM THE COMPENSATION IS PAYABLE:

The Board finds that the compensation as determined is payable to Ferne Cymbaluk, Philip Cymbaluk and David Cymbaluk, jointly.

INTEREST:

The Board considers that it is proper to award interest on the compensation payable by the Operator, but excluding special damages, from the date of the right of entry until payment in full, having regard to the part payment made by the Operator; and that the appropriate rates pursuant to section 25(9) of the *Act* are 3.25% per annum on November 8, 2005, and 4.50% per annum on November 8, 2006.

COSTS:

In considering costs, it is the Board's opinion that the fundamental principle in fixing costs is that a party entitled to an award of costs is entitled to be reimbursed for any reasonable costs reasonably incurred in and incidental to the proceedings before the Board, and necessary to the determination of fair compensation payable for that which gave rise to the proceedings.

Itemized costs were submitted as follows:

Respondents' personal costs	$ 1,319.00
Legal fees in account with Ackroyd LLP (Richard C. Secord)	$17,262.04
Consultant's fees, Berrien Associates Ltd.	$13,424.61
	$32,005.65

Costs of and incidental to the proceedings under the *Act* are fixed in the sum of $32,005.65 payable to Ferne Cymbaluk, Philip Cymbaluk and David Cymbaluk, jointly.

ORDERS:

An Order will issue determining and fixing the compensation payable by the Operator as set out below.

The compensation payable by the Operator in respect of Right of Entry Order No. 1649/2005 shall be as follows:

(a) For the period November 8, 2005, to November 7, 2006, the sum of $127,635.00, less $8,456.00 part payment made;

TOGETHER WITH INTEREST calculated at the rates as follows:

(i) 3.25% per annum on $119,179.00, from November 8, 2005, until paid in full; and

(ii) 4.50% per annum on $119,179.00, from November 8, 2006, until paid in full; and

(b) For the period November 8, 2006, to November 7, 2007, the sum of $5,635.00, less any payment made;

TOGETHER WITH INTEREST calculated at a rate 4.50% per annum on $5,635.00, less any payment made, from November 8, 2006, until paid in full; and

(c) After November 7, 2007, and so long as the said Order No. 1649/2005 is in effect, for each year or portion thereof, the sum of $5,635.00, to be paid on or before November 8, 2007, and on or before the 8th day of November in each year thereafter;

which amounts are payable to Ferne Cymbaluk, Philip Cymbaluk and David Cymbaluk, jointly.

THEREFORE, the Operator shall forthwith pay to Ferne Cymbaluk, Philip Cymbaluk and David Cymbaluk, jointly, the following:

(a) the sum of $127,635.00, less $8,456.00 part payment made, together with interest calculated as directed above; and

(b) the sum of $5,635.00, less any payment made, together with interest calculated as directed above.

Costs of and incidental to the proceedings under the *Act* are fixed in the sum of $32,005.65, payable to Ferne Cymbaluk, Philip Cymbaluk and David Cymbaluk, jointly.

Dated at the City of Edmonton in the Province of Alberta this 6th day of March, 2007.

SURFACE RIGHTS BOARD

MEMBER