Mediation and Arbitration Board
 # 114, 10142 - 101 Avenue
Fort St. John, BC V1J 2B3

FILE NO. 1565

Date: March 4, 2007
Board Order No. 403A

BEFORE THE ARBITRATOR:

IN THE MATTER OF
THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C.
1996, c. 361 as amended **(THE ACT)**

AND IN THE MATTER OF
SW 29-84-21 W6M PID 011-099-224,
SE 31-84-21 W6M PID 044-384-148
(**THE LANDS)**

BETWEEN:

TERRA ENERGY CORP.

(APPLICANT)

AND:

RHYASON RANCH LTD.

(RESPONDENTS)

ARBITRATION ORDER

Appearances:

Mr. Robert R. Bourne, counsel for Terra Energy Corp.

Mr. Tim Blair, representative

Ms. Shawn Specht, counsel for Rhyason Ranch Ltd.

Mr. Arthur Hadland, representative for Rhyason Ranch Ltd.

Mr. Greg Rhyason, principal of Rhyason Ranch Ltd.

Witnesses:

Mr. Tim Beatty, Mr. Tim Blair, Mr. Brian Dunn and Mr. Randy Finnebraaten for Terra Energy Corp.

Mr. Arthur Hadland, Mr. Larry Peterson, Mr. Remi Farvacque and Mr. Greg Rhyason for Rhyason Ranch Ltd.

This matter was heard in Fort St. John, British Columbia, on January 23 and 24, 2007.

ORDER

1. Introduction

The Applicant Terra Energy Corp. ("Terra") applied to the Mediation Arbitration Board on June 15, 2006, under Section 16(1)(a) of the ***Petroleum and Natural Gas Act***, R.S.B.C. 1996, c. 361, to enter upon the Lands for the purposes of gas and oil exploration.

More specifically, Terra is seeking a right of entry order granting access to the Respondent's property to construct and operate 3 wells on two well sites and to construct and

operate the necessary access roads. Initially, Terra intends to construct a temporary access road (the "Access Road") and drill at least one well site at 5-29-84-21 W6M ("Well 5-29") on the Lands. If Well 5-29 is commercially viable, Terra may make the Access Road a permanent road and will construct a second well, at A5-29-84-21 W6M ("Well A5-29"). Together, these two wells constitute the First Well Site. If Well A5-29 is commercially viable, Terra intends to construct another well ("Well 1-31") at 1-31-84-21 W6M (the "Second Well Site") along with a short access road diverting off the main Access Road. The well sites are outlined on the attached plans/maps marked "Appendix "A," "B," "C," "D" and "E."

2. Fact and Background

The history of the relationship between the parties and their negotiations is briefly set out below. In my view, there is little reason to go into great detail.

Terra Energy Corp. is an Alberta resource company carrying on business in, among other places, British Columbia. It has a drilling licence issued by the British Columbia Ministry of Energy and Mines (No. 56998).

Rhyason Ranch Ltd. ("Rhyason Ranch") is owned by Mr. Greg Rhyason. He also operates a construction firm, active in the oil fields. From the documentary evidence it appears that the ranch was put together over time from three smaller properties from about 1994. The ranch is approximately 7,000 acres; some 3,800 are cultivated. In addition, the ranch includes some 12,000 acres of leased

Crown land for grazing. Mr. Rhyason raises cattle and bison on various parts of the property. He explained that he has about 850 cows of the Angus breed and 300 female bison on the ranch. The Ranch is a licensed game farm. He also explained that the ranch had organic status between 1994 and 1999. He would like to obtain certification again in the future. Organic certification affects the value of the products of the ranch, from bison to ducks. Mr. Rhyason testified to the emotional value of the property to him and explained that he has hunted on the property since he was young, and that was concerned about maintaining its pristine environment.

Brian Dunn testified that he went to Rhyason on March 29, 2006, and met with Mr. Rhyason. Mr. Dunn, a land agent working for Terra, went to the approximate location of Wells 5-29 and A5-29 – no survey had been performed at the time. Regarding Well A5-29, which is actually located on a neighbouring property, Mr. Dunn explained that Mr. Rhyason proposed that it be drilled from a well site to be located on his property (the First Well Site). On all of the evidence, I accept that Mr. Rhyason was agreeable to having Terra drill the neighbouring property from his land. The location of the road was discussed in general terms, and Terra agreed to go around the ranch headquarters. At this point no survey had been conducted and the actual road location could not be determined.

Towards the end of April there was a further telephone conversation between Mr. Dunn, resulting in a letter, dated April 21, 2006, to Mr. Rhyason setting out “comparison rates” for the area and briefly discussing security issues.

That letter did not meet Mr. Rhyason's expectations. Accordingly, Mr. Rhyason wanted to deal with Mr. Beatty, Terra's vice-president, directly, and not Mr. Dunn. Shortly after receiving the letter from Mr. Dunn, Mr. Brad Martin, the ranch manager, wrote to Mr. Beatty setting out in 18 points what Rhyason wanted in return for allowing entry, including construction to be done by Rhyason Construction, $1,000/acre annual rental, construction of high grade roads and culverts, $20,000 initial right of entry fee, and a minimum of $20,000/annum for monitoring and managing security on the lands after construction. Mr. Beatty responded to the letter on May 3, 2006. While the company was prepared to continue negotiations, in view of the positions taken by the Respondent, Terra would refer the matter to the Mediation Arbitration Board. Mr. Beatty testified at the arbitration that he thought the parties were too far apart and, thus, agreement unlikely. Mr Rhyason wrote back to him on May 23, 2006, that he was prepared to meet "directly" with Mr. Beatty as soon as possible. It is fair to say that Mr. Rhyason did not find Terra cooperative. In his view, he was simply trying to negotiate the best terms possible.

A telephone conference was set up for May 31. Mr. Rhyason failed to participate. He agrees that he missed the call. Mr. Beatty wrote to him that while the company was willing to negotiate, the "18 points" were, in his view, in "excess of the norms and practice of industry and landowners." Mr. Rhyason felt that Terra should have done more to contact him and should have done more to accommodate his demands. However, on or about June 15, 2006, Terra filed the application with the Board.

On August 1, 2006, Mr. Rhyason wrote to Mr. Beatty, with a detailed proposal, dealing with the Access Road, well sites, livestock and control, and environmental issues. Among the demands mentioned in the letter were the requirement that Rhyason Construction undertake construction and maintenance on a "competitive basis," a $25,000 entry fee and $1,000/acre rental for well sites. From his standpoint, Mr. Rhyason could not "imagine" why Terra wanted someone else to do the construction work in connection with the road and the well sites. His company was one of the best in the country. His company would do a better job because it was his own land. It would also do the work economically because the rates are generally known among contractors and do not differ much.

Mr. Rhyason had numerous concerns that he attempted to address in his correspondence, including the culverts proposed for the creek crossings. He explained that a previous owner had put in large culverts that washed out after two years. Flooding had resulted in washed out fields. Mr. Rhyason was also concerned about wet road conditions that made driving difficult or impossible, and that the road would in effect split the ranch. In any event, I find it telling that there is no mention of any alternative routing of access in Mr. Rhyason's August 1, 2006 letter. Quite the contrary, his letter stated that "access is to be diverted around the ranch yard site." In fact, in cross examination, Mr. Rhyason admitted that the issue of alternative route was not mentioned prior to the Board's mediation. In my view, Mr. Rhyason knew that his proposal of $25,000.00 for each right of entry was high.

Although Mr. Rhyason, at one point during his direct testimony, stated that “if [Terra] didn’t come in, I would be much happier,” and “money doesn’t mean anything to me,” he was, in fact, quite properly, simply trying to get as much as possible out of Terra, to get the best deal with the maximum compensation and the best possible terms. He also wanted to “set a precedent.” He expected Terra to “come back” with counter offers to his proposals. I think that he ultimately “over-played” his hand.

Mr. Beatty responded to the letter on August 21, 2006 in some detail. Among others, Terra was not prepared to award the construction work to Mr.Rhyason’s company. The work was to be awarded based on competitive bids from a number of contractors (including Mr. Rhyason’s company). As well, Terra was not prepared to pay more than “market rates for access determined using area precedents and legislated requirements.” The market rate used by Terra for land value until the arbitration was $500.00/acre. In my view, Terra was, quite properly, seeking to obtain entry on terms favourable to it.

The Board convened a mediation meeting on August 28, 2006. As the parties failed to reach an agreement, the Board ordered the matter proceed to arbitration by order dated September 5, 2006. The parties agreed to delay a survey of the Lands until the end of November 2006, until the end of the hunting season, reflected in the mediation order to grant entry for the “sole purpose of conducting a survey on or after November 22, 2006.” The parties also agreed that an arbitration hearing would take place after November 22. The mediation was preceded by a pre-hearing conference in

accordance with the Board's practice on July 19, 2006. The Respondent was represented in both the pre-mediation conference and mediation by Mr. Rhyason and Mr. Arthur Hadland. The purpose of the pre-hearing conference is to set out ground rules for the mediation, including the issues to be addressed. In any event, the parties did reach an agreement in mediation.

On October 12, 2006, a pre-hearing telephone conference was held through the Board's offices, attended by the parties or their representatives, including Mr. Hadland and Mr. Rhyason, who were a little late. The parties had notice of the pre-hearing conference and had full opportunity to address the issues. Based on the submissions and discussions at the pre-hearing conference, I made a number of orders, dealing with the arbitration including "statements of points" to be filed by the parties, witness lists, document exchange, and the timing of same, including:

1. The parties shall attend for an arbitration hearing on January 23, 2007, commencing at 9:30 A.M. at Fort St. John, British Columbia.

2. The parties expect that the hearing may take 1 day.

The orders, including the dates for the various steps in the process, the delivery of the Applicant's "statement of points" and supporting documents by December 22, 2006 and the Respondent's "statement of points" and supporting documents by January 17, 2007, were made in full consultation with and between the parties. The Applicant

delivered its submission and documents to the Respondent on or before December 22, 2006.

The mediation order issued provided for the survey to be carried out on or after November 22, 2006. On that date, Mr. Dunn attended the ranch with a survey crew and a consultant, Ms. Mary Forbes, from a local archaeological firm. The latter was brought along to show where potential archaeological sites might be, to do a "quick assessment" to avoid future problems. Mr. Remi Farvacque, a registered archaeologist from the same firm, testified at the hearing for Rhyason Ranch. While he had never actually been on the property, he testified that there might be archaeologically significant sites in the property, in particular in the south east corner. All the same, in cross examination, Mr. Rhyason agreed that he had refused to allow further studies on the Lands.

Following the survey, the locations of the well sites were determined. The Access Road was also determined at that time, utilizing a combination of existing private and Crown trails, new access road on Rhyason's private land and public road allowance. The road also bypassed the ranch headquarters. It is my understanding that the Access Road in general terms followed the general concept from the meeting March at Rhyason Ranch attended by Mr. Dunn. Mr. Randy Finnebraaten, an independent contractor working as Terra's construction supervisor, also attended the Rhyason Ranch on November 22. Mr. Rhyason was present for some of the time the crew was there. Mr. Finnebraaten testified that Mr. Rhyason showed "us" around the property, around the creek and "second bridge," to the existing trails to

the two well locations. Mr. Finnebraaten explained that the route chosen was appropriate, and the main reason for the choice was the existing trail.

On January 9, 2007, the Board received a request from Ms. Shawna L. Specht who advised that she "was in the process of being retained by Mr. Greg Rhyason." Counsel sought an adjournment of the arbitration scheduled for January 23, 2007. By letter dated January 11, 2007, the Board rejected the request.

On January 16, 2007, counsel renewed her request for an adjournment. In view of the circumstances, I denied the adjournment. The application was made late, almost three months after the pre-arbitration conference on October 12, 2006 and close to the arbitration date and Rhyason had ample time to obtain legal counsel. Rhyason was (and at the time of the arbitration remains) represented and assisted by Mr. Arthur Hadland who, while not a lawyer, is "experienced in this area." As noted above, the dates for the various steps in the process - exchange of the parties' respective statements of points and documents etc. were made in full consultation with and between the parties. The Applicant delivered its submission and documents to the Respondent on or before the December 22, 2006 date set out in the pre-hearing order. As reflected in my Order dated October 12, 2006, in order to accommodate the holiday, the Respondent had almost one month after the receipt of the Applicants submission and documents, until January 17, 2006.

The hearing commenced as scheduled on January 23 as scheduled, and continued on January 24, 2007 in Fort St. John.

3. Issues

The Application raises a number of issues:

1. Does Section 9 of the ***Act*** require that a party negotiate in good faith, and, if it does, whether, Terra negotiated in good faith with Rhyason?
2. Does the ***Act*** require an Applicant to establish the most appropriate plan to access the well?
3. If Terra is granted access, what are the appropriate terms of entry, occupation and use, and what is the appropriate level of compensation?

It is fair to say that the Parties have significantly different positions on these issues.

Issues one and two are of a preliminary nature, and I turn to those first.

4. Good Faith Negotiations and Section 9

The Rhyason Ranch's basic position is that right of entry should not be granted. In support of that, Rhyason relies specifically on Section 9 of the ***Act***:

> 9 (1) A person may not enter, occupy or use land, other than Crown land, to explore for, develop or produce petroleum or natural gas

or explore for, develop or use a storage reservoir unless

(a) the person makes, with each owner of the land, a surface lease in the form and content prescribed authorizing the entry, occupation or use,

(b) the board authorizes the entry, occupation or use, or

(c) as a result of a hearing under section 20, the board makes an order specifying terms of entry, occupation and use, including payment of rent and compensation.

(2) A person who enters, occupies or uses land to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir is liable,

(a) to pay compensation to the land owner for loss or damage caused by the entry, occupation or use, and

(b) if the board so orders, to pay rent for the duration of the occupation or use.

(3) For the purposes of subsection (2) (a), if a certificate of restoration is required after the entry, occupation or use, the liability for payment of compensation ends on the date stated in the certificate.

If I understand Rhyason Ranch's argument, it is that Terra is required to negotiate in good faith before proceeding to mediation-arbitration. This is "inherent" in Section 9. Not surprisingly, Rhyason Ranch's position on the facts is that Terra did not negotiate in good faith.

The Applicant's position is that Section 9 does not impose a requirement of good faith negotiations and, in any event,

that it did negotiate in good faith. Terra says that there is no such obligation, express or implied, in Section 9, or, indeed, the Act as a whole. Section 9(1) simply sets out methods of gaining access to private land for oil and gas exploration and production: (1) by agreement with a landowner, (2) through Board authorization, or (3) through a Board order following an arbitration hearing.

In my view, there is no merit to the Respondent's argument and I dismiss it. The Respondent provided no analysis of the statutory language or, indeed, cited any authority in support of its position. There is nothing, express or implied, in the plain and ordinary language of Section 9 requiring a party to negotiate in good faith, it simply sets out, as argued by Terra, methods of gaining access, either through negotiation or some Board process. If the legislative intent is what Rhyason Ranch asserts, it would have been relatively simple to provide for it in the statutory language.

Moreover, to suggest, as Rhyason Ranch does, that the granting of a right of entry is "completely" discretionary, is wrong. It is, I think, important to consider the overall thrust of this part of the legislation, namely to provide access to subsurface rights holders, while allowing the Board to set terms and compensation. In this case, and that is not in dispute, Terra has a drilling license from the Crown in respect of oil and gas on the Lands. It is well remembered that the relevant subsurface rights in British Columbia belong to the Crown, unless the rights have been granted to a landowner in the original Crown grant.

In my view, the process for entry, occupation and use under the ***Act*** is relatively straightforward. The parties either negotiate an arrangement suitable to them, i.e. voluntarily, or they engage the Board by application, as happened here, through mediation and, failing that, through arbitration, where terms of entry and compensation may be finally settled. Contrary to Rhyason's apparent position that entry, occupation and use is simply a matter of compensation, i.e. money, both the mediation and the arbitration processes may result in orders setting out both terms – detailing how entry, occupation and use must be exercised – and, of course, monetary compensation (see Section 21). To characterize this as a matter of compensation only, with respect, incorrect.

Even if I am wrong in law, I am of the view that, on the facts, there is little evidence to support the position that Terra did not negotiate in good faith. In my view, both parties engaged in the process as self-interested agents to make the best "deal" possible. They were just not successful and, therefore, ended up in arbitration.

5. Appropriateness of Entry

Rhyason Ranch's position is that right of entry should also be denied because Terra Energy failed to show that its proposal was appropriate for the Lands. It is inappropriate to subject the Respondent landowner to what amounts to a "reverse onus" to prove that Terra Energy's proposal was not appropriate and demonstrate the existence

of more suitable alternatives. This amounts to a denial of a fair hearing. Rhyason Ranch submits that Sections 18(3) and 19(1) provides the arbitrator with the power to assess the suitability of Terra's proposal. The proposed access road raises environmental, ecological, archaeological, financial and other concerns and is not appropriate. Rhyason Ranch argues that I ought to consider an alternative plan for the accessing of the well sites, namely though neighbouring property. This access road is more appropriate.

Terra says that Rhyason Ranch is not correct. Neither is there express language in the *Act* providing that the Board assess the merits of potential locations for access roads or well sites, nor can such a meaning be reasonably implied.

Section 9, 18, 19 and 20 of the *Act* set out, in part, the Board's powers:

> 9 (1) A person may not enter, occupy or use land, other than Crown land, to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir unless …
>
> (c) as a result of a hearing under section 20, the board makes an order specifying terms of entry, occupation and use, including payment of rent and compensation.
>
> 18(3) If an application is made under section 16 (1), and if the mediator believes, as a result of a mediation hearing, that the applicant should be permitted to enter, occupy or use the land, the mediator may make an order under section 19.

> 19(1) A mediator may make an order permitting, subject to the terms the mediator may specify in the order, an applicant under section 16 to enter, occupy or use the land for a purpose stated in that section.
>
> 20(2) Unless the applicant and the other persons otherwise agree, the board must review an order of the mediator made under section 19, and may confirm or vary the order, subject to the terms it considers proper.

In my view, the legislation provides the Board with the power to set terms and determine compensation in relation to entry, occupation and use. Under Section 9(1)(c) the Board may make an order "specifying terms … including … payment of rent and compensation." Sections 19(1) and 20(1) also speak to the Board's power in mediation and in a subsequent arbitration to set terms "it considers proper."

The Board has the power to dismiss an application. The mediator may, after a first mediation hearing, "dismiss [an] application" (Section 18(2) (a)), subject to review (Section 26(2)). In my view, the Board may dismiss all or part of an application at any time after it has been filed on a number of grounds, including that an application is not within the Board's jurisdiction, amounts to an abuse of process, or was made in bad faith. It is readily apparent that none of those grounds are applicable here. Terra is seeking access to subsurface rights belonging to the Crown, which has seen fit to grant a drilling license to the Applicant, for purposes that fall squarely within the parameters of the Act, exploration, development and production of oil and gas.

I do not agree with the Applicant's position that I have no power, express or implied, to assess the substantive merits of the proposed access road(s). I accept the Respondents argument to this extent: if I were unable to assess the merits of a proposed access, to some extent, my role would be limited to an assessment of damages and compensation. I would simply have to accept whatever proposal put before me by an applicant, and I would be unable to balance the interests of surface rights and subsurface rights. I do not think that was what the *Act* contemplated. In short, I am of the view that I generally have the jurisdiction to set the terms with respect to the entry, occupation and use *within the context of the application before me*. That necessarily involves *some* consideration of the substantive merits of the proposal for access. Important considerations, in my view, are to minimize the impact on the landowner of the entry, occupation and use, and to attempt to establish reasonable terms related to that entry, occupation and use.

That said, even on the assumption that I did agree, on the facts, that the approach though the neighbouring property was the "most appropriate," and I hasten to add that I make no such finding, I do not agree with Rhyason Ranch that the Board must scrutinize an application to determine if it is the "most appropriate." While "appropriateness" – to use the parties' language – may enter into my considerations, an applicant does not have to show that a proposal is the "most appropriate." There is no basis in the statute for such an assertion. The Respondent did not provide any authority to support its position. At the end of the day,

the Applicant has the burden to show that a proposal is in some sense "appropriate" or "suitable" or "fitted for the purpose."

Concerns regarding the "appropriateness of the access may generally be addresses through terms of entry, compensation and damages. Section 9 of the Act reads, in part:

> 9(2) A person who enters, occupies or uses land to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir is liable,
>
> (a) to pay compensation to the land owner for loss or damage caused by the entry, occupation and use, and …

Under Section 16(1)(b), an application may be made to the Mediation Arbitration Board by a land owner for damages caused.

Further, my jurisdiction is constrained by the application and the statutory provisions. I have no jurisdiction to issue an entry order on an adjoining property, where there is no application by Terra for entry to that property before me.

As well, I am constrained by the jurisdiction of other regulatory regimes, health, forestry, environment, to name but a few. There are other regulatory bodies specifically dealing with the oil and gas industry, and the exploration and development of oil and natural gas resources in British Columbia, including the Oil and Gas Commission (e.g., ***Oil and gas Commission Act***, R.S.B.C. 1998, c. 39). The Oil and

Gas Commission has extensive powers to regulate the oil and gas industry (e.g. Section 96 of the ***Petroleum and Natural Gas Act***). The Applicant correctly notes that matters such as environmental and archaeological assessments are part of other regulatory processes.

Section 3 of the ***Oil and Gas Commission Act*** reads:

3 The purposes of the commission are to

(a) regulate oil and gas activities and pipelines in British Columbia in a manner that

(i) provides for the sound development of the oil and gas sector, by fostering a healthy environment, a sound economy and social well being,
(ii) conserves oil and gas resources in British Columbia,
(iii) ensures safe and efficient practices, and
(iv) assists owners of oil and gas resources to participate equitably in the production of shared pools of oil and gas,

(b) provide for effective and efficient processes for the review of applications related to oil and gas activities or pipelines, and to ensure that applications that are approved are in the public interest having regard to environmental, economic and social effects,
(c) encourage the participation of First Nations and aboriginal peoples in processes affecting them,
(d) participate in planning processes, and
(e) undertake programs of education and communication in order to advance safe and efficient practices and the other purposes of the commission.

In my view, the Respondent's argument, for example, that Terra failed to perform an archaeological assessment is not

only disingenuous, as Rhyason Ranch refused an archaeologist onto the land, it also ignores the regulatory context of the oil and gas industry. Such assessments are part of the process with the Oil and Gas Commission (see, for example, ***Heritage Conservation Act***, R.S.B.C. 1996, c. 187 and Oil and Gas Commission: ***Performance-Based Approach to Archaeological Assessment*** (November 2005).

Rhyason Ranch also argues that the proposed route is not "appropriate in the circumstances:" Terra did not adduce evidence regarding such matters as soil conditions, road conditions, flooding, culverts, potential water contamination, geotechnical considerations, environmental impact and comparative cost considerations regarding the proposed route and the alternative route though the neighbouring property. Some of these matters may be relevant to determine if, for example, a proposed access is "appropriate," others again, are more appropriately dealt with through other regulatory processes, such as the Oil and Gas Commission which has an ongoing and continuing role in the regulation of the industry. The Respondent's submission fails to address the regulatory aspects of its concerns.

I do not agree that there is a "reverse onus" on the Respondent. The onus rests on terra to establish its right to enter onto the Lands. Rhyason Ranch has raised a number of "novel" arguments and it must support these arguments with the applicable law and evidence. It was not denied the opportunity to present relevant evidence. In fact, Rhyason was given considerable latitude, and much evidence adduced related to the benefits of the alternative access though

the neighbouring property. Other evidence focussed on the supposed "bad faith" conduct of the Applicant. Again other evidence sought, wrongly, in my view, to establish the case that it would make more financial and economic sense for Terra to use the alternative access route. Much of this evidence was of marginal relevance. With respect, while the evidence and argument at one level appeared to address the issue of whether the proposal was "appropriate in the circumstances," fundamentally the thrust was on the alternative route, on land that was outside the scope of the Application before the Board. That was misdirected. More emphasis on specific concerns arising out of the proposal and how they might be addressed in terms of reasonable terms would be of greater assistance to the Board in this arbitration.

The access road was ultimately chosen following a survey of the property and, at the very least, some consultation with the landowner. It is routed around the ranch headquarters. Terra sought to avoid obvious archaeological sites. It is generally routed around the boundaries of the fields and utilizes, to a large degree, existing trails and a public road allowance. Mr. Finnebraaten said that with respect to the choice of an appropriate access route, the "biggest reason" was the existing trail. He testified that the land had relatively flat grade. He also explained that Mr. Rhyason showed him, Mr. Dunn and the survey crew a "detour around the property and residences," "around the creek" to the "second bridge" (a culvert), onto the "existing trail" past the two well locations. Mr.Finnebraaten also testified that culverts would be adequate for the two creek crossings. While Mr. Rhyason's view was that bridges over

the creek crossings were necessary, I note that only culverts are currently used on the trails. On the evidence before me, I am satisfied that the access road is “appropriate” or “suitable.”

In short, I dismiss Rhyason’s argument that the application for right of entry should be dismissed. The Applicant is entitled to an order for entry onto the Lands on the terms and conditions set out in this order.

6. Configuration

The Respondent argues that separate orders for the Access Road and for each well site are necessary. The Rhyason Ranch says that creates more consistency and clarity.

Not surprisingly, Terra does not agree. It says that this request is neither reasonable or in accordance with the Board’s practice. The construction of the Access Road is tied to the construction of the First and the Second Well Site.

I agree with Terra and dismiss this request. In my view, the road and the well sites are necessarily connected and I do not see any benefit to separate orders for each.

7. Compensation

Section 21 of the Act provides:

> 21 (1) In determining an amount to be paid periodically or otherwise on an application made under section 12 or 16 (1), the board may consider
>
> (a) the compulsory aspect of the entry, occupation or use,
>
> (b) the value of the land and the owner's loss of a right or profit with respect to the land,
>
> (c) temporary and permanent damage from the entry, occupation or use,
>
> (d) compensation for severance,
>
> (e) compensation for nuisance and disturbance from the entry, occupation or use,
>
> (f) money previously paid to an owner for entry, occupation or use,
>
> (g) other factors the board considers applicable, and
>
> (h) other factors or criteria established by regulation.

I intend to deal with the parties' positions and the evidence under each heading.

Mr. Hadland's dual role as paid "representative," sitting at the counsel table and assisting counsel, with that of "expert witness" was troubling to me. From early on in the Board's process, including mediation, Mr. Hadland acted as Rhyason Ranch's representative. In my respectful view, his appearance as a witness is tainted by his role as a representative. He claimed that when he acts as an "expert," he is guided by some code of ethics. In Terra's

cross examination of him, he acknowledged that when he was acting “outside” the expert role, he was reaching for “new ground.” I find it hard to accept that he can so easily separate the two roles. In the result, I treat his “expert” evidence with considerable caution.

Terra says that the compensation proposed is appropriate and is comparable to the maximum paid to owners in the area. Nor surprisingly, Rhyason Ranch’s position is generally the opposite, although there is agreement on, for example, land value and crop loss.

For easy reference, the amounts awarded as first years’ payments and annual payments are set out and summarized in the attached Appendixes “F,” “G,” and “H.”

a. The compulsory aspect

Compensation under this heading is intended to compensate the land owner for the fact that entry, occupation and use is required by law. A land owner loses the right to decide whether to lease his land or not, the selection of his tenant, and the use of his land. In the past, this has been a one-time payment.

Terra proposes $2,000 per well under this heading and say that this figure is industry standard applied across the province. The Applicant relies on earlier decisions of the Board and cites ***Calahoo Petroleum Ltd. v. Adley Callison*** (Board Order 279A, January 23, 1996, unreported) in support of the proposition that this is an appropriate amount. The loss of a right is not tied to the number of parcels of

land or land value. There is no precedent for adjusting this compensation on that basis.

Rhyason says that this Board order is more than nine years old and does not reflect current land values. The evidence of Mr. Hadland suggests that land values have increased 2 ½ fold in the period since the Board's earlier decision. As well, oil prices have increased dramatically and logic dictates that the land owner should be compensated proportionally. This evidence is undisputed says Rhyason. The Lands represent a significant amount of "personal value" to Mr. Rhyason who says he has hunted there since he was a young man (see e.g., ***Dome Petroleum Ltd. v.Juell***). It is a "trophy ranch" which will be divided by the Access Road. Therefore, it is reasonable $5,000 for a "single well site located on a quarter section and for each parcel [of land] crossed." Moreover, because this is an ongoing occupation, "compulsory" should be paid annually as long as there is entry, occupation and use, rather than as a one-time payment:

First Well Site:	$	5,000.00
Second Well Site:	$	5,000.00
Access Road (6 parcels)	$	30,000.00
Total	$	40,000.00

In reply, Terra says that there is no basis for adjusting the compensation for the compulsory aspect. ***Calahoo Petroleum*** makes it clear that the compensation under this heading is not tied to land value or individual circumstances. Those factors are considered under other

headings. Terra also says that there is no basis or precedent for awarding compulsory compensation annually or on a per parcel basis.

I certainly appreciate the Respondent's position that the entry, occupation and use is an imposition, and that Mr. Rhyason, at present, at least, would prefer not to have Terra on his Lands at all, the total of the access sought is some 29 acres. To put that in perspective, the Ranch is substantial, encompassing 7000 acres, plus 12,000 acres leased grazing. About half of the ranch is under cultivation, some 3,800 acres. While I appreciate the sentimental value attached by Mr. Rhyason to the Lands, I am of the view that he was exaggerating. On all of the evidence, his concern with the proposed Access Road, "dividing" the ranch, did not arise until around the time of the mediation and later. In my view, his real concern was to get the best possible agreement with Terra. As mentioned earlier, I think he over-played his hand and ended up at arbitration. In the circumstances, I do not accept the $5,000.00 proposed by Rhyason Ranch.

Although, as noted by Applicant, the issue of continuing payments, e.g. annual payments, seems to have been argued before the Board in ***Calahoo Petroleum***, and rejected, there is no analysis or reasoning to support that conclusion. The Board simply found that it "considers $2,000.00 as fair compensation for this Right-of-Entry." I do not agree with the Respondent that an award under this heading should be paid annually. While it is correct that the entry, occupation and use is a continuing occurrence, the compulsion is related to the "forced," i.e. involuntary,

nature of the entry, and the loss of rights occurs at the time of entry.

There is also no precedent to support the contention that compensation should be paid for each parcel or section of land crossed. In his testimony, Mr. Hadland proposed this, but he was unable to provide any basis whatsoever or precedent for this concept. He agreed that as an “advocate” he was trying to “reach out for new ground” and, in my view, that was exactly what he was doing.   On this point I agree with Terra Energy.

Both parties appear to recognize that the $2,000 is industry standard. However, it is not clear what that standard, the $2,000, is based on. Neither Mr. Dunn nor Mr. Hadland were able to throw any light on this question. Obviously, the value of $2,000 in 1996 or 1998 was greater than it is today. Between 1996 and 2005, the Statistics Canada Consumer Price Index increased by approximately 20%. In the circumstances, I might have been prepared to increase the compensation awarded under this. In the absence of any evidence on this point by the parties, I prefer to leave the compensation at the $2,000.00 proposed for each well, paid in the first year.

b. Value of Land and Owner's loss of Right or Profit

Terra’s initial submissions on this point are brief. It accepts that land value proposed by Rhyason Ranch is $600.00/acre and that the crop loss value is $250.00/acre.

Rhyason Ranch says that Mr. Hadland's appraisal sets the value of the ranch at $4,300,000, at $600.00/acre for agricultural purposes. If the value was based on industrial purposes the value would be much higher, says Rhyason.

However, Rhyason Ranch says that Terra's conversion of these "highly prized" agricultural lands to industrial purposes, the market value of the ranch will be irrevocably reduced. Mr. Larry Peterson, a realtor specializing in "trophy ranches," testified that in his opinion the market value of the Lands, which in his opinion was a "trophy ranch," would decrease by a minimum of 10% as a result of Terra's proposed use, because purchasers of trophy ranches do not want oil and gas development on their land. Mr. Peterson said that a neighbouring ranch, the Wilderness Ranch, had been difficult to sell because of "industrial activity on the property," although it generated $60,000 from oil and gas activities. It had been on the market for nine years. The respondent says that the Applicant failed to call any evidence to contradict Mr. Peterson's testimony.

The Respondent acknowledges that the parties agree with respect to the value of crop loss, but says that there is disagreement with respect to the quantum of acres.

The Applicant argues that Mr. Peterson's evidence is without value. He simply made a "bare assertion" without any real data or analysis. In addition, his evidence does not support the assertion that the value of the ranch would decrease by 10%. In cross examination, Mr. Peterson

specifically admitted that he considered future developments (i.e. other than those proposed) in determining the 10% reduction. He also admitted that some purchasers consider the revenue from oil and gas developments and that the Lands could be divided into large portions without any industrial use and sold to purchases who did not want industrial use. Specifically, with respect to the Wilderness Ranch, there was no evidence as to the asking price for the ranch, nor was there any analysis of the factors affecting the marketing or sale of this property. The only evidence of actual sales in the area is set out in Mr. Hadland's appraisal and the property sold at the highest per acre value was the property which had oil and gas development as the "only redeeming feature."

I turn first to crop value. From my calculations there is actually no difference between the two parties as to acreage; Terra's proposal is based on 29.03 acres, the same as in Rhyason Ranch's submission. Therefore, if the crop loss value is agreed to be $250.00/acre, the compensation is a simple calculation.

The value of the ranch land is agreed at $600.00/acre and Terra accepts the appraised value of the ranch $4,300,000. Under this heading, the land value is set at $600.00.

The question is whether to award compensation for loss in the market value of the ranch and, if so, in what amount. No issue was taken with my jurisdiction to award compensation for loss of market value to the property. Having carefully considered Rhyason's submissions, and the

evidence, I do not accept that the market value of the ranch will decrease as argued. I agree with Terra Energy on this point. My reasons for rejecting the claim for loss of value of the ranch are set out below.

Mr. Peterson offered an opinion based on his years of experience as a realtor dealing with large ranches in the area. I note that Mr. Peterson is also a neighbour of Rhyason Ranch. I was trouble by the fact that he offered no real foundation or analysis, by data showing market values or comparative values with any statistical evidence, in support of his opinion. He relied on the sales or properties set out in Mr. Hadland's report. I agree with Terra that this amounts to little more than a bald assertion.

As noted by Terra Energy, in large measure, the focus of Mr. Peterson's opinion is potential impact of future development, in terms of further well sites and, in particular, pipeline development. His very brief written opinion, dated January 15, 2007, submitted into evidence at the arbitration states:

> "I have been asked to give my professional opinion as [sic.] the effect of a proposed pipeline construction and further well site development and it's subsequent affect on market value of the Rhyason Ranch."

Mr. Peterson's concern with respect to pipelines is that compensation is normally paid on a one-time basis only whereas the property owner is faced with years of problems.

In his view, prospective buyers do not want properties with pipelines running though them.

Mr. Peterson also observed that for oil and gas well sites, although annual lease payments factor in as additional value for the property, he was finding more and more that prospective buyers for large "trophy" ranches discount or eliminates such properties. On his evidence, it is not clear to me what exactly a "trophy ranch" is, other than, perhaps, a large property. Mr. Peterson's report went on to state his opinion that the "majority of prospective buyers today consider oil and gas development as a negative." Aside from the anecdotal character of the evidence, there is as well, in my respectful view, a degree of inconsistency. On the one hand, in his written opinion, he states that appraisers consider oil and gas development a positive factor in assessing land value and, on the other, that the "majority of buyers" consider such development a negative. How he arrived at this "majority" is unclear on the evidence. Mr. Hadland also testified that oil and gas development may impact positively on land value. I appreciate that Rhyason Ranch is a large property and that special considerations might apply. However, the ranch has been put together from three smaller ranches and, in cross examination Mr. Peterson acknowledged, "in theory," that it could be divided up and sold in smaller parcels. In his direct testimony, he qualified his written opinion somewhat and explained that in "midsize" ranches, where the owners are trying to "make a living," oil and gas development could be considered a positive factor. As noted by Terra Energy in cross examination, in Mr. Hadland's appraisal report listing "comparable sales,"

relied upon by Mr. Peterson, the property with oil and gas revenue actually sold for the highest price per acre, namely $594.00/acre. Mr. Peterson testified that a nearby ranch, the Wilderness Ranch had been listed for 9 or 10 years, and had difficulty selling because of industrial development. There was no evidence as to the efforts undertaken to sell this property or the asking price. Moreover, in his direct testimony, Mr. Petersen explained that on the Wilderness Ranch the "trees had been cleared from most of it," and there were "very visible" sour gas wells off the main road.

Rhyason Ranch denies that Mr. Peterson relied on (a summary of) a 2003 report attached to his written opinion, "Impact of Oil and Gas Activity on Rural Residential Property Values," as the source of his calculations. On of the figures mentioned in the report is 10% decrease in property values in certain circumstances. In my view this "summary" cannot be relied upon, it is just that, a "summary," not the report itself with (presumably) the detailed analysis to support its conclusions. Moreover, the study is based on residential properties in Alberta between 1 and 40 acres to "exclude agricultural land use." The circumstances are easily distinguishable from the circumstances at hand. The report does not assist me.

In order to seriously support a substantial claim such as $430,000.00, I would have expected better evidence. In short, I deny the claim for $430,000.00.

Land value is set at $600.00/acre and crop loss at $250.00/acre. The amount for land value is a one-time

payment and is payable prior to entry. The amount for crop loss is payable annually.

c. Temporary and Permanent damage

Terra's evidence was that industry standard compensation under this heading range between $1,600.00 and $2,300.00. Terra's proposal is $2,300.00, the maximum. Terra also says that it has taken steps to minimize the damage to the property by routing the access along edges of fields, using an existing trail and an un-constructed road allowance.

Rhyason Ranch says that the industry standard is not tied to specifics of the property. Mr. Brian Dunn, who testified for Terra, did not provide any rationale for this amount. In any event, while Rhyason Ranch ultimately agrees with the $2,300.00, it argues that it should be applied to each parcel:

First Well Site:	$	2,300.00
Second Well Site:	$	2,300.00
Access Road (6 parcels)	$	13,800.00
Total	$	18,400.00

I accept that the industry standard amount for temporary and permanent damage is $2,300.00. The parties appeared to agree that that was "industry standard," although, quite frankly, I share the concern expressed by Rhyason as to the basis or rationale for this "standard." In cross examination, Mr. Dunn stated simply that this was the maximum number used by his firm and the industry. He

agreed that it had been in place for “several years.” The Respondent’s witness, Mr. Hadland was not able to cast light on how long this standard had been place. In the circumstances, and in the absence of better evidence, I prefer to leave this amount at $2,300.00.

As mentioned above, I am not persuaded to accept that compensation should be based on the number of parcels crossed.

In conclusion, the compensation under this heading is properly set at $2,300.00, and paid annually.

d. Compensation for Severance

Terra is proposing compensation at $600.00/acre and Mr. Dunn estimates that severance for the First Well Site is 3.00 acres ($1,800.00) and 0.5 acres ($300.00) for the Second Well Site.

Rhyason Ranch says that compensation under this heading is meant to address “interruption of the agricultural land,” not simply making land accessible for farming. Rhyason Ranch argues that I should accept the evidence of Mr. Hadland, who estimated severance to be an “absolute minimum of 10 acres,” over that of Mr. Dunn.

I prefer Terra’s estimate. Rhyason Ranch’s concept is vague and ill-defined. Terra’s “estimate” was made with reference to the plans of the well sites and the access road. In cross examination, Mr. Dunn, Terra’s land agent, explained that “severance” refers to land that cannot be

accessed by farm equipment. He based his estimate on his experience as a farmer. He also candidly agreed that he could not be exact as to the amount of severance, if it was more, "it would be minimal." He did not agree with Mr. Hadland's estimate of 10 acres on account of severance, which he characterized as "high." I have carefully reviewed Mr. Dunn's and Mr. Hadland's testimony and, in all of the circumstances, I prefer Mr. Dunn's view on this point. Ultimately, Mr. Hadland in his direct testimony said that he was "just guessing," and that actual severance could not be determined until after the fact.

There is no issue between the parties that this amount is paid annually. In short, severance is determined at 3.5 acres at $600.00/acre, paid annually.

e. Compensation for Nuisance and Disturbance

Compensation under this heading is intended to compensate for the nuisance and disturbance cause by entry and use of the lands, including traffic and operational activities.

For nuisance and disturbance, Terra is proposing $2,200.00 for each of Wells 5-29 and 1-31. This is the maximum in the range typically paid to landowners in the area. Terra argues that there is nothing about its proposal that is out of the ordinary. As Well A5-29 is on the same well site as 5-29, it would not require any additional land use. Terra proposes an additional $1,000.00 in this respect.

Rhyason Ranch does not agree that Terra has "mitigated" the nuisance and disturbance and it should be compensated at

the maximum possible. As the wells will be constructed at different times, the intrusion of construction vehicles will occur at multiple times, and will likely take longer than estimated by Mr. Beatty. As well, as Terra intends to control road maintenance, this will cause additional, uncontrollable and permanent nuisance. Terra's proposal is "woefully inadequate" and Rhyason proposes, as well, $2,200 for each well site and each of six parcels, for a total of $17,600.00.

In reply, the Applicant notes that nuisance and disturbance is a result of traffic during construction and production, it is not tied to the number of parcels crossed.

Despite the respective arguments, on the evidence of both parties this amount is maximum as per "industry standard." Mr. Dunn agreed in cross examination that the standard has been in place for "a while" and was not based on "specific factors." Anyway, there is no disagreement as to the actual amount, the issue is whether it is payable based on the number of parcels crossed. As mentioned I do not accept the "parcel" concept advanced by the Respondent here. Despite the relatively long Access Road, and the gradual development of the two Well Sites, I am not persuaded that the nuisance and disturbance will not be adequately compensated by awarding the maximum. I re-iterate my concerns about the lack of substantive and evidentiary basis for this "industry standard." In the circumstances, the proposal by Terra is reasonable and I accept it. This amount is payable on an annual basis.

f. Money Previously Paid to an Owner

Under this heading, Rhyason Ranch argues that a mediated agreement between Imperial Oil and Mr. Velander is relevant. In that case, which has similarities to the case at hand, the "mediated settlement is based on $900.00/acre, which was increased to $1,000.00/acre," and it is open for me to use this value as the basis for compensation.

Terra says that the Velander settlement is not comparable at all. It involves four well sites and five wells, each with separate access roads. Moreover, Rhyason did not provide any evidence of the land values in the area of the Velander property or establish that the circumstances of that agreement are similar to those in the case at hand.

The parties here agree on the land value, namely $600.00, and whether another landowner in mediation obtained a better result is, in my view, immaterial. In fact, the Board encourages settlement of these matters by agreement and mediation.

g. Other Factors

Terra proposes to compensate for "other factors" in the amount of $4,673.00 for Well 5-29.

Rhyason Ranch rejects this proposal. There is no basis for it, other than it rounded out the numbers such that the compensation equalled 600.00/acre. Instead, Mr. Rhyason should receive $24,350.00 to compensate him for the

personal time spent by him due to Terra's failure to negotiate in good faith. That amount would round out the compensation "in line with the market forces" (Imperial Oil) such that the property is valued at $1,000.00/acre.

I do not agree with Rhyason Ranch on this point. Apart from the fact that I have no credible evidence of the time spent by Mr. Rhyason, and I entertain some serious doubt as to whether his time is compensable under this heading, $600.00/acre is what the parties agreed. That amount derives from Mr. Hadland's appraisal which, presumably, is a better indictor of the "market forces," i.e. actual sales, than a mediated settlement or voluntary agreement between parties. In my view, that is a better basis, if any, for compensation under this heading.

I accept the amount proposed by Terra, $4,673.00, payable annually.

7. Terms of Order

In addition to compensation, there are issues with respect to appropriate terms to be included in the order for entry, occupation and use.

a. Fencing

Terra proposes the use of 5 feet buffalo wire with reinforced steel posts. Mr. Randy Finnebraaten, a rancher with experience raising buffalo, testified that is adequate.

The Respondent agrees with Terra but says that it needs to be consulted on all locations prior to construction. It also says that Rhyason should be allowed to construct the fencing, and be paid at market rate, or, if not, be advised of time and date of entry and construction. If the fence is damaged or in need of repair, Terra must attend to it within 48 hours.

In reply, Terra notes that there is no evidence to support a requirement for fencing other than as proposed, around the well sites. Terra does not agree to retain the Respondent to construct the fencing. The fencing contract will be awarded after a competitive process and is a business decision, having regard to relevant factors such as cost and availability. In any event, it is not within the Board's jurisdiction to order the Applicant to retain a specific contractor (***Penn West***, ***above***).

If parties voluntarily, on their own or though mediation, negotiate an agreement, they can provide for consultation. In fact, they are free to include terms and conditions that are unlikely to be granted and included in an arbitration order. My concern is to provide an order that is both practical and enforceable. In my view, based on the history of the relationship between the parties as it unfolded before and during the arbitration, requiring consultation would simply be unworkable.

I specifically decline to order Terra Energy to use Mr. Rhyason or his construction company in the construction of the fence. This is not a reflection on him or his company. I leave it up to Terra to award the construction contract

as they see fit. I accept that Terra will award the fencing contract after a competitive process in which the Respondent will be invited to participate, and that it is a business decision, having regard to relevant factors such as cost and availability. In light of the parties' relationship to date, this is likely to become an ongoing source of problems. Ultimately, however, that may be immaterial as I agree with Terra Energy that it is not within the Board's jurisdiction to order the Applicant to retain the services of a specific contractor. As noted in ***Penn West Petroleum Ltd. v. Silver Hammer Farms Inc. (Thorhald Skafte)***, Board Order No. 308A, unreported, May 30, 2000, it is

> "beyond the scope of the [PNG Act] for the Board to direct the Applicant to make use the services of any specified individual".

I determine that only the well sites need to be fenced using the 5 feet buffalo wire fence with reinforced steel posts.

b. Road Use Agreement

Terra proposes to access and use 3.93km of the Respondent's private road that runs from North Cache Creek Road onto the Lands and interconnects with the proposed access road at the SE ¼ of 12-85-22 W6M. Terra proposes to use the CAPLA Master Road Use Agreement, attached as Appendix "F" with the two exceptions: 1. that the rates be fixed subject to rental reviews, and 2. that the Agreement cannot be

terminated until after the wells have been abandoned and reclaimed. Terra is proposing $1,000.00/km as an initial fee for the right to use the private road and $900.00 in annual rental. These figures are industry standard. The Agreement allows the Respondent a large measure of control.

Rhyason Ranch says that Terra should re-draft the Agreement to comply with British Columbia law, and resubmitted to the arbitrator if the parties fail to agree.

In reply, Terra submits that the language of the CAPLA Agreement is plain and appropriate regardless of jurisdiction, and that the exceptions proposed affords Terra a reasonable measure of protection.

I agree with Rhyason Ranch that the Agreement should be amended to comply with British Columbia law. The CAPLA Agreement it appears to me that it is in plain language and appropriate, generally, regardless of jurisdiction. However, I direct that British Columbia law applies to the Agreement. Particularly, I direct that Article 16.2 be amended such that the laws of British Columbia apply and that the courts of British Columbia have jurisdiction with respect to the Agreement. The Agreement is attached to this order as Appendix "I".

I also find the exceptions proposed by Terra Energy reasonable: 1. that the rates be fixed subject to rental reviews, and 2. that the Agreement cannot be terminated until after the wells have been abandoned and reclaimed. In Terra's closing argument, the proposed rates are $1,000.00/km for the fist year; and $900.00 for the

following years, the annual rates. In Terra's "statement of points" submitted to the Respondent the proposed rates are the reverse, except that the annual are not per kilometre. While counsel for Terra, at the arbitration, confirmed the position in the closing argument, it seems appropriate that the annual rates are reflective of the length of road. In short, the Agreement is amended such that the rates for the purposes of Article 2.1 are set at $1,000 per kilometre as an initial fee for the right to use the private road and $900.00 per kilometre in annual rental. Article 2.2, providing for rental review upon 60 days notice, is deleted. These rates are subject to rental review under the *Act*. I also direct that Article 15.1 be amended such that the Agreement cannot be terminated until after the wells have been abandoned and reclaimed, subject to the *Act*. In my view, this is a reasonable solution.

c. Weed Control

To address the Respondent's concerns about the introduction of weeds and disease on the property, Terra is prepared to steam clean all equipment prior to entry onto the Lands during drilling, completion and work-over operations. This, says Terra, meets all current industry standards. Terra's view is that a weed assessment is not appropriate as there would be no way to determine the source of any new weeds that may enter onto the property in the future.

The Rhyason Ranch is seeking a weed assessment performed at the expense of the Applicant. It would be readily apparent which weeds are airborne or in the area, as opposed to

those transported via Terra vehicles. It must be a term of the order that any foreign weed be dealt with by Terra in accordance with Rhyason Ranch's "organic practices." Rhyason accepts the proposal to have vehicles steam cleaned. However, this must be during the entire term of production.

Terra submits that it is not industry practice to steam clean ordinary vehicles that enter the property during the productions phase.

In the circumstances, I find that Terra's proposal to steam clean all equipment prior to entry onto the Lands during drilling, completion and work-over operations. This does not include ordinary vehicles that enter the property during the production phase. This appears to meet industry standards.

I decline to order that a weed assessment be carried out at the expense of the Applicant. In my view, while such an assessment might establish a "base line" as to the weeds present on the property at the time of the assessment, it would not, on the evidence before me at the arbitration be readily apparent which weeds were transported by Terra's vehicles. It is also not clear to what exactly Rhyason Ranch's "organic practices" are. I am also concerned that, contrary to Rhyason's assertions, that such an assessment will minimize the potential for conflict in the future, it will have the exact opposite effect.

In any event, the ***Petroleum and Natural Gas Act*** provides:

> 9(2) A person who enters, occupies or uses land to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir is liable,
>
> (a) to pay compensation to the land owner for loss or damage caused by the entry, occupation and use, and …

Under Section 16(1)(b) an application may be made to the Mediation Arbitration Board by a land owner for damages caused. In such an application, the burden rests with the landowner to establish the damages.

d. Security

To prevent entry onto the Lands, Terra proposes to gate and keep gates locked using a double lock system.

Rhyason Ranch argues that a double locked gate is not sufficient and requires that Terra should have a person manning and recording all entry and exit on the property. The records should be provided to the Respondent upon request. Manning must be in place at any time that a service rig or other business out of the ordinary course of production is being carried out on the property by Terra.

Terra says that Rhyason's proposal is not ordinary practice. A double lock system is a practical and effective method.

In my view, a double lock system is a practical and reasonably effective measure, and I so direct. The locked gates will prevent intrusion and the added advantage that

the double locks will make it simple to determine responsibility for leaving gates open. In addition, I direct that the Applicant shall construct gates at the entrances to the Access Road, at the entrances to the Well Sites and at all reasonably necessary points on or in conjunction with the Access Road. If the parties fail to agree with respect to the number necessary gates, I retain jurisdiction to deal with the issue.

e. Construction

Terra argues that it is prepared to use a competitive bid process for construction of the access road and well sites, and will invite the Respondent to participate. Terra will award the contract to the successful bidder in its absolute discretion. Terra opposes the proposal from Rhyason Ranch to award it the construction work on the basis of an average of three other contractors. It is unlikely that three other contractors will bid for work they cannot be awarded. In any event, it is "beyond the scope of the [PNG Act] for the Board to direct the Applicant to make use the services of any specified individual" (***Penn West Petroleum Ltd.***).

The respondent's position is that Rhyason Contracting, a business owned and operated by Mr. Rhyason, should be used for all construction on the Lands. It takes issue with Mr. Beatty's assertion that it would be "unethical" not to follow a competitive bid process and not in the interest of shareholders. It says the market rates are well known. Moreover, it is normal (and common sense) in the industry for the landowner to do the construction on his property.

Rhyason Ranch also submits that the Board is not prohibited from ordering that a specific contractor be used, only that non-market rates cannot be imposed on Terra.

Terra replies that Rhyason did not provide the necessary evidence to support its position, including what competitive rates might be.

In negotiations between parties it is, of course, open to them to agree that an oil company will use the services of a landowner for the purposes of construction on the lands. In this case, the parties did not agree to that.

As mentioned above, I do not have the jurisdiction to order Terra to use the services of a specific contractor (***Penn West Petroleum Ltd***). In any event, this would be in the nature of specific performance, requiring some degree of ongoing supervision of the relationship and, even if there was jurisdiction, I would decline to order it, given the relationship between these parties.

f. Flaring, Venting and Sour Gas

Rhyason Ranch says that the Applicant failed to address this issue. Rhyason Ranch's position is that there should be no flaring or venting, including that of sour gas on the property at any time, as, in Mr. Rhyason's view, this is devastating on agriculture and livestock. It is particularly important to Rhyason which operates an organic bison ranch. Mr. Rhyason testified that "certain company

vehicles are equipped to address this issue" and Terra should be directed to employ such vehicles.

Terra says that Mr. Beatty testified that flaring may be necessary. All natural gas wells require flaring as part of the testing process, and is required after testing to address safety and emergency conditions.

I decline to make the order sought by Rhyason Ranch. In the circumstances, and on the submissions and evidence before me, I am not satisfied that this is an order I ought to make. Flaring, venting and sour gas are part of the regulatory process before the Oil and Gas Commission. For example, Section 71(4) of the ***Drilling and Production Regulation***, B.C. Reg 362/98, as amended, prohibits flaring, except in amounts required because of drill stem testing, unless there is authorization from the Commission. The focus in the Board's decision is the right of entry, terms and compensation for the entry, as opposed to the ongoing and continuing regulatory process which, in my view, fall squarely within the jurisdiction of the Oil and Gas Commission.

g. Cattle Guards

Rhyason Ranch argues that cattle guards should be placed at all relevant points along the access road. It says that Terra must be ordered to consult with Rhyason Ranch with respect to the location and "comply" with its requirements.

There is no submission from Terra on this point.

I direct that Terra Energy place cattle guards at all reasonably necessary points on the access road. If the parties fail to agree, I retain jurisdiction to deal with the issue.

h. Compensation and Indemnification for Damages

Rhyason Ranch says that a "standard clause" should be part of the order to protect the landowner.

I do not agree with this request. There is nothing provided here as to the details of such a clause. At minimum, the party proposing a term of an order should be required to spell out what it is seeking.   Further, the Board has the jurisdiction to entertain damage claims arising from entry, occupation and use (Sections 9(1) and 16(1).

i. Default of Obligations

Rhyason Ranch also requires that it be a term of the order that if the Applicant default on any obligation under the order, and the default is not remedied within 60 days, the order shall expire, the right of entry revoked and the Applicant is liable for damages the Respondent.

On this point, Terra argues that the ***Act***, and specifically Section 26, provides a mechanism for review, rescission or amendment of an order. Nothing further needs to be included in the order.

I accept Terra’s argument on this issue and decline to make the direction requested. Section 26 provides:

> 26 (1) An order of the mediator or board granting the right to enter, occupy or use land may be enforced in the same manner as a writ of possession issued by a court.
>
> (2) The board may, on its own motion or on application,
>
> (a) rehear an application before making a determination, and
>
> (b) review, rescind, amend or vary a direction or order made by it, the chair or a board member

If Terra defaults on its obligations under this order, Rhyason Ranch may enforce it though the courts. As well, Rhyason Ranch may return to the Board and make an application for the Board to “review, rescind, amend or vary [the] direction or order.”

8. Costs

Rhyason Ranch submits that it should be granted costs in this matter. It says that the Applicant set the timing of the arbitration, and it was not even able to present all of its evidence on the first day. Moreover, the Respondent is a lay-person and could not be expected to anticipate such matters as timing and number of witnesses. As well, due to the timing of the arbitration and the exchange of documents

occurring over the holidays, the Respondent did not know what evidence the Applicant would bring to the hearing and was not in a position to anticipate it.

The Applicant says that it is not appropriate to award costs in this case. Both the Applicant and the Respondent, represented by Mr. Hadland, "who represented himself as having experience in these matters," and Mr. Rhyason were parties to setting the timing for submissions and the date for the arbitration. Moreover, the hearing would have been concluded in one day except for the Respondent raising matters outside the jurisdiction of the Board and irrelevant to the issues before the Board. Terra denies that Rhyason did not have adequate time to prepare or could not anticipate the issues. Issues such as land value, crop loss, annual rent etc. are well known and did not depend on receiving the Applicant's statement of points. The Respondent was well aware of the issues through the negotiation and mediation process.

Section 47 of the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45, provides the Board with the Authority to award costs. It reads:

> 47 (1) Subject to the regulations, the tribunal may make orders for payment as follows:
>
> (a) requiring a party to pay part of the costs of another party or an intervener in connection with the application;

> (b) requiring an intervener to pay part of the costs of a party or another intervener in connection with the application;
>
> (c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay part of the actual costs and expenses of the tribunal in connection with the application.
>
> (2) An order under subsection (1), after filing in the court registry, has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken on it as if it were an order of the court.

I am of the view that I have the discretion to award costs.

In the circumstances of this application costs may be appropriate. However, while the parties have generally addressed this issue, there is little evidence before me with respect to costs. In the result, I ask the parties to provide me with written submissions on the amount and basis for costs in this case. I would ask the parties to provide such evidence as may be required by way of affidavits. If there is any issue as to credibility, such issue(s) may be resolved through cross examination. The Board's administrator will contact the parties to schedule written submissions.

THEREFORE THE BOARD MAKES THE FOLLOWING ORDERS:

1. Upon payment by the Applicant to the Respondent of the first year's payment, set out in Appendix "F" attached

to this Order, pursuant to Section 21(1) of the *Petroleum and Natural Gas Act*, plus the payment of initial fee for the road use of $1,000.00 per kilometer, set at 3.93 kilometers for the private part of the Access Road, the Applicant shall have entry to, occupation and use of the that part of the Lands, described as First Well Site herein, together with the Access Road, for the purposes of exploration, development and production of petroleum and natural gas.

2. Upon payment by the Applicant to the Respondent of the annual payment, set out in Appendix "F" attached to this Order, pursuant to Section 21(1) of the *Petroleum and Natural Gas Act*, plus the $900.00 per kilometer on account of annual rental for road use, the Applicant shall continue to have entry to, occupation and use of the that part of the Lands, described as First Well Site herein, together with the Access Road, for the purposes of exploration, development and production of petroleum and natural gas.
3. The amount set out in Item 2. of the order shall be paid no later than the anniversary date of the payment set out in Item 1. of this order in each of the following years.
4. Upon payment by the Applicant to the Respondent of the first year's payment, set out in Appendix "G" attached to this Order, pursuant to Section 21(1) of the *Petroleum and Natural Gas Act*, plus any amount payable on account road use, the Applicant shall have entry to, occupation and use of the that part of the Lands, described as Well A5-29-84-21 W6M herein, for the

purposes of exploration, development and production of petroleum and natural gas.

5. Upon payment by the Applicant to the Respondent of the annual payment, set out in Appendix "F" attached to this Order, pursuant to Section 21(1) of the *Petroleum and Natural Gas Act*, plus any amount payable on account of road use, the Applicant shall continue to have entry to, occupation and use of that part of the Lands, described as Well A5-29-84-21 W6M herein, together with the Access Road, for the purposes of exploration, development and production of petroleum and natural gas.
6. The amount set out in Item 5. of the order shall be paid no later than the anniversary date of the payment set out in Item 4. of this order in each of the following years.
7. Upon payment by the Applicant to the Respondent of the first year's payment, set out in Appendix "H" attached to this Order, pursuant to Section 21(1) of the *Petroleum and Natural Gas Act*, plus any amount payable on account of road use, the Applicant shall have entry to, occupation and use of the that part of the Lands, described as Second Well Site herein, together with the Access Road, for the purposes of exploration, development and production of petroleum and natural gas.
8. Upon payment by the Applicant to the Respondent of the annual payment, set out in Appendix "F" attached to this Order, pursuant to Section 21(1) of the *Petroleum and Natural Gas Act*, plus any amount payable on account of road use, the Applicant shall continue to have entry to, occupation and use of that part of the

Lands, described as Second Well Site herein, together with the Access Road, for the purposes of exploration, development and production of petroleum and natural gas.

9. The Applicant shall construct a five (5) feet buffalo wire fence with reinforced steel posts around each of the Well Sites.

10. The Applicant and the Respondent shall comply with the terms and conditions of the CAPLA Master Road Use Agreement, attached as Appendix "I" (the "Agreement") with the following exceptions:

(a) Article 2.2 is deleted and the rental rates for the purpose of the Agreement are fixed at $1,000.00 per kilometer as the initial payment and $900.00 per kilometer per year thereafter, subject to rental review under the *Act;*

(b) Article 15.1 is amended such that the Agreement shall continue to be in force and effect between the parties until the Wells have been abandoned and reclaimed, subject to the *Act;* and

(c) The Agreement shall be governed by, construed and interpreted in accordance with the laws of the Province of British Columbia and each party irrevocably agree to attorn to the jurisdiction of the courts of the Province of British Columbia and all courts of appeal thereunder.

12. For the purposes of weed control, the Applicant shall steam clean all equipment prior to entry onto the Lands during drilling, completion and work-over operations.

13. The Applicant shall construct gates at the entrances to the Access Road, at the entrances to the Well Sites and at all reasonably necessary points on or in

connection with the Access Road. The gates shall be locked using a double lock system.

14. The Applicant shall construct cattle guards at all reasonably necessary points on or in connection with the Access Road.

MEDIATION AND ARBITRATION BOARD

DATED THIS 5th DAY OF MARCH, 2007

IB S. PETERSEN,
VICE-CHAIR

APPENDIX "F"

WELL SITE COMPENSATION SUMMARY: Well 5-29-84-21 W6M

Acres, including Access Road: 24.78

			First year payments	Annual payments
(a)	Compulsory Aspect:	$	2,000.00	
(b)	Value of Land and Loss of Profit			
	Land: $600/24.78 acre	$	14,868.00	
	Crop: $250/24.78 acre	$	6,195.00	6,195.00
(c)	Temporary and Permanent Damage:	$	2,300.00	
(d)	Compensation for Severance ($600/3 acre)	$	1,800.00	1,800.00
(e)	Compensation for Nuisance and Disturbance:	$	2,200.00	2,200.00
(f)	Money Previously Paid to an Owner:	$		
(g)	Other Factors	$	4,673.00	4,673.00

TOTAL COMPENSATION:

FIRST YEAR PAYMENT:	$	34,036.00	
ANNUAL PAYMENT:	$		14,868.00

APPENDIX “G”

WELL SITE COMPENSATION SUMMARY: Well A5-29-84-21 W6M

Acres, including Access Road: 0

			First year payments	Annual payments
(a)	Compulsory Aspect:	$	2,000.00	
(b)	Value of Land and Loss of Profit Land: $___/___ acre Crop: $___/_____ acre	 $ $		
(c)	Temporary and Permanent Damage:	$		
(d)	Compensation for Severance ($600/3 acre)	$		
(e)	Compensation for Nuisance and Disturbance:	$	1,000.00	1,000.00
(f)	Money Previously Paid to an Owner:	$		
(g)	Other Factors	$		

TOTAL COMPENSATION:

FIRST YEAR PAYMENT:	$	3,000.00	
ANNUAL PAYMENT:	$		1,000.00

APPENDIX "H"

WELL SITE COMPENSATION SUMMARY: Well 1-31-84-21 W6M

Acres: 4.25

			First year payments	Annual payments
(a)	Compulsory Aspect:	$	2,000.00	
(b)	Value of Land and Loss of Profit			
	Land: $600/4.25 acre	$	2,550.00	
	Crop: $250/4.25 acre	$	1,062.50	1,062.50
(c)	Temporary and Permanent Damage:	$	2,300.00	
(d)	Compensation for Severance ($600/.5 acre)	$	300.00	300.00
(e)	Compensation for Nuisance and Disturbance:	$	2,200.00	2,200.00
(f)	Money Previously Paid to an Owner:	$		
(g)	Other Factors	$		

TOTAL COMPENSATION:

FIRST YEAR PAYMENT:	$	10,412.50	
ANNUAL PAYMENT:	$		3,562.50