

Why Refusing Land Access to the Orphan Well Association Might be a Bad Idea

The Orphan Well Association (OWA) has fostered great relationships with landowners on sites where they execute work. However, occasionally, a few landowners feel that by restricting access to the OWA, they may create leverage to obtain overdue surface lease payments from defunct companies or the Land and Property Rights Tribunal (formerly, the Surface Rights Board). In fact, by refusing access to the OWA, landowners may be harming their ability to obtain payments and/or reduce the amount of payment they may ultimately receive. Let's look into this issue a little further.

What Happens When A Company Fails To Make Surface Rental Payments?

When a company fails to make annual lease payments, landowners may apply to the Tribunal to recover the missed payments by submitting a *Recovery of Compensation Application* under section 36 of the *Surface Rights Act (SRA)*. After a complete application is received and the Tribunal is satisfied with the non-payment, the Tribunal will demand payment from the operator and any working interest participants (WIPs) identified and provide a deadline to comply. Following that, one of two scenarios play out.

1. If the operator or WIP responds within the deadline and provides proof of payment to the Tribunal, no further review of the application is necessary.
2. If the operator or WIP does not make payment within the deadline, a panel of the Tribunal will consider the application and any evidence provided by the parties in a hearing by written submissions. Following that, the Tribunal will issue a Decision and/or a Direction to Pay Order where it may direct the Minister to pay to the landowner the full amount claimed or a reduced amount. The Tribunal may also suspend and terminate the operator's rights to enter the site, other than for required maintenance or reclamation purposes.

Please Note: Payments directed by the Tribunal and paid by the Minister come from provincial tax dollars and become a debt owing to the Crown from the operator and any identified WIPs.

It's important to note that this does not terminate the lease or the operator's associated responsibilities for decommissioning (also known as abandonment) and reclamation. Landowners may claim missed lease payments for subsequent years by submitting a *Returning Recovery of Compensation Application* with the Tribunal until a reclamation certification has been formally issued.

How Do Sites End Up In The Orphan Well Program?

Once companies stop making annual surface lease payments, as outlined above, there is a good chance that they are struggling to survive. Unfortunately, in Alberta, over the past several years many oil and gas producers have failed. When this happens, their wells, pipelines, and facilities often end up in the Orphan Well program. For a site to be designated an Orphan, the Alberta Energy Regulator (AER) must first conduct a thorough review to determine that no responsible party remains. After this review the AER provides the OWA regulatory authority to deal with the site.

Insolvency, Bankruptcy, Receivership, and Inactive

These terms are thrown around a lot, and many landowners find themselves wondering what exactly these terms mean. If the operator on your land is struggling financially, you may have received a letter regarding your surface lease. Let us break it down so you know what's going on:

It is possible that the well on your land has simply been shut-in and is no longer producing (called inactive). In these cases, the company is still viable, and you should continue to receive your rental payment.

A struggling company may enter into what is known as *Companies' Creditors Arrangement Act* or CCAA. At this stage, the company still exists and are attempting to restructure and survive. If CCAA is unsuccessful, companies may become insolvent and fall into bankruptcy.

Bankruptcy is a federally regulated process that may result in a court-appointed receiver taking over the company and selling off assets to pay back creditors. At this stage rental payments will likely cease and as a landowner you would need to file for rental payments from the Land and Property Rights Tribunal.

In some cases, the lease and infrastructure may be sold. This typically happens when the well is still producing or considered to be an asset. In these situations, landowners should receive notice of the sale (but may not). The new owner would have an obligation to pay rentals. As a landowner, it is important to contact the new company and ensure the information on their file is correct, so you continue to receive rental payments going forward.

Wells and facilities that are no longer viable will not sell through the receivership and may ultimately come into the orphan well program or become the responsibility of a WIP that may hold an interest in the well. This process can take several years and can leave landowners frustrated as surface lease payments are not typically paid while sites are in receiverships and must be applied for from the Tribunal. If the wells or facilities on your land have become orphan, you will receive a letter from the OWA. You may also go onto the OWA website to see if any of the wells on your land are listed within the inventory. *(Further info and website links can be found at the end of this article.)*

Can Landowners Deny Access To A Wellsite?

When an operator has missed or reduced an annual lease payment or where the well has become orphaned, landowners often seek clarification on whether they can refuse access to their land. Unfortunately, denying access will not help your situation or speed up the payment process. The best thing to do in this situation is to apply to the Tribunal for payment as soon as possible.

When it comes to the abandonment or reclamation of a wellsite, facility or pipeline on your land associated with a defunct operator, several other parties may legally enter the site. They include the Alberta Energy Regulator, the Orphan Well Association and any WIPs.

Denying access to the AER, OWA, or WIPs may result in the Tribunal stopping all future payments in accordance with Section 36 (8) of the SRA. This section states *"The Board may direct the Minister not to make any further payments due to the person if it considers that the person entitled to receive them is refusing access for operations, abandonment or reclamation allowed by law"*.

The Orphan Well Association

The Orphan Well Association is a not-for-profit organization created from a joint industry and government initiative to manage the abandonment and reclamation of upstream oil and gas "orphans" in Alberta. Orphans are oil or gas wells, pipelines, facilities or associated sites left behind by a defunct company and have been legally deemed as orphans by the AER. The OWA operates under the delegated legal authority of the AER, with funding from the oil and gas industry. This includes the repayable loans provided by the Provincial and Federal Government you may have heard about.

The OWA has the legal authority to access all private and public lands in Alberta to suspend or decommission orphaned oil and gas assets, including wells, pipelines, facilities and associated infrastructure. This authority is based on statutes contained within the *Oil and Gas Conservation Act*. The Association is further authorized to access any Specified Lands for reclamation and remediation under the authority of the *Environmental Protection and Enhancement Act*.

The OWA has a well-earned reputation of working cooperatively with landowners; however, they have been denied access in rare cases. In these cases, the OWA informs the Tribunal and/or the Farmers Advocate, and any potential for surface lease payments from the Tribunal may be suspended or denied until access is granted. The OWA can also seek law enforcement support for access if they feel public safety is at risk or in other cases they simply bypass the site and move on to other areas. This may mean that bypassed sites remain on the land for prolonged periods.

It's also important to know that the OWA does not take the place of the former operator and does not hold any surface lease or license for the well or infrastructure. Therefore, the OWA is unable to compensate landowners for unpaid surface lease payments from defunct companies. So, what can landowners do?

While it may seem in your best interest to refuse access to your land, doing so will only impact future work and will not get you the compensation you're looking for.

Working Together

It's important to note that the OWA will work alongside landowners and communicate openly about the process and timelines in place. Stakeholders will also be engaged during the decommissioning and reclamation process.

Keep in mind that the OWA only receives sites that were owned completely (i.e., 100%) by the defunct company. The OWA will then contact landowners and let them know the well site has been designated an orphan. The OWA is not responsible for rental payments, only the care, management, decommissioning and reclamation of the site.

Taking Care of Landowners

Although the OWA requires access to sites year-round, it's important to know that they will do their best to communicate openly with landowners before accessing their land. They will also consider landowners' perspectives and concerns but may not be able to delay work and therefore some landowners may be impacted minimally. Again, these impacts should be documented and provided to the Tribunal as part of the application.

Interested in learning more?

- For additional information about applying to the Tribunal for missed payments under a Surface Lease or Compensation Order, please visit www.alberta.ca/surface-rights-board.aspx.
- For additional information on the Farmers Advocate, please visit <https://www.alberta.ca/farmers-advocate-office.aspx>
- For additional information on the Alberta Energy Regulator, please contact inquiries@aer.ca
- For additional information on the Orphan Well Association, please visit <https://www.orphanwell.ca/>

This article was written as a collaboration between the Orphan Well Association and Farmer's Advocate Office with input from the Land and Property Rights Tribunal. We thank all participating parties involved.

