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# ALBERTA PUBLIC LANDS APPEAL BOARD

## Report and Recommendations

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**Date of Report and Recommendations: December 20, 2018**

**IN THE MATTER OF** sections 121, 122, 123, 124, and 125 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 15, 98, 211, 212, 213, 216, 228, and 235 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

**-and-**

**IN THE MATTER OF** an appeal filed by Tim Kalinski with respect to the deemed rejection of the Director, Provincial Approvals Section, Alberta Environment and Parks, to refuse an application for access to Department Licence of Occupation DLO 111469, held by Alvin Bancarz.

Cite as: *Tim Kalinski v. Director, Provincial Approvals Section, Alberta Environment and Parks, re: Alvin Bancarz* (20 December 2018), Appeal No. 17-0028-R (A.P.L.A.B.).

**HEARING BEFORE:**

Ms. Marian Fluker, Panel Chair;  
Ms. Meg Barker, Board Member; and  
Ms. Anjum Mullick, Board Member.

**BOARD STAFF:**

Mr. Andrew Bachelder, Board Counsel; Ms.  
Valerie Myrmo, Registrar of Appeals; and Ms.  
Denise Black, Board Secretary.

**PARTIES:**

**Applicant:** Mr. Tim Kalinski, represented by Mr. Thomas  
Owen, Owen Law.

**Respondent:** Mr. Alvin Bancarz, represented by Mr. Brent  
Mielke, Emery Jamieson LLP.

**WITNESSES:**

**Applicant:** Mr. Tim Kalinski and Mr. Zachary Kalinski.

**Respondent:** Mr. Alvin Bancarz.

## **EXECUTIVE SUMMARY**

Mr. Tim Kalinski holds a Surface Material Lease (the “Kalinski SML”) for sand and gravel on public lands located near Calling Lake, Alberta. Mr. Kalinski holds a Department Licence of Occupation (the “Kalinski DLO”) for a road leading from the Kalinski SML to a Department of Licence of Occupation (the “Bancarz DLO”) held by Mr. Alvin Bancarz. The Bancarz DLO has a road that traverses public lands from a Surface Material Lease held by Mr. Bancarz to Highway 813. Mr. Kalinski built a road from the Kalinski SML to intersect with the road on the Bancarz DLO, but was unable to reach an agreement with Mr. Bancarz to use the road on the portion of the Bancarz DLO from the intersection with the Kalinski DLO to Highway 813.

Mr. Kalinski applied to the Director, Alberta Environment and Parks to make a decision allowing Mr. Kalinski use the road on the portion of the Bancarz DLO from the intersection with the Kalinski DLO to Highway 813. After 30 days, the request was deemed rejected. Mr. Kalinski appealed to the Board requesting access to the needed portions of the Bancarz DLO.

The Board, after reviewing the written submissions and the evidence of Mr. Kalinski and Mr. Bancarz presented at an oral hearing, recommended the Minister order Mr. Bancarz to grant access to the part of the Bancarz DLO required by Mr. Kalinski to access the Kalinski DLO, on the terms and conditions outlined in this Report and Recommendations.

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## **I. INTRODUCTION**

[1] This is the Report and Recommendations from the Public Lands Appeal Board (the “Board”) to the Minister, Alberta Environment and Parks (the “Minister”), arising from a hearing held by the Board regarding an appeal filed by Mr. Tim Kalinski (the “Applicant”) for access to Department Licence of Occupation (“DLO”) 111469 (the “Bancarz DLO”) held by Mr. Alvin Bancarz (the “Respondent”). The Applicant requires access to the Bancarz DLO to access two dispositions he holds: a DLO on which he has built a road and a Surface Material Lease (“SML”).

## **II. BACKGROUND**

[2] The Applicant is the holder of SML 130017 (the “Kalinski SML”), located on public lands northwest of Calling Lake, in the Municipal District of Opportunity No. 17, Alberta. The Kalinski SML has an expiry date of March 24, 2024. The Kalinski SML was granted for the purpose of extracting surface materials such as sand and gravel.

[3] The Applicant built a road to access the Kalinski SML on DLO 130613 (the “Kalinski DLO”),<sup>1</sup> which he holds and which also expires March 24, 2024.

[4] The Kalinski DLO runs from the Kalinski SML to the Bancarz DLO. The lease for the Bancarz DLO expires May 8, 2022. The Bancarz DLO extends from Surface Material Lease SML 110036 (the “Bancarz SML”), also located on public lands, to Highway 813.<sup>2</sup>

[5] To haul sand and gravel from the Kalinski SML along the Kalinski DLO to Highway 813, the Applicant must travel approximately 2.1 km on the Bancarz DLO (the “Road”). Appendix A to this Report and Recommendations shows the various SMLs, DLOs, and the Road.

[6] The Applicant and the Respondent (collectively, the “Parties”) were unable to reach an agreement for use of the Road by the Applicant.

[7] On January 2, 2018, the Applicant submitted a letter to the Director, Provincial Approvals Section, Alberta Environment and Parks (the “Director”), requesting the Director make a decision regarding the Applicant’s request to access to the Road. The Board considers the letter to

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<sup>1</sup> The Kalinski DLO is located on 16-23-76-23 W4M to 14-26-76-23 W4M.

<sup>2</sup> The Bancarz DLO is located on 13-19-76-22 W4M to 15-22-76-23 W4M.

be a request for an overlapping disposition. The Director did not make a decision within the prescribed 30 day period, resulting in a deemed rejection under section 15(1) of *Public Lands Administration Regulation*, AR 187/2011 (“PLAR”),<sup>3</sup> which is appealable to the Board under section 211(e) of PLAR.<sup>4</sup>

[8] On February 8, 2018, the Applicant filed a Notice of Appeal with the Board for a road use order under section 98 of PLAR.<sup>5</sup> On February 13, 2018, the Director provided the Board with a limited Director’s Record consisting of the dispositions related to the appeal. Copies of the Director’s Record were provided to the Parties.

[9] The Respondent was notified of the appeal, and on April 23, 2018, he advised the Board he wanted to participate in the appeal process. A mediation meeting was held, but no agreement was reached between the Parties. An oral hearing with written submissions was held November 20, 2018, in Edmonton. A notice of hearing was placed on the Board’s website as required by the legislation, but no requests to intervene were received.

### **III. ISSUES**

[10] The Board set out the issues as follows: “Should the Minister order that Tim Kalinski be allowed to access DLO 1360613 via DLO 111469, and if so, on what terms?”

### **IV. SUBMISSIONS**

#### **A. Applicant**

[11] The Applicant submitted the only access to the Kalinski DLO is by way of a 2.1 km portion of the Bancarz DLO, which is approximately half the length of the Bancarz DLO.

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<sup>3</sup> Section 15(1) of PLAR provides: “Subject to this section, an application under section 9, 11 or 13 is deemed to have been rejected if the director does not register a notice under section 9(6), 11(5) or 13(5) within the 30-day period provided by those sections.”

<sup>4</sup> Section 211(e) of PLAR states: “The following decisions are prescribed as decisions from which an appeal is available: ... (e) a deemed rejection under section 15(1);”

<sup>5</sup> Section 98 of PLAR provides:

“A commercial user that requires use of a road in a licensed area for the purposes of the commercial user’s commercial or business undertaking may use the road only

- (a) by agreement with the holder of the licence, whether reached in mediation under Part 10 or otherwise, or
- (b) in the absence of an agreement with the holder of the licence, in accordance with an order under section 124(3) of the Act on an appeal under Part 10.”

[12] The Applicant stated the Road is capable of being an all-season road as logs from the Kalinski SML were hauled on the Road during the winter.

[13] According to the Applicant, the Respondent is the only user of the Bancarz DLO.

[14] The Applicant said the use of the Road by the Applicant only became an issue when the business relationship with the Respondent broke down.

[15] The Applicant stated the lack of an agreement for his use of the Road has prevented him from producing any gravel or sand from the Kalinski SML.

[16] The Applicant estimated there is a potential annual production of up to 100,000 cubic yards of gravel from the Kalinski SML, which would mean 1500 to 3000 loads hauled from the Kalinski SML, each year, during daylight hours.

[17] The Applicant referred to the Board's decision in *830614 Alberta Corporation v. All Peace Asphalt Ltd. and the County of Grande Prairie No. 1* (3 November 2017), Appeal No. 16-0026 (A.P.L.A.B.) ("*830614 Alberta*"), where the Minister approved the Board's recommendation and ordered the applicant, 830614 Alberta Ltd., be granted access to the DLO held by the respondent, All Peace Asphalt Ltd., even though the DLO was routed through the SML held by All Peace. The Applicant acknowledged the *830614 Alberta* decision is being reconsidered by the Board, but submitted the Applicant's argument for access to the Bancarz DLO is stronger than the applicant's case in *830614 Alberta*. According the Applicant, the Bancarz SML is two kilometers away from the Road and, therefore, the Bancarz SML would not be impacted by the Applicant's access to the Road.

[18] The Applicant recognized his use of the Road would result in impacts to the Road and the Respondent's operations, but submitted the impacts could be mitigated or compensation paid. The Applicant stated compensation should be equivalent to any loss by the Respondent and not be an opportunity for the Respondent to profit by holding a Government lease.

[19] The Applicant submitted a \$500.00/km annual fee was reasonable, which would result in a fee for the use of the Road of \$1,050.00 annually.

[20] The Applicant stated he should be responsible for half of the reasonable annual maintenance costs of the Road.

[21] The Applicant submitted an annual fee for maintenance of the access gate, located at the intersection of the Bancarz DLO and Highway 813, should be \$1,500.00.

[22] The Applicant argued the Board should not recommend an interference fee be ordered as the Road does not traverse any portion of the Bancarz SML. Any interference that might occur would be minor and would stem from the Respondent and the Applicant's vehicles wanting to use the Road at the same time. The Applicant submitted this situation could be mitigated through the Applicant's vehicles yielding to the Respondent's vehicles, haulers communicating with each other, and widening a portion of the road to enable vehicles to pull over to allow a truck to pass. The Applicant stated it would pay for the road widening.

[23] In the alternative, the Applicant submitted an interference fee should be less than \$1.00/cubic yard and should have a cap, which the Applicant suggested would be up to one quarter of the construction costs of the Bancarz DLO, which was estimated at \$200,000.00.

[24] The Applicant argued any order for use of the Road should have the same expiry date as the Kalinski SML and the Kalinski DLO, which is March 24, 2024.

[25] The Applicant suggested the Parties should be able to make amendments to any order to use the Road if both the Respondent and the Applicant agree in writing.

[26] The Applicant submitted the road use agreement between the Applicant and Imperial Oil (the "IOL Road Use Agreement"), which the Applicant provided, was a comparable model for an order to use the Road. The Imperial Oil agreement allowed the Applicant to use over 50 kilometers of roads leased by Imperial Oil for an annual fee of \$12,500.00/year.

**B. Respondent**

[27] The Respondent requested the Board not recommend imposing an order allowing the Applicant to use the Road.

[28] The Respondent stated the Bancarz SML is an active gravel pit, operating each year between May and October.



[29] The Respondent stated he has an interest in SML 140062,<sup>6</sup> which he plans to begin work on after reclamation work on the Bancarz SML is partially completed. The Respondent noted the road constructed on the Kalinski DLO was constructed through SML 140062.

[30] The Respondent explained there is a gate located at the end of the Bancarz DLO at the intersection with Highway 813. The gate is kept locked except to allow access to the Bancarz SML.

[31] The Respondent stated the Applicant holds other SMLs in the area, either in his name or in the name of family members.

[32] The Respondent submitted the Kalinski SML will be in direct competition with the Bancarz SML.

[33] The Respondent argued the Applicant eroded any trust between the Parties by constructing the Kalinski DLO without a road use agreement between the Parties, damaging the Road by hauling logs on it, and accessing the Road without an agreement or permission while the Respondent was out of the country.

[34] The Respondent submitted the location where the Kalinski DLO connects with the Bancarz DLO is unsafe due to visibility and grading issues, and a “T” intersection would be preferable as it would require drivers to fully stop before proceeding.

[35] The Respondent argued a better location for the Kalinski DLO would be along an existing cutline to the west of the Kalinski DLO, or along the western boundary of SML 140062.

[36] The Respondent explained the yearly maintenance costs for the Road averaged between \$45,000.00 and \$60,000.00 over the eight years since it was built. The Respondent stated the terrain the Road crosses is largely muskeg and, therefore, maintenance is more intensive than in other areas of Alberta.

[37] The Respondent said vandalism and theft of equipment at the Bancarz SML was greatly reduced by locking the gate and keeping the road unplowed during the winter. The

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<sup>6</sup> SML 140062 is located east of the Bancarz SML. At the oral hearing, the Respondent testified SML 140062 was applied for in the Respondent’s company name, but was later transferred to the Respondent’s brother’s name.

Respondent stated, while he was out of the country, the Applicant or his agents or employees left the gate unlocked which resulted in the theft and vandalism of the Respondent's property.

[38] The Respondent noted the cost and risk of constructing and maintaining the Bancarz DLO was borne by him alone, and the Applicant would be unjustly enriched by being allowed to use the Road without assuming some of the initial cost of building it. The Respondent argued he was entitled to compensation for the initial construction and subsequent improvements related to the Road. In the Respondent's written submissions, it was estimated the cost to construct the Road was \$200,000.00, plus an additional \$400,000.00 to maintain and improve it over the last eight years. At the oral hearing, the Respondent estimated the initial cost to build the Road was \$163,000.00, plus \$100,000.00 for his personal time.

[39] The Respondent submitted it would be fair to expect the Applicant to pay a proportionate share of the construction costs and past improvement costs for the Road, and suggested an amount of \$300,000.00.

[40] The Respondent stated the cost of the Road's maintenance was \$58,449.00 in 2018 and 66,619.74 tonnes of gravel were hauled on the Road. The Respondent noted this works out to \$0.90 per tonne of gravel hauled on the Road, and submitted this amount should be a starting point for maintenance compensation.

[41] The Respondent argued the Board should take into consideration the damage done by the Applicant's unauthorized use of the Road, which the Respondent had to repair. The Respondent stated the "poor practices" of the Applicant's operation is a risk the Respondent would have to manage and should be passed on to the Applicant. The Respondent proposed the Applicant pay compensation of \$1.50 per tonne of gravel hauled.

[42] The Respondent submitted the following conditions for use of the Road would be appropriate:

- (a) the Applicant would assume 100 percent of the maintenance cost if he uses the Road in the winter;
- (b) the Applicant shall provide one month's notice to the Respondent of the dates he intends to use the Road;

- (c) the Applicant shall be invoiced for maintenance costs from the previous month by the first business day of each month and pay the invoices on the last business day of each month; and
- (d) if the Applicant does not pay, then the right to use the Road immediately ceases.

[43] The Respondent stated a gate fee of \$1,500.00 annually, or \$125.00 monthly, is appropriate. The Respondent requested the Board not grant the Applicant access to the Road during winter, but if the Board were to do so, the Respondent suggested an administrative fee of \$100.00 per day should be paid by the Applicant to compensate for the Respondent's travel time to the site to ensure the gate is locked.

[44] The Respondent submitted the term of any order recommended by the Board should be one year, with renewals at the Applicant's request if there are no reported compliance issues with the order.

[45] The Respondent argued the IOL Road Use Agreement included in the Applicant's written submission is not appropriate for this situation. According to the Respondent, Imperial Oil is a large corporation, with different considerations than the Respondent, and unknown maintenance and other costs associated with its roads.

[46] The Respondent submitted a baseline inspection of the present condition of the Road should be completed prior to any use by the Applicant. The inspection should be done by the Parties or by a third party, with the costs to be borne by the Applicant.

[47] The Respondent stated a pre-condition of the Applicant using the Road should be evidence of adequate insurance, as well as a requirement for the Applicant to provide the Respondent copies of any notices of renewal, replacement, or cancellation of the insurance.

[48] The Respondent submitted the Applicant, and any third parties hired by the Applicant, be required to:

- (a) adhere to the posted speed limits and traffic safety signs and controls;
- (b) not use the Road at all in wet conditions;
- (c) use licensed, adequately insured and qualified drivers only;
- (d) not use the Road if under the influence of any drugs (legal or otherwise) or alcohol;

- (e) keep the gate closed at all times except when immediately using for entering or leaving the Road;
- (f) provide for communications by VHF Radio on a designated channel for all vehicles, with clear and precise English language used only and no profanity;
- (g) follow road use and safety procedures provided to drivers by the Applicant and meet the approval of the Respondent;
- (h) pay for enhanced safety features due to increased traffic, such as additional signage, passing pullouts, or other unforeseen road improvements, implemented as deemed necessary by the Respondent; and
- (i) agree the Respondent may stop road users for the following reasons:
  - (i) if he suspects violations;
  - (ii) to inspect scale tickets for legal weights, or safety equipment;
  - (iii) for poor and unsafe use of radio;
  - (iv) for poor bush driving skills; and
  - (v) for any other reason that compromises safety or damages the road.

[49] The Respondent argued it would be appropriate for an interference fee to be paid by the Applicant.

[50] The Respondent submitted any order should grant him the ability to change the locks on the gate if the following were to occur:

- (a) non-payment of any funds owed in accordance with the agreement;
- (b) damage to the Road exceeding reasonable wear and tear;
- (c) unauthorized or unqualified drivers using the Road;
- (d) violations of the posted speed limits and signage, including weight restrictions; or
- (e) unsafe use of the Road.

**C. Applicant's Rebuttal**

[51] The Applicant noted SML 140062 is in the application stage and is not held by the Respondent.

[52] The Applicant submitted the Respondent and the Applicant discussed the possibility of the Respondent crushing gravel on the Kalinski SML and, therefore, the Respondent

knew about the Kalinski DLO, recommended a contractor to construct it, and knew where the Kalinski DLO would intersect with the Bancarz DLO.

[53] The Applicant argued the Respondent knew the Road was being used by the Respondent to haul logs from the Kalinski SML.

[54] The Applicant submitted it was unreasonable for the Respondent to expect the Applicant to build another road rather than use the Road which is currently unused for six months of the year.

[55] The Applicant stated he held discussions with the Respondent regarding the alleged damage to the Road, but the Parties could not agree on who or what type of activity caused the damage.

[56] The Applicant disputed the Respondent's claim the unlocked gate led to theft and vandalism, and he had not seen any evidence to support the claim. The Applicant agreed the gate must remain locked when the Road is not being used.

[57] The Applicant submitted the Respondent is seeking payment on a capital investment, but not offering any interest in the Road in return. The Applicant pointed out the Road would still be held by the Respondent after the Applicant was finished using it.

[58] The Applicant stated the figure of \$600,000.00 to construct and maintain the road over the last eight years was unsupported by any evidence. The Applicant argued any maintenance done on the Road thus far was solely for the benefit of the Respondent.

[59] The Applicant submitted it was unreasonable for the Respondent to expect a \$300,000.00 payment while only proposing a one-year term, renewable on the Respondent's terms.

[60] The Applicant stated the proposed fee of \$1.50/tonne is not needed as the actual cost of maintenance will be known each year. The Applicant disputed the Respondent's estimates of maintenance costs for the Road. The Applicant agreed to pay the full amount of maintenance costs of the Road during winter, and half of the costs from May to October.

[61] The Applicant argued it was unreasonable to advise the Respondent of the dates he intends to use the Road at least one month in advance.

[62] The Applicant submitted an annual gate fee of \$1,500.00 is sufficient to compensate the Respondent for all increased supervision the Respondent believes might be necessary.

[63] The Applicant stated it was unreasonable, and a safety hazard, for a hauler to stop on the highway to open the gate each time entrance to the Road is required. The gate should be locked at the end of the day when the hauling is finished.

[64] The Applicant suggested a gate at the entrance to the Bancarz SML would mitigate any damage or vandalism to the Respondent's equipment, and the Applicant would pay reasonable costs for installation of such a gate.

[65] The Applicant agreed to most of the conditions proposed by the Respondent, except those already noted and the following:

- (a) the Respondent's condition the road is not to be used in wet conditions is acceptable as long as the word "wet" is replaced with "muddy;"
- (b) the Applicant will follow any safety procedures the Respondent gives to his drivers;
- (c) the Applicant agreed to pay reasonable costs of enhanced safety signage and road improvements that are exclusive to the Applicant's benefit; and
- (d) the Applicant argued it to be excessive for the Respondent to have the authority to stop and inspect vehicles working for the Applicant, and it could be used to interfere with the Applicant's operations.

[66] The Applicant submitted the Respondent should not be given the authority to change the locks on the gate without the Applicant being given notice of an alleged infraction and the opportunity to take remedial action if necessary.

## **V. ANALYSIS**

[67] Section 98 of PLAR<sup>7</sup> states a commercial user requiring the use of the road in a licensed area may use the road only with an agreement from the license holder or an order of the

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<sup>7</sup> Section 98 of PLAR provides:

"A commercial user that requires use of a road in a licensed area for the purposes of the commercial user's commercial or business undertaking may use the road only

- (a) by agreement with the holder of the licence, whether reached in mediation under Part 10 or otherwise, or

Minister under section 124(3) of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the “Act”) on appeal to the Board.<sup>8</sup>

[68] In deciding whether the Board should recommend that the Minister issue a road use order, the Board took into consideration the following:

- (a) public lands are for the benefit of and are owned by the people of Alberta;
- (b) it is not appropriate for a holder of a DLO to profit unjustly in providing access to a DLO to another party; and
- (c) if a holder of a DLO has invested money to construct a road, the holder of the DLO should be compensated fairly by other commercial users using the road.

[69] The Board is concerned the Applicant built the road on the Kalinski DLO without first securing written permission from the Respondent to use the road on the Bancarz DLO. This approach is unacceptable. Despite the Board’s concerns regarding the Applicant’s approach, the Board finds his intention to use an existing road to be a reasonable use of public lands, compared to building another road. Although it appears other options – other locations for the Applicant to build a road - may have been available to the Applicant to access the Kalinski SML, the issue of whether to grant access on the Bancarz DLO is the only matter the Board currently had jurisdiction to consider in this appeal. The Board recommends the Applicant be permitted to use the Road on the terms and conditions as detailed in Appendix B, which is attached to this Report and Recommendations.

[70] The Board finds there would be little, if any, interference with the operations of the Appellant that are currently authorized and, therefore, the Board is not recommending the inclusion of an interference fee in the recommended road use order. The Board is hopeful the Parties will recognize it is in their best interests to communicate to reduce chances of interfering with each other’s operations. The Board notes the road on the Kalinski DLO runs through the proposed SML

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(b) in the absence of an agreement with the holder of the licence, in accordance with an order under section 124(3) of the Act on an appeal under Part 10.”

<sup>8</sup> Section 124(3) of the Act provides:

“On receiving the report of the appeal body, the Minister may, by order, confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could have made, and make any further order that the Minister considers necessary for the purpose of carrying out the decision.”

140062, which the Respondent has an interest in. However, SML 140062 is in the application stage and any concerns of interference with SML 140062 are premature and speculative.

[71] The Board notes the Applicant would have had to build a new road across public land, assuming full cost and risk, if the Respondent had not already done so. The Respondent estimated his cost to build the road on the Bancarz DLO was \$263,000.00. This compared to the amount of \$125,000.00, which was the Applicant's estimated cost to build the road on the Kalinski DLO, not including the value of the gravel used from the Kalinski SML. Since the Applicant is receiving a benefit from not having to build a road at his expense, the Board considers it appropriate for the Applicant to pay half the construction cost of the Road in the amount of \$130,000.00. Payment from the Applicant must be received by the Respondent prior to the Applicant using the Road.

[72] The Board finds the Applicant is entitled to business certainty in exchange for compensating the Respondent for the construction of the Road. One aspect of certainty is the term of the proposed road use order. The Board cannot recommend extending the term of the proposed road use order beyond the term of the Bancarz DLO. Therefore, the Board recommends the road use order have an expiry date of May 8, 2022. If the Bancarz DLO is renewed by Alberta Environment and Parks, the Applicant may apply to have the term of the road use order extended, if no agreement can be reached between the Parties.

[73] The Board considers it fair for the Respondent to be compensated for administrative expenses, including gate security and additional administrative work, which the Respondent would not have incurred if not for the road use order. The Board believes a yearly amount of \$2,160.00 (\$180.00 per month) is reasonable based on the Respondent's proposed annual gate fee of \$1,500.00 (\$125.00 per month), and then increasing it by \$55.00 per month to compensate for the need to prepare and provide information to the Applicant.

[74] The Respondent requested a baseline assessment of the condition of the Road be conducted prior to the Applicant using the Road. The Board considers this a reasonable request that will benefit both Parties. Therefore, the Board recommends a baseline assessment of the condition of the Road be conducted to determine maintenance needs and required safety improvements. The Board considers it fair for the Applicant to bear the cost of the assessment as



it is required because of his request to use the Road. Road improvement costs identified in the assessment shall be shared equally if the improvement benefits both Parties and would be needed regardless of the Applicant's use of the Road. If the improvement is for the benefit of the Applicant, or if his use of the Road is the reason for the recommended improvement, then the Applicant shall pay the cost of the improvement, including the cost associated with applying for any required approvals or amendments to existing dispositions.

[75] The Board recommends a second gate be built at a location chosen by the Respondent west of the intersection of the Bancarz DLO and the Kalinski DLO. The second gate would allow access to the Kalinski DLO from the Road, but provide security for the Respondent during the winter months when the Respondent is not hauling. As the second gate is only needed because of the Applicant's use of the Road, the Applicant should pay the costs of installing the second gate, including implementing any safety measures relating to this gate that may be required as identified in the baseline assessment.

[76] Maintenance payments for the Road should be on a proportional basis to provide fairness to both Parties. The Parties will exchange information on the total weight hauled each month. The Respondent will provide the Applicant with the total maintenance cost for each month, and the Applicant will pay a portion of the total maintenance costs based on the proportion of the total weight he hauled on the Road that month.

[77] At the hearing, the Applicant agreed he will only use the Road to haul materials originating from the Kalinski SML and he will not use the Road to haul materials from any other SMLs or operations. In order to alleviate concerns by the Respondent the Applicant may use the Road for the benefit of other SMLs, the recommended road use order will include a term stating the Applicant shall use the Road only for the purposes of transporting personnel and equipment, and hauling surface materials originating from the Kalinski SML.

[78] The Board recommends the road use order include the requirement that each Party must provide a minimum of 48 hours' notice to the other Party before commencing hauling on the Road. The Board considered 48 hours to be a fair period of notice that allows for business flexibility to meet work orders.

[79] At the hearing, concern was expressed by the Respondent regarding the intersection of the Road and Highway 813. The Respondent was concerned Alberta Transportation may require modification of the intersection for safety reasons due to the increase of traffic on the Road. To accommodate this concern, the Board recommends the road use order include a clause stating if any modification is required at the intersection of the Road and Highway 813, the Applicant, being responsible for the increase in hauling, may choose to either pay for the modification required or reduce the volume of his traffic on the Road to comply with any order from Alberta Transportation.

[80] The Board recommends the road use order include the option for the Parties to take disputes to a referee for less serious disputes, and an arbitrator for appeals of a referee's decision or for more serious disputes. Examples of disputes an arbitrator would hear include road modifications, costs or safety disagreements, and any other matter agreed to by the Parties.

[81] The Board agrees with the Parties that the recommended road use order should include a clause permitting the Parties to amend the road use order at any time if they mutually agree. Any such amendments must be in writing and signed by both Parties.

[82] The Board's recommends the road use order balance the interests of both Parties.

## **VI. RECOMMENDATION**

[83] The Board recommends the Minister reverse the deemed rejection decision of the Director, and order the Respondent, Mr. Alvin Bancarz, to grant access to the specified portion of DLO 111469, identified in Appendix A of this Report and Recommendations, to the Applicant, Mr. Tim Kalinski, on the terms and conditions as outlined in Appendix B of this Report and Recommendations.

[84] In accordance with section 124(4) of the Act,<sup>9</sup> a copy of this Report and Recommendations and any decision by the Minister regarding this appeal is to be provided to:

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<sup>9</sup> Section 124(4) of the Act provides:

“The Minister shall immediately give notice of any decision made under this section to the appeal body, and the appeal body shall immediately, on receipt of the notice of the decision, give notice of the decision to all persons who submitted notices of appeal or made representations or written submissions to the appeal body and to all the persons who the appeal body considers should receive notice of the decision.”

1. Mr. Tom Owen, Owen Law, on behalf of Mr. Tim Kalinski;
2. Mr. Brent Mielke, Emery Jamieson LLP, on behalf of Mr. Alvin Bancarz;  
and
3. Mr. Larry Nelson, Alberta Justice and Solicitor General, on behalf of the  
Director, Provincial Appeals Section, Alberta Environment and Parks.

Dated on December 20, 2018, at Edmonton, Alberta.

- *original signed* -

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Marian Fluker, Chair

- *original signed* -

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Meg Barker, Board Member

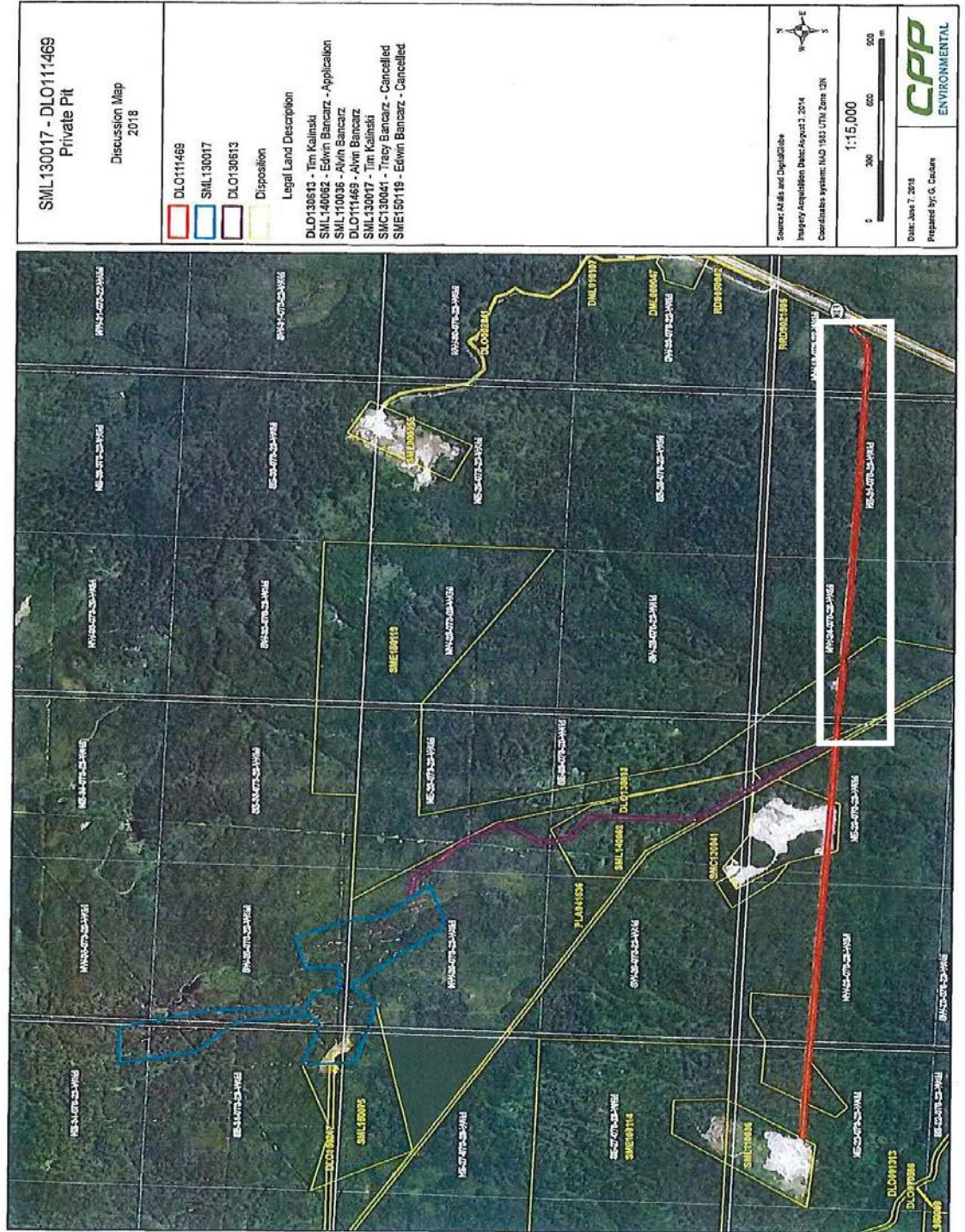
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Anjum Mullick, Board Member

Appendix A

The "Road" is defined as the portion of DLO 111469 from the intersection of DLO 130613 to Highway 813. The Road on this map is within the white square.



**APPENDIX B**  
**ROAD USE ORDER**

- A. Pursuant to section 124 of the Public Lands Act, R.S.A. 2000, c. P-40 (the “Act”) and section 98 of the Public Lands Administration Regulation, AR 187/2011 (“PLAR”), Alvin Bancarz (“Bancarz”) is ordered to allow Tim Kalinski (“Kalinski”) to use the portion of Department Licence of Occupation (“DLO”) 111469 identified in Appendix A and described as the portion of DLO 111469 from the intersection of DLO 130613 to the intersection of Highway 813 (the “Road”).
- B. This Road Use Order (“Order”) is enforceable by the Courts of Alberta.
- C. This Order is subject to the Act and PLAR. If any terms or conditions of the Order conflict with the Act or PLAR, the Act or PLAR shall prevail.
- D. Bancarz and Kalinski are collectively the “Parties.”
- E. Kalinski’s use of the Road is subject to the following conditions:

**1. Acting Reasonably**

- 1.1 In exercising their rights and carrying out their obligations under this Order, the Parties shall act reasonably.

**2. Consideration**

Capital Costs

- 2.1 Kalinski shall pay Bancarz \$130,000.00 (one hundred and thirty thousand dollars) before using the Road. This payment is in recognition that if the Road had not already been built by Bancarz, Kalinski would have to incur the expense of building a road.

Administrative Fee

- 2.2 Each year this Order is in force, Kalinski shall pay Bancarz \$2,160.00 (two thousand one hundred and sixty dollars) for administrative costs (the “Administrative Fee”).
- 2.3 In the first year of this Order, the Administrative Fee shall be pro-rated daily (1/365) and paid within 15 days of the receipt of this Order.
- 2.4 Every year, after the first year, this Order is in force, the Administrative Fee shall be paid on or before January 1st.

2.5 In the year where this Order is terminated, Bancarz shall refund Kalinski a pro-rated daily (1/365) portion of the Administrative Fee within 15 days of the effective date of termination.

### **3. Baseline Assessment**

3.1 Within 30 days of the Municipal District of Opportunity No. 17 lifting any road ban in 2019, an assessment of the condition of Road (the “Assessment”) shall be completed by a road engineer who is a member of the Association of Professional Engineers and Geoscientists of Alberta (the “Assessor”), mutually agreed upon by the Parties.

3.2 The Assessment shall include a determination by the Assessor of any additional safety requirements needed, including, but not limited to signage, speed limits, and specific safety requirements for the intersection of the roads on DLO 130613 and DLO 111469

3.3 Kalinski shall pay for the Assessment.

3.4 Where Kalinski’s use of the Road requires safety upgrades as identified in the Assessment, Kalinski shall pay for the safety upgrades, including the safety upgrades associated with the intersection of the roads DLO 130613 and DLO 111469.

3.5 Where Kalinski’s use of the Road requires the clearing of any vegetation to improve sight lines as identified the Assessment, Kalinski shall pay for the clearing of any vegetation.

3.6 Where the safety upgrades or the clearing of any vegetation require the authorization of Alberta Environment and Parks, Kalinski shall obtain and pay for obtaining the authorization.

3.7 Kalinski shall not use the Road for hauling until the required safety upgrades and clearing of vegetation are completed.

### **4. Road Restrictions**

#### Use of the Road

4.1 Kalinski will comply with the requirements of all federal, provincial, and municipal laws.

4.2 Kalinski may only use the Road to:

(a) transport personnel and equipment to and from SML 130017, and

(b) haul sand and gravel from SML 130017.

4.3 Only surface materials from SML 130017 may be hauled on the Road.

4.4 The rights of Kalinski under this Order are non-exclusive.

4.5 Bancarz may use or access the Road and any other person who has permission from Bancarz or from the Government of Alberta may use or access the Road, including those authorized under the Act.

#### Active Road Use

4.6 For sections 4.7, 4.8, and 4.9, “Active Road Use” is defined as one or more days where hauling or maintenance is conducted on the Road.

4.7 A Party shall provide a minimum of 48 hours written notice to the other Party before commencing Active Road Use. The notice shall include the estimated number of vehicles using the Road, and starting and finishing dates. Notice shall be given to the other party at the end of the Active Road Use.

4.8 If four or more consecutive days occur with no hauling or maintenance on the Road, the start of hauling or maintenance on the Road constitutes new Active Road Use.

4.9 If Active Road Use extends for more than three months, a Party providing notice of Active Road Use shall provide a new notice of Active Road Use at the end of each three month period.

#### Rules of the Road

4.10 The Parties shall conduct their activities on the Road in a safe manner and in accordance with the terms and conditions of this Order. The Parties shall ensure any activities on the Road by their employees, contractors, subcontractors, and agents are conducted in a safe manner and in accordance with the terms conditions of this Order.

4.11 In addition to section 4.10 of this Order, the use of the Road by Parties, their contractors, subcontractors, and agents shall be subject to traffic rules (“Traffic Rules”) for the safety of all users and the preservation of the Road.

4.12 The Parties shall exchange Traffic Rules to be followed by users of the Road, and shall follow the Traffic Rules with the higher standard.

4.13 A mutual agreement on Traffic Rules shall be reached prior to Kalinski using the Road.

4.14 Bancarz shall have exclusive control and operation of the Road and Kalinski shall observe all load limits, speed limits, road bans, closures, and restrictions, whether imposed by a governmental authority or by Bancarz.

4.15 Bancarz shall take reasonable steps to notify Kalinski when anticipated closures or restrictions are to be imposed.

- 4.16 Kalinski may appeal any road restriction imposed by Bancarz to a Referee or an Arbitrator as provided for in Part 8 of this Order.
- 4.17 Bancarz shall not be liable for any loss or damage incurred by Kalinski because of the imposition of limits, bans, closures, and restrictions.

#### Gates

- 4.18 The last person to leave the Road shall close the Gate at the intersection of DLO 111469 and Highway 813 (“Gate 1”) at the end of each hauling day.
- 4.19 Kalinski shall not haul surface materials on the Road until a gate (“Gate 2”) is installed west of the intersection of DLO 130613 and DLO 111469, at a location chosen by Bancarz. Kalinski shall be responsible for the cost of the installation and maintenance of Gate 2.

#### Alberta Transportation

- 4.20 In the event Alberta Transportation requires a reduction of traffic volume on the Road or improvement to the entrance from the Road from Highway 813, Kalinski shall pay for the improvement or reduce traffic volume as required.

### **5. Maintenance**

- 5.1 Kalinski shall not alter, modify, or change the Road or any structures forming a part of the Road without first obtaining the written consent of Bancarz, or on order by of a Referee or an Arbitrator under Part 8 of this Order.
- 5.2 Bancarz is responsible maintenance of the Road and for hiring for maintenance work on the Road.
- 5.3 The cost for maintenance or for hiring for maintenance work will not exceed the amounts listed in the Alberta Roadbuilders & Heavy Construction Association’s Equipment Rental Rates Guide, unless both Parties agree.
- 5.4 Kalinski may be hired by Bancarz to do road maintenance.

#### Compensation for Maintenance

- 5.5 Kalinski shall pay maintenance cost according to his portion of the weight of the material hauled on the Road each month.
- 5.6 The Parties shall exchange tickets to demonstrate the amount of material hauled on the Road during each month by the 15th day of the following month.
- 5.7 Bancarz shall provide Kalinski with evidence of the amount paid for monthly maintenance on the Road for each month by the 15th day of the following month.



5.8 Upon receipt of the evidence of the amount paid by Bancarz for monthly maintenance of the Road for the previous month, Kalinski shall pay his portion of the monthly maintenance for the previous month by the last day of the month in which the evidence was provided.

5.9 If more than 14 calendar days pass after the last day of the month without full payment from Kalinski for his portion of the monthly maintenance cost, Kalinski is prohibited from using the Road to haul material until all outstanding payments are made.

## **6. Liability and Indemnity**

6.1 Kalinski's use of the Road under this Order is at his own risk and, by entering onto the Road under this Order, Kalinski is liable for and assumes the risk of any loss, damage, or expense suffered by Bancarz, Kalinski, or any third person as a result of the use of the Road by Kalinski, his employees, agents, contractors, or subcontractors.

6.2 Kalinski shall hold Bancarz and the Government of Alberta harmless and indemnify Bancarz and the Government of Alberta against all liability, actions, proceedings, claims, demands, judgments, and costs (including actual solicitor client costs incurred in defending against the same) suffered by Bancarz or the Government of Alberta resulting from or arising out of the use of the Road by Kalinski, his employees, agents, contractors, or subcontractors, including all claims for bodily injury or death to any person or persons resulting from or arising out of Kalinski's use of or activity on the Road or the use of or activity on the Road by Kalinski's employees, agents, contractors, or subcontractors.

## **7. Environmental Matters**

7.1 Kalinski shall notify Bancarz immediately in the event of any environmental pollution or contamination problems caused by Kalinski's operations on the Road or on any adjacent lands as a result of the use of the Road ("Environmental Contamination") and Kalinski shall be solely responsible to notify the appropriate agencies related to the event and for the cost of all work carried out to correct any and all Environmental Contamination caused by Kalinski.

7.2 Kalinski shall indemnify and save Bancarz harmless against all loss, damages, and expenses which may be brought against or suffered by Bancarz and which are incidental to any Environmental Contamination, except to the extent that such loss, damage, or expense is the result of Bancarz's operations.

7.3 Upon termination of this Order, Kalinski shall leave the Road, and any lands adjacent to the Road, free of any Environmental Contamination resulting from Kalinski's operation, which may adversely affect the land. The liability and responsibility of Kalinski to Bancarz with respect to the environmental obligations contained in this Order shall continue to be enforceable by Bancarz notwithstanding the termination of this Order.

## **8. Insurance**

8.1 Kalinski shall, at his own cost, obtain and keep in force during the term of this Order, and on a claims basis for three years after termination of this Order, liability insurance protecting against any liability for bodily injury or property damage occurring on the Road or as a result of Kalinski's use the Road, with the following policy limits with insurers acceptable to Bancarz:

- (a) Bodily Injury - \$2 million; and
- (b) Property Damage – \$2 million.

8.2 Bancarz shall be named as an additional insured on the policies required under section 8.1 with respect to any claim arising out of or in connection with Kalinski's use of the Road. Kalinski shall provide Bancarz with proof of insurance within 30 days of the date of this Order and thereafter as required by Bancarz. If Kalinski fails to provide Bancarz with proof of insurance within 30 days of this Order, Kalinski is prohibited from using the Road until proof of insurance has been provided.

8.3 Kalinski shall ensure that any of his agents, employees, contractors, and subcontractors who are not covered under Kalinski's insurance policies, maintain insurance in the same amounts and subject to the same requirements as set out in section 8.1 above before they may use the Road under this Order. Kalinski shall provide Bancarz with proof of insurance required under this paragraph within 30 days of date of this Order, and thereafter as required by Bancarz. If Kalinski fails to provide Bancarz with proof of insurance within 30 days of this Order, Kalinski is prohibited from using the Road until proof of insurance has been provided.

8.4 Kalinski shall maintain in force and ensure his contractors maintain in force Workers' Compensation coverage as required by Alberta law.

8.5 The insurance policies shall be endorsed to provide that in the event of any change that could affect the interests of Bancarz, or in the event of their cancellation, the insurers shall notify Bancarz thirty (30) days prior to the effective date of such change or cancellation.

## **9. Referee/Arbitration**

9.1 Breaches or disagreements under this Order may be referred for a decision to a mutually agreed upon Referee or an Arbitrator pursuant to the Alberta Arbitration Act, R.S.A. 2000, c. A-43.

9.2 Breaches or disputes of a minor nature may be referred to a Referee. Breaches or disputes properly before an Arbitrator include, but are not limited to, road modifications, cost or safety disputes, and any other matter the Parties agree to refer to an Arbitrator.

9.3 If a Referee or Arbitrator cannot be mutually agreed upon, the party seeking the decision may request the ADR Institute of Alberta to appoint a qualified Referee or Arbitrator to hear the dispute.

9.4 If the dispute involves a safety violation, the Referee or Arbitrator may fine either party.

### Fines and Penalties

9.5 If a fine is levied by a Referee or an Arbitrator against Bancarz and Bancarz does not pay by the date set by the Referee or the Arbitrator, then the fine amount may be deducted from the next maintenance payment owed by Kalinski.

9.6 If a fine is levied by a Referee or an Arbitrator against Kalinski and Kalinski does not pay by the date set by the Referee or the Arbitrator, Kalinski is prohibited from using the Road until the fine is paid.

### Costs and Appeals

9.7 The costs of a Referee are to be paid equally by Kalinski and Bancarz.

9.8 The costs of any arbitration are to be determined and awarded as the Arbitrator may decide in their sole discretion.

9.9 A decision of a Referee may be appealed to an Arbitrator.

9.10 An Arbitrator's decision is final and binding pursuant to the provisions of the Arbitration Act, R.S.A. 2000, c. A-43.

## **10. Notices**

10.1 Any notices or other communications required or permitted to be delivered under this Order shall be in writing and delivered by hand delivery, facsimile, or pre-paid registered mail.

Such notice or communication shall be deemed to have been given and received by the other party on the date when hand delivered or sent by confirmed facsimile transmission (if delivered during the recipient's regular business hours on the business day, and otherwise on the next business day), or three days after being sent by pre-paid registered mail to the other party, at the addresses below:

Alvin Bancarz  
PO Box 30  
Calling Lake, Alberta T0G 0K0  
Telephone: 780-331-3299  
Other: 780-689-1906

Tim Kalinski (SML 130017)  
606 Beach Ave  
Cold Lake, Alberta T9M 1G5  
Telephone: 780-815-0650

10.2 Either party may, from time to time, change the address for service by giving written notice to the other party.

10.3 In the case of a postal disruption, or an anticipated postal disruption, all notices or other communications to be given under this Order shall be electronically transmitted or delivered by hand.

## **11. Assignment**

11.1 This Order is not assignable in whole or in part without mutual agreement of the Parties in writing, and the written approval of the Government of Alberta.

## **12. Termination**

12.1 This Order terminates on May 8, 2022, unless otherwise specified under this Order. If this Order is terminated for any reason, Kalinski is prohibited from using the Road.

12.2 The Parties may agree to terminate this Order earlier by agreement in writing.

12.3 Kalinski may terminate this Order by notice in writing.

12.4 This Order terminates if the Government of Alberta cancels DLO 130613 or DLO 111469.

12.5 If at the time of the termination of this Order any amounts arising from this Order are owing by one party to the other, that amount is due and payable by the party owing the amount by the last calendar day of the month following the termination.

**13. Amendment**

- 13.1 The Parties may mutually agree to amend this Order at any time in writing.
- 13.2 Any amendment that would breach the terms and conditions of DLO 111469 is void.
- 13.3 Any amendment extending the termination date beyond the expiry of DLO 111469 is void

**14. Waiver**

- 14.1 Failure by either party, at any time, to require strict performance by the other party of any provision of this Order will in no way affect the first party's rights to enforce such provision.
- 14.2 Any waiver by either party of any breach shall not be held to be a waiver of any subsequent breach or waiver of any other provision.
- 14.3 No waiver of any breach of any provision of this Order shall take effect or be binding upon a party unless it is in writing.

**15. Encumbrances**

- 15.1 Kalinski shall not:
  - (a) permit any builder's liens or other liens for labour or material relating to work to remain filed against DLO 111469, nor
  - (b) register, cause or allow to be registered, or permit to remain registered, any caveat or encumbrance against the title to DLO 111469.
- 15.2 Where a builder's lien or other lien for labour or material relating to work is registered against DLO 111469 because of any action or inaction of Kalinski, Kalinski shall immediately take whatever steps are necessary to discharge the lien.
- 15.3 Where a caveat or encumbrance is registered against the title to DLO 111469 because of any action or inaction of Kalinski, Kalinski shall immediately take whatever steps are necessary to discharge the caveat or encumbrance.