ALBERTA
PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations: June 14, 2019

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 211, 212, 213, 216, 228, 230, and 235 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an application filed by 830614 Alberta Corporation for the Public Lands Appeal Board to reconsider its Report and Recommendations for Appeal No. 16-0026, an appeal filed by 830614 Alberta Corporation for an order for a Road Use Agreement with the holders of DLO 990510, All Peace Asphalt Ltd. and the County of Grand Prairie No. 1.

Cite as: *830614 Alberta Corporation* v. *All Peace Asphalt Ltd. and the County of Grande Prairie No. 1* (14 June 2019), Appeal No. 16-0026-R2 (A.P.L.A.B.), 2019 APLAB 12.

HEARING BEFORE:		Ms. Marian Fluker, Panel Chair; Ms. Anjum Mullick, Board Member; and Dr. Brenda Ballachey, Board Member.
BOARD STAFF:		Mr. Andrew Bachelder, Board Counsel; Ms. Valerie Myrmo, Registrar of Appeals; and Ms. Denise Black, Board Secretary.
PARTIES:		
	Applicant:	830614 Alberta Corporation, represented by Mr. Sigurd Delblanc, Bryan & Company LLP.
	Respondent:	All Peace Asphalt Ltd., represented by Mr. Patrice Brideau, Stringam LLP.
	Respondent:	County of Grande Prairie, No. 1, represented by Mr. Bill Rogan, County Administrator, County of Grande Prairie No. 1.
WITNESSES:		
	Applicant:	Mr. Don Peterson, 830614 Alberta Corporation, and Mr. Emery Gorman, Frontier Resource Services Ltd.
	Respondent:	Mr. Darren Dowling, and Mr. Grant Wald, All Peace Asphalt Ltd.
	Respondent:	Mr. Bill Rogan, County Administrator, and Mr. Dale Van Volkingburgh, Director of Public Works, County of Grande Prairie No. 1.

EXECUTIVE SUMMARY

All Peace Asphalt Ltd. (the Respondent) and the County of Grande Prairie No. 1 (the County) are holders of a Department Licence of Occupation (the Shared DLO). The Shared DLO is used to access Surface Material Leases (SML) held individually by the Respondent and the County.

830614 Alberta Corporation (the Applicant) has a SML adjacent to the County's SML. The Applicant seeks to use the Shared DLO to access its SML. The County agreed to provide access to the Applicant, but the Applicant and the Respondent were unable to reach an agreement. The Applicant requested the Director, Alberta Environment and Parks, make a decision allowing the Applicant to use the Shared DLO. After 30 days the request was deemed rejected. The Applicant appealed to the Board requesting access to the Shared DLO.

The Board provided its previous Report and Recommendations to the Minister, Environment and Parks, who issued a previous Ministerial Order implementing a Road Use Agreement between the Parties. The Applicant subsequently requested the Board reconsider its previous Report and Recommendations. The Board agreed there were sufficient reasons to reconsider its previous Report and Recommendations, and requested and received submissions from the Applicant, the Respondent, and the County (collectively, the "Parties").

The Board then established a new hearing process. The Board, after reviewing the written submissions and oral evidence provided by the Parties at an oral hearing, recommended the Minister order the Respondent and the County grant the Applicant access to the Shared DLO according to the terms and conditions of a new Road Use Order, detailed in Appendix A to the Board's Report and Recommendations.

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I. INTRODUCTION

[1] This is the Report and Recommendations of 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 application filed by 830614 Alberta Corporation (the "Applicant") for a reconsideration of the Board's earlier Report and Recommendations in PLAB Appeal No. 16-0026 (the "Original Report").[1]

[2] The Board received a Notice of Appeal from the Applicant on July 28, 2016, requesting an order allowing it to use the road built on Department Licence of Occupation ("DLO") 990510 (the "Shared DLO"), issued by Alberta Environment and Parks ("AEP") and held by All Peace Asphalt Ltd. (the "Respondent") and the County of Grande Prairie No. 1 (the "County"). The Board dealt with the appeal by way of a written hearing in October, 2017, and provided the Original Report on November 3, 2017. The Minister accepted the Original Report and Recommendations and issued Ministerial Order 57/2017 (the "2017 Order") on November 14, 2017.

[3] On December 21, 2017, the Board received a request from the Applicant to reconsider the Original Report. The Board received submissions from the Applicant, the Respondent, and the County (collectively, the "Parties") on the question of whether the Board should reconsider the Original Report. In its Reconsideration Decision[2] issued on July 4, 2018, the Board determined there were sufficient reasons to justify a reconsideration of the Original Report by way of a hearing.

II. BACKGROUND

[4] The Applicant is the holder of Surface Material Lease SML 990043 ("SML 990043"), located on public lands south of the city of Grande Prairie, Alberta, in the Municipal

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1 See: *830614 Alberta Corporation* v. *All Peace Asphalt Ltd. and the County of Grande Prairie No. 1* (3 November 2017), Appeal No. 16-0026 (APLAB).

2 See: Reconsideration Decision: *830614 Alberta Corporation* v. *All Peace Asphalt Ltd. and County of Grande Prairie No. 1* (4 July 2018), Appeal No. 16-0026-RD (A.P.L.A.B.).

District of Grande Prairie No. 1. SML 990043 was granted for the purpose of extracting surface materials such as sand and gravel.

[5] The Respondent is the holder of Surface Material Lease 950005 (the "APA SML"), adjacent to SML 990043. The County is the holder of Surface Material Lease 900016 (the "County SML"), adjacent to the APA SML. As previously mentioned, the Respondent and the County are joint holders of the Shared DLO and users of a road built on the Shared DLO (the "Road").

[6] The Applicant sought access to the Shared DLO in order to haul sand and gravel from SML 990043. Although the County and the Applicant agreed on the terms of an access arrangement, negotiations between the Applicant and the Respondent were unsuccessful, with the result that an access agreement was not concluded. This led to the Applicant filing a Notice of Appeal with the Board on July 28, 2016, seeking a road use order (the "Road Use Order") from the Minister allowing access to the Shared DLO.

[7] The Board held a written hearing and received submissions from the Parties. After reviewing the submissions from the Parties, the Board issued the Original Report to the Minister on November 3, 2017.[3]

[8] In the Original Report recommended the Applicant pay the Respondents annual compensation calculated as follows:

(a) An Access fee of $1,000.00, based on $500.00 per kilometre.

(b) One-third of the actual maintenance costs for the Shared DLO;

(c) A Gate Fee of $1,500.00; and

(d) A fee of $1.00 per cubic yard fee for all materials hauled by the Applicant on the Shared DLO.

[9] The Minister accepted the Original Report and issued Ministerial Order 57/2017 (the "2017 Order") on November 14, 2017. The Parties were advised of the 2017 Order on November 23, 2017.

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[3] *830614 Alberta Corporation* v. *All Peace Asphalt Ltd. and the County of Grande Prairie No. 1* (3 November 2017), Appeal No. 16-0026 (APLAB).

[10] On December 21, 2017, the Board received a request from the Applicant to reconsider the Original Report. The Board received submissions from the Parties on the question of whether the Board should reconsider the Original Report.

[11] The Board found the Applicant presented new facts that were not reasonably available at the time of the hearing and which were significant enough to potentially have a bearing on the outcome of the Board's decision. The Board also found the Original Report may have included a material error, which could have unfairly prejudiced the Applicant. In light of these findings, the Board determined a new hearing was appropriate.[4]

[12] The Board requested and received written submissions from the Parties on February 5, 2019, and held an oral hearing on March 5, 2019 in Edmonton. Following the oral hearing the Board received written closing arguments and reply arguments from the Parties from March 15, 2019 to April 4, 2019.

[13] On March 15, 2019, the Respondent submitted additional documents it wanted considered as evidence. The Applicant and the County had opportunity to respond to the Respondent's request in their written closing arguments.

[14] On April 24, 2019, the Board requested the Parties provide additional submissions regarding the following questions:

1. How many gates are installed along DLO 990510, including its route through the SMLs, and where are the gates located? A map of the locations would be of assistance to the Board.
2. During what months of the year will most of the hauling along DLO 990510 take place? Each party is asked to provide an estimated percentage of the total volume that is hauled, or anticipated will be hauled, during each month.
3. Assuming there is no use of the DLO 990510 during the year by any party, what is the estimated cost of annual maintenance of the DLO 990510 to maintain it at a level needed to be used as a haul road?

[15] The Board received responses from the Parties on May 8, 2019. On May 16, 2019, the Board closed the hearing.

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[4] Reconsideration Decision: *830614 Alberta Corporation* v. *All Peace Asphalt Ltd. and County of Grande Prairie No. 1* (4 July 2018), Appeal No. 16-0026-RD (A.P.L.A.B.).

III. SUBMISSIONS

A. Applicant

[16] The Applicant submitted the Respondent treats the Shared DLO as if it owned the Road or as if it were a toll road. The Applicant stated the purpose of the Shared DLO was to provide access to Crown leases, not to enrich the Respondent as a profit-making venture. The Applicant argued the Shared DLO does not grant the Respondent the right to deny others the use of the Shared DLO.

[17] The Applicant stated use of the Shared DLO is not a "privilege" which the Respondent bestows on others. Instead, the Applicant submitted the DLO is a privilege bestowed by the Province to allow the Respondent access to the APA SML, permitting the Respondent to operate a business and profit from the Province's resources.

[18] The Applicant estimated SML 990043 contains in excess of three million cubic metres of gravel, which will be used by projects around the Grande Prairie region for many years, if the Applicant can access the resource. The Applicant submitted the Respondent's proposals for accessing the Shared DLO would make development of the Applicant's SML economically unprofitable.

[19] The Applicant claimed it has approximately $1 million worth of crushed material in inventory which it has been unable to transport to market, and it has rented equipment from third parties which it cannot move off its SML because it cannot access the Shared DLO.

[20] The Applicant submitted the *Public Lands Act*, R.S.A. 2000, c. P-40, has the following goals which must be considered in determining this appeal:

(a) compensation for using the Shared DLO should reflect the impact the use has on the Shared DLO as well as any actual impacts on the other dispositions;

(b) a business cannot be created by a party allowing access across its disposition; and

(c) the creation of roads should be reduced and the Province's resources conserved.

[21] The Applicant noted access under section 98 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011, ("PLAR")[5] is regulated by the Province. The Applicant submitted a commercial user applying for access to a road in a licenced area will receive that access.

[22] The Applicant cited section 77 of the *Public Lands Act*, which reads:

> "A lessee shall not make use of the land for any purpose other than that for which the lease was granted without the consent of the director, and then only on the terms and conditions the director may prescribe."

The Applicant stated the purpose of the Shared DLO is to provide access by way of an all-weather road.

[23] The Applicant submitted the legislative framework of the *Public Lands Act* recognizes the necessity of sharing access roads to the benefit of all commercial users who require it.

[24] The Applicant stated the Shared DLO is not a lease of real property at common law, and the Respondent does not have the right of exclusive possession, as it might have with a common law lease. The Applicant argued the Respondent's interest in the Shared DLO does not have the same rights and protections given to interests in private property.

[25] The Applicant submitted the terms of the Shared DLO set out the mandatory procedure to be followed when a third party applies for use of the Shared DLO. The Applicant referenced Schedule A, paragraph 6, of the Shared DLO:

> "Subject only to paragraph 23 of this Schedule, the Licensee is deemed to have entered into a temporary agreement with the Commercial User on the following terms
>
> (a) the Commercial User is granted reasonable use of the Road until the Road Agreement is finalized,

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5 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."

(b) the Licensee will not unreasonably restrict such Commercial User's use of the Road except by writing [*sic*] notice if, in the opinion of the Licensee acting reasonably, there are current adverse ground conditions that would likely make the use of the Road unsafe, create excessive rutting, destabilize the road base, or damage watercourse crossings or watercourses, and

(c) the Licensee may require compensation from the Commercial User retroactively to the date on which the Commercial User commenced use of the Road on the same basis as the parties agree in the final Road Agreement." [emphasis added by the Applicant]

[26] The Applicant submitted the Respondent unreasonably and arbitrarily denied the Applicant access to the Shared DLO, without any evidence of adverse ground conditions or threats to the Road or watercourses, for the purpose of obtaining a more financially profitable agreement.

[27] The Applicant stated compensation to the Respondent for shared use of the Shared DLO should be based on the impact additional traffic has on the Shared DLO and on the other affected dispositions.

[28] The Applicant submitted the terms of the Road Use Order must be designed to reflect the realties of the Parties, the Road, and their businesses, and should be determined in accordance with what is reasonable in the circumstances.

[29] The Applicant acknowledged that, while the Respondent is entitled to some measure of compensation for interference which the Applicant's use of the Shared DLO may cause, the suggestion by the Respondent that compensation should be based on the increased cycle time its trucks will undergo is flawed and would make the Applicant's development of SML 990043 uneconomical. The Applicant disagreed with the Respondent's proposal that the Applicant should pay a flat fee for each tonne of material which crosses the Shared DLO.

[30] The Applicant observed if compensation was based on the flat fee per tonne as proposed by the Respondent, and the Applicant used larger vehicles to haul bigger loads, the interference with cycle times would decrease, but the rate of compensation to the Respondent would increase.

[31] The Applicant claimed the APA SML was inactive and a maximum of 150,000 tonnes of sand and gravel materials remained in the APA SML. The Applicant stated the

Respondent's suggested terms for an interference fee to compensate the Respondent for interference in its operations would result in the APA SML remaining idle and the Respondent making more money on the Applicant's hauling from SML 990043 than it would from the APA SML.

[32] The Applicant argued if the intent of the compensation is to offset the Respondent's increased expenses, then the compensation rate should reflect the Respondent's actual operations.

[33] The Applicant submitted an appropriate interference fee would be $1.00 per tonne hauled by the Respondent on the Shared DLO on those days when the Applicant is also hauling, and it should be based on the actual increase in time it takes the Respondent to haul gravel from the APA SML as a result of the Applicant's use of the Shared DLO.

[34] The Applicant provided two estimates of the potential cost to the Respondent for the Applicant's use of the Shared DLO through the APA SML. The first estimate was based on 30,000 tonnes of material moved by the Applicant in one year. The Applicant stated at 30 tonnes per load and 150 to 200 hauling days, there would be 1000 trucks passing through the APA SML each year, 5 to 6.6 trucks each day, and 0.42 to 0.55 trucks each hour (assuming a 7:00 a.m. to 7:00 p.m. work day). The Applicant noted the round trip distance travelled by each truck through the APA SML would be one kilometre, and 2.28 kilometres per day travelling on the Shared DLO, taking three minutes through the APA SML and 7.2 minutes on the Shared DLO at 20 kilometres per hour. The Applicant estimated the cost of potential delay to the Respondent to be $0.12 to $0.15 per tonne of material produced by the Respondent, assuming one load hauled by the Respondent per hour. If the Respondent hauled two loads per hour, the Applicant submitted the cost would be $0.06 to $0.08 per tonne. The Applicant noted these estimates also assumed all work would stop in the APA SML during the Applicant's round trip through it.

[35] The Applicant provided a second set of estimates of the potential cost to the Respondent for the Applicant's use of the Shared DLO through the APA SML, based on 150,000 tonnes of material moved by the Applicant in one year. The Applicant stated at 30 tonnes per load and 150 to 200 hauling days, there would be 5000 trucks passing through the APA SML each year, 25 to 33.3 trucks each day, and 2.08 to 2.78 trucks each hour (assuming a 7:00 a.m. to

7:00 p.m. work day). With the same round trip distance travelled by each truck through the APA SML and the same time per truck, the Applicant estimated the cost of potential delay to the Respondent to be $0.58 to $0.78 per tonne of material produced by the Respondent, assuming one load hauled by the Respondent per hour, and $0.29 to $0.39 at two loads hauled per hour. These estimates also assumed all work would stop in the APA SML during the Applicant's round trip through it.

[36] The Applicant submitted the Respondent's estimates of potential delays to hauling in the APA SML were inaccurate for the following reasons:

(a) the Respondent did not use the correct size of haul loads the Applicant uses;

(b) the Respondent's prices for the cost of trucking equipment was inflated compared to the Alberta Road Builders and Heavy Construction price guide for 2018; and

(c) the Respondent used a smaller capacity per load amount which led to an overstatement of the number of loads crossing the APA SML.

[37] The Applicant noted the Shared DLO is a short road, and at speeds of 20 kilometres per hour, a truck would take approximately 6.8 minutes to travel the entire road. The Applicant stated less than half of the Shared DLO length crosses the APA SML, and much less than that length approaches the pit's active extraction area. The Applicant submitted it would only take three minutes for a haul truck to cross the APA SML.

[38] The Applicant said the maximum additional cost to the Respondent resulting from the Applicant's use of the Shared DLO would be $117,000.00, using the most expensive estimated delay costs and based on an estimated 150,000 tonnes of material remaining in the APA SML. The Applicant stated that if the APA SML is not in active use, or not active on the same day as the Applicant uses the Road, then the interruption to the Respondent's operations would be nil or close to nil. The Applicant submitted the additional cost to the Respondent would be lessened if the Respondent loads its trucks when the Applicant's trucks are not crossing the APA SML.

[39] The Applicant stated the Respondent proposed an interference fee of $2.00 per tonne hauled by the Applicant, which could equate to $6,000,000.00 over the life of SML 990043. At $1.00 per tonne, the Applicant said the amount would be greater than $3,000,000.00.

[40] The Applicant submitted the amount sought by the Respondent as an interference fee was disproportionate to even a generous estimate of the actual interruption to the operations of the APA SML. The Applicant argued if interference is not shown, then an interference fee should not be paid. The Applicant stated if the Board allowed compensation for the right to access a DLO, when the charges are separate and unrelated to actual interference within an SML, it would be unjust and unfounded compensation.

[41] The Applicant suggested if the Parties provided notice of hauling, used radios, and yielded a right-of-way when necessary, any potential interference with the Respondent's operations in the APA SML could be eliminated.

[42] The Applicant stated as the Respondent did not have an interest in the Shared DLO until 2011, and as the Applicant did not require access to the Shared DLO until 2014, the earliest retroactive compensation should be paid is for 2014.

[43] The Applicant submitted any compensation payable to the Respondent and the County should be reduced to acknowledge the investment by the Applicant in upgrading the Shared DLO.

[44] The Applicant noted its 2013 SML Annual Return confirms SML 990043 was inactive, and there was only minor hauling in 2014 and 2015.

[45] The Applicant stated the term of any road use agreement should be 5 years from the date of the Road Use Order as issued by the Minister.

[46] In response to the Board's questions on gates, Road usage, and Road maintenance, the Applicant identified two gates, "Gate 1," which the Applicant claimed was in poor condition, and located approximately one-third along the length of the Road, and "Gate 2" near the entrance to the gravel pits, which the Applicant said it replaced in 2017.

[47] The Applicant estimated its monthly percentage use of the Road to be as follows:

(a) May – 5%;
(b) June – 15%;
(c) July – 20%;
(d) August 25%;

(e) September – 30%; and

(f) October – 5%.

The Applicant indicated its use of the Road could change based on customer needs.

[48] The Applicant stated the annual maintenance cost of the Shared DLO under conditions of no use would be minimal, but would have to include an annual road inspection and any repair work identified as needed. The Applicant noted it upgraded the Road in 2017, which involved the following:

> "a. Maintenance work completed by 8306 in 2017 included:
>
> i. Right-of-way brushing: This is typically on an 8-year rotation. The estimated cost is $5,000.00.
>
> ii. Drainage improvements to ditches: This is typically done on a 5-year rotation. The estimated costs are $2,500.00, which includes one grader, for one day.
>
> iii. Signage and Culvert markers: These were installed by 8306 in 2017. This cost is typically $1,000.00 per km of road X 1.4 km on the DLO = $1,500.00. These would be replaced only on an as-needed basis and should not represent a significant annual expense.
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> b. Work that was not completed by 8306 in 2017 but is typically part of routine road maintenance and can be expected in the future:
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> i. Annual road inspection: $1,500.00 based on one day and travel from town.
>
> ii. No grading or running surface treatment is needed if the road is not used.
>
> iii. Culvert replacement: Typically one culvert will have to be replaced every 10 years. The average costs for small drainage culvert is roughly $8,000.00."[6]

B. Respondent

[49] The Respondent explained the County has co-ownership of the Shared DLO, but the access dispute is between the Respondent and the Applicant as the County previously stated it does not seek compensation for access to the Shared DLO and has entered into an agreement with the Applicant to access the Shared DLO through the County's SML.

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[6] "Answers of the Applicant, 830614 Alberta Corporation to the Further Questions of the Board," March 7, 2019, at pages 1 and 2.

[50] The Respondent stated there is no formal agreement with the County regarding management of the Shared DLO. The Respondent noted the County has different criteria for insurance, indemnification, compensation for access, road use agreement terms, documentation locations, etc. The Respondent argued the road use agreement between it and the County is irrelevant to this appeal.

[51] The Respondent submitted the Applicant chose to ignore the previous appeal proceedings and the Respondent's request to not access the APA SML until the hearing was concluded. The Respondent stated the Applicant, to improve its access through the APA SML, bulldozed material from the APA SML, removed the Respondent's ramp into the APA SML, destroyed a gate, and wasted material set aside for reclamation. The Respondent claimed the Applicant built a new access route despite having an existing access route it had used since the Applicant's SML 990043 was first developed.

[52] The Respondent stated comparisons to what is paid to other disposition holders in the same industry is the appropriate method of determining the amount of compensation payable in this matter, and the Board must consider multiple factors in reaching its conclusions.

[53] The Respondent stated the standard in the aggregate industry is for users of a road that crosses a disposition to pay the disposition holder an amount based on a rate for each tonne of material hauled over the disposition. The Respondent referred to agreements where compensation was paid ranging from $0.50 per tonne to $1.50 per tonne. The Respondent noted there were examples of disposition holders who refused to grant access to their disposition.

[54] The Respondent submitted a DLO becomes the property of the disposition holder, although not in fee simple, and the disposition holder is accountable for security and all activity within the DLO. The Respondent noted that while the Shared DLO is located on public land, the Respondent constructed and uses the Road within the Shared DLO. The Respondent argued the *Public Lands Act*, PLAR, and the terms of the Shared DLO, grant it authority over all commercial activity within the disposition and the right to limit public traffic on the Road.

[55] The Respondent stated it was industry standard for a user of a DLO to provide some form of compensation to the DLO holder. The Respondent noted the Board's previous report and the 2017 Order set a rate of compensation of $1.00 per cubic yard of material hauled,

payable by the Applicant to the Respondent. The Respondent stated such a rate was representative of industry standards.

[56] The Respondent submitted compensation for access should be based on the user compensating the disposition holder for use of the disposition, and the amount of resources in the disposition being accessed should not be a factor. The Respondent acknowledged it had previously claimed a compensation rate of $2.00 per tonne of gravel, but changed the amount to $1.00 per cubic yard, which is comparable to what other aggregate producers are being compensated.

[57] The Respondent disagreed with the Applicant's previous submission where it was suggested an amount of $1,850.00 per year is representative of the industry standard for an access fee.

[58] The Respondent commented on the three road use agreements submitted by the Applicant which were from aggregate producers, specifically, the Mainline Road Use Agreement, the Rail Rock Access Agreement, and the Border Access Agreement.

[59] The Respondent stated the Mainline Road Use Agreement charged an access fee of $26,500.00 to allow Wapiti Gravel Suppliers Ltd. ("Wapiti") to cross Mainline Construction Ltd.'s disposition to test gravel at a potential SML. The Respondent noted the Applicant had stated Wapiti was charged $9,000.00 for two weeks access, which was not for hauling through Mainline Construction's disposition, and worked out to an annual fee of $234,000.00.

[60] The Respondent claimed the Applicant chose a page from the Rail Rock Access Agreement to justify an artificially low rate of compensation for use of a road. The Respondent provided a letter from Alberta Rail Rock Services Ltd. ("Rail Rock") that stated the compensation amount claimed by the Applicant was only for short-term construction access to an energy site using 0.1 kilometre of the road. The letter said Rail Rock would require no less than $1.50 per tonne to allow access through its SML.

[61] The Respondent submitted the Applicant incorrectly represented the Border Access Agreement as being standard in the aggregate industry. The Respondent provided an email from Border Paving Ltd. stating a low fee is charged for access to its DLO because the

road user is an energy company accessing sites in pick-up trucks for short periods. The email also states an aggregate producer pays $0.50 per tonne of gravel hauled to access the road.

[62] The Respondent stated the original owner of the Shared DLO, Garland Trucking Ltd. ("Garland"), tried to negotiate an access agreement with Wapiti over 20 years ago. The Respondent stated Wapiti wanted compensation of $0.50 per tonne of material hauled through its disposition. Garland instead secured access to its SML with the County, which is the Shared DLO the Respondent purchased from Garland.

[63] The Respondent submitted an access agreement was reached with the Applicant in 2004.

[64] The Respondent stated the Board needed to consider the following intangible factors:

(a) collision risk and the need for insurance;
(b) required security surveillance;
(c) need for Respondent to ensure their SML is protected;
(d) equipment damages;
(e) additional management time;
(f) time spent in developing strategies to mitigate the impact posed by the Applicant's operations;
(g) limitation on mining operations inside the SML;
(h) restriction to machinery access to mineable aggregate;
(i) inconvenience factors;
(j) littering;
(k) stress and work;
(l) time spent in judgement calls;
(m) dealing with the Applicant's staff; and
(n) dust control problems.

[65] The Respondent quoted from the Alberta Surface Rights Board's decision in *TransAlta Utilities Corp.* v. *Malmberg*:

> "On reviewing the above evidence, the exhibits and argument, the board accepts the 'bare bones' assessment of compensation by the operator, as to the actual

> costs of farming around each tower, but also leans to the overall annual concerns of the respondents as detailed in exhibit 2, and in particular, those operating on the lands and finds the adverse effect to be something more than the calculated cost of farming around each tower, particularly on section 27 where there is no north-south fence line. There is no purely mathematical means of determining the annual effect on the land owners' bundle of rights. The assessment of those rights, tangible and intangible, is largely conjectural and judgmental having due regard to the facts in evidence and on inspection."[7]

[66] The Respondent also referred to the Alberta Court of Queen's Bench decision in *Conocophillips Canada Resources Corp.* v. *Lemay*, in which the Court included the following quote from the Alberta Surface Rights Board's decision:

> "In previous decisions (i.e. Decision No. 2006/0074), the Board states that the empirical or tangible costs of farming around a given site is just one of the factors to be considered in determining adverse effect. Nuisance, inconvenience, and noise form the nucleus of intangible factors must also be taken into account. Nuisance and inconvenience include but are not limited to the need for the Lessors to conduct extra surveillance, ensure their property is protected, dealing with the operator and employees (including contractors) and time spent in developing strategies to mitigate the impacts posed by the Operator's operations and facilities." [8]

[67] The Respondent submitted the intangible factors will not be similar in all cases, but consideration of tangible and intangible factors together should result in a rate not solely based on quantifiable loss.

[68] The Respondent noted the 2017 Order calculated compensation per cubic yard, which was incorrectly stated to be equal to a tonne of gravel. The Respondent submitted Alberta Transportation Specification 3.2 listed a conversion rate of 1 cubic metre to 1.632 tonne, and 1 cubic yard to 0.765 cubic metre, which is calculated to 1 cubic yard equals 1.25 tonne. The Respondent stated the rate ordered by the 2017 Order of $1.00 per cubic yard equates to $0.80 per tonne, which is consistent with the amount other gravel producers in the area are charging.

[69] The Respondent stated it had no objection to the rate provided in the 2017 Order, provided the full amount of $1.00 per cubic yard is paid to the Respondent as the County has indicated they do not claim any part of the payment.

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7 *TransAlta Utilities Corp.* v. *Malmberg*, No. 29/85, May 3, 1985 (Alberta Surface Rights Board).

8 *Conocophillips Canada Resources Corp.* v. *Lemay*, 2009 ABQB 72 (CanLII), at paragraph 27.

[70] The Respondent submitted the Applicant should pay $2.00 per tonne for all material hauled after January 27, 2017, when the Parties met in a mediation meeting, until the 2017 Order was issued on November 22, 2017, to help compensate for damages caused by the Applicant's unauthorized access to the Shared DLO.

[71] The Respondent submitted that, based on the evidence as a whole and the intangible and tangible factors, an appropriate rate of compensation would be $1.00 per yard as previously recommended by the Board and ordered by the Minister.

[72] The Respondent submitted the Applicant had entered into previous road use agreements with the last one expiring in 2006, and the Applicant continued to use the Shared DLO without the Respondent's knowledge. The Respondent stated when the locks were changed on the access gate in 2016 the Applicant requested access to the Shared DLO. The Respondent suggested compensation should be paid by the Applicant retroactively to the expiry of the previous road use agreement, which would be the start of the 2007 construction season.

[73] The Respondent stated it has no interest or say in any agreement or terms between the County and the Applicant, and the County should have no interest or say in any agreement between the Respondent and the Applicant.

[74] The Respondent submitted the County and the Applicant have used an alternate route, developed 20 years ago, with no issues, and the alternate route was used by Reco Construction Ltd. ("Reco") to haul 30,000 tonnes, and another commercial user to haul 25,000 tonnes from the Applicant's SML. The Respondent stated it was willing to permit the Applicant to use the alternate route until the Respondent and the County finalize changes to the Shared DLO which would secure the APA SML from unwanted access.

[75] The Respondent said Reco paid the then-disposition holder $1.72 per tonne to haul material from the Applicant's SML over 15 years ago. The Respondent stated the Applicant's claim that $0.80 per tonne will cause economic stagnation is exaggerated.

[76] The Respondent argued it is standard industry practice for a disposition holder to impose road use terms and conditions on the use of its DLO. The Respondent submitted the 2017 Order did not follow this practice, and removed its control over the Shared DLO and left it with all the liability.

[77] The Respondent stated any serious accident within its disposition, such as a vehicle accident, environmental spill, garbage dumping, firearm discharge, etc., could negatively impact its business. The Respondent noted some of these incidents have already occurred.

[78] The Respondent said its disposition is used as a shooting gallery, and due to the gates being left unlocked, ammunition was found in its crushing plant. The Respondent stated its employees have removed burned out vehicles, shot up refrigerators, and other garbage from the disposition. The Respondent argued the potential liability from unauthorized access is enormous, which is why it has been resolute on controlling access.

[79] The Respondent stated the gate fee of $1,500.00 in the 2017 Order was not adequate for proper monitoring of the disposition when the Applicant is hauling, given the Applicant's past actions and the fact that gates have been left unlocked. The Respondent noted it takes one hour for one of its employees to drive from its shop to the disposition and back, which costs $100.00 each time. The Respondent suggested daily inspections would be required, and the gate fee should be charged at a daily rate on days the Applicant is hauling. The Respondent indicated it would be satisfied with the gate fee included in the 2017 Order if $1.00 per cubic yard was entirely directed to the Respondent and not divided with the County, as long as no problems occur.

[80] The Respondent submitted there are alternate access routes for the Applicant on existing DLOs on neighbouring dispositions. The Respondent argued the Board must ensure the Applicant has reasonable justification for not pursuing other access options before recommending the Minister issue an order that would impact the Shared DLO.

[81] The Respondent stated the Board and the Minister are encumbering it with the liability of forced access through the lifetime of its disposition. The Respondent argued the Applicant has shown it has no concern or consideration for the Respondent's interests or rights, has already caused considerable damage to its disposition, and has refused all requests to cease activities until a road use agreement or Ministerial Order has been implemented.

[82] The Respondent submitted the Applicant refused to comply with the 2017 Order, even though a stay had not been issued. The Respondent stated the Applicant claimed work was being completed on behalf of the County, yet the County stated it did not authorize any actual

work to be done. The Respondent stated the Applicant's unauthorized access to its dispositions has impacted the Respondent financially.

[83] The Respondent acknowledged it does not own the Shared DLO, but it submitted that while the Shared DLO is located on public land, the Respondent constructed, occupies, and used the access road within the Shared DLO and has authority to limit access to it under the *Public Lands Act* and PLAR, which prohibits other commercial users from using the Shared DLO without an agreement or a ministerial order.

[84] The Respondent stated if the Applicant obtained access to the APA SML, a physical separation of the APA SML from the Shared DLO would be required, such as a heavy-duty fence or a material berm, to keep heavy equipment out of the APA SML.

[85] The Respondent suggested section 15(2) of the *Public Lands Act*[9] and paragraphs 2 and 4 of Schedule "A"[10] of the June 27, 2017, License of Occupation[11] from AEP, provides the Board with jurisdiction to recommend terms related to compensation beyond what is provided for in the Licence of Occupation.

[86] The Respondent submitted the basic principle of DLO compensation orders should be that such orders are fair, adequate, and equitable. If the Board imposed a rate of

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[9] Section 15(2) of the *Public Lands Act* provides: "The director may in a disposition or renewal, prescribe terms and conditions to which the disposition is subject."

[10] Paragraph 2 of the Licence of Occupation, June 27, 2017, reads:

> "Notwithstanding paragraph 2 of this Schedule, the Licensee may require a Commercial User to enter into a reasonable road use agreement (each, a "Road Agreement") regarding the use of the Road if the Licensee notifies the Commercial User of this requirement in in its notice to the Commercial User under subparagraph 2(a) of this Schedule."
>
> Paragraph 4 reads:
>
> "A Road Agreement negotiated by the parties: …
>
> (a) must be in writing;
>
> (b) must not be inconsistent with the Act, the Regulation or this License;
>
> (c) may provide reasonable compensation to be paid to the Licensee for additional costs resulting from the Commercial User's use of the Road, or for shared maintenance obligations, or a combination of the two;
>
> (d) must include guidelines and notice provisions to deal with safety, maintenance, environmental and traffic concerns that arise during the term of the Road Agreement; and
>
> (e) may include such other terms as may reasonably be negotiated or that are generally found in commercial agreements of a similar nature." [*emphasis by the Respondent*]

[11] AEP issued "Licence of Occupation" under disposition number, DLO 990510. To avoid confusion, the Board will continue to refer to the Licence of Occupation as the Shared DLO.

compensation that is neither fair nor equitable to the Respondent, the result would be to automatically increase the Applicant's profit margins by the same amount.

[87] The Respondent quoted the Board's decision in *Tim Kalinski* v. *Director, Provincial Approvals Section, Alberta Environment and Parks,* re: *Alvin Bancarz* ("*Kalinski*") in which the Board stated:

> "(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."[12] [emphasis by the Respondent]

The Respondent submitted making a profit should be acceptable as long as it is fair, adequate, and equitable.

[88] The Respondent stated it will suffer from tangible and intangible impacts if it must share the Shared DLO with any third party and, therefore, the Applicant should only be permitted access with proper compensation to the Respondent and specific and enforceable conditions, including the right of the Respondent to manage the usage of the Shared DLO.

[89] The Respondent submitted compensation to a disposition holder for use of its DLO should be based on comparable compensation paid to other disposition holders in the same industry, and only when such comparables do not exist should the Board engage in an empirical analysis. The Respondent quoted from the Alberta Surface Rights Board in *Canadian Natural Resources Ltd.* v. *Siebert*:

> "It is the practice of the Board to base compensation on a pattern of dealing when one exists unless there are cogent reasons for doing otherwise. This approach is (a) based on the underlying premise that the marketplace is usually the best determinant of fair and reasonable rates of compensation, (b) consistent with that used by the Court in Livingston v. Siebens Oil & Gas Ltd. (1978), 1978 ALTASCAD 83 (CanLII), 8 A.R. 439 (C.A.), and (c) now used routinely by the Court and the Board."[13]

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12 *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.) at paragraph 68.

13 *Canadian Natural Resources Ltd.* v. *Siebert*, 2017 ABSRB 325 (CanLII).

[90] The Respondent stated in the aggregate industry, a certain amount per tonne hauled over a DLO is the standard compensation formula used. The Respondent argued the formula was fair, adequate, and equitable, and noted the Applicant would make no payment if it did not use the Shared DLO.

[91] The Respondent noted the County and the Applicant admitted to not knowing how much marketable material remained in the APA SML.

[92] The Respondent argued the Parties have all testified at the hearing that none of the comparable agreements submitted by the Parties determine compensation solely on the impact on the disposition holder's cycle time or the volume hauled by the disposition holder, or considered the volume of aggregate remaining in the disposition holder's SML. The Respondent submitted if the Board determined compensation solely on these factors, it would be a precedent that would allow larger aggregate companies to take advantage of smaller operations by paying a small fraction of they pay larger disposition holders for the same type of access.

[93] The Respondent stated it would be significantly impacted by the Applicant's access of the Shared DLO which would run through its active mining area in the APA SML and, therefore, the Board should recommend an interference fee in the Road Use Order.

[94] The Respondent submitted the $1.00 per cubic yard, or $0.80 per tonne, as set in the 2017 Order, is comparable to other industry agreements.

[95] With regard to the effective date of the Road Use Agreement, the Respondent quoted from Schedule "A", section 6(c), of the Shared DLO terms and conditions:

> "Subject only to paragraph 2 of this Schedule, until the Licensee has entered into a Road Agreement with a Commercial User, the Licensee is deemed to have entered into a temporary agreement with the Commercial User on the following terms: ...
>
> (c) the Licensee may require reasonable compensation from the Commercial User retroactively to the date on which the Commercial User commenced use of the Road on the same basis as the parties agree in the final Road Agreement."

[96] The Respondent submitted the Applicant had behaved unreasonably when the Applicant:

(a) accessed the Shared DLO and the APA SML in 2014, 2015, and 2017;

(b) buried the Respondent's access ramp that led down into its gravel extraction area;

(c) destroyed and removed the gate to access the gravel extraction area of the APA SML and now the Respondent cannot access its SML without reinstalling the ramp and security gate;

(d) buried top soil and subsoil originally stripped off to the east of the APA SML;

(e) used gravel from the APA SML to fill in the Shared DLO alignment in order to make the access easier for its trucks; and

(f) pushed screened gabion rock in the APA SML off to the side and contaminated it.

[97] The Respondent argued the Applicant's actions, particularly the use of the Shared DLO without a road use agreement, justified the Applicant being ordered to pay a rate of $2.00 per tonne of gravel hauled on the Shared DLO from 2011 to the date of the Minister's decision in this matter.

[98] In response to the Board's questions regarding gates, Road usage, and Road maintenance, the Respondent noted there were two gates installed on the Road:

(a) "Top Gate," located approximately one-third of the distance of the Road from the start of the Shared DLO; and

(b) "Bottom Gate," located at the entrance to the APA SML.

[99] The Respondent said it installed the Top Gate, which is sufficient for securing access as long as it is locked. The Respondent submitted the Applicant replaced the Bottom Gate in 2017 to improve the alignment of the Road to make it more efficient for its trucks. The Respondent stated it did not provide approval for the replacement of the Bottom Gate, and a new security gate will be required to prevent unauthorized access to the APA SML.

[100] The Respondent noted most of the hauling on the Road takes place from mid-May to the end of October, as the terms of the Shared DLO require it to be closed from January 15 to April 30 of each year. The Respondent stated determining an estimated percentage of the total volume that is hauled or anticipated to be hauled, during each month, is not possible as it is dependent on the market.

[101] The Respondent submitted maintenance cost for the Road when it is not being used depends on various factors, including runoff damages, gate vandalism, garbage dumped, etc., and can range from a nominal cost to thousands of dollars.

[102] The Respondent submitted the Applicant did not provide any evidence that was not reasonably available during the original hearing. The Respondent argued the Applicant did not meet the burden of proof under section 125 of the *Public Lands Act*[14] or section 26.5 of the Board's Interim Appeals Procedure Rules for Complex Appeals.[15]

[103] The Respondent stated if the Board were to recommend an amended Road Use Order to the Minister, the following should be part of the order:

(a) a five year term prorated to the end of the Shared DLO term;

(b) a gate fee of $500.00 per week when the Applicant is hauling on the Shared DLO, and a provision allowing the Respondent or the County to deny access to the Applicant if the gates are left unsecured by the Applicant on a regular basis;

(c) an annual access fee of $1,000.00 payable on January 1 of each year;

(d) the Applicant, the County, and the Respondent to pay monthly maintenance costs based on their portion of weight of material hauled on the Shared DLO;

(e) compensation to be paid by the Applicant in a lump sum as calculated from spring of 2007 to the date the Minister issues the Road Use Order, at the rate of $2.00 per tonne hauled by the Applicant; and

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[14] Section 125 of the *Public Lands Act* provides: "The appeal body may reconsider, vary or revoke any report made by it."

[15] Section 26.5 of the Board's Interim Appeals Procedure Rules for Complex Appeals reads:

"The Board will not exercise its power under section 125 of the *Public Lands Act* in the absence of the following:

(a) New facts, evidence or case-law that was not reasonably available at the time of the hearing. The new facts, evidence or case-law must be significant enough to have a bearing on the outcome of the decision,

(b) A procedural defect during the hearing which prejudiced one or both of the parties,

(c) Material errors that could reasonably change the outcome of the decision, or

(d) Any other circumstance the Board considers reasonable and substantive."

(f) compensation to be paid quarterly by the Applicant at the rate of $1.00 per cubic yard, or $0.80 per tonne, of material hauled over the Shared DLO, effective from the date of the Minister's Road Use Order.[16]

C. The County of Grande Prairie

[104] The County submitted Alberta Public Lands, now AEP, agreed in 1999 to an access road to serve three SMLs owned by Everall, Garland, and the County. The County stated AEP was trying to limit access to the Wapiti River Valley, and the access road was granted on the condition that all three users share LOC 990510 (later DLO 990510, or the Shared DLO).

[105] In a letter dated March 9, 2000,[17] the County said the cost to construct the Road on the Shared DLO was $72,047.90. The County submitted this cost was divided among three disposition holders equally, but Garland covered Everall's cost as Everall was not yet using the Shared DLO. The County submitted the cost to build the Road today would be more than $300,000.00.

[106] The County provided a letter from AEP dated May 18, 2000, supporting combining LOC 810079 and LOC 990510, with Garland, Everall, and the County as equal disposition holders. The County noted the LOCs were combined into LOC 990510, which was later renamed DLO 990510.

[107] The County stated after the Road was constructed, the Applicant approached the County regarding access to the Shared DLO and permission to cross the County SML. The County said it agreed to grant access on the condition the Applicant pay an equal share of the cost to build the Road and be subject to the conditions of the agreement reached by the three original SML holders, which the County submitted was in the spirit of the original agreement with AEP that all users share a single road. The County noted the Applicant began operations in SML 990043 and accessed it via the Shared DLO.

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16 The Respondent also provided the Board with a proposed road use agreement based on standard agreements used in the oil and gas industry.

17 County's Submission, dated March 5, 2019.

[108] The County stated Garland transferred its SML and interest in the Shared DLO to the Respondent, but the County was not asked by any party to comment on the transfer of the Shared DLO.

[109] The County submitted it is aware this appeal may set a precedent for DLOs in the future. The County stated it has not sought compensation based on a per tonne rate as such a compensation method becomes a mechanism to restrict markets for competitive reasons. The County noted it needs to access many SMLs in the area, and was concerned that if it was charged by a company holding a DLO for access, the County would need to charge the same company to use a DLO held by the County in another area.

[110] The County submitted the Road was built across the APA SML, and was removed by the Respondent in 2018. The County provided a "Quick Memo" dated June 22, 1999, from AEP proposing the APA SML be amended to remove the area from the APA SML where the Shared DLO crossed it. The County noted the amendment of the Shared DLO did not appear to have occurred as planned.

[111] In response to the Board's questions regarding gates, Road usage, and Road maintenance, the County submitted there were three gates:

(a) Gate 1, located at the top of a hill on the Road;
(b) Gate 2, located at the entrance to the APA SML; and
(c) Gate 3, located at the entrance to SML 990043 on the County SML.

[112] The County estimated it would cost $2,000.00 annually for security checks of the gates.

[113] The County explained it has other sand and gravel operations it is currently working, and is not extracting resources from the County SML at this time. The County submitted when it begins hauling from the County SML, there will be a total volume in the range of 50,000 to 70,000 tonnes, with the hauling occurring for two weeks in the months of June, July, and August, and one week in the fall.

[114] The County submitted the maintenance cost for the Road, if it was not being used for hauling, would be minimal, but once the Road was used after a few years of non-use, it would require a high level of work to prepare the Road for hauling.

[115] The County stated it was willing to consider partnering with the Respondent and the Applicant as joint holders of the Shared DLO, although the County acknowledged the Respondent is opposed to including the Applicant as a holder of the Shared DLO.

[116] The County stated if a partnership is not possible, then a rental fee based on tonnage hauled on the Road would be an acceptable way to determine compensation to the DLO holders. The County submitted compensation for the following items should be included in a rental fee, along with an estimated cost:

(a) liability and risk: the County disagreed with the Respondent that the risk to allow the Applicant to use the Road is very significant, as both the County and the Respondent are generally insured for gravel operations. The County stated if there is Hold Harmless and Liability coverage, the cost of risk may range from $0.03 to $0.05 per tonne;

(b) delay and time lost to the DLO holders' operations by the Applicant accessing the DLO at the same time: the County did not consider the possible delays to be as serious as the Respondent claimed. If the Applicant yielded to the Respondent and County vehicles, the cost would be $0.01 to $0.02 per tonne;

(c) maintenance cost of keeping the Road to a certain standard when in use, and when not in use: the County stated each user should be responsible for maintenance of the Road when using it, and an agreement for maintenance when there is shared use should be easy to reach;

(d) major rehabilitation of the Road to keep it useable and safe: the County noted the Road will require a significant overhaul at some point, with the cost of up to $200,000.00 to be borne by the DLO holders. The County suggested an amount for a rental fee of $0.06 to $0.08 per tonne;

(e) reclamation of the road when the gravel pits are depleted: the County noted the reclamation cost would be the responsibility of the DLO Holders. The County submitted a reasonable fee would be $0.04 to $0.06 per tonne.

(f) nuisance of meeting with the Applicant for an inspection of the Road before and after use of the Road to determine if expectations are being met: the County stated a fixed fee of $5,000.00 per year would compensate the DLO holders for pre and post-haul inspections.

[117] The County submitted a road use fee of $0.20 per tonne hauled on the Road would be appropriate for 2019. The County stated the Road Use Order should have a five-year initial term, with the annual rent increasing each year by $0.01 per tonne to account for inflation.

[118] The County suggested for each year the Applicant uses the Road, the Applicant should pay an Inspection Fee of $5,000.00, and an access fee of $1,500.00.

[119] The County submitted the dispute between the Parties regarding the development of a portion of the Shared DLO through the APA SML should be left to the Parties to resolve.

D. Applicant's Rebuttal

[120] The Applicant argued that even a fee per tonne hauled across the Shared DLO of $0.80 could add up to $2.5 million in road use fees over the life of the Applicant's SML. The Applicant submitted it would be less expensive to build its own road at that price, which would not meet the principles of the *Public Lands Act* to avoid the construction of additional roads and minimize environmental disturbance.

[121] The Applicant submitted it had permission from the County to access the Shared DLO and build a new road leading to the County SML. The Applicant acknowledged there was some miscommunication between the Parties regarding this access, and a ramp to the APA SML had to be removed, but the Applicant noted the Respondent failed to attend a meeting set up by the County and the Applicant to address access issues. The Applicant stated it offered to replace the access ramp to the APA SML, and installed a new gate after the old gate had to be removed.

[122] The Applicant submitted the Respondent made no attempts to communicate with the County or the Applicant regarding its alleged concerns with the Applicant's access to the Shared DLO, and instead destroyed the new access road and ramp leading to the County SML.

[123] The Applicant argued the Respondent seeks compensation backdated to 2007, and thus acknowledges a deemed road use agreement existed, but also seeks punishment against the Applicant for accessing the Shared DLO without a road use agreement. The Applicant submitted the Respondent cannot have it both ways.

[124] The Applicant stated compensation for use of the Shared DLO should only be from 2016, when the Respondent requested a written road use agreement.

[125] The Applicant submitted this matter has province-wide implications. The Applicant stated if other disposition holders in the province demanded road use compensation based on a fee per tonne hauled over a DLO, it could lead to a restriction in accessibility to the

Province's resources and a risk of economic stagnation and resource marketability. The Applicant stated the Board's decision should be a guiding precedent for future road use disputes.

IV. ANALYSIS

A. Documents submitted by the Respondent

[126] In its written closing submission following the oral hearing, the Respondent attempted to introduce additional evidence that it had not included in its pre-hearing written submissions nor introduced through its witnesses at the hearing. This evidence consisted of twelve documents which the Respondent said supported its claim the Applicant and the Respondent had previously entered into a road use agreement requiring compensation rates to be in place before the Applicant could access the dispositions. The Respondent submitted the Board had jurisdiction to accept the filing of this evidence after written submissions had been received. The Respondent argued that during the oral hearing, the Board had allowed the County to introduce exhibits that had not been submitted as part of the Board's pre-hearing process, and the Respondent was entitled to the same opportunity.

[127] The Applicant submitted the Respondent's post-hearing documents had not been identified by witnesses nor tested by cross-examination. The Applicant noted the documents were available prior to the hearing and could have been submitted with the Respondent's written submissions or at the hearing. The Applicant argued the Respondent's documents must be disregarded.

[128] The County had no opinion on the Respondent's attempt to introduce these documents.

[129] The Board has the authority to determine what evidence is admissible. Rules 2.4(c), (d), and (e) of the Board's *Interim Appeals Procedure Rules for Complex Appeals*, says:

> "The Board has all powers necessary to conduct the fair, expeditious, and impartial hearing of an appeal, including the following: …
>
> (c) To rule on the admissibility and relevancy of evidence;
>
> (d) To seek full disclosure of evidence when the ends of justice would be served;
>
> (e) To regulate the course of the hearing and the conduct of persons at the hearing;"

[130] In determining whether to permit evidence to be submitted, the Board may consider several factors, including the following:

1. Is the evidence submitted as part of the appeal procedures as set out by the Board?
2. Have all participants in the hearing had the opportunity to review the evidence and state any objections to the evidence being submitted?
3. Did the participants in the hearing have the opportunity to test the evidence through cross-examination?
4. Does the evidence provide details, clarification, or help the Board understand the facts of the appeal?

[131] In this situation, the Board found the evidence introduced for the first time by the County at the hearing was made available to all the Parties as part of the hearing procedure and was marked as exhibits. The evidence was relevant and provided details and clarification, and assisted the Board in understanding the facts of the appeal. Although the Board would have preferred the County had submitted the evidence prior to the hearing, the Board was satisfied all Parties had the opportunity to review the County's evidence prior to it being admitted and marked as exhibits. The Respondent and the Applicant were represented by legal counsel who did not raise any objection to the submission of the County's evidence, despite having the opportunity to do so. The Respondent and the Applicant were provided the opportunity to cross-examine the County's witnesses regarding this evidence.

[132] By way of contrast, the documents included by the Respondents in its written closing statement were not submitted pursuant to the hearing procedures set by the Board. In addition, and significantly, there was no opportunity for the Applicant or the County to test the Respondent's evidence through cross-examination. The documents were available to the Respondent at the time of the oral hearing, but no reason was given by the Respondent for not providing them at that time.

[133] The Board finds the Respondent's attempt to introduce this evidence as part of its closing submissions was not in accordance with the fundamental principle of fairness. Accordingly, the Board will not admit any of these documents as evidence in this appeal.

B. Road Use Order Considerations

[134] The appeal before the Board is not a private matter. The Shared DLO and the SMLs are located on public land. The sand and gravel resource belongs to the Government of Alberta, and is important to the economic growth and development of the Province. The Government of Alberta has a public interest to ensure disputes over access to the resource are resolved effectively, otherwise such disputes could hinder economic opportunities for Albertans. The Legislature has signaled the importance of resolving road use disputes by providing a process for parties to reach a settlement, or for the Minister to impose one.

[135] The Board notes the Parties had multiple opportunities to resolve the dispute themselves. After the appeal was filed, the Parties could have continued negotiations. The Board, as is its practice, arranged a mediation meeting with the Parties and provided a trained mediator to assist, but the Parties still did not reach an agreement for the use of the Road. Holding a hearing was the last resort for the Board to resolve the dispute and make recommendations to the Minister regarding terms and conditions of access to the Shared DLO. The legislation empowers the Minister, through the Board, to intervene in a road use dispute where parties to the dispute are unable to reach an agreement. Section 98 of PLAR[18] states a commercial user requiring the use of a road in a licensed area may use the road only with an agreement from the license holder or through an order from the Minister under section 124(3) of the *Public Lands Act*,[19] on an appeal to the Board.

[136] In deciding whether the Board should recommend a road use agreement be ordered, the Board considered the following:

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18 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."

19 Section 124(3) of the *Public Lands 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."

(a) public lands are for the benefit of, and are owned by, the people of Alberta;

(b) it is inappropriate for a holder of a DLO to profit unjustly in providing access to a DLO to another party;

(c) if a holder of a DLO has invested money in the construction of a road, that holder should be compensated fairly by other parties using the road; and

(d) it is AEP policy to encourage multiple use of a DLO rather than allow the construction of new roads across public lands.

[137] The Board is concerned the Respondent, despite its claims otherwise, acted as if the Shared DLO belonged to it, rather than the people of Alberta. The Board finds some of the terms and conditions proposed by the Respondent for a Road Use Order would allow the Respondent to profit unjustly from a public resource (the Shared DLO). The legislation is clear that the holder of a licence must share the road with other commercial users, whether by reaching an agreement between parties, or by an order from the Minister. When the Respondent received assignment of the Shared DLO, it knew it was possible other commercial users may apply to use the Road. Under PLAR, there is no exclusive use of a DLO. The intent of the legislation is not to allow the first person on the site operate a road as a for-profit venture.

[138] The Board recognizes the Respondent and the County have invested resources in the Shared DLO and the construction of the Road, and deserve to be appropriately compensated by a third party benefiting from using it. If not for the existence of the Road, the Applicant would have to incur the expense of building an access road.

[139] The Board finds the Applicant's use of an existing road to be a reasonable use of public lands, as it avoids the need to build another road. The Respondent suggested the Board should look at other options for the Applicant to access SML 990043; however, the issue of whether to grant access on the Shared DLO was the only matter the Board had jurisdiction to consider in this appeal. The Board notes evidence presented at the hearing indicated there were no viable alternate options for the Applicant to access SML 990043.

[140] Upon review of the Director's Record and the written and oral submissions of the Parties, the Board determines it would be appropriate to recommend the Minister order the Applicant be permitted to use the Shared DLO and the Road, on the terms and conditions set out in the Road Use Order of this Report and Recommendations.

C. Terms and Conditions

[141] The terms and conditions of the Road Use Order recommended by the Board set out in the attached Road Use Order. To assist the Parties in understanding the Board's reasons for its recommendations to the Minister, the Board provides the following comments.

[142] The Board finds there would be little, if any, interference with the operations of the Respondent and the County resulting from the Applicant's use of the Road. Any interference that may result from the Applicant using the Road can be mitigated by the Parties by providing written notice prior to the times they intend to use the Road, and by the Applicant yielding the right-of-way on the Road to the Respondent and the County.

[143] The Board is hopeful the Parties will recognize it is in their best economic and safety interests to communicate regarding road use to reduce the chances of interfering with each other's operations. To assist with communication, the Parties shall provide written notice to each other a minimum of 24 hours before commencement of hauling on one or more days or conducting maintenance on the Road ("Active Road Use"). The notice shall include the estimated number of vehicles using the Road and the starting and finishing dates of the Active Road Use period. A minimum of 24 hours written notice shall be given to the other Parties of the cessation of the Active Road Use period.

[144] The Board notes the Applicant would have had to build a new road across public land, assuming full cost and risk, if the Respondent and the County had not already built the Road. The Board accepts the County's estimate that the Road originally cost $75,000.00 to build, and that today it would cost approximately $300,000.00 to construct. The County suggested the Applicant form a partnership with the County and the Respondent as a one-third holder of the Shared DLO, but the County noted the Respondent is opposed to such an arrangement. The Board will not recommend a forced partnership in this situation. It is unusual to have two entities holding the same DLO.

[145] Since the Applicant is receiving a benefit from not having to build a road at its expense, the Board considers it equitable for the Applicant to pay $50,000.00 to the Respondent and $50,000.00 to the County, for a total of $100,000.00, as compensation for one-third of the estimated cost of constructing the Road in current dollars (the "Capital Costs"). The payment of

Capital Costs does not give the Applicant co-ownership of the Road or the Shared DLO, nor does it create a partnership. It does ensure access for the Applicant, subject to the other terms and conditions of the Road Use Order. The payment of Capital Costs must occur before the Applicant uses the Road, unless otherwise agreed to in writing. The Parties may agree in writing to any payment terms as they see fit.

[146] The County suggested the Applicant pay a yearly fee of $0.20 per tonne hauled on the Road as compensation for liability and risk, delay and time lost, maintenance cost, major rehabilitation of the Road, reclamation, and nuisance. The Respondent submitted $1.00 per yard (or $0.80 per tonne) hauled on the road would be appropriate compensation going forward. Taking into consideration all relevant factors, the Board finds a reasonable amount to be paid by the Applicant and divided equally between the Respondent and the County, is $0.10 per tonne of material hauled by the Applicant on the Road (the "Compensation Fee") (the Board notes the Compensation Fee would be higher but for the Capital Costs payable by the Applicant without any status as holder of the Shared DLO in return). The Compensation Fee is intended to cover major rehabilitation of the Road where the Road requires significant work to keep it useable, reclamation at the end of the use of the Road, risk, any delay to the Respondent and County's operations caused by the Applicant's use of the Road, and the general inconvenience of the Applicant using the Road. Expenses related to routine maintenance, road assessment, administration, gate fees, and fees ordered paid by a dispute referee or arbitrator are not covered by the Compensation Fee.

[147] One of the concerns of the Board is the Parties may not cooperate in the mutual operation of the Road. The Board recommends the Road Use Order include the option for the Parties to take disputes to a referee, for less serious disputes, or 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. The Parties can appeal any restriction on use of the Road to a referee or arbitrator.

[148] The referees and arbitrators must be mutually agreed upon by the Parties involved in a dispute. If the Parties do not agree on a referee or an arbitrator, then one of the Parties in the dispute may request the ADR Institute of Alberta appoint a referee or an arbitrator. The ADR Institute of Alberta's appointment is final. After making a ruling on the matter in dispute, the

referee or arbitrator may require a party to pay all or a portion of the referee or arbitration fees according to which party is at fault in the dispute and the degree of cooperation from each party. An arbitrator's decision is final.

[149] The Board recognizes there will be administration work associated with the Road. Previously, administration was undertaken by each Road user individually; however, the Board is of the opinion that such an arrangement is not possible with three users of the Road. An administrator (the "Road Administrator") is required to ensure the Road Use Order is followed and the Road is monitored and maintained. The County is a holder of the Shared DLO with the Respondent, and has demonstrated a willingness to work with both the Respondent and the Applicant. The County realizes the importance of co-operation among all users of the Road. Therefore, the Board recommends the County be given the responsibility of administering the Road as the Road Administrator.

[150] To compensate the County for acting as Road Administrator, the Respondent and the Applicant will each pay to the County $2,500.00 annually (the "Administration Fee"), for a total of $5,000.00, regardless of whether the Respondent or the Applicant uses the Road in that year. The Administration Fee is to compensate the County for arranging for Road inspections, contracting out maintenance, assessing and calculating shared expenses, and other expenses incurred as Road Administrator.

[151] If the County is unwilling to be the Road Administrator, the Parties may agree the Applicant or the Respondent be the Road Administrator, or agree on a third-party to be appointed Road Administrator and paid equally by the Parties. If the Parties cannot agree on a Road Administrator, they may request the ADR Institute of Alberta assign a referee or arbitrator to determine who to appoint as Road Administrator. If the Applicant or the Respondent acts as Road Administrator, the County and the Party not acting as Road Administrator would each pay $2,500.00 to the Road Administrator annually. The Parties may wish to consider the expense of the County or one of the Parties taking responsibility as the Road Administrator, compared to the cost of a third-party or an appointed referee or arbitrator as Road Administrator.

[152] The Board considered three types of road maintenance:

(a) Base maintenance ("Base Maintenance"), which includes keeping the Road usable;

(b) Safety maintenance ("Safety Maintenance"), which may require changes to the Road in order for it to be safer for potentially increased truck traffic; and

(c) Monthly maintenance ("Monthly Maintenance"), which involves repairing the Road due to usage through the hauling season.

[153] In order to determine each Road user's share of maintenance costs, the condition of the Road must be assessed. The Road Administrator will use a qualified road inspector (the "Road Inspector") to assess the condition of the Road each year. If the County accepts the role as Road Administrator, it may use any qualified road inspectors in its employment or hire a qualified third party road inspector as it sees fit. The cost of a Road Inspector shall be shared equally by the Parties.

[154] The Road Inspector is to:

(a) assess the condition of the Road at the start and end of hauling season (April/May and October/November);

(b) recommend Base Maintenance work needed; and

(c) recommend Safety Maintenance work needed.

[155] The Road Administrator will hire a qualified civil contractor to implement the recommendations of the Road Inspector, or the Road Administrator may hire any of the Parties to do the Road work. Monthly Maintenance work may be done by the Parties as needed during the hauling season.

[156] As Base Maintenance involves keeping the Road maintained to a useable standard, all three Parties are to pay one-third of the cost of Base Maintenance. Road improvement costs identified in the assessment shall be shared equally if the improvement benefits all Parties and would be needed regardless of the Applicant's use of the Road. Base Maintenance does not include major rehabilitation of the Road.

[157] Any Safety Maintenance identified by the Road Inspector as being for the sole benefit of the Applicant, or required because of the Applicant's use of the Road, shall be paid fully by the Applicant, including the cost associated with building road turnouts if necessary to

accommodate trucks meeting on the Road, and applying for any required approvals or amendments to existing dispositions.

[158] The Parties shall carry out Monthly Maintenance of the Road and conduct Safety Maintenance work as needed and as determined by the Road Administrator. A Party repairing the Road and conducting Safety Maintenance work may submit an expense claim (the "Expense Claim") to the Road Administrator for the month in which the repairs were done, by the 15th day of the following month. The Board recommends the rates charged for the Road work not exceed the rates set by the Alberta Roadbuilders & Heavy Construction Association's Equipment Rental Rates Guide, unless the Parties agree otherwise in writing, or there is an order by a referee or an arbitrator. The Road Administrator may reject any Expense Claim it considers unreasonable.

[159] Monthly Maintenance payments for the Road should be on a proportional basis to ensure fairness to all Parties. Each Party will provide the Road Administrator with the total weight it hauled on the Road for the month by the 15th day of the following month. By the 30th day of that month, the Road Administrator will provide the Parties with the monthly maintenance costs calculated based on the proportion of the total weight each Party hauled on the Road. For example, if the Applicant hauled 50 per cent of the total weight hauled on the Road for a particular month, the Applicant would pay 50 per cent of the Monthly Maintenance cost for that month.

[160] Each party must pay its proportion of the Monthly Maintenance costs by the 30th day of the month following receipt of the invoice from the Road Administrator, in the manner directed by the Road Administrator. If a third party completes the Monthly Maintenance, payment shall be made in the manner directed by the Road Administrator.

[161] The Board appreciates the responses by the Parties to its questions regarding the gates on the Shared DLO. The Board finds the Applicant's share of gate maintenance and security should be $1,500.00 annually, with the Applicant paying $750.00 to the Respondent, and $750.00 to the County, annually. It is expected that the last Party exiting the Road at the end of the day will ensure the gates are closed and locked.

[162] The traffic safety and other road use rules (the "Traffic Rules") governing the conduct of the Parties shall be determined by the Road Administrator in compliance with existing policies and regulations. The Traffic Rules must conform to the terms and conditions of the Shared DLO. The Parties shall conduct their activities on the Road in a safe manner and shall ensure that any use of the Road by their employees, contractors, subcontractors, and agents is made in a safe manner and in accordance with the Traffic Rules, the terms and conditions of the Road Use Order, and the Shared DLO.

[163] All Parties using the Road, shall observe all load limits, speed limits, road bans, closures, and restrictions, whether imposed by governmental authority or by the Road Administrator. The Road Administrator shall provide a minimum of 48 hours' notice to the Parties when anticipated closures or restrictions are to be imposed.

[164] The Applicant shall maintain the same insurance policies and amounts as the Respondent and the County are required to have as specified in the terms and conditions of the Shared DLO:

(a) general or commercial liability in an amount not less than $2,000,000.00;

(b) Automobile liability insurance in an amount not less than $2,000,000.00; and

(c) wildfire insurance in an amount not less than $250,000.00.

At the beginning of each haul season, the Applicant must submit proof of insurance coverage to the Road Administrator 24 hours before hauling on the Road.

[165] The Parties disagreed on when the term of the Road Use Order should begin. The Applicant stated that since it did not require access to the Shared DLO until 2014, the earliest retroactive compensation should be calculated from is 2014. The Respondent argued the term should start at the expiry of the previous road use agreement, which would be the start of the 2007 construction season. The County had no opinion on when the term should start. All three Parties suggested a five year term to begin with. The Board has determined the term of the Road Use Order will be retroactive to April 30, 2014, which is when the Applicant needed access to the Road. The term will end on April 5, 2021, which is the date the Shared DLO expires, or earlier if one of the following occurs:

(a) the Parties mutually agree to terminate the Road Use Order earlier by agreement in writing;

(b) the Applicant terminates the Road Use Order earlier in writing; or

(c) the Government of Alberta cancels the Shared DLO earlier.

[166] If the Government of Alberta renews the Shared DLO, the expiry date of the Road Use Order shall be five years after the renewal date of the Shared DLO.

[167] The only retroactive fees that can be measured with any accuracy based on the information available are the Compensation Fee and the Gate Fee. The Applicant will be required to pay the Compensation Fee and the Gate Fee from April 30, 2014 to the date of the Minister's Order before it may access the Shared DLO. Road maintenance fees are not able to be retroactively measured at this point, therefore, the Board will only require the Applicant to pay road maintenance fees from the date of the Minister's Order. As there was not a Road Administrator previously, the Administrative Fee is not required to be paid for the period from April 30, 2014 to the date of the Minister's Order.

[168] The Board recommends the Minister order the Respondent to, at its own cost, restore the portion of the Road on the Shared DLO where it crosses the APA SML (the "Road Extension"), which the Respondent removed. The Board finds the Respondent removed the Road Extension which was built by the Applicant in cooperation with the County. The Board noted the Respondent expressed concern it had not been consulted regarding the construction of the Road Extension, but the Board finds the Respondent had opportunity to discuss with the Applicant and the County the construction of the Road Extension, but failed to do so. The Board further finds the removal of the Road Extension was unnecessary and an over-reaction. The Respondent must build the Road Extension within two months of the date of the Road Use Order, or two months from the start of the season being reopened in 2020, after the Road Use Order is issued, if the Road Use Order is issued late in the hauling season or after the hauling season has concluded.

[169] The Board recommends the Road Use Order 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 all three Parties.

V. RECOMMENDATIONS

[170] The Board recommends the Minister reverse the deemed rejection decision of the Director, and order the holders of DLO 990510 grant to the Applicant, 830514 Alberta Corporation, access to DLO 990510, with terms and conditions as outlined in the Road Use Order attached as Appendix A to this Report and Recommendations.

[171] In accordance with section 124(4) of the *Public Lands Act*,[20] a copy of this Report and Recommendations and any decision by the Minister regarding this appeal is to be provided to:

1. Mr. Sigurd Delblanc, Bryan & Company, on behalf of 830614 Alberta Corporation;
2. Mr. Patrice Brideau, Stringam LLP, on behalf of All Peace Asphalt Ltd.;
3. The County of Grande Prairie No. 1; and
4. Mr. Larry Nelson, Alberta Justice and Solicitor General, on behalf of the Director, Provincial Appeals Section, Alberta Environment and Parks.

Dated on June 14, 2019, at Edmonton, Alberta.

Marian Fluker, Chair

Anjum Mullick, Board Member

Brenda Ballachey, Board Member

[20] Section 124(4) of the *Public Lands 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."

Appendix A

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"), All Peace Asphalt Ltd. ("All Peace") and the County of Grande Prairie No. 1 (the "County") are ordered to allow 830614 Alberta Corporation ("ABCorp") to use Department Licence of Occupation DLO 990510 (the "DLO") for the purpose of hauling sand and gravel on a road constructed on the DLO (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 any section of the Act or PLAR, the section of the Act or PLAR shall prevail.

D. All Peace, the County, and ABCorp are collectively referred to as the "Parties."

E. The permission granted to ABCorp under this Order is subject to the following conditions:

1. Acting Reasonably

1.1 In all aspects of this Order, the Parties are required to act reasonably.

2. Consideration

Capital Costs

2.1 ABCorp shall pay All Peace $50,000.00 and the County $50,000.00, before using the Road.

Compensation Fee

2.2 ABCorp shall pay All Peace $0.05 per tonne of material hauled by ABCorp on the DLO for the period of April 30, 2014 to December 31, 2018. ABCorp shall pay the County $0.05 per tonne of material hauled by ABCorp on the DLO for the period of April 30, 2014 to December 31, 2018. ABCorp shall pay these amounts before using the Road.

2.3 ABCorp shall pay All Peace $0.05 per tonne of material hauled by ABCorp on the DLO and pay the County $0.05 per tonne of material hauled by ABCorp on the DLO as compensation for the use of the Road ("Compensation Fee"). The Compensation Fee shall be paid annually by January 15 for all material hauled by ABCorp in the preceding calendar year.

3. Dispute Resolution

Referee and Arbitrator

3.1 A "Referee" is a third party assigned to hear a dispute between two or more of the Parties. Disputes of a minor nature, or as otherwise specified in this Order, may be referred to a Referee for a less formal process of dispute resolution.

3.2 An "Arbitrator" is a third party assigned to hear an appeal from the decision of a Referee, or hear a dispute involving more serious matters. Disputes properly before an Arbitrator include road modifications, cost or safety disputes, and any other matter one of the Parties requests to refer to an Arbitrator.

3.3 Disputes arising during the performance of activities under this Order may be referred for a decision to a mutually agreed upon Referee or Arbitrator.

3.4 If a Referee or Arbitrator cannot be mutually agreed upon, one of the Parties seeking the decision may request the assistance of the ADR Institute of Alberta ("ADRIA"), or ask ADRIA to appoint a qualified Referee or Arbitrator to hear the dispute. ADRIA's appointment of a Referee or Arbitrator is final.

Fines and Penalties

3.5 A Referee or an Arbitrator may levy a reasonable fine against one of the Parties who is found at fault or uncooperative in a dispute.

3.6 If a fine is levied by a Referee or Arbitrator against All Peace or the County in a dispute with ABCorp, and All Peace or the County do not pay the fine by the date set by the Referee or Arbitrator, then the fine amount shall be deducted from the next Compensation Fee payment owed by ABCorp.

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

Costs and Appeals

3.8 A decision of a Referee, including the costs of the Referee, may be appealed to an Arbitrator.

3.9 The costs of any dispute resolution by a Referee or an Arbitrator are to be determined and awarded as the Referee or Arbitrator may, in their sole discretion, decide, according to practices established by ADRIA and the ADR Institute of Canada.

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

4. Road Administration

Road Administrator

4.1 If the County agrees, it shall be responsible for the administration of the Road ("Road Administrator").

4.2 If the County is unwilling to be the Road Administrator, a third party shall be appointed by agreement of the Parties to be the Road Administrator. If the Parties cannot agree on a third party Road Administrator, then a Referee shall appoint a third party to be the Road Administrator.

Administrative Fee

4.3 If the County agrees to be the Road Administrator, ABCorp and All Peace shall each pay the County $2,500.00 annually for administrative costs ("Administrative Fee") associated with the work of the Road Administrator in the upcoming year.

4.4 If the County is not the Road Administrator, then the Parties shall each pay one-third of the Road Administrator's fees as prescribed by the Road Administrator on an annual basis, in writing.

4.5 The Administrative Fee shall be pro-rated and paid within 15 days of receipt of this Order for the first year of this Order, and thereafter annually by January 15 of each year, or as otherwise directed by the Road Administrator in writing.

4.6 In the year this Order is terminated, the Road Administrator shall refund to the Parties the remaining pro-rated amount of the Administrative Fee within 15 days of the effective date of the termination.

5. Road Inspection

5.1 The Road Administrator shall appoint the County or a qualified third party ("Road Inspector") to conduct an inspection of the Road and provide a written report ("Road Inspection Report") to the Road Administrator.

5.2 The inspection of the Road shall be conducted within 30 days of the County lifting any road ban in 2019, if applicable, or if a road ban has already been lifted, within 30 days of the issuance of this Order.

5.3 The Road Inspection Report shall include a determination by the Road Inspector of the following:

(a) any additional safety requirements needed, including, but not limited to, signage, speed limits, and safety requirements for the Road ("Safety Maintenance");

(b) any improvements to maintain the overall integrity of the Road ("Base Maintenance"); and

(c) any improvements required to prepare the road for seasonal hauling ("Monthly Maintenance").

5.4 Each Party shall pay one-third of the Road Inspector's costs as prescribed by the Road Inspector, within 30 days of receiving a written invoice from the Road Inspector.

6. Maintenance

Service Provider

6.1 The Parties may reach agreements among themselves to carry out any maintenance work required by the Road Inspection Report or Monthly Maintenance work required during the hauling season. If the Parties are unable to reach an agreement, the Road Administrator may employ a person of its choosing (the "Service Provider"), including any of the Parties, to carry out any maintenance work.

6.2 The Road Administrator shall provide to the Parties any invoices from the Service Provider within 7 days of receipt of the invoice.

6.3 The costs of the Service Provider are to be divided equally among the Parties, except as otherwise provided in this Order or by written agreement of the Parties, and shall be paid directly to the Service Provider within the timelines required by the Service Provider.

6.4 The cost of the Service Provider for completing work recommended by the Road Inspection Report shall not exceed the amounts listed in the Alberta Roadbuilders & Heavy Construction Association's Equipment Rental Rates Guide, unless the Parties agree in writing or, in the event of disagreement, where there is a written order from a Referee or Arbitrator.

Safety Maintenance Cost

6.5 ABCorp shall pay all the cost of any Safety Maintenance work identified in the Road Inspection Report as required solely as a result of ABCorp using the Road.

6.6 Safety Maintenance work required not solely as a result of ABCorp's use of the Road shall be paid as prescribed in condition 6.3 of this Order.

Base Maintenance Cost

6.7 The Parties shall each pay a third of the cost for work identified in the Road Inspection Report as Base Maintenance, as prescribed in condition 6.3 of this Order.

Monthly Maintenance Cost

6.8 Monthly Maintenance cost shall be paid by the Parties according to each of the Parties' percentage of the weight of the material hauled on the Road each month.

6.9 The Parties shall provide tickets to the Road Administrator to indicate the amount of material hauled on the Road during each month by the 15th day of the following month.

6.10 If one of the Parties is appointed as a Service Provider and carries out any of the Monthly Maintenance work, it shall provide the Road Administrator with an expense claim detailing the costs of the work ("Expense Claim") by the 15th day of the following month after the work was done ("Expense Claim Date").

6.11 The Road Administrator shall provide to the Parties the Service Provider's Expense Claim for the Monthly Maintenance of the Road, and each Parties' proportional amount of the Monthly Maintenance within 7 days after the Expense Claim Date.

6.12 Each of the Parties shall pay its proportional amount of the Monthly Maintenance within 30 days of receipt of the Monthly Maintenance amount, unless otherwise specified by the Service Provider.

6.13 If one of the Parties fails to pay its proportional amount of the Monthly Maintenance by the date specified under condition 6.12, it shall be responsible for all late fees and penalties and shall not use the Road to haul material until payment is provided.

Gates

6.14 ABCorp shall pay $750.00 to All Peace and pay $750.00 to the County for a total of $1,500.00 ("Gate Fee") annually for security of the gates. Payment of the Gate Fee shall be paid annually on or before January 15. ABCorp shall not use the Road until the annual Gate Fee is paid.

6.15 The last of the Parties exiting the Road at the end of each day will ensure the gates are closed and locked.

6.16 ABCorp shall pay the Gate Fee for 2014, 2015, 2016, 2017, 2018, and 2019 before using the Road.

Road Modifications

6.17 ABCorp shall not alter, modify, or in any way change the Road or any structures forming a part of the Road without first obtaining the written consent of All Peace and the County, or on order of a Referee or Arbitrator under Part 3 of this Order.

7. Road Use

Compliance

7.1 The Parties shall comply at all times and in all respects with all federal, provincial, regional and municipal laws, bylaws, rules, and regulations.

Active Road Use

7.2 For conditions 7.3, 7.4, and 7.5, "Active Road Use" is defined as one or more days where hauling or maintenance is conducted on the Road.

7.3 A Party shall provide a minimum of 24 hours' written notice to the other Parties before the commencement of Active Road Use. The notice shall include the estimated number of vehicles using the Road, and the starting and estimated finishing dates of the Active Road Use. At least 24 hours' notice shall be given to the other Parties after the end of the Active Road Use.

7.4 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 a new Active Road Use period.

7.5 If an Active Road Use extends more than three months, any of the Parties providing notice of Active Road Use shall provide a new notice of Active Road Use at the end of each three month period for the next Active Road Use period.

Traffic Rules

7.6 The Parties shall conduct their activities on the Road in a safe manner and shall ensure that any use of the Road by their employees, contractors, subcontractors, and agents is carried out in a safe manner and in accordance with the terms of this Order and the terms of the DLO.

7.7 The use of the Road by the Parties, their employees, contractors, subcontractors, and agents shall be subject to traffic rules ("Traffic Rules") that ensure the safety of all users and the preservation of the Road.

7.8 The Traffic Rules shall include a condition stating ABCorp shall yield to trucks from All Peace and the County wherever it is safe to do so, and such other conditions as determined by the Road Administrator to be in compliance with existing policies and regulations.

7.9 The Parties shall observe all load limits, speed limits, road bans, closures, and restrictions, whether imposed by governmental authority or by the Road Administrator.

7.10 Where possible, the Road Administrator shall provide notice to the Parties a minimum of 48 hours before anticipated Road closures or Road restrictions are to be imposed.

7.11 The Parties may appeal any Road restriction imposed by the Road Administrator to a Referee or an Arbitrator as provided by Part 3 of this Order.

7.12 The Road Administrator shall not be liable for any loss or damage occurring to any of the Parties as a result of the imposition of reasonable limits, bans, closures, and restrictions.

8. Liability and Indemnity

8.1 ABCorp's use of the DLO under this Order is entirely at its own risk and, by entering onto the DLO under this Order, ABCorp is liable for and assumes the risk of any loss, damage, or expense suffered by All Peace, the County, ABCorp, or any third person, where that loss, damage, or expense is caused by ABCorp, its employees, agents, contractors, or subcontractors.

8.2 ABCorp shall hold All Peace, the County, and the Government of Alberta harmless and indemnify All Peace, the County, 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 All Peace, the County, or the Government of Alberta, where that liability, actions, proceedings, claims, demands, judgments, and costs (including actual solicitor-client costs incurred in defending against the same) is caused by ABCorp's employees, agents, contractors, or subcontractors.

9. Environmental Matters

9.1 ABCorp shall notify All Peace and the County immediately in the event of any environmental pollution or contamination caused by ABCorp's activities on the DLO or on any adjacent lands as a result of the use of the DLO ("Environmental Contamination") and ABCorp shall be solely responsible for notifying 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 ABCorp.

9.2 ABCorp shall comply with the provisions of all applicable federal, provincial, or municipal laws relating to the environment.

9.3 ABCorp shall indemnify and save All Peace and the County harmless against all loss, damages, and expenses which may be brought against or suffered by All Peace and the County and which are incidental to any Environmental Contamination, except to the extent that such loss, damage, or expense is the result of All Peace and the County's activities.

9.4 Upon termination of this Order, ABCorp shall leave the DLO, and any adjacent lands, free of any Environmental Contamination resulting from ABCorp's activities which may adversely affect the land, result in a breach of the duties described in the DLO or this Order, or breaches any applicable federal, provincial, or municipal law relating to the environment. The liability and responsibility of ABCorp to All Peace and the County

with respect to the Environmental Contamination contained herein shall continue to be enforceable by All Peace and the County notwithstanding the termination of this Order.

10. Insurance

10.1 ABCorp shall, at its 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 DLO or as a result of ABCorp's use thereof, with the following minimum policy limits and with insurers acceptable to All Peace and the County:

(a) Bodily Injury – $2,000,000.00;

(b) Property Damage – $2,000,000.00; and

(c) Fire – $250,000.00.

10.2 All Peace and the County shall be named as an additional insured on the policies required under condition 10.1 with respect to any claim arising out of or in connection with ABCorp's use of the DLO. ABCorp shall provide the Road Administrator with proof of insurance within 30 days of the date of this Order and thereafter as required in writing by the Road Administrator. If ABCorp fails to provide the Road Administrator with proof of insurance within 30 days of the date of this Order, ABCorp is prohibited from using the DLO until proof of insurance has been provided.

10.3 ABCorp shall ensure that its agents, employees, contractors, and subcontractors who are not covered under ABCorp's insurance policies maintain insurance in the same amounts and subject to the same requirements as set out in condition 10.1. ABCorp shall provide the Road Administrator with proof of insurance required under this condition before any of its agents, employees, contractors, and subcontractors access the DLO.

10.4 ABCorp shall maintain in force and ensure its contractors maintain in force Workers' Compensation coverage as required by Alberta law.

10.5 The insurance policies shall be endorsed to provide that in the event of any change that could affect the interests of All Peace and the County, or in the event of their cancellation, the insurers shall notify All Peace and the County a minimum of thirty (30) days before the effective date of such change or cancellation.

11. Notices

11.1 Any notices or other communication required or permitted to be delivered pursuant to this Order shall be in writing and delivered by hand delivery, email, or pre-paid registered mail. Such notices or communications shall be deemed to have been given (and received by the other party) on the date when hand delivered or sent by confirmed email transmission (if delivered or sent during the recipient's regular business hours on a business day, and otherwise on the next business day), or three (3) days after being sent by pre-paid registered mail to the other party, at the addresses below:

830614 Alberta Corporation
29 – 712051 Range Road 54
Grande Prairie, AB T8X 4A7
Phone: 780-933-8415Email: don@baillys.ca

All Peace Asphalt Ltd.
Box 339
Grande Prairie, AB T8V 3A5
Phone: 780-532-0233Email: darren@recoconstruction.com

County of Grande Prairie No. 1
10001 – 84 Avenue
Clairmont, AB T0H 0W0
Attention: Dale Van Volkingburgh
Phone: 780-532-7393Email: dvan@countygp.ab.ca

11.2 Any of the Parties may change the address for service by giving written notice to the other Parties.

11.3 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.

12. Assignment

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

13. Termination

13.1 This Order terminates on April 5, 2021, which is the expiry date of the DLO, unless:

(a) the Parties mutually agree to terminate this Order earlier by agreement in writing;

(b) ABCorp terminates this Order earlier in writing;

(c) the Government of Alberta cancels the DLO earlier; or

(d) the Government of Alberta renews the DLO, upon which the expiry date of this Order shall be five years after the renewal date of the DLO.

13.2 If at the time of termination of this Order any amounts arising from this Order that are owing by any of the Parties, including maintenance costs owing to the Service Provider, continue to be due and payable as prescribed by this Order.

14. Waiver

14.1 Failure by one of the Parties, at any time, to require strict performance by the other Parties of any condition of this Order shall in no way affect the rights to enforce such condition.

14.2 Any waiver by any of the Parties of any breach shall not be held to be a waiver of any succeeding 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 any of the Parties unless it is in writing.

15. Encumbrances

15.1 ABCorp shall not:

(a) permit any builder's liens or other liens for labour or material relating to work to remain filed against the DLO, or

(b) register, cause or allow to be registered, or permit to remain registered, any caveat or encumbrance against the title to the DLO,

where such builder's liens or other liens, caveats, or encumbrances are related to ABCorp.

15.2 Where a builder's lien or other lien for labour or material relating to work is registered against the DLO because of any action or inaction of ABCorp, ABCorp shall immediately take whatever steps are necessary to discharge the lien.

15.3 Where a caveat or encumbrance is registered against the title to the DLO because of any action or inaction of ABCorp, ABCorp shall immediately take whatever steps are necessary to discharge the caveat or encumbrance.

16. Amendment

16.1 The Parties may mutually agree to amend this Order in writing, at any time.

16.2 Any amendment that would breach a term or condition of the DLO is void.

16.3 Any amendment that contravenes the Act or PLAR is void.

16.4 Any amendment extending the termination date beyond the expiry of the DLO, if renewed, is void.

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