

THE SURFACE RIGHTS BOARD of MANITOBA

BOARD ORDER

Under The Surface Rights Act – C.C.S.M. c. S235.

ORDER NO: 02-2020

Hearing: BOARD ORDER NO: 02-2020 File No: 2019-04

Virtual Hearing via Go To Meetings
November 9, 2020

Date issued: December 3, 2020

BEFORE: June Greggor, Acting Presiding Member
David King, Board Member
Rhonda Russell, Board Member

Linda Rogoski, Board Administrator

BETWEEN:

Applicant NE20 Developments Ltd.
(Landowner)

– AND –

Respondent Seneca Petroleum Corp.
(Operator)

CONCERNING:

LSDs 2-15-10-26 WPM, 7-15-10-26 WPM, 10-15-10-26 WPM, in the Province of Manitoba (the well sites, their related access roads and surface leases, hereinafter referred to as the “well sites”).

PURPOSE OF HEARING:

To hear and receive evidence regarding an application under Sec. 21 of *The Surface Rights Act* of Manitoba (“the Act”) received from the Applicant for:

- variation of compensation payable for the well sites;
- consider a request from the Applicant to add a late payment penalty clause to the terms of the surface leases.

VARIATION OF COMPENSATION

BACKGROUND:

The Applicant filed via email, an application dated September 3, 2019.

The Applicant requested that the Board determine the compensation that should be paid on the well sites and requested that an interest penalty clause payable be added to the terms of the lease to give incentive to the Respondent to make payments on a timely basis.

October 15, 2019, the Board responded to the Applicant's solicitor, copy to the Respondent, encouraging the parties to attempt to reach independent resolution and requesting notification of, and progress in, attempts to resolve the matter between the Applicant and the Respondent.

November 4, 2019 - the Board received confirmation of receipt of above letter from Jeff McConnell, solicitor for the Applicant. Mr. McConnell indicated that contact would be made with the Respondent, and additionally enquired about the process and length of time for a hearing.

December 9, 2019 - the Board sent an email to Mr. McConnell outlining the hearing process.

December 13, 2019 - the Board received an email from Mr. McConnell indicating an impasse in efforts to reach independent resolution. Mr. McConnell stated that another attempt to reach the Respondent would be made.

On April 28, 2020 - the Board sent a letter to the solicitor for the Applicant, copied to the Respondent requesting a status update on the dispute and summarizing correspondence since the September 3, 2019 application.

June 16, 2020 - the Board received a letter from Mr. McConnell requesting that the Board move forward with the application.

July 7, 2020 - the Board received a letter from Mr. McConnell advising that further communication had taken place with the Respondent, but that it was not productive.

Additional communication took place regarding scheduling a hearing and the Parties, together with the Board, agreed to hear the matter on November 9, 2020.

Both parties agreed that the issue before the Board was the determination of the amount of annual compensation payable for the well sites.

On November 6, 2020, Board Members Russell and Greggor visited each of the three (3) well sites, with representatives of both the Applicant and the Respondent in attendance.

ISSUES:

1. Determination of whether the annual compensation payable on each well site should be varied, and if so, by how much?
2. Is it within the power of the Board to order changes to a surface lease, specifically the inclusion of a late payment penalty clause?
3. Is the Applicant entitled to interest on any amounts owing?
4. The amount of Costs, if any, to be awarded?

APPEARANCES:

Applicant: NE20 Developments Ltd.
Counsel: Jeff McConnell
Witness: Zac Penner - President/Manager T. L. Penner Construction (2020) Inc.

Respondent: Seneca Petroleum Corp.
Blaine Maller, President
Paddy Maller

EXHIBITS:

Evidence Exhibits A through N, were submitted by Counsel for the Applicant via email October 28, 2020

Exhibit A Surface Leases for LSD 10-15-10-26WPM, LSD 7-15-10-26WPM, LSD 2-15-10-26WPM
Exhibit B Property Assessment Report
Exhibit C 1985-2019 Historic FCC Farmland Values
Exhibit D Subdivision Application for NE20-10-26WPM
Exhibit E Proposed development plan in 15-10-26WPM
Exhibit F Correspondence from Seneca to NE20 regarding surface lease amounts and request for rental review
Exhibit G Correspondence from NE20 to Seneca regarding late rental payments
Exhibit H Google Earth map of Section 15-10-26WPM
Exhibit I Status of Title and Offer to Purchase Parcel F, Plan 776BLTO
Exhibit J Surface Lease activity reports for 2015, 2016, 2017
Exhibit K Surface Lease activity reports for 2007
Exhibit L Surface Rights Board Order 11-2015
Exhibit M Surface Rights Board Order 10-2015
Exhibit N Estimated Legal Fees

No written evidence was submitted by the Respondent.

DECISION:

Upon hearing the evidence and the submissions of the Parties; decision was reserved.

It is the Order of this Board that:

1. The amount of compensation for each well site be awarded as follows:
 - LSD 2 15-10-26WPM: \$3,050
 - LSD 7 15-10-26WPM: \$2,750
 - LSD 10 15-10-26WPM: \$2,750
2. Interest: No Interest shall be paid.
3. Costs: No costs shall be paid.

REASONS FOR DECISION**1. Determination of whether the annual compensation payable on each well site should be varied, and if so, by how much?**

The following provides relevant information pertaining to the well sites, which the Board considered when determining compensation payable:

The Surface Leases were entered into in 1955.

LSD 2 15-10-26WPM site:

- a) This well site is used to accommodate a single vertical well.
- b) The well site had dimensions of 350 feet per side giving it an area of 2.81.
- c) The well site has an access road of .37 acres.
- d) The total leased area is 3.18 acres.
- e) The land has been used as pasture or has had no use pending development.

LSD 7 15-10-26WPM site:

- a) This well site is used to accommodate a salt water well.
- b) The well site has dimensions of 350 feet per side giving it an area of 2.81.
- c) The well site has a shared access road of .678 acres. As the Applicant is provided separate compensation for road use, the access road area is omitted from the acreage considered by the board for compensation on this lease.
- d) The total leased area used by the Board to determine compensation is 2.81 acres.
- e) The land has been used as pasture or has had no use pending development.

LSD 10 15-10-26WPM site:

- a) The well site is used to accommodate a single vertical well.
- b) The well site has dimensions of 350 feet per side giving it an area of 2.81 acres.
- c) The well site has a shared access road of .7 acres. As the Applicant is provided separate compensation for road use, the access road area is omitted from the acreage considered by the board for compensation on this lease.
- d) The total leased area used by the Board to determine compensation is 2.81 acres.
- e) The land has been used as pasture or has had no use pending development.

Position of the Applicant

The Applicant presented the following arguments in support of their position that the annual compensation on three (3) well sites be increased.

1. The Applicant first made a request for a compensation review in 2017. The Respondent said that process was not followed. It is the Applicant's opinion that the Respondent was dragging out the process. The Applicant advised that the Board's suggestion for negotiation between the parties was unsuccessful.
2. Counsel for the Applicant stated the intended use for the property was residential development, although no subdivision application has been submitted at this point in time. The Applicant is concerned with the loss of use of land that would be experienced in future development because of the setbacks required around abandoned wells (75 meters) under The Oil & Gas Act.
3. The Applicant provided assessment values for Lot 2, Plan 54360, being one of the Applicant's titles that the wells are on, showing an increase in assessment from \$24,600 in 2009 to \$103,000 in 2020.
4. In its argument to support an increase in annual surface rent, the Applicant provided FCC farm value increases from 2006 to 2020, which show an increase in value of 143%. After adjusting for inflation, if the surface lease accounted for this increase, it would be at \$3,650.00 annually.
5. The Applicant indicated they have other property subject to surface leases, the rates paid on these sites are low, and they are seeking a fair rate.

Position of the Respondent

1. The Respondent purchased the wells from KA-bert. At that time the surface leases were in the hands of the R M of Wallace, @ \$1,200 per site, who later sold the property to NE20. Prior to NE20's purchase of the property, a well on LSD 6 became inactive; however, the process of reclamation and abandonment has not been completed.
2. The Respondent feels reasonable offers have been made for surface rights, but no agreement reached. They have paid for access, but there is no formal agreement for this access.
3. The Respondent stated the wells were drilled in 1955 and the lease site areas are smaller in size than more recent site areas.

4. The Respondent stated that in 2018 they paid the Applicant \$1,200 for each of the three sites (LSDs 2, 7, and 10-15-10-26W) and \$1200 for access (to well sites on LSD 7 and 10). In 2019 and 2020, they unilaterally paid \$2500 each for the three sites and \$2000 for access.
5. The Respondent gave no reason for late payment of leases other than cash flow.

Analysis and Findings of the Board

Upon consideration of the evidence provided the Board offers the following:

1. The Board has viewed the three sites and is of the opinion that this is a unique situation in that the wells were drilled over 50 years ago and two (2) of the wells are being accessed not according to the plan laid out in the surface lease but by travelling through another parcel of property, adjacent to the leased property, that is also owned by the Applicant. LSD 2 has a size of 3.18 acres, which includes the surface lease road. Both LSD 7 and 10 are accessed by a road that differs from the access roads outlined in the surface lease agreements. In light of this, in determining lease size for compensation purposes, the Board has removed the lease roads from the lease site sizes for both LSD 7 and 10. Both LSD 7 and 10 are 2.81 acres in size.
2. The Respondent pays a fee to the Applicant for this access in addition to the individual surface lease amounts on the well sites. There is no formal agreement for this arrangement. The amount paid in 2019 and 2020 was \$2000 annually.
3. After consideration of the factors outlined in Section 26 (1) of The Surface Rights Act, the Board feels that the global approach to compensation in this situation is more appropriate than the empirical, as the land is marginal in agricultural value and does not appear to be very productive. The Applicant indicated that some years the land is left vacant, sometimes cattle are pastured there.
4. The Board has, in past decisions (02-2019), made use of a compensation chart developed in 2014.

Compensation Guidelines for Multi-well Surface Leases & Board Orders:

Average Area of Well Site ¹ :		Number of Wells	Annual Compensation:	
Hectares	Acres		Crop land	Pasture
1.44	3.56	1	\$3,600	\$3,200
1.92	4.74	2	\$4,400	\$4,000
2.22	5.49	3	\$5,000	\$4,600
2.52	6.23	4	\$5,500	\$5,100
2.83	7.00	5	\$5,900	\$5,500
3.11	7.70	6	\$6,200	\$5,800

¹ These areas do not include an access road. An access road would entail greater compensation.

5. There has been a 9.2% CPI adjustment to these values to bring them to current day values. Based on this table the current rate is \$982/per acre for a pasture lease site with one well.
6. The concerns raised by the Applicant regarding the required set backs for development from abandoned wells under The Oil and Gas Act are noted. Issues with these set backs are beyond the scope of the Board's authority. The well sites were in existence at the time the applicant purchased the property. At this time there is no subdivision application submitted for this property.
7. The Board recognizes the frustration of the Applicant in dealing with tardy payments of annual lease rents. However, ordering the inserting of a clause or clauses into a surface lease is outside the powers of the Board.
8. Once development of the property is further along and a mutually satisfactory access route to LSD 7 and 10 is determined, the Board would recommend the parties negotiate and draft new surface lease agreements, mapping and taking into account the new access route.

It is the Order of this Board that:

1. The amount of compensation for each well site be awarded as follows:
 - LSD 2 15-10-26WPM: \$3,050
 - LSD 7 15-10-26WPM: \$2,750
 - LSD 10 15-10-26WPM: \$2,750
2. Ordering the inserting of a clause or clauses into a surface lease is outside the powers of the Board.
3. **Interest:** The Board is not awarding interest.
4. **Costs:** The Board is of the opinion that both parties have been operating in good faith in attempting to come to an agreement and therefore no costs are being awarded.

Decision delivered this 3rd day of December, 2020

*“Original Signed by
June Greggor”*

June Greggor
Acting Presiding Member