

THE SURFACE RIGHTS BOARD OF MANITOBA
BOARD ORDER
Under *The Surface Rights Act*, C.C.S.M. c. S235

File No: 02-2013

Hearing: Virden Legion Hall
Virden, Manitoba

Order No: 27-2013

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Date issued: September 25, 2013

BEFORE: Margaret Hodgson, Presiding Member
Clare Moster, Deputy Presiding Member
Claude Tolton, Board Member

Barbara Miskimmin, Board Administrator

BETWEEN:

Applicant
(Operator)

Penn West Petroleum Ltd.

- AND -

Respondent
(Landowner/Respondent)

**Peter McConnell and
Christine Isabel McConnell**

Occupant

(none)

CONCERNING:

SW ¼ 25-8-28 WPM in the Province of Manitoba (the "Lands").

PURPOSE OF HEARING:

To hear and receive evidence regarding an application under Sec. 21 of *The Surface Rights Act* of Manitoba received from the Applicant for right of entry and compensation for surface rights to construct a valve site and access road on the Respondent's Lands.

RIGHT OF ENTRY ORDER FOR A PIPELINE VALVE SITE & ACCESS ROAD

BACKGROUND:

The Applicant applied on April 12, 2013 for an order granting the right to enter the Respondent's Lands for the purpose of constructing a new above ground valve site and access road and setting the compensation payable for this right of entry and associated surface installations. The requested installations are required as part of a new oil pipeline to be built that will replace the existing smaller oil pipeline which is located adjacent to the proposed facilities and constructed in the mid 1980s. The requested facilities are in addition to the right of entry and surface rights granted for the pipeline right-of-way under Board Order 26-2013 which includes the SW1/4 25-8-28 WPM. The Applicant currently has a small valve site associated with the existing pipeline adjacent to the proposed new valve site.

This application was one of 27 applications related to the proposed new pipeline. A landowner group comprised of 26 separate landowners was represented by counsel. The Respondent was a party to this landowner group.

During the hearing process, the landowner group stated they had been denied adequate time to prepare their evidence and therefore were effectively denied the opportunity to present evidence they otherwise would have presented. This position was based on their submission that their counsel had been denied sufficient time to review the matter and prepare their evidence.

ISSUES:

1. Does the Applicant require the right to enter upon the lands of the Respondent?
2. Were the Respondents denied the opportunity to adduce evidence?
3. What will be the terms and conditions of any Board orders, if issued?
4. Is determination of compensation necessary?
5. Costs?

APPEARANCES:

COUNSEL:

Keith D. Boyd and Murray Douglas, Kanuka Thuringer LLP
– Counsel for the Applicant

Tristan N. Culham, MacPherson Leslie Tyerman LLP
– Counsel for all landowners, excluding Richard & John Tilbury

WITNESSES FOR THE APPLICANT: *(Introduced as a panel at the July 23rd hearing)*

Jason Hardy, P.Eng., Penn West (sworn)

Victor Wong, P.Eng., Penn West (sworn)

Wade McLeod, Penn West (sworn)

Bill Voth, Penn West, (sworn)

Jacqueline Redburn, Rangeland Conservation (sworn)

WITNESSES FOR THE LANDOWNER:

Glen Campbell (sworn), spokesperson for the landowner group

EXHIBITS: For June 26, 2013

- Exhibit #1 - Affidavit of Service - DVD with electronic copies of Operator's documents to all landowners, submitted by PennWest
- Exhibit #2 - 16 letters/emails (some are duplicate) appointing G.Campbell/D. Greig as spokesperson, submitted by G. Campbell
- Exhibit #3 - June 25, 2013 letter from Larry Maguire, MLA, submitted by G. Campbell
- Exhibit #4 - Pipeline application, construction permit, miscellaneous documents submitted by Penn West - binder containing 17 tabs
- Exhibit #5 - Land Titles documents, contact reports, photos/air photos submitted by Penn West - binder containing 36 tabs
- Exhibit #6 - McNally Reports submitted by PennWest - binder containing 5 tabs
- Exhibit #7 - Comparables Summary submitted by PennWest - binder containing 74 tabs
- Exhibit #8 - Proposed Pipeline Route map for townships 1 & 2-25 WPM, 2, 3 & 4-26 WPM, and 4 & 5-27 WPM
- Exhibit #9 - Proposed Pipeline Route in townships 6 & 7-27 WPM and 7, 8 & 9-28 WPM

EXHIBITS: For July 23, 2013

- Exhibit #10 – Draft terms/conditions of Environment Act Proposal, submitted by Penn West
- Exhibit #11 – Landowners' Proposed Provisions for any Interim Access Order, submitted by the landowner group.

DECISION:

Upon hearing the presentations of each of the parties and the oral evidence on June 26 and July 23, 2013, and reviewing the submissions into evidence and final written arguments; decision being reserved until today's date:

It is the Order of this Board That:

1. Pursuant to *The Surface Rights Act* which defines a "surface right" in detail and Part III of this Act which further specifies those rights, this Right of Entry application for a new valve site and new access road is granted subject to the terms and conditions as set out on Schedule "A", with locations of the valve site, access road and associated temporary work space shown on the plans attached thereto, all of which are attached to and form part of this Board Order.

2. The Applicant shall pay interim compensation of \$800.00 for the Lands affected by this Board Order. Payment shall be made within 60 days of the issuance of this Order, or prior to the Applicant using the right of entry granted by this Board Order, whichever first occurs.

The compensation portion of this application is adjourned without date. Should the parties be unable to agree upon the final compensation payable, a party may request the Board to set a date for a hearing with respect to compensation.

3. No costs are awarded.

Background:

Under section 151(2) of the *Oil and Gas Act*, where a person receives a pipeline construction permit from the Minister under section 149 of the *Oil and Gas Act* the person (a "permittee") may not commence construction of the pipeline without first obtaining the surface rights necessary to construct and operate the pipeline. A permittee may obtain the surface rights by agreement with the landowner or by obtaining an order under *The Surface Rights Act* from this Board. In the present case the Applicant received a permit to construct a pipeline from the Minister; Pipeline Construction Permit No. 2013-02 was issued to the Applicant on March 21, 2013 by the Minister of Innovation, Energy and Mines. The Permit has a map attached to it which identifies the final approved route of the proposed pipeline with respect to the Lands in question. The parties were evidently not able to arrive at an agreement as to the surface rights and compensation and the Applicant filed an application with the Board on April 12, 2013.

REASONS FOR DECISION

1. Does the Applicant require the right to enter upon the Lands of the Respondent?

The Board is of the opinion that the definition of "operator" in *The Surface Rights Act* describes an entity that has the "right" to conduct any operation in connection with the production of a mineral.

Undisputed evidence presented by the Applicant indicated that Penn West Petroleum Ltd., was an operator under *The Surface Rights Act*, by virtue of the Pipeline Construction Permit No. 2013-02, therefore the Board determined that as such, the Applicant requires the right to enter upon the Lands for the purpose of running an underground crude oil pipeline across the Lands. The applied for above ground surface rights for a new valve site and access road are integral to the proposed pipeline. The temporary work space requested is to enable construction of the new valve site.

2. Was the landowner group denied the opportunity to adduce evidence?

The landowners group claimed that they had been denied adequate time to prepare their evidence and therefore were effectively denied the opportunity to present evidence they otherwise would have

presented. This position was based on their claim that their counsel had been denied sufficient time to review the matter and prepare their evidence.

The scheduled hearing dates for this matter were June 26, and June 27; July 3 and July 4; and July 9 and July 10, 2013. By email dated June 17, 2013, Mr. Glen Campbell advised the Board that Mr. Sheldon Lanchbery, their legal counsel had been appointed to the Manitoba Court of Queen's Bench on June 7, 2013, that the landowner group now had no legal counsel, and requested an adjournment of the scheduled hearing. He was advised by the Board that his adjournment request would be heard at the commencement of the hearing on June 26, 2013.

At the commencement of the hearing on June 26, 2013 the Board heard the landowner group's request for an adjournment. Mr. Campbell, spokesperson for the landowner group, asked the Board to adjourn the matter for a few months due to lack of legal counsel and extenuating circumstances related to weather and other matters out of their control.

The Board deferred its decision on the request for an adjournment, and proceeded to hear some evidence presented by the Applicant primarily related to the background of the application. The Board then granted the landowners a 26 day adjournment, with the hearing to resume on July 23, 2013 instead of June 27, 2013. In addition, the Board with the concurrence of the Applicant, reduced the scope of the hearing to cover only the issue of right of entry, with the compensation issue deferred to a later date. This adjournment was to allow the landowners additional time to acquire new legal counsel and prepare their case as it related to the right of entry only.

On July 17, 2013 Mr. Deron Kuski, the landowner group's new counsel, requested a further adjournment of the hearing. The Board advised Mr. Kuski his adjournment request would be heard at the scheduled resumption of the hearing on July 23, 2013.

At the commencement of the July 23, 2013 hearing, the landowner group again presented a request for adjournment stating there had not been adequate time to prepare. The Board considered their request and heard evidence from the Applicant as to the potential prejudice an adjournment would cause. The hearing then proceeded, with the Applicant presenting its evidence and cross examination by counsel for the landowner group. No witnesses were called by counsel representing the landowner group, though he did introduce a document containing proposed terms and conditions for right of entry. This document was marked as Exhibit #11 by the Board. The Board then afforded the landowners an opportunity to present a written final argument before August 2, 2013, and the Applicant given until August 12, 2013 to respond to Exhibit #11 and the landowners' written argument. Both parties exercised their opportunity.

The Board concludes that the Respondent was given an adequate opportunity to retain counsel for the purposes of addressing the issue of whether a right of entry should be granted to the Applicant. The Board did postpone the date for the second day of the hearing for an additional 26 days and the Respondent was able to retain and instruct counsel within that time period.

The Board also deferred the "compensation" part of the application to a future date, if required, thus providing the Applicant and the landowners additional time to possibly come to agreement on compensation

without requiring further Board proceedings on compensation, or failing that, further time to prepare for a hearing on compensation.

3. The Terms and Conditions of the Right of Entry.

The Board is of the opinion that any right of entry order should specify the rights in detail in order to avoid disputes between owners and operators, and Part III of the Act does not specifically address these items in detail.

The Applicant referenced the Terms and Conditions included in Board Order No. 05-2012 (Enerplus v. Gabrielle) and suggested they would be appropriate in these circumstances, subject to removal of items pertaining to indemnification, compensation, liability, construction and protection of the environment.

No specific terms and conditions were submitted by the Respondent related to the above ground facilities covered by this Order.

Attached to and forming part of this Board Order is Schedule "A", which prescribes the general terms and conditions for right of entry for the new valve site, new access road and the temporary work space.

4. Is Determination of Compensation Necessary?

The question of compensation was set aside to be determined at a later date if the parties are not able to arrive at an agreement, so no final compensation is awarded in this Order.

However, Subsection 20(2) of *The Surface Rights Act* states that every operator shall pay compensation for rights acquired by him. The Board in granting right of entry considers it appropriate to order interim compensation. Based on recent Board compensation orders for pipelines, the Board considers an interim payment of **\$800.00** for the Lands affected as appropriate in these circumstances.

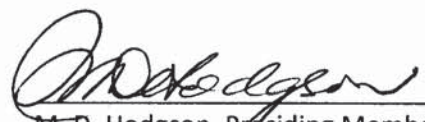
The Board is also of the opinion that interim compensation payments should be paid in a timely manner, either prior to the Applicant using the right of entry, or within 60 days of the granting of the right, whichever first occurs.

Should the parties be unable to agree upon the final compensation payable, a party may apply to the Board to determine the amount.

5. Costs

The Board makes no award for costs.

Decision delivered this 25th day of September 2013.


M. D. Hodgson, Presiding Member

Schedule "A"

Attached to and forming part of Board Order No. 27-2013

Terms and Conditions for Valve Site, Access Road and Temporary Work Space
Located in **SW ¼ 25-8-28 WPM** in the Province of Manitoba

1. Quiet Enjoyment

The Operator, upon observing and performing the covenants and conditions on the Operator's part herein ordered, shall and may peacefully possess and enjoy the **Demised Premises** and the rights and privileges hereby granted during the term of this Board Order without any interruption or disturbance from or by the Owner or any persons whomsoever.

2. Demised Premises

The Owner for the purposes and at the consideration set forth in this Order, if applicable, does hereby grant, transfer and convey to the Operator all and singular those parts shown upon the plans attached hereto and labelled **Valve Site and Access Road** (hereinafter called the "**demised premises**") to be held by the Operator, for itself, its servants, agents and contractors, for the **term of twenty-one (21) years**, as and from the date hereof, the right, licence, liberty, privilege and easement, to survey and select so much of the demised premises as may be necessary to construct, operate, inspect, maintain, repair, replace and remove an above ground valve installation and such underground appurtenances as may be necessary in connection therewith, related to the carriage, conveyance, transportation and handling of crude oil through the associated pipeline, and the right of ingress and egress via the access road, for all purposes incidental to this grant.

3. Renewal

That if the Operator is not in default of any of the covenants and conditions contained in this Board Order at the date of the expiration of the term of twenty one (21) years hereinbefore mentioned, then the Operator may, by giving written notice thereof to the Owner on or before the said date, renew this Board Order for a further term of twenty one (21) years from the said date subject to the same terms, covenants and conditions as herein contained including this covenant for renewal.

4. Review of Compensation

Notwithstanding anything contained in this Board Order, upon the request of either party to this Board Order, the amount of compensation payable in respect to the Demised Premises shall be subject to review within three (3) months before or within three (3) months after the expiration of each three (3) year interval following the date of this Board Order. Such request shall be in writing and given to the other party within the three (3) month periods aforementioned. In the case of any disagreement as to the amount of compensation to be paid or any matter in connection therewith, the relevant provisions of *The Surface Rights Act*, as amended from time to time, shall apply.

5. Taxes

The Operator shall pay all taxes, rates and assessments that may be assessed or levied against its interest in the demised premises and its installations thereon.

6. Damages

The Operator shall pay compensation for any and all damage where such damage occurs as a result of the operations of the Operator, its servants, agents, or contractors.

7. Liability

The Operator covenants and agrees to indemnify and save harmless the Owner from any and all liabilities, damages, costs, claims, suits, or actions caused by or resulting from the construction, operation, maintenance, and/or repairs of the said valve installation and/or any related fixtures and appurtenances affixed to the valve installation, other than through wilful damage or gross negligence by the Owner.

8. Removal of Property

Notwithstanding any rule of law or equity, the valve installation shall at all times remain the property of the Operator, notwithstanding that the same may be annexed or affixed to the demised premises and shall at any time and from time to time be removable in whole or in part by the Operator.

9. Topsoil

Insofar as it may be practicable to do so, the Operator shall, unless otherwise requested by the Owner, strip from the valve site and access road prior to construction such width as may be required under good oil field practices and in compliance with existing regulations, permits and licences, and replace the topsoil as near as possible to its original condition following construction.

10. Discontinuance and Abandonment

Upon the discontinuance of the use of the said demised premises and of the exercise of the rights hereby ordered, the Operator shall restore the demised premises to the same condition, so far as may be practicable to do so, as the lands were prior to the entry thereon and the use thereof by the Operator.

11. Discharge of Encumbrances

The Operator shall have the right at its option, to pay or discharge any balance owing under any agreement of sale or mortgage or any tax charge, lien or encumbrances of any kind or nature whatsoever, which may exist prior to the registration of this Board Order, upon or against or in any way affecting the demised premises, in which event the Operator shall be subrogated to the rights of the holder or holders thereof and may, in addition to exercising and enforcing such rights, at its option, apply and credit the amount so paid by it, to any considerations as set forth above in this Board Order.

12. Assignment

All the covenants and conditions herein contained, shall extend to, be binding upon, and inure to the benefit of the executors, administrators, successors and assigns of the Owner and the Operator respectively.

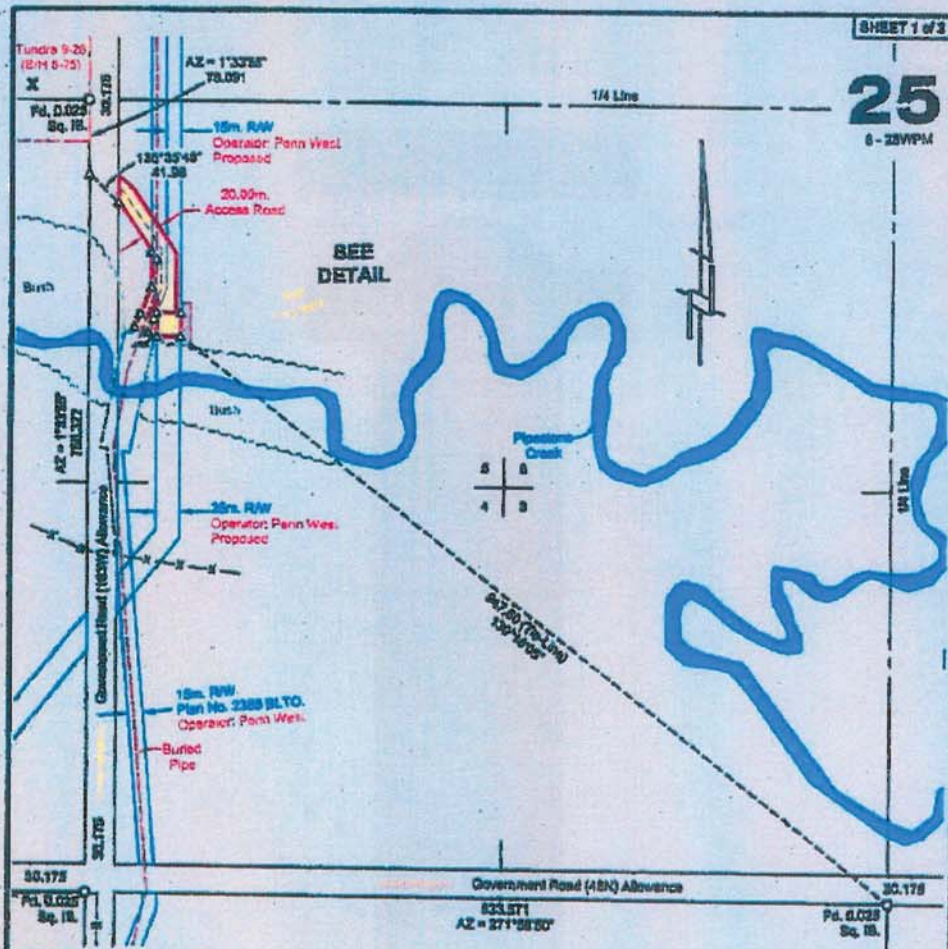
13. Temporary Workspaces/Temporary Access Roads

The Board, for the purposes of access, construction, clean-up and restoration of the new valve site, if applicable, does hereby grant to the Operator the right to enter upon, use and occupy, all and singular those parts shown as temporary workspaces and/or temporary access roads upon the plans attached hereto, subject to the following terms and conditions:

- The Operator shall compensate the Owner at the consideration set forth in this Order, if applicable, for right of entry and for damages that occur in the area covered by the Temporary Work Spaces and/or Temporary Access Roads.
- The Operator shall restore the area of all temporary workspaces and/or temporary access roads to the same condition so far as may be practicable to do, as it was prior to the entry thereon and the use thereof by the Operator, its contractors and/or representatives.
- The area designated as Temporary Work Space and/or Temporary Access Road will automatically expire on the one (1) year anniversary of the commencement of construction on the demised premises.

14. Additional Terms

The Terms and Conditions above are excerpts from applicable Right of Entry Orders. Any additional terms, expressed or implied, shall be of no force or effect unless made in writing and agreed to by the Owner and the Operator.



Plan Showing Survey of

VALVE SITE AND ACCESS ROAD

In

L.S. 5 Sec. 25 Twp. 8 Rge. 28WPM

R.M. of PIPESTONE

I certify that the survey represented by this plan is correct to the best of my knowledge.

Handwritten signatures of surveyors

AREAS:	HECTARES	ACRES
Valve Site (Now)	0.083	0.19
Valve Site (Building)	0.022	0.05
Valve Site (Turf)	0.085	0.21
Access Road (Now)	0.194	0.46
Access Road (Building)	0.142	0.35
Access Road (Turf)	0.336	0.83
Total	0.862	2.14
Temp. Workspace	0.043	0.11

20m. ACCESS ROAD = 0.13 km.

Underground facilities shown on this plan are those that could be found and located. Data facilities may exist, of which we were unaware or unable to locate.

OPERATOR:
PENN WEST PETROLEUM LTD.



CENTER OF SITE:

UTM Coordinates	NAD 83	UTM Coordinates
48.885482 Latitude		6000916.578 N
101.100000 Longitude		345717.303 E
48.885481 Latitude		6000916.571 N
101.100191 Longitude		345748.822 E

CERTIFICATE OF TITLE:

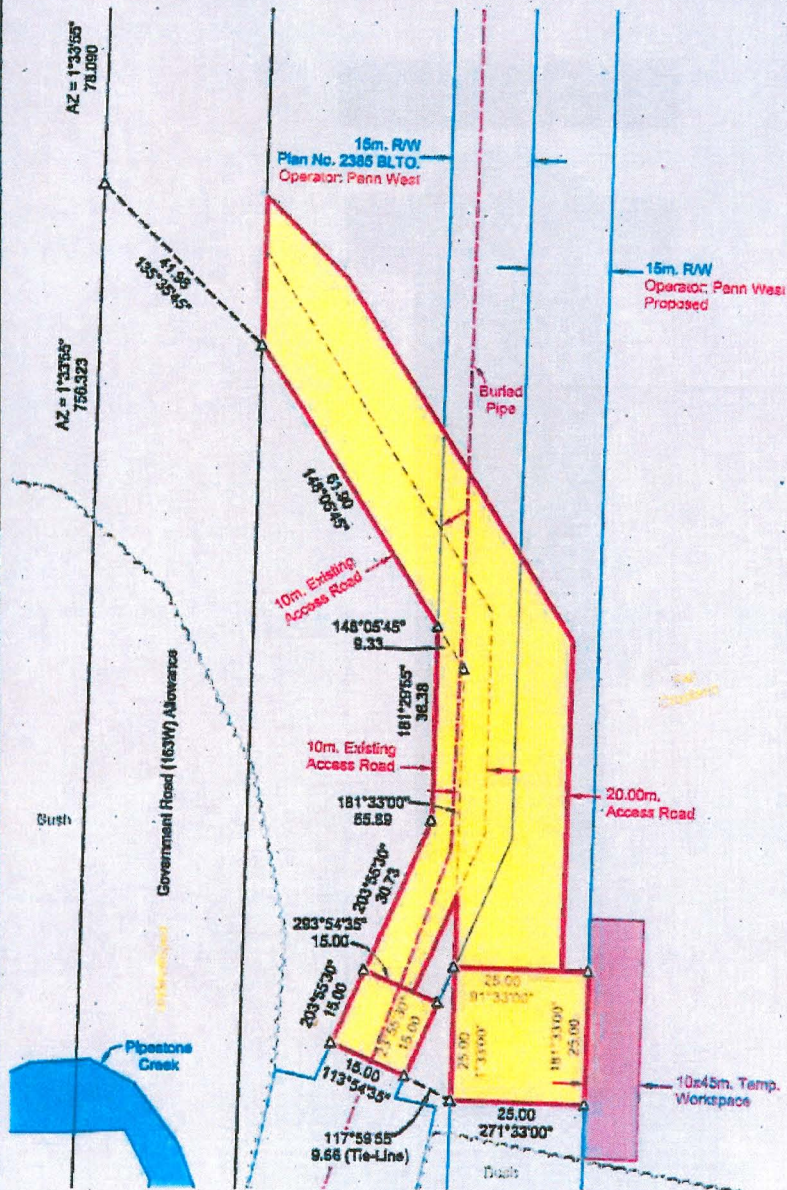
SW 25-8-28WPM/ C1 No. 201402523 (Parcel Three)
Peter McConnell
Christine Isabel McConnell

As shown are NAD 83 (Zone 14) UTM Grid Coordinates.
All distances shown are horizontal and as ground level.
Continued Scale factor derived = 0.999933

Placed Wooden Hub / Definition Point show this: ---△
Survey Monuments shown this: ---□
Perimeters referred to outlined from: ---
Distances are in metres.

NTS Sheet: 03 P711	Client File No: 202040	AFE No: A12370334
REV. (Revisors: Revised Access Road)	Date: June 02, 2012	Job No: 101111-V
File: 101111V-R1	Info: CR - AV - ND	

PENN WEST



DETAIL
0 5 10 15 20 25 m
SCALE - 1:1,000

I/We the landowner(s), consent to the location of the valve site and access road as shown on this plan and have no objections to The Manitoba Petroleum Branch of Manitoba Mines and Minerals issuing the License and / or construction permit.

Peter McConnell

Witness

Christine Isabel McConnell

Witness

Occupant(s)

Witness

NOTES:

1. The closest urban center is the Village of Cramer 6.9 km. North West of the valve site.
2. To our best knowledge the closest known residence is 0.8 km.



Facilities shown on this plan are for informational purposes only, prior to any construction on lease or access road. PENN WEST PETROLEUM LTD., MTS Communications Inc., Manitoba Hydro, and Manitoba Hydro-Gas Operations MUST be contacted for location of any underground facilities that may exist.

VALVE SITE AND ACCESS ROAD

Client File No: S93549 AFE No: A12370334

REV. Revision: Revised Access Road

Date: June 22, 2012

Job No.: 151111-V

File: 151111V-R1

Initials: CR - AV - MB