

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

File No: 02-2012

Hearing: Town Municipal Office

Order No:03-2012

Waskada, Manitoba

Date issued: December 5, 2012

BEFORE:

Margaret Hodgson, Presiding Member
Clare Moster, Deputy Presiding Member
Claude Tolton, Board Member
Russell Newton, Board Member
Barbara Miskimmin, Board Administrator

BETWEEN:

Penn West Petroleum Ltd.

(Applicant)

- AND -

Gertrude Racy Lee

(Respondent)

CONCERNING:

LSD 10, Section 32, Township 1, Range 25, West of the Principal Meridian in Manitoba
(Hereinafter referred to as "the lands")

PURPOSE OF HEARING:

To hear and receive evidence regarding an application received from the Applicant, for right of entry and compensation for surface rights.

RIGHT OF ENTRY ORDER

BACKGROUND:

The Applicant applied on June 18, 2012 under sections 21 and 26 of *The Surface Rights Act* for an order granting surface rights and compensation for five well sites and related flow line and power line right-of-ways on the lands. The parties agreed before the commencement of the hearing to adjourn the issue of compensation to a subsequent date if required.

The Respondent's position is that the Surface Rights Board has the authority and responsibility to refuse right of entry if well sites are not required and if the surface owner's environmental and economic concerns have not been considered.

ISSUES:

1. Does the Applicant have the right to enter upon the lands of the Respondent?
2. Does the Respondent have the right to deny entry?
3. Does the Board have the authority to direct the location of the well-sites, other than access roads?
4. If right of entry is granted what terms and conditions should apply.
5. Are costs to be considered?

APPEARANCES:

For the Applicant:

- Counsel: Murray W. Douglas, Kanuka Thuringer LLP

Witnesses:

- Keith Grainger, "Sworn", Surface Landman, PennWest Exploration
- Kelly Widmeyer, P.Eng., "Sworn", Production Engineering Manager, PennWest Exploration
- Brent Morris, P. Geo., "Affirmed", Geologist, PennWest Exploration
- Mike Kohlen, "Affirmed", Consultant, Kohlen Oilfield Services Ltd., providing contract work as Area Construction Coordinator to PennWest Energy.

For the Respondent:

- Counsel: Paul Elash, Kohaly & Elash Law Firm

Witnesses:

- Don Douglas Lee, "Sworn", Farmer, son of respondent, and occupant

EXHIBITS:

Applicant Exhibits:

- #1 Binder containing three colored and 25 numbered tabs
- #2 Binder containing 35 tabs – comparable leases
- #3 Compensation & Appraisal Report, McNally Land Services
- #4 Business Name Search, Companies Office dated 2012/10/02
- #6 Sketch showing existing and planned wells/pads

Respondent Exhibits:

- #5 Binder containing 5 tabs, submitted by Respondent
- #7 Respondent's "Brief of Fact and Law", dated October 10, 2012
- #8 Email dated October 10, 2012 from Don Lee to his lawyer re: terms and conditions

DECISION:

Upon hearing the presentations of each of the parties and the oral evidence on the 11th day of October 2012 and reviewing the submissions into evidence and final 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 is granted subject to the terms and conditions as set out on Schedule "A", "B", "C", & "D" and access to the site and plan of the land involved are shown on Sketch Plan "1", "2", & "3" which are all attached to and forming part of this Board Order.
2. Section 20(2) of *The Surface Rights Act* states that every operator shall pay compensation for the rights acquired by him. Therefore, the Applicant shall pay interim compensation of \$2,000.00 to the Respondent prior to entry upon the lands, until the compensation aspect of this application is determined.

REASONS FOR DECISION

Does the Applicant have the right to enter upon the lands of the Respondent?

The Board determined that under *The Surface Rights Act*, whoever holds the mineral rights is entitled to access the land to remove the minerals. It was verified by the Board that the Applicant was the owner of the mineral rights.

Does the Respondent have the right to deny entry?

The Board considered the Respondent's position and determined that, based on the fact that the Applicant held the mineral rights, the owner cannot prevent entry for any or all purposes and uses as may be necessary or useful for any of the operations in connection with drilling for, producing or recovering said mineral.

Does the Board have the authority to direct the location of the well-sites, other than access roads?

The landowners have some concerns that the Operator intends to place its' installation in a location that will cause greater hardships than would other locations. The landowners requested the Board to direct the Operator where to place the well sites.

Section 25(4)(e) of *The Surface Rights Act* was amended in 1988 to clarify the authority of the Board in relation to the location of access roads. The legislative provision enabled the Board to determine and direct the location of access roads to a well site. The Board concluded that this amendment only applies to the location of access roads to a well site and not the location of the infrastructure on the subject property.

While there may well be excellent farming or other reasons for a different location for the well sites, the Board must defer to the provision of *The Surface Rights Act*. The legislation does not provide the Board with the jurisdiction to require an operator to place a well site in a specific location.

If right of entry is granted what terms and conditions should apply.

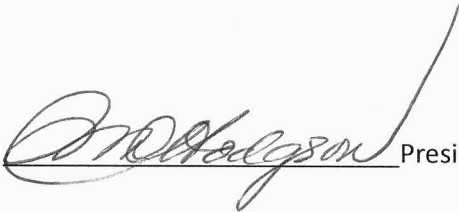
The Respondent requested that usual terms and conditions be omitted in this Board order. The Board considered this suggestion and felt it would not be in the best interest of either party to omit these terms and conditions.

The Board believes 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 Surface Rights Act* does not specifically address these eighteen items. Additional terms that were agreeable to both parties during the hearing are referred to in item 18 on Schedule "A" and attached as Schedule "B".

Are costs to be considered?

The Board makes no order for costs. The parties agreed before the commencement of the hearing to adjourn the compensation issue to a subsequent hearing. Portions of Section 26 of *The Surface Rights Act*, would prevent a determination of any costs before the final offer is reviewed by the Board.

Signed this 5th day of December 2012

 Presiding Member

Schedule "A"
Attached to and forming part of Board Order No 03-2012
Terms and Conditions for Five (5) New Well sites located in LSD 10-32-1-25 WPM

1. Quiet Enjoyment

That the Owner has good title to the Lands as hereinbefore set forth, has good right and full power to grant and lease the land, rights and privileges in the manner herein set forth, and that the Operator, upon observing and performing the covenants and conditions on the Operator's part herein contained, shall and may peaceably possess and enjoy the Demised Premises and the rights and privileges hereby granted during the term of the Board Order without any interruption or disturbance from or by the Owner or any person whomsoever.

2. Demised Premises

The Owner for the purposes and at the consideration hereinafter to be determined, does hereby lease to the Operator all and singular those parts of the lands shown upon the sketch or plan attached hereto as Sketch Plan #1 (hereinafter called the "demised premises") to be held by the Operator as tenant for the term of twenty-one (21) years from the date hereof for any and all purposes and uses as may be necessary or useful in connection with any of the Operator's operations including, without limitation, the exploration, development, production and transmission of oil, gas and any related hydrocarbons or substances produced in association therewith.

3. Site Assessments

The Operator shall have the right to conduct soil and water samples on the demised premises, and to condition, maintain, reclaim and restore the surface of the demised premises during the term of the Board Order or any renewal thereof.

4. Indemnification

The Operator shall indemnify and save harmless the Owner from and against any and all claims or demands that may directly result from the Operator's use and occupation of the demised premises, other than through wilful damage or gross negligence by the Owner.

5. Culverts

The Operator shall construct and maintain such culverts and other structures on the demised premises as may be reasonably required to ensure the unimpeded flow of water through natural drainage courses.

6. Weeds

The Operator shall control all weeds on the demised premises but in so doing, will not use a soil sterilant without the written consent of the Owner. The Operator may use commonly accepted herbicides and weed sprays.

7. Compensation for Damages

The Operator shall pay compensation for damage done by its servants and/or agents which, without restricting the generality thereof, shall include damage to crops, machinery, livestock, fences, buildings, or other improvements of the Owner upon the demised premises other than the demised premises.

8. Abandonment

Upon abandonment of any well drilled by the Operator on the demised premises, the Operator shall cause such well to be plugged and all excavations in connection therewith to be filled and completed in accordance with all applicable laws and regulations of the Province of Manitoba.

9. Repair, Removal or Replacement of Equipment

The Operator may at all times during the continuance of this Board Order remove or replace any buildings, structures, fixtures, casing in wells, pipelines, material and equipment of whatsoever nature or kind which it may have placed on or in the demised premises or in any area to be surrendered.

10. Taxes

The Owner and the Operator shall each promptly pay and satisfy all taxes, rates and assessments that may be assessed or levied against the demised premises as a result of their respective use and occupation of the demised premises.

11. Compliance with Laws and Regulations

The Owner and the Operator shall comply with all applicable laws and regulations as may be in force from time to time pertaining to the respective activities on the demised premises.

12. Review of Rental Every Three Years Upon Request of Either Party

Notwithstanding anything contained in this Board Order, upon the request of either party to this Board Order, the amount payable in respect of 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 case of any disagreement as to the amount of rental to be payable or any matter in connection therewith, the relevant provisions of *The Surface Rights Act*, as amended from time to time, shall apply.

13. Renewal

If the Operator is not in default in respect of any of the covenants and conditions contained in this Board Order at the date of expiration of the term of twenty-one (21) years hereinbefore provided, then this Board Order shall be automatically renewed for a further term of twenty-one (21) years commencing on the day following the expiration of the aforesaid term. Such extended term shall be subject to all the provisions, including this provision for renewal.

14. Reclamation

The Operator shall, upon the surrender of the whole or any portion of the demised premises, promptly restore the surface of the demised premises which are subject of such surrender, as nearly as possible to its original condition in accordance with applicable laws and regulations.

15. Surrender

Subject to the provisions of Clause 14 hereof, the Operator shall have the right at any time, by giving written notice to the Owner to that effect, to surrender and terminate this Board Order effective as at a date to be specified in such notice. Provided that if no date is specified in such notice, then the effective date of the surrender shall be the day before the following anniversary date of the within Board Order. There shall be no refund to the Operator of any annual compensation which may have been paid in advance.

16. Discharge of Encumbrances

The Operator may, at its option, pay or discharge all or any portion of any balance owing under any agreement for sale or mortgage, or of any tax, charge, lien or encumbrance of any kind or nature whatsoever which may now or hereafter exist on or be assessed against or in any way affect the demised premises, in which event the Operator shall be subrogated to the rights of the holder or holders thereof, and may in addition thereto, at its option, reimburse itself by applying on account the repayment of the amount(s) so paid by it, the annual compensation or other sums accruing to the Owner under the terms of this Board Order.

17. Manitoba Law

This Board Order shall for all purposes be construed according to the law of the Province of Manitoba.

18. Additional Terms

Any additional terms or conditions are attached as Schedule "B" and form part of this Board Order.

Schedule "B"

**Attached to and forming part of Board Order No 03-2012
Terms and Conditions for Five (5) New Well site located in LSD 10-32-1-25 WPM**

1. The Operator shall take all reasonable precautions to prevent contamination of the well site and the lands adjoining same by oil, salt water, acid, chemicals or any other contaminants. The Operator shall have adequate metal reservoirs in place during the drilling operations and shall deposit therein the drilling mud and sludge resulting from the drilling operations and shall not permit the same to escape onto the demised premises adjoining the well site. Unless otherwise agreed in writing with the Owner and Occupant, the Operator shall dispose of such drilling mud and sludge on demised premises other than the lands.

2. Prior to the commencement of drilling operations, the Operator shall strip all topsoil from the excavated portion of the well site in no less than two horizons, being the "A" topsoil and "B" subsoil horizon. The "A" topsoil horizon shall be kept separate and apart from the horizon "B" subsoil. Upon the completion of the drilling operations, the Operator shall first replace the "B" subsoil horizon to an even depth then replace the "A" topsoil horizon and restore the well site as close as possible to the original condition, insofar as it may be practical to do so.

In completing the construction of a roadway (if applicable), the Operator shall ensure that the topsoil shall be removed or rolled back and that the road will be constructed from the subsoil and that the topsoil will then be evenly spread in and along the ditches of such road and restore the area as close as possible to the original condition, insofar as it may be practical to do so.

3. The Operator shall clean up all debris on the well site as may be occasioned as a result of the drilling operations conducted thereon by the Operator.

4. If requested by the Owner or Occupant, the Operator shall construct a temporary fence around the perimeter of the well site during the drilling operations so as to prevent trespassing by the Operator or its personnel onto the adjacent lands of the Owner.

5. If the lands immediately adjacent to the well site are utilized for the pasturing of livestock, then upon the reasonable request of the Owner or Occupant, the Operator shall erect proper guards around the pumpjack and all other similar equipment located on the well site sufficient to prevent livestock from coming in contact with such equipment or from sustaining any injury as a result of such contact.

6. Subject to the prior unobstructed use and enjoyment of the well site and roadway (if applicable) by the Operator, the Owner and Occupant shall, at their own risk and expense, have access to and use of the roadway. Subject to the prior written approval of the Operator, the Owner and Occupant shall be permitted to use portions of the well site for the normal farming practices undertaken by the Owner or Occupant and provided that in doing so the Owner and Occupant stay a safe and reasonable distance from any of the Operator's structures, equipment or installations thereon. In conducting any and all such farming operations, the Owner and Occupant shall do so at their own risk and expense, and the Owner and Occupant shall indemnify and save harmless the Operator from any all liabilities, damages, costs, claims, suits or actions caused by or resulting from the Owner or Occupant's use of any portion of the well site or roadway, as aforesaid, excepting such as may result from the wilful and wanton actions of, or gross negligence of, the Operator.

7. The Operator shall not proceed with the initial construction of the well site and roadway (if applicable) should the weather and soil conditions deteriorate to a point where it would not be reasonable to continue with farming field operations, unless otherwise consented to by the Owner and Occupant.

Schedule "C"

Attached to and forming part of Board Order No 03-2012

Terms and Conditions for Right-of-Way for Flow line located in LSD 10-32-1-25 WPM

1. Quiet Enjoyment

The Operator performing and observing the covenants and conditions on its part to be performed and observed shall and may peaceably hold and enjoy the rights, liberties, and easements hereby Ordered without hindrance, molestation or interruption of the part of the Owner or any person claiming by, through, under, or in trust for the Owner for so long thereafter as the Operator, his successors, and assigns continues to use the right-of-way for the purposes herein set forth.

2. Demised Premises

The Owner for the purposes and at the consideration hereinafter to be determined, does hereby grant, transfer and convey to the Operator all and singular those parts of the lands shown upon the sketch or plan attached hereto as Sketch Plan #2 (hereinafter called the "demised premises") to be held by the Operator, for itself, its servants, agents and contractors, the right, licence, liberty, privilege and easement, to survey and select so much of the lands as may be necessary for a right-of-way twenty metres in width throughout for the laying down, construction, operation, maintenance, inspection, removal, replacement, reconstruction and repair of a flow line/pipeline or lines, and appurtenances as may be necessary or convenient in connection therewith, for the carriage, conveyance, transportation and handling of petroleum or petroleum products, water and/or gas through or by means of the same, and the right of ingress and egress for all purposes incidental to this grant as and from the date hereof and for so long hereafter as the Operator may desire to exercise the rights and privileges hereby given. The right to construct more than one flow line/pipeline in the right-of-way hereby Ordered shall be limited to one construction operation.

3. Protection of the Right-of-Way

(A) Subject to the following, the Owner shall have the right to use and enjoy the right-of-way.

- i. The Owner shall not use the right-of-way for any purpose which might either interfere with the rights granted herein to the Operator, or incur a liability for damages to the Operator without the prior written consent of the Operator, including in particular, no permanent structures may be erected on the right-of-way by the Owner without the written consent of the Operator.
- ii. The Owner hereby indemnifies and saves harmless the Operator from all actions, causes of action, proceedings, claims, demands, losses, costs, damages and expenses which the Operator may pay or incur as a result of or in connection with any use by the Owner of the right-of-way.

(B) The Operator shall be responsible for and compensate the Owner for reasonable additional costs incurred by the Owner which may be caused by the existence of the said pipeline, pipelines, and right-of-way, in connection with the excavation, drilling, installation, erection, repair, or construction for any permitted operation for agricultural or related purposes across, over or under, on or through the right-of-way.

4. Removal of Property

Notwithstanding any rule of law or equity, the pipeline or pipelines 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.

5. 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.

6. 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 pipeline or pipelines and/or any related fixtures and appurtenances affixed to the right-of-way other than through wilful damage or gross negligence by the Owner.

7. Topsoil

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

8. Taxes

The Operator shall pay all rates and taxes that may be assessed and levied from time to time against its interest in the demised premises and installation or in connection with its operations thereon.

9. Above Ground Installation

The Operator shall, so far as may be practicable, locate any above ground installation in such a fashion as to provide a minimum of inconvenience to the Owner. The Operator agrees to compensate the Owner for such above ground installation by separate agreement and failing such agreement with sixty (60) days from the date of such installation, the matter of compensation shall be submitted to arbitration as hereinafter provided.

10. Discontinuance and Abandonment

Upon the discontinuance of the use of the said right-of-way and of the exercise of the right(s) hereby Ordered, the Operator shall restore the demised premises to the same condition, so far as may be practicable to do so, as the demised premises 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 the considerations as set forth above in this Board Order.

12. Additional Terms

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.

13. 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.

Schedule "D"

Attached to and forming part of Board Order No 03-2012

Terms and Conditions for Underground Power lines located in LSD 10-32-1-25 WPM

1. Demised Premises

The Owner for the purposes and at the consideration hereinafter to be determined, does hereby grant, transfer and convey to the Operator, for itself, its servants, agents and contractors, the right, licence, liberty, privilege and easement the right to enter upon, use, occupy and take all and singular that part or portion of the demised premises as shown on the sketch or plan attached hereto as Sketch Plan #3, (hereinafter referred to as demised premises) for the purpose of an underground power line and to survey, construct, maintain and repair the said line, together with the right of ingress and egress as and from the date of this Board Order and for so long hereafter as the Operator may desire to exercise the rights and privileges hereby given.

Notwithstanding anything contained herein, it is mutually understood and agreed that the Operator shall not disturb the surface of the demised premises used for the right-of-way for the said line more than once by subsequently laying or constructing a line or removing any line within, upon or under the land of such right-of-way without compensating the Owner for any and all damage occasioned thereby.

It is further agreed that the Owner shall not, without the prior written consent of the Operator, excavate, drill, install, erect or permit to be excavated, drilled, installed, or erected on or under the right-of-way for the said line, any pit, well foundation, pavement or other structure or installations, but otherwise the Owner shall have the right fully to use and enjoy the right-of-way for the said line except as the same may be necessary for the purposes herein granted to the Operator.

2. Indemnification

The Operator will indemnify and keep indemnified the Owner against all actions, suits, claims and demands by any person whomsoever in respect of any loss, injury, damage or obligation arising out of or connected with the operations carried on by the Operator, its servants or agents in, under or upon the demised premises unless the cause of such loss, injury, damage or obligation can be traced elsewhere by the Operator.

This Board Order may be assigned by the Operator either in whole or in part and shall inure to the benefit of and be binding upon the parties hereto, and each of them, their respective heirs, executors, administrators, successors and assigns.

Sketch Plan #1- Sketch showing 5 proposed well sites together with access road in

[illegible]

PENN WEST PETROLEUM LTD.

SKETCH PLAN

SHOWING
PROPOSED PENN WEST FLOWLINE
IN
N.E. 1/4 SEC. 32 TWP. 1 RGE. 25 WPM
R.M. OF BRENDA
SCALE: 1:5000

REVISION
 0

OWNER(S): GERTRUDE RACY LEE

LEGEND

- PROPOSED WELL SITE SHOWN THUS ■
- PROPOSED POWERLINE ROW SHOWN THUS — — — — —
- PROPOSED FLOWLINE ROW SHOWN THUS — — — — —
- WORKSPACE AREA SHOWN THUS — — — — —
- SURVEY MONUMENTS FOUND SHOWN THUS ●
- DISTANCES ARE SHOWN IN METRES

CALTECH JOB NO.: 411-1993 411-168201.DWG PWP FILE NO.:

REV.	DATE	DESCRIPTION	DWG	CRD
0	2011.12.08	ISSUED	CV	BWS

The sketch plan shows a section of land divided into Townships 1 and 2, Range 25 West, and Section 32 North. A proposed Penn West flowline (yellow line) runs horizontally across the middle of the section. To its north, a proposed powerline right-of-way (blue dashed line) is shown. Two proposed well sites are indicated by red squares. The map includes various survey monuments (black dots), distances in metres, and labels for existing features like 'HIGH GRADE GRAVEL ROAD' and '30.175 ROAD ALLOWANCE'. A north arrow is located on the left side of the map.

Section 32, Twp. 2 N., R. 1 W.

Summary Table:

AREA REQUIRED:	
POWERLINE 'A'	0.320 ha (0.79 ac.)
POWERLINE 'B'	0.150 ha (0.37 ac.)
TOTAL:	0.470 ha (1.16 ac.)

Proposed Features:

- PROPOSED POWER R/W (A)
- PROPOSED POWER R/W (B)
- PROPOSED F/L R/W
- PROPOSED 3 WELL PAD SITE
- PROPOSED 8 WELL PAD SITE
- PENN WEST HZNTL 10-32 (PROPOSED)
- PENN WEST HZNTL A10-32 (PROPOSED)
- PENN WEST HZNTL B10-32 (PROPOSED)
- PENN WEST HZNTL 9-32 (PROPOSED)
- PENN WEST HZNTL A9-32 (PROPOSED)
- PENN WEST HZNTL B9-32 (PROPOSED)
- PENN WEST HZNTL C9-32 (PROPOSED)

Abandoned Features:

- ABAND 10-32
- ABAND 9-32

Other Labels:

- HIGH GRADE GRAVEL ROAD
- 30.175 ROAD ALLOWANCE
- 32
- 1-25 WPM
- FD. 0.025 Sg. I.B.
- FD. 0.025 Sg. I.B.
- FD. 0.025 Sg. I.B.
- FD. 0.025 Sg. I.B.