

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

File No: 03-2013

Hearing: Town Municipal Office & Virden Legion Hall

Order No: 09-2013

Virden, Manitoba

Page 1

Date issued: September 10, 2013

BEFORE:

**Margaret Hodgson, Presiding Member
Clare Moster, Deputy Presiding Member
Claude Tolton, Board Member**

Barbara Miskimmin, Board Administrator

BETWEEN:

Applicant
(Operator)

EOG Resources Canada Inc.

- AND -

Kenneth Brian Lee

Respondent
(Landowners)

CONCERNING:

NW ¼ 29-2-29 WPM in the Province of Manitoba

(The "Lands")

PURPOSE OF HEARING:

To hear and receive evidence regarding an application as per s. 21 of *The Surface Rights Act* of Manitoba received from the Applicant for right of entry and compensation for surface rights to construct one underground gas pipeline across the Respondent's land.

RIGHT OF ENTRY FOR A GAS PIPELINE & COMPENSATION ORDER

BACKGROUND:

The Applicant applied on December 21, 2012 for an order granting the right to enter the Respondent's Lands for the purpose of running a new six inch steel underground sweet natural gas pipeline across the lands and setting compensation payable for this right of entry and resulting right-of-way.

The Respondent objected stating that the Surface Rights Board was without jurisdiction to hear the matter because it was an interprovincial pipeline and as such was under the jurisdiction of the National Energy Board. Further the Respondent requested a dismissal of the application subject to Section 25(5) of *The Surface Rights Act*.

ISSUES:

1. Does the Board have the jurisdiction to hear the Applicant's application?
2. Does the Applicant require the right to enter upon the lands of the Respondent?
3. What compensation is payable?
4. What will be the terms and conditions of the right of entry?
5. Costs?

APPEARANCES:

COUNSEL:

R.J.M. Adkins, Thompson Dorfman Sweatman LLP – counsel for the Applicant (TDS)

Aaron Ludwig, Kohaly, Elash & Ludwig Law Firm LLP – counsel for the Respondent

Michael Bodner, Manitoba Justice – counsel for the Attorney General of Manitoba

WITNESSES FOR THE APPLICANT:

Kevin Marshall, P.Eng., EOG

Kelly Scott, Environmental Consultant, Kelly Wm. Scott & Associates

Thomas Everett, Surface Land Representative, EOG

Darren Clarke, Appraiser and Land Consultant, McNally Land Services Ltd.

Lorne Rollheiser, EOG's general counsel (he attended but as an advisor)

WITNESSES FOR THE RESPONDENT:

Dr. Ty Faechner, Phd., ARECA (affirmed via telephone)

Wade Barnes, FarmersEdge (sworn)

J. P. Weir, Roland/Weir Realty & Appraisal (sworn)

Wes Mayes, Landowner (sworn)

Ron White, Landowner (sworn)

Troy Mayes, Landowner (affirmed)

Todd Daniels, Landowner (sworn)

EXHIBITS:

- Exhibit #1 – Final offer as received from TDS/EOG
- Exhibit #2 – Written Submissions and Brief of Law – Adjournment – as received from A. Ludwig
- Exhibit #3 – Bio of Kevin Broderick Marshall, P.Eng., Production Engineer, EOG
- Exhibit #4 – Bio of Kelly W. Scott, Environmental Consultant, Kelly Wm. Scott & Associates
- Exhibit #5 – Bio of Thomas S. Everett, Surface Land Representative, EOG
- Exhibit #6 – Bio of Darren W. Clarke, Appraiser and Land Consultant, McNally Land Services Ltd.
- Exhibit #7 – Pipeline Construction Permit No. 2013-04 dated May 7, 2013, submitted by TDS/EOG
- Exhibit #8 – Application to Construct a Sweet Gas Sales Pipeline – letter dated February 25, 2013, submitted by TDS/EOG
- Exhibit #9 – EOG Resources compiled plan covering Coulter Area – existing Phase 1 and proposed Phase 2 of EOG Gas Right of Way – submitted by TDS/EOG
- Exhibit #10 – EOG Resources compiled plan covering Coulter Area – showing affected lands without Right of Way Agreements signed and highlighted "PINK" - submitted by TDS/EOG
- Exhibit #11 – Site Photographs of NE 20-1-25 WPM & NW 24-1-26 WPM submitted by TDS/EOG
- Exhibit #12 – Environmental Assessment Licence Application – February, 2013 – submitted by TDS/EOG
- Exhibit #13 – EOG Sweet Gas Sales Pipeline Survey Tracking – submitted by TDS/EOG
- Exhibit #14 – Affected Landowner/Occupant Acquired Line List–Phase 2–prepared by Progress Land–submitted by TDS/EOG
- Exhibit #15 – October 22, 2012 letter from EOG to affected landowners/occupants re: Notification of Proposed Construction of 32km Sweet Natural Gas Pipeline – submitted by TDS/EOG
- Exhibit #16 – 15 Surface Land Reports affecting various lands – submitted by TDS/EOG
- Exhibit #17 – Table showing various existing agreements with the respondents – submitted by TDS/EOG
- Exhibit #18 – Document consisting of 31 tabs of comparables as prepared by McNally Land Services Ltd. – submitted by TDS/EOG
- Exhibit #19 – Report prepared by McNally Land Services Ltd. on the market value review of the proposed Manitoba pipeline – submitted by TDS/EOG
- Exhibit #20 – Written Submissions and Brief of Law – Application for Dismissal – submitted by Aaron Ludwig
- Exhibit #21 – Brief of Respondents' Submissions – Jurisdiction – submitted by Aaron Ludwig
- Exhibit #22 – Book of Authorities – submitted by Aaron Ludwig
- Exhibit #23 – Exhibit Book – Binder containing Tabs A to S – submitted by Aaron Ludwig
- Exhibit #24 – 4 Case Laws (Westcoast Energy v. NEB/Canadian Hunter Exploration Ltd. v. NEB/Dome Petroleum Limited v. NEB/Reference re Legislative Authority in Relation to Bypass Pipelines – submitted by Michael Bodner, Crown Counsel, Manitoba Justice
- Exhibit #25 – Map showing subject properties in "yellow" and property sales in "red" – submitted by TDS/EOG

DECISION:

Upon hearing the presentations of each of the parties and the oral evidence on the 18th day of June and the 15th and 16th of July 2013 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* this Right of Entry application is granted subject to the terms and conditions as set out on Schedule "A" & "B" and access to the site and plan of the lands involved are shown on Individual Ownership Plan(s) which are all attached to and forming part of this Board Order.
2. The Applicant pay to the Respondent compensation of \$1,250.00 per acre for the pipe line and \$625.00 per acre for the temporary work space prior to the Applicant exercising the Right of Entry or within 60 days of this order, whichever occurs first.

REASONS FOR DECISION

1. 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. 2013-04 was issued to the Applicant on May 7, 2013 by the Minister of Innovation, Energy and Mines. The permit has a map attached to it which identifies the location 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 December 21, 2012.

2. Procedural History

The application involving the Respondent's land was one of several applications filed by the Applicant relating to the various lands that the proposed pipeline will cross. The Board set a hearing for all related applications for June 18, 2013. On May 30, 2013 the Respondents, who were largely represented by the same counsel, requested an adjournment of all hearings on this matter before the Board until a ruling was made pursuant to an application they filed regarding jurisdiction with the National Energy Board (the "NEB"). The Respondents alleged that the pipeline was an interprovincial pipeline and as such all matters relating to it were within the jurisdiction of the NEB, not provincial authorities. This application was dismissed by the NEB without prejudice on June 13, 2013.

At the outset most of the landowners were represented by Mr. Sheldon Lanchbery, while one landowner was represented by Mr. Aaron Ludwig. Mr. Lanchbery was appointed to the Court of Queen's Bench and Mr. Ludwig was retained to represent all affected landowners.

The Board proceeded with the hearing on June 18, 2013. While some of the evidence was heard the Respondents also argued that the Board lacked jurisdiction. The hearing was adjourned at the end of the day on June 18, 2013 to be continued on July 15 and 16, 2013. On July 9, 2013 the Respondents filed a Notice of Constitutional Question with the Board. The Notice of Constitutional Question indicated that the Respondents would be asking the Board to make a determination that it did not have jurisdiction over the subject matter of the allegations on the basis that the proposed pipeline was an interprovincial pipeline and within the sole jurisdiction of the NEB.

The Board received notice on July 10, 2013 that the Attorney General of Manitoba intended to intervene and make an oral submission at the proceedings pursuant to s 7 of *The Constitutional Questions Act* of Manitoba. When the hearing resumed on July 15, 2013, the Board heard presentations on the constitutional question from the Applicant, the Respondent and Michael Bodner, Crown Counsel for the Attorney General of Manitoba. The Attorney General's position was that the Board had jurisdiction.

The Board then continued with the hearing, reserving its decision on jurisdiction in order to hear the evidence on the question of right of entry and compensation.

3. The Jurisdictional Issue

The Board finds that it has jurisdiction to consider and rule on the application for surface rights.

The Applicant's proposed pipeline is to run from near Lyleton, Mb to just east of the Saskatchewan border. The evidence showed this pipeline is designed to link up with another proposed pipeline constructed and operated by Many Islands Pipe Lines (Canada) Ltd. ("MIPL"), a Saskatchewan Crown Corporation. The MIPL pipeline, would cross the Manitoba-Saskatchewan border and without question would be an interprovincial pipeline and under the jurisdiction of the NEB. In fact MIPL has filed a Notice with the NEB in respect of its proposed pipeline which was entered into evidence and which is the primary source of the Board's information about the MIPL pipeline.

The MIPL pipeline would run from approximately 5 kilometers east of Gainsborough, Saskatchewan (i.e. just into Manitoba) west to an existing TransGas pipeline east of Alida, Saskatchewan. The eastern (Manitoba) end of the MIPL pipeline would begin with a 'header' designed to accommodate other companies running pipelines within Manitoba to the header for delivery of their product to Saskatchewan. MIPL's NEB Notice mentions the Applicant and Penn West Petroleum as two potential customer(s) who would deliver their product to the header. The Notice indicates that the Applicant and Penn West are responsible for constructing the necessary pipeline infrastructure within the province of Manitoba and related consultation and regulatory requirements.

The Respondents say that because the Applicant's pipeline is designed to meet with MIPL's pipeline, the two lines should be considered one interprovincial pipeline system under the NEB's jurisdiction and outside of this Board's jurisdiction.

The Minister of Innovation Energy and Mines has issued a Permit to the Applicant under *The Oil and Gas Act*. In doing so, the Minister would have had to consider the definition of "pipeline" under that Act and determine that the proposed pipeline fell within that definition and within provincial jurisdiction. While the Board knows nothing about the procedures that resulted in the Minister issuing the Permit, the Board has received a copy of the Permit and, in the Board's view, it is not the Board's role to question or review the Minister's decision to determine that the requested pipeline Permit was within his jurisdiction to issue.

The Board must consider its own jurisdiction in light of the Permit and in light of what it is being asked to order. It is obvious that the Board may only grant surface rights in relation to lands within Manitoba and in the present case, the Board is being asked to grant surface rights with respect to lands within Manitoba. In the Board's view *The Surface Rights Act* does not call upon the Board to consider the application of the definition of "pipeline" as it is used in *The Oil and Gas Act*; that is the role of the Minister in considering whether to issue a Permit. Rather, the Board is presented by the Applicant with a Permit for a pipeline and the Minister has already determined that the Applicant wants to build a pipeline within the meaning of *The Oil and Gas Act* and has issued the Permit on that basis. The Board is entitled to assume that the Minister has issued a valid Permit. The Board's role is to consider the right of entry and compensation issues in relation to the Manitoba lands affected by the Permit.

However, if the Board was required to consider the issue of whether the proposed pipeline is an interprovincial pipeline over which the NEB would have jurisdiction, the Board would have found that the pipeline in question is within provincial jurisdiction. The Board agrees with the submissions of counsel for the Attorney General of Manitoba.

The evidence shows that the proposed MIPL pipeline ends in Manitoba at a 'header' that is designed to receive multiple 'inputs'. The material filed shows that MIPL contemplates more than one line operated by different companies in Manitoba feeding into this 'header'. The Applicant is the first of these companies. Penn West is mentioned as a potential second. This indicates that the Applicant's pipeline is essentially a way for it to transport the product to the custody of another company. It is then the MIPL pipeline that would transport the product over the border.

There is no evidence that the Applicant intends to operate or manage the proposed MIPL pipeline jointly with MIPL. The Applicant's proposed pipeline and the MIPL proposed pipeline do not form a single system of pipelines and facilities operated by one company or a series of related companies or as part of a joint venture. This distinguishes the present situation from the decision in *Westcoast Energy Inc. v Canada (National Energy Board)* [1998] 1 S.C.R. 322; in that case, a series of lines and facilities were held to be one undertaking because they were operated by a single company. The present case is also different from the Federal Court of Appeal's decision in *Dome Petroleum v. Canada (National Energy Board)* (1987) N.R. 135 which concerned a joint venture by several companies where the elements in question (storage caverns) were jointly owned and operated as part of a pipeline system that moved gas from Alberta to Ontario through the United States.

The Board concludes that the Applicant's proposed pipeline and the MIPL proposed pipeline are not sufficiently integrated so as to constitute a single federal work or undertaking. The Applicant's pipeline is a separate and discrete undertaking that is entirely within Manitoba and therefore subject to provincial jurisdiction.

4. The Respondent's argument that the requested Surface Rights will not be used within 6 months following the order

The Respondent also requested that the application be dismissed based on s. 25(5) of *The Surface Rights Act*, which states that "An order granting surface rights shall not grant any rights other than rights which the operator may reasonably propose to utilize with the six month period next following the date of the order." As the Applicant has applied for the surface rights, the Board believes it is reasonable to assume the Operator plans to utilize these rights within the required time period unless the Respondent can prove the contrary. The Board was made aware of a number of outstanding issues related to this application and the Board recognizes they may possibly prohibit the Operator from meeting this deadline, however the Board is of the view that it is reasonably possible for the Applicant to utilize the rights within the required time period.

5. 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 EOG Resources Canada Inc., was an operator under *The Surface Rights Act*, by virtue of the Pipeline Construction Permit No. 2013-04, therefore the Board determined that as such, the Applicant requires the right to enter upon the lands for the purpose of running an under-ground gas pipe line across the lands.

6. What Compensation is payable?

The Board finds that it is appropriate for the Applicant to make a single lump sum compensation award to the Respondent. The Applicant proposes to install an underground pipeline. The installation itself will disrupt the Respondent's use of the Land and can reasonably be expected to cause the Respondent damage. However, once installed, the pipeline is not likely to impair the Respondent's use of the Lands. The Board is of the opinion that an Owner has no right to annual compensation unless ongoing loss or damage will be suffered. It is not sufficient to claim that future damage is possible. The mere possibility of damage is not a basis for an award of compensation. If there is any future damage occasioned by the Applicant's use of its surface rights (for example to repair or maintain the pipeline, or if for some reason the productivity of the Lands has declined as a result of the pipeline) then, if the Applicant and Respondent cannot agree on the compensation for the damage, they may return to the Board for a determination.

After consideration of all of the evidence and the applicable factors under Section 26 of *The Surface Rights Act* the Board has determined that the Applicant pay \$1,250.00 per acre for the pipe line and \$625.00 per acre for the temporary work space and access roads, if applicable, is appropriate compensation in the circumstances. This amount must be paid by to the Respondent prior to the Applicant exercising the Right of Entry, or within 60 days of this order, whichever occurs first.

7. 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 Surface Rights Act* does not specifically address these items in detail.

Attached to and forming part of this Board Order are schedules "A", "B", and "C" if applicable, that outline the general terms and conditions for right-of-way for pipe lines and temporary work spaces.

8. Costs

After reaching the above decision, the Board opened the sealed envelope containing a final offer pursuant to subsection 26(4) and 26(5) of *The Surface Rights Act*.

The following compensation was offered by the Applicant before commencement of the hearing: \$1,250.00/acre for the pipeline right-of-way; \$625.00/acre for the temporary work space; and a \$250.00/acre expediency bonus for the avoidance of further regulatory delay.

The Board makes no award for costs.

Decision delivered this 10th day of September 2013.


M. D. Hodgson, Presiding Member

Schedule "A"

**Attached to and forming part of Board Order No 09-2013
Terms and Conditions for Right-of-Way for Gas Pipeline
Located in NW ¼ 29-2-29 WPM in the Province of Manitoba**

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 on the part of the Owner (or any person claiming that 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 set forth in this Order, does hereby grant, transfer and convey to the Operator all and singular those parts of the shown upon the sketch or plan attached hereto as Sketch Plan #1 (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 demised premises as may be necessary for a right-of-way throughout for the laying down, construction, operation, maintenance, inspection, removal, replacement, reconstruction and repair of a flow line/pipeline or lines, and underground 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 within 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 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 the 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. 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.

Schedule "B"

**Attached to and forming part of Board Order No 09-2013
Terms and Conditions for Temporary Work Space
located on NW ¼ 29-2-29 WPM in the Province of Manitoba**

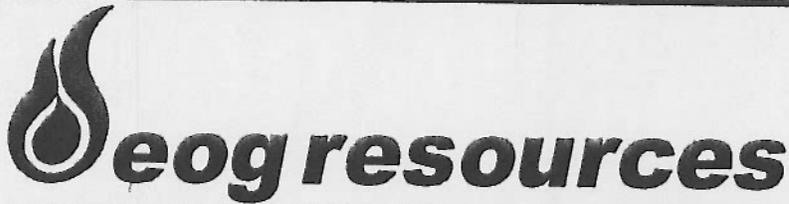
The Owner for the purposes and at the consideration set forth in this Board Order, does hereby grant to the Operator, its contractors and/or representatives utilizing temporary workspace, as approximately shown on the Individual Ownership Plan attached hereto for the purposes of:

1. Access to and clean-up of area necessary for a right-of-way throughout for the laying down, construction, operation, maintenance, inspection, removal, replacement, reconstruction and repair of a flow line/pipeline(s).

The Operator will restore the surface of the temporary workspace area 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 Operator will compensate the Owner for damages that may occur in the area covered by the Temporary Work Space.

The area designated as Temporary Work Space will automatically expire on the one (1) year anniversary of the commencement of construction on the demised premises.



INDIVIDUAL OWNERSHIP PLAN

Showing

RIGHT-OF-WAY

in

N.W. 1/4 Sec. 29 - Twp. 2 - Rge. 29WPM

Scale - 1 : 5000

Portions referred to outlined thus :

Azimuths are NAD 83 (Original) UTM Grid Azimuths referred to the Central Meridian 99° W. and were derived by G.N.S.S.

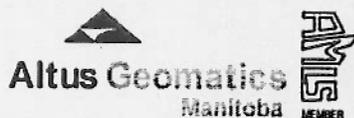
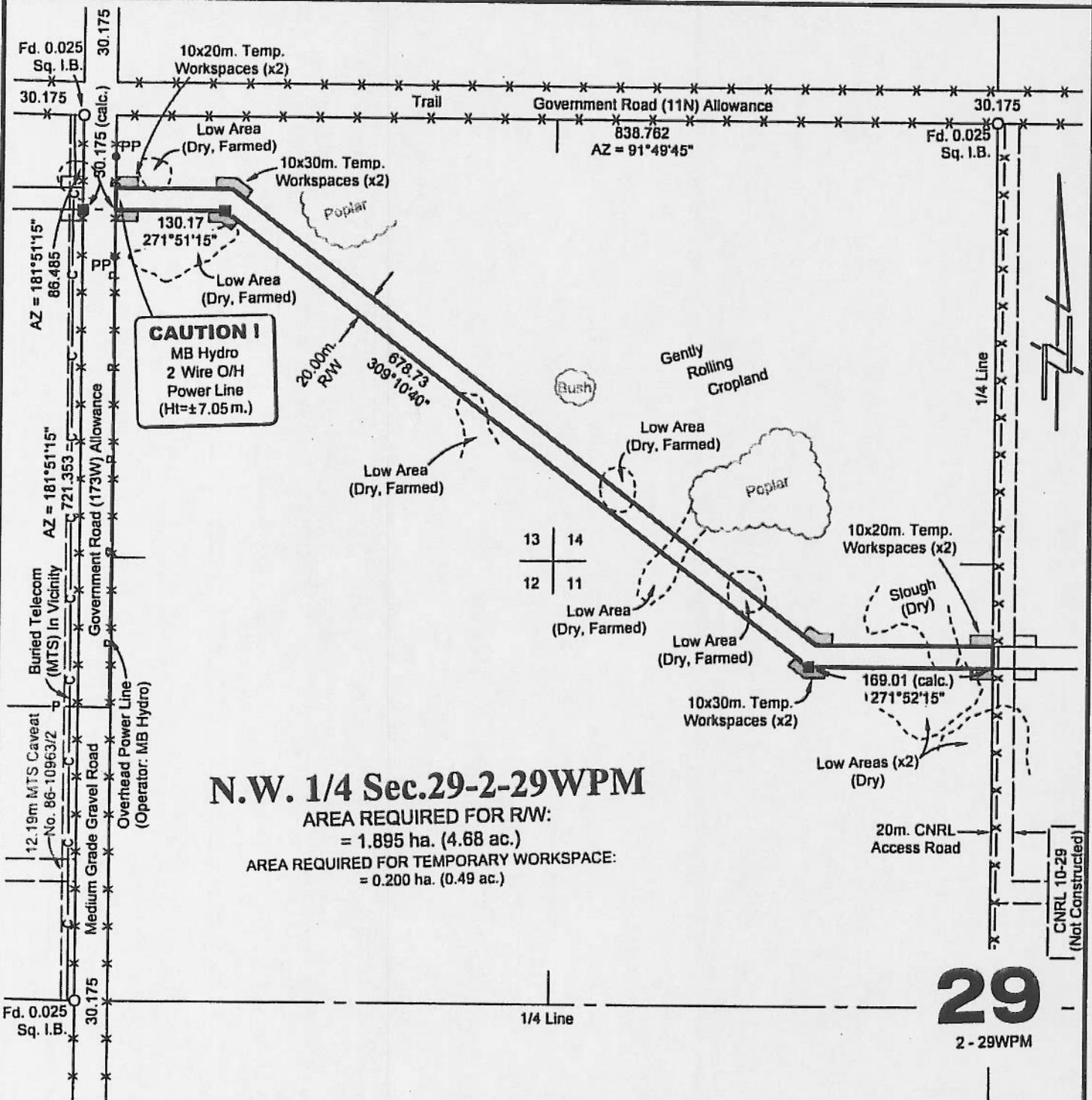
TITLE No. : 1737704/2

OWNER : Kenneth Brian Lee

I/We, the landowner(s), consent to the location of the Right(s)-of-Way as shown and have no objections to The Manitoba Petroleum Branch of Manitoba Mines and Minerals Issuing an Underground Facility and / or construction permit
Dated this ____ day of _____, 2012.

Kenneth Brian Lee

Witness



Toll Free: 1-800-465-6233
www.altusgeomaticsmb.com

I.O.P. No.: 6		SEGMENT: C4	
Client File No: 9350 1020		AFE No: 11H0405	
REV.	Revision:		
0	Date: Sept. 6, 2012	Job No.: 138765-V	
	File: 138765P-C4	Initials: GA/CM - AV - PFS	