

**Talisman Energy Inc.
locations**

**File No.
1597, 1609**

**File No.
1447**

**Alaska
Hwy**

**File No.
1460**

**File No.
1653, 1654,
1655, 1656,
1657, 1659,
1660, 1661**

**Ft. St.
John**

Halfway River

Peace River

97

29

MEDIATION AND ARBITRATION BOARD
Under the Petroleum and Natural Gas Act
#114, 10142 - 101 Avenue
Fort St. John, BC V1J 2B3

Date: May 11, 2001

File No. 1447

Board Order No. 336A

BEFORE THE MEDIATOR:

IN THE MATTER OF THE PETROLEUM AND NATURAL
GAS ACT BEING CHAPTER 361 OF THE REVISED
STATUTES OF BRITISH COLUMBIA AND
AMENDMENTS THERETO:
(THE ACT)

AND IN THE MATTER OF A PORTION OF THE EAST ½
SECTION 12 TOWNSHIP 113, AND THE SOUTHWEST ¼
SECTION 12 TOWNSHIP 113 PEACE RIVER DISTRICT
WEST OF THE SIXTH MERIDIAN
(SW ¼ 12-113 & E ½ 12-113 W6M)
(THE LANDS)

BETWEEN:

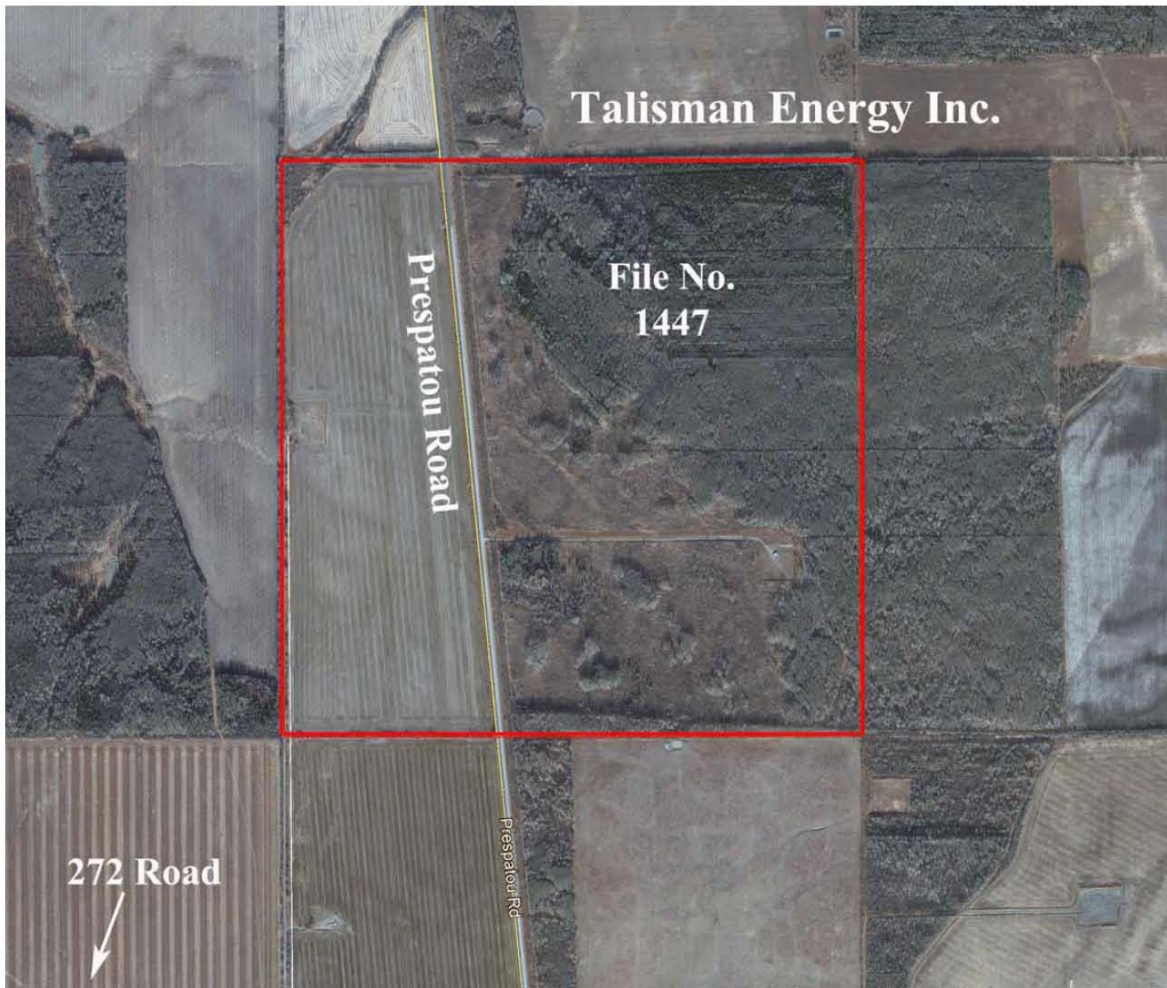
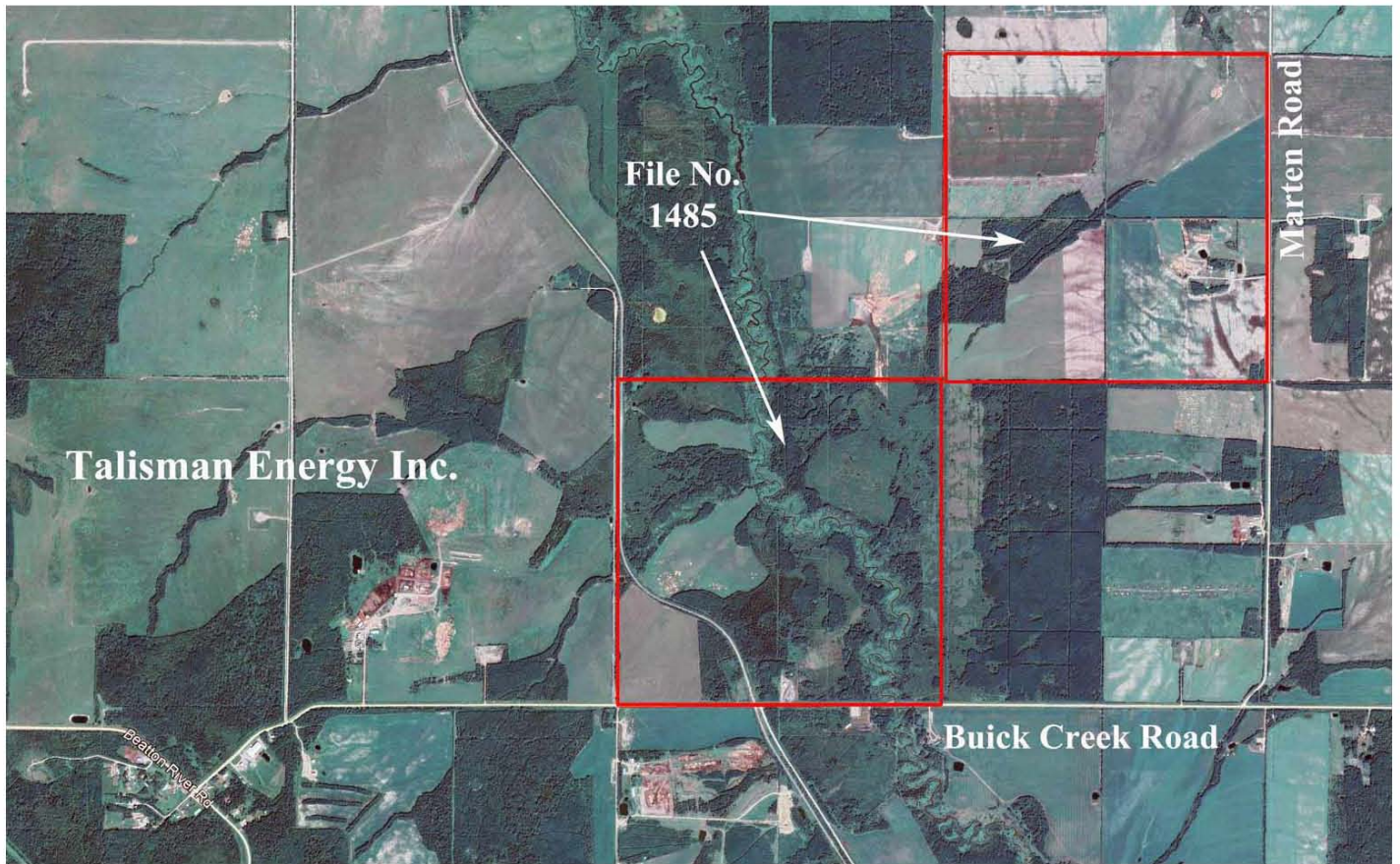
TALISMAN ENERGY INC.
SUITE 3400, 888 -3RD STREET SW
CALGARY, AB
T2P 5C5
(THE APPLICANT)

AND:

WALTER BERRESHEIM
BOX 6214
FORT ST. JOHN, B. C.
V1J 4H7
(THE RESPONDENT)

ARBITRATION ORDER

The Mediation and Arbitration Board received an application from Doug Doray, Surface Landman for Roy



Northern Land Services Ltd. (Roy Northern), agent for Talisman Energy Inc., 13 February 2001 for permission to enter upon the land of the Respondent.

Ivor Miller conducted a Mediation Hearing in this matter on March 19, 2001 at 10:00 a.m. Mountain Standard Time. At the conclusion of that mediation a Right-Of-Entry order was not granted, further mediation hearings were refused and the unresolved issues were to be settled by an Arbitration to be heard not later than April 30, 2001.

The Arbitration Hearing in this matter was conducted in the Mediation and Arbitration Board (Board) office located at 10142 101st Avenue, Fort St. John, on April 19, 2001. The Arbitration panel consisted of Mavis Nelson, Board member, and Rod Strandberg, Chair of the Board heard evidence regarding the application by Talisman Energy Inc. (Applicant) to enter on land owned by the Respondent, Walter Berresheim. The land is legally described as SW 1/4 Section 12, Twp. 113, Peace River District; and the E ½ Section 12, Twp. 113 Peace River District, except the south 90 feet (Land).

Attending on behalf of Talisman was Doug Doray and Eddie Taylor from Roy Northern and Luella E. Reimer a representative of Talisman.

Ms. Andrea Hall appeared as a representative with the landowner, Walter Berresheim.

Nature of the Application

Talisman applied for an Order to allow it to enter upon the Respondent's land for the purpose of constructing a flow line to join two natural gas wells. The flow line was to run from well site b-37-L, to d-39-L. This flow line crosses the Respondent's property, which is bisected by a gravel road. To the west of the road the cultivated land is rented to John Fehr. To the east of the road the flow line follows along an existing access road to the well site located at b-37-L.

POSITION OF THE PARTIES

There were a variety of issues between Talisman and the Respondent regarding the proposed use of the Respondent's property. During the Arbitration it became clear that the sole issue the parties wished the Board to address was compensation payable. A variety of other issues raised by the Respondent were agreed to by Talisman. During the Arbitration a request was made for the parties to formalize an agreement on these other issues. A letter of agreement dated May 1, 2001 setting out some 22 terms and conditions regarding the use of the Land, was provided to the Mediation Arbitration Board.

The Applicant

On the issue of compensation Talisman felt that its offer of \$ 950.00 per acre for the flow line Right-Of-Way, and with \$ 100.00 X 3 temporary work spaces, was fair compensation and likely exceeded the fair market value of the Land.

Talisman noted that to the east of the gravel road the flow line would follow an existing access road causing minimal inconvenience or disturbance to the Respondent's surface rights. To the west of the road the flow line would pass under cultivated land. Talisman felt that the routing of the flow line and the depth of its installation

would ensure that there would be minimal inconvenience or disruption to the Respondent and his future use of the Land.

Talisman was opposed to any agreement or order by the Board that annual compensation is paid for the flow line on the Land.

The Respondent

The Respondent felt that he was entitled to an annual payment for the presence of the flow line. It was his position that the existence of a flow line or pipe line below the surface of his property would restrict his future use of Land. And that any encumbrance on title, such as an Order from this Board, might impact the marketability or value that he might receive for his Land. He wished an annual payment for the flow line payable until the line was abandoned, removed or decommissioned. He felt that by requiring the Applicant to make annual payments to him, the Applicant would be more accountable and responsive to his concerns.

The Respondent provided no evidence to the Board that the existence of the flow line or right of entry order on title would reduce the marketability or market value of the Land. He indicated that although he had many other properties, which had registered right-of-way agreements or Right-Of-Entry orders on the title, he had no experience that the presence of those charges reduced the marketability or fair market value.

Concerning restrictions on the future use of the Land, the Respondent felt that the fact of the existence of a flow line or pipe line would unduly restrict his choice of operations. This concern would be greater on the cultivated western portion of the Land, as the construction of a flow line along an existing access road on the Eastern side would have less adverse impact on his use of the Land.

In support of his position the Respondent relied upon two previous orders of the Board, Board Orders 90A and 91A, ordered annual payments of \$10.00 per year in 1977. The factual circumstance in which these Board Orders were granted was not made clear during the Arbitration.

The Respondent was requesting \$ 950.00 per acre for the flow line construction together with \$ 100.00 per temporary work space, and annual payments of \$ 250.00 per year. In addition he requested compensation for the damages such as crop loss and timber loss resulting from the construction of the flow line.

The Respondent also sought \$ 450.00 compensation for his time and his legal fees in the sum of \$ 2,000.00 plus GST.

Discussion

After having reviewed the evidence and the submissions of the parties and bearing in mind the factors to which the Board is directed to consider pursuant to Section 21 (1) of the *Petroleum and Natural Gas Act*, the Panel conclude that the appropriate compensation for the Right-Of-Entry is the sum of \$ 950.00 per acre. This award does not deal with any consequential damages resulting from the construction of the flow line, such as crop or timber loss. Either of the parties is at liberty to ask the Board to assess damages consequential upon the construction of the flow line if they are unable to reach agreement.

Although the Respondent's position was that the presence of the flow line would unduly restrict his activities or affect the marketability of his Land, this position was not supported by any evidence. The Respondent's request for an annual payment is not a factor under Section 21 (1) of the Petroleum and Natural Gas Act and the Board declines to order an annual payment in this case.

The evidence did not support that the presence of the flow line would interfere with the current or contemplated use of the Land or that the existence of the flow line and any encumbrance on title could have an adverse effect on the marketability of the Land.

On the issue of the Respondent's legal fees the Board cannot accede to this request. Ms. Hull, who appeared as a representative of Mr. Berresheim, is not a member of the Law Society of British Columbia. Ms. Hull is, therefore, precluded from charging legal fees for work performed for the Respondent in British Columbia. It would be contrary to public policy and the existing legislation for the Board to order payment of the Respondent's legal fee.

On the issue of costs incurred by Mr. Berresheim in preparing for the Mediation and Arbitration in this matter the Board awards him \$ 400.00 for his time.

IT IS HEREBY ORDERED THAT:

1. Pursuant to Section 20 (2) of the Petroleum and Natural Gas Act, the Order of the Mediator is varied to provide that the Applicant is entitled to enter upon the land of the Respondent for the purpose of constructing a flow line between well site b-37-L and d-39-L;
2. Pursuant to Section 21 of the Petroleum and Natural Gas Act the Applicant will pay to the Respondent the sum of \$ 4,405.00 forthwith and, in any event, within thirty days of the date of this Order calculated as follows:
 1. \$ 950.00 per acre x 3.9 acres, for the flow line = \$3,705.00;
 2. \$ 300.00 for temporary work spaces; and;
 3. \$ 400.00 representing compensation for Mr. Berresheim for his time in preparing for and attending the Mediation and Arbitration in this proceeding
3. Pursuant to Section 25(3) of the Petroleum and Natural Gas Act the Applicant shall forthwith file a Certified Copy of this Order with the Registrar of the appropriate Land Title district and provide details of that filing with the Board;
4. No portion of this Order varies the legislative, statutory or regulatory requirements of the Petroleum and Natural Gas Act or any other legislation effect regarding the construction of this flow line.
5. The parties have liberty to have other issues of compensation arising from the construction of the flow line which is the subject matter of this application dealt with by further application to the Board.
6. The terms and conditions contained in the letter of agreement dated May 1, 2001 (Schedule "A") together with the copy of a letter from Ms. Hull to the Board (Schedule "B") is attached and forms

part of this Order. If there is a discrepancy between the letters and this Order on any item, the letters will govern the relationship between the parties to this Order.

7. Nothing in this order is or operates as consent, permit or authorization that by enactment a person is required to obtain in addition to this order.

Dated at the City of Fort St. John, British Columbia, this 11th day of May 2001.

MEDIATION AND ARBITRATION BOARD
UNDER THE
PETROLEUM AND NATURAL GAS ACT

Rodney Strandberg, Chair

Mavis Nelson, Member

MEDIATION AND ARBITRATION BOARD
Under the Petroleum and natural Gas Act
114, 10142 101 Avenue
Fort St. John, BC V1J 2B3

Date: July 11, 2001

File No. 1460

Board Order No. 340ARR

BEFORE THE ARBITRATOR:

IN THE MATTER OF THE PETROLEUM AND
NATURAL GAS ACT BEING CHAPTER 361 OF THE
REVISED STATUTES OF BRITISH COLUMBIA AND
AMENDMENTS THERETO: **(THE ACT)**

AND IN THE MATTER OF A PORTION OF THE
NORTHEAST ¼ OF SECTION EIGHTEEN,
TOWNSHIP EIGHTY-FIVE, RANGE SEVENTEEN,
WEST OF THE SIXTH MERIDIAN, PEACE RIVER
DISTRICT (NORTHEAST ¼ 18-85-17 W6M) **(THE
LANDS)**

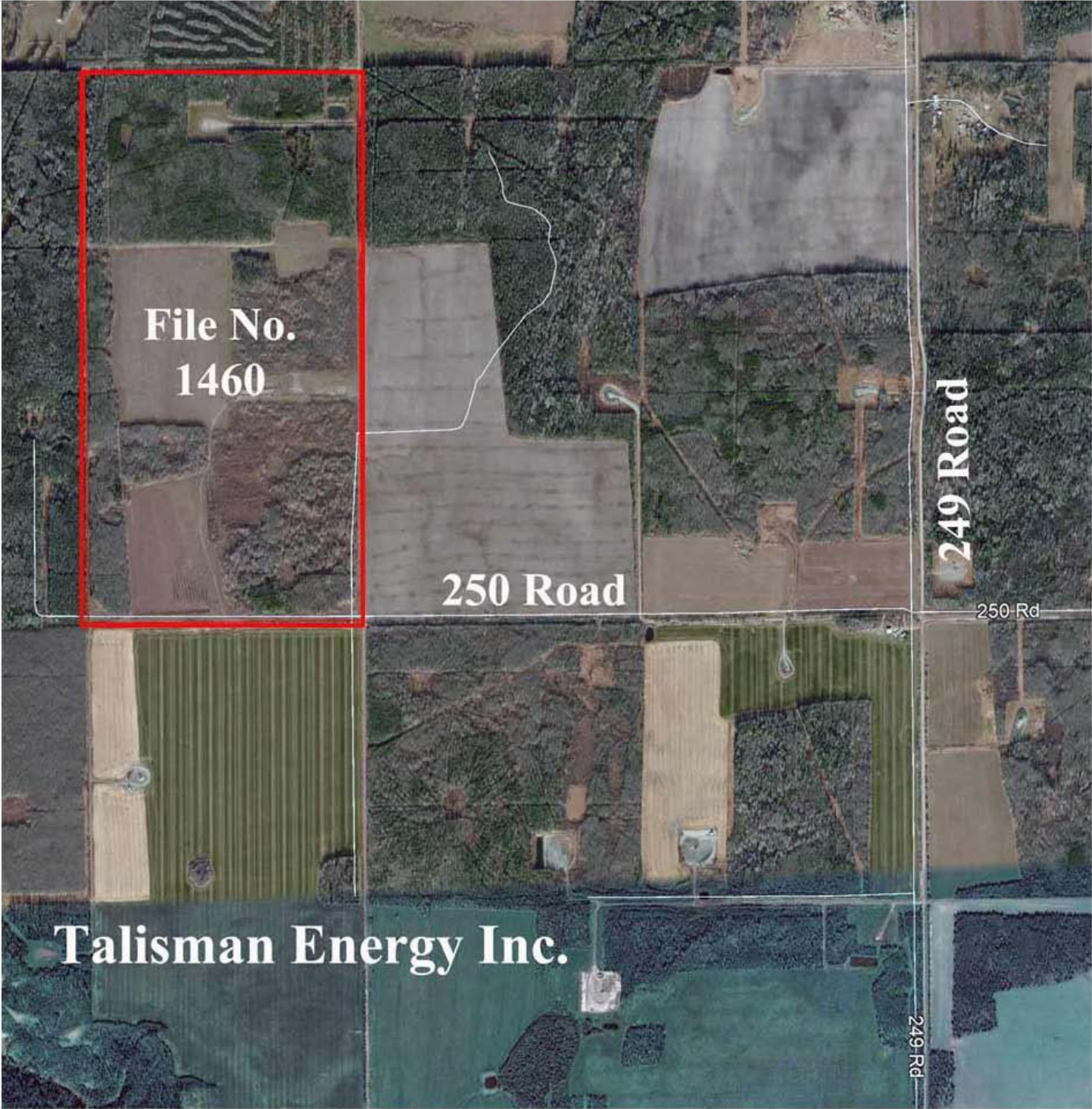
BETWEEN:

FRANK SCHLICHTING
P.O. BOX 199
CECIL LAKE, BC
V0C 1G0
(THE APPLICANT)

AND:

TALISMAN ENERGY INC.
SUITE 3400, 888 3rd Street SW
CALGARY, AB
T2P 5C5
(THE RESPONDENT)

RENT REVIEW ARBITRATION ORDER



**File No.
1460**

250 Road

249 Road

250 Rd

249 Rd

Talisman Energy Inc.

BACKGROUND

The surface rights owner, Frank Schlichting, applied to the Mediation and Arbitration Board on the 22nd of May 2001 for Arbitration to settle compensation pursuant to Section 12 of the Petroleum and Natural Gas Act.

The Applicant had sent the 60 day notice pursuant to Section 11 of the Petroleum and Natural Gas Act, requesting renegotiation of the rental conditions on 20 September 2000.

As the two parties were unable to reach a mutually satisfactory annual payment, an Arbitration Hearing was scheduled for 31 May 2001.

Members of the Arbitration Panel, Frank Breault, Julie Hindbo and William Wolfe inspected the site on 30 May 2001. They observed that the well site is a shut in well with no connecting flow lines and is surrounded by immature second growth bush.

An Arbitration Hearing was held on 31 May 2001 in the Boardroom of Execuplace Business Centre located at 10142 101st Avenue, Fort St. John, BC. Present for the Mediation and Arbitration Board were William Wolfe, Frank Breault and Julie Hindbo. The Applicant, Mr. Frank Schlichting represented himself. Doug Doray of Roy Northern Land Service Ltd. represented the Respondent.

POSITION OF THE PARTIES

Applicant

The Applicant presented comparables for leases on four other properties, two owned by himself and two by others in the district. Annual rentals on these leases ranged from \$725 per acre to \$873 per acre and included Mediation and Arbitration Board Order No. 337ARR, which awarded annual rental payments of \$836 per acre.

The Applicant noted that land immediately surrounding the wellsite and access road has been previously logged, is now covered by immature second growth poplar, pine and spruce and is considered to be under tree farm cultivation. The Applicant acknowledged that the tree farm value of the disturbed land would be similar to its value under hay crop production.

The Applicant noted that the wellsite and access road lies at the end of a main access road and is frequented by third parties who cause nuisance and disturbance, as well as potential forest fire hazard.

The Applicant indicated the negotiations and appearance before the Mediation and Arbitration Board resulted in lost wages.

Respondent

On behalf of Talisman Energy Inc., Roy Northern Land Service Ltd. presented comparable lease rentals for eight other well sites within a 3 km radius of the subject wellsite. These comparable

sites are all located on land currently covered by bush or in two cases, under hay production. Annual rentals on these eight leases ranged from \$591 per acre to \$700 per acre. The Respondent's last offer for annual rental was \$3,150.00 (\$635 per acre) retroactive to April 26, 1999, based on a per acre rate comparable with other similar leases in the area. The well is shut in and Talisman has no immediate plans for production. The Respondent obtained ownership of this lease since the last rental renegotiation in 1994 and following terms of the April 26, 1994 agreement, has continued to make annual rental payments of \$2,500.00 at the 2000 and 2001 anniversary dates.

DECISION

The Arbitration Panel, having heard all the evidence presented at the hearing, and the arguments made in support, makes the following observations;

1. Exhibit B-4 presented by the Applicant was a Rent Review Arbitration Order, which varied the rental provisions of a surface lease by awarding an annual rental payment of \$ 5,582 on a 6.67 acre lease (\$836 per acre). This amount included an additional two acre strip alienated by the lease location. Considering both the lease area and the additional area, the per acre value for this comparable would be approximately \$643 per acre.
2. The Respondent's figures were based on a per acre value of comparable leases without reference to headings under the Petroleum and Natural Gas Act Section 21 (1) compensation guidelines. The low end of the range of annual rentals (\$591 per acre) presented for comparison by the Respondent represents a rental negotiated in 1994. This figure was discarded as unreflective of 1999 values even though it does represent a wellsite in close proximity to the subject site. The average of the seven remaining comparables presented by the Respondent is \$641 per acre.
3. In determining the amount to be paid for annual lease rentals, the Arbitration Panel is governed by Section 21 (1) of the Petroleum and Natural Gas Act which lists eight categories the Panel may consider in arriving at compensation due to the surface owner. Of these eight categories Section 21 (1) (a) to (h), only one category 21 (1) (b) is clearly related in a direct way to the acreage of the lease. Without any evidentiary information submitted as to how the other seven categories contributed to the final dollar per acre figure, it is difficult to make fair assumptions based on the comparables presented. In the absence of evidence to support the headings under Section 21 (1) of the Petroleum and Natural Gas Act, the Board, has considered the per acre comparables submitted by the parties as evidence.

IT IS HEREBY ORDERED THAT:

1. Pursuant to Section 12 (2) of the Petroleum and Natural Gas Act, the surface lease rental provisions effective April 26, 1994, paid by the Respondent to the Applicant are varied from \$ 2,500.00 per annum to \$ 3,185.00 per annum. The varied rental provisions are

effective from April 26, 2000 and shall be due and payable on the 26th April of each year until agreement of the parties or further order of this Board.

2. The payment of the retroactive increase of \$ 6,370.00 is due and payable as of the date of this order, less any annual payments the Respondent has made to the Applicant pursuant to the existing lease agreement.
3. The Respondent shall within 60 days of this order, provide the Applicant with a single one time payment of \$500.00 representing reimbursement for the Applicant's costs connected with negotiation and attendance at the arbitration hearing.
4. The Respondent shall within 60 days of this order, provide an accounting to the Board of the payments actually made to the Applicant for the payments due on April 26, 2000 and 2001 indicating the amount due and owing to the Applicant.
5. The Respondent will provide to the Applicant and the Mediation and Arbitration Board a copy of all assignments of ownership of the surface lease agreement from the original lessor to the current corporate holder of the surface lease agreement, to clarify the current ownership of this wellsite.
6. Nothing in this Order varies expressly or by implication any of the other terms of the existing lease between Frank Schlichting and Talisman Energy Inc.
7. Nothing in this order is or operates as consent, permit or authorization that by enactment a person is required to obtain in addition to this order.

Dated at the City of Fort St. John, British Columbia, this 31st day of July 2001.

MEDIATION AND ARBITRATION BOARD
UNDER THE
PETROLEUM AND NATURAL GAS ACT

William Wolfe, Member

Frank Breault, Member

Julie Hindbo, Member

File No. 1485
Board Order # 1485-1

February 15, 2008

MEDIATION AND ARBITRATION BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS
ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF NE $\frac{1}{4}$ of Section 5, TWP 110, P.R.D.
and SW $\frac{1}{4}$ of Section 9, TWP 110 P.R.D.

(The "Lands")

BETWEEN:

Diane and Larry Fay

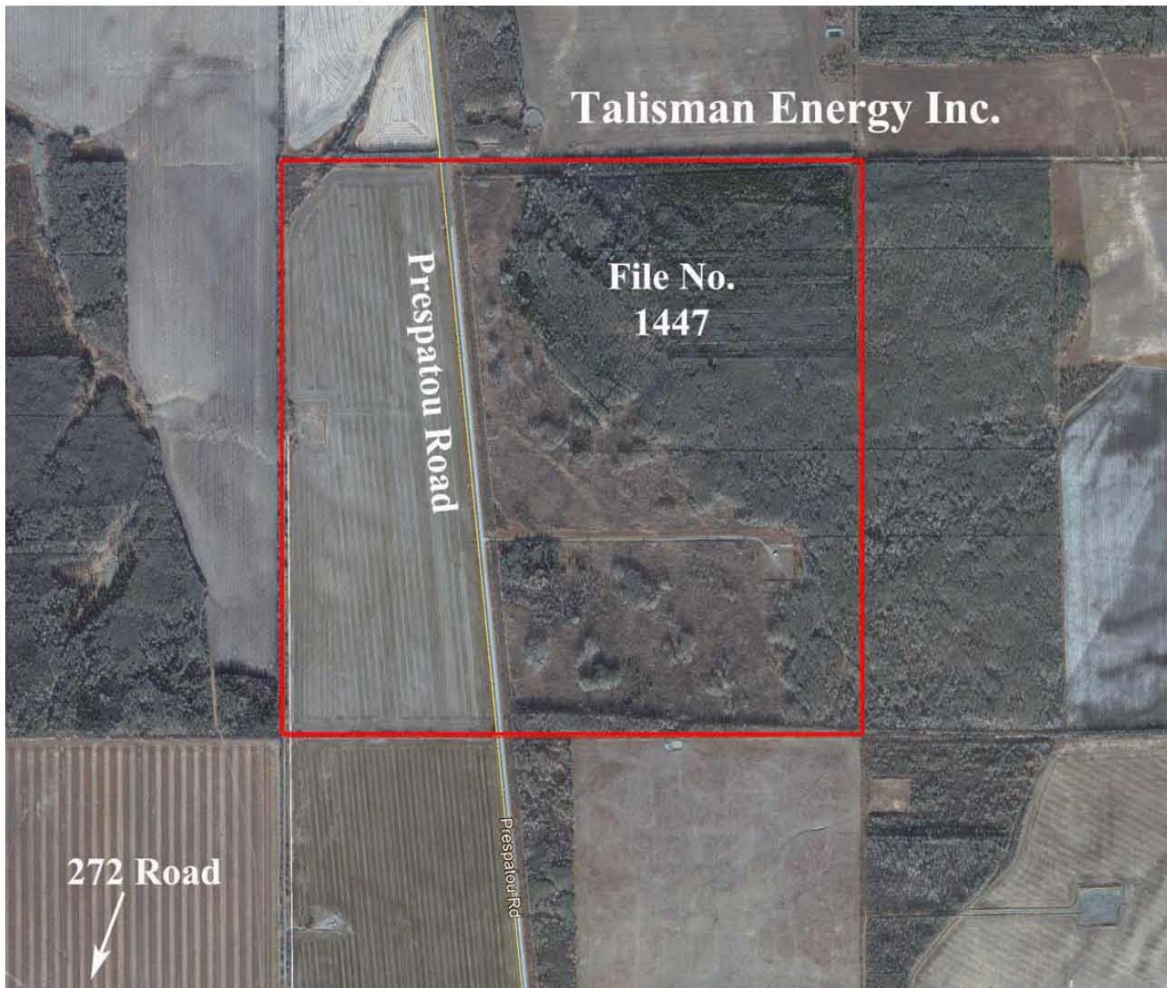
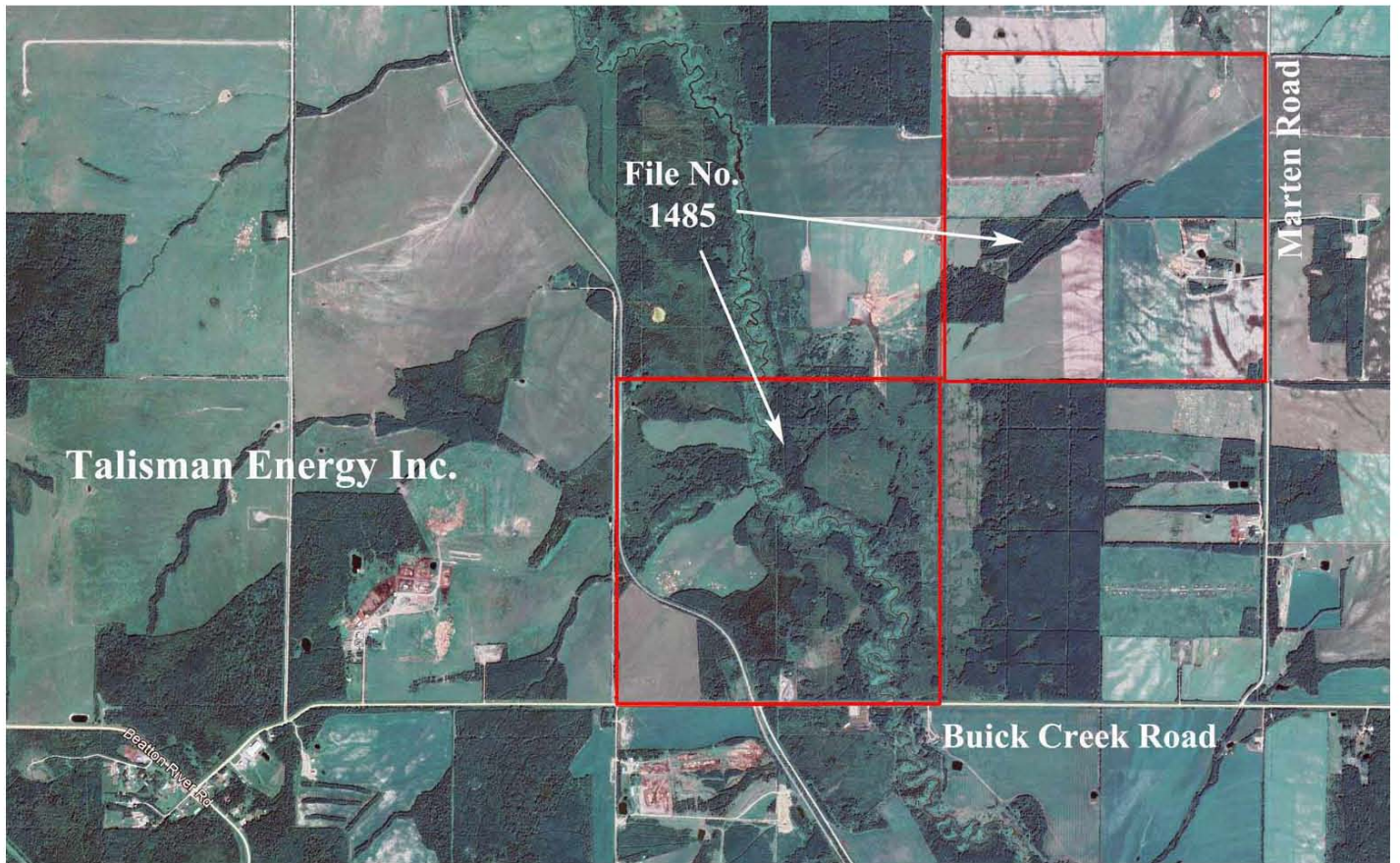
(APPLICANTS)

AND:

Talisman Energy Inc

(RESPONDENT)

BOARD ORDER



INTRODUCTION AND ISSUE

[1] Diane and Larry Fay are the registered owners of the Lands that are the subject of this application. Talisman Energy Inc. (Talisman) owns and operates a pipeline that runs through the Lands.

[2] In September 2004, the Fays applied for arbitration under section 12 of the *Petroleum and Natural Gas Act* (the *PNG Act*) of the rent payable under orders issued by the Mediation and Arbitration Board (MAB) in 1977. The orders were issued in proceedings between a predecessor to Talisman and the then owners of the Lands. The Board declined to schedule the matter for arbitration on the basis that proceedings before the Expropriation Compensation Board (ECB) with respect to the Lands were underway (Board Order No. 388 Interim). In February 2006, the ECB rendered a decision determining the compensation payable (*Talisman Energy Inc. v. Fay* (2006) E.C.B. No. 09/04/264). Talisman registered a statutory right of way in the Land Title Office (LTO) against the Lands in April, 2006.

[3] The Fays ask the Board to schedule the rent review for arbitration. The issue is whether the Board should proceed or whether, in the circumstances, the application is moot.

BACKGROUND

[4] In 1974, the MAB granted right of entry orders with respect to the Lands to Houston Oils Limited (Houston) for the purpose of constructing and operating a pipeline. Houston constructed the pipeline and deposited a plan of pipeline right of way in the LTO in 1974. In 1977, the MAB issued compensation orders for the entry, loss of right or profit, temporary and permanent damage, and nuisance and disturbance, including orders for the payment of annual rent.

[5] In 1999, Houston's interest in the pipeline and pipeline right of way transferred to Talisman. In 2000, the Fays purchased the Lands.

[6] The Fays tried to renegotiate the rental provisions, and in August 2003 delivered a notice to renegotiate under section 11 of the *PNG Act*. Talisman took the position that the pipeline was not a "flow line" over which the MAB had jurisdiction. Talisman commenced proceedings under the *Railway Act* to expropriate a statutory right of way for the existing pipeline. Talisman served the Fays with the required notice, surveyor's affidavit, and appraisal in April 2004.

[7] In May 2004, Talisman filed an application with the ECB for determination of compensation. The Fays asked the ECB to dismiss the application on the grounds that compensation for the Lands was within the jurisdiction of the MAB. In August 2004, the ECB determined that it had jurisdiction.

[8] In September 2004, the Fays applied to MAB for a rent review arbitration. In February 2005, the Board issued an order declining to schedule an arbitration because the ECB proceedings were underway.

[9] In February 2006, the ECB rendered its decision determining the amount of compensation payable by Talisman to the Fays for the expropriation of the statutory right of way over the Lands. Talisman registered the statutory right of way in the LTO in April 2006.

[10] In September 2006, the Fays asked the Board to schedule the rent review for arbitration. The former chair sought submissions from counsel. The parties disagreed as to whether the Board had jurisdiction. In June 2007, the chair concluded the issue of jurisdiction should be determined by way of oral hearing.

[11] I was appointed chair of the Board in July 2007. By letter dated December 6, 2007, I asked counsel to participate in a pre-hearing telephone conference and set out a number of questions. Mr. Cosburn, for Talisman, provided an email response dated December 11, 2007. Mr. Carter, for the Fays, and Mr. Cosburn attended a telephone conference on February 11, 2008 and spoke to whether the Board should proceed with this application.

SUBMISSIONS

[12] Mr. Carter submits that the ECB cannot make an order affecting MAB's jurisdiction. He submits there is an existing MAB order and that Talisman is doing an "end run" around the MAB's jurisdiction. He says the pipeline in issue is a "flow line", that MAB had jurisdiction to issue the entry order and order compensation in the first place, and continues to have jurisdiction. He says Houston initially invoked the jurisdiction of the MAB and Talisman cannot now "cherry pick" the forum they would rather be in.

[13] Mr. Cosburn submits that as a result of the expropriation there is no longer a live issue before MAB. He submits the ECB made a decision with respect to its own jurisdiction and that the issue of compensation is *res judicata*. He says that regardless of whether or not the pipeline was ever a "flow line", Talisman came to the conclusion that it was not a "flow line" and that expropriation of a statutory right of way was appropriate. He submits the application to the ECB was not to "cherry pick" the forum but because Talisman had determined that the pipeline was not a "flow line". He says if the Fays disagreed with the ECB's decision taking jurisdiction, their remedy was to seek judicial review of that decision.

DECISION

[14] Having considered all of counsel's submissions, I have concluded that a rent review and the threshold question of whether the board has jurisdiction are moot.

[15] Registration of the statutory right of way conferred on Talisman an estate or interest in the Lands that they did not have when the original MAB order for the payment of rent was made. Compensation for the interest expropriated to Talisman has been determined. The interest was expropriated pursuant to the provisions of the *Pipeline Act* and *Railway Act*, and compensation determined by a Board that determined it had the jurisdiction.

[16] Mr. Carter argues that the ECB could not determine the MAB's jurisdiction, but neither can the MAB determine the ECB's jurisdiction. The ECB determined it had jurisdiction and it is not up to the MAB to determine the correctness of that decision. While the ECB could not determine the MAB's jurisdiction, it could and did determine its own jurisdiction. If the Fays disagreed with that determination, the appropriate remedy was judicial review. They did not seek judicial review and the expropriation has been completed.

[17] More importantly, Talisman no longer occupies and uses the Lands under the right of entry orders and its use and occupation of the Lands is no longer subject to the payment of rent. The underlying foundation for the MAB's earlier decisions has changed. A review of the rent payable under those orders, therefore, can have no practical effect. Talisman has a registered interest in the lands for which compensation has been awarded. Events have occurred which have changed the original relationship between the parties and their respective interests in the Lands and associated rights.

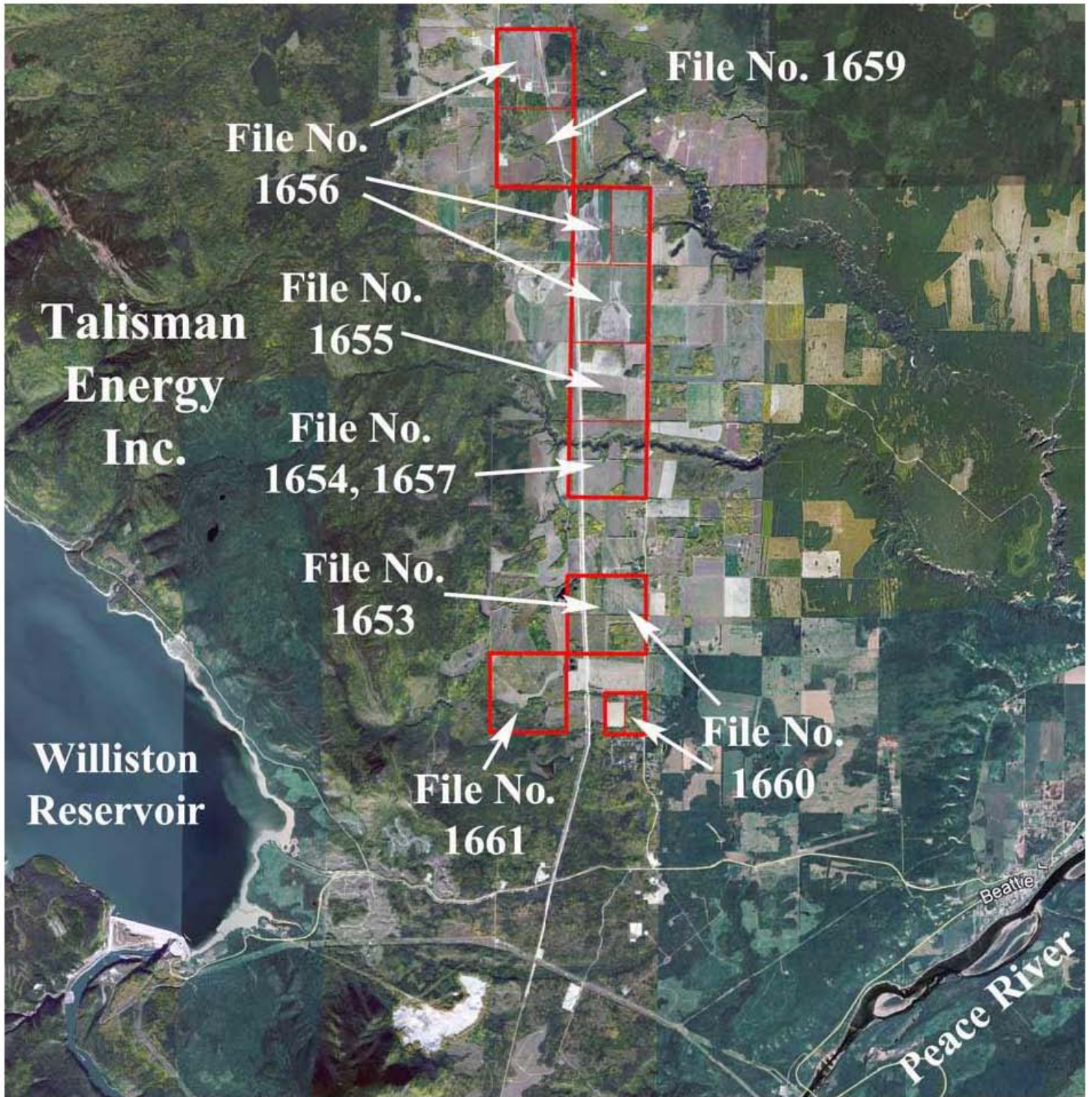
[18] There is no practical purpose in continuing with the application for rent review in the circumstances. I dismiss the application as moot.

Dated: February 15, 2008

FOR THE BOARD



Cheryl Vickers
Chair



File No. 1653
Board Order # 1653-1

September 13, 2010

MEDIATION AND ARBITRATION BOARD

**IN THE MATTER OF THE PETROLEUM AND NATURAL GAS
ACT, R.S.B.C., C. 361 AS AMENDED**

**AND IN THE MATTER OF
NW ¼ of District Lot 1215, Peace River District
Parcel A (R32032) of District Lot 1220, Peace River District;**

(The "Lands")

BETWEEN:

Talisman Energy Inc.

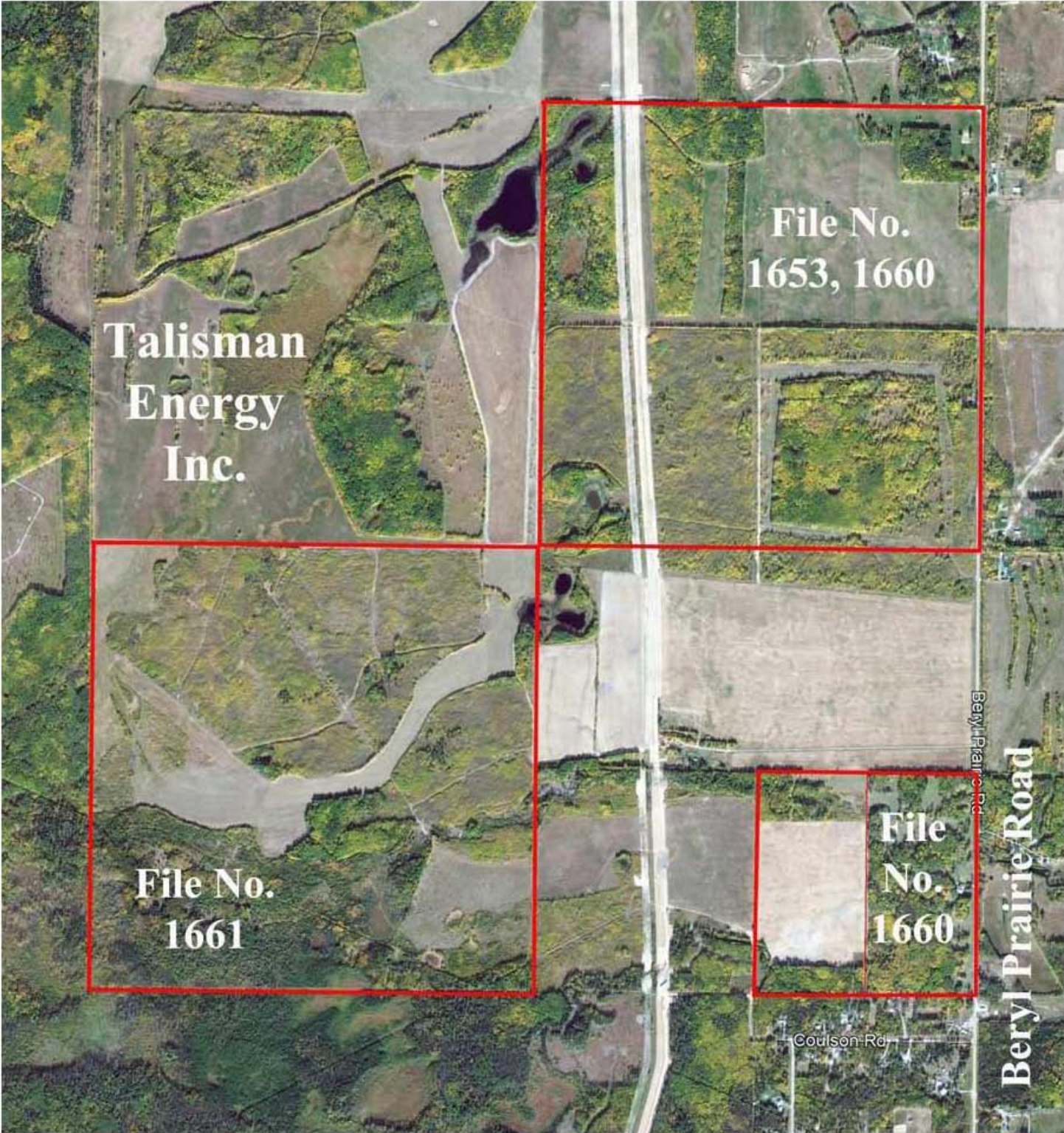
(APPLICANT)

AND:

Eagle-Eye Mountain Ltd.

(RESPONDENT)

BOARD ORDER



**Talisman
Energy
Inc.**

**File No.
1653, 1660**

**File No.
1661**

**File
No.
1660**

Beryl Prairie Rd

Beryl Prairie Road

Coulson Rd

Heard by telephone conference together with MAB files 1654 to 1661: September 3 and 10, 2010

Mediator: Cheryl Vickers

Attended by: Gary Richardson, Jennifer Findlay, Sacha Plotnikow (Sept 3 only), Lance DeLaRonde (Sept 10 only), for the Applicant; Dave Core, Deborah McVicar (Sept 10 only), Pamela Gunderson (Sept 3 only), Derek Beam, James Vince (Sept 10 only), Terry Webster (Sept 10 only), and Doug Summer (Sept 10 only) for the Respondent and the Respondents in MAB files 1654 to 1661

Introduction

[1] The Applicant, Talisman Energy Inc. ("Talisman") has applied to the Board for mediation and arbitration respecting right of entry to the Lands owned by the Respondent, Eagle-Eye Mountain Ltd., as well as to the Lands owned by the Respondents in MAB applications 1654 through 1661 (collectively the "Respondent Landowners" or "Landowners"), heard at the same time. In each application, Talisman seeks access to the respective Lands for the purpose of surveying, and for conducting the required soil sampling and archaeological assessments in advance of making an application to the Oil and Gas Commission ("OGC") for the construction of a water pipeline. The proposed water pipeline is to transport water to be used in the production of natural gas in a process known as "fracking".

[2] The applications are not about whether the proposed water pipeline should be built, or whether it is either necessary or beneficial. It is only about whether Talisman requires land for a purpose set out in section 16 of the *Petroleum and Natural Gas Act (PNGA)*, and if so, whether I should exercise my discretion to make an entry order pursuant to section 19 of the *PNGA* permitting Talisman to enter and use the Lands for the required purpose. During my discussions with the parties, the Landowners expressed contradictory views about the proposed pipeline. One of the Landowners submitted Talisman does not need the water pipeline, that it can continue to truck water for fracking, and that the purpose of the pipeline is only to save Talisman money. Others of the Landowners expressed support for the proposed pipeline submitting it will lessen traffic on the local roads. The merits of the pipeline itself are not a matter within the jurisdiction of the Board. The OGC must decide whether to grant an application to construct a water pipeline used in conjunction with the oil and gas industry, and address any operational, environmental, safety or other regulatory concerns with the proposed project.

[3] The Landowners submit the applications are premature. They submit that Talisman has not engaged in good faith negotiation, and that they are prepared to negotiate access with Talisman, but not in the context of an application to the Board. The Landowners also take issue with the jurisdiction of the Board to issue an entry order.

Issues

[4] Does the Board have jurisdiction in Talisman's applications?

[5] If so, should I grant the right of entry order requested by Talisman?

Jurisdiction

[6] The Landowners question the jurisdiction of the Board on the basis that the proposed pipeline is a water pipeline, as opposed to a pipeline to transport petroleum or natural gas.

[7] Section 16 of the *Petroleum and Natural Gas Act (PNGA)* provides a person may apply to the Board for mediation and arbitration if the person "requires land to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir or for a connected or incidental purpose, and an owner of the land refuses to grant a surface lease satisfactory to that person authorizing entry, occupation or use for that purpose."

[8] Talisman says it requires access to the Lands to conduct a survey, soil sampling and archaeological assessments in advance of making an application to the OGC for a permit to build and operate the pipeline. The purpose of the pipeline is to carry water to the production fields to be used for fraccing. Fraccing is a process whereby water is used to fracture the rock in order to extract the natural gas. Fraccing is, therefore, a connected purpose to the production of natural gas.

[9] The jurisdictional issue for the Board, at this time, is whether entry for surveying, soil sampling and archaeological assessment is a "connected or incidental purpose" within the meaning of the *PNGA*. Talisman cannot construct the proposed water pipeline without a permit from the OGC. The OGC requires that an application be accompanied by a survey, soil tests and an archaeological assessment. Talisman must access the Lands in order to complete the required survey work, soil tests and archaeological assessments. The Landowners have not given Talisman permission to enter their land for this purpose. Because the surveying, soil testing and archaeological assessments is work that is required by the OGC before an application to build the water pipeline for fraccing can be considered, this work is also a connected or incidental purpose to the production

of natural gas. The purpose for which Talisman requires access to the Lands, therefore, is a purpose that triggers its ability to make an application to the Board under section 16(1) of the *PNGA* and the Board has jurisdiction.

Right of Entry

[10] Section 18(3) of the *PNGA* provides:

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[25] In British Columbia, most landowners do not own subsurface resources. Their ownership of land is not absolute but limited to rights to the subsurface retained by the Crown. The Crown, in turn, may grant a person or company rights to explore for or develop subsurface resources. If a person or company requires surface access to private lands to explore for, or develop a subsurface resource, the person or company requiring surface access may not enter without the agreement of the landowner or authorization of the Board. The Board may authorize entry if access is needed and terms of access are not agreed. In other words, if access is required, a landowner may either agree to compensation and terms of access, or the Board may make an order authorizing access and setting out terms. The courts have acknowledged the compulsory aspect of this situation and that landowners lose the right to decide whether there will be oil and gas activity on their land (*Dome Petroleum Ltd. v. Juell*, [1982] B.C.J. 1510 (Q.L.)(S.C.)). An application to the Board does not compromise a landowner's negotiating position; the law has already compromised it. In the circumstances, landowners should focus on negotiating the best terms of access possible to compensate them for loss and that will address their legitimate concerns about stewardship of the land.

[26] While companies should always endeavour to negotiate terms of access and compensation with landowners or their representatives in advance of making an application to the Board, if terms of access are not agreed, they may seek the assistance of the Board. The Board's job is then to try and facilitate an agreement that addresses the needs and concerns of all parties within the context of the law. An application to the Board does not preclude the parties from reaching their own agreement without the Board's assistance or intervention.

[27] The information before me indicates that Talisman has been attempting to negotiate entry for the purpose of surveying, soil testing and archeological assessment with the Landowners since early May. Upon receipt of CAEPLA's letter in early June, it sought to convene a conference call to discuss while seeking confirmation of CAEPLA's authority to negotiate. Despite being asked by CAEPLA to commit to paying fees and costs, Talisman did not receive confirmation from the Landowners of CAEPLA's representation until late July, almost three months after initial contact with the Landowners and more than two months after being told CAEPLA would be involved.

[28] Talisman served CAEPLA, as the Landowners' representative, with the applications to the Board in late July, filing the applications with the Board itself in early August. Following initiation of the applications to the Board, Talisman and CAEPLA continued to correspond, although somewhat at cross-purposes prior to

the Board convening its first conference call with the parties. CAEPLA wanted to negotiate a comprehensive agreement for the pipeline right of way; Talisman only sought an agreement for the limited purpose of surveying, soil testing and archaeological assessments given that the project could change as a result of the initial work or as a result of the OGC's process.

[29] I am satisfied Talisman tried to negotiate the Landowners' agreement for the survey work both individually and with CAEPLA before filing the applications to the Board. Some of the Landowners initially agreed to the survey work but then withdrew. Time passed without discussions occurring with CAEPLA despite requests for a conference call. CAEPLA sought payment of fees, but without formal confirmation that it had the authority to negotiate on the Landowners behalf. Given the amount of time that had passed following Talisman's initial contact with the Landowners and initial communications with CAEPLA, I do not think it was unreasonable for Talisman to commence the applications to the Board to seek assistance in negotiating an agreement. When Talisman filed its applications, the Landowners had not agreed to terms of access to the Lands, and it was not unreasonable, in the circumstances, to seek the Board's assistance in negotiating that agreement.

[30] An application to the Board does not preclude the parties from coming to agreement. The Board received the applications on August 3. It convened its first teleconference with the parties on September 3. The parties had a month before the Board commenced telephone discussions to continue negotiations. In fact, they did continue negotiations but negotiations broke down. Despite a telephone conference between the parties on August 11 and ensuing correspondence, no agreement was reached. By the time the Board convened its process, the Landowners were no longer willing to negotiate unless the applications were withdrawn. Talisman considered the Landowners' request to withdraw the applications but declined to do so.

[31] It is possible that if Talisman had acceded to the Landowners' request to withdraw the applications, agreement for access to the Lands to complete the surveying, soil sampling and archaeological assessments would have quickly followed. It is equally possible that, given negotiations to date had not focused on the immediate need for limited access and the differing views amongst the Landowners themselves over the merits of the proposed pipeline, negotiations would have continued to be unsuccessful. We will never know.

[32] I am satisfied that the parties had the opportunity to agree to terms of access both before and after the applications to the Board were made. In the context of these proceedings I invited the Landowners to express their concerns about the proposed access and suggest terms that would address their concerns. They were not willing to do so. I offered to adjourn the Board's proceedings to allow the parties to agree on terms of access, but the Landowners maintained that they would not negotiate with Talisman unless the applications were withdrawn.

[33] I am satisfied that Talisman requires access to the Lands for a purpose set out in section 16 of the *PNGA*. I am further satisfied that Talisman tried to negotiate terms of access with the Landowners individually and with CAEPLA on the Landowners' behalf without success before making their applications to the Board. I am satisfied that Talisman continued to try to negotiate terms of access with CAEPLA on the Landowners' behalf following the applications to the Board again without success. I am satisfied there are time pressures to Talisman's need for access and that it is beneficial for the required work to be done before freeze-up. I am satisfied that time is running out in that regard. If I decline to make the entry order, I am not convinced that the parties will be able to negotiate terms of access in a timely way so that the work can be completed before freeze-up.

[34] In all of the circumstances, I am inclined to exercise my discretion to grant the right of entry. It is not without a great sense of sadness that I do so. I had hoped that the parties would come to terms. I regret that they have not. I accept that the Landowners have stewardship responsibilities with respect to the Lands and that, in any access for subsurface development, an effort should be made to address their legitimate concerns. I am frustrated that the Landowners were not willing to participate in mediation before me, were not willing to let me facilitate discussion in an effort at having the parties craft an agreement for the limited purpose of surveying, soil testing, and archaeological assessment that would be satisfactory to all parties. I hope that if Talisman proceeds with an application to the OGC for a permit to construct the water pipeline, that the parties will engage with each other and the OGC to address any operational, environmental, safety or other regulatory concerns. In the event a permit to construct the pipeline is granted, I encourage the parties to engage with each other in a timely manner to negotiate terms of access for the construction of the pipeline itself. Hopefully, further applications to the Board will not be necessary.

[35] As the Landowners declined to engage in negotiations before me, declined to express their specific concerns about the access for surveying, soil sampling and archaeological assessments, and declined to suggest terms of access that would address their concerns, I have made my best efforts to set out terms of access that will minimize impact to the land and livestock and permit consultation between the parties to ensure the safety of persons and livestock. There is no point to further mediation and further mediation is refused.

[36] I make the following Order pursuant to section 18(2) and section 19 of the *Petroleum and Natural Gas Act*.

Order

The Mediation and Arbitration Board orders:

1. Upon payment of the amounts set out in paragraphs 3 and 4, the Applicant and its contractors shall have the right of entry to and access across the Lands for a period of sixty (60) days from the date of this Order for the purpose of surveying, soil testing, and archaeological assessment, as required by the OGC in advance of making an application for a permit to construct the proposed water pipeline.
2. Entry to the Lands for the purpose of surveying, soil testing, and archaeological assessment shall be subject to the terms set out in Appendix "A".
3. The Applicant shall deposit with the Mediation and Arbitration Board security of \$2,500.00 payable to the Minister of Finance. All or part of the security deposit may be returned to the Applicant or paid to the Respondent upon the agreement of the parties or as ordered by the Board.
4. The Applicant shall pay to the Respondent \$2,000.00 as partial payment for compensation payable for entry to and use of the Lands for the specified purpose, and to acknowledge the compulsory aspect of the entry.
5. The Applicant shall serve the Respondent with a copy of this Order prior to entry onto the Lands. Service may be accomplished by personal service of a copy of the Order or by e-mail to CAEPLA.
6. The Applicant shall pay the Respondent's costs of this application. If the parties cannot agree on the amount of costs payable, the Board retains jurisdiction to determine the amount.
7. Nothing in this order operates as consent, permission, approval or authorization of matters within the jurisdiction of the Oil and Gas Commission.

Dated: September 13, 2010

FOR THE BOARD



Cheryl Vickers
Chair

APPENDIX A

Right of entry to the Lands for surveying, soil testing, and archaeological assessment required for the purpose of making an application to the Oil and Gas Commission is subject to the following general terms:

- Talisman and/or its contractors shall at all times conduct their work in a safe and responsible manner, which without limitation, shall include: driving with due care and attention when approaching the Lands, including being mindful of speed, the presence of children playing, and the minimization of dust, and taking care in the presence of livestock to avoid disturbance or harm to the livestock
- Talisman shall advise the Respondent landowner immediately of any situation that may require the landowner's attention
- The Respondent landowner shall advise Talisman of any concerns with respect to the activity of Talisman and/or its contractors and of any damage incurred as a result of the entry
- Talisman shall be responsible for any damage caused by the entry
- Contractors of Talisman entering the Lands pursuant to this Order will be accompanied by a representative of Talisman

Surveying of the Lands is subject to the following additional terms:

- Focus will conduct the survey. Focus will give the Respondent landowner at least 24 hours notice prior to entry. The Respondent landowner may contact the surveyors, or the attending representative of Talisman, with any questions or concerns during the survey
- Surveyors will consult the Respondent landowner with respect to their method of access over the Lands, and may only use motorized vehicles with the permission of the Respondent landowner
- Surveyors will minimize the number of survey stakes used. Any stakes required can be removed after the soils assessment and archaeological assessment have been completed
- Surveyors will only cut trees or branches in areas where growth is too dense for sight lines.
- Any trees or branches cut down will be disposed of in a manner acceptable to the Respondent landowner

Soil sampling is subject to the following additional terms:

- Roy Northern will conduct the soil testing. Roy Northern will give the Respondent landowner at least 24 hour notice prior to entry. The Respondent landowner may contact Roy Northern, or the attending representative of Talisman, with any questions or concerns during the soil sampling

- Personnel will consult the Respondent landowner with respect to method of access across the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- Soil samples will be taken in accordance with the requirements of the Oil and Gas Commission
- The Respondent landowner will be provided with a copy of the soil assessment report

Archaeological assessment is subject to the following additional terms:

- Landsong will conduct the archaeological assessment. Landsong will give the Respondent Landowner at least 24 hours notice prior to entry. The Respondent landowner may contact Landsong, or the attending representative of Talisman, with any questions or concerns during the assessment.
- The assessment will take place at or near the same time as the soil assessment.
- Personnel will consult the Respondent landowner with respect to method of access over the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- The bulk of the assessment will be completed with an archaeologist walking along the proposed access. Ground disturbance (shovel testing) will only occur if the archaeologist sees areas of "high potential".

File No. 1654
Board Order # 1654-1

September 13, 2010

MEDIATION AND ARBITRATION BOARD

**IN THE MATTER OF THE PETROLEUM AND NATURAL GAS
ACT, R.S.B.C., C. 361 AS AMENDED**

**AND IN THE MATTER OF
SW ¼ of District Lot 1227, Peace River District**

(The "Lands")

BETWEEN:

Talisman Energy Inc.

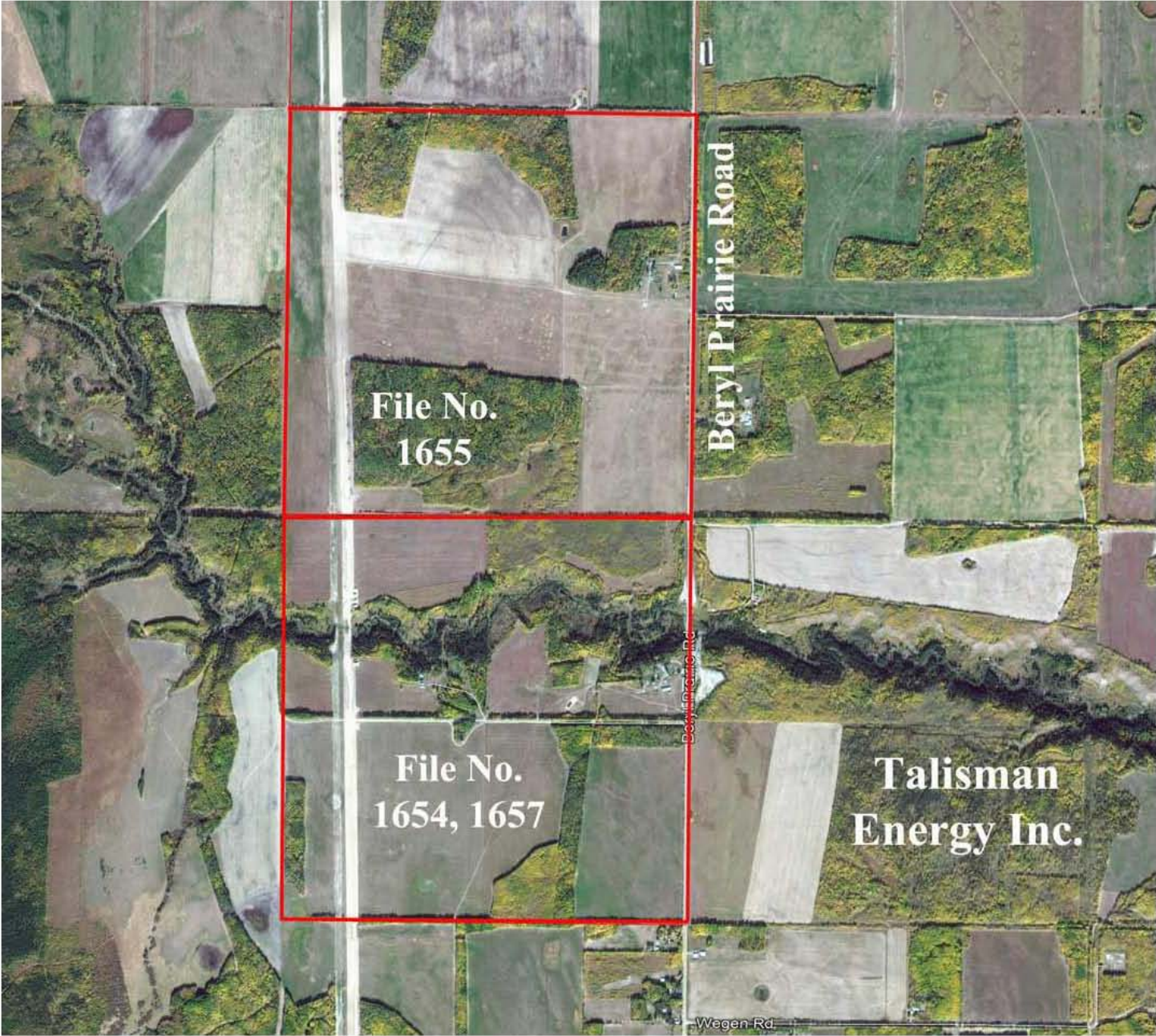
(APPLICANT)

AND:

**David Allan Vrim Gunderson
and Pamela Gail Gunderson**

(RESPONDENTS)

BOARD ORDER



**File No.
1655**

**File No.
1654, 1657**

Beryl Prairie Road

**Talisman
Energy Inc.**

Wegen Rd

Heard by telephone
conference together with MAB
files 1653 and 1655 to 1661:
Mediator: Cheryl Vickers

Attended by: Gary Richardson, Jennifer Findlay, Sacha Plotnikow (Sept 3 only), Lance DeLaRonde (Sept 10 only), for the Applicant; Dave Core, Deborah McVicar (Sept 10 only), Pamela Gunderson (Sept 3 only), Derek Beam, James Vince (Sept 10 only), Terry Webster (Sept 10 only), and Doug Summer (Sept 10 only) for the Respondent and the Respondents in MAB files 1653 and 1655 to 1661

Introduction

[1] The Applicant, Talisman Energy Inc. ("Talisman") has applied to the Board for mediation and arbitration respecting right of entry to the Lands owned by the Respondents, Mr. and Mrs. Gunderson, as well as to the Lands owned by the Respondents in MAB applications 1653 and 1655 through 1661 (collectively the "Respondent Landowners" or "Landowners"), heard at the same time. In each application, Talisman seeks access to the respective Lands for the purpose of surveying, and for conducting the required soil sampling and archaeological assessments in advance of making an application to the Oil and Gas Commission ("OGC") for the construction of a water pipeline. The proposed water pipeline is to transport water to be used in the production of natural gas in a process known as "fracking".

[2] The applications are not about whether the proposed water pipeline should be built, or whether it is either necessary or beneficial. It is only about whether Talisman requires land for a purpose set out in section 16 of the *Petroleum and Natural Gas Act (PNGA)*, and if so, whether I should exercise my discretion to make an entry order pursuant to section 19 of the *PNGA* permitting Talisman to enter and use the Lands for the required purpose. During my discussions with the parties, the Landowners expressed contradictory views about the proposed pipeline. One of the Landowners submitted Talisman does not need the water pipeline, that it can continue to truck water for fracking, and that the purpose of the pipeline is only to save Talisman money. Others of the Landowners expressed support for the proposed pipeline submitting it will lessen traffic on the local roads. The merits of the pipeline itself are not a matter within the jurisdiction of the Board. The OGC must decide whether to grant an application to construct a water pipeline used in conjunction with the oil and gas industry, and address any operational, environmental, safety or other regulatory concerns with the proposed project.

[3] The Landowners submit the applications are premature. They submit that Talisman has not engaged in good faith negotiation, and that they are prepared to negotiate access with Talisman, but not in the context of an application to the Board. The Landowners also take issue with the jurisdiction of the Board to issue an entry order.

Issues

[4] Does the Board have jurisdiction in Talisman's applications?

[5] If so, should I grant the right of entry order requested by Talisman?

Jurisdiction

[6] The Landowners question the jurisdiction of the Board on the basis that the proposed pipeline is a water pipeline, as opposed to a pipeline to transport petroleum or natural gas.

[7] Section 16 of the *Petroleum and Natural Gas Act (PNGA)* provides a person may apply to the Board for mediation and arbitration if the person "requires land to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir or for a connected or incidental purpose, and an owner of the land refuses to grant a surface lease satisfactory to that person authorizing entry, occupation or use for that purpose."

[8] Talisman says it requires access to the Lands to conduct a survey, soil sampling and archaeological assessments in advance of making an application to the OGC for a permit to build and operate the pipeline. The purpose of the pipeline is to carry water to the production fields to be used for fraccing. Fraccing is a process whereby water is used to fracture the rock in order to extract the natural gas. Fraccing is, therefore, a connected purpose to the production of natural gas.

[9] The jurisdictional issue for the Board, at this time, is whether entry for surveying, soil sampling and archaeological assessment is a "connected or incidental purpose" within the meaning of the *PNGA*. Talisman cannot construct the proposed water pipeline without a permit from the OGC. The OGC requires that an application be accompanied by a survey, soil tests and an archaeological assessment. Talisman must access the Lands in order to complete the required survey work, soil tests and archaeological assessments. The Landowners have not given Talisman permission to enter their land for this purpose. Because the surveying, soil testing and archaeological assessments is work that is required by the OGC before an application to build the water pipeline for fraccing can be considered, this work is also a connected or incidental purpose to the production

of natural gas. The purpose for which Talisman requires access to the Lands, therefore, is a purpose that triggers its ability to make an application to the Board under section 16(1) of the *PNGA* and the Board has jurisdiction.

Right of Entry

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[26] While companies should always endeavour to negotiate terms of access and compensation with landowners or their representatives in advance of making an application to the Board, if terms of access are not agreed, they may seek the assistance of the Board. The Board's job is then to try and facilitate an agreement that addresses the needs and concerns of all parties within the context of the law. An application to the Board does not preclude the parties from reaching their own agreement without the Board's assistance or intervention.

[27] The information before me indicates that Talisman has been attempting to negotiate entry for the purpose of surveying, soil testing and archeological assessment with the Landowners since early May. Upon receipt of CAEPLA's letter in early June, it sought to convene a conference call to discuss while seeking confirmation of CAEPLA's authority to negotiate. Despite being asked by CAEPLA to commit to paying fees and costs, Talisman did not receive confirmation from the Landowners of CAEPLA's representation until late July, almost three months after initial contact with the Landowners and more than two months after being told CAEPLA would be involved.

[28] Talisman served CAEPLA, as the Landowners' representative, with the applications to the Board in late July, filing the applications with the Board itself in early August. Following initiation of the applications to the Board, Talisman and CAEPLA continued to correspond, although somewhat at cross-purposes prior to

the Board convening its first conference call with the parties. CAEPLA wanted to negotiate a comprehensive agreement for the pipeline right of way; Talisman only sought an agreement for the limited purpose of surveying, soil testing and archaeological assessments given that the project could change as a result of the initial work or as a result of the OGC's process.

[29] I am satisfied Talisman tried to negotiate the Landowners' agreement for the survey work both individually and with CAEPLA before filing the applications to the Board. Some of the Landowners initially agreed to the survey work but then withdrew. Time passed without discussions occurring with CAEPLA despite requests for a conference call. CAEPLA sought payment of fees, but without formal confirmation that it had the authority to negotiate on the Landowners behalf. Given the amount of time that had passed following Talisman's initial contact with the Landowners and initial communications with CAEPLA, I do not think it was unreasonable for Talisman to commence the applications to the Board to seek assistance in negotiating an agreement. When Talisman filed its applications, the Landowners had not agreed to terms of access to the Lands, and it was not unreasonable, in the circumstances, to seek the Board's assistance in negotiating that agreement.

[30] An application to the Board does not preclude the parties from coming to agreement. The Board received the applications on August 3. It convened its first teleconference with the parties on September 3. The parties had a month before the Board commenced telephone discussions to continue negotiations. In fact, they did continue negotiations but negotiations broke down. Despite a telephone conference between the parties on August 11 and ensuing correspondence, no agreement was reached. By the time the Board convened its process, the Landowners were no longer willing to negotiate unless the applications were withdrawn. Talisman considered the Landowners' request to withdraw the applications but declined to do so.

[31] It is possible that if Talisman had acceded to the Landowners' request to withdraw the applications, agreement for access to the Lands to complete the surveying, soil sampling and archaeological assessments would have quickly followed. It is equally possible that, given negotiations to date had not focused on the immediate need for limited access and the differing views amongst the Landowners themselves over the merits of the proposed pipeline, negotiations would have continued to be unsuccessful. We will never know.

[32] I am satisfied that the parties had the opportunity to agree to terms of access both before and after the applications to the Board were made. In the context of these proceedings I invited the Landowners to express their concerns about the proposed access and suggest terms that would address their concerns. They were not willing to do so. I offered to adjourn the Board's proceedings to allow the parties to agree on terms of access, but the Landowners maintained that they would not negotiate with Talisman unless the applications were withdrawn.

[33] I am satisfied that Talisman requires access to the Lands for a purpose set out in section 16 of the *PNGA*. I am further satisfied that Talisman tried to negotiate terms of access with the Landowners individually and with CAEPLA on the Landowners' behalf without success before making their applications to the Board. I am satisfied that Talisman continued to try to negotiate terms of access with CAEPLA on the Landowners' behalf following the applications to the Board again without success. I am satisfied there are time pressures to Talisman's need for access and that it is beneficial for the required work to be done before freeze-up. I am satisfied that time is running out in that regard. If I decline to make the entry order, I am not convinced that the parties will be able to negotiate terms of access in a timely way so that the work can be completed before freeze-up.

[34] In all of the circumstances, I am inclined to exercise my discretion to grant the right of entry. It is not without a great sense of sadness that I do so. I had hoped that the parties would come to terms. I regret that they have not. I accept that the Landowners have stewardship responsibilities with respect to the Lands and that, in any access for subsurface development, an effort should be made to address their legitimate concerns. I am frustrated that the Landowners were not willing to participate in mediation before me, were not willing to let me facilitate discussion in an effort at having the parties craft an agreement for the limited purpose of surveying, soil testing, and archaeological assessment that would be satisfactory to all parties. I hope that if Talisman proceeds with an application to the OGC for a permit to construct the water pipeline, that the parties will engage with each other and the OGC to address any operational, environmental, safety or other regulatory concerns. In the event a permit to construct the pipeline is granted, I encourage the parties to engage with each other in a timely manner to negotiate terms of access for the construction of the pipeline itself. Hopefully, further applications to the Board will not be necessary.

[35] As the Landowners declined to engage in negotiations before me, declined to express their specific concerns about the access for surveying, soil sampling and archaeological assessments, and declined to suggest terms of access that would address their concerns, I have made my best efforts to set out terms of access that will minimize impact to the land and livestock and permit consultation between the parties to ensure the safety of persons and livestock. There is no point to further mediation and further mediation is refused.

[36] I make the following Order pursuant to section 18(2) and section 19 of the *Petroleum and Natural Gas Act*.

Order

The Mediation and Arbitration Board orders:

1. Upon payment of the amounts set out in paragraphs 3 and 4, the Applicant and its contractors shall have the right of entry to and access across the Lands for a period of sixty (60) days from the date of this Order for the purpose of surveying, soil testing, and archaeological assessment, as required by the OGC in advance of making an application for a permit to construct the proposed water pipeline.
2. Entry to the Lands for the purpose of surveying, soil testing, and archaeological assessment shall be subject to the terms set out in Appendix "A".
3. The Applicant shall deposit with the Mediation and Arbitration Board security of \$2,500.00 payable to the Minister of Finance. All or part of the security deposit may be returned to the Applicant or paid to the Respondent upon the agreement of the parties or as ordered by the Board.
4. The Applicant shall pay to the Respondent \$2,000.00 as partial payment for compensation payable for entry to and use of the Lands for the specified purpose, and to acknowledge the compulsory aspect of the entry.
5. The Applicant shall serve the Respondent with a copy of this Order prior to entry onto the Lands. Service may be accomplished by personal service of a copy of the Order or by e-mail to CAEPLA.
6. The Applicant shall pay the Respondent's costs of this application. If the parties cannot agree on the amount of costs payable, the Board retains jurisdiction to determine the amount.
7. Nothing in this order operates as consent, permission, approval or authorization of matters within the jurisdiction of the Oil and Gas Commission.

Dated: September 13, 2010

FOR THE BOARD



Cheryl Vickers
Chair

APPENDIX A

Right of entry to the Lands for surveying, soil testing, and archaeological assessment required for the purpose of making an application to the Oil and Gas Commission is subject to the following general terms:

- Talisman and/or its contractors shall at all times conduct their work in a safe and responsible manner, which without limitation, shall include: driving with due care and attention when approaching the Lands, including being mindful of speed, the presence of children playing, and the minimization of dust, and taking care in the presence of livestock to avoid disturbance or harm to the livestock
- Talisman shall advise the Respondent landowner immediately of any situation that may require the landowner's attention
- The Respondent landowner shall advise Talisman of any concerns with respect to the activity of Talisman and/or its contractors and of any damage incurred as a result of the entry
- Talisman shall be responsible for any damage caused by the entry
- Contractors of Talisman entering the Lands pursuant to this Order will be accompanied by a representative of Talisman

Surveying of the Lands is subject to the following additional terms:

- Focus will conduct the survey. Focus will give the Respondent landowner at least 24 hours notice prior to entry. The Respondent landowner may contact the surveyors, or the attending representative of Talisman, with any questions or concerns during the survey
- Surveyors will consult the Respondent landowner with respect to their method of access over the Lands, and may only use motorized vehicles with the permission of the Respondent landowner
- Surveyors will minimize the number of survey stakes used. Any stakes required can be removed after the soils assessment and archaeological assessment have been completed
- Surveyors will only cut trees or branches in areas where growth is too dense for sight lines.
- Any trees or branches cut down will be disposed of in a manner acceptable to the Respondent landowner

Soil sampling is subject to the following additional terms:

- Roy Northern will conduct the soil testing. Roy Northern will give the Respondent landowner at least 24 hour notice prior to entry. The Respondent landowner may contact Roy Northern, or the attending representative of Talisman, with any questions or concerns during the soil sampling

- Personnel will consult the Respondent landowner with respect to method of access across the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- Soil samples will be taken in accordance with the requirements of the Oil and Gas Commission
- The Respondent landowner will be provided with a copy of the soil assessment report

Archaeological assessment is subject to the following additional terms:

- Landsong will conduct the archaeological assessment. Landsong will give the Respondent Landowner at least 24 hours notice prior to entry. The Respondent landowner may contact Landsong, or the attending representative of Talisman, with any questions or concerns during the assessment.
- The assessment will take place at or near the same time as the soil assessment.
- Personnel will consult the Respondent landowner with respect to method of access over the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- The bulk of the assessment will be completed with an archaeologist walking along the proposed access. Ground disturbance (shovel testing) will only occur if the archaeologist sees areas of "high potential".

File No. 1655
Board Order # 1655-1

September 13, 2010

MEDIATION AND ARBITRATION BOARD

**IN THE MATTER OF THE PETROLEUM AND NATURAL GAS
ACT, R.S.B.C., C. 361 AS AMENDED**

**AND IN THE MATTER OF
Parcel A (R28068) District Lot 1232 Peace River District,
except Plan 18398**

(The "Lands")

BETWEEN:

Talisman Energy Inc.

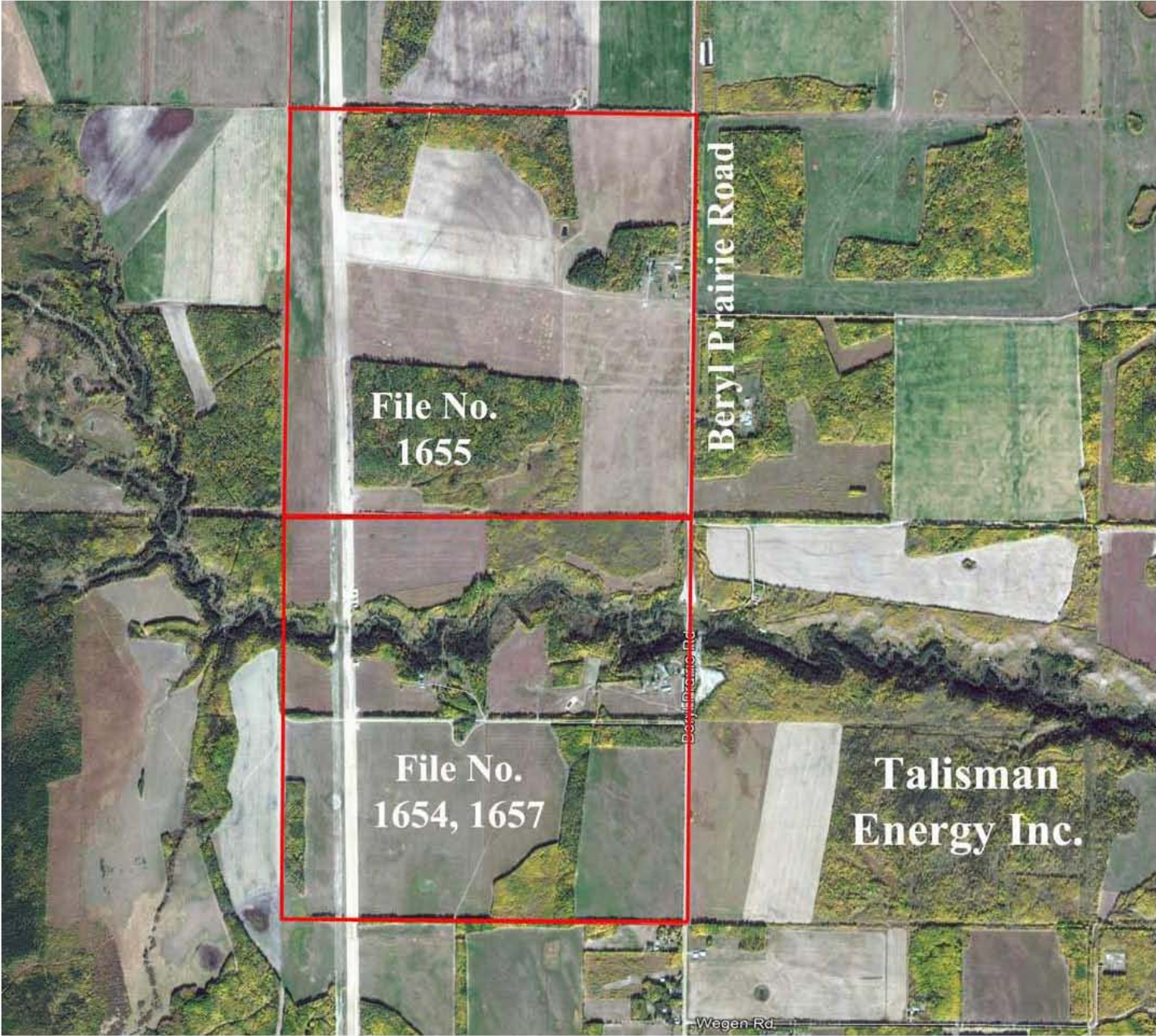
(APPLICANT)

AND:

**Robert Allen Webster
and Terry Kathleen Webster**

(RESPONDENTS)

BOARD ORDER



**File No.
1655**

**File No.
1654, 1657**

Beryl Prairie Road

**Talisman
Energy Inc.**

Wegen Rd

Heard by telephone conference together with MAB files 1653 to 1654 and 1656 to 1661: September 3 and 10, 2010

Mediator: Cheryl Vickers

Attended by: Gary Richardson, Jennifer Findlay, Sacha Plotnikow (Sept 3 only), Lance DeLaRonde (Sept 10 only), for the Applicant; Dave Core, Deborah McVicar (Sept 10 only), Pamela Gunderson (Sept 3 only), Derek Beam, James Vince (Sept 10 only), Terry Webster (Sept 10 only), and Doug Summer (Sept 10 only) for the Respondent and the Respondents in MAB files 1653 to 1654 and 1656 to 1661

Introduction

[1] The Applicant, Talisman Energy Inc. ("Talisman") has applied to the Board for mediation and arbitration respecting right of entry to the Lands owned by the Respondents, Mr. and Mrs. Webster, as well as to the Lands owned by the Respondents in MAB applications 1653, 1654, and 1656 through 1661 (collectively the "Respondent Landowners" or "Landowners"), heard at the same time. In each application, Talisman seeks access to the respective Lands for the purpose of surveying, and for conducting the required soil sampling and archaeological assessments in advance of making an application to the Oil and Gas Commission ("OGC") for the construction of a water pipeline. The proposed water pipeline is to transport water to be used in the production of natural gas in a process known as "fracking".

[2] The applications are not about whether the proposed water pipeline should be built, or whether it is either necessary or beneficial. It is only about whether Talisman requires land for a purpose set out in section 16 of the *Petroleum and Natural Gas Act (PNGA)*, and if so, whether I should exercise my discretion to make an entry order pursuant to section 19 of the *PNGA* permitting Talisman to enter and use the Lands for the required purpose. During my discussions with the parties, the Landowners expressed contradictory views about the proposed pipeline. One of the Landowners submitted Talisman does not need the water pipeline, that it can continue to truck water for fracking, and that the purpose of the pipeline is only to save Talisman money. Others of the Landowners expressed support for the proposed pipeline submitting it will lessen traffic on the local roads. The merits of the pipeline itself are not a matter within the jurisdiction of the Board. The OGC must decide whether to grant an application to construct a water pipeline used in conjunction with the oil and gas industry, and address

any operational, environmental, safety or other regulatory concerns with the proposed project.

[3] The Landowners submit the applications are premature. They submit that Talisman has not engaged in good faith negotiation, and that they are prepared to negotiate access with Talisman, but not in the context of an application to the Board. The Landowners also take issue with the jurisdiction of the Board to issue an entry order.

Issues

[4] Does the Board have jurisdiction in Talisman's applications?

[5] If so, should I grant the right of entry order requested by Talisman?

Jurisdiction

[6] The Landowners question the jurisdiction of the Board on the basis that the proposed pipeline is a water pipeline, as opposed to a pipeline to transport petroleum or natural gas.

[7] Section 16 of the *Petroleum and Natural Gas Act (PNGA)* provides a person may apply to the Board for mediation and arbitration if the person "requires land to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir or for a connected or incidental purpose, and an owner of the land refuses to grant a surface lease satisfactory to that person authorizing entry, occupation or use for that purpose."

[8] Talisman says it requires access to the Lands to conduct a survey, soil sampling and archaeological assessments in advance of making an application to the OGC for a permit to build and operate the pipeline. The purpose of the pipeline is to carry water to the production fields to be used for fracking. Fracking is a process whereby water is used to fracture the rock in order to extract the natural gas. Fracking is, therefore, a connected purpose to the production of natural gas.

[9] The jurisdictional issue for the Board, at this time, is whether entry for surveying, soil sampling and archaeological assessment is a "connected or incidental purpose" within the meaning of the *PNGA*. Talisman cannot construct the proposed water pipeline without a permit from the OGC. The OGC requires that an application be accompanied by a survey, soil tests and an archaeological assessment. Talisman must access the Lands in order to complete the required survey work, soil tests and archaeological assessments. The Landowners have not given Talisman permission to enter their land for this purpose. Because the surveying, soil testing and archaeological assessments is work that is required by

the OGC before an application to build the water pipeline for fracking can be considered, this work is also a connected or incidental purpose to the production of natural gas. The purpose for which Talisman requires access to the Lands, therefore, is a purpose that triggers its ability to make an application to the Board under section 16(1) of the *PNGA* and the Board has jurisdiction.

Right of Entry

[10] Section 18(3) of the *PNGA* provides:

If an application is made under section 16(1), and if the mediator believes, as a result of a mediation hearing, that the applicant should be permitted to enter, occupy or use the land, the mediator may make an order under section 19.

[11] Section 19 provides that the mediator may make an order permitting, subject to terms the mediator may specify, an applicant under section 16 to enter, occupy or use land for a purpose stated in that section.

[12] I am satisfied that Talisman requires entry to the Lands for a purpose stated in section 16. The question remains, however, whether I should exercise my discretion to grant the right of entry order at this time.

[13] The Landowners submit they have not refused entry. They say they have been and remain willing to negotiate entry with Talisman but that Talisman has not engaged them in negotiation. They submit the applications to the Board ought not to have been made in advance of meaningful negotiations. Talisman, on the other hand, says they held discussions with individual Landowners as far back as May 2010, that permission to enter has not been forthcoming, and that time to conduct the necessary work before freeze-up is running out.

[14] Talisman says it initially contacted individual Landowners in early May 2010 to provide information about the proposed project and seek permission to survey. Talisman says that, initially, some of the Landowners agreed to access for the surveying and other work, but later withdrew agreement. Talisman's record of events indicates that following initial contact with individual Landowners in the first half of May, one of the Landowners indicated Mr. Core of CAEPLA would be in touch on the Landowners' behalf. Talisman received a letter from CAEPLA on June 7, 2010 requesting Talisman agree to a budget for costs and expenses of Landowners but without any documentation from the Landowners confirming CAEPLA's representation. Talisman responded on June 22, 2010 requesting authorization from the Landowners confirming CAEPLA's representation, proposing a conference call to discuss, and requesting permission for survey work. CAEPLA emailed Talisman on June 28 requesting advance payment of fees prior to proceeding with negotiations. Talisman responded reiterating the need for Landowner authorization of CAEPLA's representation and again requesting a conference call and requesting permission for survey work.

Talisman says they did not receive written authorizations from the Landowners of CAEPLA's representation until July 21, 2010 and that most of the authorizations received by Talisman had been signed in May 2010.

[15] Talisman served CAEPLA on behalf of the Landowners with its applications to the Board on July 23, 2010.

[16] On July 29, 2010, following receipt of Talisman's applications to the Board, Mr. Core of CAEPLA wrote to the Board submitting it was premature to apply for right of entry without having previously consulted or negotiated with the Landowners' authorized spokespeople. Mr. Core said, "Before landowners will agree to entry of their lands, for surveying purposes, they want to address access and damage issues." The Board responded that it had not yet received Talisman's applications and that, once the applications had been received, there would be opportunity to discuss the Landowner's concerns through the Board's processes.

[17] On July 30, 2010, CAEPLA copied the Board with a letter of the same date to Talisman expressing that Talisman had not met with the Beryl Prairie Land Committee (BPLC) or CAEPLA to discuss terms of access for surveyors or terms of damage mitigation as a result of surveying, and setting out landowner concerns. While some of the concerns articulated in the letter of July 30, 2010 are relevant to access for surveying, most of the concerns raised in the letter of July 30, 2010 relate to the construction of the water pipeline itself, for which access to the Lands is not yet requested or required.

[18] The Board received and acknowledged Talisman's applications on August 3, 2010.

[19] Communication between Talisman and CAEPLA continued in the first two weeks of August and the parties met by teleconference on August 11, 2010. Minutes of that teleconference prepared by Talisman indicated that all parties expressed a desire to work together to build a positive relationship. The minutes note Talisman's initial contact with the Landowners in May, and the concern about winter approaching and the increasing necessity to complete the survey and other work before then. The minutes note the Landowners' concern over their stewardship responsibilities, the imposition on them and impact to the land of the proposed project, their desire to negotiate a comprehensive agreement encompassing all aspects of the pipeline project before granting survey permission, and their feeling that the project was being pushed on them through the involvement of the Board. The Landowners questioned the need for a survey as the proposed route for the water pipeline followed an existing right of way. Talisman indicated the proposed route represented an ideal route but that it would be adjusted as necessary based on information obtained from a survey and that the archaeological work also needed to be done. Some negotiation ensued around funding for expenses and commitment by Talisman to pay

damages and reasonable compensation. The parties agreed to another teleconference the following week.

[20] Further correspondence between the parties ensued, however negotiations broke down essentially over the involvement of the Board. Talisman expected the negotiations would continue in parallel with the Board's process. The Landowners indicated they were not willing to negotiate with Talisman as long as Talisman proceeded with the Board's process.

[21] The Board convened a teleconference with the parties on September 3, 2010. The Landowners maintained their position that the Board's application was premature, that Talisman had not negotiated with the Landowner's legitimate representative in an effort to reach agreement. They maintained they were not opposed to the proposed project but wanted to be treated with respect and wanted the opportunity to engage in negotiations without the coercion of the Board as they would in any other business arrangement. They asked Talisman to withdraw their applications and expressed a likelihood that an agreement could be reached. Talisman's representatives indicated they would consider withdrawing the applications but needed to discuss with the project's executive and seek instructions. A telephone conference between the parties without the Board was scheduled for early the following week. The Board adjourned its process pending further advice from the parties.

[22] On September 7, 2010 Talisman indicated it was not willing to withdraw the applications. The Landowners indicated they were not willing to negotiate under the circumstances. The Board reconvened its process by teleconference on September 10, 2010.

[23] The Landowners maintained their position that no meaningful negotiation had occurred between Talisman and CAEPLA, the Landowners' authorized representative, that any consultations with the Landowners individually were not valid once notification of CAEPLA's representation was given. The Landowners feel that the Board's involvement compromises their ability to negotiate on a level playing field with the company. They reiterated that they were willing to negotiate, but not before the Board. They questioned Talisman's need to do survey work. Talisman maintained they also wanted to negotiate with the Landowners but that time was running out before freeze-up. Talisman reiterated the necessity for a survey, soil testing and archaeological assessment as a requirement of the OGC process. The Board invited the Landowners to express their concerns about the proposed access for surveying, soil testing and archaeological assessments and to propose terms of access that would address their concerns. The Landowners were not willing to discuss their concerns with the Board. The Board offered to adjourn proceedings to allow the parties the opportunity to reach an agreement. The Landowners reiterated that unless the applications were withdrawn, they were not willing to negotiate. Talisman, in turn, expressed concern that if the applications were withdrawn, and agreement

was not reached, there would be insufficient time to reapply to the Board before freeze-up.

[24] I was advised that freeze-up could happen anytime from about the middle of October. I was further advised that while the work could continue after the ground froze, it would require more time on the Lands, be more intrusive, and cause greater inconvenience.

[25] In British Columbia, most landowners do not own subsurface resources. Their ownership of land is not absolute but limited to rights to the subsurface retained by the Crown. The Crown, in turn, may grant a person or company rights to explore for or develop subsurface resources. If a person or company requires surface access to private lands to explore for, or develop a subsurface resource, the person or company requiring surface access may not enter without the agreement of the landowner or authorization of the Board. The Board may authorize entry if access is needed and terms of access are not agreed. In other words, if access is required, a landowner may either agree to compensation and terms of access, or the Board may make an order authorizing access and setting out terms. The courts have acknowledged the compulsory aspect of this situation and that landowners lose the right to decide whether there will be oil and gas activity on their land (*Dome Petroleum Ltd. v. Juell*, [1982] B.C.J. 1510 (Q.L.)(S.C.)). An application to the Board does not compromise a landowner's negotiating position; the law has already compromised it. In the circumstances, landowners should focus on negotiating the best terms of access possible to compensate them for loss and that will address their legitimate concerns about stewardship of the land.

[26] While companies should always endeavour to negotiate terms of access and compensation with landowners or their representatives in advance of making an application to the Board, if terms of access are not agreed, they may seek the assistance of the Board. The Board's job is then to try and facilitate an agreement that addresses the needs and concerns of all parties within the context of the law. An application to the Board does not preclude the parties from reaching their own agreement without the Board's assistance or intervention.

[27] The information before me indicates that Talisman has been attempting to negotiate entry for the purpose of surveying, soil testing and archeological assessment with the Landowners since early May. Upon receipt of CAEPLA's letter in early June, it sought to convene a conference call to discuss while seeking confirmation of CAEPLA's authority to negotiate. Despite being asked by CAEPLA to commit to paying fees and costs, Talisman did not receive confirmation from the Landowners of CAEPLA's representation until late July, almost three months after initial contact with the Landowners and more than two months after being told CAEPLA would be involved.

[28] Talisman served CAEPLA, as the Landowners' representative, with the applications to the Board in late July, filing the applications with the Board itself in early August. Following initiation of the applications to the Board, Talisman and CAEPLA continued to correspond, although somewhat at cross-purposes prior to the Board convening its first conference call with the parties. CAEPLA wanted to negotiate a comprehensive agreement for the pipeline right of way; Talisman only sought an agreement for the limited purpose of surveying, soil testing and archaeological assessments given that the project could change as a result of the initial work or as a result of the OGC's process.

[29] I am satisfied Talisman tried to negotiate the Landowners' agreement for the survey work both individually and with CAEPLA before filing the applications to the Board. Some of the Landowners initially agreed to the survey work but then withdrew. Time passed without discussions occurring with CAEPLA despite requests for a conference call. CAEPLA sought payment of fees, but without formal confirmation that it had the authority to negotiate on the Landowners behalf. Given the amount of time that had passed following Talisman's initial contact with the Landowners and initial communications with CAEPLA, I do not think it was unreasonable for Talisman to commence the applications to the Board to seek assistance in negotiating an agreement. When Talisman filed its applications, the Landowners had not agreed to terms of access to the Lands, and it was not unreasonable, in the circumstances, to seek the Board's assistance in negotiating that agreement.

[30] An application to the Board does not preclude the parties from coming to agreement. The Board received the applications on August 3. It convened its first teleconference with the parties on September 3. The parties had a month before the Board commenced telephone discussions to continue negotiations. In fact, they did continue negotiations but negotiations broke down. Despite a telephone conference between the parties on August 11 and ensuing correspondence, no agreement was reached. By the time the Board convened its process, the Landowners were no longer willing to negotiate unless the applications were withdrawn. Talisman considered the Landowners' request to withdraw the applications but declined to do so.

[31] It is possible that if Talisman had acceded to the Landowners' request to withdraw the applications, agreement for access to the Lands to complete the surveying, soil sampling and archaeological assessments would have quickly followed. It is equally possible that, given negotiations to date had not focused on the immediate need for limited access and the differing views amongst the Landowners themselves over the merits of the proposed pipeline, negotiations would have continued to be unsuccessful. We will never know.

[32] I am satisfied that the parties had the opportunity to agree to terms of access both before and after the applications to the Board were made. In the context of these proceedings I invited the Landowners to express their concerns about the proposed access and suggest terms that would address their concerns.

They were not willing to do so. I offered to adjourn the Board's proceedings to allow the parties to agree on terms of access, but the Landowners maintained that they would not negotiate with Talisman unless the applications were withdrawn.

[33] I am satisfied that Talisman requires access to the Lands for a purpose set out in section 16 of the *PNGA*. I am further satisfied that Talisman tried to negotiate terms of access with the Landowners individually and with CAEPLA on the Landowners' behalf without success before making their applications to the Board. I am satisfied that Talisman continued to try to negotiate terms of access with CAEPLA on the Landowners' behalf following the applications to the Board again without success. I am satisfied there are time pressures to Talisman's need for access and that it is beneficial for the required work to be done before freeze-up. I am satisfied that time is running out in that regard. If I decline to make the entry order, I am not convinced that the parties will be able to negotiate terms of access in a timely way so that the work can be completed before freeze-up.

[34] In all of the circumstances, I am inclined to exercise my discretion to grant the right of entry. It is not without a great sense of sadness that I do so. I had hoped that the parties would come to terms. I regret that they have not. I accept that the Landowners have stewardship responsibilities with respect to the Lands and that, in any access for subsurface development, an effort should be made to address their legitimate concerns. I am frustrated that the Landowners were not willing to participate in mediation before me, were not willing to let me facilitate discussion in an effort at having the parties craft an agreement for the limited purpose of surveying, soil testing, and archaeological assessment that would be satisfactory to all parties. I hope that if Talisman proceeds with an application to the OGC for a permit to construct the water pipeline, that the parties will engage with each other and the OGC to address any operational, environmental, safety or other regulatory concerns. In the event a permit to construct the pipeline is granted, I encourage the parties to engage with each other in a timely manner to negotiate terms of access for the construction of the pipeline itself. Hopefully, further applications to the Board will not be necessary.

[35] As the Landowners declined to engage in negotiations before me, declined to express their specific concerns about the access for surveying, soil sampling and archaeological assessments, and declined to suggest terms of access that would address their concerns, I have made my best efforts to set out terms of access that will minimize impact to the land and livestock and permit consultation between the parties to ensure the safety of persons and livestock. There is no point to further mediation and further mediation is refused.

[36] I make the following Order pursuant to section 18(2) and section 19 of the *Petroleum and Natural Gas Act*.

Order

The Mediation and Arbitration Board orders:

1. Upon payment of the amounts set out in paragraphs 3 and 4, the Applicant and its contractors shall have the right of entry to and access across the Lands for a period of sixty (60) days from the date of this Order for the purpose of surveying, soil testing, and archaeological assessment, as required by the OGC in advance of making an application for a permit to construct the proposed water pipeline.
2. Entry to the Lands for the purpose of surveying, soil testing, and archaeological assessment shall be subject to the terms set out in Appendix "A".
3. The Applicant shall deposit with the Mediation and Arbitration Board security of \$2,500.00 payable to the Minister of Finance. All or part of the security deposit may be returned to the Applicant or paid to the Respondent upon the agreement of the parties or as ordered by the Board.
4. The Applicant shall pay to the Respondent \$2,000.00 as partial payment for compensation payable for entry to and use of the Lands for the specified purpose, and to acknowledge the compulsory aspect of the entry.
5. The Applicant shall serve the Respondent with a copy of this Order prior to entry onto the Lands. Service may be accomplished by personal service of a copy of the Order or by e-mail to CAEPLA.
6. The Applicant shall pay the Respondent's costs of this application. If the parties cannot agree on the amount of costs payable, the Board retains jurisdiction to determine the amount.
7. Nothing in this order operates as consent, permission, approval or authorization of matters within the jurisdiction of the Oil and Gas Commission.

Dated: September 13, 2010

FOR THE BOARD



Cheryl Vickers
Chair

APPENDIX A

Right of entry to the Lands for surveying, soil testing, and archaeological assessment required for the purpose of making an application to the Oil and Gas Commission is subject to the following general terms:

- Talisman and/or its contractors shall at all times conduct their work in a safe and responsible manner, which without limitation, shall include: driving with due care and attention when approaching the Lands, including being mindful of speed, the presence of children playing, and the minimization of dust, and taking care in the presence of livestock to avoid disturbance or harm to the livestock
- Talisman shall advise the Respondent landowner immediately of any situation that may require the landowner's attention
- The Respondent landowner shall advise Talisman of any concerns with respect to the activity of Talisman and/or its contractors and of any damage incurred as a result of the entry
- Talisman shall be responsible for any damage caused by the entry
- Contractors of Talisman entering the Lands pursuant to this Order will be accompanied by a representative of Talisman

Surveying of the Lands is subject to the following additional terms:

- Focus will conduct the survey. Focus will give the Respondent landowner at least 24 hours notice prior to entry. The Respondent landowner may contact the surveyors, or the attending representative of Talisman, with any questions or concerns during the survey
- Surveyors will consult the Respondent landowner with respect to their method of access over the Lands, and may only use motorized vehicles with the permission of the Respondent landowner
- Surveyors will minimize the number of survey stakes used. Any stakes required can be removed after the soils assessment and archaeological assessment have been completed
- Surveyors will only cut trees or branches in areas where growth is too dense for sight lines.
- Any trees or branches cut down will be disposed of in a manner acceptable to the Respondent landowner

Soil sampling is subject to the following additional terms:

- Roy Northern will conduct the soil testing. Roy Northern will give the Respondent landowner at least 24 hour notice prior to entry. The Respondent landowner may contact Roy Northern, or the attending representative of Talisman, with any questions or concerns during the soil sampling

- Personnel will consult the Respondent landowner with respect to method of access across the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- Soil samples will be taken in accordance with the requirements of the Oil and Gas Commission
- The Respondent landowner will be provided with a copy of the soil assessment report

Archaeological assessment is subject to the following additional terms:

- Landsong will conduct the archaeological assessment. Landsong will give the Respondent Landowner at least 24 hours notice prior to entry. The Respondent landowner may contact Landsong, or the attending representative of Talisman, with any questions or concerns during the assessment.
- The assessment will take place at or near the same time as the soil assessment.
- Personnel will consult the Respondent landowner with respect to method of access over the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- The bulk of the assessment will be completed with an archaeologist walking along the proposed access. Ground disturbance (shovel testing) will only occur if the archaeologist sees areas of "high potential".

File No. 1656
Board Order # 1656-1

September 13, 2010

MEDIATION AND ARBITRATION BOARD

**IN THE MATTER OF THE PETROLEUM AND NATURAL GAS
ACT, R.S.B.C., C. 361 AS AMENDED**

**AND IN THE MATTER OF
Block A District Lot 1255 Peace River District
except the most westerly 60 metres in parallel width thereof
The West ½ of District Lot 1244 Peace River District
Parcel A (P1961) of District Lot 1239 Peace River District**

(The "Lands")

BETWEEN:

Talisman Energy Inc.

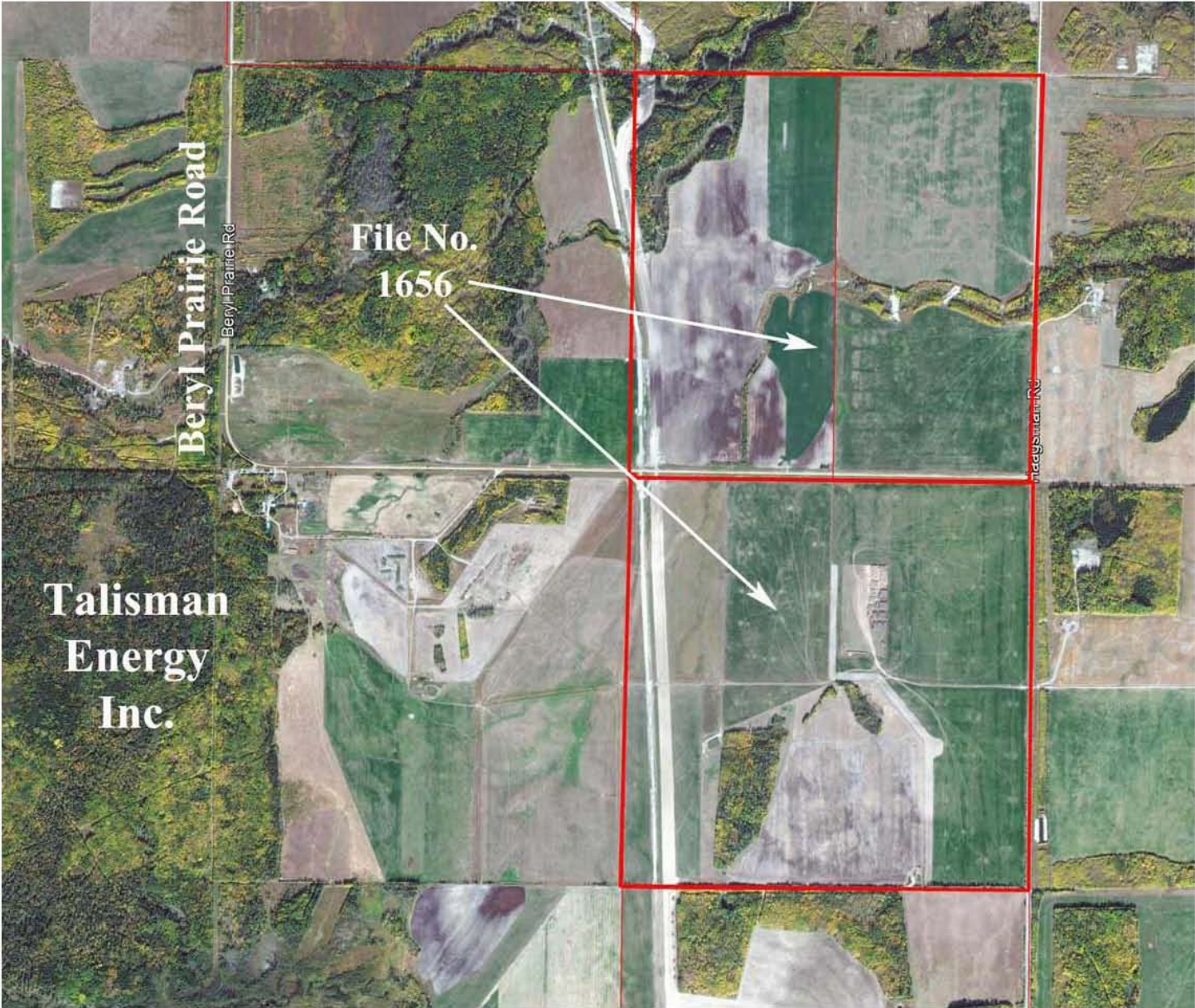
(APPLICANT)

AND:

Ridge View Ranch Ltd.

(RESPONDENT)

BOARD ORDER





**File No.
1656**

Talisman Energy Inc.

**File No.
1659**

Beryl Prairie Road

Beryl Prairie Rd

Heard by telephone conference together with MAB files 1653 to 1656 and 1657 to 1661: September 3 and 10, 2010

Mediator: Cheryl Vickers

Attended by: Gary Richardson, Jennifer Findlay, Sacha Plotnikow (Sept 3 only), Lance DeLaRonde (Sept 10 only), for the Applicant; Dave Core, Deborah McVicar (Sept 10 only), Pamela Gunderson (Sept 3 only), Derek Beam, James Vince (Sept 10 only), Terry Webster (Sept 10 only), and Doug Summer (Sept 10 only) for the Respondent and the Respondents in MAB files 1653 to 1655 and 1657 to 1661

Introduction

[1] The Applicant, Talisman Energy Inc. ("Talisman") has applied to the Board for mediation and arbitration respecting right of entry to the Lands owned by the Respondent, Ridge View Ranch Ltd., as well as to the Lands owned by the Respondents in MAB applications 1653 to 1655 and 1657 through 1661 (collectively the "Respondent Landowners" or "Landowners"), heard at the same time. In each application, Talisman seeks access to the respective Lands for the purpose of surveying, and for conducting the required soil sampling and archaeological assessments in advance of making an application to the Oil and Gas Commission ("OGC") for the construction of a water pipeline. The proposed water pipeline is to transport water to be used in the production of natural gas in a process known as "fracking".

[2] The applications are not about whether the proposed water pipeline should be built, or whether it is either necessary or beneficial. It is only about whether Talisman requires land for a purpose set out in section 16 of the *Petroleum and Natural Gas Act (PNGA)*, and if so, whether I should exercise my discretion to make an entry order pursuant to section 19 of the *PNGA* permitting Talisman to enter and use the Lands for the required purpose. During my discussions with the parties, the Landowners expressed contradictory views about the proposed pipeline. One of the Landowners submitted Talisman does not need the water pipeline, that it can continue to truck water for fracking, and that the purpose of the pipeline is only to save Talisman money. Others of the Landowners expressed support for the proposed pipeline submitting it will lessen traffic on the local roads. The merits of the pipeline itself are not a matter within the jurisdiction of the Board. The OGC must decide whether to grant an application to construct a water pipeline used in conjunction with the oil and gas industry, and address

any operational, environmental, safety or other regulatory concerns with the proposed project.

[3] The Landowners submit the applications are premature. They submit that Talisman has not engaged in good faith negotiation, and that they are prepared to negotiate access with Talisman, but not in the context of an application to the Board. The Landowners also take issue with the jurisdiction of the Board to issue an entry order.

Issues

[4] Does the Board have jurisdiction in Talisman's applications?

[5] If so, should I grant the right of entry order requested by Talisman?

Jurisdiction

[6] The Landowners question the jurisdiction of the Board on the basis that the proposed pipeline is a water pipeline, as opposed to a pipeline to transport petroleum or natural gas.

[7] Section 16 of the *Petroleum and Natural Gas Act (PNGA)* provides a person may apply to the Board for mediation and arbitration if the person "requires land to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir or for a connected or incidental purpose, and an owner of the land refuses to grant a surface lease satisfactory to that person authorizing entry, occupation or use for that purpose."

[8] Talisman says it requires access to the Lands to conduct a survey, soil sampling and archaeological assessments in advance of making an application to the OGC for a permit to build and operate the pipeline. The purpose of the pipeline is to carry water to the production fields to be used for fraccing. Fraccing is a process whereby water is used to fracture the rock in order to extract the natural gas. Fraccing is, therefore, a connected purpose to the production of natural gas.

[9] The jurisdictional issue for the Board, at this time, is whether entry for surveying, soil sampling and archaeological assessment is a "connected or incidental purpose" within the meaning of the *PNGA*. Talisman cannot construct the proposed water pipeline without a permit from the OGC. The OGC requires that an application be accompanied by a survey, soil tests and an archaeological assessment. Talisman must access the Lands in order to complete the required survey work, soil tests and archaeological assessments. The Landowners have not given Talisman permission to enter their land for this purpose. Because the surveying, soil testing and archaeological assessments is work that is required by

the OGC before an application to build the water pipeline for fracking can be considered, this work is also a connected or incidental purpose to the production of natural gas. The purpose for which Talisman requires access to the Lands, therefore, is a purpose that triggers its ability to make an application to the Board under section 16(1) of the *PNGA* and the Board has jurisdiction.

Right of Entry

[10] Section 18(3) of the *PNGA* provides:

If an application is made under section 16(1), and if the mediator believes, as a result of a mediation hearing, that the applicant should be permitted to enter, occupy or use the land, the mediator may make an order under section 19.

[11] Section 19 provides that the mediator may make an order permitting, subject to terms the mediator may specify, an applicant under section 16 to enter, occupy or use land for a purpose stated in that section.

[12] I am satisfied that Talisman requires entry to the Lands for a purpose stated in section 16. The question remains, however, whether I should exercise my discretion to grant the right of entry order at this time.

[13] The Landowners submit they have not refused entry. They say they have been and remain willing to negotiate entry with Talisman but that Talisman has not engaged them in negotiation. They submit the applications to the Board ought not to have been made in advance of meaningful negotiations. Talisman, on the other hand, says they held discussions with individual Landowners as far back as May 2010, that permission to enter has not been forthcoming, and that time to conduct the necessary work before freeze-up is running out.

[14] Talisman says it initially contacted individual Landowners in early May 2010 to provide information about the proposed project and seek permission to survey. Talisman says that, initially, some of the Landowners agreed to access for the surveying and other work, but later withdrew agreement. Talisman's record of events indicates that following initial contact with individual Landowners in the first half of May, one of the Landowners indicated Mr. Core of CAEPLA would be in touch on the Landowners' behalf. Talisman received a letter from CAEPLA on June 7, 2010 requesting Talisman agree to a budget for costs and expenses of Landowners but without any documentation from the Landowners confirming CAEPLA's representation. Talisman responded on June 22, 2010 requesting authorization from the Landowners confirming CAEPLA's representation, proposing a conference call to discuss, and requesting permission for survey work. CAEPLA emailed Talisman on June 28 requesting advance payment of fees prior to proceeding with negotiations. Talisman responded reiterating the need for Landowner authorization of CAEPLA's representation and again requesting a conference call and requesting permission for survey work.

Talisman says they did not receive written authorizations from the Landowners of CAEPLA's representation until July 21, 2010 and that most of the authorizations received by Talisman had been signed in May 2010.

[15] Talisman served CAEPLA on behalf of the Landowners with its applications to the Board on July 23, 2010.

[16] On July 29, 2010, following receipt of Talisman's applications to the Board, Mr. Core of CAEPLA wrote to the Board submitting it was premature to apply for right of entry without having previously consulted or negotiated with the Landowners' authorized spokespeople. Mr. Core said, "Before landowners will agree to entry of their lands, for surveying purposes, they want to address access and damage issues." The Board responded that it had not yet received Talisman's applications and that, once the applications had been received, there would be opportunity to discuss the Landowner's concerns through the Board's processes.

[17] On July 30, 2010, CAEPLA copied the Board with a letter of the same date to Talisman expressing that Talisman had not met with the Beryl Prairie Land Committee (BPLC) or CAEPLA to discuss terms of access for surveyors or terms of damage mitigation as a result of surveying, and setting out landowner concerns. While some of the concerns articulated in the letter of July 30, 2010 are relevant to access for surveying, most of the concerns raised in the letter of July 30, 2010 relate to the construction of the water pipeline itself, for which access to the Lands is not yet requested or required.

[18] The Board received and acknowledged Talisman's applications on August 3, 2010.

[19] Communication between Talisman and CAEPLA continued in the first two weeks of August and the parties met by teleconference on August 11, 2010. Minutes of that teleconference prepared by Talisman indicated that all parties expressed a desire to work together to build a positive relationship. The minutes note Talisman's initial contact with the Landowners in May, and the concern about winter approaching and the increasing necessity to complete the survey and other work before then. The minutes note the Landowners' concern over their stewardship responsibilities, the imposition on them and impact to the land of the proposed project, their desire to negotiate a comprehensive agreement encompassing all aspects of the pipeline project before granting survey permission, and their feeling that the project was being pushed on them through the involvement of the Board. The Landowners questioned the need for a survey as the proposed route for the water pipeline followed an existing right of way. Talisman indicated the proposed route represented an ideal route but that it would be adjusted as necessary based on information obtained from a survey and that the archaeological work also needed to be done. Some negotiation ensued around funding for expenses and commitment by Talisman to pay

damages and reasonable compensation. The parties agreed to another teleconference the following week.

[20] Further correspondence between the parties ensued, however negotiations broke down essentially over the involvement of the Board. Talisman expected the negotiations would continue in parallel with the Board's process. The Landowners indicated they were not willing to negotiate with Talisman as long as Talisman proceeded with the Board's process.

[21] The Board convened a teleconference with the parties on September 3, 2010. The Landowners maintained their position that the Board's application was premature, that Talisman had not negotiated with the Landowner's legitimate representative in an effort to reach agreement. They maintained they were not opposed to the proposed project but wanted to be treated with respect and wanted the opportunity to engage in negotiations without the coercion of the Board as they would in any other business arrangement. They asked Talisman to withdraw their applications and expressed a likelihood that an agreement could be reached. Talisman's representatives indicated they would consider withdrawing the applications but needed to discuss with the project's executive and seek instructions. A telephone conference between the parties without the Board was scheduled for early the following week. The Board adjourned its process pending further advice from the parties.

[22] On September 7, 2010 Talisman indicated it was not willing to withdraw the applications. The Landowners indicated they were not willing to negotiate under the circumstances. The Board reconvened its process by teleconference on September 10, 2010.

[23] The Landowners maintained their position that no meaningful negotiation had occurred between Talisman and CAEPLA, the Landowners' authorized representative, that any consultations with the Landowners individually were not valid once notification of CAEPLA's representation was given. The Landowners feel that the Board's involvement compromises their ability to negotiate on a level playing field with the company. They reiterated that they were willing to negotiate, but not before the Board. They questioned Talisman's need to do survey work. Talisman maintained they also wanted to negotiate with the Landowners but that time was running out before freeze-up. Talisman reiterated the necessity for a survey, soil testing and archaeological assessment as a requirement of the OGC process. The Board invited the Landowners to express their concerns about the proposed access for surveying, soil testing and archaeological assessments and to propose terms of access that would address their concerns. The Landowners were not willing to discuss their concerns with the Board. The Board offered to adjourn proceedings to allow the parties the opportunity to reach an agreement. The Landowners reiterated that unless the applications were withdrawn, they were not willing to negotiate. Talisman, in turn, expressed concern that if the applications were withdrawn, and agreement

was not reached, there would be insufficient time to reapply to the Board before freeze-up.

[24] I was advised that freeze-up could happen anytime from about the middle of October. I was further advised that while the work could continue after the ground froze, it would require more time on the Lands, be more intrusive, and cause greater inconvenience.

[25] In British Columbia, most landowners do not own subsurface resources. Their ownership of land is not absolute but limited to rights to the subsurface retained by the Crown. The Crown, in turn, may grant a person or company rights to explore for or develop subsurface resources. If a person or company requires surface access to private lands to explore for, or develop a subsurface resource, the person or company requiring surface access may not enter without the agreement of the landowner or authorization of the Board. The Board may authorize entry if access is needed and terms of access are not agreed. In other words, if access is required, a landowner may either agree to compensation and terms of access, or the Board may make an order authorizing access and setting out terms. The courts have acknowledged the compulsory aspect of this situation and that landowners lose the right to decide whether there will be oil and gas activity on their land (*Dome Petroleum Ltd. v. Juell*, [1982] B.C.J. 1510 (Q.L.)(S.C.)). An application to the Board does not compromise a landowner's negotiating position; the law has already compromised it. In the circumstances, landowners should focus on negotiating the best terms of access possible to compensate them for loss and that will address their legitimate concerns about stewardship of the land.

[26] While companies should always endeavour to negotiate terms of access and compensation with landowners or their representatives in advance of making an application to the Board, if terms of access are not agreed, they may seek the assistance of the Board. The Board's job is then to try and facilitate an agreement that addresses the needs and concerns of all parties within the context of the law. An application to the Board does not preclude the parties from reaching their own agreement without the Board's assistance or intervention.

[27] The information before me indicates that Talisman has been attempting to negotiate entry for the purpose of surveying, soil testing and archeological assessment with the Landowners since early May. Upon receipt of CAEPLA's letter in early June, it sought to convene a conference call to discuss while seeking confirmation of CAEPLA's authority to negotiate. Despite being asked by CAEPLA to commit to paying fees and costs, Talisman did not receive confirmation from the Landowners of CAEPLA's representation until late July, almost three months after initial contact with the Landowners and more than two months after being told CAEPLA would be involved.

[28] Talisman served CAEPLA, as the Landowners' representative, with the applications to the Board in late July, filing the applications with the Board itself in early August. Following initiation of the applications to the Board, Talisman and CAEPLA continued to correspond, although somewhat at cross-purposes prior to the Board convening its first conference call with the parties. CAEPLA wanted to negotiate a comprehensive agreement for the pipeline right of way; Talisman only sought an agreement for the limited purpose of surveying, soil testing and archaeological assessments given that the project could change as a result of the initial work or as a result of the OGC's process.

[29] I am satisfied Talisman tried to negotiate the Landowners' agreement for the survey work both individually and with CAEPLA before filing the applications to the Board. Some of the Landowners initially agreed to the survey work but then withdrew. Time passed without discussions occurring with CAEPLA despite requests for a conference call. CAEPLA sought payment of fees, but without formal confirmation that it had the authority to negotiate on the Landowners behalf. Given the amount of time that had passed following Talisman's initial contact with the Landowners and initial communications with CAEPLA, I do not think it was unreasonable for Talisman to commence the applications to the Board to seek assistance in negotiating an agreement. When Talisman filed its applications, the Landowners had not agreed to terms of access to the Lands, and it was not unreasonable, in the circumstances, to seek the Board's assistance in negotiating that agreement.

[30] An application to the Board does not preclude the parties from coming to agreement. The Board received the applications on August 3. It convened its first teleconference with the parties on September 3. The parties had a month before the Board commenced telephone discussions to continue negotiations. In fact, they did continue negotiations but negotiations broke down. Despite a telephone conference between the parties on August 11 and ensuing correspondence, no agreement was reached. By the time the Board convened its process, the Landowners were no longer willing to negotiate unless the applications were withdrawn. Talisman considered the Landowners' request to withdraw the applications but declined to do so.

[31] It is possible that if Talisman had acceded to the Landowners' request to withdraw the applications, agreement for access to the Lands to complete the surveying, soil sampling and archaeological assessments would have quickly followed. It is equally possible that, given negotiations to date had not focused on the immediate need for limited access and the differing views amongst the Landowners themselves over the merits of the proposed pipeline, negotiations would have continued to be unsuccessful. We will never know.

[32] I am satisfied that the parties had the opportunity to agree to terms of access both before and after the applications to the Board were made. In the context of these proceedings I invited the Landowners to express their concerns about the proposed access and suggest terms that would address their concerns.

They were not willing to do so. I offered to adjourn the Board's proceedings to allow the parties to agree on terms of access, but the Landowners maintained that they would not negotiate with Talisman unless the applications were withdrawn.

[33] I am satisfied that Talisman requires access to the Lands for a purpose set out in section 16 of the *PNGA*. I am further satisfied that Talisman tried to negotiate terms of access with the Landowners individually and with CAEPLA on the Landowners' behalf without success before making their applications to the Board. I am satisfied that Talisman continued to try to negotiate terms of access with CAEPLA on the Landowners' behalf following the applications to the Board again without success. I am satisfied there are time pressures to Talisman's need for access and that it is beneficial for the required work to be done before freeze-up. I am satisfied that time is running out in that regard. If I decline to make the entry order, I am not convinced that the parties will be able to negotiate terms of access in a timely way so that the work can be completed before freeze-up.

[34] In all of the circumstances, I am inclined to exercise my discretion to grant the right of entry. It is not without a great sense of sadness that I do so. I had hoped that the parties would come to terms. I regret that they have not. I accept that the Landowners have stewardship responsibilities with respect to the Lands and that, in any access for subsurface development, an effort should be made to address their legitimate concerns. I am frustrated that the Landowners were not willing to participate in mediation before me, were not willing to let me facilitate discussion in an effort at having the parties craft an agreement for the limited purpose of surveying, soil testing, and archaeological assessment that would be satisfactory to all parties. I hope that if Talisman proceeds with an application to the OGC for a permit to construct the water pipeline, that the parties will engage with each other and the OGC to address any operational, environmental, safety or other regulatory concerns. In the event a permit to construct the pipeline is granted, I encourage the parties to engage with each other in a timely manner to negotiate terms of access for the construction of the pipeline itself. Hopefully, further applications to the Board will not be necessary.

[35] As the Landowners declined to engage in negotiations before me, declined to express their specific concerns about the access for surveying, soil sampling and archaeological assessments, and declined to suggest terms of access that would address their concerns, I have made my best efforts to set out terms of access that will minimize impact to the land and livestock and permit consultation between the parties to ensure the safety of persons and livestock. There is no point to further mediation and further mediation is refused.

[36] I make the following Order pursuant to section 18(2) and section 19 of the *Petroleum and Natural Gas Act*.

Order

The Mediation and Arbitration Board orders:

1. Upon payment of the amounts set out in paragraphs 3 and 4, the Applicant and its contractors shall have the right of entry to and access across the Lands for a period of sixty (60) days from the date of this Order for the purpose of surveying, soil testing, and archaeological assessment, as required by the OGC in advance of making an application for a permit to construct the proposed water pipeline.
2. Entry to the Lands for the purpose of surveying, soil testing, and archaeological assessment shall be subject to the terms set out in Appendix "A".
3. The Applicant shall deposit with the Mediation and Arbitration Board security of \$2,500.00 payable to the Minister of Finance. All or part of the security deposit may be returned to the Applicant or paid to the Respondent upon the agreement of the parties or as ordered by the Board.
4. The Applicant shall pay to the Respondent \$2,000.00 as partial payment for compensation payable for entry to and use of the Lands for the specified purpose, and to acknowledge the compulsory aspect of the entry.
5. The Applicant shall serve the Respondent with a copy of this Order prior to entry onto the Lands. Service may be accomplished by personal service of a copy of the Order or by e-mail to CAEPLA.
6. The Applicant shall pay the Respondent's costs of this application. If the parties cannot agree on the amount of costs payable, the Board retains jurisdiction to determine the amount.
7. Nothing in this order operates as consent, permission, approval or authorization of matters within the jurisdiction of the Oil and Gas Commission.

Dated: September 13, 2010

FOR THE BOARD



Cheryl Vickers
Chair

APPENDIX A

Right of entry to the Lands for surveying, soil testing, and archaeological assessment required for the purpose of making an application to the Oil and Gas Commission is subject to the following general terms:

- Talisman and/or its contractors shall at all times conduct their work in a safe and responsible manner, which without limitation, shall include: driving with due care and attention when approaching the Lands, including being mindful of speed, the presence of children playing, and the minimization of dust, and taking care in the presence of livestock to avoid disturbance or harm to the livestock
- Talisman shall advise the Respondent landowner immediately of any situation that may require the landowner's attention
- The Respondent landowner shall advise Talisman of any concerns with respect to the activity of Talisman and/or its contractors and of any damage incurred as a result of the entry
- Talisman shall be responsible for any damage caused by the entry
- Contractors of Talisman entering the Lands pursuant to this Order will be accompanied by a representative of Talisman

Surveying of the Lands is subject to the following additional terms:

- Focus will conduct the survey. Focus will give the Respondent landowner at least 24 hours notice prior to entry. The Respondent landowner may contact the surveyors, or the attending representative of Talisman, with any questions or concerns during the survey
- Surveyors will consult the Respondent landowner with respect to their method of access over the Lands, and may only use motorized vehicles with the permission of the Respondent landowner
- Surveyors will minimize the number of survey stakes used. Any stakes required can be removed after the soils assessment and archaeological assessment have been completed
- Surveyors will only cut trees or branches in areas where growth is too dense for sight lines.
- Any trees or branches cut down will be disposed of in a manner acceptable to the Respondent landowner

Soil sampling is subject to the following additional terms:

- Roy Northern will conduct the soil testing. Roy Northern will give the Respondent landowner at least 24 hour notice prior to entry. The Respondent landowner may contact Roy Northern, or the attending representative of Talisman, with any questions or concerns during the soil sampling

- Personnel will consult the Respondent landowner with respect to method of access across the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- Soil samples will be taken in accordance with the requirements of the Oil and Gas Commission
- The Respondent landowner will be provided with a copy of the soil assessment report

Archaeological assessment is subject to the following additional terms:

- Landsong will conduct the archaeological assessment. Landsong will give the Respondent Landowner at least 24 hours notice prior to entry. The Respondent landowner may contact Landsong, or the attending representative of Talisman, with any questions or concerns during the assessment.
- The assessment will take place at or near the same time as the soil assessment.
- Personnel will consult the Respondent landowner with respect to method of access over the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- The bulk of the assessment will be completed with an archaeologist walking along the proposed access. Ground disturbance (shovel testing) will only occur if the archaeologist sees areas of "high potential".

File No. 1657
Board Order # 1657-1

September 13, 2010

MEDIATION AND ARBITRATION BOARD

**IN THE MATTER OF THE PETROLEUM AND NATURAL GAS
ACT, R.S.B.C., C. 361 AS AMENDED**

**AND IN THE MATTER OF
NW ¼ of District Lot 1227, Peace River District**

(The "Lands")

BETWEEN:

Talisman Energy Inc.

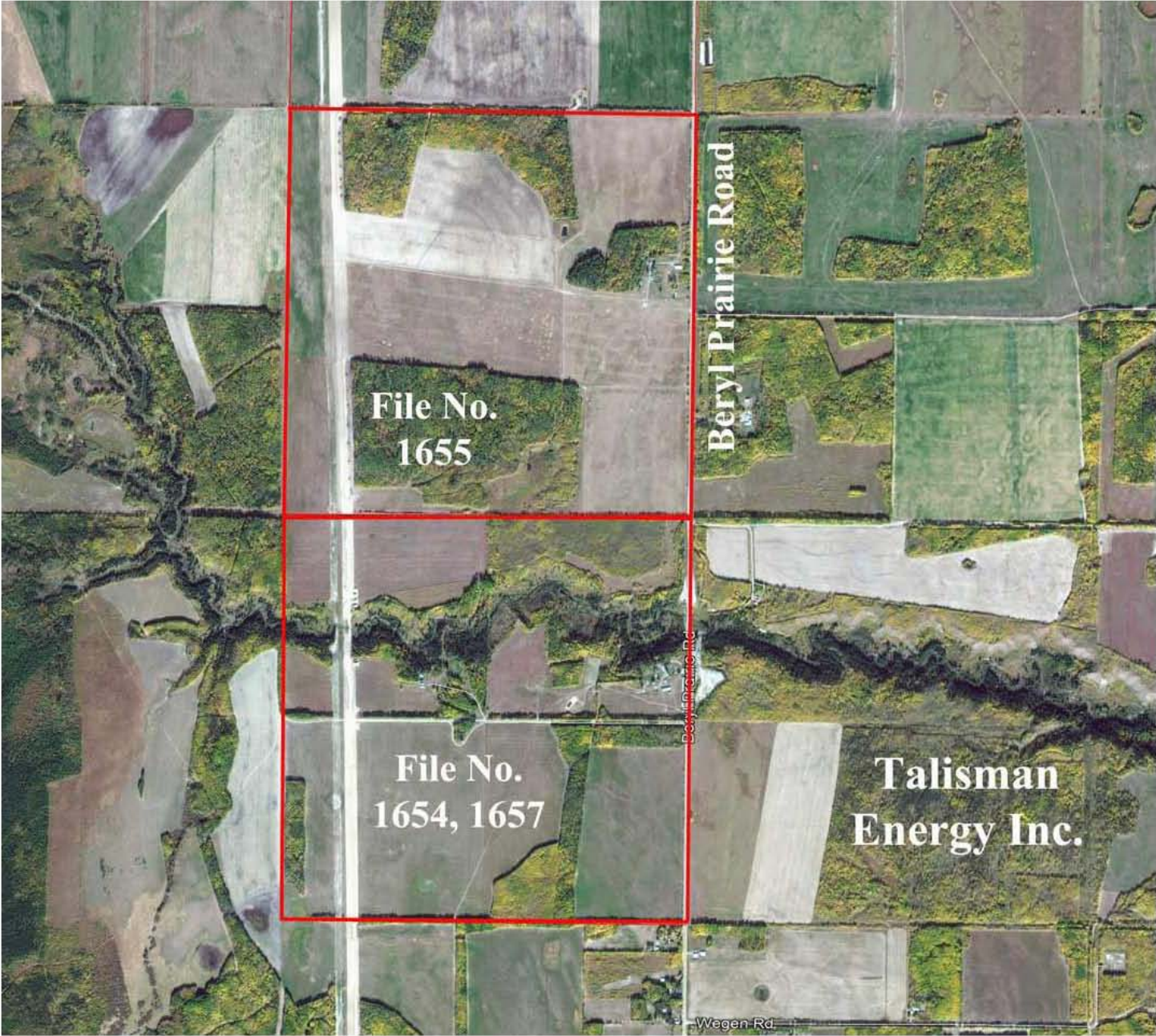
(APPLICANT)

AND:

Connie Elizabeth Powell

(RESPONDENT)

BOARD ORDER



**File No.
1655**

**File No.
1654, 1657**

**Talisman
Energy Inc.**

Beryl Prairie Road

Wegen Rd

DOWLING INC.

Heard by telephone conference together with MAB files 1653 to 1656 and 1658 to 1661: September 3 and 10, 2010

Mediator: Cheryl Vickers

Attended by: Gary Richardson, Jennifer Findlay, Sacha Plotnikow (Sept 3 only), Lance DeLaRonde (Sept 10 only), for the Applicant; Dave Core, Deborah McVicar (Sept 10 only), Pamela Gunderson (Sept 3 only), Derek Beam, James Vince (Sept 10 only), Terry Webster (Sept 10 only), and Doug Summer (Sept 10 only) for the Respondent and the Respondents in MAB files 1653 to 1656 and 1658 to 1661

Introduction

[1] The Applicant, Talisman Energy Inc. (“Talisman”) has applied to the Board for mediation and arbitration respecting right of entry to the Lands owned by the Respondent, Connie Elizabeth Powell, as well as to the Lands owned by the Respondents in MAB applications 1653 to 1656 and 1658 through 1661 (collectively the “Respondent Landowners” or “Landowners”), heard at the same time. In each application, Talisman seeks access to the respective Lands for the purpose of surveying, and for conducting the required soil sampling and archaeological assessments in advance of making an application to the Oil and Gas Commission (“OGC”) for the construction of a water pipeline. The proposed water pipeline is to transport water to be used in the production of natural gas in a process known as “fracking”.

[2] The applications are not about whether the proposed water pipeline should be built, or whether it is either necessary or beneficial. It is only about whether Talisman requires land for a purpose set out in section 16 of the *Petroleum and Natural Gas Act (PNGA)*, and if so, whether I should exercise my discretion to make an entry order pursuant to section 19 of the *PNGA* permitting Talisman to enter and use the Lands for the required purpose. During my discussions with the parties, the Landowners expressed contradictory views about the proposed pipeline. One of the Landowners submitted Talisman does not need the water pipeline, that it can continue to truck water for fracking, and that the purpose of the pipeline is only to save Talisman money. Others of the Landowners expressed support for the proposed pipeline submitting it will lessen traffic on the local roads. The merits of the pipeline itself are not a matter within the jurisdiction of the Board. The OGC must decide whether to grant an application to construct a water pipeline used in conjunction with the oil and gas industry, and address

any operational, environmental, safety or other regulatory concerns with the proposed project.

[3] The Landowners submit the applications are premature. They submit that Talisman has not engaged in good faith negotiation, and that they are prepared to negotiate access with Talisman, but not in the context of an application to the Board. The Landowners also take issue with the jurisdiction of the Board to issue an entry order.

Issues

[4] Does the Board have jurisdiction in Talisman's applications?

[5] If so, should I grant the right of entry order requested by Talisman?

Jurisdiction

[6] The Landowners question the jurisdiction of the Board on the basis that the proposed pipeline is a water pipeline, as opposed to a pipeline to transport petroleum or natural gas.

[7] Section 16 of the *Petroleum and Natural Gas Act (PNGA)* provides a person may apply to the Board for mediation and arbitration if the person "requires land to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir or for a connected or incidental purpose, and an owner of the land refuses to grant a surface lease satisfactory to that person authorizing entry, occupation or use for that purpose."

[8] Talisman says it requires access to the Lands to conduct a survey, soil sampling and archaeological assessments in advance of making an application to the OGC for a permit to build and operate the pipeline. The purpose of the pipeline is to carry water to the production fields to be used for fracking. Fracking is a process whereby water is used to fracture the rock in order to extract the natural gas. Fracking is, therefore, a connected purpose to the production of natural gas.

[9] The jurisdictional issue for the Board, at this time, is whether entry for surveying, soil sampling and archaeological assessment is a "connected or incidental purpose" within the meaning of the *PNGA*. Talisman cannot construct the proposed water pipeline without a permit from the OGC. The OGC requires that an application be accompanied by a survey, soil tests and an archaeological assessment. Talisman must access the Lands in order to complete the required survey work, soil tests and archaeological assessments. The Landowners have not given Talisman permission to enter their land for this purpose. Because the surveying, soil testing and archaeological assessments is work that is required by

the OGC before an application to build the water pipeline for fracking can be considered, this work is also a connected or incidental purpose to the production of natural gas. The purpose for which Talisman requires access to the Lands, therefore, is a purpose that triggers its ability to make an application to the Board under section 16(1) of the *PNGA* and the Board has jurisdiction.

Right of Entry

[10] Section 18(3) of the *PNGA* provides:

If an application is made under section 16(1), and if the mediator believes, as a result of a mediation hearing, that the applicant should be permitted to enter, occupy or use the land, the mediator may make an order under section 19.

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was not reached, there would be insufficient time to reapply to the Board before freeze-up.

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[25] In British Columbia, most landowners do not own subsurface resources. Their ownership of land is not absolute but limited to rights to the subsurface retained by the Crown. The Crown, in turn, may grant a person or company rights to explore for or develop subsurface resources. If a person or company requires surface access to private lands to explore for, or develop a subsurface resource, the person or company requiring surface access may not enter without the agreement of the landowner or authorization of the Board. The Board may authorize entry if access is needed and terms of access are not agreed. In other words, if access is required, a landowner may either agree to compensation and terms of access, or the Board may make an order authorizing access and setting out terms. The courts have acknowledged the compulsory aspect of this situation and that landowners lose the right to decide whether there will be oil and gas activity on their land (*Dome Petroleum Ltd. v. Juell*, [1982] B.C.J. 1510 (Q.L.)(S.C.)). An application to the Board does not compromise a landowner's negotiating position; the law has already compromised it. In the circumstances, landowners should focus on negotiating the best terms of access possible to compensate them for loss and that will address their legitimate concerns about stewardship of the land.

[26] While companies should always endeavour to negotiate terms of access and compensation with landowners or their representatives in advance of making an application to the Board, if terms of access are not agreed, they may seek the assistance of the Board. The Board's job is then to try and facilitate an agreement that addresses the needs and concerns of all parties within the context of the law. An application to the Board does not preclude the parties from reaching their own agreement without the Board's assistance or intervention.

[27] The information before me indicates that Talisman has been attempting to negotiate entry for the purpose of surveying, soil testing and archeological assessment with the Landowners since early May. Upon receipt of CAEPLA's letter in early June, it sought to convene a conference call to discuss while seeking confirmation of CAEPLA's authority to negotiate. Despite being asked by CAEPLA to commit to paying fees and costs, Talisman did not receive confirmation from the Landowners of CAEPLA's representation until late July, almost three months after initial contact with the Landowners and more than two months after being told CAEPLA would be involved.

[28] Talisman served CAEPLA, as the Landowners' representative, with the applications to the Board in late July, filing the applications with the Board itself in early August. Following initiation of the applications to the Board, Talisman and CAEPLA continued to correspond, although somewhat at cross-purposes prior to the Board convening its first conference call with the parties. CAEPLA wanted to negotiate a comprehensive agreement for the pipeline right of way; Talisman only sought an agreement for the limited purpose of surveying, soil testing and archaeological assessments given that the project could change as a result of the initial work or as a result of the OGC's process.

[29] I am satisfied Talisman tried to negotiate the Landowners' agreement for the survey work both individually and with CAEPLA before filing the applications to the Board. Some of the Landowners initially agreed to the survey work but then withdrew. Time passed without discussions occurring with CAEPLA despite requests for a conference call. CAEPLA sought payment of fees, but without formal confirmation that it had the authority to negotiate on the Landowners behalf. Given the amount of time that had passed following Talisman's initial contact with the Landowners and initial communications with CAEPLA, I do not think it was unreasonable for Talisman to commence the applications to the Board to seek assistance in negotiating an agreement. When Talisman filed its applications, the Landowners had not agreed to terms of access to the Lands, and it was not unreasonable, in the circumstances, to seek the Board's assistance in negotiating that agreement.

[30] An application to the Board does not preclude the parties from coming to agreement. The Board received the applications on August 3. It convened its first teleconference with the parties on September 3. The parties had a month before the Board commenced telephone discussions to continue negotiations. In fact, they did continue negotiations but negotiations broke down. Despite a telephone conference between the parties on August 11 and ensuing correspondence, no agreement was reached. By the time the Board convened its process, the Landowners were no longer willing to negotiate unless the applications were withdrawn. Talisman considered the Landowners' request to withdraw the applications but declined to do so.

[31] It is possible that if Talisman had acceded to the Landowners' request to withdraw the applications, agreement for access to the Lands to complete the surveying, soil sampling and archaeological assessments would have quickly followed. It is equally possible that, given negotiations to date had not focused on the immediate need for limited access and the differing views amongst the Landowners themselves over the merits of the proposed pipeline, negotiations would have continued to be unsuccessful. We will never know.

[32] I am satisfied that the parties had the opportunity to agree to terms of access both before and after the applications to the Board were made. In the context of these proceedings I invited the Landowners to express their concerns about the proposed access and suggest terms that would address their concerns.

They were not willing to do so. I offered to adjourn the Board's proceedings to allow the parties to agree on terms of access, but the Landowners maintained that they would not negotiate with Talisman unless the applications were withdrawn.

[33] I am satisfied that Talisman requires access to the Lands for a purpose set out in section 16 of the *PNGA*. I am further satisfied that Talisman tried to negotiate terms of access with the Landowners individually and with CAEPLA on the Landowners' behalf without success before making their applications to the Board. I am satisfied that Talisman continued to try to negotiate terms of access with CAEPLA on the Landowners' behalf following the applications to the Board again without success. I am satisfied there are time pressures to Talisman's need for access and that it is beneficial for the required work to be done before freeze-up. I am satisfied that time is running out in that regard. If I decline to make the entry order, I am not convinced that the parties will be able to negotiate terms of access in a timely way so that the work can be completed before freeze-up.

[34] In all of the circumstances, I am inclined to exercise my discretion to grant the right of entry. It is not without a great sense of sadness that I do so. I had hoped that the parties would come to terms. I regret that they have not. I accept that the Landowners have stewardship responsibilities with respect to the Lands and that, in any access for subsurface development, an effort should be made to address their legitimate concerns. I am frustrated that the Landowners were not willing to participate in mediation before me, were not willing to let me facilitate discussion in an effort at having the parties craft an agreement for the limited purpose of surveying, soil testing, and archaeological assessment that would be satisfactory to all parties. I hope that if Talisman proceeds with an application to the OGC for a permit to construct the water pipeline, that the parties will engage with each other and the OGC to address any operational, environmental, safety or other regulatory concerns. In the event a permit to construct the pipeline is granted, I encourage the parties to engage with each other in a timely manner to negotiate terms of access for the construction of the pipeline itself. Hopefully, further applications to the Board will not be necessary.

[35] As the Landowners declined to engage in negotiations before me, declined to express their specific concerns about the access for surveying, soil sampling and archaeological assessments, and declined to suggest terms of access that would address their concerns, I have made my best efforts to set out terms of access that will minimize impact to the land and livestock and permit consultation between the parties to ensure the safety of persons and livestock. There is no point to further mediation and further mediation is refused.

[36] I make the following Order pursuant to section 18(2) and section 19 of the *Petroleum and Natural Gas Act*.

Order

The Mediation and Arbitration Board orders:

1. Upon payment of the amounts set out in paragraphs 3 and 4, the Applicant and its contractors shall have the right of entry to and access across the Lands for a period of sixty (60) days from the date of this Order for the purpose of surveying, soil testing, and archaeological assessment, as required by the OGC in advance of making an application for a permit to construct the proposed water pipeline.
2. Entry to the Lands for the purpose of surveying, soil testing, and archaeological assessment shall be subject to the terms set out in Appendix "A".
3. The Applicant shall deposit with the Mediation and Arbitration Board security of \$2,500.00 payable to the Minister of Finance. All or part of the security deposit may be returned to the Applicant or paid to the Respondent upon the agreement of the parties or as ordered by the Board.
4. The Applicant shall pay to the Respondent \$2,000.00 as partial payment for compensation payable for entry to and use of the Lands for the specified purpose, and to acknowledge the compulsory aspect of the entry.
5. The Applicant shall serve the Respondent with a copy of this Order prior to entry onto the Lands. Service may be accomplished by personal service of a copy of the Order or by e-mail to CAEPLA.
6. The Applicant shall pay the Respondent's costs of this application. If the parties cannot agree on the amount of costs payable, the Board retains jurisdiction to determine the amount.
7. Nothing in this order operates as consent, permission, approval or authorization of matters within the jurisdiction of the Oil and Gas Commission.

Dated: September 13, 2010

FOR THE BOARD



Cheryl Vickers
Chair

APPENDIX A

Right of entry to the Lands for surveying, soil testing, and archaeological assessment required for the purpose of making an application to the Oil and Gas Commission is subject to the following general terms:

- Talisman and/or its contractors shall at all times conduct their work in a safe and responsible manner, which without limitation, shall include: driving with due care and attention when approaching the Lands, including being mindful of speed, the presence of children playing, and the minimization of dust, and taking care in the presence of livestock to avoid disturbance or harm to the livestock
- Talisman shall advise the Respondent landowner immediately of any situation that may require the landowner's attention
- The Respondent landowner shall advise Talisman of any concerns with respect to the activity of Talisman and/or its contractors and of any damage incurred as a result of the entry
- Talisman shall be responsible for any damage caused by the entry
- Contractors of Talisman entering the Lands pursuant to this Order will be accompanied by a representative of Talisman

Surveying of the Lands is subject to the following additional terms:

- Focus will conduct the survey. Focus will give the Respondent landowner at least 24 hours notice prior to entry. The Respondent landowner may contact the surveyors, or the attending representative of Talisman, with any questions or concerns during the survey
- Surveyors will consult the Respondent landowner with respect to their method of access over the Lands, and may only use motorized vehicles with the permission of the Respondent landowner
- Surveyors will minimize the number of survey stakes used. Any stakes required can be removed after the soils assessment and archaeological assessment have been completed
- Surveyors will only cut trees or branches in areas where growth is too dense for sight lines.
- Any trees or branches cut down will be disposed of in a manner acceptable to the Respondent landowner

Soil sampling is subject to the following additional terms:

- Roy Northern will conduct the soil testing. Roy Northern will give the Respondent landowner at least 24 hour notice prior to entry. The Respondent landowner may contact Roy Northern, or the attending representative of Talisman, with any questions or concerns during the soil sampling

- Personnel will consult the Respondent landowner with respect to method of access across the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- Soil samples will be taken in accordance with the requirements of the Oil and Gas Commission
- The Respondent landowner will be provided with a copy of the soil assessment report

Archaeological assessment is subject to the following additional terms:

- Landsong will conduct the archaeological assessment. Landsong will give the Respondent Landowner at least 24 hours notice prior to entry. The Respondent landowner may contact Landsong, or the attending representative of Talisman, with any questions or concerns during the assessment.
- The assessment will take place at or near the same time as the soil assessment.
- Personnel will consult the Respondent landowner with respect to method of access over the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- The bulk of the assessment will be completed with an archaeologist walking along the proposed access. Ground disturbance (shovel testing) will only occur if the archaeologist sees areas of "high potential".

File No. 1659
Board Order # 1659-1

September 13, 2010

MEDIATION AND ARBITRATION BOARD

**IN THE MATTER OF THE PETROLEUM AND NATURAL GAS
ACT, R.S.B.C., C. 361 AS AMENDED**

**AND IN THE MATTER OF
District Lot 1252 Peace River District except:
the south 80 feet and Plan PGP35612**

(The "Lands")

BETWEEN:

Talisman Energy Inc.

(APPLICANT)

AND:

Kimberly Ann Hawkins

(RESPONDENT)

BOARD ORDER



**File No.
1656**

Talisman Energy Inc.

**File No.
1659**

Beryl Prairie Road

Beryl Prairie Rd

Heard by telephone conference together with MAB files 1653 to 1658 and 1660 to 1661: September 3 and 10, 2010

Mediator: Cheryl Vickers

Attended by: Gary Richardson, Jennifer Findlay, Sacha Plotnikow (Sept 3 only), Lance DeLaRonde (Sept 10 only), for the Applicant; Dave Core, Deborah McVicar (Sept 10 only), Pamela Gunderson (Sept 3 only), Derek Beam, James Vince (Sept 10 only), Terry Webster (Sept 10 only), and Doug Summer (Sept 10 only) for the Respondent and the Respondents in MAB files 1653 to 1658 and 1660 to 1661

Introduction

[1] The Applicant, Talisman Energy Inc. ("Talisman") has applied to the Board for mediation and arbitration respecting right of entry to the Lands owned by the Respondent, Kimberly Ann Hawkins, as well as to the Lands owned by the Respondents in MAB applications 1653 to 1658 and 1660 to 1661 (collectively the "Respondent Landowners" or "Landowners"), heard at the same time. In each application, Talisman seeks access to the respective Lands for the purpose of surveying, and for conducting the required soil sampling and archaeological assessments in advance of making an application to the Oil and Gas Commission ("OGC") for the construction of a water pipeline. The proposed water pipeline is to transport water to be used in the production of natural gas in a process known as "fracking".

[2] The applications are not about whether the proposed water pipeline should be built, or whether it is either necessary or beneficial. It is only about whether Talisman requires land for a purpose set out in section 16 of the *Petroleum and Natural Gas Act (PNGA)*, and if so, whether I should exercise my discretion to make an entry order pursuant to section 19 of the *PNGA* permitting Talisman to enter and use the Lands for the required purpose. During my discussions with the parties, the Landowners expressed contradictory views about the proposed pipeline. One of the Landowners submitted Talisman does not need the water pipeline, that it can continue to truck water for fracking, and that the purpose of the pipeline is only to save Talisman money. Others of the Landowners expressed support for the proposed pipeline submitting it will lessen traffic on the local roads. The merits of the pipeline itself are not a matter within the jurisdiction of the Board. The OGC must decide whether to grant an application to construct a water pipeline used in conjunction with the oil and gas industry, and address

any operational, environmental, safety or other regulatory concerns with the proposed project.

[3] The Landowners submit the applications are premature. They submit that Talisman has not engaged in good faith negotiation, and that they are prepared to negotiate access with Talisman, but not in the context of an application to the Board. The Landowners also take issue with the jurisdiction of the Board to issue an entry order.

Issues

[4] Does the Board have jurisdiction in Talisman's applications?

[5] If so, should I grant the right of entry order requested by Talisman?

Jurisdiction

[6] The Landowners question the jurisdiction of the Board on the basis that the proposed pipeline is a water pipeline, as opposed to a pipeline to transport petroleum or natural gas.

[7] Section 16 of the *Petroleum and Natural Gas Act (PNGA)* provides a person may apply to the Board for mediation and arbitration if the person "requires land to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir or for a connected or incidental purpose, and an owner of the land refuses to grant a surface lease satisfactory to that person authorizing entry, occupation or use for that purpose."

[8] Talisman says it requires access to the Lands to conduct a survey, soil sampling and archaeological assessments in advance of making an application to the OGC for a permit to build and operate the pipeline. The purpose of the pipeline is to carry water to the production fields to be used for fracking. Fracking is a process whereby water is used to fracture the rock in order to extract the natural gas. Fracking is, therefore, a connected purpose to the production of natural gas.

[9] The jurisdictional issue for the Board, at this time, is whether entry for surveying, soil sampling and archaeological assessment is a "connected or incidental purpose" within the meaning of the *PNGA*. Talisman cannot construct the proposed water pipeline without a permit from the OGC. The OGC requires that an application be accompanied by a survey, soil tests and an archaeological assessment. Talisman must access the Lands in order to complete the required survey work, soil tests and archaeological assessments. The Landowners have not given Talisman permission to enter their land for this purpose. Because the surveying, soil testing and archaeological assessments is work that is required by

the OGC before an application to build the water pipeline for fracking can be considered, this work is also a connected or incidental purpose to the production of natural gas. The purpose for which Talisman requires access to the Lands, therefore, is a purpose that triggers its ability to make an application to the Board under section 16(1) of the *PNGA* and the Board has jurisdiction.

Right of Entry

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[26] While companies should always endeavour to negotiate terms of access and compensation with landowners or their representatives in advance of making an application to the Board, if terms of access are not agreed, they may seek the assistance of the Board. The Board's job is then to try and facilitate an agreement that addresses the needs and concerns of all parties within the context of the law. An application to the Board does not preclude the parties from reaching their own agreement without the Board's assistance or intervention.

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[28] Talisman served CAEPLA, as the Landowners' representative, with the applications to the Board in late July, filing the applications with the Board itself in early August. Following initiation of the applications to the Board, Talisman and CAEPLA continued to correspond, although somewhat at cross-purposes prior to the Board convening its first conference call with the parties. CAEPLA wanted to negotiate a comprehensive agreement for the pipeline right of way; Talisman only sought an agreement for the limited purpose of surveying, soil testing and archaeological assessments given that the project could change as a result of the initial work or as a result of the OGC's process.

[29] I am satisfied Talisman tried to negotiate the Landowners' agreement for the survey work both individually and with CAEPLA before filing the applications to the Board. Some of the Landowners initially agreed to the survey work but then withdrew. Time passed without discussions occurring with CAEPLA despite requests for a conference call. CAEPLA sought payment of fees, but without formal confirmation that it had the authority to negotiate on the Landowners behalf. Given the amount of time that had passed following Talisman's initial contact with the Landowners and initial communications with CAEPLA, I do not think it was unreasonable for Talisman to commence the applications to the Board to seek assistance in negotiating an agreement. When Talisman filed its applications, the Landowners had not agreed to terms of access to the Lands, and it was not unreasonable, in the circumstances, to seek the Board's assistance in negotiating that agreement.

[30] An application to the Board does not preclude the parties from coming to agreement. The Board received the applications on August 3. It convened its first teleconference with the parties on September 3. The parties had a month before the Board commenced telephone discussions to continue negotiations. In fact, they did continue negotiations but negotiations broke down. Despite a telephone conference between the parties on August 11 and ensuing correspondence, no agreement was reached. By the time the Board convened its process, the Landowners were no longer willing to negotiate unless the applications were withdrawn. Talisman considered the Landowners' request to withdraw the applications but declined to do so.

[31] It is possible that if Talisman had acceded to the Landowners' request to withdraw the applications, agreement for access to the Lands to complete the surveying, soil sampling and archaeological assessments would have quickly followed. It is equally possible that, given negotiations to date had not focused on the immediate need for limited access and the differing views amongst the Landowners themselves over the merits of the proposed pipeline, negotiations would have continued to be unsuccessful. We will never know.

[32] I am satisfied that the parties had the opportunity to agree to terms of access both before and after the applications to the Board were made. In the context of these proceedings I invited the Landowners to express their concerns about the proposed access and suggest terms that would address their concerns.

They were not willing to do so. I offered to adjourn the Board's proceedings to allow the parties to agree on terms of access, but the Landowners maintained that they would not negotiate with Talisman unless the applications were withdrawn.

[33] I am satisfied that Talisman requires access to the Lands for a purpose set out in section 16 of the *PNGA*. I am further satisfied that Talisman tried to negotiate terms of access with the Landowners individually and with CAEPLA on the Landowners' behalf without success before making their applications to the Board. I am satisfied that Talisman continued to try to negotiate terms of access with CAEPLA on the Landowners' behalf following the applications to the Board again without success. I am satisfied there are time pressures to Talisman's need for access and that it is beneficial for the required work to be done before freeze-up. I am satisfied that time is running out in that regard. If I decline to make the entry order, I am not convinced that the parties will be able to negotiate terms of access in a timely way so that the work can be completed before freeze-up.

[34] In all of the circumstances, I am inclined to exercise my discretion to grant the right of entry. It is not without a great sense of sadness that I do so. I had hoped that the parties would come to terms. I regret that they have not. I accept that the Landowners have stewardship responsibilities with respect to the Lands and that, in any access for subsurface development, an effort should be made to address their legitimate concerns. I am frustrated that the Landowners were not willing to participate in mediation before me, were not willing to let me facilitate discussion in an effort at having the parties craft an agreement for the limited purpose of surveying, soil testing, and archaeological assessment that would be satisfactory to all parties. I hope that if Talisman proceeds with an application to the OGC for a permit to construct the water pipeline, that the parties will engage with each other and the OGC to address any operational, environmental, safety or other regulatory concerns. In the event a permit to construct the pipeline is granted, I encourage the parties to engage with each other in a timely manner to negotiate terms of access for the construction of the pipeline itself. Hopefully, further applications to the Board will not be necessary.

[35] As the Landowners declined to engage in negotiations before me, declined to express their specific concerns about the access for surveying, soil sampling and archaeological assessments, and declined to suggest terms of access that would address their concerns, I have made my best efforts to set out terms of access that will minimize impact to the land and livestock and permit consultation between the parties to ensure the safety of persons and livestock. There is no point to further mediation and further mediation is refused.

[36] I make the following Order pursuant to section 18(2) and section 19 of the *Petroleum and Natural Gas Act*.

Order

The Mediation and Arbitration Board orders:

1. Upon payment of the amounts set out in paragraphs 3 and 4, the Applicant and its contractors shall have the right of entry to and access across the Lands for a period of sixty (60) days from the date of this Order for the purpose of surveying, soil testing, and archaeological assessment, as required by the OGC in advance of making an application for a permit to construct the proposed water pipeline.
2. Entry to the Lands for the purpose of surveying, soil testing, and archaeological assessment shall be subject to the terms set out in Appendix "A".
3. The Applicant shall deposit with the Mediation and Arbitration Board security of \$2,500.00 payable to the Minister of Finance. All or part of the security deposit may be returned to the Applicant or paid to the Respondent upon the agreement of the parties or as ordered by the Board.
4. The Applicant shall pay to the Respondent \$2,000.00 as partial payment for compensation payable for entry to and use of the Lands for the specified purpose, and to acknowledge the compulsory aspect of the entry.
5. The Applicant shall serve the Respondent with a copy of this Order prior to entry onto the Lands. Service may be accomplished by personal service of a copy of the Order or by e-mail to CAEPLA.
6. The Applicant shall pay the Respondent's costs of this application. If the parties cannot agree on the amount of costs payable, the Board retains jurisdiction to determine the amount.
7. Nothing in this order operates as consent, permission, approval or authorization of matters within the jurisdiction of the Oil and Gas Commission.

Dated: September 13, 2010

FOR THE BOARD



Cheryl Vickers
Chair

APPENDIX A

Right of entry to the Lands for surveying, soil testing, and archaeological assessment required for the purpose of making an application to the Oil and Gas Commission is subject to the following general terms:

- Talisman and/or its contractors shall at all times conduct their work in a safe and responsible manner, which without limitation, shall include: driving with due care and attention when approaching the Lands, including being mindful of speed, the presence of children playing, and the minimization of dust, and taking care in the presence of livestock to avoid disturbance or harm to the livestock
- Talisman shall advise the Respondent landowner immediately of any situation that may require the landowner's attention
- The Respondent landowner shall advise Talisman of any concerns with respect to the activity of Talisman and/or its contractors and of any damage incurred as a result of the entry
- Talisman shall be responsible for any damage caused by the entry
- Contractors of Talisman entering the Lands pursuant to this Order will be accompanied by a representative of Talisman

Surveying of the Lands is subject to the following additional terms:

- Focus will conduct the survey. Focus will give the Respondent landowner at least 24 hours notice prior to entry. The Respondent landowner may contact the surveyors, or the attending representative of Talisman, with any questions or concerns during the survey
- Surveyors will consult the Respondent landowner with respect to their method of access over the Lands, and may only use motorized vehicles with the permission of the Respondent landowner
- Surveyors will minimize the number of survey stakes used. Any stakes required can be removed after the soils assessment and archaeological assessment have been completed
- Surveyors will only cut trees or branches in areas where growth is too dense for sight lines.
- Any trees or branches cut down will be disposed of in a manner acceptable to the Respondent landowner

Soil sampling is subject to the following additional terms:

- Roy Northern will conduct the soil testing. Roy Northern will give the Respondent landowner at least 24 hour notice prior to entry. The Respondent landowner may contact Roy Northern, or the attending representative of Talisman, with any questions or concerns during the soil sampling

- Personnel will consult the Respondent landowner with respect to method of access across the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- Soil samples will be taken in accordance with the requirements of the Oil and Gas Commission
- The Respondent landowner will be provided with a copy of the soil assessment report

Archaeological assessment is subject to the following additional terms:

- Landsong will conduct the archaeological assessment. Landsong will give the Respondent Landowner at least 24 hours notice prior to entry. The Respondent landowner may contact Landsong, or the attending representative of Talisman, with any questions or concerns during the assessment.
- The assessment will take place at or near the same time as the soil assessment.
- Personnel will consult the Respondent landowner with respect to method of access over the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- The bulk of the assessment will be completed with an archaeologist walking along the proposed access. Ground disturbance (shovel testing) will only occur if the archaeologist sees areas of "high potential".

File No. 1660
Board Order # 1660-1

September 13, 2010

MEDIATION AND ARBITRATION BOARD

**IN THE MATTER OF THE PETROLEUM AND NATURAL GAS
ACT, R.S.B.C., C. 361 AS AMENDED**

**AND IN THE MATTER OF
The North ½ of District Lot 1208 Peace River District
The South ½ of District Lot 1215 Peace River District except Plan 17222**

(The "Lands")

BETWEEN:

Talisman Energy Inc.

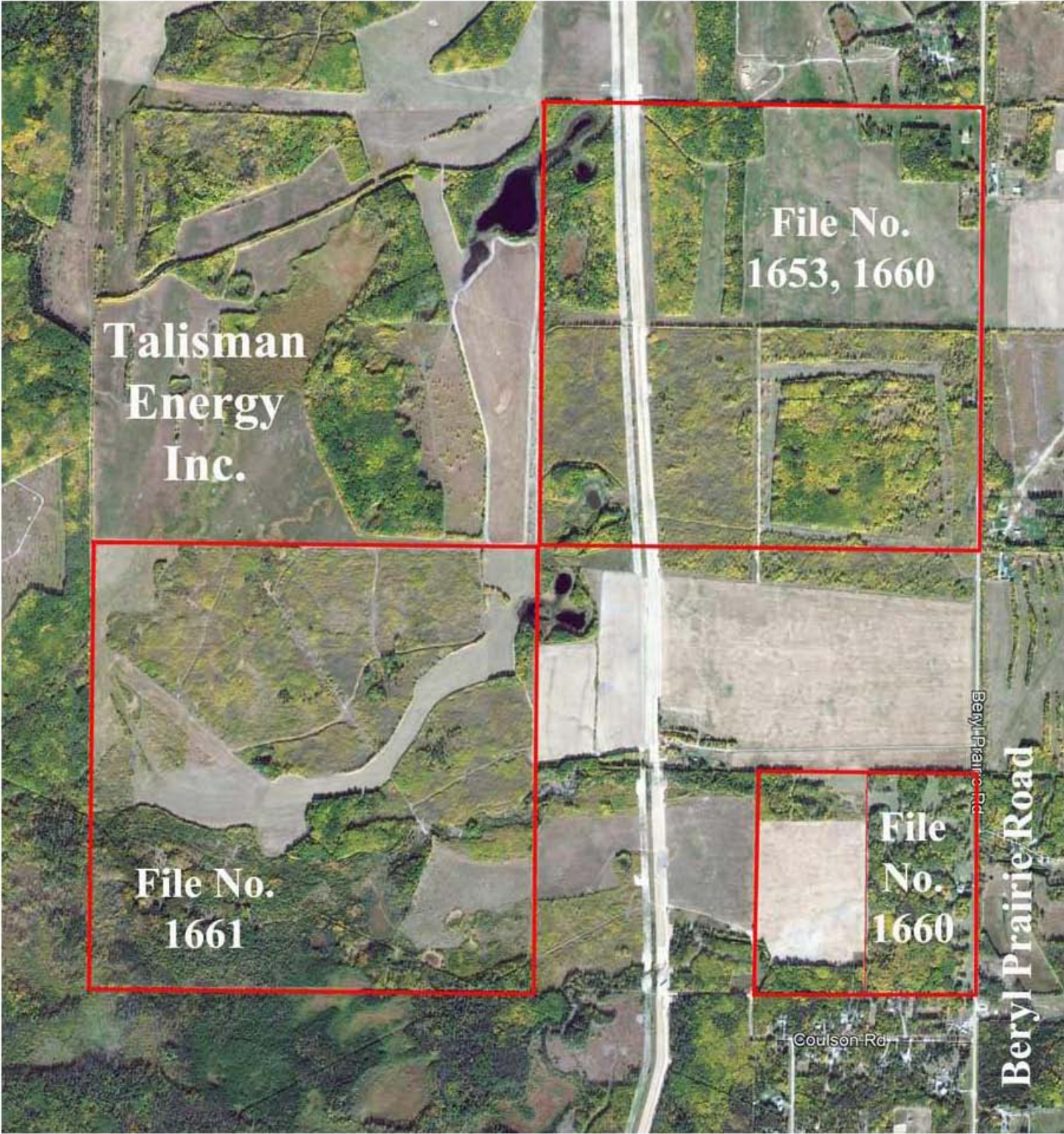
(APPLICANT)

AND:

James Edward Vince

(RESPONDENT)

BOARD ORDER



**Talisman
Energy
Inc.**

**File No.
1653, 1660**

**File No.
1661**

**File
No.
1660**

Beryl Prairie Rd

Beryl Prairie Road

Coulson Rd

Heard by telephone conference together with MAB files 1653 to 1659 and 1661: September 3 and 10, 2010

Mediator: Cheryl Vickers

Attended by: Gary Richardson, Jennifer Findlay, Sacha Plotnikow (Sept 3 only), Lance DeLaRonde (Sept 10 only), for the Applicant; Dave Core, Deborah McVicar (Sept 10 only), Pamela Gunderson (Sept 3 only), Derek Beam, James Vince (Sept 10 only), Terry Webster (Sept 10 only), and Doug Summer (Sept 10 only) for the Respondent and the Respondents in MAB files 1653 to 1659 and 1661

Introduction

[1] The Applicant, Talisman Energy Inc. ("Talisman") has applied to the Board for mediation and arbitration respecting right of entry to the Lands owned by the Respondent, James Edward Vince, as well as to the Lands owned by the Respondents in MAB applications 1653 to 1659, and 1661 (collectively the "Respondent Landowners" or "Landowners"), heard at the same time. In each application, Talisman seeks access to the respective Lands for the purpose of surveying, and for conducting the required soil sampling and archaeological assessments in advance of making an application to the Oil and Gas Commission ("OGC") for the construction of a water pipeline. The proposed water pipeline is to transport water to be used in the production of natural gas in a process known as "fracking".

[2] The applications are not about whether the proposed water pipeline should be built, or whether it is either necessary or beneficial. It is only about whether Talisman requires land for a purpose set out in section 16 of the *Petroleum and Natural Gas Act (PNGA)*, and if so, whether I should exercise my discretion to make an entry order pursuant to section 19 of the *PNGA* permitting Talisman to enter and use the Lands for the required purpose. During my discussions with the parties, the Landowners expressed contradictory views about the proposed pipeline. One of the Landowners submitted Talisman does not need the water pipeline, that it can continue to truck water for fracking, and that the purpose of the pipeline is only to save Talisman money. Others of the Landowners expressed support for the proposed pipeline submitting it will lessen traffic on the local roads. The merits of the pipeline itself are not a matter within the jurisdiction of the Board. The OGC must decide whether to grant an application to construct a water pipeline used in conjunction with the oil and gas industry, and address

any operational, environmental, safety or other regulatory concerns with the proposed project.

[3] The Landowners submit the applications are premature. They submit that Talisman has not engaged in good faith negotiation, and that they are prepared to negotiate access with Talisman, but not in the context of an application to the Board. The Landowners also take issue with the jurisdiction of the Board to issue an entry order.

Issues

[4] Does the Board have jurisdiction in Talisman's applications?

[5] If so, should I grant the right of entry order requested by Talisman?

Jurisdiction

[6] The Landowners question the jurisdiction of the Board on the basis that the proposed pipeline is a water pipeline, as opposed to a pipeline to transport petroleum or natural gas.

[7] Section 16 of the *Petroleum and Natural Gas Act (PNGA)* provides a person may apply to the Board for mediation and arbitration if the person "requires land to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir or for a connected or incidental purpose, and an owner of the land refuses to grant a surface lease satisfactory to that person authorizing entry, occupation or use for that purpose."

[8] Talisman says it requires access to the Lands to conduct a survey, soil sampling and archaeological assessments in advance of making an application to the OGC for a permit to build and operate the pipeline. The purpose of the pipeline is to carry water to the production fields to be used for fracking. Fracking is a process whereby water is used to fracture the rock in order to extract the natural gas. Fracking is, therefore, a connected purpose to the production of natural gas.

[9] The jurisdictional issue for the Board, at this time, is whether entry for surveying, soil sampling and archaeological assessment is a "connected or incidental purpose" within the meaning of the *PNGA*. Talisman cannot construct the proposed water pipeline without a permit from the OGC. The OGC requires that an application be accompanied by a survey, soil tests and an archaeological assessment. Talisman must access the Lands in order to complete the required survey work, soil tests and archaeological assessments. The Landowners have not given Talisman permission to enter their land for this purpose. Because the surveying, soil testing and archaeological assessments is work that is required by

the OGC before an application to build the water pipeline for fracking can be considered, this work is also a connected or incidental purpose to the production of natural gas. The purpose for which Talisman requires access to the Lands, therefore, is a purpose that triggers its ability to make an application to the Board under section 16(1) of the *PNGA* and the Board has jurisdiction.

Right of Entry

[10] Section 18(3) of the *PNGA* provides:

If an application is made under section 16(1), and if the mediator believes, as a result of a mediation hearing, that the applicant should be permitted to enter, occupy or use the land, the mediator may make an order under section 19.

[11] Section 19 provides that the mediator may make an order permitting, subject to terms the mediator may specify, an applicant under section 16 to enter, occupy or use land for a purpose stated in that section.

[12] I am satisfied that Talisman requires entry to the Lands for a purpose stated in section 16. The question remains, however, whether I should exercise my discretion to grant the right of entry order at this time.

[13] The Landowners submit they have not refused entry. They say they have been and remain willing to negotiate entry with Talisman but that Talisman has not engaged them in negotiation. They submit the applications to the Board ought not to have been made in advance of meaningful negotiations. Talisman, on the other hand, says they held discussions with individual Landowners as far back as May 2010, that permission to enter has not been forthcoming, and that time to conduct the necessary work before freeze-up is running out.

[14] Talisman says it initially contacted individual Landowners in early May 2010 to provide information about the proposed project and seek permission to survey. Talisman says that, initially, some of the Landowners agreed to access for the surveying and other work, but later withdrew agreement. Talisman's record of events indicates that following initial contact with individual Landowners in the first half of May, one of the Landowners indicated Mr. Core of CAEPLA would be in touch on the Landowners' behalf. Talisman received a letter from CAEPLA on June 7, 2010 requesting Talisman agree to a budget for costs and expenses of Landowners but without any documentation from the Landowners confirming CAEPLA's representation. Talisman responded on June 22, 2010 requesting authorization from the Landowners confirming CAEPLA's representation, proposing a conference call to discuss, and requesting permission for survey work. CAEPLA emailed Talisman on June 28 requesting advance payment of fees prior to proceeding with negotiations. Talisman responded reiterating the need for Landowner authorization of CAEPLA's representation and again requesting a conference call and requesting permission for survey work.

Talisman says they did not receive written authorizations from the Landowners of CAEPLA's representation until July 21, 2010 and that most of the authorizations received by Talisman had been signed in May 2010.

[15] Talisman served CAEPLA on behalf of the Landowners with its applications to the Board on July 23, 2010.

[16] On July 29, 2010, following receipt of Talisman's applications to the Board, Mr. Core of CAEPLA wrote to the Board submitting it was premature to apply for right of entry without having previously consulted or negotiated with the Landowners' authorized spokespeople. Mr. Core said, "Before landowners will agree to entry of their lands, for surveying purposes, they want to address access and damage issues." The Board responded that it had not yet received Talisman's applications and that, once the applications had been received, there would be opportunity to discuss the Landowner's concerns through the Board's processes.

[17] On July 30, 2010, CAEPLA copied the Board with a letter of the same date to Talisman expressing that Talisman had not met with the Beryl Prairie Land Committee (BPLC) or CAEPLA to discuss terms of access for surveyors or terms of damage mitigation as a result of surveying, and setting out landowner concerns. While some of the concerns articulated in the letter of July 30, 2010 are relevant to access for surveying, most of the concerns raised in the letter of July 30, 2010 relate to the construction of the water pipeline itself, for which access to the Lands is not yet requested or required.

[18] The Board received and acknowledged Talisman's applications on August 3, 2010.

[19] Communication between Talisman and CAEPLA continued in the first two weeks of August and the parties met by teleconference on August 11, 2010. Minutes of that teleconference prepared by Talisman indicated that all parties expressed a desire to work together to build a positive relationship. The minutes note Talisman's initial contact with the Landowners in May, and the concern about winter approaching and the increasing necessity to complete the survey and other work before then. The minutes note the Landowners' concern over their stewardship responsibilities, the imposition on them and impact to the land of the proposed project, their desire to negotiate a comprehensive agreement encompassing all aspects of the pipeline project before granting survey permission, and their feeling that the project was being pushed on them through the involvement of the Board. The Landowners questioned the need for a survey as the proposed route for the water pipeline followed an existing right of way. Talisman indicated the proposed route represented an ideal route but that it would be adjusted as necessary based on information obtained from a survey and that the archaeological work also needed to be done. Some negotiation ensued around funding for expenses and commitment by Talisman to pay

damages and reasonable compensation. The parties agreed to another teleconference the following week.

[20] Further correspondence between the parties ensued, however negotiations broke down essentially over the involvement of the Board. Talisman expected the negotiations would continue in parallel with the Board's process. The Landowners indicated they were not willing to negotiate with Talisman as long as Talisman proceeded with the Board's process.

[21] The Board convened a teleconference with the parties on September 3, 2010. The Landowners maintained their position that the Board's application was premature, that Talisman had not negotiated with the Landowner's legitimate representative in an effort to reach agreement. They maintained they were not opposed to the proposed project but wanted to be treated with respect and wanted the opportunity to engage in negotiations without the coercion of the Board as they would in any other business arrangement. They asked Talisman to withdraw their applications and expressed a likelihood that an agreement could be reached. Talisman's representatives indicated they would consider withdrawing the applications but needed to discuss with the project's executive and seek instructions. A telephone conference between the parties without the Board was scheduled for early the following week. The Board adjourned its process pending further advice from the parties.

[22] On September 7, 2010 Talisman indicated it was not willing to withdraw the applications. The Landowners indicated they were not willing to negotiate under the circumstances. The Board reconvened its process by teleconference on September 10, 2010.

[23] The Landowners maintained their position that no meaningful negotiation had occurred between Talisman and CAEPLA, the Landowners' authorized representative, that any consultations with the Landowners individually were not valid once notification of CAEPLA's representation was given. The Landowners feel that the Board's involvement compromises their ability to negotiate on a level playing field with the company. They reiterated that they were willing to negotiate, but not before the Board. They questioned Talisman's need to do survey work. Talisman maintained they also wanted to negotiate with the Landowners but that time was running out before freeze-up. Talisman reiterated the necessity for a survey, soil testing and archaeological assessment as a requirement of the OGC process. The Board invited the Landowners to express their concerns about the proposed access for surveying, soil testing and archaeological assessments and to propose terms of access that would address their concerns. The Landowners were not willing to discuss their concerns with the Board. The Board offered to adjourn proceedings to allow the parties the opportunity to reach an agreement. The Landowners reiterated that unless the applications were withdrawn, they were not willing to negotiate. Talisman, in turn, expressed concern that if the applications were withdrawn, and agreement

was not reached, there would be insufficient time to reapply to the Board before freeze-up.

[24] I was advised that freeze-up could happen anytime from about the middle of October. I was further advised that while the work could continue after the ground froze, it would require more time on the Lands, be more intrusive, and cause greater inconvenience.

[25] In British Columbia, most landowners do not own subsurface resources. Their ownership of land is not absolute but limited to rights to the subsurface retained by the Crown. The Crown, in turn, may grant a person or company rights to explore for or develop subsurface resources. If a person or company requires surface access to private lands to explore for, or develop a subsurface resource, the person or company requiring surface access may not enter without the agreement of the landowner or authorization of the Board. The Board may authorize entry if access is needed and terms of access are not agreed. In other words, if access is required, a landowner may either agree to compensation and terms of access, or the Board may make an order authorizing access and setting out terms. The courts have acknowledged the compulsory aspect of this situation and that landowners lose the right to decide whether there will be oil and gas activity on their land (*Dome Petroleum Ltd. v. Juell*, [1982] B.C.J. 1510 (Q.L.)(S.C.)). An application to the Board does not compromise a landowner's negotiating position; the law has already compromised it. In the circumstances, landowners should focus on negotiating the best terms of access possible to compensate them for loss and that will address their legitimate concerns about stewardship of the land.

[26] While companies should always endeavour to negotiate terms of access and compensation with landowners or their representatives in advance of making an application to the Board, if terms of access are not agreed, they may seek the assistance of the Board. The Board's job is then to try and facilitate an agreement that addresses the needs and concerns of all parties within the context of the law. An application to the Board does not preclude the parties from reaching their own agreement without the Board's assistance or intervention.

[27] The information before me indicates that Talisman has been attempting to negotiate entry for the purpose of surveying, soil testing and archeological assessment with the Landowners since early May. Upon receipt of CAEPLA's letter in early June, it sought to convene a conference call to discuss while seeking confirmation of CAEPLA's authority to negotiate. Despite being asked by CAEPLA to commit to paying fees and costs, Talisman did not receive confirmation from the Landowners of CAEPLA's representation until late July, almost three months after initial contact with the Landowners and more than two months after being told CAEPLA would be involved.

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[29] I am satisfied Talisman tried to negotiate the Landowners' agreement for the survey work both individually and with CAEPLA before filing the applications to the Board. Some of the Landowners initially agreed to the survey work but then withdrew. Time passed without discussions occurring with CAEPLA despite requests for a conference call. CAEPLA sought payment of fees, but without formal confirmation that it had the authority to negotiate on the Landowners behalf. Given the amount of time that had passed following Talisman's initial contact with the Landowners and initial communications with CAEPLA, I do not think it was unreasonable for Talisman to commence the applications to the Board to seek assistance in negotiating an agreement. When Talisman filed its applications, the Landowners had not agreed to terms of access to the Lands, and it was not unreasonable, in the circumstances, to seek the Board's assistance in negotiating that agreement.

[30] An application to the Board does not preclude the parties from coming to agreement. The Board received the applications on August 3. It convened its first teleconference with the parties on September 3. The parties had a month before the Board commenced telephone discussions to continue negotiations. In fact, they did continue negotiations but negotiations broke down. Despite a telephone conference between the parties on August 11 and ensuing correspondence, no agreement was reached. By the time the Board convened its process, the Landowners were no longer willing to negotiate unless the applications were withdrawn. Talisman considered the Landowners' request to withdraw the applications but declined to do so.

[31] It is possible that if Talisman had acceded to the Landowners' request to withdraw the applications, agreement for access to the Lands to complete the surveying, soil sampling and archaeological assessments would have quickly followed. It is equally possible that, given negotiations to date had not focused on the immediate need for limited access and the differing views amongst the Landowners themselves over the merits of the proposed pipeline, negotiations would have continued to be unsuccessful. We will never know.

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They were not willing to do so. I offered to adjourn the Board's proceedings to allow the parties to agree on terms of access, but the Landowners maintained that they would not negotiate with Talisman unless the applications were withdrawn.

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[35] As the Landowners declined to engage in negotiations before me, declined to express their specific concerns about the access for surveying, soil sampling and archaeological assessments, and declined to suggest terms of access that would address their concerns, I have made my best efforts to set out terms of access that will minimize impact to the land and livestock and permit consultation between the parties to ensure the safety of persons and livestock. There is no point to further mediation and further mediation is refused.

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Order

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2. Entry to the Lands for the purpose of surveying, soil testing, and archaeological assessment shall be subject to the terms set out in Appendix "A".
3. The Applicant shall deposit with the Mediation and Arbitration Board security of \$2,500.00 payable to the Minister of Finance. All or part of the security deposit may be returned to the Applicant or paid to the Respondent upon the agreement of the parties or as ordered by the Board.
4. The Applicant shall pay to the Respondent \$2,000.00 as partial payment for compensation payable for entry to and use of the Lands for the specified purpose, and to acknowledge the compulsory aspect of the entry.
5. The Applicant shall serve the Respondent with a copy of this Order prior to entry onto the Lands. Service may be accomplished by personal service of a copy of the Order or by e-mail to CAEPLA.
6. The Applicant shall pay the Respondent's costs of this application. If the parties cannot agree on the amount of costs payable, the Board retains jurisdiction to determine the amount.
7. Nothing in this order operates as consent, permission, approval or authorization of matters within the jurisdiction of the Oil and Gas Commission.

Dated: September 13, 2010

FOR THE BOARD



Cheryl Vickers
Chair

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- Focus will conduct the survey. Focus will give the Respondent landowner at least 24 hours notice prior to entry. The Respondent landowner may contact the surveyors, or the attending representative of Talisman, with any questions or concerns during the survey
- Surveyors will consult the Respondent landowner with respect to their method of access over the Lands, and may only use motorized vehicles with the permission of the Respondent landowner
- Surveyors will minimize the number of survey stakes used. Any stakes required can be removed after the soils assessment and archaeological assessment have been completed
- Surveyors will only cut trees or branches in areas where growth is too dense for sight lines.
- Any trees or branches cut down will be disposed of in a manner acceptable to the Respondent landowner

Soil sampling is subject to the following additional terms:

- Roy Northern will conduct the soil testing. Roy Northern will give the Respondent landowner at least 24 hour notice prior to entry. The Respondent landowner may contact Roy Northern, or the attending representative of Talisman, with any questions or concerns during the soil sampling

- Personnel will consult the Respondent landowner with respect to method of access across the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- Soil samples will be taken in accordance with the requirements of the Oil and Gas Commission
- The Respondent landowner will be provided with a copy of the soil assessment report

Archaeological assessment is subject to the following additional terms:

- Landsong will conduct the archaeological assessment. Landsong will give the Respondent Landowner at least 24 hours notice prior to entry. The Respondent landowner may contact Landsong, or the attending representative of Talisman, with any questions or concerns during the assessment.
- The assessment will take place at or near the same time as the soil assessment.
- Personnel will consult the Respondent landowner with respect to method of access over the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- The bulk of the assessment will be completed with an archaeologist walking along the proposed access. Ground disturbance (shovel testing) will only occur if the archaeologist sees areas of "high potential".

File No. 1661
Board Order # 1661-1

September 13, 2010

MEDIATION AND ARBITRATION BOARD

**IN THE MATTER OF THE PETROLEUM AND NATURAL GAS
ACT, R.S.B.C., C. 361 AS AMENDED**

**AND IN THE MATTER OF
District Lot 962 Peace River District**

(The "Lands")

BETWEEN:

Talisman Energy Inc.

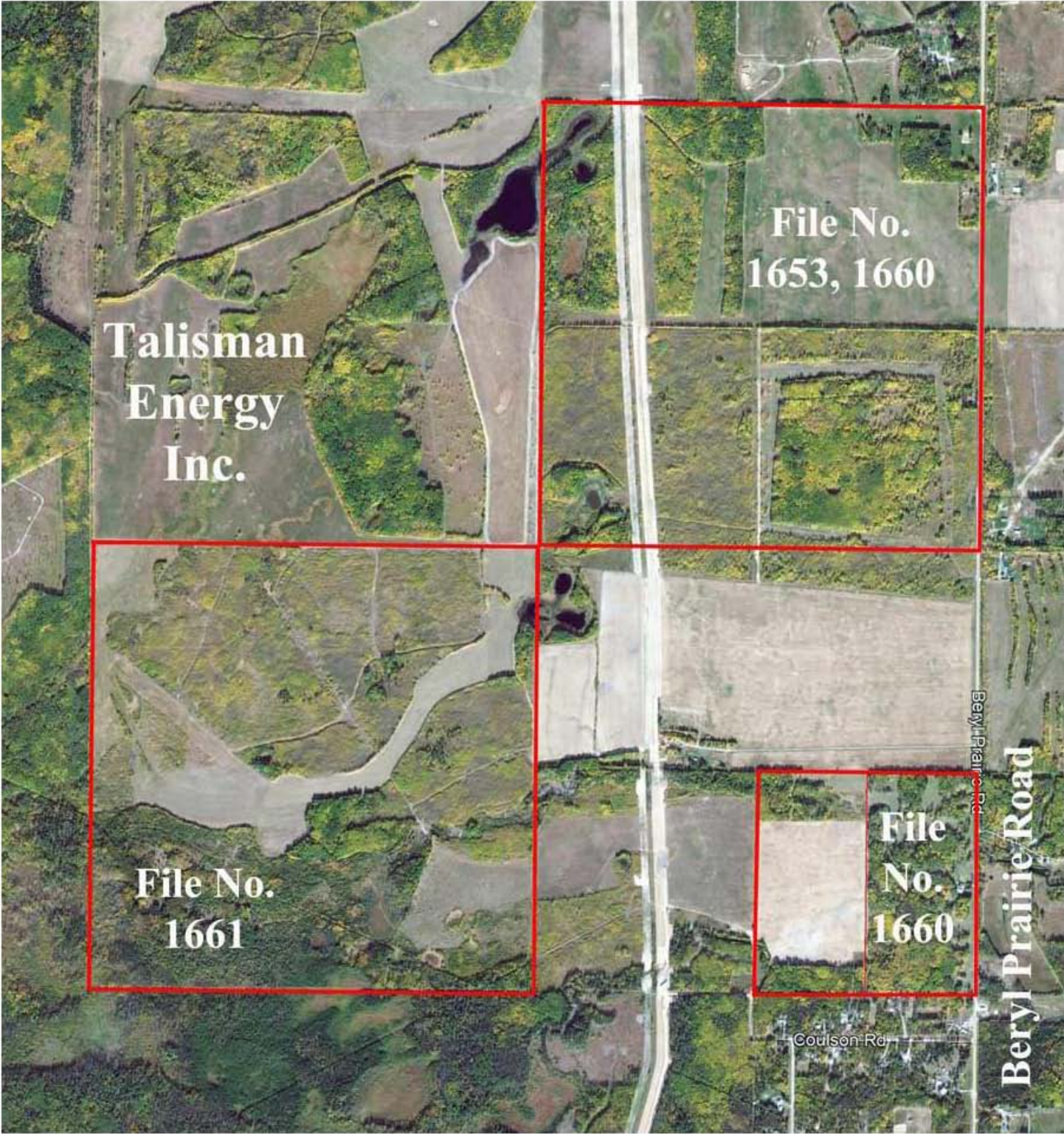
(APPLICANT)

AND:

**James Edward Vince
and Margaret Phyllis Vince**

(RESPONDENTS)

BOARD ORDER



**Talisman
Energy
Inc.**

**File No.
1653, 1660**

**File No.
1661**

**File
No.
1660**

Beryl Prairie Rd

Beryl Prairie Road

Coulson Rd

Heard by telephone conference September 3 and 10, 2010
together with MAB files 1653
through 1660:

Mediator: Cheryl Vickers

Attended by: Gary Richardson, Jennifer Findlay, Sacha
Plotnikow (Sept 3 only), Lance DeLaRonde
(Sept 10 only), for the Applicant;
Dave Core, Deborah McVicar (Sept 10 only),
Pamela Gunderson (Sept 3 only), Derek
Beam, James Vince (Sept 10 only), Terry
Webster (Sept 10 only), and Doug Summer
(Sept 10 only) for the Respondent and the
Respondents in MAB files 1653 to 1660

Introduction

[1] The Applicant, Talisman Energy Inc. ("Talisman") has applied to the Board for mediation and arbitration respecting right of entry to the Lands owned by the Respondents, Mr. and Mrs. Vince, as well as to the Lands owned by the Respondents in MAB applications 1653 to 1660 (collectively the "Respondent Landowners" or "Landowners"), heard at the same time. In each application, Talisman seeks access to the respective Lands for the purpose of surveying, and for conducting the required soil sampling and archaeological assessments in advance of making an application to the Oil and Gas Commission ("OGC") for the construction of a water pipeline. The proposed water pipeline is to transport water to be used in the production of natural gas in a process known as "fracking".

[2] The applications are not about whether the proposed water pipeline should be built, or whether it is either necessary or beneficial. It is only about whether Talisman requires land for a purpose set out in section 16 of the *Petroleum and Natural Gas Act (PNGA)*, and if so, whether I should exercise my discretion to make an entry order pursuant to section 19 of the *PNGA* permitting Talisman to enter and use the Lands for the required purpose. During my discussions with the parties, the Landowners expressed contradictory views about the proposed pipeline. One of the Landowners submitted Talisman does not need the water pipeline, that it can continue to truck water for fracking, and that the purpose of the pipeline is only to save Talisman money. Others of the Landowners expressed support for the proposed pipeline submitting it will lessen traffic on the local roads. The merits of the pipeline itself are not a matter within the jurisdiction of the Board. The OGC must decide whether to grant an application to construct a water pipeline used in conjunction with the oil and gas industry, and address

any operational, environmental, safety or other regulatory concerns with the proposed project.

[3] The Landowners submit the applications are premature. They submit that Talisman has not engaged in good faith negotiation, and that they are prepared to negotiate access with Talisman, but not in the context of an application to the Board. The Landowners also take issue with the jurisdiction of the Board to issue an entry order.

Issues

[4] Does the Board have jurisdiction in Talisman's applications?

[5] If so, should I grant the right of entry order requested by Talisman?

Jurisdiction

[6] The Landowners question the jurisdiction of the Board on the basis that the proposed pipeline is a water pipeline, as opposed to a pipeline to transport petroleum or natural gas.

[7] Section 16 of the *Petroleum and Natural Gas Act (PNGA)* provides a person may apply to the Board for mediation and arbitration if the person "requires land to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir or for a connected or incidental purpose, and an owner of the land refuses to grant a surface lease satisfactory to that person authorizing entry, occupation or use for that purpose."

[8] Talisman says it requires access to the Lands to conduct a survey, soil sampling and archaeological assessments in advance of making an application to the OGC for a permit to build and operate the pipeline. The purpose of the pipeline is to carry water to the production fields to be used for fracking. Fracking is a process whereby water is used to fracture the rock in order to extract the natural gas. Fracking is, therefore, a connected purpose to the production of natural gas.

[9] The jurisdictional issue for the Board, at this time, is whether entry for surveying, soil sampling and archaeological assessment is a "connected or incidental purpose" within the meaning of the *PNGA*. Talisman cannot construct the proposed water pipeline without a permit from the OGC. The OGC requires that an application be accompanied by a survey, soil tests and an archaeological assessment. Talisman must access the Lands in order to complete the required survey work, soil tests and archaeological assessments. The Landowners have not given Talisman permission to enter their land for this purpose. Because the surveying, soil testing and archaeological assessments is work that is required by

the OGC before an application to build the water pipeline for fracking can be considered, this work is also a connected or incidental purpose to the production of natural gas. The purpose for which Talisman requires access to the Lands, therefore, is a purpose that triggers its ability to make an application to the Board under section 16(1) of the *PNGA* and the Board has jurisdiction.

Right of Entry

[10] Section 18(3) of the *PNGA* provides:

If an application is made under section 16(1), and if the mediator believes, as a result of a mediation hearing, that the applicant should be permitted to enter, occupy or use the land, the mediator may make an order under section 19.

[11] Section 19 provides that the mediator may make an order permitting, subject to terms the mediator may specify, an applicant under section 16 to enter, occupy or use land for a purpose stated in that section.

[12] I am satisfied that Talisman requires entry to the Lands for a purpose stated in section 16. The question remains, however, whether I should exercise my discretion to grant the right of entry order at this time.

[13] The Landowners submit they have not refused entry. They say they have been and remain willing to negotiate entry with Talisman but that Talisman has not engaged them in negotiation. They submit the applications to the Board ought not to have been made in advance of meaningful negotiations. Talisman, on the other hand, says they held discussions with individual Landowners as far back as May 2010, that permission to enter has not been forthcoming, and that time to conduct the necessary work before freeze-up is running out.

[14] Talisman says it initially contacted individual Landowners in early May 2010 to provide information about the proposed project and seek permission to survey. Talisman says that, initially, some of the Landowners agreed to access for the surveying and other work, but later withdrew agreement. Talisman's record of events indicates that following initial contact with individual Landowners in the first half of May, one of the Landowners indicated Mr. Core of CAEPLA would be in touch on the Landowners' behalf. Talisman received a letter from CAEPLA on June 7, 2010 requesting Talisman agree to a budget for costs and expenses of Landowners but without any documentation from the Landowners confirming CAEPLA's representation. Talisman responded on June 22, 2010 requesting authorization from the Landowners confirming CAEPLA's representation, proposing a conference call to discuss, and requesting permission for survey work. CAEPLA emailed Talisman on June 28 requesting advance payment of fees prior to proceeding with negotiations. Talisman responded reiterating the need for Landowner authorization of CAEPLA's representation and again requesting a conference call and requesting permission for survey work.

Talisman says they did not receive written authorizations from the Landowners of CAEPLA's representation until July 21, 2010 and that most of the authorizations received by Talisman had been signed in May 2010.

[15] Talisman served CAEPLA on behalf of the Landowners with its applications to the Board on July 23, 2010.

[16] On July 29, 2010, following receipt of Talisman's applications to the Board, Mr. Core of CAEPLA wrote to the Board submitting it was premature to apply for right of entry without having previously consulted or negotiated with the Landowners' authorized spokespeople. Mr. Core said, "Before landowners will agree to entry of their lands, for surveying purposes, they want to address access and damage issues." The Board responded that it had not yet received Talisman's applications and that, once the applications had been received, there would be opportunity to discuss the Landowner's concerns through the Board's processes.

[17] On July 30, 2010, CAEPLA copied the Board with a letter of the same date to Talisman expressing that Talisman had not met with the Beryl Prairie Land Committee (BPLC) or CAEPLA to discuss terms of access for surveyors or terms of damage mitigation as a result of surveying, and setting out landowner concerns. While some of the concerns articulated in the letter of July 30, 2010 are relevant to access for surveying, most of the concerns raised in the letter of July 30, 2010 relate to the construction of the water pipeline itself, for which access to the Lands is not yet requested or required.

[18] The Board received and acknowledged Talisman's applications on August 3, 2010.

[19] Communication between Talisman and CAEPLA continued in the first two weeks of August and the parties met by teleconference on August 11, 2010. Minutes of that teleconference prepared by Talisman indicated that all parties expressed a desire to work together to build a positive relationship. The minutes note Talisman's initial contact with the Landowners in May, and the concern about winter approaching and the increasing necessity to complete the survey and other work before then. The minutes note the Landowners' concern over their stewardship responsibilities, the imposition on them and impact to the land of the proposed project, their desire to negotiate a comprehensive agreement encompassing all aspects of the pipeline project before granting survey permission, and their feeling that the project was being pushed on them through the involvement of the Board. The Landowners questioned the need for a survey as the proposed route for the water pipeline followed an existing right of way. Talisman indicated the proposed route represented an ideal route but that it would be adjusted as necessary based on information obtained from a survey and that the archaeological work also needed to be done. Some negotiation ensued around funding for expenses and commitment by Talisman to pay

damages and reasonable compensation. The parties agreed to another teleconference the following week.

[20] Further correspondence between the parties ensued, however negotiations broke down essentially over the involvement of the Board. Talisman expected the negotiations would continue in parallel with the Board's process. The Landowners indicated they were not willing to negotiate with Talisman as long as Talisman proceeded with the Board's process.

[21] The Board convened a teleconference with the parties on September 3, 2010. The Landowners maintained their position that the Board's application was premature, that Talisman had not negotiated with the Landowner's legitimate representative in an effort to reach agreement. They maintained they were not opposed to the proposed project but wanted to be treated with respect and wanted the opportunity to engage in negotiations without the coercion of the Board as they would in any other business arrangement. They asked Talisman to withdraw their applications and expressed a likelihood that an agreement could be reached. Talisman's representatives indicated they would consider withdrawing the applications but needed to discuss with the project's executive and seek instructions. A telephone conference between the parties without the Board was scheduled for early the following week. The Board adjourned its process pending further advice from the parties.

[22] On September 7, 2010 Talisman indicated it was not willing to withdraw the applications. The Landowners indicated they were not willing to negotiate under the circumstances. The Board reconvened its process by teleconference on September 10, 2010.

[23] The Landowners maintained their position that no meaningful negotiation had occurred between Talisman and CAEPLA, the Landowners' authorized representative, that any consultations with the Landowners individually were not valid once notification of CAEPLA's representation was given. The Landowners feel that the Board's involvement compromises their ability to negotiate on a level playing field with the company. They reiterated that they were willing to negotiate, but not before the Board. They questioned Talisman's need to do survey work. Talisman maintained they also wanted to negotiate with the Landowners but that time was running out before freeze-up. Talisman reiterated the necessity for a survey, soil testing and archaeological assessment as a requirement of the OGC process. The Board invited the Landowners to express their concerns about the proposed access for surveying, soil testing and archaeological assessments and to propose terms of access that would address their concerns. The Landowners were not willing to discuss their concerns with the Board. The Board offered to adjourn proceedings to allow the parties the opportunity to reach an agreement. The Landowners reiterated that unless the applications were withdrawn, they were not willing to negotiate. Talisman, in turn, expressed concern that if the applications were withdrawn, and agreement

was not reached, there would be insufficient time to reapply to the Board before freeze-up.

[24] I was advised that freeze-up could happen anytime from about the middle of October. I was further advised that while the work could continue after the ground froze, it would require more time on the Lands, be more intrusive, and cause greater inconvenience.

[25] In British Columbia, most landowners do not own subsurface resources. Their ownership of land is not absolute but limited to rights to the subsurface retained by the Crown. The Crown, in turn, may grant a person or company rights to explore for or develop subsurface resources. If a person or company requires surface access to private lands to explore for, or develop a subsurface resource, the person or company requiring surface access may not enter without the agreement of the landowner or authorization of the Board. The Board may authorize entry if access is needed and terms of access are not agreed. In other words, if access is required, a landowner may either agree to compensation and terms of access, or the Board may make an order authorizing access and setting out terms. The courts have acknowledged the compulsory aspect of this situation and that landowners lose the right to decide whether there will be oil and gas activity on their land (*Dome Petroleum Ltd. v. Juell*, [1982] B.C.J. 1510 (Q.L.)(S.C.)). An application to the Board does not compromise a landowner's negotiating position; the law has already compromised it. In the circumstances, landowners should focus on negotiating the best terms of access possible to compensate them for loss and that will address their legitimate concerns about stewardship of the land.

[26] While companies should always endeavour to negotiate terms of access and compensation with landowners or their representatives in advance of making an application to the Board, if terms of access are not agreed, they may seek the assistance of the Board. The Board's job is then to try and facilitate an agreement that addresses the needs and concerns of all parties within the context of the law. An application to the Board does not preclude the parties from reaching their own agreement without the Board's assistance or intervention.

[27] The information before me indicates that Talisman has been attempting to negotiate entry for the purpose of surveying, soil testing and archeological assessment with the Landowners since early May. Upon receipt of CAEPLA's letter in early June, it sought to convene a conference call to discuss while seeking confirmation of CAEPLA's authority to negotiate. Despite being asked by CAEPLA to commit to paying fees and costs, Talisman did not receive confirmation from the Landowners of CAEPLA's representation until late July, almost three months after initial contact with the Landowners and more than two months after being told CAEPLA would be involved.

[28] Talisman served CAEPLA, as the Landowners' representative, with the applications to the Board in late July, filing the applications with the Board itself in early August. Following initiation of the applications to the Board, Talisman and CAEPLA continued to correspond, although somewhat at cross-purposes prior to the Board convening its first conference call with the parties. CAEPLA wanted to negotiate a comprehensive agreement for the pipeline right of way; Talisman only sought an agreement for the limited purpose of surveying, soil testing and archaeological assessments given that the project could change as a result of the initial work or as a result of the OGC's process.

[29] I am satisfied Talisman tried to negotiate the Landowners' agreement for the survey work both individually and with CAEPLA before filing the applications to the Board. Some of the Landowners initially agreed to the survey work but then withdrew. Time passed without discussions occurring with CAEPLA despite requests for a conference call. CAEPLA sought payment of fees, but without formal confirmation that it had the authority to negotiate on the Landowners behalf. Given the amount of time that had passed following Talisman's initial contact with the Landowners and initial communications with CAEPLA, I do not think it was unreasonable for Talisman to commence the applications to the Board to seek assistance in negotiating an agreement. When Talisman filed its applications, the Landowners had not agreed to terms of access to the Lands, and it was not unreasonable, in the circumstances, to seek the Board's assistance in negotiating that agreement.

[30] An application to the Board does not preclude the parties from coming to agreement. The Board received the applications on August 3. It convened its first teleconference with the parties on September 3. The parties had a month before the Board commenced telephone discussions to continue negotiations. In fact, they did continue negotiations but negotiations broke down. Despite a telephone conference between the parties on August 11 and ensuing correspondence, no agreement was reached. By the time the Board convened its process, the Landowners were no longer willing to negotiate unless the applications were withdrawn. Talisman considered the Landowners' request to withdraw the applications but declined to do so.

[31] It is possible that if Talisman had acceded to the Landowners' request to withdraw the applications, agreement for access to the Lands to complete the surveying, soil sampling and archaeological assessments would have quickly followed. It is equally possible that, given negotiations to date had not focused on the immediate need for limited access and the differing views amongst the Landowners themselves over the merits of the proposed pipeline, negotiations would have continued to be unsuccessful. We will never know.

[32] I am satisfied that the parties had the opportunity to agree to terms of access both before and after the applications to the Board were made. In the context of these proceedings I invited the Landowners to express their concerns about the proposed access and suggest terms that would address their concerns.

They were not willing to do so. I offered to adjourn the Board's proceedings to allow the parties to agree on terms of access, but the Landowners maintained that they would not negotiate with Talisman unless the applications were withdrawn.

[33] I am satisfied that Talisman requires access to the Lands for a purpose set out in section 16 of the *PNGA*. I am further satisfied that Talisman tried to negotiate terms of access with the Landowners individually and with CAEPLA on the Landowners' behalf without success before making their applications to the Board. I am satisfied that Talisman continued to try to negotiate terms of access with CAEPLA on the Landowners' behalf following the applications to the Board again without success. I am satisfied there are time pressures to Talisman's need for access and that it is beneficial for the required work to be done before freeze-up. I am satisfied that time is running out in that regard. If I decline to make the entry order, I am not convinced that the parties will be able to negotiate terms of access in a timely way so that the work can be completed before freeze-up.

[34] In all of the circumstances, I am inclined to exercise my discretion to grant the right of entry. It is not without a great sense of sadness that I do so. I had hoped that the parties would come to terms. I regret that they have not. I accept that the Landowners have stewardship responsibilities with respect to the Lands and that, in any access for subsurface development, an effort should be made to address their legitimate concerns. I am frustrated that the Landowners were not willing to participate in mediation before me, were not willing to let me facilitate discussion in an effort at having the parties craft an agreement for the limited purpose of surveying, soil testing, and archaeological assessment that would be satisfactory to all parties. I hope that if Talisman proceeds with an application to the OGC for a permit to construct the water pipeline, that the parties will engage with each other and the OGC to address any operational, environmental, safety or other regulatory concerns. In the event a permit to construct the pipeline is granted, I encourage the parties to engage with each other in a timely manner to negotiate terms of access for the construction of the pipeline itself. Hopefully, further applications to the Board will not be necessary.

[35] As the Landowners declined to engage in negotiations before me, declined to express their specific concerns about the access for surveying, soil sampling and archaeological assessments, and declined to suggest terms of access that would address their concerns, I have made my best efforts to set out terms of access that will minimize impact to the land and livestock and permit consultation between the parties to ensure the safety of persons and livestock. There is no point to further mediation and further mediation is refused.

[36] I make the following Order pursuant to section 18(2) and section 19 of the *Petroleum and Natural Gas Act*.

Order

The Mediation and Arbitration Board orders:

1. Upon payment of the amounts set out in paragraphs 3 and 4, the Applicant and its contractors shall have the right of entry to and access across the Lands for a period of sixty (60) days from the date of this Order for the purpose of surveying, soil testing, and archaeological assessment, as required by the OGC in advance of making an application for a permit to construct the proposed water pipeline.
2. Entry to the Lands for the purpose of surveying, soil testing, and archaeological assessment shall be subject to the terms set out in Appendix "A".
3. The Applicant shall deposit with the Mediation and Arbitration Board security of \$2,500.00 payable to the Minister of Finance. All or part of the security deposit may be returned to the Applicant or paid to the Respondent upon the agreement of the parties or as ordered by the Board.
4. The Applicant shall pay to the Respondent \$2,000.00 as partial payment for compensation payable for entry to and use of the Lands for the specified purpose, and to acknowledge the compulsory aspect of the entry.
5. The Applicant shall serve the Respondent with a copy of this Order prior to entry onto the Lands. Service may be accomplished by personal service of a copy of the Order or by e-mail to CAEPLA.
6. The Applicant shall pay the Respondent's costs of this application. If the parties cannot agree on the amount of costs payable, the Board retains jurisdiction to determine the amount.
7. Nothing in this order operates as consent, permission, approval or authorization of matters within the jurisdiction of the Oil and Gas Commission.

Dated: September 13, 2010

FOR THE BOARD



Cheryl Vickers
Chair

APPENDIX A

Right of entry to the Lands for surveying, soil testing, and archaeological assessment required for the purpose of making an application to the Oil and Gas Commission is subject to the following general terms:

- Talisman and/or its contractors shall at all times conduct their work in a safe and responsible manner, which without limitation, shall include: driving with due care and attention when approaching the Lands, including being mindful of speed, the presence of children playing, and the minimization of dust, and taking care in the presence of livestock to avoid disturbance or harm to the livestock
- Talisman shall advise the Respondent landowner immediately of any situation that may require the landowner's attention
- The Respondent landowner shall advise Talisman of any concerns with respect to the activity of Talisman and/or its contractors and of any damage incurred as a result of the entry
- Talisman shall be responsible for any damage caused by the entry
- Contractors of Talisman entering the Lands pursuant to this Order will be accompanied by a representative of Talisman

Surveying of the Lands is subject to the following additional terms:

- Focus will conduct the survey. Focus will give the Respondent landowner at least 24 hours notice prior to entry. The Respondent landowner may contact the surveyors, or the attending representative of Talisman, with any questions or concerns during the survey
- Surveyors will consult the Respondent landowner with respect to their method of access over the Lands, and may only use motorized vehicles with the permission of the Respondent landowner
- Surveyors will minimize the number of survey stakes used. Any stakes required can be removed after the soils assessment and archaeological assessment have been completed
- Surveyors will only cut trees or branches in areas where growth is too dense for sight lines.
- Any trees or branches cut down will be disposed of in a manner acceptable to the Respondent landowner

Soil sampling is subject to the following additional terms:

- Roy Northern will conduct the soil testing. Roy Northern will give the Respondent landowner at least 24 hour notice prior to entry. The Respondent landowner may contact Roy Northern, or the attending representative of Talisman, with any questions or concerns during the soil sampling

- Personnel will consult the Respondent landowner with respect to method of access across the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- Soil samples will be taken in accordance with the requirements of the Oil and Gas Commission
- The Respondent landowner will be provided with a copy of the soil assessment report

Archaeological assessment is subject to the following additional terms:

- Landsong will conduct the archaeological assessment. Landsong will give the Respondent Landowner at least 24 hours notice prior to entry. The Respondent landowner may contact Landsong, or the attending representative of Talisman, with any questions or concerns during the assessment.
- The assessment will take place at or near the same time as the soil assessment.
- Personnel will consult the Respondent landowner with respect to method of access over the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- The bulk of the assessment will be completed with an archaeologist walking along the proposed access. Ground disturbance (shovel testing) will only occur if the archaeologist sees areas of "high potential".