LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: McAfee v Ember Resources Inc, 2025 ABLPRT 907235

Date: 2025-09-23
File No: RC2023.1234
Order No: LPRT907235/2025
Municipality: Kneehill County

In the matter of a proceeding commenced under section 36 of the *Surface Rights Act*, RSA 2000, c S-24 (the "*Act*")

And in the matter of land in the Province of Alberta within the:

NW-13-28-24-W4M as described in Certificate of Title No. 911 172 934 (the "Land"), particularly the area granted for a wellsite in L.S. 12, Alberta Energy Regulator Licence No. 0385221 (the "Licence"), collectively (the "Site").

Between:

Ember Resources Inc.,

Operator,

- and -

Keith McAfee,
and
Arlene Mae McAfee,

Applicants.

Before: William Johnston ("the Panel")

Appearances by written submissions:

For the Applicants: Paul Vasseur

For the Operator: Ember Resources Inc., Doug Dafoe, President & CEO

DIRECTION TO PAY PURSUANT TO SECTION 36 OF THE ACT

The Tribunal directs the Minister to pay out of the General Revenue Fund the total sum of ONE THOUSAND NINE HUNDRED THIRTY-ONE and 25/100 DOLLARS ($1,931.25) to Keith McAfee and Arlene Mae McAfee in the Province of Alberta, comprised of compensation that became due in the years 2022 and 2023 (the “Compensation”) and costs awarded in this Order.

DECISION AND REASONS

[1] The Applicants filed an application dated December 20, 2023, under section 36 of the *Act* (the Application) seeking recovery of unpaid compensation due under a surface lease agreement, consent of occupant agreement, or Compensation Order for the above Site (the “Right-of-Entry Instrument”) dated July 23, 2007. The Applicants claim $900.00 annually, for a total amount of $1,800.00 under the Application for 2022 and 2023. The Applicants also request costs in the amount of $131.25 related to this proceeding.

PRELIMINARY MATTER

[2] Ember Resources Inc. (“Ember”) presented the position that it had reviewed the rental rate, familiarised itself with the wellsite and access road and its impact on the farming operation of the subject property. Based on that review, Ember, without consultation with the Applicants, reduced the annual payment from $3, 000 to $2,100.00. Ember then paid the reduced amount. The Applicants did not agree to a variance in the amount of annual compensation but accepted the payment from Ember as partial payment of the amount due and owing. The Applicants subsequently submitted a section 36 application seeking the unpaid balance.

[3] The Panel reviewed Ember’s actions and position presented and finds:

- In Karve Energy Inc. v Drylander Ranch Ltd 2019 ABQB 298, the Honourable Madam Justice N. Dilts confirmed there are only two ways that the annual rental rate can be amended under a lease: either by agreement by the parties in an amending agreement or under an order under s.27 of the Act.

- The Honourable Madam Justice N. Dilts also stated in paragraph [45], “Under s.36, the Board is only entitled to determine whether compensation is owed under the Lease”.

[4] The Panel finds that there was no amending agreement, nor was there an order under s.27 of the Act varying the amount of annual compensation presented in evidence.

[5] Ember’s argument is based on economics, and they are seeking to change the annual rate of compensation. Under Drylander, the Board may only determine if compensation is owing and may not amend the rate of compensation as requested by Ember.

[6] Based on these findings, the Panel decides that it can only determine if money is due and owing under the surface lease and cannot vary the amount of annual compensation payable by the Operators. The Panel will not consider a variance in annual compensation as raised by Ember.

ISSUES

1. Who is an Operator for the purpose of section 36 of the *Act*?
2. Is there money past due and unpaid by the Operator to the Applicants under a Right of Entry Instrument?
3. Should the Tribunal direct the Minister to pay the Applicants any of the money past due under section 36 of the *Act*?
4. Should the Tribunal suspend and terminate the Operator’s rights?
5. Should the Tribunal award costs under section 39 of the *Act*?
    a. If costs are awarded, should the Tribunal direct the Minister to pay those costs to Applicants without further process?

DECISION

1. For the purposes of section 36 of the *Act*, the Operator is Ember Resources Inc.
2. The written evidence proves that compensation in the amount of $1,800.00 is payable to the Applicants by the Operator.
3. Without further notice, the Tribunal directs the Minister to pay the Applicants Compensation in the amount of $1,800.00 from the General Revenue Fund.
4. The decision to suspend or terminate the Operator’s rights is reserved.
5. The Operator shall pay costs to the Applicants for $131.25, including GST.

a. The Tribunal directs the Minister to pay costs in the amount of $131.25 without further process.

ANALYSIS

1. Who is an operator for the purpose of section 36 of the Act?

[7] The Tribunal gave notice pursuant to s. 36(4) to Ember and the Panel is satisfied that the demand for payment and notice meets the requirements of the *Act* pursuant to s.36(4) and the Interpretation of Section 36(4) *Surface Rights Act* Guideline, ABSRB 2020-1.

[8] Section 36(1) and (2) expands the definition of *operator* so that it has a broader meaning than in the rest of the *Act*.

[9] Under section 36(1)(c), the holder of a licence issued by the AER and its successors is an Operator. The License for the Site is in the name of Ember as of January 28, 2015; therefore, the Panel finds this party is an Operator under section 36(1)(c) for the years 2022 and 2023.

[10] Under s.36(1)(d) working interest participants and successors are Operators. The Panel confirms that Ember is an Operator under section 36(1)(d) for the years 2022 and 2023 because the AER Well Summary Report dated July 14, 2025, for the Licence shows it was a working interest participant on the Site as of January 28, 2015.

2. Is there money past due and unpaid by the Operator to the Applicants under a Right-of-Entry Instrument?

[11] The current Certificate of Title confirms the Applicants are the owner of the Land and was the owner when the rentals became due. Therefore, the Panel finds the Applicants are entitled to receive the money. The Applicants provided evidence of a Right-of-Entry Instrument, and the Application and supporting documentation support the compensation. The Applicants declared in writing that the Compensation has not been paid for the years claimed.

[12] The Panel is satisfied that compensation is owed to the Applicants for the annual payment due under the Right-of-Entry Instrument. This amount is calculated as two payments of $900.00 for a total amount owing of $1,800.00 due for 2022 and 2023. The Site is not reclaimed, and the Right-of-Entry Instrument remains in effect. The Panel finds that at the time the Compensation became due, the Operator is liable for the Compensation due to the Applicants.

3. Should the Tribunal direct the Minister to pay the Applicants any of the money past due from the General Revenue Fund under section 36 of the Act?

[13] *Bateman v Alberta (Surface Rights Board)*, 2023 ABKB 640 specified that under s. 36 of the *Act*, the Applicants need only prove there is a Right of Entry Instrument and there is a default on the payment; therefore, the Panel directs the Minister to pay the full amount owing. The Panel determined there is a right of entry instrument and money is

owing; accordingly, the Minister is directed to pay the Applicant $1,800.00 from the General Revenue Fund.

4. Should the Tribunal suspend and terminate the Operator's rights?

[14] The Tribunal can suspend and terminate an operator's rights to access the Site when appropriate. The Panel reserves its decision to suspend and terminate at this time to avoid delay in payment to the Applicants; however, if the Operator attempts to access the Site but still does not pay compensation, the Tribunal may issue a suspension/termination order.

5. Should the Tribunal award costs under section 39 of the Act?

[15] Section 39(1) of the *Act* puts costs of and incidental to proceedings under the *Act* in the discretion of the Tribunal. Rule 31(2) the *Surface Rights Board Rules* provides guidance as to the factors the Tribunal may consider when awarding costs.

[16] In *Bear Canyon Farms Holdings Ltd v Apex Energy (Canada) Inc,* 2018 ABSRB 64, ("*Bear Canyon*" the Tribunal held:

> [17] A factor weighing towards a lower costs award is the low complexity of the proceedings. Board administration provides a reasonably short application form (2 pages) for section 36 applications and drafts the required statutory declaration for applicants. The vast majority of the information requested on the form, such as Applicant's name, land description, rate of annual compensation, and year(s) claimed for unpaid compensation are generally within the knowledge of applicants. The proceedings are entirely by writing and are usually unopposed by the Operator. In the majority of these kinds of straightforward section 36 applications, applicants are able to file all paperwork by themselves and do so correctly.
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> [18] Board administration performs all necessary searches, including searches for the responsible operator and its insolvency status; Board administration prepares a statutory declaration which the Applicants are requested to swear before a commissioner of oaths; and the Board convenes a Panel to make a determination, generally without an in-person hearing."…
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> [20] …in the opinion of the [p]anel, an experienced professional should usually be able to file a section 36 application within one hour or less.

[17] This Panel applies the reasoning in *Bear Canyon* and awards costs for one hour of professional assistance at a rate of $125.00 per hour plus 5 percent GST $6.25, for a total cost award of $131.25.

[18] Costs in the amount of $131.25 are payable by the Operator to the Applicants jointly.

COSTS ORDER

[19] IT IS ORDERED that costs in the amount of ONE HUNDRED THIRTY-ONE and 25/100 DOLLARS ($131.25) are payable by the Operator to the Applicants jointly.

> *5a. If costs are awarded, should the Tribunal direct the Minister to pay those costs to Applicants without further process?*

[20] The claim for costs is part of the application process, and the operator can review the entire Tribunal file, which includes the costs claim. Directing the Minister to pay the costs without further process results in efficiency and expeditious payment to the Applicants without incurring further costs.

[21] The Direction to Pay for costs will issue immediately.

Dated at the Town of Olds in the Province of Alberta this 23rd day of September 2025.

LAND AND PROPERTY RIGHTS TRIBUNAL

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William Johnston, Member