



Grizzly Resources Ltd.

Section 39 and 40 Review of
Well Licences No. 0404964 and 0404965
Pembina Field

Cost Awards

October 22, 2010

ENERGY RESOURCES CONSERVATION BOARD

Energy Cost Order 2010-007: Grizzly Resources Ltd., Section 39 and 40 Review of Well Licences No. 0404964 and 0404965, Pembina Field

October 22, 2010

Published by

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CONTENTS

1	Introduction.....	1
1.1	Background.....	1
1.2	Cost Claim.....	1
2	Views of the Board—Authority to Award Costs.....	2
3	Losey and Kerpan Cost Claim.....	2
3.1	Views of Grizzly.....	2
3.2	Views of the Board.....	2
4	The Kelly Intervenors’ Cost Claim.....	3
4.1	Views of Grizzly.....	3
4.2	Views of the Kelly Intervenors.....	4
4.3	Views of the Board.....	5
5	Order.....	6
	Appendix A Summary of Costs Claimed and Awarded.....	7

ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

**GRIZZLY RESOURCES LTD.
SECTION 39 AND 40 REVIEW OF
WELL LICENCES NO. 0404964 AND 0404965
PEMBINA FIELD**

**Energy Cost Order 2010-007
Proceeding No. 1632087
Cost Application No. 1649069**

1 INTRODUCTION

1.1 Background

Grizzly Resources Ltd. (Grizzly) received approval for Applications No. 1577870 and 1577877 to drill two directional wells from a surface location at Legal Subdivision 7, Section 5, Township 50, Range 6, West of the 5th Meridian. The Energy Resources Conservation Board (ERCB/Board) issued Well Licences No. 0404964 and 0404965 to Grizzly on November 28, 2008, in accordance with Section 2.020 of the *Oil and Gas Conservation Regulations*. The purpose of the wells was to obtain crude oil production from the Nisku Formation.

In December 2008, Susan Kelly, Lil Duperron, and Linda McGinn (Kelly Interveners) requested a review of the ERCB's decision to dismiss their objections and to approve the wells. The ERCB denied the review request and Grizzly drilled the wells in January 2009.

In a decision dated October 28, 2009, the Alberta Court of Appeal of Alberta remitted the review application back to the ERCB for consideration and redetermination under Sections 39 and 40 of the *Energy Resources Conservation Act (ERCA)*.

On April 13, 2010, the Board held a hearing to consider the applications and well licences that had been issued to Grizzly. The Board issued its decision on the applications in *Decision 2010-028: Grizzly Resources Ltd., Section 39 and 40 Review of Well Licences No. 0404964 and 0404965*, dated July 13, 2010 (*Decision 2010-028*).

1.2 Cost Claims

On April 22, 2010, Dr. Timothy C. Losey and Cheryl Kerpan (Losey and Kerpan) filed a cost claim in the amount of \$2195.60. Grizzly did not provide a response to the claim made by Losey and Kerpan.

On May 14, 2010, the Kelly Interveners filed a cost claim in the amount of \$39 765.54. On June 8, 2010, Grizzly submitted comments on the Kelly Interveners' cost claim. On June 23, 2010, the Kelly Interveners submitted a response to Grizzly's comments and on July 19, 2010, counsel for the Kelly Interveners provided her statement of account in support of the cost claim.

The Board considers the cost process to have closed on July 19, 2010.

2 VIEWS OF THE BOARD—AUTHORITY TO AWARD COSTS

In determining local intervener costs, the Board is guided by its enabling legislation, in particular by Section 28(1) of the *ERCA*, which reads as follows:

28(1) In this section, “local intervener” means a person or a group or association of persons who, in the opinion of the Board,

- (a) has an interest in, or
- (b) is in actual occupation of or is entitled to occupy

land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.

It is the Board’s view that a person claiming local intervener costs must establish the requisite interest in or right to occupy land, and provide reasonable grounds for believing that such land may be directly and adversely affected by the Board’s decision on the application in question.

When assessing costs to which a local intervener is entitled, the Board refers to Part 5 of the *Energy Resources Conservation Board Rules of Practice* and Appendix E: Scale of Costs in *ERCB Directive 031: Guidelines for Energy Proceeding Cost Claims*.

Section 57(1) of the *Rules of Practice* states:

57(1) The Board may award costs, in accordance with the scale of costs, to a participant if the Board is of the opinion that

- (a) the costs are reasonable and directly and necessarily related to the proceeding, and
- (b) the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Board.

3 LOSEY AND KERPAN COST CLAIM

On April 22, 2010, Losey and Kerpan filed a cost claim for attendance honoraria in the amount of \$2000.00, expenses in the amount of \$186.28, and GST in the amount of \$9.32, for a total claim of \$2195.60.

3.1 Views of Grizzly

By letters dated May 10, 2010, and May 27, 2010, the Board requested that Grizzly provide comments on Losey and Kerpan’s cost claim. The Board did not receive a response from Grizzly.

3.2 Views of the Board

The Board’s authority to award costs is derived from Section 28 of the *ERCA*. Pursuant to Section 28(2), a local intervener may be awarded costs. Section 28(1) identifies a local intervener as someone with an interest in or the right (exercised or not) to occupy land that will or may be directly and adversely affected by a decision of the Board. This requires the Board to determine

1) if the party seeking costs has an interest in, occupies, or has the right to occupy certain land; and 2) if that land may be directly and adversely affected by a decision of the Board.

In this matter, the Board accorded Losey and Kerpan the participatory rights set out in Section 26(2) of the *ERCA*. The Board advised Losey and Kerpan prior to the hearing that the fact they were being given these rights was no assurance that they would receive costs at the end of the proceeding. The question of Losey's and Kerpan's entitlement to participate in the hearing does not bear on the question of their status as local interveners under Section 28 of the *ERCA*. Sections 26(2) and 28(1) set out different tests and determine different entitlements. Section 26(2) requires a determination based upon information available prior to a hearing on whether a person has legally recognized rights that may be directly and adversely affected by a Board decision. Section 28(1) entails a consideration by the Board of all evidence provided at the hearing and in the cost proceeding to determine if a party applying for costs has an interest in, occupies, or is entitled to occupy land that could be directly and adversely affected by the Board's decision.

The evidence before the Board clearly indicated that Losey and Kerpan have an interest in and occupy certain lands. However, as set out in *Decision 2010-028*, the Board's consideration of the whole of the evidence in the review hearing indicated no possibility of effects on Losey and Kerpan resulting from the Board's decision to approve the wells. More importantly for the purposes of this decision, there was no evidence to indicate that there was a possibility of effect on lands Losey and Kerpan have an interest in, occupy, or are entitled to occupy. As such, the Board finds that Losey and Kerpan are not local interveners pursuant to Section 28(1) of the *ERCA*, and the Board makes no cost award to Losey and Kerpan.

4 THE KELLY INTERVENERS' COST CLAIM

On May 14, 2010, the Kelly Intervenors filed a cost claim for legal fees in the amount of \$30 450.00, attendance honoraria in the amount of \$6000.00, expenses in the amount of not \$1710.46, and GST in the amount of \$1605.08, for a total claim of \$39 765.54.

4.1 Views of Grizzly

Grizzly submitted that the Kelly Intervenors' cost claim should be denied, and if costs were awarded, anything in excess of \$5000.00 would not be justified in the circumstances.

Grizzly noted that the time, effort, and costs it incurred in dealing with the Kelly Intervenors before there was any issue of standing was in excess of \$125 000. In comparison, Grizzly spent 20 hours with other persons who resided within the emergency planning zone (EPZ).

Grizzly submitted that when the Board corrected its error in *Directive 071: Emergency Preparedness and Response Requirements for the Petroleum Industry* in the calculation of protective action zones (PAZs), the Kelly Intervenors did not challenge or take issue with the correction, even though it resulted in the PAZ for the proposed wells not exceeding the EPZ.

Further, Grizzly submitted that the Kelly Intervenors failed to make a meaningful contribution to the hearing. According to the Kelly Intervenors' hearing submission, their intervention was

directed towards “...issues that may arise during the production and servicing of the wells,” but Grizzly noted that all these interveners live outside the EPZ and the PAZ.

Grizzly submitted that the evidence at the hearing demonstrated that the Kelly Intervenors’ statement of having “observed frequent and prolonged flaring” from January to May 2009 was inaccurate.

Grizzly maintained that there were no circumstances in which the Kelly Intervenors would agree to withdraw their objections, resulting in an unnecessary delay that has cost Grizzly hundreds of thousands of dollars.

Grizzly proposed that if the Board awards any costs, they should be nominal given that persons who choose to object are expected to do so in a meaningful and responsible manner.

4.2 Views of the Kelly Intervenors

In response to Grizzly’s comments on their cost claim, the Kelly Intervenors submitted that “the rules provide that anyone who could be potentially directly and adversely affected by an application, [sic] should be reimbursed their reasonable costs of participating in a hearing (Directive 31).”

The Kelly Intervenors also submitted that the Court of Appeal made the determination that they were “potentially and adversely affected by the wells” and that the change to *Directive 071* had no impact on that finding. The Kelly Intervenors noted that at the Court of Appeal hearing, Grizzly conceded that “there is a potential ongoing health and safety risk to the Appellants if there is a release of poisonous gas during the future operation of the wells.” The Kelly Intervenors submitted that it followed that the hearing was necessary to deal with their concerns about the future operation of these wells.

The Kelly Intervenors stated that because Grizzly did not have any plans for production at the time of the hearing, they had to deal with the possibilities that could occur during production. The Kelly Intervenors submitted that there may be future flaring at the wells that could impact on them and their concerns were heightened by the reports on the flaring during well testing.

The Kelly Intervenors took the position that the time Grizzly spent with other citizens compared to the time spent with them was irrelevant. Further, the Kelly Intervenors submitted that Grizzly overstated the time it spent with them. If Grizzly’s evidence were correct with respect to the time spent in consultation with other residents, the Kelly Intervenors questioned the efficacy of that consultation.

The Kelly Intervenors submitted that they did not challenge the change to *Directive 071* because they were granted standing under the Court of Appeal’s decision.

The Kelly Intervenors noted that they too spent a great deal of time and money dealing with this matter, and the process assisted the ERCB in finding a mistake for which the Kelly Intervenors were not compensated.

In conclusion, the Kelly Interveners submitted that awarding limited or no costs to them in the face of the actual time spent preparing for the hearing and assisting the ERCB would be a punitive response for challenging the Board.

4.3 Views of the Board

4.3.1 Views and Decision of the Majority

The views and decision below are those of Board Members M. J. Bruni, Q.C. and J. D. Dilay, P.Eng. (Majority).

Directive 031 is the Board's directive relating to cost claims. *Directive 031* makes clear that only those persons determined to be "local interveners" by the ERCB will be eligible to recover the costs associated with participating in an ERCB proceeding. It also makes clear that there are two criteria for eligibility for local intervener funding: 1) the intervener has an interest in land or occupies or has the right to occupy land; and 2) the land in question will or may be directly and adversely affected by the Board's decision on the proposed project that is the subject of the hearing. Only if the Board determines that a party claiming costs is a local intervener does it move to consider of the reasonableness of the costs claimed.

The determination of entitlement to participate in a hearing is made by applying Section 26(2) of the *ERCA*. In this matter, the Kelly Interveners were given the opportunity to be heard on the merits of the Grizzly applications by way of a hearing as directed by the Court of Appeal. This decision of the Court of Appeal was not a determination of the Kelly Interveners' entitlement to costs under Section 28 of the *ERCA* and the Court of Appeal did not consider that question when it decided the Kelly Interveners' appeal application. The Section 28 test to be applied in determining the entitlement to a cost award following a hearing is different from the test under Section 26(2) of the *ERCA*.

In considering the application of the test under Section 28(1) of the *ERCA* to the Kelly Interveners, the Board arrives at two conclusions. First, the Board finds that the evidence clearly demonstrates that each of the Kelly Interveners has an interest in, occupies, or is entitled to occupy certain land whose location in relation to the Grizzly wells is known. Second, the evidence before the Board in the review hearing provided no indication of possible effect on any of the Kelly Interveners arising from the drilling or operation of the wells. The concerns raised by the Kelly Interveners at the hearing related to their health and safety (including the potential for adverse effects) resulting from the approval of Grizzly's applications to the Board.

As discussed in *Decision 2010-028*, the evidence presented demonstrated no connection between those concerns and the drilling or operation of the Grizzly wells. The Board was satisfied that the evidence in the review hearing demonstrated no potential for effect on the Kelly Interveners from the approval of the Grizzly applications. Further, no evidence was presented at the review hearing or in this cost proceeding to demonstrate a potential for the Grizzly wells to directly and adversely affect lands that the Kelly Interveners have an interest in, occupy, or are entitled to occupy. It therefore follows that the second half of the local intervener test is not satisfied, and the Board finds that the Kelly Interveners are not local interveners as defined by Section 28(1) of the *ERCA*.

As the Kelly Interveners are not local interveners under Section 28 of the *ERCA*, the Majority hereby dismisses their application for an award of local intervener costs.

4.3.2 Views and Decision of the Minority

The views and decision noted in this section are those of panel member G. Eynon, P.Geol. (Minority).

The Minority agrees with and adopts the views of the Board as presented in Section 4.3.1 above. The Minority particularly notes that *Decision 2010-028* affirms the Board's initial determination that the Kelly Interveners did not meet the test under Section 26(2) of the *ERCA* to trigger a hearing of the application in the first instance and that they are not local interveners as defined by Section 28(1) of the *ERCA*.

However, the Minority acknowledges that the hearing was conducted on the instruction of the Court of Appeal and that participation by the Kelly Interveners was necessary to give effect to the Court's direction. Given this unique circumstance, the Minority finds that the Kelly Interveners should be entitled to some portion (but not all) of their costs for participation in the hearing.

5 ORDER

The following is hereby ordered:

- 1) The cost claim made by Losey and Kerpan be dismissed.
- 2) The cost claim made by the Kelly Interveners be dismissed.

Dated in Calgary, Alberta, on October 22, 2010.

ENERGY RESOURCES CONSERVATION BOARD

"original signed by"

M. J. Bruni, Q.C.
Presiding Board Member

"original signed by"

J. D. Dilay, P.Eng.
Board Member

"original signed by"

G. Eynon, P.Geol.
Board Member

APPENDIX A SUMMARY OF COSTS CLAIMED AND AWARDED



Microsoft Excel
Worksheet