



The Problem of Unpaid Rentals and Wind and Solar Farm Concerns

Daryl Bennett

- Oil/gas, powerline, Cell phone tower, and Solar and Wind farm Operators may go bankrupt or simply decide to not pay Annual Compensation amounts owed to landowners.
- With Oil/gas and powerlines, there is a regulatory system in place to ensure that landowners receive the annual compensation due and that the lease sites, or ROWs, are reclaimed.
- The Orphan Well Association pays to abandon/reclaim “orphan wells” and is primarily funded by a current \$30 million “levy” that is paid each year by solvent Oil/gas companies (*Last Man Standing model*). Working Interest partners may also be held responsible but can apply to the OWA to recoup the costs.
- The License Liability Rating program is another program run by the AER that requires financially weaker Operators to deposit money to cover potential future abandonment/reclamation liabilities. There is currently around \$225 million on deposit.

- The Minister of Environment and Parks (AEP) orders payment to landowners of their unpaid annual compensation out of General Revenues once application has been made to the SRB and the Board directs partial or full payment.
- The SRB requires proof that a surface lease existed and/or proof of what the annual payment should be before they will proceed with an application. This can be challenging if landowners have not kept adequate records and documentation.
- In some cases, the SRB will refuse jurisdiction, or deny the application because of insufficient documentation or extraordinary circumstances.
- There are situations where land is encumbered by numerous well sites without surface leases, Right of Entry orders or caveats, and the Board refuses to order any compensation at all.
 - however a caveat, survey plan and proof of payment may be enough to file
 - landowners may also receive bills for unpaid Operator utilities
 - some municipalities may claim that landowners are responsible for unpaid Operator property taxes

How Big is the Problem?

Social Contract: Industry development of the minerals

Landowners made whole

- Compensation for Market Value of Land
- Compensation for Adverse Effect
- Compensation for Loss of Use
- Representation Costs paid

Background of Industry Development

- Dept. of Energy Highest bidder
- AER Approves license, mandate to develop resource
- SRB Grants ROE, compensates landowner
- Minister of AEP Pays for Orphans annual rentals
- Orphan Well Association Reclaims Orphans

Current State of Industry

The AER regulates approximately 446 000 wells in Alberta:

- 186 000 are active
- 82 000 are inactive
- 66 000 are abandoned
- 68 000 are reclamation certified
- 37 000 are reclamation certificate exempt as they were abandoned prior to the legislative requirement to obtain a reclamation certificate.

	2016	2017
Orphan Wells to be Abandoned	695	1529
Orphan Well Reclamation Sites	503	697
Orphan Well sites to be Suspended (Lexin)		1087

Legal Evolvment of Who Is Responsible

1991 *Northern Badger* – Reclamational liabilities are “Super Priority”

1997 *BIA* amendments

2015 *Redwater* Decision

Operators now split off “good assets” and dump “bad assets” onto public

“Privatize the profits, socialize the losses”

The LMR Situation

LLR= $\frac{\text{Deemed Productive Assets}}{\text{Deemed Liabilities to Reclaim}}$ -based upon 3 year avg. netback price (\$236m3)
 -likely 50% too low, was adjusted in 2015

Liability Management Rating (LMR)	September 2015	December 2016
Industry LMR Threshold	1.00	1.00
Industry Average LMR	3.73	4.39
Number of Licensees at or over Industry Threshold	455	418
Number of Licensees BELOW Industry Threshold	357	351
Total Number of Licensees Evaluated	812	769
Total Number of Licences/Approvals Evaluated	348,271	345,787
Total Deemed Assets	\$134,706,309,697	\$132,503,772,072
Total Deemed Liabilities	\$ 36,129,986,883	\$ 30,181,249,397
Total Estimated Liabilities	\$ 37,086,662,570	\$ 30,592,794,599
Total LMR Security Held	\$190,217,356	\$225,671,597

Number of Licensees with Zero LMR

236

Total Deemed Liabilities

\$104,249,710

\$1 million of LMR deposits was transferred to the OWA over the last two years.

\$6 Billion reduction in Deemed Liabilities

AER Responses

Thank you for your questions. The Provincial Industry Netback is published in [*Directive 011: Licensee Liability Rating \(LLR\) Program - Updated Industry Parameters and Liability Costs*](#)). As you're aware it was originally intended to be updated annually. However, because the Liability Management Rating program is continuously improved to ensure effectiveness the annual update is not planned.

LLR liabilities have decreased for two reasons. The AER has recently enhanced the ways liabilities are deemed. We are now collecting additional well information throughout the lifecycle of a well, specifically tubing and artificial lift information. This information helps us better calculate the deemed liabilities in our LLR program and has led to a reduction in the total deemed liabilities.

The number of well abandonments has not increased. However, more reclamation certificates have been issued by the AER over the last year, reducing the total number of sites that have been previously included in the deemed liabilities calculation. This is due to the AER's new reclamation certification tool and process which has improved the quality of applications and has reduced backlog and processing time.

The AER remains committed to ensuring that abandoning and reclaiming oil and gas wells, pipelines and facilities is done safely and all environmental requirements are met – without placing financial burden on Albertans.

What they did was allow companies to pretend tubing wasn't down hole so they could pretend clean up would be cheaper so more companies could avoid deposits and stay out of bankruptcy.

Fasttrack process led to 3400 reclamation certificates being issued last year

* \$30,000 each = \$102 million.

Less than 15% of reclamations are verified, Operators use a self-inspection process.

What happened to the other \$5.9 Billion?

Deemed Assets

AER Directive #011

Netback of \$236.54/m3OE = \$37.61/barrel

Surface Rights Board Process

Do Leases expire?

- Production privileges “expire” according to term of lease *Bruder v. Pennine*
 - Operator must obtain new lease or ROE Order
 - only works with productive leases or Operator doesn't bother
- Leases with “Everlasting clause” do not expire
- Section 144 *EPEA* – lease doesn't “expire” without Reclamation Certificate
- SRB has jurisdiction to review compensation and damages throughout

SRB Suspension/Termination Process

- If compensation remains unpaid, the SRB suspends & terminates production privileges but the abandonment/reclamation obligation remains.
- SRB will request gov't department to pay unpaid compensation from General Revenue Fund

Types of SRB Applications

Section 36 Unpaid Annual Compensation

- Need proof of amount of annual compensation
- Landowner needs to sign a Statutory Declaration for 1st application
- Recurring applications just need a witness
- Applications can take over a year to process
- Should apply for costs with each application
- Cost awards are applied for on the next application
- Never ending process until Reclamation certificate granted
- Generally doesn't require an oral hearing
- May need to submit Section 27 application to establish annual amount

Section 36 Concerns

- SRB duty to taxpayer, may not award full amount
- Untimely applications will receive “Haircut”
- FAO has issued warning on expecting much for costs
- SRB assumes 1 hour is enough for representation

Time Involved

- Searching for leases and caveats
- Explaining process to landowner numerous times
- Filling out applications
- Explaining AE and LOU factors
- Lengthy delay at the SRB
- SRB clerical errors

Section 27 Compensation Review

- Need proof of area taken and legal instrument (lease or caveat)
- Need to know area “Pattern of Dealings” or possess cogent evidence to suggest departure from “Pattern”
- Application/hearing process can easily take two years
- Generally requires oral hearing
- Evidence Disclosure rules apply
- Board generally gives landowner a 2.5 year grace period to apply or longer dependent upon circumstances

Section 30 Damages

- Application for “off-lease” and “off-ROW” damages only
- Must have instrument attached to land, otherwise use court process
- Two year limitation period from when damage last occurred
- \$25,000 damage limit
- No limitation on “construction damages” under Section 25

Section 39 Cost Recovery Process

- Landowner entitled to “reasonable costs”
 - Landowner isn’t liable for “Operator costs”
 - No cost rules/amounts set like AER and AUC
 - Costs are paid to landowner, not representative
 - Board usually “haircuts” representation costs and restricts landowner costs to avoid duplication of costs
-
- ❖ Board can award costs against Bankrupt Operators notwithstanding *Bergman v. Francana* and other court decisions (see *Juhar* and *Molnar*)

AER process related to Section 36 applications

- Section 3.012A of *OGCA* requires Operator to abandon the well
- “Not in public interest to follow the law”
- Freehold mineral owners may not want well abandoned
- AER commonly gives Operator lots of time to comply
- Only worthwhile to force compliance if wellhead is productive

Freehold Mineral Rights Situation

- The AER will not intervene as long as the Operator pays the Freehold Mineral Tax to Alberta Energy
- Landowner must go to court to prove default if Operator doesn't pay royalties on production
- If Operator does not pay tax on freehold mineral production, the Department of Energy will threaten landowner with loss of mineral rights if the entire amount not paid
- Landowner may receive bill for unpaid utilities bills
- Operator generally pays surface lease so the SRB will not suspend/terminate lease
 - Can't force AER to enforce well shut-in

Wind and Solar Farm issues

Farmer's Advocate Office Publication for landowners

[http://www1.agric.gov.ab.ca/\\$Department/deptdocs.nsf/All/agdex16246](http://www1.agric.gov.ab.ca/$Department/deptdocs.nsf/All/agdex16246)

Concerns

- 1) Contract is designed to reflect Operator's concerns, not landowner's
- 2) No licensing requirements or Standard of Conduct for land agent's (professional conduct, negotiate in good faith, follow laws)
- 3) No right of expropriation for solar and wind in Alberta
- 4) Projects subject to AUC approval/hearing process, intervenor costs
- 5) Landowner generally required to support Development application
- 6) SRB has no jurisdiction for compensation review or damages
 - 7) Landowners should ask Developer to cover legal costs of review
 - 8) Solar projects generally utilize whole area while wind does not
 - 9) Developer generally takes exclusive use of entire area

- 10) Developer generally offers surrounding neighbors compensation to avoid opposition
- 11) Powerlines are required but landowner can require underground lines
- 12) Aerial spraying will be restricted
- 13) Landowner generally waives adverse health and noise impacts
 - Infrasound, Visual, Shadow flicker, Ice throw, sunlight reflection
- 14) Increased traffic and property devaluation can occur
- 15) Environmental Impact Assessments will likely be required
- 16) Landowner's need to ensure that contract includes indemnification and insurance requirements
- 17) Leases are often 50-70 years with no landowner termination clause (except rent)
- 18) Landowner should request solar or wind collection data for future use

- 19) Do not give permission to remove obstructions
- 20) Field Access points may be restricted in the future
- 21) Landowner may become responsible for unpaid Developer property taxes (linear and mutually assessed)
- 22) Reclamation requirements and compensation are severely deficient (not legislated)
- 23) Landowner may become responsible for reclamation, as no OWA exists and gov't not responsible for unpaid rentals
- 24) Landowner should retain ability to ask AUC to condition license
- 25) Many municipalities send “weed notices” to the landowner, not the Operator
- 26) Landowner should require Operator equipment to be sanitized (weed and crop disease)

27) Landowners should insist on final assignment approval

28) Compensation should include a “fixed” component plus variable rate and inflation factors

29) Compensation should begin when construction starts

30) Developer usually insists on confidentiality clause for landowner