Alberta Energy Regulator

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January 24, 2020

By email only

MLT AIKINS
Attention: John Gruber

TORYS LLP
Attention: David Wood

Re: Proceeding 360
Harvest Operations Ltd. Motion to Dismiss Bearspaw Petroleum Ltd. Applications 1877294 and 1878333 (the Motion)

Introduction

In January 2017, Bearspaw Petroleum Ltd. (Bearspaw) filed two applications with the Alberta Energy Regulator (AER). The first (1877294) was for a common carrier order pursuant to section 48 of the *Oil and Gas Conservation Act (OGCA)* naming Harvest Operations Corp. (Harvest) to be a common carrier of gas produced from the Crossfield Basal Quartz C Pool (BQC Pool) through a series of pipelines extending from 5-36-24-28 W4M to 14-16-28-28 W4M and including a field compressor located at 13-6-27-27 W4M (the Gathering System). The second (1878333) was for a rateable take order under section 36 of the *OGCA* distributing gas production among wells in the BQC Pool including Bearspaw's gas well at 02/11-24-24-28 W4M (Bearspaw well).

Four days before the original date scheduled for the oral hearing of Bearspaw's applications, which was September 24, 2018, the hearing was adjourned on the motion of Harvest because Bearspaw was involved in a lawsuit about its legal rights to produce from the Bearspaw well. The adjournment lasted until July 2, 2019, when Bearspaw was able to demonstrate it had the legal right to produce the Bearspaw well. The hearing was rescheduled to begin January 13, 2020.

On November 14, 2019, Harvest, on behalf of itself and its partners CNOOC Petroleum North America ULC and ExxonMobil Canada Energy, (from here on referred to collectively as Harvest or Harvest and partners) filed the Motion with the AER pursuant to section 44 of the *Alberta Energy Regulator Rules of Practice (*the *Rules).* The Motion asks that the AER dismiss Bearspaw's common carrier and rateable take applications or, in the alternative, for an order immediately suspending or adjourning the proceeding established to hear the applications.

Harvest refined its request for relief at the oral hearing of the Motion. It said that, as an alternative to dismissal of Bearspaw's applications, rather than suspending or adjourning Bearspaw's applications indefinitely, it would not object to the AER suspending or adjourning Bearspaw's applications until Harvest and partners complete abandonment of the wells and the Gathering System. At that point the AER could then dismiss Bearspaw's applications.

After having reference to Bearspaw's applications and considering:

i. The Motion and supporting materials filed by Harvest that are dated November 14, 2019, including the affidavit of Jeff French, its exhibit and schedule;

ii. Bearspaw's Reply to the Harvest Motion dated November 20, 2019, and supporting appendices;

iii. Harvest's Reply and Supplemental Affidavit of Jeff French, with exhibits, both dated November 22, 2019;

iv. Harvest's update in the form of Supplemental Affidavit No.2 of Jeff French, as corrected,[1] with exhibits; and

v. the Transcript of the Questioning of Michael Jeffrey French by Mr. J. Gruber dated January 3, 2020.

(the written submissions of the parties),

as well as the parties' oral submissions made to AER hearing commissioners C. Low (presiding), P. Meysami and T. Stock (the panel), the panel has decided to grant Harvest's motion to dismiss Bearspaw's

[1] Exhibit 84.01.

applications for a common carrier order and rateable take order in respect of gas produced from the BQC Pool.

Background

At the time Bearspaw filed its common carrier and rateable take applications, Harvest and partners were operating the only producing wells in the BQC Pool. Gas produced from those wells was transported via the Gathering System to a tie-in to the TAQA North gas plant system. Harvest and partners were also producing gas from wells near the Gathering System that are north of the BQC Pool and transporting that gas via the Crossfield gathering system to the TAQA North gas plant tie-in. As shown on the map that is Attachment "A" to this letter[2] (the Map), the Gathering System is comprised of several parts. The North Delacour gathering system and the Crossfield gathering system. The North Delacour gathering system provided service to the Harvest and partners wells in the BQC Pool. It connects to the Crossfield gathering system at the 13-06-27-27W4M field compressor. The Crossfield gathering system is comprised of three functional units as identified on the Map.

In support of its Motion, Harvest provided evidence that Harvest and partners had agreed to permanently shut-in and abandon the Gathering System, including the 13-6 field compressor, but excluding the part of the system identified as Crossfield gathering system Functional Unit 3. They have also agreed to permanently shut-in and abandon the Harvest wells served by the Gathering System.

According to the affidavit of Jeff French dated November 14, 2019, the pipeline facilities being "permanently shut-in and abandoned include all of those facilities that would be used to transport gas from the Bearspaw well to the Taqa gas plant."[3] The wells being permanently shut-in and abandoned include all of the Harvest and partners wells in the BQC Pool. Those wells are the only wells that have been producing in the BQC Pool since the Bearspaw well last produced in April 2011 (observation status since September 1, 2014). A well operated by Journey Energy is the only other well in the BQC Pool and it has not produced since 2010 and was shut-in in 2011.

In its response to the Motion, Bearspaw did not provide any evidence to contradict Harvest's evidence outlined above. Bearspaw said that the Regulator could not rely on stated future plans, such as

[2] The map was filed by Harvest as part of its submissions on the Motion and is part of Exhibit 81.01 in the proceeding.
[3] Exhibit 67.02 paragraph 6.

plans to abandon segments of the Gathering System, to make its decision. Bearspaw referred to the language in the affidavit of Jeff French dated November 14, 2019 and said that the course of action set out in the affidavit, that is the intention to permanently shut-in the BQC Pool wells and abandon the Gathering System, is "speculative and contingent." Bearspaw pointed out that Harvest and partners had not yet agreed on costs, timeline and execution.

Bearspaw also said there is no evidence that Harvest's reserves are depleted and posited that "the most probable outcome" would be a sale of Harvest's interests. Bearspaw noted that Harvest had recently attempted to sell various lands and interests including those relating to this proceeding.

Harvest's Reply submission responded to points raised by Bearspaw but it contained no new evidence about concrete steps it had taken to act on its decision to permanently shut-in and abandon the Gathering System, including the 13-6 field compressor, and the Harvest and partner wells served by the Gathering System.

After reviewing the Motion, Bearspaw's response and Harvest's reply along with the supporting materials, the panel notified the parties that it would hold an oral hearing of the Motion on January 6, 2020. It also directed Harvest to provide an update about steps it had taken as of the date of the update was to be filed, January 2, 2020, to permanently shut-in and abandon the wells and all of the gathering system, both as defined in its Motion.

In Harvest's January 2, 2020, update, Mr. French's affidavit evidence confirmed that Harvest had, as of or prior to that date, discontinued operating the North Delacour system - including the 13-6 field compressor. Specifically, Supplemental Affidavit No. 2 of Jeff French shows that all the pipeline segments of the North Delacour system had been pigged, purged with nitrogen, and blinded and/or discontinued. The 13-6 field compressor has been purged, shut-in and listed for sale along with associated equipment. No gas is currently being transported on the North Delacour gathering system by Harvest or anyone else. Harvest has also issued abandonment notices in accordance with *Directive 056: Energy Development Applications and Schedules (Directive 056)* for the pipelines in the North Delacour gathering system.

In the affidavit Mr. French also described the steps taken on the Crossfield gathering system. For our purposes it is important to note that Functional Unit 2's sales gas pipeline has been pigged, purged and discontinued. Only Functional Unit 3 and the fuel gas portion of Functional Unit 2 remain operational. Functional Unit 3 is to remain in operation to transport gas gathered from Harvest wells located north of the 13-6 field compressor to the tie-in to the TAQA system.

Harvest's January 2, 2020 update also shows that all of the Harvest and partners wells that produced from the BQC Pool and or that produce from pools north of the BQC Pool into the North Delacour gathering system, have been shut in and suspended or abandoned. Specifically, Harvest and partners had, in December 2019, shut-in the 5 remaining producing wells in the BQC Pool. Each of those wells was disconnected from the Gathering System and blinded effective December 17, 2019. Abandonment notices had been issued for 3 of those 5 wells. Harvest's evidence is that its remaining wells in the BQC Pool are to be abandoned in 2020. The wells in pools north of the BQC Pool and south of the 13-6 field compressor are to be abandoned in and or by 2022.

In order to ensure that the parties had every opportunity to address certain issues the panel had identified when reviewing the written submissions for the Motion, the Panel sent four questions to Bearspaw and Harvest in a letter dated January 3, 2020.[4] The panel explicitly invited the parties to make submissions on the questions at the hearing of Harvest's motion.

Finally, on January 3, 2020, Bearspaw questioned Mr. French on his evidence contained in his three affidavits. A transcript of that questioning under oath was filed on the day of the Motion and included in the record of the Motion.

Analysis

Jurisdiction to decide Bearspaw's applications

Harvest brought the motion because, it said, in light of the facts as they are now, Bearspaw cannot satisfy the requirements to be eligible for either a common carrier or a rateable take order. Harvest's request for dismissal is analogous to a summary judgment application. Bearspaw argued that a summary

[4] For ease of reference those questions were:
i) Can the AER require a proprietor to continue or recommence operations of a pipeline or segment of pipeline that it plans to or has discontinued or abandoned? If so, what is the source of this authority?
ii) What would be the practical effect of a common carrier order as sought by Bearspaw in light of the update evidence provided by Harvest on January 02, 2020?
iii) In light of the update evidence provided by Harvest on January 02, 2020, and in light of your views on question ii, would a hearing of Bearspaw's applications numbers 1877294 and 1878333 for a common carrier order and rateable take order be an efficient use of adjudicator's resources?
iv) In light of the update evidence provided by Harvest on January 02, 2020, what would be the consequences of adjournment of one or both of Bearspaw's applications versus dismissal?

determination would not be appropriate, and that it should have the opportunity to present its full case in the context of an oral hearing.

Pursuant to section 34(4) of the *Responsible Energy Development Act (REDA)*, hearings must be conducted in accordance with the *Rules*. The *Rules* are silent on the specific topic of summary determination of applications. However, some provisions within the *Rules* provide guidance and context to the issue. Panels are given the choice of conducting hearings in writing, electronically, orally or by any combination of those methods. When the Regulator holds a written hearing, it may dispose of the proceeding on the basis of the documents filed by the parties pursuant to section 19(1). Section 39 of the *Rules* gives the Regulator the discretion to "issue any direction it considers necessary for the fair determination of an issue." Section 42 of the *Rules* states that "The Regulator may dispense with, vary or supplement all or any part of these Rules if it is satisfied that the circumstances of any proceeding require it." Also, section 34(1) of the *REDA* provides that "…the Regulator may make a decision on an application with or without conducting a hearing." As a result, the panel finds that it may dispose of the Bearspaw applications that were set down for an oral hearing without proceeding through the oral portion of the hearing.

No previous decision of the AER or its predecessors dealing with a summary determination of an application was brought to our attention by the parties. To provide guidance, the panel has looked to decisions of the courts regarding summary judgment.

The Supreme Court of Canada, in *Hryniak v. Mauldin* (2014 SCC 7) (*Hryniak*), found that undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. The Court concluded that a "shift in culture" was necessary to promote the principal goal of a fair process that results in a just adjudication of disputes, and that the principle of proportionality must be applied which meant that "the best forum for resolving a dispute is not always that with the most painstaking procedure." The Court also stated that "A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found."

Following the reasoning in *Hryniak*, the Alberta Court of Appeal in the recent decision of *Weir-Jones Technical Services Incorporated v. Purolator* (2019 ABCA 49) (*Weir-Jones*) set out factors to apply when considering summary judgment applications.

The proportionality principle articulated in *Hryniak* is also a reasonable and appropriate goal for administrative tribunals. To that end, the panel is also guided by the relevant factors considered in *Weir-Jones* phrased as follows to reflect the context of the Motion:

Is it possible to fairly resolve the dispute on a summary basis having regard to the record and the issues? In particular:

- Are there any uncertainties or gaps in the facts, the record or the law that indicate there is an issue that can only be decided after an oral hearing of the applications?
- Does the record before the panel allow the panel to make the necessary findings of fact, including weighing the evidence?
- Is a summary disposition of the applications a more expeditious and less expensive means of achieving a just and fair result for the parties?

A recurring theme in Bearspaw's submissions is that the panel must make its decision on the Motion based on the current evidentiary record, not on any speculative or contingent future. We agree. It is the current record before the panel that must be considered to determine whether it is possible to fairly and justly resolve the dispute. Conversely, Bearspaw cannot avoid a summary disposition and force a hearing on the basis of speculation about what might happen in the future.[5]

Bearspaw also asserts that the Regulator has all the information and jurisdiction required to decide Bearspaw's applications. Harvest agrees. The difference is that Bearspaw argues that in order to make these decisions, the panel must proceed to a full oral hearing and that a failure to do so would deny Bearspaw of an opportunity to fully present its case. To support its argument Bearspaw referred the panel to an application made by Ember Resources Inc. to the AER in October, 2014 for a common carrier order naming Alta Gas and designating certain Alta Gas facilities as a common carrier.[6] In Ember's application, it indicated that some of the infrastructure in the facilities sought to be designated for common carrier service had been shut-in. Bearspaw asks the panel to infer that issuance of a Notice of Application by the AER was a conclusive indication that it was prepared to hold a hearing on the matter.

In response, Harvest states that such a conclusion cannot be drawn from Ember. Harvest states that the facts in Ember make it distinguishable from the facts here. Specifically: Ember filed an application when it was unable to negotiate continued access to the Alta Gas facilities after a prior agreement with Alta Gas, giving Ember access, had terminated. The matter did not proceed to hearing because the parties

[5] *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para. 19.
[6] Application 1811400.

resolved the matter through ADR and there is no evidence that the AER considered the question of its ability to compel an owner to continue operating facilities it no longer wished to own or operate.

The panel does not find Bearspaw's interpretation of the Ember application to be persuasive. The facts in the Ember application do not in any way establish that the AER was prepared to hold a hearing on the matter. Pursuant to section 31 of the *REDA*, the Regulator is required to give public notice of the applications it receives. A Notice of Application is simply that, and a hearing process does not automatically follow.

Bearspaw argued that the Supreme Court of Canada decision in *Canadian Pacific Railway v. Province of Alberta* [1950] S.C.R. 25 *(Canadian Pacific Railway)* is applicable here and requires the AER to exercise its mandate to consider and decide Bearspaw's applications rather than refusing to exercise its mandate on the basis of irrelevant considerations. Bearspaw said "speculative and contingent considerations proffered by Harvest" are equivalent to irrelevant considerations. In the panel's view Bearspaw must have been addressing Harvest's alternative relief of adjourning or suspending Bearspaw's applications when it raised this argument.

Harvest's response was that it is not asking the AER to refrain from making a decision within its mandate. Harvest is asking the AER to exercise its authority to make a decision on the basis of the record before it to dismiss or, in the alternative, to adjourn or suspend Bearspaw's applications.

The panel has decided that it can and will exercise its authority to make a decision on the basis of the record before it so it is not necessary to comment on the applicability of *Canadian Pacific Railway* case to these circumstances.

If the panel has all the information and jurisdiction it requires to decide Bearspaw's applications at this point, should it? Looking at the record before us, and in particular, the evidence filed as part of the Motion, is it complete in the sense that it allows the panel to assess and weigh the evidence and find the facts relevant to a decision on each of the common carrier and rateable take applications? Is the record sufficiently well developed and the evidence tested to allow the panel to exercise the discretion to decide the applications now?

To determine whether the record is complete and sufficiently well-developed, the panel must identify the facts that must be established in order to meet the requirements of the applicable laws.

Common carrier application

To succeed on its common carrier application, Bearspaw must satisfy the requirements of section 48(1) of the *OGCA* and part 1.3.4 of *Directive 065: Resource Applications for Oil and Gas Reservoirs (Directive 065)*. Subsection 48(1) of the *OGCA* provides:

> "… the Regulator may from time to time declare each proprietor of a pipeline in any designated part of Alberta or the proprietor of any designated pipeline to be a common carrier…on the making of the approved declaration the proprietor is a common carrier of…gas…in accordance with the declaration."

It is Bearspaw's position that since there is a proprietor of a pipeline, even though that pipeline has been discontinued and is in the process of being abandoned, the AER can direct that proprietor (Harvest) to operate the pipeline for the purpose of being a common carrier. In particular, Bearspaw argues that, to avoid the discrimination it says occurs if Harvest is able to discontinue all but a part of the Gathering System that it continues to use for its own purposes, the Regulator has the jurisdiction pursuant to section 48(2) of the *OGCA* to require a proprietor to recommence operations of a discontinued or abandoned pipeline.

Bearspaw also relies on the purposes provision of the *OGCA* to suggest that, unless Harvest is required to operate the Gathering System, petroleum resources will be stranded and so an adjournment or dismissal of its applications would not be in the public interest. Bearspaw's argument, in effect, is that to ensure the orderly and efficient development of oil and gas resources, to ensure conservation and prevent waste and to afford Bearspaw the opportunity to obtain its share of production from the BQC Pool, the AER must be able to require Harvest to recommence operations of the Gathering System even though it has been discontinued.

Harvest argues that the legislative framework does not give the Regulator the authority to require a proprietor to recommence operating a pipeline that it has discontinued or to refrain from discontinuing operating a pipeline. It is Harvest's position that the relevant wells and pipeline facilities in this case are private property. Harvest referred the panel to a leading text on statutory interpretation[7] stating that there is a presumption against interference with property rights and there would need to be clear, explicit, and unambiguous statutory authority for the Regulator to compel the proprietor of a pipeline to continue to

[7] Sullivan, Ruth, "*Sullivan on the Construction of Statues*" 5th ed. at 481.

operate that pipeline against their will. Harvest pointed out examples of clear, explicit, and unambiguous statutory language that gives the Regulator the authority to compel a pipeline operator to cease operations or take certain steps as part of operations. But, Harvest submits, there is no clear, explicit, and unambiguous statutory authority in the relevant legislation to give the Regulator the power to order a proprietor to resume operating a discontinued or abandoned pipeline.

Harvest also responded specifically to Bearspaw's submissions on the purposes provision of the *OGCA*. Referring to the same text on statutory interpretation[8] Harvest argued that section 4 of the *OGCA*, the purposes provision, does not give the Regulator any specific jurisdiction or authority. Rather, it provides context for the interpretation and application of the substantive provisions in the *OGCA*.

The panel agrees that there is no clear, explicit and unambiguous statutory authority for the Regulator to compel the proprietor of a pipeline to recommence operating a pipeline it has discontinued. In particular, the panel affirms that the purposes provision of the *OGCA* does not give the Regulator jurisdiction or authority to compel the proprietor of a pipeline to recommence operating a pipeline it has discontinued in the context of a common carrier application.

In addition, as pointed out by Harvest, a pipeline license does not oblige the holder to construct or operate the pipeline it authorizes. Similarly, there is no statutory authority for the Regulator to compel an operator to continue to operate a pipeline against their will in the context of a common carrier application. The wording of section 48 of the *OGCA* also makes it clear that the only rights that may be interfered by the Regulator when granting a common carrier order are who may be granted access to the pipeline, where they are to be granted physical access, and the allocation of capacity among the producers and owners offering production for the service.

The panel notes Bearspaw suggested a number of times that pipeline proprietors have to apply to abandon pipelines. Bearspaw also suggested there is a requirement for an application to discontinue operating a pipeline. That is not the case. The *Pipeline Rules* and *Directive 056* deal explicitly with discontinuing pipeline operation and with abandoning pipelines. In each case, the proprietor is required to follow certain procedures and to provide notice to the Regulator only after the operational steps and

[8] *Ibid* at 388 and 390.

prescribed notification (to stakeholders) have been completed, not before, and nowhere is there a requirement for a pipeline proprietor to apply for approval to discontinue or abandon a pipeline.

In response to Bearspaw's reliance on subsection 48(2) of the *OGCA*, Harvest states that the non-discrimination provision relating to common carriers can only be invoked to require an existing (emphasis added) common carrier to provide non-discriminatory service. It is Harvest's position that there can be no discrimination where there is no service at all being provided to anyone, including the proprietor, as is the case on the North Delacour gathering system.

The panel finds that subsection 48(2) does not come into play unless there exists a common carrier order: the non-discrimination provision clearly presumes there is a common carrier order in place naming the proprietor offering service that is said to be discriminatory. The panel refers to a scoping decision dated October 26, 2018 of the AER in Proceeding ID 359 involving Applications 1869537 and 1869547 filed by Tykewest Limited for a common carrier order and common processor orders. There, the panel assigned to that matter said:

> "...the Panel draws attention to section 48(2) of the *OGCA* which applies to circumstances where a common carrier declaration has already been issued. If a common carrier order were to be issued in these circumstances, and should Tykewest believe that it is being discriminated against as outlined in section 48(2), Tykewest may bring this to the attention of the AER."

There is no common carrier order here.

The panel also finds that it is a necessary implication in subsection 48(4)(b) of the *OGCA*, which gives the AER the authority to decide the "proportion of production to be taken by the common carrier from each producer or owner offering production…," that there be: a proprietor named in a common carrier order; and, a producer or producers or owner or owners, other than the person applying for the common carrier order, offering production to the pipeline proposed to be designated. That is not the case here. Harvest is not providing service at all on the North Delacour gathering system

Finally, Part 1.3.5 of *Directive 065* also supports the interpretation that in order to be named a common carrier, a proprietor must be providing service to producers and or owners. That Part requires

applicants for common carrier orders to include an indication of available capacity.[9] In this case, there is no available capacity from the point where the Bearspaw well is connected to the North Delacour gathering system.

The uncontradicted and tested evidence before us shows that:

- the portions of the Gathering System used to provide gas transportation service to wells in the BQC Pool have been discontinued;
- notices of abandonment have been issued for those portions of the Gathering System; and
- the field compressor which Bearspaw seeks to have included in the common carrier order has been decommissioned and listed for sale along with other important physical elements of the Gathering System.

However, Bearspaw correctly points out that Harvest is continuing to operate Functional Unit 3 in the Crossfield gathering system.

It is Harvest's uncontradicted evidence that all of the facilities that would be used to provide service to Bearspaw to the tie in to the TAQA gas plant have been discontinued and will be abandoned. It is also Harvest's uncontradicted evidence that the line of sight distance from the Bearspaw well to Functional Unit 3 in the Crossfield gathering system is about 24 kilometres.

The panel finds, that even assuming the facilities comprising Functional Unit 3 in the Crossfield gathering system could be used to provide common carrier service, that is not the application before us: Bearspaw seeks to have the entire Gathering System included in a common carrier declaration. Bearspaw's common carrier application specifically includes and relies on the North Delacour gathering system, the 13-6 field compressor and a delivery point at the southern end of the North Delacour gathering system.

Finally, Bearspaw submitted that it is most likely Harvest will sell the lands and infrastructure to "a buyer intending to produce them" and so the common carrier and rateable take orders it seeks are still necessary. There is no evidence before us to support Bearspaw's prediction. Indeed, evidence filed by

[9] Section 6 of Part 1.3.5 states: 6) An indication of the available capacity of the pipeline to be subject to the proposed common carrier order.

Bearspaw in its Reply to the Motion is to the contrary. Bearspaw provided evidence to show that Harvest had offered lands and facilities for sale including the North Delacour gathering system and BQC Pool wells. There was no buyer. In addition, and in any event, the requirements of Part 1.3.5 of *Directive 065*, such as the requirements that the applicant state the name of the company to be designated as the common carrier and demonstrate that they have made substantial efforts to negotiate a resolution with the proposed common carrier, prevent the Regulator from issuing a common carrier order in respect of an unidentified proprietor. In addition, and in any event, as argued by Bearspaw, it would not be appropriate for us to base our decision on events that may or may not happen.

The panel finds the evidence on the record to be clear. It has been tested through questioning by Bearspaw's counsel. Harvest is no longer operating a pipeline that provides service, of any kind, to anyone for gas produced from the BQC Pool. There are no uncertainties or gaps in the facts, record, or law on this point. The panel concludes that it is fair and just for the parties, as well as a more efficient use of the parties' and the Regulator's resources to decide the common carrier application on a summary basis now. With the decision of the panel, Bearspaw can focus its efforts on options for producing its 02/11-24 well.

In light of the facts, and for the above reasons, the panel grants Harvest's motion and dismisses Bearspaw's common carrier application.

Rateable take application

Bearspaw's rateable take application is governed by section 36 of the *OGCA* and Part 1.1 of *Directive 065*. Subsection 36(2)(b) of the *OGCA* is relevant here. It sets out one of the ways in which the Regulator may impose a restriction on gas produced from a pool in Alberta. It says the Regulator may impose a restriction:

> "… by distributing the amount of gas that may be produced from the pool or part of the pool in an equitable manner among the wells or groups of wells in the pool for the purpose of giving each well owner the opportunity of receiving the well owner's share of gas from the pool."

Section 36, specifically, in this case, subsection 36(2)(b), should be read along with the relevant requirements in *Directive 065*.

Part 1.1.3 of *Directive 65* describes how the Regulator processes rateable take applications. The key points for our decision are that:

> The AER considers the issuance of a rateable take order to be a very significant action because it has the potential to override contractual arrangements put in place through normal business practices.

> Consequently, before approving an application, the AER requires an applicant to demonstrate that it is being deprived of the opportunity to obtain its share of production from the pool. The applicant must show that drainage has occurred and continues to occur or that it can be expected to occur with a very high degree of certainty. (emphasis added)

To succeed on a rateable take application Bearspaw must be able to show that drainage has occurred and that drainage continues to occur or that it can be expected to occur with a very high degree of certainty. The "and" is conjunctive. With no other production from the BQC Pool, Bearspaw cannot show that drainage continues to occur, or that it can be expected to occur with a very high degree of certainty.

The uncontradicted evidence before the panel is that, as of December 17, 2019, there were no wells producing from the BQC Pool, so there can be no drainage from Bearspaw's lands to those wells as a result of production. Also, in light of the uncontradicted evidence before us, and in particular the evidence contained in Exhibit 83.01 (the transcript of the Questioning of Mr. Michael Jeffrey French), the panel finds that, while it is technically possible for some of the Harvest and partner wells in the BQC Pool to be put back on production, that cannot be expected to occur with even a high let alone a very high degree of certainty. This is particularly the case where the pipeline previously used to transport production from the BQC Pool wells has been discontinued and, as the evidence shows, will be abandoned absent a significant change in circumstances.

Bearspaw speculated that Harvest did not actually intend to abandon the North Delacour gathering system or to permanently shut-in and abandon the BQC Pool wells. Bearspaw appears to suggest that Harvest is discontinuing operations of the Gathering System, and shutting-in and abandoning wells that are still capable of production, as part of an effort to keep Bearspaw from producing its 02/11-24 well.

The uncontradicted evidence filed by Harvest in support of the Motion, and which Bearspaw had the opportunity to test through questioning of Mr. French on his affidavits, demonstrates that Harvest and partners intend to, and are in the process of, permanently shutting down their operations in the Crossfield area, including the BQC Pool and the North Delacour gathering system, for financial reasons. Harvest acknowledged that if there were a "marked and long-term improvement" in natural gas prices, it is possible they could choose to reverse course. But as noted above, it would be inappropriate for the panel to decide this application on the basis of speculation.

In respect of the rateable take application, the panel finds that the evidence on the record is also clear. There are no wells producing from the BQC pool: The Journey well is not producing; Harvest and partners are no longer producing their wells in the BQC Pool. Evidence before the panel indicates that Harvest and partners have no intention of operating and producing from those wells in the future.

The evidence has been tested through questioning on the affidavits. There are no uncertainties or gaps in the facts, record or law on this point. The panel concludes that it is fair and just for the parties, as well as a more efficient use of the parties' and the Regulator's resources, to decide the rateable take application on a summary basis.

In light of the facts, and for the above reasons, the panel grants Harvest's motion and dismisses Bearspaw's rateable take application.

Questions posed by the panel

In arriving at its decision to dismiss both Bearspaw's common carrier and rateable take applications, the panel also considered the parties' oral submissions made in response to the three of its four specific questions that were not addressed above. For ease of reference the three remaining questions are:

ii) What would be the practical effect of a common carrier order as sought by Bearspaw in light of the update evidence provided by Harvest on January 02, 2020?

iii) In light of the update evidence provided by Harvest on January 02, 2020, and in light of your views on question ii, would a hearing of Bearspaw's applications numbers 1877294 and 1878333 for a common carrier order and rateable take order be an efficient use of adjudicator's resources?

iv) In light of the update evidence provided by Harvest on January 02, 2020, what would be the consequences of adjournment of one or both of Bearspaw's applications versus dismissal?

In response to the question about the practical effects of the orders sought by Bearspaw in the circumstances, Bearspaw submitted that the practical effect of a common carrier order made in respect of the Gathering System at this time would be that Harvest would or could then be required by the Regulator to recommence operations.

Harvest stated that there would be no practical effect. It reiterated its arguments about the lack of jurisdiction for the Regulator to require pipeline owners to operate pipelines the owner has decided to discontinue or abandon.

The panel finds that there would be no practical effect of a common carrier order in these circumstances - where the North Delacour gathering system has been discontinued, is in the process of being abandoned by its owner and, as a result is not in service and thus has no capacity.

For the reasons given above, the Regulator does not have the jurisdiction to require Harvest to recommence operations of the Gathering System. If circumstances change, and service is once again

being offered on the North Delacour gathering system, Bearspaw can bring new applications as it sees fit in light of the facts existing at that time.

The third question posed by the panel asked about whether proceeding to a hearing would be an efficient use of adjudicator's resources. Bearspaw submitted that the Regulator is using its resources efficiently when it considers completed applications that are within its jurisdiction and statutory mandate.

Harvest submits that because the Regulator does not have the jurisdiction to require Harvest to reactivate the portions of the Gathering System already discontinued, it would be a waste of the Regulator's and the parties' resources to proceed to the oral hearing.

In light of the panel's finding regarding the second question, the panel finds that it would not be an efficient use of adjudicator or the parties' resources to proceed to a hearing of Bearspaw's applications. The record is complete and clear. The panel was able to make the necessary findings of fact. There are no uncertainties or gaps in the facts, the record or the law that indicate there is an issue that can only be decided after an oral hearing of Bearspaw's applications. A summary disposition of Bearspaw's applications is a more expeditious and less expensive means of achieving a just and fair result for the parties.

Finally, in response to the panel's question about the consequences of adjournment v. dismissal of one or both of Bearspaw's applications, Bearspaw stated that further delay resulting from an adjournment of the hearing would be prejudicial to it. Bearspaw cited delay, generally, as prejudice, in and of itself. Bearspaw also cited its inability to realize the value of its asset as prejudice.

In light of the panel's decision to grant the Motion and dismiss Bearspaw's applications the panel does not need to address the question of prejudice to Bearspaw that may result from an adjournment.

Conclusion

For the above reasons the panel finds that:

i) It may decide Harvest's motion to dismiss or suspend the Bearspaw's applications without proceeding through the oral portion of the hearing.

ii) The panel has all the information and jurisdiction it requires to decide Bearspaw's applications at this point.

iii) The record as it stands, in particular, the evidence filed as part of the Motion, is complete and sufficiently well-developed to allow the panel to exercise the discretion to decide the applications now.

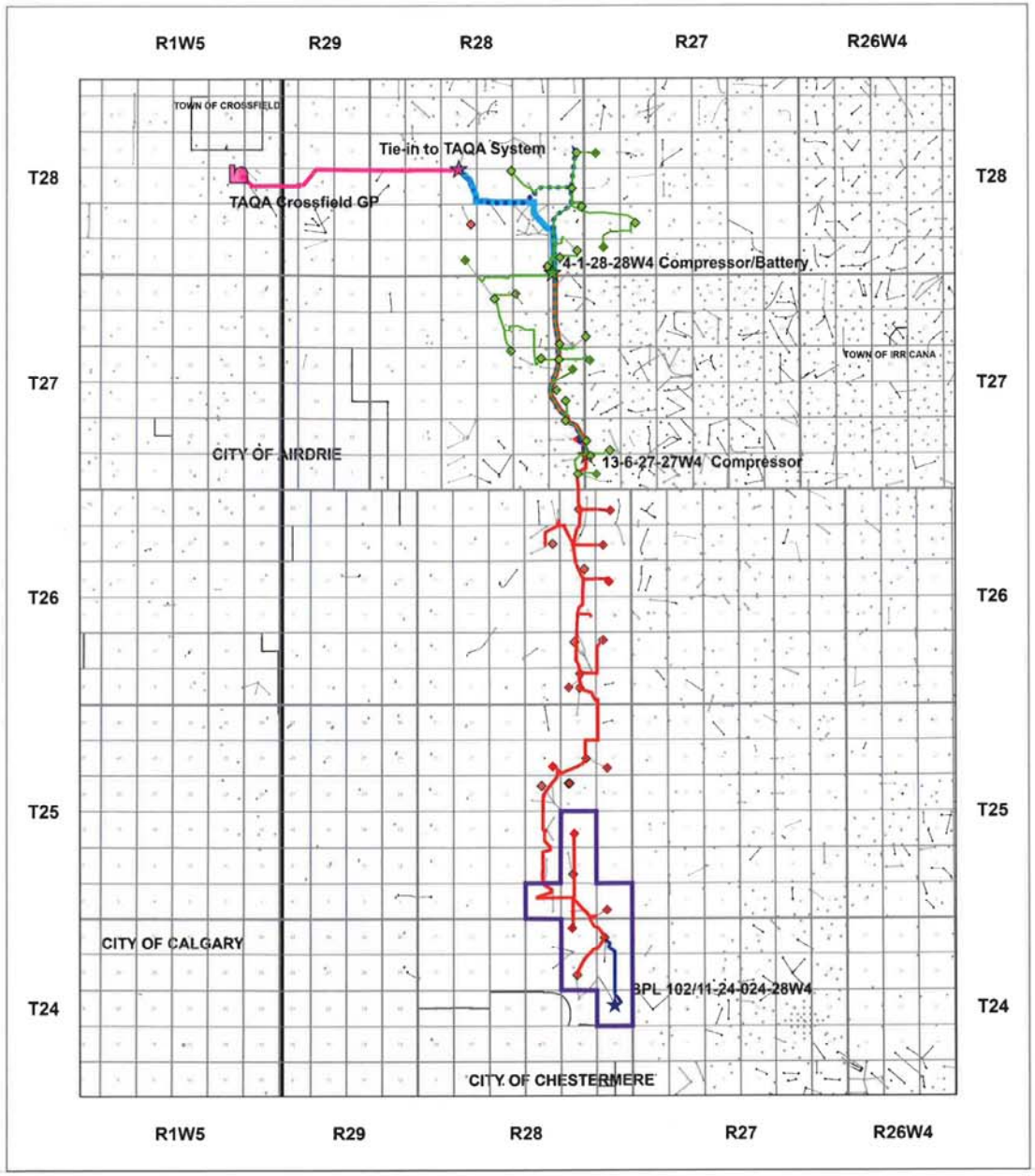
iv) Granting Harvest's motion for dismissal of Bearspaw's applications at this point without proceeding through the oral hearing is fair and just.

v) Bearspaw is not able to satisfy the requirements for either a common carrier or rateable take application in respect of the Gathering System and the BQC Pool.

As a result, the panel grants Harvest's motion. Bearspaw applications 1877294 and 1878333 are dismissed.

Cecilia Low, B.Sc., LL.B., LL.M. on behalf of the panel.

cc: B. Kapel Holden and C. Ross, AER Counsel



Legend

Crossfield- Proceeding 360

- TAQA Crossfield Complex (9-14-28-1W5)
- TAQA Pipeline System
- 14-16-28-28W4 Tie-in Point to TAQA Pipeline system
- 4-1-28-28W4 Compressor
- HOC wells producing to 4-1 Compressor
- Gathering System servicing 04-01 Compressor Wells
- Crossfield GGS Functional Unit #1 (13-6-27-27W4 Compressor)
- Crossfield GGS Functional Unit #2 (Operating Fuel Gas Pipeline)
- Crossfield GGS Functional Unit #2 (Suspended Sales Gas Pipeline - Lic# 53632)
- Crossfield GGS Functional Unit #3 Fuel Gas - Operating (Lic# 51645-19)
- Crossfield GGS Functional Unit #3 Sales Gas - Operating (Lic# 53164-1)
- North Delacour GGS Suspended Gas Pipelines
- Shut-in or Suspended Wells - Listed in Supplemental Affadavit Number 2
- Basal Quartz C Pool Boundary
- BPL Pipeline - Lic# 49533-1
- BPL 102-11-24-24-28W well

Kilometres
0 5 10 15
0 5 10
Miles

Datum: NAD 27 Spheroid: Clarke 1866
Projection: 6 degrees TM (Transverse Mercator)

This is Exhibit "D" to the Affidavit of Jeff French sworn before me on January 2, 2020

A Commissioner for Oaths in and for Alberta

COLLEEN A. ALLEN
A Commissioner for Oaths in and for Alberta
My Commission Expires June 12, 2021

Harvest Operations Corp

Crossfield
Discontinued and Operating Infrastructure
as at January 2, 2020

Licensed to : Harvest Operations Corp

geoSCOUT www.geologic.com	By :	Date : 2020/01/02
	Scale = 1:196000	Project : MasterA