

August 3, 2023

## Conflict in Paradise

**By:** Nigel Bankes

**Decisions Commented On:** (1) [AUC Decision 27589-D01-2023](#), Nova Solar G.P. Inc. and AltaLink Management Ltd., Nova Solar Power Plant and Transmission Connection, July 19, 2023; and (2) [AUC letter decision on standing](#), October 31, 2022 (AUC’s Standing Ruling).

New and different resource uses may give rise to conflict or competition, and many have been discussed on [ABlawg’s](#) pages. Examples include:

(1) competition between natural gas storage operations and conventional oil and gas operation, (see for example Bankes, [“Kallisto #2. Competing Uses of Geological Space: Resolving Conflicts Between Oil Production and Natural Gas Storage Interests”](#));

(2) competition for underground disposal capacity, (see, for example Bankes, [“Sharing Geological Pore Space Disposal Capacity”](#) as well as a [complex and ongoing regulatory matter](#) involving CNRL and Greenfire Resources before the Alberta Energy Regulator); and

(3) competition between proposed carbon capture and storage operations and a variety of conventional and non-conventional resource activities, (see for example, Ettinger et al, [“Alberta’s Carbon Capture & Storage Land Grab And The Potential For Conflicts Of Subsurface Rights”](#)).

The Nova Solar decisions of the Alberta Utilities Commission (AUC) discussed in this blog post involve a type of conflict that is both old and new. The conflict is old and traditional insofar as it is a conflict between surface owner interests and subsurface or mineral owner interests. The conflict is new in the sense that it engages a “new” resource use, namely the use of the surface for the generation of electricity from arrays of solar panels, and the implication of this for the potential development of subsurface hydrocarbons.

The AUC ultimately approved Nova Solar’s application for its 150 MW generating facility in Wheatland County under the *Hydro and Electric Energy Act*, [RSA 2000, c H-13](#) but rejected the applicant’s transmission and connection application (part of which involved a related application from AltaLink). This means that the project will not be built unless and until Nova Solar comes back to the AUC with a revised application that addresses the AUC’s concerns with respect to these aspects of its application. My comment on this decision, however, focuses on an objection raised to the generation element of the application by PrairieSky Royalty Ltd (PSK). PSK owns the fee simple mineral rights situated under the entirety of the lands within the area of the power project. PSK considered that “its mineral rights under the project lands would be directly and

adversely affected by the solar project” and specifically “that the project would negatively impact PSK’s ability to access its freehold mineral rights, thereby negatively impacting the value of those rights ‘by ensuring [its] mineral title is sterilized, resulting in a de facto expropriation of [its] core assets.’” (at para 29, footnote omitted). PSK’s business model is to lease out its mineral title interests to lessees in return for a royalty interest. In this model, PSK is not the operator and all operational decisions are made by the lessee/working interest owner.

PSK’s objections seems to have raised four questions for the AUC (although what follows is my framing rather than the Commission’s). First, did PSK have standing to participate in Nova Solar’s application? Second, what procedural steps should Nova Solar have taken to engage with PSK in advance of filing its application? Third, was there a practice or custom in the industry prescribing how possible conflicts between mineral owners and solar developers should be resolved? And fourth, did PSK’s subsurface interest require the AUC to reject Nova Solar’s application or to make approval conditional upon an award of compensation?

The AUC’s decision contains significant and an unusually large number of redactions with respect to some of these matters.

### **Did PSK Have Standing to Participate in Nova Solar’s Application?**

Section 9 of the *Alberta Utilities Commission Act*, [SA 200, c A-37.2](#) (AUCA) requires the Commission to afford standing to a person where the Commission forms the view that its decision on a matter “may directly and adversely affect the rights” of that person. Nova Solar argued that the Commission should not afford PSK standing on the basis that: (1) PSK had no legally recognized *surface* rights, (2) PSK’s primary interest was a commercial interest in seeking compensation from Nova Solar, which matter is not within the jurisdiction of the Commission, and (3) PSK had no specific plans to develop its mineral interests and as such its claims are “speculative and insufficient for the Commissions to determine any potential for direct and adverse impacts” (AUC Standing Ruling at para 17).

The Commission rejected those submissions. With respect to the first part of the standing test, (the existence of a right) the Commission concluded that PSK had a legal right by virtue of its fee simple ownership of mines and minerals in the subject lands that may be directly and adversely affected by the project. This was not “undermined by the fact that it does not as yet have surface rights or any necessary approvals required in order to work the mines and minerals.” (AUC Standing Ruling, at para 19). With respect to the second part of the test the Commission was of the view that PSK had provided enough information “at this preliminary stage of the proceeding” to support the claim that its right to work the mines and minerals on the lands “as well as the value of the mineral rights *may* be directly and adversely affected by the project.” (AUC Ruling on Standing at para 19, emphasis in original, references omitted.)

The AUC returned to the question of standing in its decision on the merits at the end of its consideration of PSK’s submission under the heading “Conclusion about whether PSK is directly and adversely affected”. Here the Commission repeated its earlier assessment:

Having considered the evidence and argument of the parties, the Commission is satisfied, on the balance of probabilities, that PSK would be directly and adversely affected by approval of the Nova Solar project. The reasons for this include: (i) PSK's fee simple title to mines and minerals of the project lands; (ii) the potential for subsurface resource development of the project lands; and (iii) the potential that as a result of the project footprint, future access to PSK's mines and minerals will be more challenging and/or costly. (at para 62).

In my opinion this is clearly correct. While there is a sense in which the project will not affect PSK's legal rights – since it will still, in theory, be able to rely on the proposition that the mineral estate dominates the surface estate (*Borys v Canadian Pacific Railway*, [1953 CanLII 414 \(UK JCPC\)](#), [1953] 2 DLR 65) and exercise the rights accorded to it by Alberta's *Surface Rights Act*, [RSA 2000, c S - 24](#) – it will in practice be far more difficult and expensive for it (or its lessee) to exercise those rights than if the current agricultural use of the lands continued.

### **What Procedural Steps Should Nova Solar Have Taken to Engage with PSK in Advance of Filing its Application?**

As the Commission notes early in its decision “the Commission requires the applicant to comply with the various requirements in Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines*” (at para 17; the Rule is available [here](#)). Later, the Commission expanded on the contents of Rule 007:

Rule 007 states that personal consultation “[g]oes beyond personal notification and refers to meaningfully engaging with individuals and groups about the project and includes listening and responding to any objections to the project.” Rule 007 further states that the applicant “must make reasonable attempts to contact stakeholders..., provide information about the project, discuss the project, and address any questions and concerns.” These requirements were reiterated in a recent Commission decision where the panel indicated that in order to have “meaningful engagement,” the applicant should “attempt to address concerns raised about the project during consultation.”

In the Commission's view, while Nova Solar's consultation efforts with PSK may have met the bare requirements of Rule 007, this was not an example of effective consultation. Nova Solar attempted to communicate with PSK during the consultation process; however, its suggestions for addressing PSK's concerns are somewhat disingenuous - Nova Solar could not agree to the magnitude of compensation requested by PSK and therefore offered project layout modifications, but then stated in the hearing that layout modifications that would reduce the capacity of the power plant would render the project not viable. (AUC Decision at paras 41-42)

These paragraphs encapsulate the divide between Nova Solar and PSK. Reading between the lines, PSK wanted accommodations that would have allowed conventional vertical drilling operations, at least during exploration, or, failing that, compensation, presumably based (hard to tell because of the redactions) on the loss of market value associated with the increased difficulty or

impossibility of exploiting the hypothetical resource value of the property. On the other hand, Nova Solar wanted to be able to maximize its solar footprint and was averse to paying compensation in the alternative, especially when, in its view, PSK had failed to provide concrete plans as to how it would go about exploiting the non-proven potential of the mineral property. PSK justified its failure to provide details on the basis of its business model (PSK did not operate its mineral properties and it was therefore up to a future lessee to bring its own exploration and development plans).

While the Commission regretted the failure of the parties to reach an agreement that would have allowed PSK to withdraw its objections to the project (see for example at para 45), the Commission did not lay all the blame on Nova Solar. Indeed, it considered that both parties were inflexible in their approaches “and that that both parties share blame in their respective approaches during the consultation process” (at para 43.)

### **Is There a Practice or Custom in the Industry Prescribing how Possible Conflicts Between Mineral Owners and Solar Developers Should be Resolved?**

The AUC expressly directed the parties to address this issue (at para 46), but the parties were unable to agree as to whether there was a practice and what that practice was. PSK took the view that there was a practice, but the evidence presented suggests that “the practice” amounted to little more than constructive engagement with a view to reaching agreement rather than a particular substantive outcome. The AUC summarized PSK’s evidence as follows:

PSK is aware of a number of examples in the past six years wherein conflict arose between a solar developer and a subsurface rights owner in the context of an AUC proceeding. PSK submitted that it is customary for subsurface rights holders to file statements of intent to participate seeking to address their concerns; and that as a result of the subsurface rights owners’ participation in such AUC proceedings, it is industry practice for the parties to reach an agreement whereby the subsurface rights owners’ concerns are addressed by the applicants, leading to the withdrawal of their objection previously filed. (at para 47).

PSK also urged the AUC to consider US practice as summarized in Sewell and Stahl, “[Mineral Issues’ Impact on Solar Energy Development in Texas and Other States](#)”. (at para 37, note 37).

Nova Solar dealt expressly with the question of whether there was a customary duty to compensate the mineral rights holder. Nova Solar denied that there was any such duty and summarized its experience to the effect that:

... mineral rights holders customarily do not object to the development of solar projects where no steps have been taken by the mineral rights holders to secure surface rights or where there is no specific development plan to access the minerals. Nova Solar pointed out one exception where its parent company, Renewable Energy Systems Canada Inc., had reached a compensation agreement with PSK in relation to another solar project. (at para 49)

For its part the AUC recognized that it had no statutory authority to order a solar developer to compensate a mineral rights holder but considered it “appropriate to acknowledge and endorse best practices for accommodation, which may include financial compensation, by project proponents.” (at para 51). The Commission also seemed to support the suggestion of Sewell and Stahl to the effect that “a practical goal of solar energy developers should be to obtain an adequate waiver of surface rights or accommodation agreement in order for the solar developer to contract around the risk of future surface disruption.” (at para 51).

### **Did PSK’s Subsurface Interest Require the AUC to Reject Nova Solar’s Application or to Make Approval Conditional upon an Award of Compensation?**

The Commission emphasised throughout that its role was to assess whether the generation project was in the public interest having regard to the purposes of the *Electric Utilities Act*, [SA 2003, E 5.1](#) (as required by s 3(1)(d) of the *Hydro and Electric Energy Act*, [RSA 2000, c H-16](#), and s 17 of the *AUCA*):

Where the Commission conducts a hearing or other proceeding on an application to construct or operate a hydro development, power plant or transmission line under the *Hydro and Electric Energy Act* or a gas utility pipeline under the *Gas Utilities Act*, it shall, in addition to any other matters it may or must consider in conducting the hearing or other proceeding, give consideration to whether construction or operation of the proposed hydro development, power plant, transmission line or gas utility pipeline is in the public interest, having regard to the social and economic effects of the development, plant, line or pipeline and the effects of the development, plant, line or pipeline on the environment. (at para 21, citing *AUCA* at s 17)

It followed from this that PSK could have no veto over Nova Solar’s project by virtue of PSK’s fee simple ownership of the mines and minerals underlying the surface estate. Had PSK been first in the field and had it (or its lessee) acquired surface rights to develop its mineral interest then it is clear that Nova Solar would have to accommodate that reality, but there is no abstract priority that attaches to mineral ownership that allows it to preclude certain uses of the surface simply to protect the possibility that the mineral owner might require access to the surface estate to work its mineral interest in the future.

It is even more obvious that the applicable statutory provisions quoted above do not accord a veto to the owner of the mineral estate. At most the public interest test incorporated in the *AUCA* requires the Commission to consider the mineral owner’s position - but only as part of weighing the overall public interest. This might have involved the Commission assessing the net societal benefits associated with different development scenarios (recall here the [lengthy regulatory proceedings](#) associated with the gas over bitumen debate in Alberta; see Mike Wenig, “[Valuing Energy Resources: Reflections on the EUB’s Decision in the Surmont ‘Gas over Bitumen Controversy’](#)” (2002), 80 Resources 1), but that is difficult to accomplish when the Commission must weigh the benefits (and costs) of a concrete project proposal versus the more amorphous and less concrete development possibilities associated with the mineral estate. That seems to have weighed heavily on the Commission in its conclusions on PSK’s intervention:

The overriding question for the Commission on Nova Solar's applications is whether construction or operation of the power plant is in the public interest, having regard to the social and economic effects of the power plant and the effects of that power plant on the environment. Issues relating to PSK are one component of the broader assessment that the Commission must undertake in deciding whether the project is in the public interest.

Parties that intervene in Commission proceedings are frequently directly and adversely affected by applications brought by proponents for the approval of facilities, but that does not mean that the application ought to be denied. Mitigation is often offered by a proponent, and short of some agreement between the parties in that regard, the proponent may make commitments to the intervener during the course of a proceeding, or the Commission may make its approval conditional upon certain steps being taken by a proponent to mitigate, in whole or in part, the adverse effects on that party. In other cases, the Commission may approve an application as being in the public interest, without requiring any mitigative steps.

In this case, Nova Solar's ability to put forth mitigation was limited by PSK's failure to put forward realistic information on potential drilling and related developments. While the Commission does not expect PSK to have put forward a fully developed proposal including a reserves evaluation and drilling plan, the Commission does expect more than pure speculation on potential drilling and development locations. ... (at paras 63 – 65, references omitted).

The Commission returned to this point in its overall conclusions when it rejected PSK's argument to the effect that the AUC should condition its approval of Nova Solar's application on Nova Solar meeting PSK's concerns:

The Commission has determined that subject to the conditions outlined in this decision, the approval of the power project is in the public interest, notwithstanding the issues raised by PSK concerning the effects the power project may have on its interests in mines and minerals underneath the project lands. The Commission disagrees with PSK that the Commission is somehow jurisdictionally precluded from approving the power project because such approval would amount to a regulatory taking, for which the Commission has no jurisdiction to compensate PSK. The Commission is not persuaded by this argument, nor by the distinguishable cases referred to by PSK to support it. Indeed, the approval of a power project is squarely within the Commission's jurisdiction. (at para 104, references omitted).

This too must be correct. The types of conditions sought by PSK would have afforded PSK a veto over different uses of the surface estate (it was currently used for agricultural purposes). But as discussed above, neither property law nor the relevant statutory rules afford the owner of the mineral estate such a veto.

## Other Matters

Two other matters are worth noting. First, notwithstanding the fact that the AUC rejected the transmission and connection parts of the application, the AUC did commend the parties for bringing forward the facilities application and the transmission and connections applications at the same time. Indeed, the Commission had this to say:

The Commission appreciates having both the power plant applications and transmission line applications before it. The Commission believes considering power plant and transmission line connection applications in one proceeding is a more efficient approach, compared to considering them in separate proceedings. *The Commission endorses this approach wherever feasible.* (at para 11, emphasis added).

Second, I can't help but notice that PSK is proving to be vigilant in using various fora to protect its legal interests as the owner of freehold and royalty mineral interests. In addition to this AUC matter PSK has also been active in the court system protecting its gross overriding royalty interests (see *PrairieSky Royalty Ltd v Yangarra Resources Ltd*, [2023 ABKB 11](#) and my comment on that decision [here](#)) as well as before the Alberta Energy Regulator seeking to protect its freehold mineral interests in an unusual compulsory pooling application (see [2023 ABAER 003](#), and an early article of mine on compulsory pooling orders [here](#)).

---

This post may be cited as: Nigel Bankes, "Conflict in Paradise" (3 August 2023), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2023/08/Blog\\_NB\\_AUC\\_Conflict\\_in\\_Paradise.pdf](http://ablawg.ca/wp-content/uploads/2023/08/Blog_NB_AUC_Conflict_in_Paradise.pdf)

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](#)

