Appeal No. PLAB 12-0012

ALBERTA
PUBLIC LANDS APPEAL BOARD

Decision of Preliminary Matters

Hearing Dates – June 9, 19, July 9 and 18, 2014
Date of Decision – August 13, 2014

IN THE MATTER OF Part 7 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and Part 10 of the *Public Lands Administration Regulation*, A.R. 187/2011;

-and-

IN THE MATTER OF an appeal filed by **Lone Pine Resources Canada Ltd.** with respect to a Licence of Occupation under the *Public Lands Act*, R.S.A. 2000, c. P-40 ("PLA") to construct a road on public lands (the "**Application**," located at NW 12, NE 11, SE 14 all in 064 – 14W6M rejected by the **Director, Rose Radomsky, Lands Disposition Branch, Alberta Environment and Sustainable Resource Development.**

Cite as: *Lone Pine Resources Canada Ltd. v Alberta Environment and Sustainable Resource Development*, re: Preliminary Application**,** Appeal No. PLAB 12-0012

WRITTEN HEARING BEFORE:	Eric McAvity, Q.C., Panel Chair A.J. Fox, Panel Member Dr. Alan Kennedy, Panel Member
PARTIES:	
Appellant:	Sander Duncanson for Lone Pine Resources Canada Ltd.
Director:	Wendy Thiessen for Alberta Environment and Sustainable Resource Development
Other Applicable Parties:	Stuart Chambers and Sean Parker, Board Counsel
Board Staff:	Gordon McClure, Public Lands Appeals Board Coordinator

EXECUTIVE SUMMARY

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I. INTRODUCTION

1. This is a decision, based on written submissions, of preliminary matters before the Public Lands Appeal Board (the "**Board**"). The decision relates to the issues raised by the Director of Alberta Environment and Sustainable Resource Development (the "**Director**") in the Director's application ("**Preliminary Application**") regarding the grounds of appeal and appeal submissions of the Appellant, Lone Pine Resources Canada Ltd. ("**Lone Pine**"). The parties made written submissions to the Board on the preliminary questions of:

    a. Does the Board have jurisdiction to decide questions of mixed fact and law?

    b. May the Board consider grounds of appeal raised by Lone Pine after the deadline for filing a Notice of Appeal expired?

    In this decision, the Board has only considered the matters arising in the Preliminary Application. Issues relating to the appeal proper ("**Appeal**") will be addressed in a further, separate hearing to be scheduled following the issuance of the Board's decision on these preliminary matters. The Board will render a decision on the Preliminary Application pursuant to the *Public Lands Administrative Regulation*, Alta. Reg. 187/2011 ("***PLAR***") and the Board's Appeal Procedure Rules. This decision of the Board does not go to the matters of the Appeal and, therefore, a recommendation to the Minister is not required.

II. BACKGROUND

2. The Board reviewed the Director's Record, the written submissions and authorities provided by the parties in connection with the Preliminary Application of the Director, and the written appeal submissions of the parties. The Board also reviewed the previous findings of fact in its Interim Report dated June 21, 2013 related to the background of this matter, and adopts the facts as stated therein. The facts set out in this Background section have been updated to reflect subsequent events in the matter.

3. On February 14, 2012 Lone Pine applied to what was then Alberta Sustainable Resource Development ("**ASRD**") for a Licence of Occupation under the *Public Lands Act*, R.S.A. 2000, c. P-40 ("**PLA**") to construct a road on public lands (the "**Application**"). The stated purpose of the proposed road was to assist with transportation between Lone Pine's operations in West Narraway, Alberta and Ojay, B.C.

4. From March 2012 through May 2012, ASRD and Lone Pine had communications regarding the Application; ASRD asked for additional information and Lone Pine provided the same.

5. On September 11, 2012 the Director issued a decision denying the Application. The Director indicated that:

    a. The mitigation proposals did not support Approval Standards 100.1.1 or 100.1.2 or the Desired Outcomes of those standards.

    b. The proposed access would create an extended loop road connecting a number of paved highways and industrial high and low grade roads in Alberta and British Columbia.

    c. The proposal brought "unacceptable impacts of increased access and traffic to both grizzly bear and caribou."

    d. The "proposed road is routed through the middle of the key caribou wintering habitat and the Narraway Range."

6. On September 15, 2012 Lone Pine submitted a Notice of Appeal challenging the Director's decision denying the Application. The Notice of Appeal raised the issue of the Director's alleged error in the determination of material facts and a deemed rejection pursuant to section 15 of the *PLAR* as Lone Pine's grounds of appeal. Specifically with respect to the alleged error in determination of material facts, the Notice of Appeal stated:

    A. The Director erred in the determination of a material fact on the face of the record by concluding that:

i. The road is a “loop road.”

ii. The proposed gate system would not provide adequate mitigation.

7. The Director’s Record was submitted to the Board on November 8, 2012 and the Director’s Supplemental Record was provided on February 15, 2013.

8. Lone Pine provided additional written submissions on February 19, 2013 addressing a number of issues and grounds of appeal (“**Lone Pine’s Written Submissions**”).

9. On March 27, 2013 the Director brought the Preliminary Application, which was a motion to dismiss Lone Pine’s appeal, and provided written submissions in support of the Preliminary Application.

10. On April 10, 2013, Lone Pine responded to the Director’s Preliminary Application (“**Lone Pine’s Response**”).

11. The Director provided rebuttal submissions on April 17, 2013.

12. The Board held a hearing (by written submissions) on April 26, 2013 and determined that the parties had not fully addressed the issue of deemed rejection raised in the Notice of Appeal. In a letter dated May 2, 2013, the Board therefore requested further submissions from the Director and Lone Pine regarding the deemed rejection issue. The Board specifically requested that the parties address the relief available should the Board find that a deemed rejection had occurred.

13. In response to the Board’s direction, Lone Pine provided submissions on May 10, 2013; the Director provided a response on May 17, 2013; and Lone Pine provided rebuttal submissions on May 24, 2013.

14. The Board recommenced the hearing (by written submissions) on May 29, 2013.

15. The Board provided a hearing report for decision regarding the issue of a deemed rejection pursuant to section 15 of the *PLAR* to the Minister of Environment and

Sustainable Resource Development on June 21, 2013. Only the deemed rejection issue was the subject of a recommendation at that time.

16. On February 6, 2014 the Minister accepted the Board's recommendations and allowed Lone Pine's appeal on the deemed rejection issue and found the Application complete. It was, however, also recognized that circumstances may exist where the remedy of instructing the Director to issue a decision on the merits of the Application could potentially prejudice a successful appellant. Therefore, Lone Pine was provided the option to waive the remedy for the deemed rejection issue and proceed to a hearing before the Board on the merits of the Application.

17. On February 10, 2014 Lone Pine chose to waive the remedy and requested that the Board proceed with the Appeal on the merits of the Application.

18. On March 20, 2014 the Minister, based upon the Lone Pine's waiving of the remedy provided, ordered that the Board proceed with the Appeal on the merits of the Application. As the deemed rejection issue has been settled, matters related to that issue are not addressed further in this decision.

19. On March 27, 2014 Lone Pine requested that the Appeals Coordinator provide relief under section 236(2) of the *PLAR* to allow Lone Pine's Appeal automatically, on the basis that the Board had not processed the Appeal within the legislated time period.

20. On May 14, 2014 the Appeals Coordinator issued a letter denying Lone Pine's application for the mandatory granting of the Appeal pursuant to section 236(2) of *PLAR*, on the basis that the Appeals Coordinator was of the opinion that the *PLAR* section 236(3) exceptions were engaged on at least two grounds, and accordingly the Appeal would proceed. The Appeals Coordinator noted that before a hearing of the Appeal proper could proceed, the Board must first complete the hearing of the Director's Preliminary Application to dismiss the Appeal, which hearing was to proceed forthwith based on the written submissions already received.

21. On May 29, 2014 the Appeals Coordinator issued a letter to the parties advising that the hearing for the Director's Preliminary Application would commence on June 9, 2014 where the following two issues were before the Panel:

    a. Does the Board have jurisdiction to decide questions of mixed fact and law?

    b. May the Board consider grounds of appeal raised by Lone Pine after the deadline for filing a Notice of Appeal expired?

22. A hearing by written submission of the Director's Preliminary Application to dismiss the Appeal commenced on June 9, 2014.

23. On July 9, 2014, acting on instruction from the Panel, the Appeals Coordinator wrote the parties informing them that the Panel had reviewed the submissions and authorities provided by the parties, and in the course of its deliberations also identified five further authorities ("**Further Authorities**") potentially relevant to the issues before the Panel. The parties were provided with copies of the Further Authorities and given the opportunity to make "**Submissions on the Further Authorities**," if they chose to do so. Both the Director and Lone Pine made Submissions on the Further Authorities in response to the opportunity provided by the Board.

24. The Further Authorities are:

    a. *Joey's Delivery Service v. Workplace Health Safety and Compensation Commission*, 2001 NBCA 17 ("***Joey's***");

    b. *Saint John (City) Pension Board v. New Brunswick (Superintendent of Pensions)*, [2006] N.B.J. No. 255 ("***Saint John***");

    c. *Attila Dogan Construction and Installation Co. Inc. v. AMEC America Limited*, 2014 ABCA 74 ("***Attila***");

    d. *Texaco Exploration Canada Limited v. Alberta (Mineral Assessment Appeal Board)*, 1976 CanLII 276, ("***Texaco***"); and

e. *Castle Crown Wilderness Coalition (Re)*, [2006] A.E.A.B.D. No. 14 ("***Castle Crown***").

25. The Panel convened for a total of four hearing sessions regarding the Director's Preliminary Application on the following dates: June 9, 2014, June 19, 2014, July 9, 2014 and July, 18, 2014. The hearing was adjourned between sessions. The hearing concluded on July 18, 2014.

III. ISSUES

26. The Board considered the following two questions during the hearing by written submissions:

a. Does the Board have jurisdiction to decide questions of mixed fact and law?

b. May the Board consider grounds of appeal raised by Lone Pine after the deadline for filing a Notice of Appeal expired?

Grounds of Appeal

27. For convenience, all of Lone Pine's grounds of appeal are set out here.

28. Lone Pine's original Notice of Appeal included the following grounds of appeal:

A. The Director erred in the determination of a material fact on the face of the record by concluding:

i. The road is a "loop road," and

ii. The proposed gate system would not provide adequate mitigation.

29. The following grounds of appeal were raised in Lone Pine's Written Submissions dated February 19, 2013:

B. The Director erred in the determination of a material fact on the face of the record in determining:

i. The proposed mitigation does not support the Desired Outcomes of Approval Standards 100.1.1 and 100.1.2;

ii. The proposed road would result in unacceptable impacts to grizzly bear and caribou.

C. The Director failed to provide adequate reasons and the decision should be quashed on that basis.

D. The Director failed to consider several relevant factors and the decision should be quashed on that basis.

For ease of reference, throughout this decision the Board will refer to each of the above four grounds of appeal by reference to the capitalized letter assigned in the preceding paragraphs.

IV. SUBMISSIONS

30. The Board will summarize the key submissions of the parties. All submissions have been reviewed and considered, whether expressly described here or not.

(i) The Director's Position

Regulatory Framework

31. The Director submitted that Lone Pine's application for the Licence of Occupation, the processing and rejection of that application, and the Appeal are governed by the *PLA* and the *PLAR*. The Director stated that her authority to make, renew, or reject an application for a disposition is found in sections 15 and 16 of the *PLA*. In addition, the Director noted that an appeal of a Director's decision "must be based on the decision and the record of the decision-maker."

32. The Director further submitted that the *PLAR* sets out the grounds on which a decision may be appealed. The Director submitted that it is these grounds that cause the Board to lose jurisdiction over this Appeal.

33. The Director's submissions indicated that the Enhanced Approved Process Manual ("**EAP Manual**") is a department policy document setting out its process and general criteria for applications. According to the Director, the criteria in the Integrated Standards and Guidelines ("**Integrated Standards**"), which accompany the EAP, are more application-specific. The Director noted that the Integrated Standards set out the department's "expectation for managing and mitigating risks to landscape sensitivities" and are comprised of the Pre-Application Requirements, the Approval Standards, the Operating Conditions, and the Best Management Guidelines.

34. The Director submitted that if an application does not satisfy all of the Approvals Standards, it is considered "non-standard" and is referred to field staff for review. According to the Director, the application will only be approved if the alternative mitigation strategies proposed by the applicant satisfy the "Desired Outcomes" indicated for the Approval Standards, which are not satisfied.

Issue # 1: Does the Board have jurisdiction to decide questions of mixed fact and law?

35. The Director submitted that the *PLAR* sets out limited grounds on which a decision may be appealed:

> Section 213 A decision is appealable only on the grounds that
>
> (a) the director or officer who made the decision
>
> (i) erred in the determination of a material fact on the face of the record,
>
> (ii) erred in law,
>
> (iii) exceeded the director's or officer's jurisdiction or authority, or
>
> (iv) did not comply with an ALSA regional plan
>
> or
>
> (b) the decision is expressly subject to an appeal under section 59.2(3) of the Act or section 15(4).

36. The Director submitted that section 213 of *PLAR* raises the distinction between questions of material fact, questions of law, and questions that are neither pure fact nor pure law.

37. It is the Director's position that, pursuant to section 213 of the *PLAR*, only errors of material fact on the face of the record and errors of law are appealable. The Director submitted that conclusions involving the exercise of discretion are not contemplated by section 213. In particular, section 213 does not include questions of mixed fact and law in the list of "appealable" grounds. The Director submitted that, so long as the Director did not make a pure error of material fact or a pure error of law in coming to her decision, then the conclusion based upon mixed fact and law is not itself appealable.

38. The Director defined questions of law, fact, and mixed law and fact in the following manner:

    a. Questions of law are "questions about what the correct legal test is."

    b. Questions of fact are "questions about what actually took place between the parties." This is the "who, what, when, and where." Questions about physical characteristics are also questions of fact.

    c. Questions of mixed law and fact are "questions about whether the facts satisfy the legal tests." The Director argued that discretionary conclusions are said to fall within this category.

39. The Director noted that section 213 of the *PLAR* does not grant the right to appeal just any error of fact. The Director stated that the error of fact must also be:

    a. Material in that it affects the ultimate outcome, and

    b. Apparent from the express contents of the record in that the reviewer need not look beyond the record or draw inferences from the record.

The "loop road" issue

40. The Director stated that Lone Pine's Notice of Appeal asserted that it was an error of fact for the Director to conclude that the proposed road would be a "loop road," a term which is defined in the Integrated Standards.

41. The Director submitted that this issue is not an issue of pure fact (or pure law) and so is not appealable under section 213 of the *PLAR*. The Board therefore, would not have jurisdiction to consider this issue.

42. The Director argued that Lone Pine does not point to any fact which is in dispute. The Director submitted that the term "**Loop Route**" is defined in the Integrated Standards, and thus is not appealable. Further, the Director stated that whether the physical qualities of a road satisfy (what the Director calls) a legal definition is a discretionary conclusion based on mixed fact and law. Lastly, the Director submitted that the facts related to the road are uncontested.

Whether the proposed gate system would provide adequate mitigation

43. According to the Director, Lone Pine's Notice of Appeal asserted that the Director made an error of fact in concluding that Lone Pine's proposed gates would not provide sufficient closure for unauthorized access to the area. It is the Director's position that this issue is not an issue of pure fact (or pure law) and so, is not appealable under section 213 of the *PLAR* and therefore, the Board would not have jurisdiction to consider the issue due to the following:

    a. Lone Pine has not pointed to any particular fact underlying the Director's decision with which Lone Pine disagrees.

    b. Whether something is "sufficient" is not a question of fact. It is a conclusion involving the discretionary application of the Integrated Standards to the facts. In other words, it is a question of mixed fact and law and so is submitted to not be appealable.

c. Even if the sufficiency of the gates to prevent access is a question of fact, it is not 'material'. The Director submitted that her decision was not based on the sufficiency of the gates, but rather the expected traffic that would be authorized by Lone Pine. The Director stated that, although she recognized that the gates would regulate traffic, Lone Pine would still allow traffic through the area. The Director asserted that those authorized users would be the problem.

Whether the proposed mitigation supports the Desired Outcomes of Approval Standards 100.1.1 and 100.1.2

44. The Director argued that Lone Pine's Written Submissions allege that the proposed access road is consistent with the Desired Outcomes for Approval Standards 100.1.1 and 100.1.2 and that the Director made errors of fact by concluding differently.

45. The Director submitted that the question of whether the Approval Standards are satisfied is not a question of pure law nor pure fact. Instead, the Director asserted that it is a discretionary decision involving an application of law to fact; in other words, it is a question of mixed fact and law and so is not appealable.

46. According to the Director, Lone Pine can only support its appeal by pointing to some underlying mistake of fact, which it has not done. The Director argued that the 'Approval Standard' issues are simply a complaint about the Director's exercise of discretion to reject the Application.

Potential impacts to grizzly bear and caribou

47. According to the Director, Lone Pine's Written Submissions alleged that the Director made an error of fact by concluding that the impact of the road applied for on caribou and grizzly bear would be unacceptable.

48. The Director submitted that the question of whether impact on wildlife is acceptable is discretionary and is an issue of mixed fact and law. Accordingly, the Director submitted that the issue is not appealable and the Board does not have discretion to consider the issue.

49. The Director argued that Lone Pine has not pointed to any mistake of fact underlying the Director's conclusion. Instead, according to the Director, Lone Pine argued that policy does not prohibit new linear disturbances and that Lone Pine's activities will satisfy the Integrated Standards. Accordingly, in the opinion of the Director, Lone Pine is simply objecting to the Director's exercise of discretion, which is the Director submitted is not appealable.

Allegation of the Director's failure to provide adequate reasons and consequences thereof

50. According to the Director, Lone Pine's Written Submissions asserted that the Director made an error of law by issuing inadequate reasons.

51. The Director submitted that allegedly inadequate reasons are not an error of law, and that, as a result, this issue does not fall within section 213 of the *PLAR*. Accordingly, the Director submitted that the issue is not appealable and the Board does not have jurisdiction to consider the issue.

52. The Director referred to the Supreme Court of Canada case of *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at paragraph 14 ("***Newfoundland***"). According to the Director, *Newfoundland* stands for the propositions that adequacy of reasons is not a "stand-alone basis for quashing a decision," an appellate body is not to conduct a separate analysis of the reasons, and reasons serve the purpose of showing the reviewing body whether the reasons fall within the range of possible outcomes. [Tab 5 to Director's Submission dated March 27, 2013]

53. According to the Director, the decision-maker's legal duty is met so long as there *are* reasons. Thus, the Director argued that reasons that are allegedly inadequate do not give rise to an error of law. The Director cited *Edmonton (City) v. Edmonton Composite Assessment Review Board*, 2012 ABQB 439 [Tab 7 to Director's Submission dated March 27, 2013] and *Edmonton (City) v. Edmonton Composite Assessment Review*

Board, 2012 ABQB 154 [Tab 6 to Director's Submission dated March 27, 2013] in support of this position.

54. The Director submitted that *Newfoundland* overturned earlier cases such as *VIA Rail Canada Inc. v. Canada (National Transportation Agency)*, [2001] 2 F.C. 25, (cited by Lone Pine), which, according to the Director, held that the duty to give reasons was only fulfilled if the reasons were adequate.

55. It is the position of the Director that she was not required to give any reasons. The Director did not dispute that she owed Lone Pine a duty of procedural fairness. However, the Director argued that not every decision of a statutory delegate requires reasons. According to the Director, the content of the duty of fairness is assessed by applying factors (nature of the decision, importance of the interest at stake, regulatory scheme, legitimate expectations, and procedural choices) to the decision. The Director argued that, in this case, the nature of the question is administrative and discretionary, not quasi-judicial. The Director argued that the regulatory scheme (*PLAR* section 10(5)) provides that where an application for a disposition is refused, the applicant may request the Director to provide written reasons for his or her decision, inferring that the Legislature did not intend reasons to be mandatory. Both factors were argued by the Director to indicate a lesser duty of fairness.

Allegation of the Director's failure to consider several relevant factors and consequences thereof

56. According to the Director, Lone Pine's Written Submissions asserted that the Director made an error of law by failing to consider several relevant factors.

57. The Director conceded that it is an error of law for the decision-maker to fail to consider factors that the law requires the decision-maker to consider. However, the Director argued that she is not required by any law to consider the matters that Lone Pine listed as relevant factors (Lone Pine's list is provided in paragraph 43 of Lone Pine's Written Submissions).

58. According to the Director, Lone Pine conceded that the PLA does not set out the factors that the Director must consider. The Director submitted that, due to the absence of an enumerated list of factors, Lone Pine supported its position by pointing to a high level introductory sentence in the Integrated Standards. Specifically, the Director argued that Lone Pine, in its Written Submissions, cited a sentence in the Integrated Standards for the proposition that, when making decisions, the Director must balance environmental factors against other factors. The Director disputed Lone Pine's position by arguing that the point of the sentence in the Integrated Standards is simply that industry competitiveness is not to be pursued without addressing environmental concerns. Further, the Director noted that, sometimes, environmental concerns outweigh the concerns of industry.

59. In addition, the Director noted that the Integrated Standards do set out mandatory considerations, namely the Approval Standards themselves. However, the Director stated that Lone Pine objected to the importance that the Director placed on them.

60. In further support of her position, the Director relied on *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65 ("***Driver Iron***") (at paragraph 3) for the proposition that the common law does not require the Director to consider each argument of Lone Pine. [Tab 8 to Director's Submission dated March 27, 2013]

61. The Director further argued that Lone Pine used the word "factors" to create the impression of a list of mandatory considerations, but the "factors" listed by Lone Pine were simply the arguments that Lone Pine used in support of its application.

62. The Director drew parallels between Lone Pine's position and the plaintiff in *Creelman v Nova Scotia (Workers' Compensation Appeals Tribunal [WCAT])*, 2012 NSCA 26 ("***Creelman***"). In particular, the Director cited *Creelman* at paragraphs 25 and 26:

> Mr. Creelman submits that it is an error of law to fail to consider a relevant factor. When exercising a discretion, a tribunal must weigh all the correct factors. But in this case, the "factors" for which Mr. Creelman argues are purely hypothetical. There is no evidence that any of these factually possible "factors" actually exist in this case.

> In my view, the real question is not whether WCAT failed to consider other important factors but rather whether WCAT could have reached the decision that it did based on the evidence that it had. In my view, it could.

63. Finally, the Director argued that the way in which a decision-maker weighs the evidence is not appealable.

Issue #2: May the Board consider grounds of appeal raised by Lone Pine after the deadline for filing a Notice of Appeal expired?

64. The Director submitted that the Board's jurisdiction is limited to hear and determine only those grounds of appeal raised within the timelines set by section 217 of the *PLAR* for serving a Notice of Appeal.

65. The Director's position is that Lone Pine's Written Submissions were provided to the Board well after the limitations period for serving a Notice of Appeal. Accordingly, the Director submitted that the allegedly new and/or revised grounds of appeal in Lone Pine's Written Submissions are not within the jurisdiction of the Board.

(ii) <u>Lone Pine's Position</u>

Issue #1: Does the Board have jurisdiction to decide questions of mixed fact and law?

66. Lone Pine submitted that the *PLAR* could be differentiated from other legislation in the Province. Specifically, Lone Pine submitted that while errors of law and jurisdiction are common grounds of appeal in Alberta legislation, the legislature in the case of section 213 of the *PLAR* chose to allow appeals based on determinations of material fact. Lone Pine argued that this potential ground of appeal differentiates the *PLAR* from other legislation in the Province, none of which Lone Pine could identify as allowing determinations of material fact to be appealed.

67. Lone Pine argued that case law in Alberta considering grounds of appeal has focused on questions of law or jurisdiction, which are the only permitted grounds of appeal under most statutes governing decision-makers. Lone Pine argued that, despite this focus, courts in Alberta have interpreted these grounds of appeal more broadly than as suggested by

the Director in the Preliminary Application. In particular, the Preliminary Application contends that questions involving mixed fact and law are not appealable because they are neither questions of pure fact (such as questions of what actually took place between the parties) or questions of pure law (questions of what the legal test is). Lone Pine submitted that this interpretation is inconsistent with the case law.

68. Lone Pine argued that the Alberta Court of Appeal has held that issues of mixed fact and law that involve the decision-maker misinterpreting or misapplying the law are errors of law. In support of its position, it cited *Graff v. Alberta (Energy and Utilities Board)*, 2007 ABCA 20 at paragraph 9 ("***Graff #1***") [Tab 2 to Lone Pine's Response] and *Kelly v. Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325 ("***Kelly***") [Tab 3 to Lone Pine's Response]. Both of these appeals were said by Lone Pine to involve questions of mixed fact and law under statutory grounds of appeal that were much narrower than those contained in the *PLA* and the *PLAR*, and yet they were construed by the Court as questions of law.

69. Lone Pine also cited a further decision of the Court of Appeal, *Graff v. Alberta (Energy and Utilities Board)*, 2007 ABCA 246 at paragraph 14 ("***Graff #2***") [Tab 4 to Lone Pine's Response] (*Graff #1* and *Graff #2* are collectively referred to as "***Graff***"), for the proposition that, even under statutes that limit appeals to questions of law or jurisdiction, factual determinations that are inconsistent with the evidence or that are unsupported by the evidence are errors of law.

70. Lone Pine also cited *Gerard Developments Ltd v. Parkland (County)*, 2010 ABCA 52 ("***Gerard***") [Tab 5 to Lone Pine's Response], in which the Alberta Court of Appeal held at paragraph 9 that "[n]ormally, a finding made in the absence of evidence results in a loss of jurisdiction... Even if there is a modicum of evidence supporting a finding, a loss of jurisdiction may ensue if the vast wealth of the evidence supports a contrary finding."

71. Lone Pine argued that the cited cases demonstrate that questions involving mixed fact and law may be appealed if: (a) the decision-maker disregarded, misapplied, or misinterpreted the law in making a factual determination, or (b) the decision-maker made

factual determinations that were inconsistent with the evidence or unsupported by the evidence.

72. Lone Pine emphasized that the cited cases involved statutory grounds of appeal that were limited to errors of law or jurisdiction. As a result, the broader grounds of appeal contained in the *PLAR* should, Lone Pine submitted, expand the potential decisions that are appealable under the *PLA*.

73. In addition, Lone Pine argued that, from a "purely common sense perspective," the Director's argument that questions involving mixed fact and law are not appealable because they are neither questions of pure fact nor questions of pure law is unreasonable because in reality, almost every determination that the Director makes under the *PLA* will involve some element of both fact and law. Lone Pine argued that the Legislature could not have intended that any decision that involves aspects of both law and fact is protected from appeal, regardless of whether that decision contains legal and factual errors.

74. Similarly, Lone Pine submitted that the Legislature could not have intended the appeal provisions in the *PLA* and the *PLAR* to be more restrictive than those appeal provisions in other statutes that limit appeals only to questions of law or jurisdiction. For example, the *Energy Resources Conservation Act* ("***ERCA***") states that decisions of the former Energy Resources Conservation Board ("**ERCB**") are "final and conclusive" and "not open to question or review in any court," subject to the right to appeal a decision of the ERCB on a question of law or jurisdiction. Yet, Lone Pine argued that, despite these narrow grounds of appeal, the Court of Appeal routinely considered appeals of ERCB decisions that involved questions of mixed fact and law. In contrast, Lone Pine says, the *PLA* and the *PLAR* set out a variety of decisions that can be appealed to the Board on any of the four enumerated grounds of appeal. Adopting the Director's interpretation of section 213 of the *PLAR* would have the effect of narrowing the right of appeal under the *PLA*, despite the broader grounds of appeal in the *PLAR* as compared with other statutes such as the *ERCA*. Lone Pine asserts that this cannot have been the intention of the Legislature.

Characterization of the road as a "loop road" and adequacy of mitigation provided by the proposed gate system

75. Lone Pine alleged that the Director erred in making factual conclusions regarding the proposed road, such as characterizing the road as a "loop road," and in deeming the proposed gate system inadequate to prevent public access on the road. Lone Pine submitted that these factual conclusions of the Director are wholly unsupported by the evidence.

76. Applying the cases cited above, Lone Pine submitted that factual determinations that are inconsistent with the evidence or that are unsupported by the evidence have been construed by the Alberta Court of Appeal as both errors of fact and errors of law. Accordingly, Lone Pine submitted that under either ground of appeal, the Board is seized with jurisdiction pursuant to section 213 of the *PLAR*.

77. In addition, Lone Pine noted that these factual determinations were material because they formed the basis for the Director's conclusion about the applicability of the Approval Standards, which was one of the only issues cited by the Director in denying Lone Pine's requested disposition.

The proposed mitigation and the Desired Outcomes of Approval Standards 100.1.1 and 100.1.2

78. Lone Pine disputed the Director's submission that the treatment of Approval Standards 100.1.1 and 100.1.2 in the decision to deny the Application is a question of mixed fact and law is therefore not appealable pursuant to the *PLAR*.

79. Lone Pine submitted that in the Alberta Court of Appeal cases upon which it relied (namely, *Graff*, *Kelly* and *Gerard*), it has been established that questions involving mixed fact and law may be appealed if (a) the decision-maker disregarded, misapplied or misinterpreted the law in making a factual determination, or (b) the decision-maker made factual determinations that were inconsistent with the evidence or unsupported by the evidence. In addition, Lone Pine emphasized that the broader grounds of appeal set out in the *PLAR* allow for appeals of the determinations of material facts.

80. With respect to the Director's treatment of Approval Standards 100.1.1 and 100.1.2 in the decision under appeal, Lone Pine submitted that:

a. The Director erred in her interpretation or application of the Approval Standards;

b. The Director erred by making factual determinations about Lone Pine's proposal that were inconsistent with the evidence before her; and/or

c. The Director erred in the determination of material fact associated with Lone Pine's proposal.

81. Accordingly, while Lone Pine conceded that Lone Pine's Written Submissions characterize this issue as an error in determination of a material fact on the face of the record, Lone Pine submitted that this issue also involves errors of law, based on the principles established in *Graff, Kelly,* and *Gerard* discussed above.

82. Lone Pine stated that Lone Pine's Written Submissions set out the criteria for Approval Standards 100.1.1 and 100.1.2 and their desired outcomes, and explain how Lone Pine's proposal is fully consistent with those standards.

83. According to Lone Pine, a misinterpretation of a legal test is purely a question of law. It is Lone Pine's position that, to the extent that the Director misinterpreted the Approval Standards as alleged by Lone Pine, the Director erred in law.

84. Similarly, Lone Pine indicated that misapplication of facts is an error of law, and cited *Graff* and *Kelly* in support of its proposition. Thus, it is Lone Pine's position that, to the extent that the Director misapplied the Approval Standards to the facts of Lone Pine's proposal as alleged by Lone Pine, the Director erred in law.

85. Lone Pine, therefore, asserted that the Director erred in misinterpreting or misapplying the Approval Standards to the facts, and that the Director's error was an error of law that is a valid ground of appeal under section 213 of the *PLAR*.

Potential impacts to grizzly bear and caribou

86. Lone Pine disputed the Director's argument that the question of whether Lone Pine's proposal will result in unacceptable impacts to wildlife is a question of mixed fact and law and that, as a result, the Board has no jurisdiction to consider this ground of appeal.

87. Lone Pine argued that the Director does not identify any law that guides the Director in determining whether impacts to caribou or grizzly bear are acceptable. Accordingly, Lone Pine argued that it is unclear how this determination is one of mixed fact and law.

88. In Lone Pine's view, it is a question of pure fact whether the activities proposed by Lone Pine in constructing the road will impact caribou and grizzly bear to an unacceptable level. Lone Pine noted that, while the Director must consider government policy documents in making this determination, there is no legal test or criteria that the Director must interpret or apply to determine whether Lone Pine's proposal will give rise to unacceptable impacts. As a result, Lone Pine argued that this is a factual determination of the Director to be made based on the evidence before her.

89. In addition, Lone Pine submitted that this factual determination was clearly material to the outcome of the Director's decision as this was one of the only issues cited by the Director in denying Lone Pine's requested disposition. Therefore, Lone Pine submits that this constitutes an alleged error in the determination of material fact on the face the record, which is expressly subject to appeal under section 213 of the *PLAR*.

90. In the alternative, Lone Pine submitted that *Graff* and *Gerard* stand for the proposition that factual determinations inconsistent with the evidence or unsupported by the evidence are errors of law. As a result, Lone Pine's contention that the evidence does not support a finding of unacceptable impacts to caribou and grizzly bear is also said to be appealable on the basis of an error in law.

Allegation of the Director's failure to provide adequate reasons and consequences thereof

91. Lone Pine noted that the Director submitted (at paragraph 43 of submissions on the Preliminary Application dated March 27, 2013) that inadequacy of reasons is not an appealable issue because "[s]o long as there are reasons, the decision-maker's legal duty is met." As discussed above, the Director relied on the Supreme Court of Canada case in *Newfoundland* for this issue. Lone Pine submitted that the Director's argument misconstrues both the holding of the Supreme Court in *Newfoundland* and the legal obligation on a decision-maker to provide adequate reasons.

92. Specifically, according to Lone Pine, the Supreme Court in *Newfoundland* at paragraph 14 held that the reasons must allow the reviewing body to understand why the tribunal made its decision and must permit it to determine whether the conclusion is within the range of acceptable outcomes. As a result of this holding, Lone Pine argues that the Board is required to consider the adequacy of the Director's reasons.

93. Lone Pine submitted that the Director's decision contained no rationale for how she reached the conclusions in the decision, or what evidence she relied on in reaching these conclusions. As it is not possible to ascertain the reasons for the Director's conclusions, Lone Pine argues, the Director erred in law.

94. Lone Pine noted that the Director also submitted that she was not required to provide any reasons to Lone Pine for her decision, as section 10(5) of the *PLAR* provides an Applicant with the ability to request that the Director provide reasons where a disposition is refused. However, Lone Pine submits that the Supreme Court of Canada has held on numerous occasions that when a decision is provided, it must be justified, transparent and intelligible, and that this is a requirement of all decision-makers. Lone Pine also submitted that in *Kelly*, the Alberta Court of Appeal allowed the appeal of the applicant and remitted the matter back to the ERCB and in so doing, the Court held at paragraph 25 that, "[t]he reasoning of the Board therefore does not withstand scrutiny on the reasonableness standard. It is not transparent and intelligible, nor is it a method of analysis available on the facts and the law." Similarly, Lone Pine submitted that the

Director erred in law by failing to provide reasons that are justified, transparent and intelligible.

Allegation of the Director's failure to consider several relevant factors and consequences thereof

95. Lone Pine took issue with the submission of the Director that the common law does not require the Director to consider each argument of Lone Pine. The Director cited the Supreme Court of Canada decision in *Driver Iron* as support for this proposition. Lone Pine argues that the holding in *Driver Iron* does not support the Director's assertion and does not relate to a decision-maker's obligation to consider relevant factors.

96. According to Lone Pine, the issue in *Driver Iron* was that the Alberta Labor Relations Board (the "**LRB**") had failed to properly consider different provisions of the governing legislation. Lone Pine stated that the Alberta Court of Appeal, in *Driver Iron Inc. v. International Association of Bridge, Structural Ornamental and Reinforcing Ironworkers, Local Union No. 720*, 2011 ABCA 55 [Tab 8 of Lone Pine's Response], had previously quashed the decision of the LRB holding that it failed to demonstrate its reasoning with transparency and intelligibility. The Supreme Court reversed this decision and held at paragraph 3 that "administrative tribunals do not have to consider and comment on every issue raised by the parties and their reasons." The key to this passage, Lone Pine argued, is the Court's focus on the reasons of the LRB. Lone Pine submitted that this case is simply a short reiteration of the Supreme Court's holding in *Newfoundland*; as it addresses the responsibility of the LRB to give reasons, not the responsibility of the LRB to consider relevant factors.

97. Lone Pine submitted that it is clearly established in the case law that a tribunal's failure to consider relevant factors is an error of law reviewable by an overseeing body. In support of this proposition, Lone Pine cited two Supreme Court of Canada decisions, *Oakwood Development Ltd. v. St. Francois Xavier (Rural Municipality)*, [1985] 2 S.C.R. 164, [Tab Q of Lone Pine's Written Submissions] and *C.U.P.E. v. Ontario (Minister of Labour)*, 2000 SCC 29, [Tab R of Lone Pine's Written Submissions]. In addition, Lone Pine argued that its position was further supported by decisions of the Alberta Court of

Appeal. According to Lone Pine, the Alberta Court of Appeal in *Calgary (City of) v. Alberta (Energy and Utilities Board)*, 2007 ABCA 256, held that the former Energy and Utilities Board's ("**EUB**") failure to give the plaintiff's evidence meaningful consideration constituted a reviewable error of law [Tab 9 of Lone Pine's Response]. Similarly, Lone Pine stated that, in *Graff*, the Alberta Court of Appeal held that the EUB's failure to consider the appellant's letters detailing the cumulative effects of hydrocarbon development on her health constituted an error of law. Lone Pine cited *Graff* #2 at paragraph 16:

> ... despite the fact that Barbara Graff's letters make obvious reference to the cumulative effects of hydrocarbon development on her health, the Board's decision makes no reference to this matter. Although that may be because of its initial decision that the Graffs had not shown direct and adverse effect, it is arguable that the Board committed an error of law by overlooking this issue.

98. Accordingly, Lone Pine argued that the proposition that a decision-maker's failure to consider relevant factors is an error of law is unaffected by the Supreme Court's decision in *Driver Iron*.

99. Lone Pine also contested the Director's argument, as characterized by Lone Pine, that failure to consider relevant factors that are not set forth by a legislative scheme does not cause a reviewable error of law. According to Lone Pine, the Director cited *Creelman* in support of this argument. Lone Pine refers to cases cited in paragraph 23 of its Written Submissions (although presumably also intended to refer to those cases cited in paragraph 24 of its Written Submissions) for the proposition that factors raised by the parties in their submissions are relevant factors that must be considered by the Board, and it is not only failure to consider legislatively-mandated factors that may lead to a reviewable error of law.

100. Further, Lone Pine argued that *Creelman* is distinguishable from the facts of the current case. According to Lone Pine, in *Creelman*, the Nova Scotia Court of Appeal found that the Workers' Compensation Appeals Tribunal had taken into account the relevant factors in reaching its decision. Lone Pine noted that, while Mr. Creelman set out several factors

that he claimed the Tribunal had ignored, the Court of Appeal held that those factors were purely hypothetical and that there was no evidence that the factors actually existed.

101. Lone Pine submitted that, in contrast to the facts in *Creelman*, the factors that Lone Pine has argued that the Director was required to consider are not hypothetical, but rather, they are facts essential to Lone Pine's Application - they were contained in Lone Pine's evidence and were critical to the Director's decision.

102. Lone Pine accordingly submitted that the case law establishes that it is an error of law for the Director to fail to consider the relevant factors detailed in Lone Pine's Written Submissions, and so this is a valid ground of appeal under the *PLAR*.

Issue #2: May the Board consider grounds of appeal raised by Lone Pine after the deadline for filing a Notice of Appeal expired?

103. Lone Pine noted that the Director submitted that the Board may not consider any of the grounds of appeal raised in Lone Pine's Written Submissions, as Lone Pine provided its Written Submissions to the Board outside the defined period for serving a Notice of Appeal. Implicit in this argument would appear to be the Director's view that the grounds of appeal raised in Lone Pine's Written Submissions were different from or in addition to those raised in Lone Pine's Notice of Appeal. In any event, Lone Pine submitted that this argument should be dismissed for two reasons, as discussed below.

104. Firstly, Lone Pine argued that the Director has not suffered any prejudice by the introduction of additional grounds of appeal in Lone Pine's Written Submissions.

105. In support of its position, Lone Pine stated that it retained legal counsel immediately prior to the deadline for filing its Written Submissions and so it did not have legal representation when it filed its Notice of Appeal. In addition, given that Lone Pine consented to the Director's request for additional time to prepare written submissions and to prepare for an oral hearing, Lone Pine submitted that there is no prejudice to the Director in the circumstances. Lone Pine cited and relied upon the British Columbia Supreme Court decision in *Nordon Apartments Ltd. v. Fraser*, [1998] B.C.J No 3028, in which the Court held that a party is not restricted to the grounds set out in an application

leave for appeal as long as the opposing party is not prejudiced because of lack of notice of the grounds to be argued. Lone Pine submitted that the Alberta Court of Queen's Bench recently reaffirmed this rule in *Canadian Natural Resources Limited v. Arecelormittal Tubular Products Roman S.A. (Mittal Steel Roman S.A.)*, 2012 ABQB 679, affirmed 2013 ABCA 87 ("***CNRL***") in granting leave to the applicant to amend its third-party claims, finding that the respondent would suffer no serious prejudice from delay. [Tabs 10, 11 and 12 of Lone Pine's Response.]

106. In further support of its position, Lone Pine submitted that the Director had over a month to prepare responses to Lone Pine's submissions which, given the length and complexity of the issues raised, Lone Pine submits was more than sufficient. As result, Lone Pine argues that there is no prejudice to the Director and that Lone Pine should not be restricted to the language used in the original Notice of Appeal.

107. Secondly, Lone Pine argued that refusing to consider the grounds of appeal raised in Lone Pine's Written Submissions due to a technicality would undermine Lone Pine's ability to pursue its legal rights and would result in a serious prejudice to Lone Pine.

108. In support of its position, Lone Pine quoted from *Construction Gilles Paquette Ltée v. Entreprises Végo Ltée*, [1997] 2 S.C.R. 299 [Tab 13 of Lone Pine's Response], in which the Supreme Court of Canada held, at paragraph 21, that,"[t]his Court has held on a number of occasions "that a party must not be deprived of his rights on account of an error of counsel where it is possible to rectify the consequences of such error without injustice to the opposing party."" While here Lone Pine acknowledged that the error in time resulted not from an error of counsel but from an absence of counsel, Lone Pine argued that the same analysis regarding the deprivation of a party's rights applies.

109. In further support of its position, Lone Pine submitted that to interpret section 216(1)(e) of the *PLAR* to mean that an appellant must finalize its legal arguments for appealing the decision within 20 days of that decision being rendered is unreasonable and would not allow the appellant a fair opportunity to understand and respond to that decision. Accordingly, Lone Pine argued that this would result in severe prejudice to the appellant. Lone Pine further asserted that the purpose of a Notice of Appeal is to preserve the

appellant's right to challenge the decision and to set out, in general terms, the concerns that the appellant has with the decision. Lone Pine argues that formal written submissions are then required later in the appeal process to more fully develop and elaborate on those concerns.

(iii) Director's Rebuttal

Issue #1: Does the Board have jurisdiction to decide questions of mixed fact and law?

110. The Director noted that Lone Pine described it as 'significant' that the *PLAR* allows for appeals of factual determinations whereas various other legislation only allows appeals on questions of law or jurisdiction. According to the Director, Lone Pine inferred that the Legislature therefore intended broad appeal rights and could not have intended to protect decisions involving mixed fact and law from appeal.

111. The Director argued that Lone Pine's position is merely speculation. Further, the Director indicated that Lone Pine's position was founded in the particular legislation that it selected. In contrast to Lone Pine's position, the Director drew attention to the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 ("***EPEA***") and noted that the *EPEA* does not limit appeals to any enunciated grounds. Accordingly, the Director submitted that, in comparison to *EPEA*, the *PLAR*'s rights of appeal are constrained.

112. The Director submitted that the Legislature could have left out all reference to grounds of appeal, but it instead enumerated them. Therefore, the Director argued, the Legislature more likely intended to limit appeals. In addition, the Director noted other indications that the Legislature intended to restrict appeals: that the type of decisions that are appealable are restricted, the timeline for filing Notices of Appeal is short, only certain people are allowed to appeal, and only certain types of errors are appealable.

113. In addition, the Director submitted that the *PLAR*'s position on the spectrum of broad-to-restrictive rights to appeal is not determinative. The Director argued that it is the wording of section 213 that governs.

114. According to the Director, Lone Pine argued that questions of mixed fact and law may be appealed even where errors of law or jurisdiction are the only permitted grounds of appeal. In response, the Director submitted that Lone Pine's position confuses the *decision* being appealed from the *grounds* for appeal.

115. It is the Director's position that, whether a decision is appealable under section 213 of the *PLAR* depends on the nature of the questions that the appellant alleges the Director to have erred in answering in coming to the end decision, not the nature of the end decision.

116. The Director submitted that although the *Kelly* and *Graff* decisions, cited by Lone Pine, arose from decisions involving the application of law to fact, each was grounded on an underlying error of law. The Director also submitted that the applicant in *Gerard* was denied leave to appeal because it could not point to an error of law underlying the end decision.

117. The Director further asserted that the analysis in Lone Pine's Response was incomplete and did not provide cases that supported its position.

118. The Director also argued that Lone Pine misconstrued the principle articulated in *Graff #1*. According to the Director, Lone Pine relied on *Graff #1* for the proposition that a misapplication of fact is an error of law. However, the Director, citing *Graff #2*, argued that the principle from *Graff #1* is that a misapprehension of fact *may give rise* to an error of law. Accordingly, the Director argued that a misapprehension of fact does not necessarily give rise to an error of law.

119. Further, the Director submitted that whether and when a misapprehension of fact amounts to an error of law is relevant in situations where appeals are limited to errors of law or jurisdiction. Accordingly, the Director argued that whether and when a misapprehension of fact amounts to an error of law is not relevant to appeals before the Board because the *PLAR* expressly allows for appeals based on an error of material fact on the face of the record.

The proposed mitigation and the Desired Outcomes of Approval Standards 100.1.1 and 100.1.2

120. The Director asserted that Lone Pine alleged that the Director misinterpreted and misapplied the Approval Standards.

121. The Director stated that Lone Pine's allegations were just bald assertions, and that Lone Pine's real complaint is with the Director's conclusion.

Potential impacts to grizzly bear and caribou

122. The Director took the position that, in Lone Pine's Response, Lone Pine simply repeated its earlier appeal submissions that a determination of whether the impacts to wildlife are 'acceptable' is a question of pure fact. In response, the Director simply referred to the arguments in the Preliminary Application.

123. The Director further asserted that Lone Pine stated that *Graff* and *Gerard* stand for the proposition that factual determinations that are inconsistent with the evidence are errors of law. The Director submitted that such an argument attempts to move the Board's focus from the pertinent question of whether Lone Pine has alleged an error of material fact on the face of the record.

Allegation of the Director's failure to provide adequate reasons and consequences thereof

124. The Director disputed Lone Pine's interpretation of *Newfoundland*, arguing that Lone Pine's interpretation of *Newfoundland* is circular. The Director's position is that *Newfoundland* unequivocally stands for the proposition that adequacy of reasons is not a standalone ground of appeal. The Director submits that Lone Pine is urging the Board to make the same error that the chambers judge made in *Newfoundland*.

125. The Director also disputed Lone Pine's reliance on *Kelly*, arguing that *Kelly* has nothing to do with adequacy of reasons.

Allegation of the Director's failure to consider several relevant factors and consequences thereof

126. The Director argued that Lone Pine had misconstrued *Driver Iron*. According to the Director, Lone Pine stated that *Driver Iron* is about the responsibility to provide reasons. It is the position of the Director that neither the duty to give reasons nor the adequacy of reasons was in issue in *Driver Iron*.

127. In addition, the Director discussed its admission that it is an error of law for a tribunal to fail to consider relevant factors. The Director stated that the key is that the factors considered must be relevant and that, in this case, Lone Pine's suggested factors are not relevant to the Approval Standards, regardless of whether the factors are provable.

Issue #2: May the Board consider grounds of appeal raised by Lone Pine after the deadline for filing a Notice of Appeal expired?

128. The Director stated that *Nordon*, which was cited by Lone Pine, has not been cited by any other Canadian case including *CNRL*, which Lone Pine described as affirming it.

129. Further, the Director submitted that, if the Board decides that it may waive the deadlines in the *PLAR*, then it should refer to the case law that addresses when a plaintiff may amend a statement of claim following the expiry of the limitations period. The Director stated that, under the common law, amendments to claims after the expiration of a limitation period were only allowed in special circumstances. The Director noted that Lone Pine has not pointed to any special circumstances.

130. According to the Director, Lone Pine's position is that the Board should use the test to extend the time for filing and serving a third party claim. The Director submits that one of the three factors that must be considered in that test is the reason for the delay. The Director argues that, if the Board applies the test for third party claims, then Lone Pine has not explained the reason for delay other than to state that Lone Pine did not immediately retain counsel, which, in the opinion of the Director, is a fact common to most appellants.

131. Lastly, the Director noted that its position is not that the appellant must finalize its legal arguments prior to submitting a Notice of Appeal. Rather, the Director stated that its argument is that an appellant must state all of its grounds of appeal prior to the deadline for filing a Notice of Appeal.

(iv) <u>Director's Submissions on the Further Authorities</u>

132. The Director submitted that *Joey's* distinguishes questions of law, questions of fact and questions of mixed fact and law as three separate types of questions; a distinction central to the Director's Preliminary Application.

133. The Director submitted that, despite going to lengths to distinguish the various types of questions, the decision in *Joey's* contains an *obiter* statement at paragraph 36 that lumps questions of mixed fact and law with questions of law. The Court in Joey's stated at paragraph 36:

> … it is generally assumed that a reference to a question of law necessarily includes questions of mixed fact and law unless, for example, the relevant statute limits review to "questions of law alone"….

The Director asserted that this statement is not binding and that neither the issue nor the legislation interpreted in *Joey's* are relevant in the matter currently before the Board. The Director emphasized that the *PLAR* states that a decision is appealable 'only' on the identified grounds, and that the *PLAR*'s plain and ordinary meaning determines the issue of what grounds of appeal are allowed.

134. In addition, the Director argued that, if the Board chooses to address the *obiter* statement in *Joey's*, then the statement contradicts the Court's own analysis and Canadian jurisprudence. The Director argued that the balancing of factors or interests is not a matter of law. Also, the Director indicated that the dissent in *Joey's* was the better position. The Director cited *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748; *Alberta Permit Pro v. Booth*, 2009 ABCA 146 ("***Booth***"); *Vargo v. Canmore (Town)*, 2013 ABCA 96 ("***Vargo***"); and *Saint John* in support of its arguments.

135. The Director argued that *Saint John* is not relevant because it interprets different legislation and deals with a different issue. According to the Director, the case makes statements on implied jurisdiction that are not relevant. Specifically, the Director stated that the doctrine of implied jurisdiction would not extend to something as fundamental as expanding the list of the 'only' grounds of appeal allowed by the Legislature. The Director requested that, if the Board were to view a particular portion or statement of *Saint John* to be relevant, the Board should clarify and provide further opportunity to comment.

136. The Director submitted that *Texaco* provides that new grounds of appeal are not permitted. The Director noted that, similar to the legislation in this matter, the legislation in *Texaco* specified (i) a time limit for filing appeals; and (ii) that a Notice of Appeal must include the grounds for appeal. The Director stated that, in *Texaco*, the Court found that the time limit for filing appeals was mandatory. The Director noted that the Court in *Texaco* held that, in the absence of power expressly given to a board by statute, a board is powerless to assist the appellant once the time limit for filing a Notice of Appeal had expired. The Director further relied on *Texaco* for the proposition that, where the legislation requires the appellant to specify the grounds of appeal in the Notice of Appeal, a ground of appeal not specified is not open to the appellant.

137. The Director argued that *Castle Crown* provides that new grounds of appeal are not permitted. The Director stated that in *Castle Crown* the Alberta Environmental Appeal Board ("**AEAB**") denied the appellant's request to amend the Notice of Appeal for the following reasons: (a) certainty of the appeal process; (b) fairness in allowing the other parties an opportunity to respond without creating a shifting target; and (c) the requirement in the governing legislation that a Notice of Appeal must be filed within a specified period of time. The Director noted that the fact that the appellant was self-represented at the time that it filed the Notice of Appeal did not change the AEAB's assessment of fairness to the other parties. The Director also noted the AEAB's findings that appeals before the AEAB are not civil proceedings and that the Alberta *Rules of Court*, Alta. Reg. 124/2010 ("***Rules of Court***") do not apply to appeals before the AEAB. The Director argued that the Board should apply the reasoning in *Castle Crown* and

similarly find that the *Rules of Court* do not apply and Lone Pine should not be allowed to advance additional grounds of appeal on this basis.

138. The Director stated that *Attila* is not relevant. The Director noted that the Alberta Court of Queen's Bench has inherent jurisdiction and that the decision in *Attila* relates to the *Rules of Court*. The Director submitted that, to the contrary, the Board is governed by the *PLAR* and the Board does not have inherent jurisdiction. The Director cited *Castle Crown* in support of its position.

(v) Lone Pine's Submissions on the Further Authorities

139. Lone Pine submitted that *Joey's* supports its position. Lone Pine asserted that the *Joey's* decision indicates that, if appeals are allowed on questions of law, then they should be assumed to be allowed on questions of mixed fact and law, unless the statute limits the appeals to 'questions of law alone'.

140. Lone Pine argued that *Saint John* also supports its position. According to Lone Pine, the New Brunswick Court of Appeal in *Saint John* held that statutory bodies, such as the Board, enjoy not only the powers expressly conferred upon them by statute, but also those powers that are implied as reasonably necessary for the body to accomplish its mandate. Lone Pine argued that a finding that the Board lacks jurisdiction to consider decisions involving mixed fact and law would bifurcate the administrative process in a manner that the Court of Appeal in *Saint John* held should not be sanctioned.

141. Lone Pine submitted that *Attila* affirms its position. Lone Pine argued that, based on *Attila*, the primary consideration for the Board in deciding whether to consider amended grounds of appeal is whether there was any prejudice to the Director. In turn, Lone Pine submitted that there was no prejudice to the Director in the Board considering the grounds of appeal. Lone Pine further indicated that Lone Pine met all of the other requirements set out in *Attila* for amending grounds of appeal.

142. Lone Pine stated that the AEAB in *Castle Crown* held that amendments to Notices of Appeal should only be allowed in rare circumstances because allowing amendments could cause unfairness to other parties. Lone Pine argued that the primary mischief with

which the AEAB was concerned was the uncertainty caused to the other party through the creation of a constantly shifting target. Lone Pine submitted that this mischief is not present in this matter, and indicated that the Board should use the test outlined in *Attila*.

143. In response to the *Texaco* decision, Lone Pine argued that administrative law in Canada has evolved significantly since that decision was rendered. As an example, Lone Pine noted that courts now recognize that a tribunal's powers may be implied. Lone Pine further argued that the Court in *Texaco* focused on the strict language in the legislation at issue in the case, and that the Board has much broader powers than the board in *Texaco*. Lone Pine concluded that the Court's narrow interpretation in *Texaco* does not apply to the Board's powers in this matter.

V. REASONS FOR DECISION

Legislation

144. The *PLA* provides:

> **Appeal on the record**
>
> **120** An appeal under this Act must be based on the decision and the record of the decision-maker.

145. The *PLAR* provides:

> **Grounds for appeals**
>
> **213** A decision is appealable only on the grounds that
>
> (a) the director or officer who made the decision
>
> (i) erred in the determination of a material fact on the face of the record,
>
> (ii) erred in law,
>
> (iii) exceeded the director's or officer's jurisdiction or authority, or

(iv) did not comply with an ALSA regional plan,

or

(b) the decision is expressly subject to an appeal under section 59.2(3) of the Act or section 15(4).

Notice of Appeal

216(1) A Notice of Appeal must …

(e) set out the grounds on which the appeal is made …

Service of Notice of Appeal

217(1) A Notice of Appeal must be served on the appeals coordinator within

a. 20 days after the appellant received, became aware of or should have recently become aware of the decision objected to, or

b. 45 days after the date the decision was made,

whichever elapses first.

(2) The appeals coordinator may, either before or after the expiry of the period described in subsection (1)(a) or (b), extend the time for service of the Notice of Appeal if, in the opinion of the appeals coordinator, it is not contrary to the public interest do so.

146. For convenience, Lone Pine's grounds of appeal are restated here.

147. Lone Pine's original Notice of Appeal included Ground of Appeal A:

A. The Director erred in the determination of a material fact on the face of the record by concluding:

i. The road is a "loop road"; and

ii. The proposed gate system would not provide adequate mitigation.

148. Grounds of Appeal B through D were raised in Lone Pine's Written Submissions dated February 19, 2013:

> B. The Director erred in the determination of a material fact on the face of the record in determining:
>
> iii. The proposed mitigation does not support the Desired Outcomes of Approval Standards 100.1.1 and 100.1.2;
>
> iv. The proposed road would result in unacceptable impacts to grizzly bear and caribou.
>
> C. The Director failed to provide adequate reasons and the decision should be quashed on that basis.
>
> D. The Director failed to consider several relevant factors and the decision should be quashed on that basis.

Issue #1: What are the matters of appeal properly before the Board?

149. Pursuant to section 213 of the *PLAR*, a decision is appealable only on the grounds that the Director:

> iv. erred in the determination of a material fact on the face of the record;
>
> v. erred in law;
>
> vi. exceeded her jurisdiction or authority; or,
>
> vii. did not comply with an ALSA regional plan; or,
>
> viii. the decision is expressly subject to an appeal under section 59.2(3) of the Act or section 15(4).

The PLAR does not speak expressly to whether decisions are appealable on the grounds of an alleged error involving mixed fact and law.

150. While errors of law and jurisdiction are commonly permitted grounds of appeal in Alberta legislation, the Legislature in this case chose to allow appeals based on alleged

errors in determinations of material fact on the face of the record. In the Board's view, this distinguishes the *PLAR* from other legislation in the Province and case law considering such legislation.

Further Authorities

151. The Board has considered the Director's request for further direction in relation to any specific passages in the Further Authorities that may be considered by the Board to be relevant, and the opportunity to comment further on the same. The Board finds that it is not obliged, and it is not necessary, to provide further direction in this regard and denies the Director's request.

152. The Board's review of the law suggests that Canadian courts interpret the scope of legislative grounds of appeal more broadly than the Director's argument contemplates.

153. Firstly, the Board notes that the Alberta Court of Appeal has indicated that questions of mixed fact and law that involve the decision-maker disregarding, misapplying or misinterpreting one of its directives in making its factual determinations constitutes an error of law. Specifically, the Court of Appeal has held that misapprehension of facts may give rise to an error of law. In regard to *Graff* and *Kelly,* both appeals were made under statutory grounds of appeal that the Board views as being narrower than those contained in the *PLA* and the *PLAR*.

154. Secondly, in considering the Board's ability to determine questions of fact, law, and mixed fact and law that arise in matters before the Board, the Board considered the case of *Saint John* and the parties' Submissions on the Further Authorities on this decision.

155. In *Saint John*, the New Brunswick Court of Appeal considered issues related to the powers of the province's Labour and Employment Board ("**LEB**"). The LEB is not an appeals tribunal. The LEB's powers arise from section 97(1) of New Brunswick's *Pension Benefits Act*, S.N.B 1987, c. P-5.1, which provides:

> **97(1)** The Labour and Employment Board has exclusive jurisdiction to exercise the powers conferred on it under this Act

> and to determine all questions of fact or law that arise in a matter before it.

156. The LEB has express jurisdiction to determine questions of fact and questions of law; however, the relevant Act is silent with respect to questions of mixed fact and law. The Court held at paragraph 97:

> … the [LEB] has been granted… jurisdiction to decide all questions of law and fact, which I take to include questions of mixed law and fact.

157. Contrary to the Director's submissions, the Board finds that *Saint John* is relevant. The Court's findings in paragraph 97 are directly on point. The Court reaches these findings during its analysis of the doctrine of jurisdiction by necessary implication. This doctrine provides that a tribunal's powers conferred by enabling legislation include not only those expressly granted but also, by implication, all powers that are practically necessary to achieve the objects of the legislative regime (see *Saint John* at paragraphs 91, 98 and 100). The Board accepts Lone Pine's submissions that a finding that the Board lacks jurisdiction over questions of mixed fact and law would bifurcate the administrative process in a manner that the Court of Appeal in *Saint John* said ought to be avoided.

158. In *Joey's*, the New Brunswick Court of Appeal interpreted the *Workplace Health, Safety and Compensation Commission Act*, R.S.N.B. 1973, c. W-14, where the decision-maker was addressing a statute that expressly limited the statutory right of appeal to questions of law and jurisdiction. In discussing whether or not the legislature intended that questions of mixed fact and law could be subject to the statutory right of appeal, the Court stated the following at paragraph 36:

> … it is generally assumed that a reference to a question of law necessarily includes questions of mixed fact and law unless, for example, the relevant statute limits review to "questions of law alone"….

159. The Board accepts the Director's submissions on *Joey's* to the extent that the above quote from paragraph 36 is *obiter* and the Court recognizes questions of law, questions of fact and questions of mixed law and fact as being separate types of questions. However, the Board does not accept the remainder of the Director's submissions on *Joey's*. The remainder of the Director's submissions, and the *Booth* and *Vargo* decisions cited in support, go to the issue of standard of review, not jurisdiction of the Board to decide questions of mixed fact and law (see *Booth* at paragraphs 36-40, and *Vargo* at paragraph 45). These are different issues. It is not contentious that there are three types of questions. The issue before the Board is whether it has jurisdiction over all types of questions, not what the appropriate standard of review would be when assessing the appropriateness of the Director's decisions.

160. The Board finds the reasoning in *Joey's* to be persuasive. The Board's findings with respect to *Joey's* are consistent with Lone Pine's submissions on this authority.

161. Applying the above jurisprudence and its own interpretation of section 213 of the *PLAR*, the Board finds that to restrictively interpret the permissible grounds of appeal in the manner argued by the Director, that is, to effectively bar the Board from hearing appeals that engage alleged errors of mixed fact and law, is an overly restrictive and technical interpretation that does not accord with the intent of the Legislature or the direction of Canadian courts. The Board does acknowledge that section 213 expressly speaks not to just any error of fact, but to a "material fact on the face of the record." Accordingly, for the Board to have jurisdiction over an error of mixed law and fact, the fact element must be material and on the face of the record.

162. In reaching this conclusion, the Board is mindful of Lone Pine's submission that as a practical matter, many decisions that the Director would be expected to make would involve issues of mixed fact and law. The Board does not accept that the Legislature intended to restrict the availability of appeals as severely as argued by the Director.

163. The Board's interpretation of the *PLAR* in this regard is guided by its understanding of the purpose and intent of the legislation. The *PLA* and the *PLAR* together constitute the provincial regime governing, among other things, dispositions on public lands. The

Director's proposed approach would require applicants considering the appeal of a decision to understand and properly apply a fine and technical distinction between a pure error of fact, a pure error of law, and one that mixes both elements. As the case law cited above shows, these are not easy distinctions to make. Nor, in the Board's view, does it necessarily accord with common sense to allow an appeal to proceed if the alleged error relates to an issue of fact, or an issue of law, but not if the alleged error engages both. Denying the Board jurisdiction over questions of mixed law and fact would lead to the undesirable outcome of bifurcating the administrative process, which, in the Board's view, would be contrary to the Legislature's intention.

164. For the above reasons, the Board concludes that it has jurisdiction over grounds of appeal engaging allegations of an error of mixed law and material fact on the face of the record.

165. Having made this determination, the Board must next consider how to properly characterize the grounds of appeal advanced by Lone Pine.

166. With respect to Ground of Appeal A, the Board finds that whether or not a road is properly characterized as a "loop road" (or Loop Route) is a matter of fact because it involves a factual determination and does not require application of any legal test. This question is not a question of law or mixed fact and law. Further, as this issue was expressly cited as one of the reasons for the Director's denial, and because the Approval Standards provide for certain treatment of a Loop Route application, the Board accepts that this is a "material" fact. Finally, the Board finds that this material fact can be addressed on the face of the record. Accordingly, as a material fact on the face of the record, and contained within a timely Notice of Appeal, the Board finds that it has jurisdiction over this aspect of Ground of Appeal A.

167. The second aspect of Ground of Appeal A relates to a challenge to the Director's finding that Lone Pine's mitigation measures were not adequate. The Board accepts that in making this determination, the Director was not applying a legal test but rather department policy and discretion. There is no legal element to this question because no law was applied by the Director. Whether or not mitigation measures will achieve a particular outcome is a matter of fact. Again, this is a "material" fact given that this was a

clear basis for the Director's decision, and on the "face of the record" based on the evidence before this Board as to what mitigation measures were proposed by Lone Pine and the Director's evaluation of those measures. Accordingly, the Board finds that it has jurisdiction over this aspect of Ground of Appeal A as well.

168. Grounds of Appeal B, C and D are contained in Lone Pine's Written Submissions, and accordingly, are subject to the further objection of the Director that they are outside the jurisdiction of the Board as they are argued not to have been raised in a timely Notice of Appeal.

169. With respect to Ground of Appeal B, determining whether impacts to caribou or grizzly bear are acceptable is a question of fact as to whether the activities proposed by Lone Pine in constructing the road will impact caribou or grizzly bear to an unacceptable level. In making this determination the Director must consider government policy documents and relevant scientific and technical information, but again there is no legal test or criteria to interpret or apply to determine whether Lone Pine's proposal constitutes an unacceptable impact. As a result, the Board concludes that Ground of Appeal B relates to a factual determination of the Director based on the evidence before her.

170. Further, this factual determination was clearly material to the outcome of the Director's decision, as this was one of the issues cited by the Director in denying Lone Pine's Application. Also, the measures proposed by Lone Pine and the Director's evaluation of same can all be reviewed on the face of the record.

171. In relation to both Grounds of Appeal A and B, the Board notes that in light of its determination that it has jurisdiction to address allegations of errors of mixed law and material fact on the face of the record, even should these errors be found to constitute errors of "mixed fact and law" rather than material fact on the face of the record, the result would be the same and the Board would have jurisdiction in any event.

172. Determination of whether Ground of Appeal C is a question of law, fact, or mixed fact and law is not necessary at this time. For the reasons provided further below, the Board

finds that Ground of Appeal C is beyond its jurisdiction. Therefore, the Board declines to make a finding on this point at this time.

173. Similarly, determination of whether Ground of Appeal D is a question of law, fact, or mixed fact and law is not necessary at this time. For the reasons provided further below, the Board finds that Ground of Appeal D is beyond its jurisdiction. Therefore, the Board declines to make a finding on this point at this time.

Issue #2: May the Board consider grounds of appeal raised by Lone Pine after the deadline for filing a Notice of Appeal expired?

174. It is not in dispute that the Notice of Appeal was served on the Appeals Coordinator within the required period of time. Accordingly, in light of the Board's findings in connection with Ground of Appeal A, the Board has jurisdiction to address those issues regardless of its determination on this second issue. The Board must now consider whether it has jurisdiction to consider the issues raised in Lone Pine's Written Submissions to the extent that they may constitute "new" grounds of appeal.

175. There are no provisions in the *PLA* or the *PLAR* expressly authorizing the Board to consider grounds of appeal that are not raised within the timeframes set in section 217 of the *PLAR*, through an amended Notice of Appeal or otherwise. However, section 217 does authorize the Appeals Coordinator to extend the time period for submitting a Notice of Appeal. No application was made by Lone Pine to seek such relief from the Appeals Coordinator.

Further Authorities

176. In addition to the authorities cited by the parties, the Board has considered the Further Authorities and other legislation with respect to the issue of hearing grounds of appeal raised after the expiry of the applicable deadline.

The Alberta Environmental Appeal Board (AEAB)

177. The Board notes that in *Castle Crown*, Alberta Environment brought a motion to dismiss the appeal of Castle Crown Wilderness Association ("**Wilderness Association**"),

alleging that the relief requested in the Wilderness Association's Notice of Appeal was moot. In response, the Wilderness Association requested the opportunity to amend its Notice of Appeal. The AEAB held that such amendments create elements of uncertainty – in particular, they can create a shifting target that can prevent participants from knowing when or on what basis the appeal process could proceed. The AEAB held that its general approach is not to allow an appellant to amend a Notice of Appeal, and that it will only allow amendments of a Notice of Appeal in rare and very specific circumstances. The AEAB held that an appellant would have to show rationally that there is a clear need for an amendment. The AEAB did not allow the appellant's amendments in this case because the appellant did not provide sufficient reasons to warrant an amendment.

178. In the Wilderness Association's argument before the AEAB, it referred to the *Rules of Court* pointing out that they allow amendments in almost any circumstance. The AEAB dismissed this argument, noting that "[a]ppeals before the [AEAB] are not civil proceedings, and therefore, the Rules of Court do not apply... What the [AEAB] does adhere to are the principles of administrative law and natural justice" (paragraph 65).

179. The Board generally accepts the Director's submissions regarding *Castle Crown*.

Alberta Court of Queen's Bench

180. Rules for amending pleadings in the Alberta Court of Queen's Bench are set out in the *Rules of Court*. The *Rules of Court* allow parties to amend their pleadings until pleadings close. Following the close of pleadings, parties must obtain permission from the Court to amend their pleadings. However, the *Rules of Court* allow amendments to pleadings at any time with the permission of the court (Rule 3.65). The basic principle for when the court will permit amendments is set out in *Attila*, at paragraph 25:

> … any pleading may be amended, no matter how careless or late the party seeking the amendment, subject to four major exceptions:
>
> a. The amendment would cause serious prejudice to the opposing party, not compensable in costs;

b. The amendment requested is hopeless;

c. Unless permitted by statute, the amendment seeks to add a new party or new cause of action after the expiry of a limitation period; or

d. There is an element of bad faith associated with the failure to plead the amendment in the first instance.

181. Prejudice is a key factor when a court is considering an application to amend pleadings under the *Rules of Court.* This is consistent with Lone Pine's submissions. However, the Board is not governed by the *Rules of Court*. Instead, the Board adheres to its own Appeals Procedure Rules and the regime established under the *PLA* and the *PLAR*, which do not provide for allowing the addition of new grounds of appeal as argued by Lone Pine. The Board prefers the submissions of the Director respecting applicability of the *Rules of Court* and *Attila* to matters before the Board. Although prejudice may be a relevant factor for the Board to consider in some circumstances where a party is seeking to add new grounds of appeal, it is not determinative for this matter.

Mineral Assessment Appeal Board

182. The Alberta Supreme Court case *Texaco* discusses this issue in similar circumstances. Texaco properly submitted a Notice of Appeal to the Alberta Mineral Assessment Appeal Board ("**MAA Board**") within the statutory time limit. After the time expired, Texaco attempted to add further grounds of appeal. The MAA Board refused to hear the further grounds. Texaco then appealed the MAA Board's decision to the Alberta Supreme Court. The Court upheld the MAA Board's decision. The Court found that, in the absence of authority expressly given by the statute, the MAA Board could not permit Texaco to amend its Notice of Appeal after the time limit for appeals had expired. The court held at paragraph 27 of *Texaco*:

> [27] In my view therefore the ground of appeal relating to production restrictions by the National Energy Board was not open to Texaco on 12th August 1975, since it was not specified in the Notice of Appeal filed prior to 15th July 1975. **Moreover the Board could not, in the absence of**

> **power expressly given by the statute, permit Texaco to amend its Notice of Appeal after a time limit for appeals had expired**: *Eshelby v. Federated European Bank Ltd., [1932] 1 K.B. 254 at 262; Regina v. Pontypool Gaming Licensing Committee; Ex parte Risca Cinemas, [1970] 1 W.L.R. 1299, [1970] 3 All E.R. 241 at 244.* The time limit for appeals is mandatory so far as the Board is concerned, although a remedial power is given to the minister, the extent of which I shall consider in a moment. The Legislature did not see fit to give the Board remedial powers, and in the absence of such a provision the Board was powerless to assist Texaco once the time had expired. On occasion the tribunal is given such a remedial power to extend time. Examples may be seen in RR. 556 to 558 of the *Supreme Court Rules* and in s. 87(3) of The Planning Act, R.S.A. 1970, c. 276. (emphasis added)

183. In *Texaco*, the Court found that the statute did not grant the Board remedial powers in relation to Notices of Appeal after the time limit for filing an appeal has expired. Section 217(2) of the *PLAR*, however authorizes the Appeals Coordinator to extend the time periods for filing appeals. Further, the Appeals Coordinator may do so even after the period for filing the appeal has expired. The Board is cognizant that *Texaco* could potentially be cited as authority for the proposition that extending the time frame for filing a Notice of Appeal would provide remedial measures that could also allow for new grounds of appeal to be raised. However, because that issue was not squarely addressed by the Court in *Texaco* and for the reasons that follow, such a position does not influence the outcome of this matter.

184. It is clear that the exercise of extending the time for service is within the scope of authority of the Appeals Coordinator, not the Board as submitted by Lone Pine. Section 217(2) of the *PLAR* provides:

> (2) The appeals coordinator may, either before or after the expiry of the period described in subsection (1)(a) or (b), extend the time

for service of the Notice of Appeal if, in the opinion of the appeals coordinator, it is not contrary to the public interest do so.

185. It is also clear that the exercise of extending the time period for service of a Notice of Appeal is subject to the discretion of the Appeals Coordinator. In particular, a decision granting or conversely denying an extension will be based on whether, in the opinion of the Appeals Coordinator, the granting of an extension of the time for service is in the public interest.

186. As noted, in reviewing the Record, the Board found that Lone Pine had not requested an extension of the time for service of the Notice of Appeal either before or after the expiry of the period described in section 217(1)(a) or (b).

187. In the absence of such a determination by the Appeals Coordinator, and in the absence of express statutory authority for the Board to extend the time for service of a Notice of Appeal or to allow amendments to a filed Notice of Appeal, the Board concludes that it has no jurisdiction over grounds of appeal raised in the Written Submissions of Lone Pine which were not originally raised in its Notice of Appeal.

188. The Board finds that *Texaco* continues to be a valid authority in Alberta. Although administrative law in Canada has evolved since the *Texaco* decision, as submitted by Lone Pine, the Board does not find that it has evolved in such a way to invalidate *Texaco* or make it inapplicable to the matter at hand. The Board generally accepts the Director's submissions respecting *Texaco* and does not accept the submissions of Lone Pine.

189. However, the Board also finds that this does not necessarily end the matter. As noted above, the Director's submissions are founded on the assumption that the issues raised in the Written Submissions of Lone Pine and identified as Grounds of Appeal B, C and D are all "new." With respect to Ground of Appeal B, the Board disagrees.

190. The Board notes that the grounds of appeal within the timely Notice of Appeal accepted by the Appeals Coordinator were simply that "the director or officer who made the decision erred in the determination of a material fact on the face of the record." Lone

Pine then expanded on this in an attachment to the Notice of Appeal, in which it made reference to the "loop road" and mitigation questions that comprise Ground of Appeal A.

191. Ground of Appeal B, as described above, also constitutes an alleged error in the determination of a material fact on the face of the record. Further, the Board notes that the Director's findings with respect to compliance with applicable department policy, and impacts on wildlife, fall within the scope of a determination on the adequacy of mitigation and are simply particulars of that ground of appeal. For these reasons, the Board finds that it also has jurisdiction over Ground of Appeal B.

192. With respect to Grounds of Appeal C and D, allegations with respect to inadequacy of reasons and failure to consider relevant considerations cannot be said to fall within the scope of the grounds of appeal identified in the Notice of Appeal, namely, errors of material fact on the face of the record (with reference to mitigation and "loop road"). Accordingly, the Board finds that it has no jurisdiction over Grounds of Appeal C and D.

VI. DECISION

193. In conclusion, the Board finds that Lone Pine's Ground of Appeal A is an appeal of a determination of material fact on the face of the record raised with the original Notice of Appeal received on a timely basis, and as such is within the jurisdiction of the Board. Accordingly the following grounds of appeal are properly before the Board:

A. The Director erred in the determination of a material fact on the face of the record by concluding that:

   i. The road is a "loop road"; and

   ii. The proposed gate system would not provide adequate mitigation.

194. The Board further finds that Lone Pine's Ground of Appeal B is properly under the original Notice of Appeal as related to, or a particularization of, Ground of Appeal A, and is also an appeal in relation to a determination of a material fact on the face of the record. Accordingly this also falls within the jurisdiction of the Board, and the following grounds of appeal are properly before the Board:

B. The Director erred in the determination of a material fact on the face of the record in determining that:

i. The proposed mitigation does not support the desired outcomes of Approval Standards 100.1.1 and 100.1.2; and

ii. The proposed road would result in unacceptable impacts to grizzly bear and caribou.

195. The Board finds that Grounds of Appeal C and D, identified within Lone Pine's Written Submissions, are new grounds of appeal outside of the Board's jurisdiction to consider as they were raised after the time period identified in section 217(1) of *PLAR* had elapsed. Therefore the following grounds of appeal are not within the jurisdiction of the Board:

C. The Director failed to provide adequate reasons and the decision should be quashed on that basis.

D. The Director failed to consider several relevant factors and the decision should be quashed on that basis.

Accordingly, Grounds of Appeal C and D will not be considered by the Board as part of the hearing of the Appeal in this matter, nor will the Board accept submissions from the parties on these two grounds.

196. The Board accordingly directs the Appeals Coordinator to set the Appeal down for oral hearing on the basis of Grounds of Appeal A and B as identified in this decision.

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Eric McAvity, Q.C.
Panel Chair

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A.J. Fox
Board Member

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Dr. Alan Kennedy
Board Member