
ALBERTA PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations – June 5, 2018

IN THE MATTER OF sections 121, 122, 123, and 124 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 211, 212, 213, 228, and 235 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

- and -

IN THE MATTER OF an appeal filed by Conklin Aggregates Ltd. with respect to a refusal of an application for DLO 160183 by the Director, Provincial Approvals Section, Alberta Environment and Parks.

Cite as: *Conklin Aggregates Ltd. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (5 June 2018), Appeal No. 17-0010-R (A.P.L.A.B.).

BEFORE:

Ms. A.J. Fox, Panel Chair;
Ms. Marian Fluker, Acting Board Chair; and
Dr. Brenda Ballachey, Board Member.

BOARD STAFF:

Mr. Gilbert Van Nes, General Counsel and
Settlement Officer; and Ms. Valerie Myrmo,
Registrar of Appeals.

SUBMISSIONS BY:

Appellant: Conklin Aggregates Ltd., represented by Mr.
Hugh Ham and Ms. Laura Snowball,
Municipal Counsellors, Barristers and
Solicitors.

Interested Party: Mr. Stan Jensen, represented by Mr. Daniel
Hawkwood, Beaumont Church LLP (Mr.
Hawkwood did not attend the hearing).

Director: Mr. Jon Murray, Director, Provincial Approvals
Section, Alberta Environment and Parks,
represented by Mr. Larry Nelson, Alberta
Justice and Solicitor General.

WITNESSES:

Appellant: Mr. Everett Normandeau, Conklin Aggregates
Ltd.; and Ms. Mary Wallace.

Interested Party: Mr. Stan Jensen.

Director: Mr. Jon Murray, Director, Provincial
Approvals Section, Alberta Environment and
Parks.

EXECUTIVE SUMMARY

Conklin Aggregates Ltd. (the Appellant) applied for a Department Licence of Occupation (DLO) on public land currently leased by a third party holding a grazing lease. Alberta Environment and Parks (AEP) rejected the application for the DLO, because the Appellant did not have signed consent from the grazing lease holder as required under section 9(1)(e) of the *Public Lands Administration Regulation*. The stated purpose of the requested DLO was to provide access across the grazing lease to a parcel of freehold land. The Appellant purported to be acting as the agent for the owner of the freehold parcel.

The Appellant appealed the decision to the Public Lands Appeal Board (the Board).

The Board held an oral hearing to hear arguments on the following issues:

1. Did the Director, by rejecting the Appellant's application for DLO 160183, err in the determination of a material fact on the face of the record?
2. Did the Director, by rejecting the Appellant's application for DLO 160183, err in law?
3. Is the Director's decision to reject the Appellant's application for DLO 160183 expressly subject to appeal under Section 15 of the *Public Lands Administration Regulation* or Section 59.2 of the *Public Lands Act*?

Based on the submissions and arguments provided, the Board found there was no error of a material fact on the face of the record and no error in law. The issue of the effect of section 15 of the *Public Lands Administration Regulation* or section 59.2 of the *Public Lands Act* did not apply in this case.

The Board recommended AEP's decision to reject the application for the DLO be confirmed.

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I. INTRODUCTION

[1] This is the Report and Recommendations of the Public Lands Appeal Board (the “Board”) in respect to the decision of the Director, Provincial Approvals Section, Alberta Environment and Parks (“AEP” or the “Director”) to reject the application for Department Licence of Occupation DLO 160183 (the “DLO”). Conklin Aggregates Ltd. (the “Appellant”) submitted the application for the DLO for land located in the Municipal District of Bighorn. The DLO was rejected on the basis the application did not include consent from Mr. Stan Jensen, the holder of grazing lease GRL 35454 (the “GRL”).

[2] Although it was not made clear in the application for the DLO, other evidence indicated the purpose of the DLO was to provide access across the grazing lease to a parcel of freehold land. The Appellant stated it was acting as the agent for the owner of the freehold land, Ms. Mary Wallace (the “Landowner”)

[3] The Board received an appeal from the Appellant appealing the rejection of the application for the DLO.

[4] The Board held an oral public hearing to hear arguments on the following issues:

1. Did the Director, by rejecting the Appellant’s application for DLO 160183, err in the determination of a material fact on the face of the record?
2. Did the Director, by rejecting the Appellant’s application for DLO 160183, err in law?
3. Is the Director’s decision to reject the Appellant’s application for DLO 160183 expressly subject to appeal under Section 15 of the *Public Lands Administration Regulation* or Section 59.2 of the *Public Lands Act*?

[5] Based on the Director’s record and the oral and written submissions from the Appellant and the Director (collectively, the “Parties”), the Board recommends the Minister confirm the Director’s decision.

II. BACKGROUND

[6] On June 14, 2017, the Director notified the Appellant he was rejecting the Appellant's application for the DLO since the Appellant did not provide written consent from Mr. Stan Jensen, the holder of the GRL, pursuant to sections 9(1)(e) and 9(5) of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011 ("PLAR").¹

[7] On June 16, 2017, the Board received a Notice of Appeal from the Appellant, appealing the Director's decision to reject the application. On the same date, the Board wrote to the Parties, notifying the Director of the appeal and asking the Director to advise the Board when a copy of the documents upon which the Director based his decision would be provided (the "Record"). The Board also asked for contact information of any disposition holders or occupants who may be impacted by the appeal.

[8] On June 22, 2017, the Director requested the Board dismiss the appeal on the grounds the application submitted by the Appellant for the DLO was incomplete and, pursuant to section 9(1)(e) and 9(5) of PLAR, the application must be rejected.

[9] On June 26, 2017, the Board asked the Appellant to provide a response to the Director's request to dismiss the appeal.

[10] On August 4, 2017, the Board received the Appellant's submission regarding the Director's request to dismiss the appeal.

¹ Sections 9(1)(e) of PLAR states:

"An application to the director for a formal disposition ...

- (e) must, if the application relates to public land that is already the subject of a disposition under the Act or a timber disposition, be accompanied with a statement of consent, in a form acceptable to the director, that is signed by the disposition holder or timber disposition holder...."

Section 9(5) of PLAR provides:

"The director

- (a) must reject an application if it does not meet the requirements of this section or if the applicant is served with a notice under subsection (2) and does not comply with that subsection, and
- (b) in any other case, must accept the application and proceed to consider it on its merits."

[11] On October 4, 2017, the Board notified the Parties that the Director's application to dismiss the appeal was denied. The Board found the appeal met the criteria under sections 216 and 217 of PLAR and was, therefore, a validly filed appeal.² The Board again asked the Director to provide the Record.

² Section 216 of PLAR states:

- “(1) A notice of appeal must
- (a) identify the director or officer who made the decision objected to,
 - (b) identify the provision of the enactment on which the appeal is based,
 - (c) include a copy of the decision objected to or, if the decision is not written, a description of it including the date on which it was made,
 - (d) include the legal description of, or the approximate global position system co-ordinates of the location of, the area of public land to which the appeal relates,
 - (e) set out the grounds on which the appeal is made,
 - (f) contain a description of the relief requested by the appellant,
 - (g) where the appellant is an individual, be signed by the appellant or the appellant's lawyer,
 - (h) where the appellant is a corporation, be signed by a duly authorized director or officer of the corporation or by the corporation's lawyer, and
 - (i) an address for service for the appellant.
- (2) If a notice of appeal does not comply with subsection (1), the appeals co-ordinator must reject it and immediately notify the appellant in writing of the rejection.”

Section 217 of PLAR provides:

- “(1) A notice of appeal must be served on the appeals co-ordinator within
- (a) 20 days after the appellant received, became aware of or should reasonably have become aware of the decision objected to, or
 - (b) 45 days after the date the decision was made,
- whichever elapses first.
- (2) The appeals co-ordinator may, either before or after the expiry of a period described in subsection (1)(a) or (b), extend the time for service of a notice of appeal if, in the opinion of the appeals co-ordinator, it is not contrary to the public interest to do so.
- (3) A notice of appeal must be served on the appeals co-ordinator
- (a) at the physical address of the appeals co-ordinator as shown in any publicly-available records of the Department, by
 - (i) personal service, or
 - (ii) a method of delivery that provides a signature proving receipt by the office of the appeals co-ordinator,
 - (b) by fax to the fax number for the appeals co-ordinator as shown in any publicly-available records of the Department, or
 - (c) by e-mail to the e-mail address for the appeals co-ordinator as shown in any publicly-available records of the Department.
- (4) Despite subsection (3)(b) and (c), service by fax or e-mail is not effective unless the appeals co-ordinator acknowledges receipt of the fax or e-mail.

[12] On October 17, 2017, the Director notified the Board that he wanted the Board to address the issue as to whether the Notice of Appeal raised an issue or question capable of being the subject of an appeal. The Board provided the Appellant an opportunity to respond to the Director's letter.

[13] On October 24, 2017, the Appellant provided its response, stating the Director was re-arguing his initial submission.

[14] On October 25, 2017, the Director provided additional comments, noting the Board has the ability to reconsider, vary, or revoke any report made by it. The Appellant provided a response on November 9, 2017.

[15] On November 10, 2017, the Board confirmed its previous decision that the appeal was properly before the Board. The Board advised the Parties they could raise preliminary motions after the Record was received.

[16] On February 5, 2018, the Board asked the Director to provide a copy of the Record by February 12, 2018.

[17] On February 9, 2018, the Director provided the Record. The Director also requested the Board revoke its previous decision letters, consider the Director's submissions, and dismiss the Notice of Appeal as being without merit or frivolous.

[18] On February 16, 2018, the Board set the schedule to receive additional submissions on the Director's motion to dismiss the appeal.

[19] The Board received the Parties' submissions between February 28, 2018, and March 5, 2018.

[20] On April 10, 2018, the Board provided its decision on whether there was a valid ground of appeal.³ As the Board found there was a valid ground of appeal, the Board set the issues for the hearing and canvassed the Parties for available dates for an oral hearing.

(5) On being served with a notice of appeal, the appeals co-ordinator must provide a copy of it to the director or officer who made the decision objected to."

³ See: *Conklin Aggregates Ltd. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (10 April 2018), Appeal No. 17-0010-ID1 (A.P.L.A.B.).

[21] The Board notified potentially interested persons of the appeal and requested them to advise the Board if they were wanted to participate in the hearing.

[22] On April 15, 2018, Mr. Stan Jensen (the “GRL Holder”) notified the Board of his interest to participate in the hearing. The Board asked the Parties to comment on the GRL Holder’s request to participate in the hearing.

[23] On April 20, 2018, the Director provided comments on the GRL Holder’s participation in the hearing. The Director did not oppose the GRL Holder participating in the hearing.

[24] On April 20, 2018, the Board notified the Parties and the GRL Holder that he could participate fully in the hearing.

[25] The Board received submissions for the hearing from the Parties and the GRL Holder on April 23 and 24, 2018.

[26] On May 9, 2018, the Board held an oral public hearing in Calgary to hear evidence and arguments on the following issues:

1. Did the Director, by rejecting the Appellant’s application for DLO 160183, err in the determination of a material fact on the face of the record?
2. Did the Director, by rejecting the Appellant’s application for DLO 160183, err in law?
3. Is the Director’s decision to reject the Appellant’s application for DLO 160183 expressly subject to appeal under Section 15 of the *Public Lands Administration Regulation* or Section 59.2 of the *Public Lands Act*?

[27] This is the Board’s Report and Recommendations submitted to the Minister of Environment and Parks pursuant to section 124 of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the “Act”).⁴

⁴ Section 124 of the Act states:

“The appeal body shall, within 30 days after the completion of the hearing of the appeal, submit a report to the Minister, including recommendations and the representations or a summary of the representations that were made to it.”

(2) The report may recommend confirmation, reversal or variance of the decision appealed.”

III. SUBMISSIONS

A. Appellant

[28] The Appellant explained he applied for the DLO in relation to NE 27-30-7-W5M which was already subject to Grazing Lease 35454, but consent from the GRL Holder was not included with the application.

[29] At the hearing, the Appellant said, while it was not explained in the DLO application, the purpose of the DLO was to gain access across the grazing lease to a freehold parcel of land. The Appellant advised that once the freehold parcel of land was sold, the DLO would be transferred to the purchaser so, in effect, the Appellant was acting as the agent of the Landowner.

[30] The Appellant said the only determination of fact the Director had to make was whether consent from the GRL Holder was included in the application, and the Director did not err in determining the consent was absent.

[31] The Appellant stated, since the application did not include a consent form from the GRL holder, the Director was required to reject the application pursuant to section 9(1)(e) of PLAR and, therefore, there was no error of law. The Appellant acknowledged the Director was not permitted to consider the merits of the application.

[32] The Appellant confirmed reference to section 59.2 of the Act in the Notice of Appeal was made in error, and section 16 of PLAR did not apply to this appeal.

[33] The Appellant noted section 211(b) of PLAR allows an appeal of the Director's decision to reject an application,⁵ and section 9(5)(a) of PLAR requires a rejection by the Director.

[34] The Appellant stated when the Director rejects an application because there was a prior disposition with respect to the lands and the application did not include consent from the prior disposition holder, the only reason for the Director rejecting the application was because it

⁵ Section 211(b) of PLAR states:

“The following decisions are prescribed as decisions from which an appeal is available: ...

(b) the rejection of an application under the Act for a disposition....”

was incomplete. The Appellant said the Director had not and could not make any decision about the merits of the application or any other criteria. The Appellant stated the lack of consent of a prior disposition holder is the equivalent of an objection, but the Director cannot examine the merits of the deemed objection. The Appellant said the only party that can appeal is the rejected applicant.

[35] The Appellant stated the purpose of the appeal allows the Board to make recommendations to the Minister of Environment and Parks. The Appellant noted section 211(b) of PLAR says a section 9(5)(a) rejection of an application for a disposition when there are existing dispositions is appealable.

[36] The Appellant said an appeal is not necessarily about an error made by the Director. The Appellant noted the Board is an expert body constituted to provide advice to the Minister.

[37] The Appellant noted the Director's argument that the Board can only recommend to the Minister to reject any application such as the one currently at issue before the Board, and the powers vested in the Minister by the Act are no greater than the Director's powers. The Appellant argued the effect of the Director's argument is that he has the authority to restrict or limit the Minister's decision, effectively overseeing his own Minister.

[38] The Appellant argued if the lack of consent by a prior disposition holder excludes any subsequent person from seeking a disposition, it gives exclusive possession to the initial disposition holder which is contrary to section 2 of PLAR.⁶

[39] The Appellant noted the GRL only allows the holder to graze cattle on the subject lands for two weeks in June and two weeks in November, and there is no right of exclusive or continual possession.

[40] The Appellant stated the reasons for the DLO application and whether granting the DLO would adversely affect either the GRL Holder or public lands were not discussed.

⁶ Section 2 of PLAR provides:
"Subject to the Act and this Regulation, a disposition holder has only the estate, interest, rights and privileges expressly provided in the disposition."

B. Interested Party

[41] The GRL Holder said he was not provided with an explanation as to why the DLO application was submitted by the Appellant or what interest the Appellant, Conklin Aggregates, has in accessing the lands of the Landowner. The GRL Holder noted neither the application nor the Notice of Appeal indicated the Appellant was acting as an agent for the Landowner. The GRL Holder questioned what the Appellant's interest was in the DLO. The GRL Holder argued that if the Appellant was not acting as an agent for the Landowner, it potentially does not have standing to submit the DLO application, and if it has no interest of its own, the appeal should be dismissed.

[42] The GRL Holder noted the Appellant and Director affirmed in their submissions the Director did not err in the determination of a material fact or in law, and section 15 of PLAR and section 59.2 of the Act did not apply in this appeal. The GRL Holder agreed with their opinions. The GRL Holder argued the Board has no choice but to recommend the appeal be dismissed, as there was no evidence to suggest the Director erred in any of the enumerated grounds.

[43] The GRL Holder stated, even if the Minister has the power to ignore the requirements of sections 9(1)(e) and 9(5)(a), from a public policy perspective there are good reasons why the Legislature included these sections in the Act.

[44] The GRL Holder said if the Minister reviewed and accepted the DLO application without his consent, this would result in the Government unilaterally amending the conditions of the GRL. He stated the GRL is a binding contractual agreement, and to unilaterally change the conditions of the agreement without the GRL Holder's consent would be unfair and attract a lawsuit.

[45] The GRL Holder stated the Legislature intentionally included sections 9(1)(e) and 9(5)(a) to protect the rights of current lease and disposition holders and to require negotiation and compromise between the interested parties. The GRL Holder said the legislation intentionally makes it impossible to amend the rights of the current disposition holder as it relates to a new disposition without the disposition holder's consent. The GRL Holder stated a decision to accept the application would be unfair to him and contrary to the legislative intent.

[46] The GRL Holder said there was an error in the Appellant's submission regarding the GRL. The GRL Holder stated that, despite the wording in the GRL, his use of the land spans the period between June 1 and November 15, not from June 1 to June 15 and October 31 to November 15.⁷ The GRL Holder said he files a yearly report to AEP outlining the use of the disposition, and the reports have been accepted. The GRL Holder said this was the true intent of the GRL. The GRL Holder explained he is required to report activity on the lands even when his cattle are not on the disposition and is responsible for maintaining the lands and fences. The GRL Holder stated his rights are not intermittent, and he is responsible for the lands in the winter as well as during the grazing season. The GRL Holder said the DLO applied for would impact his use of the lands throughout the year.

[47] The GRL Holder explained he has a responsibility to maintain and care for the GRL in accordance with the Act and regulations, and he has the right to use and enjoy the lands for pasturing his cattle. The GRL Holder said the DLO would allow for unrestricted access across a portion of the GRL, which could cause harm to the lands themselves and affect his rights as the holder of the GRL.

[48] The GRL Holder explained the GRL is bordered to the west and south by forestry lands, which are used recreationally throughout the year. The GRL Holder said in recent years, recreational users have attempted to trespass onto the GRL by cutting fences and cutting locks off the gates. The GRL Holder said the dirt bike and ATV users who trespass tear up the pasture the GRL Holder relies on to feed his cattle, and the noise and disturbance scare his cattle away from a large portion of the lands, which are then not grazed, reducing the feed available.

[49] The GRL Holder stated the DLO would remove control he currently maintains on access to the GRL. He believed opening up access without restriction would result in more recreational users trespassing on the lands. The GRL Holder stated he has the right under the GRL to enjoy possession of the lands without interference. Allowing the DLO would take away those rights and make the GRL Holder's duty as steward of the lands more difficult.

⁷ The Board encourages the GRL Holder to work with the Director to correct this apparent typographical error to ensure his use of the grazing lease complies with the terms and conditions of GRL.

[50] The GRL Holder explained the GRL currently has an access roadway used by Spray Lake Sawmills, and the roadway is used by Spray Lake Sawmills and himself in accordance with strict guidelines agreed between them. The GRL Holder said the gates allowing access to the GRL are locked, and only certain employees have access to the combinations and only certain individuals can cross the GRL. The GRL Holder said these employees must close and lock the gates behind them and must stay on the roadway. The GRL Holder stated this agreement has worked well and has balanced his rights as the disposition holder with the needs of Spray Lake Sawmills.

[51] The GRL Holder stated he does not intend to be obstructive to the goals of the Landowner or any other party, but he only wanted to maintain control over those individuals who cross the GRL to ensure the lands are not abused and his rights as the GRL Holder are not impacted. The GRL Holder stated he did not give consent to the DLO because the application did not address his concerns.

C. Director

[52] The Director explained PLAR requires the Appellant to include a written consent from the pre-existing disposition holder as part of the DLO application. The Director noted the Appellant had advised in the application the GRL consent was to follow, the Form B consent would be provided, and even though there was a potential conflict with the GRL Holder, the signed consent would be provided.

[53] The Director explained the initial review of the application proceeded on the basis the consent from the GRL Holder was forthcoming, but as the consent was never submitted, there was no merit review of the application.

[54] The Director stated the application was rejected for failing to submit the consent from the GRL Holder.

[55] The Director explained when a person applies for a DLO on public lands, the application is first reviewed to ensure it meets the requirements set out in PLAR, and then the application is considered on its merit before a formal disposition is granted.

[56] The Director noted nowhere in the DLO application or Notice of Appeal did the Appellant indicate it was acting for the Landowner as an agent or otherwise, or that the purpose of the proposed DLO was for access to the Landowner's property for purposes unrelated to the Appellant.

[57] The Director submitted the Landowner's use of the GRL was not relevant to the issues being considered. In addition, the Director said the following matters were irrelevant and representations should not be permitted:

1. whether the GRL Holder has or is acting improperly;
2. whether the Director's decision may impact the perceived market value of the Landowner's property;
3. whether the Landowner has a valid road use agreement with Spray Lake Sawmills (1980) Ltd.; and
4. previous use of the GRL lands other than for activities permitted under the Act.

[58] The Director stated even if he had been aware the underlying purpose of the DLO was to provide access to the Landowner's property for the Landowner or any successor in title, the result would have been the same since:

1. the proposed DLO would be used for a purpose other than that for which it was issued; and
2. the Appellant would not be holding the proposed DLO for its sole use and benefit.

[59] The Director noted the Appellant acknowledged the Director did not make an error in determining there was no consent from the GRL Holder included in the DLO application. The Director submitted he did not err in the determination of a material fact on the face of the Record.

[60] The Director referred to the Appellant's submission where it stated the Director was bound to reject the DLO application. The Director submitted he did not err in law.

[61] The Director noted the Appellant conceded in its submission that none of the grounds of appeal were applicable to the Director's decision to reject the DLO application.

[62] The Director submitted the Board must recommend to the Minister that his decision be confirmed.

[63] The Director submitted the Board should review the Director's decision on the standard of reasonableness and should show deference to the Director. The Director stated that even if the Director's decision was reviewed on the standard of correctness, the decision was correct.

[64] The Director referred to the Alberta Court of Appeal decision of *Edmonton School District No. 7 v. Dorval*, 2016 ABCA 8 at paragraphs 36 to 38, where the Court summarized that an administrative decision is reasonable if it is:

1. justifiable, transparent, and intelligible;
2. falls within the range of possible acceptable outcomes that are defensible in respect of the facts and law;
3. can stand up to a somewhat probing examination; and
4. shows a line of analysis that could lead the decision-maker to its conclusion.

[65] The Director submitted that, since he followed the requirements of PLAR regarding the rejection of the application for a formal disposition, the decision was reasonable. The Director stated that since PLAR requires him to reject an application that is incomplete, in these circumstances rejection was the only reasonable decision he could have made. The Director said not rejecting the DLO application would have been an error of law, and issuing a DLO based on an incomplete application would have been a further error of law and appealable by anyone who was impacted by the error, which in this case would be the GRL Holder.

[66] The Director explained a completeness review is a fundamental part of the application process for a formal application and is based on mandatory criteria established by the legislature and set out in PLAR.

[67] The Director stated that unless one of the grounds for appeal under section 213 of PLAR is met, the Board has no basis for recommending anything except confirming the decision being appealed.

[68] The Director stated the Board is restricted to recommending the decision being appealed be confirmed, reversed, or varied, and the Board cannot recommend a new decision that was not considered by the Director at the time the Director made his decision.

[69] The Director stated even though the Minister has greater authority under the Act generally when making a decision regarding an appeal, the Minister is restricted under section 124(3) of the Act to “confirm, reverse or vary the decision being appealed and make any decision that the person whose decision was appealed could have made.” The Director said that within the appeals process, the Minister cannot order a decision that was not considered by or available to the Director at the time the Director’s decision was made.

[70] The Director stated that fairness and equity must be viewed from the perspective of all parties that could potentially be impacted by a decision. The Director said he was responsible for balancing the interests of the parties, including the GRL Holder, in light of the legislative requirements. The Director stated a decision to accept the DLO application would not be fair and equitable to the GRL Holder. The Director stated the legislature determined applicants for formal dispositions are required to obtain the consent of a holder of a disposition that was previously issued for the same public land.

IV. PRELIMINARY MATTERS

[71] In his written submission, the Director said the Appellant provided additional materials as part of its submission. The Director noted the Appellant did not: (1) provide any specific references to the new material in the submission; (2) indicate how or why geographical and historical context was required; (3) indicate the relevance of the material to the decision being appealed; or (4) provide any basis under the legislation to show how the material was admissible.

[72] In response, the Appellant explained the material was to be used at the hearing as exhibits.

[73] At the oral hearing, the Director stated he would wait to see how the Appellant and its witnesses used the material when presenting their evidence.

[74] The Board stated it would allow this material to be introduced as evidence and award it the appropriate weight in relation to the issues before the Board.

V. ANALYSIS

[75] In this case, the decision being appealed is of the Director's decision to reject the Appellant's application for the DLO.

[76] In the Appellant's and Director's submission, it was acknowledged the issue regarding section 15 of PLAR or section 59.2 of the Act did not apply in this appeal. Section 15 of PLAR relates to deemed rejections.⁸ The decision in question was not a **deemed** rejection since the Director clearly notified the Appellant the application was rejected. Therefore, section 15 does not apply in this appeal. Section 59.2 of the Act refers to stop orders, which is not the situation in this appeal and, therefore, is not applicable.⁹ The Board agrees with the Parties'

⁸ Section 15 of PLAR provides:

- “(1) Subject to this section, an application under section 9, 11 or 13 is deemed to have been rejected if the director does not register a notice under section 9(6), 11(5) or 13(5) within the 30-day period provided by those sections.
- (2) The director may, by written notice to the applicant, extend the 30-day period referred to in subsection (1) for a further period not exceeding 90 days if the director considers it appropriate to do so in the circumstances.
- (3) If an applicant requires regulatory approval for a development on land that is the subject of a disposition for which the applicant has applied, the director may, by written notice to the applicant, extend the period referred to in subsection (1) for an indefinite period pending the outcome of any proceedings related to the regulatory approval.
- (4) A deemed rejection under this section is appealable under Part 10.”

⁹ Section 59.2 of the Act states:

- “(1) In addition to exercising other powers under this Act and the regulations, if in the opinion of a director or officer an activity or land use on public land is in contravention of one or more of
 - (a) this Act,
 - (b) the regulations under this Act,

conclusions on this matter and, therefore, the Board will not discuss the third issue any further in this report.

[77] The remaining issues before the Board are whether the Director, in rejecting the application for the DLO, made an error on the face of the Record or whether he made an error in law.

[78] Prior to the Director assessing an application for a DLO on its merits, the application must first comply with the requirements of PLAR and must be complete. The public lands covered by the DLO application currently have an existing GRL. Under section 9(1)(e) of PLAR, in order for an application to be deemed complete, there must be written consent from the existing disposition holder. The Appellant was aware of this requirement and indicated on the application the consent form was forthcoming.

[79] It is clear from the Record the Appellant did not provide written consent from the GRL Holder, and the GRL Holder confirmed he did not provide written consent. The Appellant acknowledged it never received written consent and the application was, therefore, incomplete.

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- (c) a notice or order issued under this Act or the regulations, and
 - (d) the terms and conditions of a disposition or an authorization under section 20, the director or officer may act under subsection (2).
- (2) If subsection (1) applies, the director or officer may, by written notice, order any person responsible for the contravention
- (a) to stop the activity or land use on the public land in whole or in part as directed by the notice,
 - (b) to demolish, remove or replace any improvements made or in the process of being made, or
 - (c) to carry out any other actions required by the notice so that the activity or land use on the public land complies with this Act or the regulations or the terms and conditions of a disposition or an authorization under section 20, within the time set out in the notice.
- (3) A person who receives a notice referred to in subsection (2) may appeal to an appeal body in accordance with the regulations.
- (4) Costs incurred by the director or officer under this section are recoverable by the Crown as a debt owing to the Crown against the person to whom the stop order was directed.
- (5) The director may, at any time,
- (a) amend a term or condition of, add a term or condition to or delete a term or condition from a stop order, or
 - (b) cancel a stop order.”

[80] The consent was never provided even though it was required under section 9(1)(e) of PLAR. The Board finds the Director did not make an error on the face of the Record.

[81] The remaining issue is whether the Director made an error in law.

[82] During the Appellant's testimony, it was clarified the Appellant was in fact representing the Landowner as an agent to go through the DLO application process, which, as the Director agreed, can be complicated for those with no previous experience with the process. It was actually the Landowner who was seeking the DLO to ensure continued access to her property. The Director stated knowing the Appellant was acting as the agent for the Landowner would have provided a clearer picture of who was making the application and why, but his decision would not have been different.

[83] Under section 9(5)(a) of PLAR, the Director must reject an application for a disposition if consent from the holder of an existing disposition is not provided. The Director has no discretion under this section of PLAR. All Parties agreed, as does the Board, no written consent was provided by the GRL Holder as required. Without the consent, the Director must reject the application. If he had done otherwise, the Director would have made an error in law.

[84] Therefore, the Board finds the Director did not make an error in law.

[85] The matter of standard of review was raised in the Director's submission. As there was only one option available to the Director in this case, which was to reject the application, the Board does not have to assess which standard of review is applicable in this case. The Director's decision was both reasonable and correct.

[86] Although the Board found the Director did not make an error of fact or law, this appeal raised concerns with the legislation.

[87] The Landowner's property is accessed using roads constructed on DLO 02872 and DLO 04422, held by Spray Lake Sawmills (the "Spray Lake Road"), and then along a seismic cutline through the GRL for the last approximately 600 metres. The DLO application was filed to allow the seismic cutline to be upgraded from an existing trail to a road. This cutline runs through the GRL and, therefore, written permission is required from the GRL Holder as part of the application for the DLO. Although verbal consent for access may have been granted to the

Landowner by the GRL Holder in the past, without written consent, the application is incomplete.

[88] The Landowner's property is surrounded by public lands to the north and west, and lands to the east and south are privately owned by the GRL Holder and his family.

[89] The Board appreciates the difficult position the Landowner is now in. There is no permanent access to her property, unless she constructs a road along the undeveloped road allowances which could involve kilometres of roadway. The alternative is to acquire an easement through the GRL Holder's property.

[90] The Board notes that, even if the DLO was issued, there is no guaranteed access to the Landowner's property using the Spray Lake Road. If Spray Lake Sawmills decides the road is no longer needed, it could reclaim the road and request its DLOs be cancelled, leaving the Landowner with no access, even if she held a DLO for a road on the seismic line.

[91] The Board is concerned the legislation as it is currently written, allows a third-party, such as the GRL Holder, to completely control public lands. The Board understands the purpose of obtaining consent from a current disposition holder to ensure there are no conflicting uses and not to impact rights given to the disposition holders. However, this takes away any discretion from the Director in situations where a subsequent disposition would have little or no impact on a previous disposition and yet the previous disposition holder refuses to provide consent. There is no mechanism available in the legislation to resolve the matter, except potentially petitioning the Minister to remove the land from the previous disposition under section 14 of the Act.¹⁰ When asked about this at the hearing, the Director stated he was not aware of any process that could be used to initiate section 14 by either the Director or the public. Even if the Minister was to remove the land required for the DLO from the GRL, this could

¹⁰ Section 14 of the Act provides:

“The Minister may

- (a) restrict the disposition of or withdraw from disposition any public land in any specified area in any manner the Minister considers warranted, or
- (b) prescribe, as to any specified public land or as to public land in any area, when and on what conditions applications for dispositions may be made.”

create problems for the GRL Holder, such as increased risk of trespassers or requiring the DLO be fenced, thereby removing access to the DLO for grazing.

[92] In assessing the situation the Landowner is now in, the Board realizes landowners in different situations would have alternatives available. For example, if an oil and gas company owned the Landowner's property, it could acquire a right of entry order under the *Surface Rights Act*, R.S.A. 2000, c. S-24, either through the GRL Holder's property or through the public lands. Unfortunately, this option is not available to the Landowner in this case. This disparity of rights concerns the Board, and the Board is hopeful the Landowner and GRL Holder are able to reach a workable solution.

[93] Notwithstanding these concerns, the Board finds the Director did not err in a finding of fact on the face of the Record and did not err in law when he rejected the application for the DLO. Therefore, the Board recommends the Minister confirm the Director's decision.

VI. RECOMMENDATIONS

[94] The Board finds there was neither an error in fact on the face of the Record nor an error in law in the Director's decision to reject the application for the DLO. Therefore, the Board recommends the Minister confirm the Director's decision.

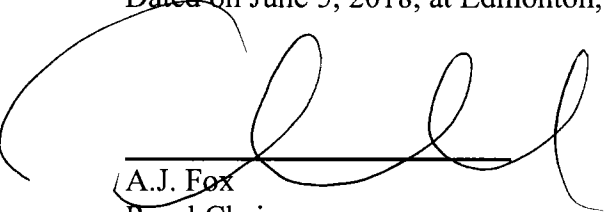
[95] Pursuant to section 124(4) of the Act,¹¹ a copy of this report and recommendation and of any decision by the Minister are to be provided to:

1. Mr. Hugh Ham, on behalf of Conklin Aggregates Ltd. and Ms. Mary Wallace;
2. Mr. Stan Jensen; and
3. Mr. Larry Nelson, Alberta Justice and Solicitor General, on behalf of the Director, Provincial Approvals Section, Alberta Environment and Parks.

¹¹ Section 124(4) of the Act states:
"The Minister shall immediately give notice of any decision made under this section to the appeal body, and the appeal body shall immediately, on receipt of the notice of the decision, give notice of the decision to all persons who submitted notices of appeal or made representations or written submissions to the appeal body and to all the persons who the appeal body considers should receive notice of the decision."

[96] The Board notes the Appellant and the GRL Holder reserved their rights to ask for costs. A process for the costs applications will be established after the Minister makes her decision in this appeal.

Dated on June 5, 2018, at Edmonton, Alberta.



A.J. Fox
Panel Chair



Marian Fluker
Acting Board Chair



Brenda Ballachey
Board Member