ALBERTA
PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations –October 28, 2019

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, 216, 217, 219, and 228 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by MM Corp. with respect to the decision of the Director, Approvals and Dispositions Services Unit, Provincial Approvals Section, Operations Division, Alberta Environment and Parks, to refuse to issue Grazing Lease GRL 39154 to MM Corp.

Cite as: *MM Corp.* v. *Director, Approvals and Dispositions Services Unit, Provincial Approvals Section, Operations Division, Alberta Environment and Parks* (28 October 2019), Appeal No. 18-0019-R (A.P.L.A.B.), 2019 ABPLAB 23.

WRITTEN HEARING BEFORE:

Mr. Gordon McClure, Board Chair
Dr. Brenda Ballachey, Panel Member
Mr. Tim Goos, Panel Member

SUBMISSIONS BY:

Appellant: MM Corp., represented by Mr. Patrick Stratton, Witten LLP.

Director: Ms. Donna Jean Zubko, Director, Approvals and Dispositions Services Unit, Provincial Approvals Section, Operations Division, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

MM Corp. (the Appellant) was the holder of a grazing lease (GRL), which it received because of an assignment from the previous GRL holder. Alberta Environment and Parks (AEP) inspected the GRL and found:

(a) insufficient fencing to contain livestock;
(b) unauthorized cultivation and cropping;
(c) unauthorized construction of a dugout; and
(d) non-utilization of the GRL for grazing.

AEP advised the Appellant these issues were not in compliance with the terms of the GRL, the *Public Lands Act,* and the *Public Lands Administration Regulation.* AEP warned the Appellant that failure to bring the GRL into compliance could result in the cancellation of the GRL.

After receiving the letters, the Appellant advised AEP it had taken steps to address the issues and that it was in compliance with the terms of the GRL and the legislation.

The GRL expired, and the Appellant remained on the lands as a month-to-month tenant.

A follow-up inspection of the lands by AEP revealed that the Appellant did not address the issues to AEP's satisfaction. AEP decided not to issue a new GRL to the Appellant. The Appellant appealed AEP's decision to the Public Lands Appeal Board, alleging AEP had erred in the determination of a material fact on the face of the record and had erred in law.

At the request of AEP and the Appellant, the Board held a hearing by written submissions only. After reviewing the written submissions, the Board found AEP had not erred in the determination of a material fact on the face of the record and had not erred in law.

The Board recommended the Minister of Environment and Parks confirm AEP's decision not to issue a new GRL to the Appellant.

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I. INTRODUCTION

[1] This is the report and recommendations of the Public Lands Appeal Board (the "Board") regarding the appeal by MM Corp. (the "Appellant") of the decision by the Director, Approvals and Dispositions Services Unit, Provincial Approvals Section, Operations Division, Alberta Environment and Parks (the "Director") to refuse to issue Grazing Lease No. GRL 39154 (the "GRL") to the Appellant.[1]

[2] The GRL is located on four quarter sections of public land in the Municipal District of Spirit River in northwestern Alberta at NW 18-77-6-W6M; SW 19-77-6-W6M; NE 13-77-7-W6M; and SE 24-77-7-W6M.

II. BACKGROUND

[3] The GRL was first issued to leaseholders by Alberta Sustainable Resource Development, as it was then called,[2] on February 1, 2007.

[4] On June 24, 2011, the GRL was assigned to Leo Meyer Grain Production Ltd. ("LMGP").

[5] On January 23, 2014, AEP sent a Request for Compliance to LMGP following inspections of the GRL in the summer and fall of 2013. In the Request for Compliance, AEP said it found the fencing on the lands covered by the GRL was in disrepair, there were no signs of grazing on the lands, Stock Return Forms had not been submitted, and unauthorized cropping was occurring on the lands.

[6] On June 5, 2014, LMGP applied to AEP to assign the GRL to the Appellant, and on April 1, 2015, AEP assigned the GRL to the Appellant.

[7] On August 17 and 25, 2015, AEP conducted an inspection of the GRL for a possible renewal. AEP found the fences were still in poor condition, there was no evidence of

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[1] The Appellant previously held the GRL, but it expired and the Appellant became a month-to-month tenant on the lands. As a result, the decision before the Director was whether to issue a new GRL. The Director decided not to issue a new GRL, which in the terminology of the legislation is a "refusal to issue" a GRL.

[2] In 2012, the departments of Alberta Sustainable Resource Development and Alberta Environment and Water merged into Alberta Environment and Sustainable Resource Development. The Department is now called Alberta Environment and Parks ("AEP").

livestock grazing on the lands, and there was unauthorized cultivation and cropping on the lands. The Director was provided with a Rangeland Management Form recommending renewal of the disposition for a period of 10 years, noting: "Although this lease is recommended for renewal, disposition use is unacceptable. This status is pending the outcome of the terms and conditions stated in the Notice of Non-compliance."

[8] On September 30, 2015, in response to questions from AEP, the Appellant advised AEP the GRL was not grazed in 2015 due to high cattle prices and would not be grazed until the summer of 2016. Further, the Appellant advised that arrangements had been made for the fences to be repaired.

[9] On November 24, 2015, AEP wrote to the Appellant about subleasing and unauthorized cultivation of the GRL. AEP noted the inspection conducted on August 17, 2015, found the pasture was in cereal crop, and the crop appeared to have been harvested when the lands were inspected again on August 25, 2015. AEP noted cropping pastures is not allowed and subleasing is prohibited. AEP stated the Appellant was required to seed the cropped area to a pasture mixture by June 30, 2016, and advised the Appellant that failure to adhere to the legislation and the terms and conditions of the lease may jeopardize the tenure of the GRL. AEP also confirmed a telephone conversation between AEP staff and the Appellant on November 6, 2015, in which the Appellant confirmed a third party was cropping a field in the GRL.

[10] On May 2, 2016, AEP received a completed Stewardship Self-Assessment Form ("SSAF") from the Appellant. The SSAF indicated the GRL was not grazed in 2015, and the dugout and fencing were repaired. The SSAF also indicated that the Appellant complied with all the terms and conditions of the GRL.

[11] On May 16, 2016, AEP recommended renewal of the GRL for a 10-year term.

[12] On May 18, 2016, AEP sent a letter to the Appellant outlining issues and evidence of non-compliance found during the inspections on August 17 and 25, 2015, including:

(a) weed control;
(b) fence maintenance;
(c) an abandoned camping trailer that had to be removed;
(d) unauthorized cultivation;

(e) subleasing of the lease; and

(f) the requirement that the cultivated area must be seeded to pasture by June 2016.

[13] On July 22, 2016, the Appellant purchased livestock.

[14] On August 3, 2016, AEP inspected the GRL and sent a letter the Appellant about unauthorized utilization of the GRL. The letter summarized the previous communications with the Appellant about non-compliance issues and detailed the required actions to bring the Appellant into compliance. The letter noted that failure to utilize the lease as authorized may affect the tenure of the lease and could result in the cancellation of the GRL.

[15] On December 8, 2016, AEP received the 2016 Stock Return Form ("SRF") from the Appellant, which stated livestock were on the lands between June 29, 2016 and October 26, 2016.

[16] On January 31, 2017, the GRL expired. The Appellant remained on the lands as a month-to-month tenant.

[17] Between July 13, 2017 and September 6, 2017, AEP tried unsuccessfully to contact Mr. Leo Meyer and Mr. Bob Maclean, via telephone and email concerning the cultivation and cropping on the lands. Mr. Meyer was authorized by the Appellant to crop the lands, and Mr. Maclean is the President of the Appellant.

[18] On July 18, 2017, AEP took aerial photos of the lands previously in the GRL.

[19] On August 10, 2017, AEP sent both the Appellant and Mr. Meyer Notice of Investigation letters concerning the cultivation on the lands previously included in the GRL. The letters noted AEP could take compliance action may be taken without further notice.

[20] On February 6, 2018, and February 16, 2018, AEP completed two Merit Rationales recommending cancellation of the GRL.

[21] On June 8, 2018, the Director sent a letter to the Appellant advising AEP did not intend to issue a disposition for the GRL for the following reasons:

(a) unauthorized cropping;

(b) unauthorized subleasing;

(c) an unauthorized dugout;

(d) fences inadequate to contain livestock;

(e) non-utilization from 2011 through 2015; and

(f) no evidence of utilization for 2016 and 2017.

[22] The Director noted inspections were conducted on August 17, 2015, July 18, 2017, and September 26, 2017, and letters of non-compliance dated November 24, 2015, May 18, 2016, and August 22, 2016, were sent to the Appellant outlining issues of non-compliance and the requirements to bring the GRL into compliance. The Director invited the Appellant to make representations within 30 days of the date of the letter as to why the disposition should be issued. The Director stated AEP would not be issuing a disposition if no response was received.

[23] In its July 6, 2018 correspondence to the Director, the Appellant expressed its opposition to the Director's plan not to issue the GRL. The Appellant identified it had taken steps to rectify the non-compliance issues and concluded its letter requesting the GRL be renewed on an annual basis.

[24] On July 24, 2018 and July 25, 2018, AEP inspected the lands and took photos to illustrate the cultivation, cropping, fences, and vegetation growth throughout the area.

[25] On August 22, 2018, AEP contacted the Appellant regarding unauthorized utilization of the GRL and advised the Appellant that continuing non-compliance would threaten the tenure of the GRL.

[26] On December 5, 2018, the AEP Rangeland Agrologist sent an email to the Director noting the July 24 and July 25, 2018 inspections confirmed the pasture was being cropped, the fence was in disrepair, the fence was inadequate to confine livestock, and there was no evidence of utilization. The email concluded with the recommendation that GRL should not be issued.

[27] On December 6, 2018, AEP issued a Notice of Administrative Penalty for $7,800.00 (the "Administrative Penalty") to the Appellant. The Administrative Penalty was for unsatisfactory fencing, unauthorized cropping, and unauthorized cultivation on the GRL.

[28] On January 15, 2019, the Director wrote the Appellant and advised she had decided not to issue the GRL to the Appellant (the "Decision"). The Director stated her decision

was based on the historic and continuing non-compliance with the terms and conditions of the GRL and the *Public Lands Administration Regulation*, Alta. Reg. 187/2001 ("PLAR").

[29] On February 11, 2019, the Appellant filed a Notice of Appeal with the Board, alleging the Director, in making her decision not to issue the GRL, erred in the determination of a material fact on the face of the record and erred in law.

[30] On February 14, 2019, the Board acknowledged receipt of the Notice of Appeal and requested the Director's records that were reviewed and available when the Director was making the decision. On March 7, 2019, the Director provided the Director's record to the Board, which was then provided to the Appellant on March 13, 2019. The Board also requested the Appellant and the Director (collectively, the "Parties") provide their available dates for a mediation meeting.

[31] On March 20, 2019, the Director requested the Board proceed directly to a hearing by written submissions. On March 25, 2019, the Appellant advised the Board it would prefer an oral hearing of the appeal. The Board granted the Appellant's request and asked the Parties for dates for an oral hearing of the appeal. On April 5, 2019, the Board set the hearing date for May 13, 2019.

[32] On April 17, 2019 and April 25, 2019, the Director provided the Board with five documents that had been inadvertently left out of the Director's record initially provided by the Director (Tabs 68, 69, 70, 71, and 72 of the Director's record).

[33] On May 3, 2019, the Appellant requested the hearing be adjourned to September 2019, to allow the Appellant to retain new legal counsel. On May 3, 2019, the Board granted the adjournment request and asked the Parties to provide available dates in September. On May 21, 2019, the Appellant advised it was unavailable in September and October 2019.

[34] On June 24, 2019, the Director again requested a written hearing of the appeal.

[35] On July 9, 2019, the Appellant advised it had retained new legal counsel and requested a hearing by written submissions. On July 10, 2019, the Board granted the request for a written submission hearing. A submission schedule was set for the Parties.

[36] On August 16, 2019, the Appellant filed a written submission that included documents, not in the Director's record (the "Disputed Documents").

[37] On August 30, 2019, the Director filed a written response submission and requested the Disputed Documents be "struck in their entirety."

[38] On September 13, 2019, the Appellant filed a written rebuttal submission.

[39] The Board held the written submission hearing on September 27, 2019.

III. ISSUES

[40] The issues to be heard at the hearing are:

1. Did the Director who made the decision to refuse to issue Grazing Lease GRL 39154 to the Appellant err in the determination of a material fact on the face of the record?; and
2. Did the Director err in law?

The Director's motion to exclude the Disputed Documents was also considered by the Board.

IV. SUBMISSIONS

A. Appellant

[41] The Appellant submitted the Director erred in the determination of a material fact in finding the Appellant was non-compliant with the terms of the GRL. The Appellant stated the Director further erred in law in refusing to issue the GRL under section 15.1 of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the "Act"),[3] based on alleged non-compliance with PLAR.

[42] The Appellant said the fencing was in disarray before the assignment of the GRL to the Appellant. The Appellant submitted that upon becoming the leaseholder of the GRL, it had taken active steps to comply with the requirements of the GRL and maintain fencing to confine livestock. The Appellant stated it advised AEP it contracted with a third party to repair the fencing in the winter of 2015.

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[3] Section 15.1 of the Act provides:

"The director may refuse to issue, mortgage, assign, transfer, sublet or renew a disposition if the applicant

(a) is indebted to the Crown, or

(b) is otherwise in non-compliance with this Act or the regulations."

[43] The Appellant submitted it expended significant funds to repair the fencing on the GRL in expectation of renewal and in reliance on AEP's preliminary recommendation to renew the GRL for a further ten-year term.

[44] The Appellant stated large wildlife in the area, such as elk, continually damage sections of fencing on the GRL. The Appellant said the fencing will never be perfect, but it was in good shape overall after the 2016 repairs. The Appellant noted the fencing was effective in confining all livestock within the boundaries of the GRL in 2016 and 2017.

[45] The Appellant submitted that the Director did not have any facts to suggest unsatisfactory fencing and erred by relying on incorrect factual determinations in its refusal to renew the GRL. The Appellant noted the terms of the GRL require "satisfactory fencing" before cattle can graze. The Appellant argued the GRL does not require perfect fencing.

[46] The Appellant stated the Director's decision to refuse to renew the GRL was not fully informed, as she did not have all the necessary documents, such as invoices for the fencing improvements.

[47] The Appellant submitted the Director failed to provide sufficient evidence of the unauthorized construction of a dugout between 2015 and 2016. The Appellant stated aerial photographs are unreliable and insufficient to establish the presence of a dugout, or the timing of its construction. The Appellant said AEP was aware of the Appellant's plans to refurbish the existing dugout on the GRL, which the Appellant did, expending $990.00, plus GST on May 28, 2016.

[48] The Appellant stated AEP indicated the dugout could remain as it was. The Appellant said dugouts are an improvement to a grazing lease as they provide water for livestock. The Appellant submitted it was unfair for the Director to refuse to renew the GRL based on a dugout that does not pose any problems and can remain on the GRL for subsequent users.

[49] The Appellant submitted the Director erred in a material determination of fact as the Director had insufficient evidence to hold the Appellant responsible for the construction of the alleged dugout.

[50] In response to the Director's allegations of cultivation and cropping on the GRL before and after the assignment of the lease to the Appellant, the Appellant submitted if the land was farmed, it was not farmed with authorization or knowledge of the Appellant. The Appellant

stated it never harvested a crop on the GRL, and once receiving the Notice of Non-Compliance, it promptly directed farming activities to cease. The Appellant stated it did allow cutting of the volunteer rye crop in 2016, to allow room for native grass species to grow and to plant triticale in 2018 with the same objective.

[51] The Appellant noted AEP wrote in the January 23, 2014, Notice of Compliance, "[c]ropping of the range improvements is not allowed except to rejuvenate tame grass that has deteriorated."[4] The Appellant stated the rye discovered during AEP's inspections was a voluntary crop that had been present on the GRL since 1985, and at no time during the Appellant's procession of the lease had the GRL been seeded for a crop, other than triticale in 2018. The Appellant said triticale is a rye-wheat hybrid conducive to the growth of native grass underneath and was seeded to allow the native grasses to grow, as authorized by AEP. The Appellant said the Director misinterpreted the seeding of triticale as a continuation of the cultivation and cropping of the land for the production of rye.

[52] The Appellant submitted the planting of triticale would help return the GRL to a suitable state for grazing purposes, which state is an equivalent land capability required under section 21(1)(f) of PLAR.[5]

[53] The Appellant stated that it should not be considered at fault for crops present on the GRL before assuming the lease. The Appellant said it took active steps to comply with the terms of the GRL, as well as the directions from AEP, to place the full 640 acres into cattle grazing.

[54] The Appellant submitted the Director erred in the determination of a material fact in finding that the Appellant was continuously cultivating and cropping the land contrary to terms of the GRL. The Appellant argued the cropping of voluntary rye and planting of triticale were done to ensure the growth of native grass species on the GRL.

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4 Director's File, at Tab 56.

5 Section 21(1)(f) of PLAR provides:

"The holder of a formal disposition...

(f) must, on the expiry, cancellation, surrender or abandonment of the formal disposition, reclaim the subject land to an equivalent land capability...."

[55] The Appellant noted that the Director, in her submissions and the Notice of Refusal, indicated there was a lack of evidence of livestock grazing. The Appellant stated while AEP's inspectors may have been unable to locate evidence of cattle, there is no record showing the areas of land inspected. The Appellant submitted no weight could be placed on AEP's statement that cattle were not observed on the GRL without evidence of the specific locations inspected for cattle.

[56] The Appellant stated its evidence contradicts AEP's allegations regarding cattle grazing. The Appellant said it placed cattle on the land for the years of 2016 and 2017, as indicated in the respective SRFs for each year and made three cattle purchases, as evidenced by three Livestock Bill of Sales, dated July 22, 2016.

[57] The Appellant said AEP was acting inconsistently by issuing the Administrative Penalty against the Appellant for grazing cattle on the GRL without enclosing the lands with a satisfactory fence and then refusing to renew the GRL because there was no evidence of cattle grazing.

[58] The Appellant submitted the Director's conclusions in regards to livestock represent factual errors and inconsistent findings, and not to renew the GRL based on these conclusions amounts to an overriding error.

[59] The Appellant said it made no admission of fact or liability concerning the Administrative Penalty and contested AEP's proposal for an Administrative Penalty.

[60] The Appellant submitted the Director's decision to refuse to issue the GRL to the Appellant based on the same facts outlined in the Administrative Penalty amounts to double punishment, which is unfair given the Appellant's substantial investment in the GRL and the factual errors made by AEP.

[61] The Appellant stated the Director indicated that her authority to refuse to renew the GRL was under section 15.1 of the Act,[6] which states a director may decide not to issue a

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[6] Section 15.1 of PLAR reads:

"The director may refuse to issue, mortgage, assign, transfer, sublet or renew a disposition if the applicant

(a) is indebted to the Crown, or

disposition if the applicant is indebted to the Crown or in non-compliance. The Appellant said it paid all amounts owing to the Crown and has fully complied with the terms of the GRL. The Appellant submitted the Director made an error in law by refusing the renewal of the GRL in the absence of the legislative authority to do so under section 15.1 of the Act.

[62] The Appellant requested the Board find the Director erred in the determination of material facts and erred in law in refusing to issue the GRL, and the Appellant requested that the Board recommend to the Minister of Environment and Parks (the "Minister") that the GRL be renewed.

B. Director

[63] The Director submitted that under the authority of section 15.1 of the Act, she refused to issue the GRL to the Appellant based on the following:

(a) continuing non-compliance;
(b) the May 18, 2016, recommendation by the Rangeland Agrologist;
(c) the February 6, 2018, Merit Rational;
(d) the July 24, 2018, field inspections; and
(e) the December 6, 2018, Notice of Administrative Penalty.

[64] The Director submitted she did not err in the determination of a material fact when she refused to issue the GRL to the Appellant.

[65] The Director stated that the Appellant did not dispute any of the facts on which AEP issued the Administrative Penalty when it had the opportunity to appeal that decision. The Director said she relied on those same facts when she issued the Decision.

[66] The Director submitted the Appellant provided no evidence the Director erred in the determination of material fact and did not meet the onus, which is on the Appellant.

[67] The Director stated she relied on section 15.1 of the Act when she issued the Decision, and she did not err in law.

(b) is otherwise in non-compliance with this Act or the regulations."

[68] The Director said she was within her authority under the Act to refuse to issue the GRL to the Appellant based on the long history of its non-compliance with the terms and conditions of the GRL and non-compliance with PLAR.

[69] The Director requested the Board find the Director did not err in the determination of a material fact on the face of the record and did not err in law in deciding to refuse to issue the GRL to the Appellant.

[70] The Director stated the issues of inadequate fencing persisted after 2016 when the Appellant was assigned the GRL through January 2019, when the Director issued the Decision. The Director stated the Director's record showed specific locations and issues with the fencing.

[71] The Director submitted that despite the Appellant's expenditure, the Appellant remained in non-compliance with the requirements related to fencing in PLAR and the GRL.

[72] The Director said she did not agree with the Appellant's opinion the fence was in "good shape overall." Ultimately, the fencing does not confine cattle as required by s. 53(3) of PLAR[7] and condition 10 of the GRL.[8]

[73] The Director submitted the Appellant only provided evidence that cattle were purchased and did not prove the purchased cattle grazed on the GRL. The Director stated the SRFs for 2016 and 2017 do not establish that the cattle the Appellant purchased grazed on the GRL. The Director noted that during inspections, AEP staff did not observe signs of grazing. The Director said the cattle the Appellant purchased could have grazed elsewhere.

[74] The Director stated there was no guarantee of renewal given to the Appellant. The Director submitted that the Recommendation to Renew depended on satisfactory completion of all of the requirements set out in the Notice of Non-Compliance, dated November 24, 2015, which were not met.

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7 Section 53(3) of PLAR provides:

"The holder of a grazing disposition must

(a) confine the livestock to the land under the disposition and any other land that is controlled by the holder and grazed in conjunction with that land, and

(b) erect any fences and cattle guards that are necessary to ensure compliance with clause (a)."

8 Condition 10 of the GRL states: "The land shall be enclosed by a satisfactory fence before livestock is

[75] The Director noted that the Appellant said it did not know a third party was conducting unauthorized activities on the GRL. The Director stated it was not until AEP notified the Appellant that the Appellant took any steps to cease the unauthorized activities. The Director submitted the Appellant had an obligation to comply with the terms and conditions of the GRL, including the obligation to not allow the cultivating of the GRL without AEP approval.

[76] The Director submitted the Appellant admitted there was unauthorized cropping on the GRL. The Director noted the GRL was issued for grazing purposes only, and cultivation is inconsistent with the GRL and section 56(1) of PLAR,[9] which prohibits a holder from causing or allowing the cultivation of a GRL.

[77] The Director said that when the GRL expired on January 31, 2017, the Appellant was deemed to be an overholding tenant and continued to be required to pay rent.

[78] The Director stated that when AEP inspected the GRL, it was evident the crops were not voluntary. The Director said the crops were planted in rows, and there was no other vegetation that would support under-planting or a forage species. The Director noted a Temporary Field Authorization was issued to seed a forage mix and did not authorize the Appellant to seed a nurse crop.

[79] The Director submitted contrary to the Appellant's assertions the photographs were taken in the AEP inspection included detailed descriptions identifying each location in each photograph. The Director said the inspection included a sketch showing where the GRL was not adequately fenced to confine livestock, where cropping on GRL occurred, and where cattle were expected to be found. The Director stated the inspecting officers made observations at numerous locations on the GRL.

[80] The Director submitted a different decision-maker made a finding of fact in issuing the Administrative Penalty and those findings of fact remain uncontested. The Director stated a challenge to those facts is beyond the scope of this appeal.

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allowed on it."

[9] Section 56(1) of PLAR reads: "Subject to any approval issued under subsection (2), the holder of a grazing disposition shall not cause or allow the clearing, breaking, ploughing, cultivating or surface disturbance of the land under the grazing disposition."

[81] The Director stated the Appellant admitted to not paying the $7,800.00 Administrative Penalty, which remained outstanding as of August 27, 2019. The Director said that although the debt is a ground for refusal, the Director did not rely upon it in refusing the Appellant's application for renewal.

[82] The Director requested the Board find the Director did not err in the determination of a material fact on the face of the record and did not err in law when she decided to refuse to issue the GRL to the Appellant. The Director submitted the Board should recommend the Minister confirm the Director's decision and dismiss the appeal.

C. Appellant Rebuttal

[83] The Appellant submitted the fencing on the GRL was neglected by the former GRL holders and required a significant investment of $19,315.00 to construct and repair. The Appellant stated that to maintain the fencing, the Appellant had to deal with constant damage from large wildlife such as elk, and inhospitable and uneven terrain.

[84] The Appellant said it took steps to construct and repair the fencing to ensure confinement of livestock in accordance with section 53(3)(a) of PLAR. The Appellant stated this was evidenced through the successful confinement of cattle within the boundaries of the GRL in 2016 and 2017.

[85] The Appellant submitted the photographs from AEP's inspection do not reflect the reality of the whole GRL. The Appellant stated that none of the photographs noted an absence of trampling, manure, grazed forage, or any signs of cattle. The Appellant said the photographs focused on the condition of the fencing and the area with voluntary rye and did not make an assessment of cattle grazing.

[86] The Appellant noted that the only photographs of the pasture were taken on May 13, 2016, before cattle were put on the GRL by the Appellant on June 29, 2016. The Appellant said the photographs were not related to fencing.

[87] The Appellant submitted the Director's allegation that the cattle purchased by the Appellant were grazed elsewhere was not supported by evidence.

[88] The Appellant submitted Mr. Leo Meyer's actions concerning the cropping of rye and planting of triticale were done for the best interests of the GRL and based on the direction of AEP to plant such crops. The Appellant stated arguments from the Director that the Appellant breached the GRL's terms and conditions, or section 56(1) of PLAR, cannot stand.

[89] The Appellant said the Director acknowledged volunteer crops grow on their own as a result of past-farming practices. The Appellant noted there was no evidence of any planting of rye on the GRL since April 1, 2015, when it was assigned to the Appellant.

[90] The Appellant stated triticale was seeded as a forage crop to comply with the direction of AEP, and AEP mistook it as a production crop.

[91] The Appellant submitted that the Director's refusal to renew the GRL was not fully informed and contained significant errors in fact and, therefore, the Director did not have authority under section 15.1 of the Act to refuse the application.

[92] The Appellant requested the Board find the Director erred in the determination of material facts on the face of the record and erred in law. The Appellant asked the Board to recommend to the Minister the appeal be granted, and the GRL issued in the Appellant's name.

D. Admissibility of Documents

1. Director

[93] The Director requested the Disputed Documents be struck and not form part of the evidence in the appeal, as none of the documents were in the Director's record. The Director noted section 120 of the Act states: "An appeal under this Act must be based on the decision and the record of the decision-maker."

[94] The Director also referred to section 209(f) of PLAR, which states: "'director's file', in respect of a prescribed decision made by the director, means records of the Department that are considered by the director in making the decision...."

[95] The Director submitted the Director's record was complete after she had provided the documents that were inadvertently left out.

[96] The Director noted Tabs 1 and 3 of the Disputed Documents are letters to the Board dated August 16, 2019, and are unsworn statements from witnesses. The Director stated

that by including unsworn statements in the Appellant's submission, the Director was denied the opportunity to test the evidence of the two witnesses. The Director noted procedural fairness dictates that each party should have an opportunity to cross-examine the witnesses of the opposing party.

[97] The Director said the Appellant provided no notice it was going to rely on the letters, which prevented the Director from considering a preliminary motion to determine their admissibility.

[98] The Director submitted the June 8, 2018 Intent Not to Issue letter offered the Appellant the opportunity to submit representations as to why the GRL should be issued and placed no restrictions on the nature and scope of the documents the Appellant could provide. The Director submitted that the Appellant was attempting to use the hearing submission process to bolster its previous representations.

[99] The Director submitted the Appellant should have provided the fencing invoices in the Disputed Documents to the Director before she made her decision to refuse to issue the GRL to the Appellant. The Director noted that all the fencing invoices are dated before the date of the Director's Decision, yet the Appellant chose not to provide them. The Director said she did not have the opportunity to consider the new evidence contained in the Disputed Documents before she issued her Decision.

[100] The Director submitted the Disputed Documents should not be admitted, given the nature of appeals under the Act and PLAR.

2. Appellant

[101] The Appellant submitted the Board should consider the Disputed Documents as they contain information relevant and material to the Board's decision. The Appellant said the Director should have sought out such documents and information in making a fully informed decision.

[102] The Appellant noted that the Director requested a hearing by written submission, which prevents the cross-examination of witnesses.

[103] The Appellant stated the letters in Tabs 1, and 3 support the Appellant's claim it utilized the GRL for cattle grazing, its significant investment in fencing, and its stewardship of the GRL.

[104] The Appellant submitted that the Director had many opportunities to review and respond to the Appellant's documents in the Director's Reply Submissions.

[105] The Appellant stated it is a question of procedural fairness for the Board to hear and consider all relevant and material information. The Appellant said the Board should give due consideration to documents directly related to the issues under appeal.

V. ANALYSIS

A. Admissibility of Disputed Documents

[106] When the Board determines whether certain evidence is admissible, the first consideration is the governing legislation, being the Act and PLAR. The Act and PLAR do not directly address what evidence is admissible, but section 120 of the Act states: "An appeal under this Act must be based on the decision and the record of the decision-maker." In this appeal, the decision the appeal is based on is the Director's decision to refuse to re-issue the GRL to the Appellant. (In the language of the legislation, it is "refuse to issue," as the legislation does not use the phrase renew.)

[107] Section 209(m) of PLAR states, "'record' means record as defined in the *Freedom of Information and Protection of Privacy Act*...." The *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP"), section 1(q) defines "record" as follows:

> "'record' means a record of information in any form and includes notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records...."

According to these definitions, an appeal to the Board must be based on an appealable decision of the Director and the "record" of the Director, as defined in FOIP.

[108] The Board may consider evidence not in the Director's record if that evidence is rationally connected to the evidence in the Director's record. By "rationally connected," the

Board means evidence that clarifies, provides details, or helps the Board understand the evidence in the Director's record. The Board will determine how much weight to assign the evidence-based on how rationally connected the evidence is to the Director's record, whether the Director had the opportunity to consider the evidence when making the decision, and whether procedural fairness requires a greater or lesser weight be given.

[109] In this appeal, the Appellant introduced the six Disputed Documents with its submissions. The Director objected to the Disputed Documents and requested the Board not consider them. One reason the Director gave for objecting to the Disputed Documents is that in a written hearing, the evidence cannot be tested by a cross-examination. The Board notes the Director twice requested a written hearing for this appeal. The consequence of a written hearing is that there is no opportunity to cross-examine and test evidence.

[110] The Appellant submitted the Disputed Documents contain information relevant and material to the appeal and should be admitted based on the principles of procedural fairness.

[111] The Board considered the submissions of the Parties, the legislation, and relevant case law in making its decision regarding the admissibility of the Disputed Documents. The Board decided to admit the Disputed Documents and assign them the appropriate weight. The Board found as follows:

(a) Tabs 1 and 3 were unsworn statements. The Board cannot rely on unsworn statements, as there is no way to determine the truth of the statements. The documents under Tabs 1 and 3 were assigned low weight;

(b) Tab 2 was an invoice pertaining to the fencing and ditching of the dugout. The invoice was of no assistance to the Board was assigned no weight;

(c) Tab 4 consisted of invoices showing the Appellant purchased cattle on certain dates. The Board found the invoices by themselves did not prove cattle were grazed on the GRL. The Board assigned the invoices low weight;

(d) Tab 5 was an aerial photo showing cultivated pasture in the GRL. The Board found the photo to be of limited value as it did not address the question of unauthorized use of the GRL. The Board assigned the photo low weight; and

(e) Tab 6 was a Western Procedure article on triticale. The article did not assist the Board in its deliberations and was assigned no weight.

[112] The Board found the Disputed Documents were of little value in its considerations.

B. Fencing

[113] The GRL terms and conditions stated in condition 10: "The land shall be enclosed by a satisfactory fence before livestock is allowed on it." Section 27 of PLAR states: "The holder of a disposition must, at the holder's sole expense, comply with any written direction of the director respecting the construction, maintenance, and repair of any fences, gates and cattle guards bounding or within the subject land." Condition 10 of the GRL and Section 27 of PLAR make it clear that the fence must be satisfactory to the Director.

[114] The Director's record reveals a history of fencing issues with the GRL, both before and after the Appellant was assigned the lease.

[115] On June 24, 2011, AEP wrote Mr. Leo Meyer, who was then the leaseholder and advised him "[t]he area covered by the disposition must be fenced prior to livestock entry.... Fences are to be kept in good repair at all times."[10]

[116] On April 1, 2015, AEP wrote the Appellant and advised it of the fencing requirement using the same wording as the June 24, 2011 letter.[11]

[117] An inspection done by AEP on August 17, 2015, found: "Fences are largely in poor condition (overgrown), however, they may be adequate to contain livestock. The lessee stated during a discussion in the fall of 2015 that he was redoing all the perimeter lines and fences."

[118] AEP wrote the Appellant on May 18, 2016, about renewing the GRL. On the topic of fencing, the letter stated:

> "At the time of inspection, it was noted that the fences were overgrown and in disrepair. Some of the lines were overgrown. However, you received a Temporary Field Authorization (TFA) in November 2015 (expiring in November 2016) to clear the perimeter fence lines on the lease, for the purpose of repairing fences. You stated on your SSAF that the fence repairs have been completed."

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10 Director's record, at Tab 6.

11 Director's record, at Tab 7.

It was recommended the GRL be renewed for a further ten years. It is clear from the letter that AEP relied on the information provided by the Appellant in the SSAF that the fence had been repaired.

[119] On July 24, 2018, AEP conducted another investigation that included photos of the fence at multiple locations around the GRL.[12] The photographic evidence of the fence at multiple locations around the GRL shows:

(a) fence posts out of the ground;
(b) single strands of fence wire loosely attached to a post or lying on the ground;
(c) the fence line is overgrown;
(d) bush debris piled against the tree line;
(e) breaks in the fence to allow open access to roads or fields;
(f) wire wrapped around trees instead of posts;
(g) old fencing not removed;
(h) open and missing gates; and
(i) a spool of wire lying on the ground.

[120] Having reviewed the evidence, the Board finds the poor condition of the fence cannot be solely attributed to large animals, as claimed by the Appellant. The Board finds the fence was in serious disrepair in many places and not sufficient to contain livestock.

[121] The Director provided the Appellant with the opportunity to remedy the fencing contraventions, and the Appellant did not comply. Fencing is a significant component of the proper utilization of a grazing lease. As grazing leases may be utilized only during defined periods and at a predetermined carrying capacity, proper fencing is a component of good stewardship. The ability to lease public land is a privilege that includes the obligations associated with the use of a grazing lease. The Board finds the Appellant did not fulfill its responsibility to fence and maintain the fencing properly, as required under the conditions of the grazing lease agreement and the legislation. The Board does not accept the argument put forward by the Appellant that the damage to the fence was caused by elk or other large animals. Regardless of the cause of the damage, leaseholders are expected to repair and maintain the fences on their leases.

[122] The Board finds the Director did not err in the determination of material fact on the face of the record in determining the fences were not maintained in a satisfactory manner as to enclose the lands for livestock.

C. Cropping and cultivation

[123] In her Decision, the Director stated one of her reasons for refusing to issue the GRL to the Appellant was that the Appellant, or a third party, was cropping the lands in the GRL, despite AEP's multiple notices to the Appellant to cease cropping and to seed tame pasture.

[124] The Appellant submitted that if cropping was occurring, it was done without its authorization. The Appellant stated the rye was a voluntary crop and the triticale was seeded to help return the land to a suitable grazing condition.

[125] AEP's May 18, 2016, letter to the Appellant stated:

> "During the field inspections in August, 2015, it was noted that the field on NW-77-6-W6 was in cultivation and had been harvested (Field B, as per the attached sketch). During our phone conversation on November 6, 2015, you mentioned it had been subleased to a third party for cultivation purposes. It was made clear during this conversation and the follow-up Notice of Non-Compliance that subleasing and unauthorized cultivation are unacceptable activities on grazing dispositions, and the area must be seeded to a pasture mixture by June 2016."[13]

[126] An inspection of the GRL on August 3, 2016, found the cultivation and cropping were still occurring. Almost two years later, another AEP inspection on July 24, 2018, included photos of the GRL showing parts of it planted with a crop. An investigation on August 26, 2018, included aerial photos of a harvested field within the GRL.

[127] Condition 8 of the GRL states: "The lessee agrees that no range improvement will be undertaken on the lease area unless prior written approval has been obtained from the appropriate District Rangeland Agrologist."[14]

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12 Director's record, at Tab 43.

13 Director's record, at Tab 20.

14 Grazing Lease Agreement, Director's record, at Tab 4.

[128] Section 56(1) of PLAR provides: "Subject to any approval issued under subsection (2), the holder of a grazing disposition shall not cause or allow the clearing, breaking, ploughing, cultivating or surface disturbance of the land under the grazing disposition."

[129] The Appellant proceeded with rangeland improvements without prior written approval from AEP and did not comply with AEP directions to cease the cultivation and cropping of the GRL lands.

[130] Regardless of whether the rye was a voluntary crop, the Appellant had the responsibility to bring the GRL into compliance. AEP advised the Appellant it was required to return the pasture to an equivalent state by seeding with an acceptable pasture mix and warned that failure to comply with this direction may jeopardize the tenure of the GRL. The Appellant submitted it was preparing the GRL for a return to pasture by seeding with triticale, but the use of triticale was not approved by AEP. The Appellant failed to follow AEP's directives.

[131] The Board finds the Director did not err in the determination of material fact on the face of the record in determining the Appellant was not in compliance with the GRL, the Act, and PLAR, by allowing unauthorized cultivation and cropping on the GRL.

D. Dugout

[132] In the Decision, the Director listed the construction of an unauthorized dugout on the GRL as one of the reasons for refusing to issue the GRL to the Appellant. The Board found the aerial photographs taken in the summer of 2015 to be of such poor quality that the Board was unable to determine if a dugout had previously existed or was constructed after the photograph was taken. The Board finds there is insufficient evidence the Appellant constructed an unauthorized dugout and therefore this is not a proper reason for the Director to refuse to issue the GRL.

E. Utilization

[133] The Director stated in her Decision there was no evidence of livestock grazing on the GRL and, therefore, the Appellant did not utilize the GRL as required under the terms and conditions of the GRL and in accordance with the directions from AEP. The Appellant provided SRFs to AEP that indicated cattle were grazed on the GRL. The Board found there was not sufficient evidence from either Party to make a conclusive determination on whether livestock

had grazed on the GRL after it was assigned to the Appellant. The Board finds the evidence the Appellant did not utilize the GRL as required to be insufficient for the Director to include as one of the reasons for her Decision.

F. Administrative Penalty

[134] The Appellant noted that the Director acknowledged the Decision was based on the same set of facts as outlined in the Administrative Penalty. The Appellant submitted the Administrative Penalty, and the Director's Decision creates an unfair situation for the Appellant where it is receiving "double punishment" for the same alleged contraventions.

[135] Although they share identical backgrounds, the Administrative Penalty and the Director's Decision are two different matters. The Board is not able to hear arguments related to the Administrative Penalty, as it is not before the Board in this appeal.

[136] The Board notes the Act and PLAR do not prohibit the Director from refusing to issue a grazing lease if AEP has already issued an administrative penalty for contraventions of the legislation on the same public lands. The Director's Decision and the Administrative Penalty do not create a situation of "double punishment" as suggested by the Appellant. Therefore, the Board does not accept the Appellant's argument that it is being punished twice for the same offence.

G. Error in Law

[137] The Appellant submitted the Director erred in law in refusing to issue the GRL under section 15.1 of the Act. Section 15.1 of the Act states:

> "The director may refuse to issue, mortgage, assign, transfer, sublet or renew a disposition if the applicant
>
> (a) is indebted to the Crown, or
>
> (b) is otherwise in non-compliance with this Act or the regulations [(PLAR)]."

[138] The Board finds the Appellant was non-compliant with PLAR on the issues of fencing, cultivation, and cropping. Therefore, the Director acted within her jurisdiction to refuse to issue the GRL to the Appellant. There was no error in law.

VI. CONCLUSION

[139] Section 124(1) and (2) requires the Board to submit this report to the Minister and to make a recommendation the Minister confirm, reverse, or vary the Director's decision to refuse to issue the GRL to the Appellant.[15]

[140] For the Board to recommend the Minister reverse or vary the Director's decision, the Appellant must prove the Director, in deciding not to issue the GRL to the Appellant:

(a) erred in the determination of a material fact on the face of the record; or

(b) erred in law.

[141] The Director said she decided not to issue the GRL to the Appellant because the Appellant failed to comply with the conditions of the GRL, the Act, and PLAR. The Director gave four reasons to support her decision:

(a) the Appellant failed to maintain fences in a satisfactory manner as to enclose the lands for livestock;

(b) the Appellant allowed unauthorized cultivation and cropping to occur on the GRL;

(c) the Appellant constructed a dugout on the GRL without authorization; and

(d) the Appellant did not utilize the GRL as required under the GRL and according to the directions from AEP.

[142] The Board may recommend the Director's decision be confirmed if the Board finds:

- at least one of the Director's reasons is supported by the evidence presented;
- the Director followed the legislation; and
- the Director did not breach the principles of procedural fairness in reaching her decision.

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[15] Section 124(1) and (2) reads:

"(1) 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."

To recommend the Minister confirm the Director's decision to refuse to issue the GRL to the Appellant, the Board is not required to find the Director was correct in each reason she used to make the decision.

[143] The Board reviewed the evidence for each of the reasons listed by the Director. The Board found the Director did not err in the determination of a material fact on the face of the record in determining the Appellant failed to maintain fences in a satisfactory manner as to enclose the lands for livestock and allowed unauthorized cultivation and cropping to occur on the GRL.

[144] There was insufficient evidence for the Board to make a conclusive finding whether the Appellant constructed a dugout on the GRL without authorization. Further, there is insufficient evidence for the Board to find the Appellant did not utilize the GRL as required under the terms of the GRL and according to the directions from AEP.

[145] The Board found the Director did not err in law in deciding to refuse to issue the GRL to the Appellant. The Director properly exercised her authority under section 15.1 of the Act and did not breach the principles of procedural fairness in reaching her decision.

VII. RECOMMENDATION

[146] The Board recommends the Minister confirm the decision of the Director to refuse to issue the GRL to the Appellant.

Dated on October 28, 2019, at Edmonton, Alberta.

-original signed-

Gordon McClure
Board Chair

-original signed-

Brenda Ballachey
Panel Member

-original signed-

Tim Goos
Panel Member

ALBERTA
ENVIRONMENT AND PARKS

Office of the Minister
Government House Leader
MLA, Rimbey-Rocky Mountain House-Sundre

Ministerial Order
50/2019

Public Lands Act
R.S.A. 2000, c. P-40;

and

Public Lands Administration Regulation
Alta. Reg. 187/2011.

Order Respecting Public Lands Appeal Board
Appeal No. 18-0019

I, Jason Nixon, Minister of Environment and Parks, pursuant to section 124 of the *Public Lands Act*, make the order in the attached Appendix, being an Order Respecting Public Lands Appeal Board Appeal No. 18-0019.

Dated at the City of Edmonton, Province of Alberta, this 31 day of oct, 2019.

Jason Nixon
Minister

323 Legislature Building, 10800 97 Avenue, Edmonton, Alberta T5K 2B6 Canada Telephone 780-427-2391 Fax 780-422-6259

Appendix

Order Respecting Public Lands Appeal Board Appeal No. 18-0019

With respect to the decision of the Director, Approvals and Dispositions Services Unit, Provincial Approvals Section, Operations Division, Alberta Environment and Parks, (the "Director"), not to issue Grazing Lease GRL 39154 to MM Corp., I, Jason Nixon, Minister of Environment and Parks, order that:

1. The decision of the Director not to issue Grazing Lease GRL 39154 to MM Corp. is confirmed.