

ALBERTA PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – March 23, 2022

IN THE MATTER OF sections 82, 121 and 123 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 211, 212, 213, and 216 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by Everett Normandeau, with respect to the decision of the Director, Lands Delivery & Coordination South Branch, Lands Division, Alberta Environment and Parks, to refuse to withdraw land from grazing lease GRL 35454 held by Stanley Jensen.

Cite as: Jurisdiction Decision: *Normandeau v. Director, Lands Delivery & Coordination South Branch, Lands Division, Alberta Environment and Parks, re: Stanley Jensen* (23 March 2022), Appeal No. 21-0008-ID1 (A.P.L.A.B.), 2021 ABPLAB 3.

BEFORE:

Mr. Gordon McClure, Appeals Co-ordinator
and Board Chair.

WRITTEN SUBMISSIONS BY:

Appellant: Mr. Everett Normandeau, represented by Mr.
R. Alex Kennedy, Worobec Law Offices.

Director: Mr. Stephen Shenfield, Director, Lands
Delivery & Coordination South Branch, Lands
Division, Alberta Environment and Parks,
represented by Mr. Paul Maas, Alberta Justice
and Solicitor General.

Lease Holder: Mr. Stanley Jensen

EXECUTIVE SUMMARY

The Appellant, Mr. Everett Normandeau, owns land adjacent to a public lands grazing lease held by Mr. Stanley Jensen. The Appellant applied to the Director, Lands Delivery & Coordination South Branch, Lands Division, Alberta Environment and Parks, to have a portion of land withdrawn from the grazing lease. The Appellant advised the Director that if land was withdrawn from the grazing lease the Appellant would apply for a disposition to use the land to access his property. The Director refused the application and stated the decision was not appealable. The Appellant appealed to the Public Lands Appeal Board.

The Board set the following issues to be determined before the appeal could proceed:

1. Is the appeal *res judicata*, meaning the Board had already settled the issue?
2. Is a decision made under section 82(1) of the *Public Lands Act* appealable to the Board?
3. Is the Appellant prohibited from appealing the decision because of the lack of third-party participatory rights?

After receiving and considering the written submissions from the parties, the Board found:

1. Although the Appellant represented the previous owner in an appeal before the Public Lands Appeal Board regarding the same GRL, the current matter did not meet the criteria for *res judicata* as the issue and parties are different from the previous appeal.
2. A decision under section 82(1) of the *Public Lands Act* is appealable if the substance or effect of a decision corresponds with the range of prescribed decisions listed in section 211 of *Public Lands Administration Regulation*. The Director's Decision corresponds to a refusal to amend a disposition and is appealable under section 211(c).
3. Third-party participatory rights are implied in section 82(1) of the *Public Lands Act*.

The Board found it had jurisdiction to hear the appeal. The Appellant's Notice of Appeal was properly before the Board, and the appeal may proceed on its merits.

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	DECISION	1
III.	BACKGROUND	1
IV.	ISSUES	3
V.	ANALYSIS	3
A.	Is the appeal <i>res judicata</i> ?	3
B.	Is a decision under section 82(1) of the <i>Public Lands Act</i> appealable to the Board?	5
C.	Is the Appellant prohibited from appealing the Director's Decision because of the lack of third-party participatory rights?	12
VI.	DECISION	17

I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board (the “Board”) regarding whether it has the jurisdiction to hear the appeal by Mr. Everett Normandeau (the “Appellant”) of the decision of the Director, Lands Delivery & Coordination South Branch, Lands Division, Alberta Environment and Parks (the “Director”), to refuse to withdraw land from Grazing Lease 35454 (the “GRL”). Mr. Stanley Jensen is the grazing lease holder.

II. DECISION

[2] The Board finds:

- (a) the appeal is not barred by the principle of *res judicata*;
- (b) a decision under section 82(1) of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the “Act”), is appealable if the substance or effect of a decision corresponds with the range of prescribed decisions listed in section 211 of the *Public Lands Administration Regulation*, A.R. 187/2011 (“PLAR”). The Director’s decision corresponds to a refusal to amend a disposition and is appealable under section 211(c); and
- (c) third-party participatory rights are implied in section 82(1) of the Act.

[3] The Board has jurisdiction to hear the appeal. The Notice of Appeal is properly before the Board, and the appeal may proceed on its merits.

III. BACKGROUND

[4] The Appellant is the owner of land located at SW 35-30-7 W5M (the “Land”), east of the Town of Didsbury in Mountain View County. On September 24, 2021, the Appellant requested the Director withdraw a portion of the lands from the GRL to facilitate access to the Land, and said the request was made under section 82(1) of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the “Act”), which states:

“Sixty days after the date on which the director mails a notice in writing to the last known address of the lessee, the director may cancel a lease or withdraw any part of the land contained in a lease

- (a) when, except in the case of a lease conveying rights to sand, silica sand, topsoil, peat, gravel, clay or marl, the director is satisfied that the land

contained in the lease or to be withdrawn from it contains sand, silica sand, topsoil, peat, gravel, clay or marl in commercial quantities,

- (b) when the land contained in the lease or to be withdrawn from it is to be subdivided or made the subject of a disposition that will authorize its use for industrial or commercial purposes,
- (c) when the land contained in the lease or to be withdrawn from it is to be designated as a park pursuant to the *Provincial Parks Act* or added to a park designated under that Act or its predecessors, or is to be set aside as a public resort or recreation area,
- (d) when the land contained in the lease or to be withdrawn from it is, in the opinion of the director, irrigable in whole or in part,
- (e) when the land contained in the lease or to be withdrawn from it is required to provide public access to a public resort or recreation area or to a river, stream, watercourse, lake or other body of water,
- (f) when, in the opinion of the director, the land contained in the lease or to be withdrawn from it is required for a purpose that the director considers to be in the public interest, or
- (g) when, in the opinion of the director, the land contained in the lease or to be withdrawn from it is required for the purposes of an applicable ALSA regional plan.”

[5] On December 8, 2021, the Director wrote to the Appellant and refused to grant the request (the “Decision”). The Appellant filed a Notice of Appeal with the Board on December 8, 2021. The Appellant alleged the Director, in making the Decision, erred in the determination of a material fact on the face of the record, and erred in law.

[6] On December 10, 2021, the Board noted the Director had stated in the Decision that the matter was not appealable under the *Public Lands Administration Regulation*, A.R. 187/2011 (“PLAR”). By filing a Notice of Appeal with the Board, the Appellant indicated he disagreed with the Director. The Board determined that before the appeal could proceed, the question of whether the Board had jurisdiction to consider the appeal needed to be resolved. The Board requested the Director provide documents related to the Director’s decision and also requested the Director, Mr. Jensen, and the Appellant (the “Parties”) provide written submissions on whether the appeal was properly before the Board. The Board received submissions from the Parties between January 10, 2022, and January 31, 2021.

IV. ISSUES

[7] The Board requested the Parties provide submissions on the issue of whether the appeal is properly before the Board. In reviewing the submissions, the Board noted the following sub-issues would assist the Board in making its determination:

- A. Is the appeal *res judicata*?
- B. Is a decision made under section 82(1) of the *Public Lands Act* appealable to the Board? and
- C. Is the Appellant prohibited from appealing the Decision because of the lack of third-party participatory rights?

V. ANALYSIS

A. Is the appeal *res judicata*?

(i) *Submissions*

[8] The Director submitted the Board had already decided on the issues currently before the Board in its decision *Conklin Aggregates v. Director* (“*Conklin*”).¹ The Director stated that in *Conklin*, the Appellant applied to Alberta Environment and Parks (“AEP”) for an overlapping disposition involving the same lands and GRL, but was refused because the application did not have the consent of the GRL holder, Mr. Jensen. The Director alleged the current appeal was an attempt by the Appellant to circumvent the statutory requirement for the GRL holder’s consent.

[9] The Appellant argued the current appeal is about a different question, “whether there is any alternate path for an applicant who requires a disposition on overlapping land.”² The Appellant submitted that if there is no alternate path, then the legislation has the effect of making a disposition holder a “quasi-owner” of the public lands.

¹ *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.).

² Appellant’s Rebuttal Submission, January 31, 2022, at paragraph 9.

[10] Mr. Jensen noted the Board made a decision on June 5, 2018, in *Conklin*, regarding a previous application. Mr. Jensen stated that the previous owner of the land hired Conklin Aggregates Ltd., which Mr. Jensen said was registered to the Appellant. Mr. Jensen stated the Board upheld the original decision in *Conklin* to refuse the application in that appeal.³

(ii) Analysis

[11] On June 16, 2017, the Board received a Notice of Appeal from Conklin Aggregates Ltd., appealing the Director's decision to refuse an application for a Department Licence of Occupation (the "DLO") for a road that would cross the GRL. The Director refused the application because it did not include the consent from the GRL holder, Mr. Jensen. After a hearing into the matter, the Board provided a Report and Recommendations to the Minister, Environment and Parks. The Minister issued an order on September 10, 2018, confirming the Director's decision to reject the application.

[12] The Board notes the appellant and landowner in *Conklin* is not the Appellant in the current appeal, although Mr. Normandeau was involved in the appeal as a representative of Conklin Aggregates Ltd. After the appeal was heard, Mr. Normandeau purchased the Land from the previous owner.

[13] The Board cannot hear a matter that has already been conclusively decided. Section 123(6) of the Act states: "The appeal body shall dismiss a notice of appeal if a matter has been adequately dealt with through a hearing or review under any enactment." Section 123(6) codifies the doctrine of *res judicata*, which is defined as: "an issue that has been definitively settled by judicial [or quasi-judicial] decision."⁴

[14] The Supreme Court of Canada set the requirements for *res judicata* in the case of *Danyluk v. Ainsworth Technologies Inc.*⁵ The Court said for *res judicata* to apply, the following must be present:

³ Jensen's Response Submission, January 24, 2022. While the Board found Mr. Jensen's submission to be useful background information, the submission did not address the legal arguments which are central to this preliminary decision.

⁴ Black's Law Dictionary (11th ed. 2019), *res judicata*.

- (a) the same issue must be involved;
- (b) the original decision must be final;
- (c) the same parties or their agents must be involved; and
- (d) as a discretionary matter, it must be fair and just to apply the doctrine of *res judicata* in the particular circumstances.

[15] In applying the Court's test to this appeal, the Board finds:

- (a) The issue decided in the *Conklin* appeal is different than the issue in this appeal. In *Conklin* the appellant was appealing the refusal of the Director to grant a disposition overlapping the GRL without the GRL holder's consent. In this appeal, the Appellant is appealing the refusal of the Director to withdraw land from the GRL. The two refusals involve different sections of the legislation and different requirements. The issue raised in the current appeal was not raised or argued in the *Conklin* appeal, nor could it have been given the circumstances.
- (b) The Minister's decision in *Conklin* was final, but as the issues in the two appeals are different, this aspect of the test for *res judicata* is not applicable.
- (c) While Mr. Normandeau was the agent for the landowner in *Conklin*, he is now the landowner in this appeal. He is acting on his own behalf, not on the previous owner's.
- (d) While the ultimate goal in the appeal is the same as in *Conklin* - access through the GRL - the Appellant has raised a new issue for the Board's consideration. Fairness demands that the principles of *res judicata* not be applied mechanically,⁶ as facts and circumstances may evolve.

[16] The differences between the facts in *Conklin* and the facts in this appeal are significantly different for the Board to find that *res judicata* does not apply.

B. Is a decision under section 82(1) of the *Public Lands Act* appealable to the Board?

[17] Section 82(1) of the Act states:

“Sixty days after the date on which the director mails a notice in writing to the last known address of the lessee, the director may cancel a lease or withdraw any part of the land contained in a lease

⁵ *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 (S.C.C.).

⁶ *Crescenzo v. Vancouver (City) Board of Variance*, 2015 BCSC 504.

- (a) when, except in the case of a lease conveying rights to sand, silica sand, topsoil, peat, gravel, clay or marl, the director is satisfied that the land contained in the lease or to be withdrawn from it contains sand, silica sand, topsoil, peat, gravel, clay or marl in commercial quantities,
- (b) when the land contained in the lease or to be withdrawn from it is to be subdivided or made the subject of a disposition that will authorize its use for industrial or commercial purposes,
- (c) when the land contained in the lease or to be withdrawn from it is to be designated as a park pursuant to the *Provincial Parks Act* or added to a park designated under that Act or its predecessors, or is to be set aside as a public resort or recreation area,
- (d) when the land contained in the lease or to be withdrawn from it is, in the opinion of the director, irrigable in whole or in part,
- (e) when the land contained in the lease or to be withdrawn from it is required to provide public access to a public resort or recreation area or to a river, stream, watercourse, lake or other body of water,
- (f) when, in the opinion of the director, the land contained in the lease or to be withdrawn from it is required for a purpose that the director considers to be in the public interest, or
- (g) when, in the opinion of the director, the land contained in the lease or to be withdrawn from it is required for the purposes of an applicable ALSA regional plan.”

(i) Submissions

[18] The Director noted that not all decisions made under the legislation are appealable to the Board, and that section 211 of PLAR “refers explicitly to specific types of decisions, including by referring to specific sections of the Act and [PLAR].”⁷ The Director stated that section 211 of PLAR does not list section 82(1) of the Act as decisions from which an appeal is available, and does not refer withdrawals of land as an appealable decision.

[19] The Director submitted a decision to withdraw land from a lease is different from an amendment to a disposition, which are addressed elsewhere in the Act. The Director stated the legislative intent of section 82(1) of the Act was to “treat withdrawals and amendments as distinct and separate concepts. The Director noted that section 81(1.1) of the Act distinguished between amendments and withdrawals as follows: “Where the director is authorized to cancel or

⁷ Director’s Response Submission, January 24, 2022, at paragraph 33.

amend a lease under subsection (1)(a), the director may instead withdraw part of the land from the lease.” [Emphasis is the Director’s.]

[20] The Director stated:

“If a withdrawal from a lease under [section] 82(1) were an amendment, the Legislature could have indicated that a withdrawal is a class of amendment by explicitly defining it as such, by using the term ‘amend’ in [section] 82, by treating a [section] 82(1) withdrawal as a class of amendment, or by some other means. It did none of those things.”⁸

[21] The Director submitted the Act and PLAR must specifically authorize decisions that can be appealed to the Board. The Director said “being able to ‘colour’ a statutory decision as appealable is not sufficient to create a right of appeal.”⁹ The Director stated that any decision not clearly authorized in PLAR as appealable to the Board is left to the courts.

[22] The Appellant noted that section 10 of the *Interpretation Act*, R.S.A. 2000, c. I-8, stated: “An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.” The Appellant submitted that section 10 applies to how the Director’s decisions are determined to be appealable under PLAR. The Appellant argued, “... if a given decision is reasonably colourable as appealable, it is appealable.”¹⁰ The Appellant stated that the application was a request that the GRL be amended to remove the area contained in a cutline, following which the Appellant would apply for a disposition to allow the use of the cutline to access the Land. The Appellant submitted the Decision was a refusal to amend a disposition applied for under the Act, and was therefore appealable under section 211(c) of PLAR.¹¹

⁸ Director’s Response Submission, January 24, 2022, at paragraph 43.

⁹ Director’s Response Submission, January 24, 2022, at paragraph 48.

¹⁰ Appellant’s Initial Submission, January 10, 2022, at paragraph 12.

¹¹ Section 211(c) of PLAR states:

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

(c) a refusal to issue a disposition or to renew or amend a disposition applied for under the Act...”

[23] The Appellant submitted that the absence of the word “withdrawal” in section 211 does not mean a withdrawal is not appealable. The Appellant noted section 102 of the Act¹² addresses the issuance of a grazing lease, however the word issue or issuance are not included in that section. The Appellant asked: “Are we to conclude that the issuance (or refusal to issue) a grazing lease is not subject to appeal?”¹³

[24] The Appellant stated the Director decided the request was a matter under section 82(1) of the Act and, therefore was not appealable. The Appellant stated:

“With respect, just as it would be absurd for the Director’s decision to not be subject to appeal because he characterized it as a ‘refusal to grant a disposition’ rather than a ‘refusal to issue a disposition,’ it is absurd for the Director to claim that his decision is not appealable because he characterizes it as a ‘refusal to withdraw from a disposition’ rather than a ‘refusal to amend a disposition.’”¹⁴

(ii) Analysis

[25] The Board’s jurisdiction is set out in the Act and PLAR. Section 211 of PLAR sets out prescribed decisions of the Director that can be appealed to the Board. Some of the prescribed decisions are appealable under a specific section, and some are decisions that generally affect the management or administration of public lands.

¹² Section 102 of the Act provides:

- “(1) The director may in accordance with this Part lease public land for a term not exceeding 20 years for the purpose of grazing livestock when, in the director’s opinion, the best use that may be made of the land is the grazing of livestock.
- (1.1) Notwithstanding subsection (1), the director may in accordance with this Part
- (a) lease public land in a heritage rangeland for a term not exceeding 30 years, or
 - (b) amend any lease granted under subsection (1) in a heritage rangeland to extend the term to one not exceeding 30 years and to include other terms and conditions,
- if the lease is for the purpose of grazing livestock and the director is satisfied that ongoing grazing of livestock is essential for maintaining the grassland ecology and ensuring the effective management and lasting protection of the heritage rangeland.
- (2) A lease under this Part shall be called a grazing lease.
- (3) The area of land leased under this Part shall not exceed an area sufficient to graze 600 head of cattle, unless, in the opinion of the director, a larger area can be leased without adversely affecting the interests of other farmers or ranchers residing in the vicinity of the leased land.”

¹³ Appellant’s Rebuttal Submission, January 31, 2022, at paragraph 27.

¹⁴ Appellant’s Rebuttal Submission, January 31, 2022, at paragraph 30.

[26] The Board follows the accepted approach to statutory interpretation as outlined in *Rizzo and Rizzo Shoes Ltd. (Re)*,¹⁵ which can be summarized as:

“... the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”¹⁶

[27] The Board also looks to the *Interpretation Act*, R.S.A. 2000, c. I-8, which provides direction on how to interpret legislation. Section 10 of the *Interpretation Act* states:

“An enactment shall be construed as being remedial and shall be given the fair, large, and liberal construction and interpretation that best ensures the attainment of its objects.”

[28] The Act and PLAR are silent on whether the decision to withdraw, or not withdraw, land from a grazing lease is appealable. Without specific wording to review, the next step is to review the Legislature’s purpose, object and intent. Unfortunately, this is complicated because the legislation has never included wording to expressly indicate any purpose, object and intent of the Act.

[29] The Canadian Institute of Resources Law noted:

“The *Public Lands Act*, despite the broad scope suggested by its title, deals with a set of relatively specific issues relating primarily to the disposition of certain interests in public lands. This Act has no purpose section and contains no general provisions setting out principles, objectives or standards for the management of Alberta’s public lands as a whole.”¹⁷

[30] The Government of Alberta’s publication page for online access to the legislation provides a non-statutory statement of the purpose of the Act:

“The Act establishes the role of the Alberta government in managing public land. It sets out mechanisms by which rights in public land may be transferred by lease or sale. It provides for and defines the powers of the Minister and the Lieutenant Governor in Council with respect to establishing regulations to govern use and allocation of public land. The Act and its regulations also control public land use

¹⁵ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1988] 1 S.C.R. 27.

¹⁶ Ruth Sullivan & Elmer A. Driedger, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, ON: Butterworths, 2002) at page 1.

¹⁷ Steven A. Kennett and Monique M. Ross, “In Search of Public Land Law in Alberta,” Canadian Institute of Resources Law, CIRL Occasional Paper #5, January 1998, <<https://cir.ca/sites/default/files/Occasional%20Papers/Occasional%20Paper%20%235.pdf>>.

through the establishment of public land use zones, recreation areas and trails. The Act provides for appropriate use and management of public land and for the classification of the public land base in Alberta.”¹⁸

Based on the Alberta Government’s statement and a reading of the Act as a whole, the Act’s purpose can be summarized as, “the Act governs the Government’s management of public land for multiple uses and users.”

[31] PLAR likewise does not have a purpose section, although as a regulation, the necessity of a purpose statement is lesser than an act. PLAR contains the details and mechanisms for exercising the powers and responsibilities listed in the Act.

[32] In reviewing the legislation as a whole and the role of grazing leases in the legislation, the Board notes that grazing leases are included in the definition of “formal disposition” in the Act, section 1(o)(v), which states:

- (o) “formal disposition” means a disposition issued under the Act before or after the coming into force of this Regulation and bearing a title and number assigned by the Department for the purposes of identifying the disposition in the records of the Department, and includes numbered instruments bearing the title...
- (v) grazing lease...”

[33] As part of the purpose, object, and intent of the Act and PLAR, the Legislature provided for an appeal system so members of the public could appeal certain decisions by AEP related to formal dispositions, such as grazing leases. Section 211(a) to (d) of PLAR sets out which decisions related to dispositions can be appealed to the Board:

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

- (a) the issuance, renewal, amendment or suspension of a disposition issued under the Act;
- (b) the rejection of an application under the Act for a disposition,
- (c) a refusal to issue a disposition or to renew or amend a disposition applied for under the Act;
- (d) the imposition or variation under the Act of a term or condition of a disposition ...”

¹⁸ Alberta Government, *Public Lands Act*, Description <<https://open.alberta.ca/publications/p40>>.

These sections represent an extensive range of decisions that are appealable to the Board. It covers decisions related to the life of the grazing lease, from the initial application stage, through the operation of the grazing lease stage, to the end of the term of the grazing lease. The disposition holder can appeal penalties and orders that may be assessed during the grazing lease term or even after the grazing lease has expired. Clearly, the Legislature considered the right to appeal to be a significant and important part of the Act's overall purpose, object and intent.

[34] In reviewing the appeal provisions in the legislation, the Board takes a "fair, large, and liberal construction and interpretation" as required by the *Interpretation Act*. While the *Interpretation Act* should not be used to create appeal rights where the Legislature intended none, it does provide guidance where the legislation is silent or vague. A "fair, large, and liberal construction and interpretation" of the broad wording of the Act and PLAR suggests that a decision is appealable if it fits within one of the prescribed categories in section 211.

[35] In determining if a decision is appealable, it is essential to consider that decision's substance or effect. A decision must have a substance or effect that falls under section 211 for it to be appealable to the Board.

[36] The examination of the effect of a decision is supported in the renowned text, "Practice and Procedure Before Administrative Tribunals," which states:

"Every time an agency elects to do something (or to do nothing) it has made a decision. Decisions are the things the agency resolves to do, or not to do, to allow or not to allow. Every question before an agency results in a decision, even if that decision is to do nothing... It is not the name of a document which determines what it is. It is what the document does that determines its nature."¹⁹
[Emphasis is the Board's.]

[37] In this appeal, the Appellant requested the Director remove land from the GRL. The Director is authorized to withdraw land from a disposition under section 82(1) of the Act. A withdrawal of land from the GRL would change the terms of the disposition, and it would have to be amended to reflect the withdrawal. The Director refused the Appellant's request to withdraw land from the GRL.

¹⁹ Robert Macaulay, James Sprague & Lorne Sossin, "Practice and Procedure Before Administrative Tribunals" (Toronto: Thomson Reuters Canada Limited, 2021), at §28.1.

[38] At this stage in the appeal process, the Board cannot assess whether the Director was correct to refuse the Appellant's request to withdraw land from the GRL; the Board can only consider whether the Director's Decision is appealable. Had the Director agreed to withdraw land from the GRL, the grazing lease would have to be amended. Amendments to a disposition are prescribed decisions that are appealable under section 211(a) of PLAR. Likewise, a refusal to amend a disposition is a prescribed decision appealable under section 211(c) of PLAR. The Board finds the substance or effect of the Director's refusal to withdraw land from the GRL is a refusal to amend a disposition. As the refusal to amend a disposition is a prescribed decision appealable under section 211(c), the Board finds the Appellant may appeal the Director's Decision.

[39] The Board respectfully disagrees with the Director that an applicant who wishes to appeal a decision made under section 82(1) of the Act must resort to the Courts. In reviewing the Act as a whole, the Board finds that the Legislature intended an appeal process to be available for applicants, and was preferable to forcing applicants into the more costly and time-consuming judicial review process.

[40] While not every decision is appealable, the right of appeal is available if the substance or effect of a decision corresponds with the range of prescribed decisions listed in section 211 of PLAR.

C. Is the Appellant prohibited from appealing the Director's Decision because of the lack of third-party participatory rights?

(i) Submissions

[41] The Director submitted section 82(1) of the Act does not create participatory rights, and the Director was under no obligation to respond to the request to withdraw land or even make the Decision. The Director noted that other sections in the Act and PLAR provide for applications to the Director and require a response. The Director stated, "... there is nothing in the Act or the Regulation that provide a person with standing to make a request regarding

dispositions held by other parties...”²⁰ and that there is no process for making a withdrawal of land request.

[42] The Director argued there was no basis for the Appellant to make the withdrawal request as none of the matters listed in section 82(1)(a) to (f) of the Act²¹ were applicable to the circumstances. The Director submitted that as a matter of public policy, the absence of third-party participatory rights makes sense otherwise, third-parties could make withdrawal requests on existing dispositions to generate appealable decisions.

[43] The Appellant noted the Director argued that because section 82(1) does not directly reference an application process, the Director was not obligated to reply to the withdrawal application. The Appellant submitted it was “... contrary to the whole body of administrative law to contend that the Director's decisions are only appealable when he is required to make them, and that unilateral applications of his power are automatically without oversight.”²² The Appellant stated that whether the Director was obligated or not to make the Decision, the fact is that he did.

²⁰ Director’s Response Submission, January 24, 2022, at paragraph 57.

²¹ Section 82(1)(a) to (f) of the Act states:

“Sixty days after the date on which the director mails a notice in writing to the last known address of the lessee, the director may cancel a lease or withdraw any part of the land contained in a lease

- (a) when, except in the case of a lease conveying rights to sand, silica sand, topsoil, peat, gravel, clay or marl, the director is satisfied that the land contained in the lease or to be withdrawn from it contains sand, silica sand, topsoil, peat, gravel, clay or marl in commercial quantities,
- (b) when the land contained in the lease or to be withdrawn from it is to be subdivided or made the subject of a disposition that will authorize its use for industrial or commercial purposes,
- (c) when the land contained in the lease or to be withdrawn from it is to be designated as a park pursuant to the *Provincial Parks Act* or added to a park designated under that Act or its predecessors, or is to be set aside as a public resort or recreation area,
- (d) when the land contained in the lease or to be withdrawn from it is, in the opinion of the director, irrigable in whole or in part,
- (e) when the land contained in the lease or to be withdrawn from it is required to provide public access to a public resort or recreation area or to a river, stream, watercourse, lake or other body of water,
- (f) when, in the opinion of the director, the land contained in the lease or to be withdrawn from it is required for a purpose that the director considers to be in the public interest...”

²² Appellant’s Rebuttal Submission, January 31, 2022, at paragraph 33.

[44] The Appellant argued it could not be the case the Director only has to respond to an application if the section the application is submitted under mentions an application process. The Appellant noted there are powers in the Act and PLAR that can only be used on an application. The Appellant stated:

“For example, subsection 15(4) [of the Act]²³ permits the Director to amend a disposition if there is a conflict with a neighboring disposition; certainly the only way such a conflict could practically come to the Director's attention is by an application by one or both neighbors, and certainly the Director's decision about such a conflict is a decision about whether or not a given disposition is to be amended, and is subject to appeal.”²⁴

(ii) *Analysis*

[45] The Board finds there are two approaches to participatory rights in section 82(1). The first is to view participatory rights as a matter of standing. If the Appellant has standing to submit an appeal, and the appeal corresponds to one of the range of prescribed decisions, then the Appellant has participatory rights. Section 212 of PLAR states:

“The following persons have standing to appeal a prescribed decision:

- (a) a person to whom the decision was given...”

[46] The Appellant is “a person to whom the decision was given.” The Board has determined the Director’s refusal to withdraw land from the GRL corresponds with a refusal to amend a disposition. Therefore, the Decision is a prescribed decision that is appealable to the Board. As a person with standing to appeal the Decision, participatory rights for the Appellant are implied.

[47] The second approach is a pragmatic review of the legislation. Language is inherently imprecise in identifying all possible outcomes and meanings of the words used. Legislation cannot anticipate and articulate every circumstance that requires the law’s application. As Cameron Hutchison, a law professor at the University of Alberta stated:

²³ Section 15(4) of the Act states:

“If, in the opinion of the director, there is a conflict between the holder of a disposition and one or more other holders of a disposition concerning the whole or a part of the same parcel of land or adjoining land, the director may amend one or more of the relevant dispositions at any time if, in the opinion of the director, the amendment is necessary to resolve the conflict.”

“The world is a complex place where unanticipated facts or situations develop about which lawmakers, who have drafted rules in advance, could not contemplate. This can result in an absurdity when the statute’s terms are literally applied.”²⁵

[48] The first step in statutory interpretation is to look at the plain meaning of words used. If there is ambiguity, then the interpretation focuses on the purpose of the legislation. If the purpose of the legislation does not help understand the legislation, then the reasonable meanings of the words may be examined.²⁶

[49] The Board finds that the words of section 82(1) of the Act do not cover all aspects of what is necessary for the actions contemplated in the legislation to occur. Interpreting section 82(1) based solely on the plain meaning of the words, or even reasonable permissible meanings of the words, would result in an absurdity. The issue is not about the meaning of the words, but rather the pragmatic functioning of the clauses.

[50] The Director argued section 82(1) does not create third-party participatory rights, and stated, “... there is nothing in the Act or the Regulation that provide a person with standing to make a request regarding dispositions held by other parties.” However, the Board notes that section 82(1) implies participatory rights in several instances²⁷:

- 82(1)(a) authorizes the Director to withdraw land that contains certain surface materials.²⁸ How does the Director become aware of the existence

²⁴ Appellant’s Rebuttal Submission, January 31, 2022, at paragraph 34.

²⁵ Cameron Hutchison, *The Fundamentals of Statutory Interpretation* (Toronto: LexisNexis Inc., 2018), at page 9.

²⁶ See: *Alexis v. Alberta (Environment and Parks)*, 2002 ABCA 188.

²⁷ Director’s Response Submission, at paragraph 57.

²⁸ Section 82(1)(a) to (f) of the Act states:

“Sixty days after the date on which the director mails a notice in writing to the last known address of the lessee, the director may cancel a lease or withdraw any part of the land contained in a lease

- (a) when, except in the case of a lease conveying rights to sand, silica sand, topsoil, peat, gravel, clay or marl, the director is satisfied that the land contained in the lease or to be withdrawn from it contains sand, silica sand, topsoil, peat, gravel, clay or marl in commercial quantities...”
- (b) when the land contained in the lease or to be withdrawn from it is to be subdivided or made the subject of a disposition that will authorize its use for industrial or commercial purposes,
- (c) when the land contained in the lease or to be withdrawn from it is to be designated as a park pursuant to the *Provincial Parks Act* or added to a park designated under that Act or its predecessors, or is to be set aside as a public resort or recreation area,

of those surface materials? Presumably, a third-party can apply to have the land withdrawn from the lease for a surface material lease.

- 82(1)(b) authorizes the Director to withdraw land that is to be subdivided or made the subject of a disposition for industrial or commercial purposes. Again, a third-party with interest in applying for a disposition to use the land for industrial or commercial purposes is required for the withdrawal to even come to the attention of the Director.
- 82(1)(d) authorizes the Director to withdraw irrigable land. It is unlikely that the Director would withdraw the land unless a third-party had expressed interest or applied for a disposition to use the irrigable land.
- 82(1)(e) authorizes the Director to withdraw land to provide public access to a public resort, recreation area, a river, stream, watercourse, lake or body of water. How would the Director know that such access was needed? A third-party advocating for such access would likely be the source of an application for such a withdrawal.
- 82(1)(f) authorizes the Director to withdraw land that is required for a purpose in the public interest. The public interest could be brought to the Director's attention by a third-party.

[51] While the person initiating the actions listed in section 82(1) could be the leaseholder, the Director, or other AEP employees, it is more likely that it is a third-party that requests the withdrawal of the land for a particular purpose.

[52] Not only is third-party participatory rights implied in section 82(1), but it is necessary for the proper functioning of the provisions in the legislation. The purpose of the legislation and the intent of the Legislature clearly includes third-party participatory rights.

-
- (d) when the land contained in the lease or to be withdrawn from it is, in the opinion of the director, irrigable in whole or in part,
 - (e) when the land contained in the lease or to be withdrawn from it is required to provide public access to a public resort or recreation area or to a river, stream, watercourse, lake or other body of water,
 - (f) when, in the opinion of the director, the land contained in the lease or to be withdrawn from it is required for a purpose that the director considers to be in the public interest..."

VI. DECISION

[53] The Board finds:

- (a) the appeal is not barred by the principle of *res judicata*;
- (b) a decision under section 82(1) of the Act is appealable if the substance or effect of a decision corresponds with the range of prescribed decisions listed in section 211 of PLAR. The Director's Decision corresponds to a refusal to amend a disposition and is appealable under section 211(c); and
- (c) third-party participatory rights are implied in section 82(1) of the Act.

[54] The Board has jurisdiction to hear the appeal. The Notice of Appeal is properly before the Board and the appeal may proceed on its merits.

Dated on March 23, 2022, at Edmonton, Alberta.

"original signed by"
Gordon McClure
Appeals Co-ordinator
and Board Chair