

ALBERTA
PUBLIC LANDS APPEAL BOARD
REPORT

March 23, 2016

IN THE MATTER OF sections 121 and 124 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 15, 211, 213, 228 and 235 of the Public Lands Administration Regulation, A.R. 187/2011;

- and -

IN THE MATTER OF an appeal filed by Barry Marquardt under section 211 of the Public Lands Administration Regulation.

Cite as: Marquardt v. Director, Alberta Environment and Parks, APLAB 15-0023.

Panel Members

Mr. Gordon McClure, Panel Chair

Eric McAvity, Q.C., Panel Member

Jim Barlishen, Panel Member

Appearances

Andrew R. Bachelder, Counsel for the Public Lands Appeal Board

J. Larry Nelson, Counsel for the Director

Donna Zubko, Director

David Vanderwell, AEP Agrologist

Barry Marquardt, Appellant

Quentin Marquardt, Agent for the Appellant

EXECUTIVE SUMMARY

An oral hearing was held on February 24, 2016 for appeal PLAB 15-0023, an appeal of the non-renewal of Grazing Lease (GRL) 810263. In a letter dated March 6, 2015 the Director provided a Notice of Intention Not to Renew to the Appellant for the GRL for the following reasons:

- a) The GRL had not been utilized;
- b) The Appellant had not submitted Stock Return Forms; and
- c) Unauthorized work had been conducted on the lands subject to the GRL.

On April 2, 2015 the Appellant responded to the Director's March 6, 2015 letter, claiming continual utilization of the GRL. On July 22, 2015 the Director wrote the Appellant, informing him that the decision not to renew the lease had been made. The Appellant filed a Notice of Appeal with the Public Lands Appeal Board on August 8, 2015, alleging the Director made an error in the determination of a material fact

The Panel considered the merits of the arguments presented in regard to the questions: were the lands properly utilized, were Stock Return Forms submitted, and were unauthorized range improvements made. The Panel found that:

- The Director did not err in the determination of a material fact that the grazing lease was being poorly utilized;
- The Director was correct in determining the Appellant had failed to submit Stock Return Forms and should have alerted the Appellant that the lack of submission could result in the non-renewal of the lease, thus giving the Appellant the opportunity to remedy the situation; and
- The evidence does not allow a determination of the magnitude of unauthorized range improvements and whether they had any significant impact on the proper

management of the lease. It is not possible to determine if and when unauthorized range improvements may have taken place.

The Panel recommends that the Minister confirm the Director's decision to refuse to renew Grazing Lease 810263 to Mr. Barry Marquardt for poor utilization and improper management of the lease and dismiss the appeal without costs.

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I BACKGROUND

- [1] The Appellant, Mr. Barry Marquardt, was initially issued Grazing Lease (GRL) 810263 on March 7, 1984. The lease was renewed June 20, 1994, was amended January 29, 2004 and was renewed a second time March 29, 2004.
- [2] The GRL expired on January 31, 2014. From January 31, 2014 to July 22, 2015 the GRL was in a state of over-holding tenancy under the Public Lands Administration Regulation (“PLAR”).
- [3] During the 10-year term of the GRL that was renewed on March 29, 2004, the Appellant submitted a Stock Return Form only in 2014. In the Appellant’s Grazing Lease Renewal – Stewardship Self-Assessment Form dated March 26, 2013 the Appellant acknowledged he had not annually submitted Stock Return Forms.
- [4] An inspection of the GRL conducted by Alberta Environment and Parks (AEP) on August 28, 2013 found the condition of the GRL to be unsatisfactory, specifically:
- a) unauthorized disturbances or range improvements had been performed on the GRL; and
 - b) there was no evidence of grazing activity, based upon field observations with respect to the height of the grasses and the lack of animal impacts.
- [5] In a letter dated March 6, 2015 the Director provided a written Notice of Intention Not to Renew to the Appellant for the GRL for the following reasons:
- a) The GRL had not been utilized;
 - b) The Appellant had not submitted Stock Return Forms; and
 - c) Unauthorized work had been conducted on the lands subject to the GRL.
- [6] On April 2, 2015 the Appellant responded to the Director’s March 6, 2015 letter, stating:

“The lease has indeed been utilized year after year for the grazing of cattle and enclosed are pictures of the current state of various locations around the lease which clearly show evidence of the presence of cattle and grazing activity.”

- [7] On July 22, 2015 the Director wrote the Appellant, informing him that the decision not to renew the lease had been made.
- [8] The Appellant filed a Notice of Appeal with the Public Lands Appeal Board on August 8, 2015 alleging the Director made an error in the determination of a material fact.
- [9] Mediation was held between the Appellant and the Director on December 4, 2015. The mediation was not successful.
- [10] An oral hearing was scheduled with written submissions being received in advance. The hearing for appeal PLAB 15-0023 was held on February 24, 2016 in the Environmental Appeal Board chambers located at the Peace Hills Trust Tower, 10011 -109 Street, Edmonton, Alberta.

II ISSUES

- [11] The Board established the following issues for the hearing:

Did the Director, in making her decision to refuse to renew Grazing Lease 810263:

1. Err in the determination of a material fact on the face of the record?

III ANALYSIS AND DECISION

ISSUE:

Did the Director, in making her decision to refuse to renew Grazing Lease 810263 err in the determination of a material fact on the face of the record?

APPELLANT

[12] The Appellant submitted that the Director erred in the determination of a material fact by reaching that decision based upon contraventions of sections 81(1)(a), 54(1), and 77(a) of the *Public Lands Act*. The Appellant submitted that the Director's claim of contravention of section 81(1)(a) and 77(a) was false and that non-renewal of his lease only for contravention of section 54(1), the non-completion of the Stock Return Forms, should not warrant such drastic action as non-renewal.

Utilization of the Lands

[13] Under section 81(1)(a) it was first stated that the lease was not being utilized. However, when presented with evidence proving otherwise, the claim was changed to under-utilization at times and over-utilization at other times.

[14] The Appellant submitted that a single inspection within a 10-year period, conducted early in the grazing season, is not an accurate measure to determine whether a lease is being utilized.

[15] The Appellant submitted that he could not provide evidence of utilization for each year he had grazed the lease, however, he did provide statements from two individuals who frequented the area and witnessed lease utilization. The statements were from a Mr. Sheldon Hagen (neighbour) and Mr. Colby Williscroft (neighbour and distant relative). Both attested to seeing livestock grazing on Mr. Marquardt's lease at various times.

[16] The Appellant submitted that the photographs submitted to the Director on April 2, 2015 in response to the Notice to Not Renew Grazing Lease 810263 showed that the lease was being utilized.

Stock Return Forms

[17] The Appellant acknowledged that he had not been consistently submitting Stock Return Forms as required under section 54(1), as he did not know that the Stock Return Forms were mandatory. The Appellant offered the assurance that on a go-forward basis the forms would be completed.

Range Improvements

[18] In regard to contravention of section 77(a) having made unauthorized improvements, the Appellant submitted that no improvements have been made to the lease in more than 15 years.

[19] The Appellant, when cross-examining the department's agrologist, concluded that the date of the aerial photos used to determine range improvements could not be determined from the photographs provided in the evidence.

DIRECTOR

[20] The Director submitted that she did not err in the determination of a material fact when she refused to renew Grazing Lease 810263.

Utilization of the Lands

[21] The Director submitted that she was correct in determining the lands had not been utilized.

[22] The Director submitted that although the Appellant has shown some evidence that livestock have grazed on a portion of the lands, based upon the evidence as a whole it

was clear that the lands were not being properly utilized. The inspection conducted indicated non-utilization of the lands. Photographs taken on August 28, 2013 and testimony by the department's professional agrologist, David Vanderwell, were submitted in support of the Director's position that there was inconsistent utilization of the grazing lease lands in question. Testimony provided by the department's agrologist indicated that there were areas of over-grazing and areas where over-grown grass, grass litter from past seasons and willow regrowth had taken place. The photographs showed that gates were not closed. The photos led the agrologist to conclude that the cattle were not properly managed and had congregated only in certain portions of the lease, indicating the lease was being improperly utilized.

- [23] The Director and the department's agrologist submitted that the photographs submitted to the Director on April 2, 2015 by the Appellant in response to the notice not to renew Grazing Lease 810263 showed that portions of the lease were being over-utilized and that coupled with the agrologist's photographs from August 28, 2013, indicated there was inconsistent utilization and a lack of proper livestock management on the lease.
- [24] The Director submitted that there were no Stock Return Forms for the years 2004 to 2013 to support the Appellant's claims that he utilized the lands for grazing.
- [25] The Director submitted that the written statements provided by the Appellant from neighbours Mr. Sheldon Hagen (neighbour) and Mr. Colby Willisroft (neighbour and distant relative) whom the Appellant suggested "frequented the area and have witnessed the utilization of the lease from year to year," did not provide any information regarding their qualifications or experience in their ability to inspect and assess grazing lands accurately, nor the frequency or timeframes when they witnessed livestock grazing on the lease.

Stock Return Forms

- [26] The Director submitted that she was correct in determining the Appellant failed to submit Stock Return Forms. The Appellant admitted he has consistently failed to submit completed Stock Return Forms annually as required by the terms of the GRL and the PLAR.
- [27] The Director noted that although the Appellant suggested the Stock Return Forms were “confusing,” the Appellant never asked for assistance or clarification on how to complete the forms.

Range Improvements

- [28] The Director submitted that she was correct in determining unauthorized range improvements had been conducted on the lease.
- [29] The Director stated that the Appellant was not authorized to implement any improvements that were not consistent with the Range Management Plan approved on March 8, 1993 and that she had relied on the advice of the department’s agrologist concerning this issue.
- [30] The department’s agrologist stated in his testimony that he had determined unauthorized range improvements, namely the clearing of land in areas not indicated in the March 1993 Range Improvement Plan, had taken place by a comparison of aerial photography showing landscape changes.

ANALYSIS

- [31] The Panel noted that at key junctures in decision-making process the record lacked documentation of recommendations made to assist the Director in making a decision. In particular, for the period between July 8, 2015 and July 22, 2015, the Panel was left to infer that further input and advice was indeed provided by the department agrologist to

the Director to assist her in arriving at the decision not to renew the lease. It is a concern to the Panel that this advice was not reflected or captured in the record.

[32] The Panel considered all records, documents, submissions and testimony before it. Three arguments were presented in regard to the issue of:

a) Did the Director, in making the decision to refuse to renew Grazing Lease 810263, err in the determination of a material fact on the face of the record?

[33] The Panel considered the merits of the arguments presented with regard to the questions: were the lands properly utilized; were Stock Return Forms completed and submitted; and were unauthorized range improvements made?

Utilization of the Lands

[34] The Appellant was unable to provide evidence of annual utilization of the lease. He testified that the rearing of livestock was not his main source of livelihood and that he kept a modest herd of livestock (30+ animals). The Panel received the impression that the Appellant primarily used his adjacent home quarter for grazing and that GRL 810263 was simply overflow pasture available to his livestock when they accessed it through gates left open. Stock Return Forms were submitted only in the year 2014. The absence of Stock Return Forms for nine of the ten years of the lease would seem to indicate that the lease was not being utilized, at least in a manner anticipated by the department. Had the Appellant submitted Stock Return Forms for each year of the lease, the Panel may have been better able to determine the degree to which the Appellant had utilized Grazing Lease 810263 and more inclined to believe the Appellant had been continually utilizing Grazing Lease 810263.

[35] The letters submitted by the Appellant from two neighbours attesting to his utilization of the lease did not definitively verify the extent or duration of utilization of the lease. The letters of support did not identify the years or time periods that livestock were observed on the lease, nor the number of livestock. The Panel does not doubt that the Appellant's

livestock did use portions of the lease at some times; however the Panel doubts the Appellant made any effort to manage the lease in a manner that the department anticipated when it issued the lease.

[36] The Panel accepted the submitted photographs within the record taken by the agrologist on August 28, 2013 and the photographs submitted by the Appellant to the Director on April 2, 2015 as evidence. The Panel accepted the agrologist's testimony and photographs showing grass litter from past seasons and willow regrowth that had taken place over an extended period of time, indicating under-utilization within portions of the lease identified in the August 28, 2013 photographs. The Appellant's photographs on April 2, 2015 indicated the impact of over-grazing on the specific area shown. The Panel further accepted the department agrologist's interpretation of the photographs as being indicative of over-grazing, suggesting poor livestock management by not distributing the livestock over a greater area of the grazing lease.

[37] The Panel found that the Director did not err in her determination of a material fact that the grazing lease was being poorly utilized.

Stock Return Forms

[38] The Appellant acknowledged that that he had not been consistently submitting Stock Return Forms. The Appellant was unable to provide evidence of yearly submission of the Stock Return Form, even though they were mailed to him annually requesting that they be filled out and returned. Stock Return Forms were not submitted for nine of the ten years of the lease, with Stock Return Forms being submitted only for 2014, after the Appellant was notified that the department intended not to renew his lease.

[39] The Panel noted that the department's agrologist stated that a lease would not necessarily be cancelled for the lack of submission of a Stock Return Form, leading the Panel to conclude that there is an ability for the Director to exercise discretion in regard to the submission of Stock Return Forms. Section 54 of PLAR outlines the obligations of the

grazing disposition holder in regard to providing the return. However, section 54 is silent in regard to the consequences of a failure to file, leaving the Director with discretion to proceed under section 56 of the *Public Lands Act*.

- [40] The Director was correct in determining the Appellant had failed to submit Stock Return Forms and should have alerted the Appellant that this failure could result in the non-renewal of the lease, thus giving the Appellant the opportunity to remedy the situation. Notice of Non-Renewal for not submitting Stock Return Forms, particularly after years of non-compliance with no notice from the department brings into question procedural fairness. Even though the terms of the lease agreement require the lessee to comply with all the conditions found in the *Public Lands Act* and its regulations, a duty of fairness may require the Director to provide some type of written warning to the Appellant that failure to submit the Stock Return Form could form the basis for a decision not to renew the lease.

Range Improvements

- [41] The Appellant submitted that no improvements have been made to the lease in more than 15 years. He conceded that he did bulldoze a number of “cut lines” on the lease. Neither the Director’s letter of Notice of Intent Not to Renew nor the record identified what specific unapproved range improvements were alleged to have occurred and subsequently cited as a reason for not renewing the lease. The department’s agrologist gave testimony that he determined range improvements had taken place based upon his examination of aerial photographs and his interpretation of the vegetative patterns that currently existed on the lease. While the date of the aerial photographs used to help him reach this conclusion was unknown, his evidence regarding regrowth patterns in vegetation and the areas where this had occurred was compelling in that these areas did not coincide with areas that had originally been approved (March 8, 1993) in the Range Improvement Plan for clearing to create fields. The agrologist also testified it was his opinion that the vegetative patterns of regrowth indicated that clearing of certain areas had occurred much

less than 15 years ago. In this instance, however, the evidence does not allow the Panel to ascertain the magnitude of these unapproved range improvements and their impact on the proper management of this lease.

- [42] The Panel does not accept the allegation that unauthorized improvements were made as a basis for non-renewal of the lease. The Panel considers that these unauthorized improvements should be given only minor consideration as a reason for non-renewal of the lease due to the lack of definitive evidence of the impacts these unauthorized improvements had on the proper management of the lease. The Director in this case did err in a determination of a material fact, or at least she did not appear to have sufficient factual information available to make such a determination.

IV RECOMMENDATIONS

- [43] The Panel noted that at key junctures in the decision-making process the record lacked complete documentation of staff communication, information provided and recommendations made that enabled the Director to reach her decision. In particular, for the period between July 8, 2015 and July 22, 2015 the Panel was left to infer that further input had been provided by the department's agrologist in arriving at the decision to not renew the lease, but was not captured in the record. The Panel recommends that the department develop a standard decision-making document that provides a synopsis of all the information used by a Director to reach a decision regarding non-renewal of grazing leases.

- [44] The Panel concluded that the annual submission of Stock Return Forms are a key element necessary for ensuring grazing leases are being properly utilized and public lands are being properly managed. The Panel recommends a letter accompany the next mail-out of the annual Stock Return Forms to all grazing lease holders reminding them of the

importance of these forms and notifying lessees that failure to submit these forms on an annual basis could result in a non-renewal of the lease.

[45] The Panel recommends that the Minister confirm the Director's decision to refuse to renew Grazing Lease 810263 to Mr. Barry Marquardt for poor utilization and improper management of the lease, and dismiss the appeal without costs.

_____ (*original signed by*) _____

Gordon McClure, Chair

_____ (*original signed by*) _____

Eric McAavity, Q.C., Panel Member

_____ (*original signed by*) _____

Jim Barlishen, Panel Member



ALBERTA

ENVIRONMENT AND PARKS

*Office of the Minister
MLA, Lethbridge-West*

ALBERTA ENVIRONMENT AND PARKS

*Public Lands Act
RSA 2000, c. P-40*

**MINISTERIAL ORDER
20/2016**

**ORDER RESPECTING PUBLIC LANDS APPEAL BOARD
APPEAL NO. 15-0023**

I, Shannon Phillips, Minister of Environment and Parks, pursuant to section 124 of the *Public Lands Act*, make the order in the attached Appendix, being the Order Respecting Public Lands Appeal Board Appeal no. 15-0023.

DATED at the City of Edmonton, in the Province of Alberta, this 16th day of May, YYYY.

2016

Shannon Phillips
Minister

APPENDIX

ORDER RESPECTING PUBLIC LANDS APPEAL BOARD APPEAL NO. 15-0023

With respect to Public Lands Appeal Board Appeal No. 15-0023, I, Shannon Phillips, Minister of Alberta Environment and Parks, order as follows:

1. That the Director's refusal to renew Grazing Lease 810263 to Mr. Barry Marquardt for poor utilization and improper management of the lease be confirmed and upheld. The appeal is dismissed without costs.
2. That the Department develop a standard decision-making document that provides a synopsis of all information used by a Director to reach a decision regarding non-renewal of grazing leases.
3. That a letter notifying all grazing lease holders that failure to submit Stock Return Forms on an annual basis may result in non-renewal of the lease accompany all mail-outs of the Stock Return Forms.