

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – August 30, 2011

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal filed by the Alberta Wilderness Association, Trout Unlimited Canada, Water Matters Society of Alberta, Cheryl Bradley, Lorne Fitch, and Walter Hohloch with respect to *Water Act* Licence Amendment No. 00071066-00-01 issued to the Eastern Irrigation District by the Director, Southern Region, Environmental Management, Alberta Environment.

Cite as: *Alberta Wilderness Association et al. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Eastern Irrigation District* (30 August 2011), Appeal No. 10-038-043-ID1 (A.E.A.B.).

**PRELIMINARY MOTIONS
HEARING BEFORE:**

Justice Delmar W. Perras (ret.), Chair;
Dr. Alan Kennedy, Board Member; and
Mr. Eric O. McAvity, Board Member.

SUBMISSIONS BY:

- Appellants:** Alberta Wilderness Association, Trout Unlimited Canada, Water Matters Society of Alberta, Ms. Cheryl Bradley, Mr. Lorne Fitch, and Mr. Walter Hohloch, represented by Mr. Barry Robinson, Ecojustice.
- Director:** Mr. Kevin Wilkinson, Director, Southern Region, Environmental Management, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.
- Licence Holder:** Eastern Irrigation District, represented by Mr. Earl Wilson, General Manager, Eastern Irrigation District.

EXECUTIVE SUMMARY

Alberta Environment issued a Licence Amendment to the Eastern Irrigation District (the EID) authorizing the provision of water for the purposes of municipal, agricultural, commercial, industrial, habitat enhancement, and recreational uses.

The Board received Notices of Appeal from the Alberta Wilderness Association, Trout Unlimited Canada, Water Matters Society of Alberta, Ms. Cheryl Bradley, Mr. Lorne Fitch, and Mr. Walter Hohloch (the Appellants).

The Board received and considered submissions on the following preliminary matters:

1. the directly affected status of the Appellants;
2. whether the issues raised in the Notices of Appeal are within the jurisdiction of the Board or otherwise properly before the Board; and
3. the issues to be heard at a hearing, should one be held.

The Board found that, except for Mr. Hohloch, the Appellants did not meet the onus of demonstrating to the Board that they were directly affected by Alberta Environment's decision to issue the Licence Amendment. Although they were all genuinely interested in the riparian and aquatic ecosystems in the Bow River Basin, their interests were too general in nature. The Board did not accept the public interest standing argument presented by these Appellants. The Board dismissed their appeals.

Mr. Hohloch owns land within the EID and receives water from the EID. The Board found Mr. Hohloch has demonstrated there is a reasonable possibility he may be affected by the Licence Amendment. Therefore, the Board will hear Mr. Hohloch's appeal on the following issues:

1. Did the Director, in issuing the Licence Amendment, act in accordance with the *Water Act* and the applicable Alberta Environment policies, including the South Saskatchewan River Basin Water Management Plan and the Water Licence Change of Purpose: Administrative Licencing Criteria?
2. What effect will the Licence Amendment have on Mr. Hohloch's water supply for his cattle?

The Board does not have any jurisdiction under the *Irrigation Districts Act* and cannot hear arguments on the matters raised by Mr. Hohloch relating to the *Irrigation Districts Act* or the contractual arrangements he has with the EID other than how the issuance of the Licence Amendment may impact his ability to receive water under the contracts.

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I. BACKGROUND

[1] On November 18, 2010, the Director, Southern Region, Environmental Management, Alberta Environment (the “Director”), issued Licence Amendment No. 00071066-00-01 (the “Licence Amendment”) under the *Water Act*, R.S.A. 2000, c. W-3, to the Eastern Irrigation District (the “Licence Holder” or “EID”) authorizing the provision of water for the purposes of municipal, agricultural, commercial, industrial, habitat enhancement, and recreational uses. The Licence Amendment amends the original licence issued to the EID for the limited purpose of irrigation.

[2] On December 17, 2010, the Environmental Appeals Board (the “Board”) received Notices of Appeal from the Alberta Wilderness Association (“Alberta Wilderness”)(10-038), Trout Unlimited Canada (“Trout Unlimited”)(10-039), Water Matters Society of Alberta (“Water Matters”)(10-040), Ms. Cheryl Bradley (10-041), Mr. Lorne Fitch (10-042), and Mr. Walter Hohloch (10-043) (collectively, the “Appellants”) appealing the Licence Amendment.

[3] On December 21, 2010, the Board wrote to the Appellants, Licence Holder, and Director (collectively the “Participants”) acknowledging receipt of the Notices of Appeal and notifying the Licence Holder and the Director of the appeals. The Board also requested the Director provide the Board with a copy of the records (the “Record”) relating to these appeals, and that the Participants provide available dates for a mediation meeting, preliminary motions hearing, or hearing.

[4] On January 26, 2011, the Board received a copy of the Record from the Director, and copies were forwarded to the Appellants and the Licence Holder.

[5] In his January 21, 2011 letter to the Board, the Director requested the Board hold a preliminary motions hearing and raised preliminary motions to dismiss the appeals on the grounds the Appellants were not directly affected or raised issues that were not within the Board’s jurisdiction. On February 11, 2011, the Board set the schedule to receive submissions on the preliminary motions. The Participants were asked to comment on the following matters:

1. Is the Alberta Wilderness Association directly affected by the Licence Amendment?
2. Is the Water Matters Society of Alberta directly affected by the Licence Amendment?
3. Is Ms. Cheryl Bradley directly affected by the Licence Amendment?
4. Is Mr. Lorne Fitch directly affected by the Licence Amendment?
5. (a) Is Trout Unlimited Canada directly affected by the Licence Amendment?
(b) What is the nature of the property interest identified in the Notice of Appeal of Trout Unlimited Canada and how does this impact its directly affected status?
6. (a) Is Mr. Walter Hohloch directly affected by the Licence Amendment?
(b) Will Mr. Hohloch continue to get his water for stock watering purposes in a manner that is unaffected by the Licence Amendment and how does this impact his directly affected status?
(c) Are Mr. Hohloch's concerns about how the Licence Holder will deliver water to its customers unrelated to the Licence Amendment and how does this impact his directly affected status?
(d) Is the Notice of Appeal filed by Mr. Hohloch a "duplicate" of the Notices of Appeal filed by the other Appellants such that it is not his Notice of Appeal and how does this impact (i) his standing and (ii) the validity of his Notice of Appeal?
(e) Do the issues raised in Mr. Hohloch's Notice of Appeal not match his Statement of Concern and how does this impact (i) his standing and (ii) the validity of his Notice of Appeal?
7. (a) Does the Board have any jurisdiction under the *Irrigation Districts Act*?
(b) Are any of the issues raised in the Notices of Appeal solely under the jurisdiction of the *Irrigation Districts Act* and how does this impact the validity of the Notices of Appeal?
(c) Are there any other issues raised in the Notices of Appeal that are not properly before the Board and how does this impact the validity of the Notices of Appeal?
8. If this matter proceeds to a hearing, what issues included in the Notices of Appeal should be considered by the Board?

[6] Submissions were received between March 9, 2011 and April 20, 2011.

II. SUBMISSIONS

A. Appellants

[7] Each of the Appellants provided submissions and affidavits. They provided an explanation of who they are, and their arguments were similar in many instances. Therefore, the Board will summarize each of the Appellants' main points but will provide their collective arguments first. The Board will then summarize additional arguments provided for each specific appellant.

[8] It was the Appellants' common position that:

1. The Director's issuance of the Licence Amendment was contrary to the provisions of the *Irrigation Districts Act*, R.S.A. 2000, c. I-11, and is, therefore, contrary to law.
2. The Director's issuance of the Licence Amendment was an unreasonable exercise of the Director's discretion under the *Water Act*.
3. The Licence Holder supplies water to other users contrary to the *Irrigation Districts Act* and the Licence Amendment was a colourable attempt to have the Director overlook the non-compliance.
4. The Licence Amendment was contrary to the intent of the *Water Act* and the South Saskatchewan River Basin Water Management Plan (Alberta) ("Management Plan")¹ that closed the Bow River Basin to new users except through the transfer of an existing licence allocation.
5. The Licence Amendment was a colourable attempt to transfer a water allocation without complying with the transfer provisions of the *Water Act* and the *Irrigation Districts Act*.
6. The Director improperly delegated the Director's authority and obligation to review and decide on new water uses and users in the Bow River Basin to the Licence Holder.
7. The Director could not have reasonably formed the opinion there is no or will be no adverse effect on the rights of a household user, other licensee or traditional agricultural user, and no adverse effect on the ability to conserve or manage a water body. The Director could not have formed this opinion because the application failed to identify the specific use,

¹ The Management Plan is an approved Management Plan under the *Water Act* pursuant to section 11. Under section 51(4)(a) of the *Water Act*, when issuing a water licence, "...the Director must consider, with respect to the applicable area of the Province, the matters and factors that must be considered in issuing a licence, as specified in an applicable approved water management plan...."

location of use, quantity, timing, return flow, water quality, or point of return flow for the water to be allocated to existing and future non-irrigation users under the Licence Amendment.

8. The Water Licence Change of Purpose: Administrative Licencing Criteria (the “Criteria”) provides that an amendment for a change of purpose would only be considered where the point of diversion, related works, and point of use remain the same, but the application for the Licence Amendment failed to specify the location of use for the amended uses.
9. The Criteria require an application for an amendment to describe how the water will be used, the quantity of water for each amended use, new works to deliver the water, and any changes to return flow, but this specific information was not included in the application for the Licence Amendment.

1. Water Matters Society of Alberta

[9] Water Matters explained it was formed in 2007 partly in response to the 2007 application filed by the Licence Holder to amend the purpose of the original licence to permit the Licence Holder to allocate water to non-irrigation users through a change of purpose amendment rather than a water licence transfer. Water Matters stated it was formed to raise public awareness of inappropriate water allocation transfers, including inter-basin water allocation transfers and the potential for irrigation district licence holders to implement *de facto* water transfers without complying with the water transfer obligations set out in the *Water Act*. Water Matters explained its objective is to provide leadership as an independent non-governmental organization with expertise and resources to address water supply and watershed issues in Alberta by: (a) conducting and promoting timely and leading edge research and investigation; (b) providing outreach and education programs; (c) advancing initiatives for watershed health; and (d) working with others concerned about the protection of watersheds.²

[10] Water Matters stated it has been actively and directly involved with the Government of Alberta and the public in the development of water allocation policies, including water licence transfers and water licence amendments. Water Matters stated that, at the invitation of Alberta Environment, it responded to the Draft Policy Statement: Water Licence Change of Purpose, identifying the legal and policy failures, particularly the avoidance of the

² See: <<http://www.water-matters.org>>

transfer provisions in the *Water Act* by amending the purposes allowed under a licence. Water Matters stated it has contributed to the development and understanding of the water licence amendment and transfer policy and has a reasonable expectation the policies would be interpreted and implemented in accordance with the *Water Act*, *Irrigation Districts Act*, and the Management Plan. Water Matters explained it relies on the proper interpretation, implementation, and enforcement of the *Water Act* and *Irrigation Districts Act* when it participates in the consultation process and when advising its members, the public, and other environmental organizations.

[11] Water Matters was of the view the Licence Amendment

“... threatens the integrity of the policymaking process by setting a precedent that allows for water allocation and transfer through the change of purpose licence amendment process. This approval process between the Director and a substantial water user such as an irrigation district effectively sets water allocation and transfer public policy outside of the policymaking process. This result has a personal and direct adverse impact on the ability of Water Matters to influence the development of water allocation and transfer policy in Alberta.”³

2. Alberta Wilderness Association

[12] Alberta Wilderness explained its mandate is to “...advance the protection and conservation of representative wilderness areas in Alberta, including a focus on achieving healthy watersheds and river corridors for general ecosystem health.”⁴ It stated it has been actively involved in the development and interpretation of water-related legislation and policy in Alberta and management strategies and policies within the Bow River Basin, including:

- (a) as a member of the Bow River Advisory Council, it advised the Government of Alberta during the development of the Management Plan;
- (b) as a member of the Bow River Basin Council;
- (c) as a steering committee member for the watershed report completed in 2005 and updated in 2010; and
- (d) as a steering committee member for the development of the Bow River Basin Phase 1 and Phase 2 Watershed Management Plan.

³ Water Matters’ submission, dated March 7, 2011, Affidavit of Mr. Joe Obad, at paragraph 26.

⁴ Appellants’ submission, dated March 7, 2011, at paragraph 55.

[13] Alberta Wilderness stated it has been actively involved in the protection of terrestrial and aquatic ecosystems in, adjacent to, and downstream of the Licence Holder. Alberta Wilderness argued it relies on the proper interpretation and implementation of the *Water Act* and *Irrigations District Act* in designing and implementing its conservation programs, when it is involved in the consultation processes sponsored by Alberta Environment, and in advising its members, the public, and other environmental organizations with respect to the transfer and amendment provisions of the *Water Act*.

[14] Alberta Wilderness stated the Licence Amendment circumvents the transfer provisions of the *Water Act* and avoids water conservation holdback considerations set out in the legislation and Management Plan. Alberta Wilderness stated the transfer process through an amendment directly impacts the effectiveness of its policy work relating to the water allocation transfer process and other initiatives to protect instream flow and aquatic ecosystems generally in the Bow River Basin.

3. Trout Unlimited Canada

[15] Trout Unlimited explained it is a national organization whose mission is to "...conserve and protect Canada's freshwater ecosystems and their cold water resources for current and future generations."⁵ Trout Unlimited stated it carries out habitat restoration projects, education, and scientific research. It stated it protects the public interest in environmental matters. Trout Unlimited explained it is actively involved in watershed and conservation planning in Alberta including sitting as a member of the Bow River Basin Council, chairing the Nose Creek Watershed Group Technical Committee, and participating in several provincial technical and advisory groups. It stated the Bow River chapter of Trout Unlimited has over 1,000 members.

[16] Trout Unlimited noted the protection of the health of the aquatic ecosystem of the Bow River falls within its mission and mandate. It explained its conservation and management work in the Bow River Basin deals with migratory fish species that may use the Bow River

⁵ Appellant's submission, dated March 7, 2011, at paragraph 71.

within the EID for some or all of their lives, so activities within the EID can impact the health of fish populations in a larger area of the Bow River.

[17] Trout Unlimited stated it has a direct interest in improving in-stream flows in the Bow River from current levels, but a transfer of water to other users by a licence amendment rather than a licence transfer avoids the 10 percent holdback for water conservation objectives and fails to contribute to the improvement of in-stream flows. Trout Unlimited operates a fish rescue program to capture and release fish trapped in irrigation canals prior to winter freezing of the canals. It explained fish rescued from the Western Headworks Canal and Carseland Bow River Headworks Canal are returned to the Bow River upstream of the EID.

[18] Trout Unlimited stated the Bow River chapter of Trout Unlimited holds a recreational lease on public lands within the Bow River known as Jensen's Island, located at SE 21 and SE 28-21-26-W4M. It explained the primary use of the island is for public fishing access to the Bow River. Trout Unlimited stated it has a direct recreational interest in the management and conservation of water resources of the Bow River to sustain a healthy aquatic ecosystem.

[19] Trout Unlimited argued the circumvention of the water transfer provisions of the *Water Act* directly impacts the effectiveness of its water conservation and management efforts. It stated the conservation holdback provision of the *Water Act* directly affects the work it does to protect the integrity of the aquatic ecosystem in the Bow River Basin.

4. Ms. Cheryl Bradley

[20] Ms. Cheryl Bradley, a resident of Lethbridge, stated she holds a Masters degree in geography, specializing in botany and fluvial geomorphology, and she is a member of the Alberta Society of Professional Biologists. In addition, Ms. Bradley:

1. has been retained by the Government of Alberta to advise on water management issues in the South Saskatchewan River Basin;
2. has been a member of several environmental organizations concerned with water management;
3. has completed scientific investigations with respect to the environmental health of the aquatic and riparian ecosystems of the Bow River Basin;

4. was involved in projects and consultation processes regarding aquatic and riparian ecosystems of the Bow River Basin;
5. was directly involved in the planning processes leading to the Management Plan and was actively involved in the decisions that the basin be closed to new water licences, new users should obtain water allocations by means of a water licence transfer, and unallocated water should be held for water conservation objectives; and
6. served on the steering committee to develop the Irrigation Sector Conservation, Efficiency and Productivity Plan 2005-2015 under the auspices of the Alberta Water Council.

[21] Ms. Bradley stated she has been directly involved in the development of water management plans and policies for the Bow River Basin and has relied on the proper interpretation and implementation of the *Water Act* and *Irrigations District Act*. She explained she also relies on the proper interpretation of the legislation in carrying out her scientific studies, participating in planning processes related to the irrigation sector, and advising her private clients, the Government of Alberta, and other environmental organizations with respect to environmental matters, water management, and the regulation of water allocations in the South Saskatchewan River Basin.

[22] Ms. Bradley explained she has been directly involved in the analysis and development of conservation and efficiency strategies for the irrigation sector and in identifying the failure of the irrigation sector to contribute conserved water for conservation purposes by using amendments instead of transfers of water to new users.

[23] Ms. Bradley stated she reviewed information from Alberta Environment and the Irrigation Secretariat⁶ on water transfers and conservation holdbacks and found only 31 of 54

⁶ The Irrigation Secretariat is established under the *Irrigation Districts Act*. It consists of employees of Alberta Agriculture and Rural Development (“ARD”). The Irrigation Secretariat assists ARD in developing policies and legislation relating to irrigation districts and provides clarification to irrigation districts and other partners in the irrigation industry on those policies and legislation.

The Irrigation Secretariat, in conjunction with the Irrigation Council, administers the department’s Irrigation Rehabilitation Program (“IRP”), an on-going cost shared, multi-million dollar grant program that provides funding for the irrigation districts to use to rehabilitate their extensive water conveyance and storage infrastructure.

The Irrigation Secretariat also carries out the functions and duties assigned by the Irrigation Council. The Irrigation Secretariat is responsible for ensuring that Alberta’s Irrigation Council is well informed on irrigation matters and has the tools to meet its legislated responsibilities under the *Irrigation Districts Act*.

The Irrigation Secretariat acts as the administrative arm of the Irrigation Council, liaise with others in dealing with matters relating to irrigation districts, assist and advise irrigation districts on administrative matters,

water allocation transfers granted since the Management Plan was approved have been subject to conservation holdbacks. She stated the rates of flow specified in the licences related to the holdbacks are too small to result in measurable improvement to the aquatic environment in degraded river reaches.

[24] Ms. Bradley argued the circumvention of the transfer process would impact her in the following ways:

1. it impairs the integrity of her published works on watershed management and governance framework in southern Alberta;
 2. it marginalizes the recognized contributions she personally made to water management and policy in southern Alberta over the course of her professional career;
 3. it potentially impedes her ability to obtain data on water users in the South Saskatchewan River Basin for research purposes by placing control of the information within the proprietary scope of the EID; and
 4. it directly and adversely affects her reasonable expectation the Director will comply with the intent and provisions of the *Water Act* and Management Plan which she relies on in her work.
5. Mr. Lorne Fitch

[25] Mr. Lorne Fitch, a resident of Lethbridge, explained he holds a degree in zoology with a minor in geography, and he is a member of the Alberta Society of Professional Biologists. Mr. Fitch explained that, when he was employed with Alberta Fish and Wildlife, he was directly involved in fisheries management within the Bow River Basin and the EID. Since 2006, he has worked as the provincial riparian specialist with the Cows and Fish Program operated by the Alberta Riparian Habitat Management Society. He has provided consulting services to provincial and federal agencies, conservation groups, municipalities, and agricultural groups on riparian issues, management, research, implementation, and evaluation. Mr. Fitch was involved with the Oldman Watershed Council and is currently involved with Water Matters and Trout Unlimited.

[26] Mr. Fitch noted that, both personally and professionally, he has dedicated his efforts to the protection of riparian and aquatic ecosystems. Mr. Fitch stated that, throughout his career, he has relied on the proper interpretation, implementation, and enforcement of the *Water Act* and *Irrigation Districts Act* in planning and implementing his research, management, and education activities.

[27] Mr. Fitch stated that, through his involvement with the South Saskatchewan River Basin Study, he was aware the intent of the Management Plan was that new water users in the Bow River Basin would be required to obtain a water allocation through the transfer of an existing water licence, subject to the environmental review and approval of the Director. Mr. Fitch understood the conserved water would be used to meet the water conservation objective of the river. He stated allowing new users to divert water by means of an amendment to the original licence undermines the *Water Act*, Management Plan, and his efforts to ensure the protection of riparian and aquatic ecosystems in the Bow River Basin and within the EID.

[28] Mr. Fitch stated the Director's decision directly affects his ability to plan and manage his professional activities by creating uncertainty with respect to the correct interpretation of the statutes and policies.

6. Mr. Walter Hohloch

[29] Mr. Walter Hohloch stated he owns lands in Township 19, Range 16, W4M, that lie within the boundaries of the EID and which he uses for ranching purposes. Mr. Hohloch explained he entered into an agreement to sell 95 acres to the Licence Holder for the construction of the Snake Lake Dam and Snake Lake Canal, and in exchange, the Licence Holder agreed to provide water to certain dugouts on his lands for the purpose of livestock watering. He stated the agreements were entered into as domestic agreements and subsequently as a Household Purposes Agreement, but in 2003, the agreements were converted into five Rural Water Use Agreements ("Rural Agreements").

[30] Mr. Hohloch explained that, in 2004 or 2005, the Licence Holder arbitrarily refused to supply him water contrary to the Rural Agreements, and the water was supplied only after he contacted the local Member of the Legislative Assembly. Mr. Hohloch believes his

water supply would be better protected if water allocations were controlled by the Director and not at the discretion of the Licence Holder.

[31] Mr. Hohloch noted the Licence Holder proposes to supply water to unidentified users pursuant to a new type of agreement not specified in the *Irrigations District Act*, and the relationship between the new agreements and the Rural Agreements, including the relative priority, is not specified in the *Irrigations District Act* and is not known to Mr. Hohloch. Mr. Hohloch stated this creates uncertainty as to the security of his water supply.

[32] Mr. Hohloch argued the Director's decision also creates uncertainty as to the security and enforceability of the Rural Agreements, and therefore the impact on his ranching operations surpasses the abstract interest of all Albertans. Mr. Hohloch submitted the supply of water to unspecified future users may directly and adversely affect his water supply under the existing Rural Agreements.

[33] Mr. Hohloch noted he was considered directly affected by the Director when he submitted his Statement of Concern. He argued the Licence Amendment expands the power and authority of the Licence Holder into areas the government should be handling itself. Mr. Hohloch argued the Director accepted he was directly affected when the Director accepted Mr. Hohloch's Statement of Concern.

[34] Mr. Hohloch stated the Director does not know the quantity, timing, and point of diversion from the irrigation system, the location of use, and the location, quantity, timing, and quality of return flow, but these factors have the potential to directly affect Mr. Hohloch's property or his ability to withdraw and use water for livestock watering.

[35] Mr. Hohloch explained only Water Matters had legal counsel when the Appellants filed their Statements of Concern, and he retained counsel only after the Licence Amendment was issued but prior to filing his Notice of Appeal. Mr. Hohloch stated all the Appellants retained the same counsel and all filed similar Notices of Appeal.

[36] Mr. Hohloch stated a Notice of Appeal must identify the grounds of appeal, and filing a Statement of Concern is a condition precedent to filing an appeal. He noted there is no requirement in the *Water Act*, the *Environmental Protection and Enhancement Act*, R.S.A. 2000,

c. E-12 (“EPEA”), the relevant regulations, or the Board’s Rules of Practice that requires the issues raised in the Statement of Concern match the issues raised in the Notice of Appeal. Mr. Hohloch stated filing a Statement of Concern and a Notice of Appeal are two distinct processes.

[37] Mr. Hohloch noted hearings before the Board are *de novo* hearings, so the Board may consider any evidence or issues relevant to the matter before it. He argued that, under section 95(2)(d) of EPEA, the Board may consider whether any new information will be presented that is relevant but was not available to the decision maker at the time the decision was made demonstrates there is no requirement the issues in the Notice of Appeal match the issues in the Statement of Concern. Mr. Hohloch stated that, requiring the issues raised in the Notice of Appeal match the issues raised in the Statement of Concern would deny him and the other Appellants the benefit of the advice of legal counsel in identifying grounds of appeal in drafting their Notices of Appeal.

[38] Mr. Hohloch argued it is not logical to have the issues match in both the Statement of Concern and the Notice of Appeal since the Notice of Appeal raises issues of jurisdiction and law in the Director’s decision. He stated it could not be anticipated the Director would make jurisdictional errors and law.

7. Legal Arguments

[39] The Appellants argued the Board’s approach in determining standing must keep the participatory role envisaged for Alberta citizens under section 2 of the *Water Act* in mind.⁷ The Appellants stated the question of standing is one of mixed fact, law, and policy. The

⁷ Section 2 of the *Water Act* states:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta’s economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;

Appellants submitted the types of harm that qualify for the purpose of determining standing are open-ended and determined by the plain meaning of the word “affected.” They stated it is helpful if the interest affected is included in the purpose section of the *Water Act*, such as a direct interest in water management and water resource conservation to ensure a healthy environment.

[40] The Appellants argued there is a fundamental public right to have government operate in accordance with the law, and the rule of law guarantees citizens the right to protection against arbitrary government action. The Appellants stated it is a matter of constitutional principle that, if the Director does not follow the law, then any person offended or harmed should be able to seek a remedy. The Appellants argued a case that is potentially meritorious should be heard on its merits, and it would be a serious matter if a person was prevented from being heard as a result of a narrow interpretation of standing.

[41] The Appellants stated the Board is ultimately responsible for interpreting the *Water Act* and other relevant statutes and regulations. The Appellants stated the role of the Board is to determine if the Director acted unreasonably, without jurisdiction, without statutory authority, or contrary to the *Water Act* or *Irrigations District Act* in approving the Licence Amendment.

[42] The Appellants stated:

1. They have demonstrated a longstanding, active, and direct interest in the management and allocation of water resources in Alberta and have been actively and directly involved in the development of policy with respect to water licence amendments and transfers and the management of water resources in the Bow River Basin.
2. Their involvement in the policy and management processes initiated by Alberta Environment is directly affected when the Director acts unreasonably, without jurisdiction or statutory authority, or contrary to the *Water Act* or *Irrigations District Act*. Participation in these processes requires the Appellants to rely on the proper interpretation of the *Water Act*, *Irrigations Districts Act*, and the Management Plan.
3. Their ability to advise their members or clients, the public, and other environmental groups as to the management, allocation, and conservation of water resources and the regulation of water licence transfers and amendments

(f) the important role of comprehensive and responsive action in administering this Act.”

is directly affected when the Director acts unreasonably or without jurisdiction, creating uncertainty to the interpretation of the Acts.

4. The Board has the discretion to find the Appellants directly affected considering the participatory role envisaged for Alberta citizens by section 2(d) of the *Water Act*. The direct and adverse effect on the interests and work of the Appellants falls within the normal meaning of affected and within the range of interests that have been recognized by the Board as legitimate interests that may be harmed. They have a direct interest in the proper administration of the *Water Act*.
5. The Appellants have a direct interest in ensuring the issuance of the Licence Amendment is consistent with the proper interpretation of the *Water Act*, the *Irrigation Districts Act*, and the Management Plan. The Appellants have a right and responsibility to bring matters before the Board to ensure the Director acts reasonably, within his jurisdiction, and not contrary to the law.
6. The provisions of the *Water Act* dealing with standing should not be interpreted so narrowly that it permits the Director to act with impunity.
7. The Appellants requested the Board to determine the Appellants are directly affected and the matter be heard on its merits.

[43] The Appellants submitted that, if the Appellants are not found to be directly affected then the Board has the discretion to determine the Appellants are parties to the appeals based on their public interest standing.

[44] The Appellants submitted the Board and the Court of Queen's Bench erred in applying the decisions in *Friends of the Athabasca Environmental Association v. Alberta (Public Health and Advisory and Appeal Board)* (1996) 37 Alta. L.R. (3d) 148 (Alta. C.A.) ("*Friends of the Athabasca*") and *C.U.P.E. Local 30 v. WMI Waste Management of Canada* (1996) 34 Admin. L.R. (2d) 172 (Alta. C.A.) ("*WMI*") to hearings before the Board. The Appellants agreed with the interpretation of public interest standing as stated in *Friends of the Athabasca* and *WMI* as adopted by the Board and the Court in *Dr. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection, re Alberta Cement Corporation*, (23 August 1995), Appeal No. 94-017 (A.E.A.B.) ("*Kostuch*") and *Kostuch v. Alberta (Director, Air and Water Approvals Division, Alberta Environmental)* (1996) 35 Admin. L.R. (2d) 160 ("*Kostuch #2*"). The Appellants stated it is their position the decisions in *Friends of the Athabasca* and *WMI* conclude that public interest standing cannot be extended to administrative tribunals, was overly broad, and should have been limited to tribunals such as the Public Health

Advisory and Appeal Board. The Appellants stated the particular tribunal process must be interpreted in accordance with the legislative intent. The Appellants noted the Public Health Advisory and Appeal Board had no discretion with respect to the parties to an appeal.

[45] The Appellants stated the Board has the discretion to forego dismissing an appeal under any of the circumstances listed under section 95(5)(a) of EPEA. Therefore, according to the Appellants, the Board is not obligated to dismiss a Notice of Appeal where the person submitting the Notice of Appeal is not directly affected. They stated the Board has the discretion pursuant to section 95(6) of EPEA and section 1(f) of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the “Regulation”), to determine that any person may be a party to an appeal if consistent with the principles of natural justice.

[46] The Appellants argued the appropriate test for public interest standing is found in *Finlay v. Canada (Minister of Finance)* [1986] 2 S.C.R. 607 (“*Finlay*”) and *Reese v. Alberta* (1992) 87 D.L.R. (4th) 1 (Alta. Q.B.) (“*Reese*”). The Appellants stated that in *Finlay*, the Supreme Court of Canada confirmed individuals can be granted public interest standing with respect to administrative decisions, particularly in situations where it is alleged the administrative decision maker acted outside his statutory authority. The Appellants stated the Court in *Reese* adopted the four-part test for public interest standing from *Finlay*, specifically:

1. the issue before the court is justiciable;
2. the issue is serious;
3. the applicant is directly affected by the issue or has a genuine interest therein as a citizen; and
4. there is no other reasonable and effective manner for the issue to be brought before the court.

[47] The Appellants argued the matter is justiciable and serious when the Director acts without jurisdiction and statutory authority. The Appellants stated the Court in *Reese* found that public interest standing may be granted even though the statute in question does not specifically contemplate a role for the party. The Appellants argued this includes parties who are not directly affected but have a genuine interest in the matter. The Appellants stated they have a genuine interest in ensuring the Director acts reasonably, within his jurisdiction and statutory authority, and in compliance with the *Water Act* and *Irrigation Districts Act*. The Appellants argued the

fourth part of the test is not whether there is any other way to bring the action, but whether there is any other reasonable and effective manner to resolve the dispute.

[48] The Appellants stated that, if none of the Appellants are found to be directly affected, there is no other reasonable and effective way to bring the matter before the Board except by the Board granting public interest standing to one or more of the Appellants.⁸ The Appellants stated that, if the matter is not heard by the Board, it is likely the Appellants would proceed with a judicial review. Therefore, according to the Appellants, for efficiency and to avoid unnecessary use of scarce court resources, it is appropriate for the Board to grant public interest standing to the Appellants and hear the matter on its merit.

[49] The Appellants agreed that neither the Director nor the Board has the jurisdiction to make decisions under the *Irrigation Districts Act*, and the Board does not have the jurisdiction to hear appeals under that act. They submitted the Board is responsible for interpreting the *Water Act* and other relevant legislation, including the *Irrigation Districts Act*. The Appellants argued it is contrary to law if the Director issues an amendment of a water licence pursuant to the *Water Act* that necessarily contravenes a provision of the *Irrigation Districts Act*. The Appellants stated the issuance of the Licence Amendment relies on a new type of agreement that is not permitted under the *Irrigation Districts Act* and is, therefore, contrary to law. The Appellants argued the Licence Amendment was an attempt by the Approval Holder to avoid the plebiscite required by section 11 of the *Irrigation Districts Act* to obtain approval of the irrigators for a water licence transfer. The Appellants argued the Licence Holder has been supplying water to non-irrigator users contrary to the *Irrigation Districts Act* and, therefore, the Director could not have reasonably determined the original licence was in good standing. Therefore, according to the Appellants, it is within the Board's jurisdiction to interpret the provisions of the *Irrigation Districts Act* in determining if the Director's decision was contrary to law.

⁸ See: Appellants' submission, dated March 7, 2011, at paragraph 53.

B. Licence Holder

[50] The Licence Holder submitted that none of the Appellants are directly affected. The Licence Holder stated it has conserved more than 5,000 acre feet of water in the last 10 years, and it is willing to share a portion of the conserved water with other users within the boundary of the EID. The Licence Holder explained the diversion at the river will not change since all other users must receive the water directly from its distribution system.

[51] The Licence Holder stated the only people who could be affected by the Licence Amendment are the existing water users in an extremely dry year where water has to be rationed to its users. The Licence Holder stated there would be 5,000 acre feet less available for crops, which equates to 5,000 acre feet over 300,000 acres, equaling 0.2 inches per acre. The Licence Holder stated an alternative would be to expand the irrigation land base by 3,500 acres to use the water.

[52] The Licence Holder stated Mr. Hohloch will continue to receive his stock water and will not be affected by the Licence Amendment. The Licence Holder explained Mr. Hohloch currently has five Rural Agreements for 10 acre feet each at five different locations, and if he required more than 20 acre feet in any of these locations, he could change his water agreement to an "Other Purposes Livestock Water Agreement" using the Licence Amendment. The Licence Holder stated it treats all water supply agreement holders, irrigation acres, and conveyance agreements to other users equally in times of drought, so if it has to ration water below 18 inches per acre, all the other types of users will be rationed the same percentage as the irrigated acres. The Licence Holder stated that in drought times, if the junior licence holders are short of water, the irrigation districts will assign a portion of their licences to others for human needs and livestock water at no cost.

[53] The Licence Holder argued how the EID delivers water to Mr. Hohloch is irrelevant to the Licence Amendment.

[54] The Licence Holder submitted the Board does not have jurisdiction under the *Irrigations District Act*, since the appeal mechanism under that act is to the Irrigation Council.

The Licence Holder stated that, under the *Irrigations District Act*, irrigation districts can provide water for other purposes.

[55] The Licence Holder stated the issue before the Board is whether the Appellants are directly affected by the Licence Amendment.

[56] The Licence Holder stated it is supplying water to country residences within rural subdivisions under individual Rural Agreements, and with the Licence Amendment, these agreements will be changed to Other Purposes Country Subdivision Agreements for the entire subdivision. The Licence Holder noted this would require less administrative work and would be more cost effective for the EID and the users. The Licence Holder explained it is inadvertently supplying water through seepage from canals and tailout flows to some trees, shrubs, and wetlands, but when the canals are rehabilitated via pipelines, it will eliminate seepage and spill water flows. The Licence Holder explained that, if the landowner wants to keep the habitat and it requires more than 20 acre feet of water from the EID, the EID would undertake an Other Purposes Habitat Agreement to convey the water.

[57] The Licence Holder stated the Bow River Basin is not closed to new users, only new licences. The Licence Holder argued it is not practical to go through the requirements of a water transfer for every small water user. The Licence Holder noted the Licence Amendment application identified the various types of users and quantities allowed under the Licence Amendment.

[58] The Licence Holder explained Mr. Hohloch will continue to receive his water under the Rural Agreements, but new Other Purposes Agreements will have equal rights as Mr. Hohloch. The Licence Holder explained the majority of the conserved water will be used to expand the irrigation land base and lower the risk to existing users. It explained that if rationing occurs, all users will be cut back the same percentage. The Licence Holder stated that, if the Licence Amendment is not confirmed, the 5,000 acre feet of water will be used for irrigation expansion and additional Rural Agreements.

[59] The Licence Holder confirmed it purchased land from Mr. Hohloch, built a canal through his land, constructed some large borrow pits and, in return, gave Mr. Hohloch domestic

water agreements. The Licence Holder explained Mr. Hohloch received a domestic agreement for a pond off a Ducks Unlimited ditch, and Mr. Hohloch has a large Ducks Unlimited marsh on his lands that requires water from the EID under a domestic agreement.

[60] The Licence Holder explained the definition of “domestic water” was removed from the *Irrigation Districts Act* and was replaced with the definition of “household purposes.” The major difference in the definitions was that “household purposes” had a maximum quantity of 1 acre foot per year whereas “domestic water” had no quantity limitation. The Licence Holder notified Alberta Agriculture that most farmyards and livestock water agreements needed more than 1 acre foot, and amendments were passed in 2002; in the interim, the EID converted Mr. Hohloch’s and all other Domestic Water Users to Household Purposes agreements, and Ducks Unlimited was asked to apply for its own licence on any projects the EID was supplying water to under Domestic Water Users Agreements. The Licence Holder noted all Ducks Unlimited projects also supply water to livestock, but the EID will only supply water to Ducks Unlimited when the EID has excess water for its needs.

[61] The Licence Holder explained the consequences that resulted from low river flows and high demand in 2001:

1. all irrigation and water deliveries were suspended for a 2 week period in September;
2. the canal system was then turned back on to fill landowners’ dugouts for winter water supplies and to irrigators who had not used their allotment of water;
3. Mr. Hohloch asked the EID to turn on a large canal to fill the dugouts the EID had constructed and to turn on a Ducks Unlimited canal to fill the Ducks Unlimited project;
4. the EID told Mr. Hohloch it could not fill his ponds at that time and it had no mandate to fill the Ducks Unlimited projects because it was rationing all its users;
5. Mr. Hohloch’s ponds were filled and some water was put into the Ducks Unlimited project;
6. there is an agreement that Mr. Hohloch’s ponds will be filled when the Snake Canal is on, which is often not in use; and

7. after the *Irrigations District Act* was amended, the EID issued Mr. Hohloch five Rural Agreements for 10 acre feet each to five different parcels of land on his ranch.

[62] The Licence Holder explained how its handling of the situation of a water shortage and changes in the legislation between Mr. Hohloch and the EID are not matters for the Board.

C. Director

[63] The Director explained the Licence Holder applied to have a change of purpose of 5,000 acre feet of its 680,000 acre-feet original licence. In response to the public notice, the Director stated he found four people directly affected, including Mr. Hohloch because he owned a ranch within the boundaries of the EID.

[64] The Director submitted Alberta Wilderness, Trout Unlimited, and the Water Matters did not demonstrate that they met the Board's test for directly affected. The Director argued the submissions focused on the general mandate of the groups, their involvement in water policy, and how they rely on the general conduct of Alberta Environment and the Director in implementing the *Water Act*. The Director stated none of the evidence met the Board's group standing test, because it did not show how individual members are directly affected by the Director's decision or establish that a majority of their memberships are directly affected. The Director noted the groups failed to identify their memberships. The Director submitted these groups have broad-based mandates that do not meet the group standing test.

[65] With respect to Trout Unlimited, the Director argued that holding a disposition under the *Public Lands Act*, R.S.A. 2000, c. P-40, in and of itself, is not sufficient evidence to meet the directly affected test. The Director stated Trout Unlimited did not provide evidence of how its disposition will be affected by the Licence Amendment since the location of the disposition will be approximately 75 kilometres upstream of the EID. The Director argued there has never been and never will be any impacts to the disposition by the Licence Amendment.

[66] The Director submitted that neither Ms. Bradley nor Mr. Fitch are directly affected because they live in Lethbridge and, although they are clearly committed to environmental matters, their commitment is not sufficient to meet the Board's directly affected

test. The Director noted the Board has stated in previous decisions that general volunteer activities is not sufficient to demonstrate the party is directly affected. The Director stated there was no evidence to show Ms. Bradley is undertaking any current research that would be impacted by the Licence Amendment. The Director submitted the appeals of Ms. Bradley and Mr. Fitch should be dismissed.

[67] The Director argued Mr. Hohloch is not directly affected by the Licence Amendment. The Director explained he found Mr. Hohloch directly affected on the basis his ranch is within the EID boundary, and the Director took a broader view in the application review stage. However, given the final decision made on the application, the Director did not believe Mr. Hohloch was directly affected. The Director noted the Board is not bound by his decision regarding directly affected, and the Board can find a person no longer directly affected given the terms of the final decision by the Director.

[68] The Director noted the Licence Amendment is not a new allocation of water and the status quo of the impact of the original licence is maintained. The Director stated the Licence Amendment does not change the diversion point of the allocation, the amount of water diverted from the river, the rate of diversion by the Licence Holder, the timing of the diversion, or the priority number of the original licence. The Director noted that, since the point of diversion does not change, the location where priority could be called from will not change. The Director argued the impact to the Bow River and other users of the Bow River will not change from what was authorized when the original licence was issued and, therefore, none of the Appellants are directly affected by the Licence Amendment.

[69] The Director stated that, prior to the Licence Amendment, the Licence Holder was authorized to provide water for irrigation and agriculture purposes, and the latter purposes encompass how Mr. Hohloch currently receives water from the EID. The Director noted there is no change in relation to the purpose for which Mr. Hohloch receives water from the EID.

[70] The Director clarified the Licence Amendment is not a diversion under the *Water Act* or pursuant to the original licence. The Director stated a licence only deals with a diversion from a water body, but irrigation works are specifically excluded from the definition of a water body. The Director stated the Licence Amendment does not contain return flow provisions

requiring a certain amount, quality, or timing of return flow. The Director argued that since the Licence Amendment does not regulate return flow, the Licence Amendment is not changing any conditions on return flow and, therefore, the Appellants cannot argue there should be conditions on return flow or use it as a basis for being directly affected.

[71] The Director stated the Licence Holder could provide water for agriculture and stock watering, and this non-irrigation purpose will continue. The Director noted that Mr. Hohloch currently receives water from the Licence Holder through a contractual agreement, and if the contractual arrangement continues, then Mr. Hohloch and the Licence Holder will continue to have a contract for water supply. The Director stated he has no role in the management of these third party agreements and cannot comment on whether Mr. Hohloch will continue to have a contractual relationship with the Licence Holder. The Director explained the contractual agreement does not give Mr. Hohloch a contractual or statutory right or a licence under the *Water Act*. The Director confirmed that only the Licence Holder has a water right under the *Water Act*. The Director stated how the contracts are managed is not governed by the *Water Act*, but by the *Irrigation Districts Act*. The Director noted the *Irrigation Districts Act* clearly states that Alberta Environment has no roles in the bylaws of an irrigation district.

[72] The Director stated the Licence Amendment has no impact on Mr. Hohloch's contracts with the Licence Holder and has no impact on his directly affected status. The Director argued Mr. Hohloch's submission relates to how the Licence Holder treated him in the past under their contractual agreements, but these complaints have nothing to do with the Licence Amendment. The Director noted he has no statutory authority to tell the Licence Holder how to treat Mr. Hohloch. The Director argued the concerns expressed by Mr. Hohloch are about how the Licence Holder manages its various types of contracts under the *Irrigation Districts Act*, but the Licence Amendment is irrelevant to this and cannot be used as grounds to grant Mr. Hohloch standing.

[73] The Director explained the preliminary motions regarding the validity of Mr. Hohloch's Notice of Appeal were raised because of the complete lack of overlap between Mr. Hohloch's Statement of Concern and Notice of Appeal. The Director stated it was important to ensure Notices of Appeal are that of a specific appellant and not a platform for another entity or

individual. The Director acknowledged Mr. Hohloch's concerns from his Statement of Concern and in his submission relate to the Licence Holder's handling of his contracts and not the issues raised by the other Appellants so it remains a valid issue.

[74] The Director noted the Appellants rely on sections 95(5) and (6) of EPEA and section 1(f) of the Regulation, and the public interest standing test in the context of judicial review to support their argument the Board has the discretion to grant public interest standing. The Director submitted that public interest standing does not exist before the Board under the *Water Act* or EPEA.

[75] The Director stated the concept of public interest standing arises in the context of judicial review applications where a court may recognize public interest standing to allow a party to bring an application for judicial review where the traditional directly affected criteria for standing are not met. The Director noted a judicial review application is very different and is a distinct legal creature as compared to an appeal to a statutorily created appeal body.

[76] The Director submitted the Appellants are mixing separate and distinct concepts by relying on the statutory authorities of the Board to grant standing and participation by others as intervenors while trying to invoke the inherent jurisdiction of a court to grant public interest standing. The Director stated the Appellants failed to read section 95(5) of EPEA in the context of the provisions in EPEA setting out who is entitled to submit a Notice of Appeal. The Director noted the Board does not have the inherent jurisdiction to expand the statutory list of potential appellants. The Director argued the Appellants are attempting to rewrite section 115 of the *Water Act*.

[77] The Director stated the Board is not a public interest decision maker. He noted his decision on an application for a licence does not include public interest consideration (section 54) compared to a Ministerial decision under section 34 of the *Water Act*. The Director argued this demonstrates a clear legislative intent that some decisions under the *Water Act* are public interest decisions while others are not.

[78] The Director submitted that, if the Board decides to revisit the issue of public interest standing, he has no issue with the components of the public interest test as articulated by the Appellants, but the Appellants did not meet the test for the following reasons:

1. A justiciable issue is capable of being disposed of judicially and implies and relies on a court's jurisdiction to consider questions of law. The Appellants combined the elements of justiciable and seriousness together and failed to consider how the question of justiciability relates to forum. The power to grant public interest standing is derived from a court's inherent jurisdiction, whereas the Board derives its power from statute.
2. The Appellants disagreement with the legislative scheme and Alberta Environment's policies are not appealable to the Board and are not akin to the Director acting unreasonably, without jurisdiction or statutory authority, or contrary to the *Water Act*. The Director has the authority to amend a licence under section 54 of the *Water Act*; he applied the applicable policies; the Licence Amendment did not change any parameters of the allocation, diversion, or priority so it was reasonable to conclude there was no adverse effect; the Licence Amendment was not contrary to the surface water licence basin closure in the Bow River Basin since it merely expanded the types of users an existing licence holder could supply water to; and the water will be used within the boundaries of the EID which accords with the original appurtenance of the Licence Amendment and, therefore, is not a transfer application.
3. The Appellants are genuinely interested in the environment and water conservation and management issues in Alberta, but they failed to demonstrate a genuine interest in the Licence Amendment. Their concerns are broad and policy based.
4. There is an effective means to bring the issue of the Licence Amendment before the Board by a directly affected party. A challenge to the legislation and policies cannot be done through the Board since it does not have the jurisdiction to amend or rescind policies or legislation. The proper forum may be the courts or policy and legislation making forums.

[79] The Director noted the Appellants agreed that neither the Director nor the Board has authority under the *Irrigation Districts Act*. He stated the applicable legislation in this case is the *Water Act* and EPEA. The Director explained there is no statutory requirement under the *Water Act* requiring the Director to ensure, as part of a review of the application for an amendment, the applicant is acting in accordance with the *Irrigation Districts Act* or any other legislation.

[80] The Director stated the irrigation districts have their own governing legislation, which is the *Irrigation Districts Act*, and it is the appropriate forum for concerns or challenges with how an irrigation district is running itself. The Director stated the *Water Act* or an appeal to the Board is not the appropriate forum to remake or make contractual management decisions for irrigation districts.

[81] The Director noted he did ask the Licence Holder about complying with the *Irrigation Districts Act*, and Alberta Environment advised the Licence Holder that they did not feel the amendment contravenes the *Irrigation Districts Act*.

[82] The Director argued all the issues raised by Mr. Hohloch relate to how the Licence Holder manages its contracts which are solely governed by the *Irrigations District Act* and apply regardless if the Licence Amendment exists or not.

[83] The Director explained an irrigation district has the rights, capacity, powers, and privileges of a natural person. The Director stated the *Irrigations District Act* sets out the type of contracts an irrigation district can enter into and some rules for priority of stoppage of water amongst irrigation users, but it does not set out rules of priority delivery between irrigation users and non-irrigation users. The Director stated these provisions govern regardless if the Licence Amendment exists or not.

[84] The Director stated all of the other Appellants set out a series of points relating to the *Irrigations District Act*, such as: (1) the Director's decision was contrary to the provisions of the *Irrigations District Act*; (2) the Director's decision was an unreasonable exercise of discretion under the *Irrigations District Act*; (3) the Licence Holder is supplying water contrary to the provisions of the *Irrigations District Act*; and (4) the *Water Act* application was done to avoid a plebiscite under the *Irrigations District Act*. The Director submitted all of these points are not properly before the Board.

[85] The Director noted a preliminary matter raised in the Notices of Appeal was regarding the production of the Director's decision statement. The Director argued the issue is not properly before the Board, because the production of documents prior to an appeal is governed by the regulations in the *Water Act* and FOIP. He noted that, after an appeal is filed,

the Record is provided to the Board, which was done in this case and included the decision statement. Therefore, the issue is moot.

[86] The Director submitted the issues that should be considered if the appeals proceed to a hearing are:

1. Did the Director issue the amendment in accordance with the *Water Act* and applicable Alberta Environment policies? The applicable policies would be the Management Plan and the Criteria.
2. What information did the Director have before him when he made his decision?

[87] The Director submitted the issues that should not be considered are:

1. any issue regarding the *Irrigations District Act*;
2. any suggestion of ill-motives on the part of the Director or Licence Holder since there is no evidence to support the allegation; and
3. any issue regarding improper sub delegation, because the Director retains his authority to issue *Water Act* licences. The Licence Holder was not given authority to issue water rights of any sort or to allocate water. The Licence Amendment expands upon the existing list of purposes for which the Licence Holder can supply water to its users. The authority for the Licence Holder to enter into contracts with these users exists under the provisions of the *Irrigation Districts Act*, and has nothing to do with the *Water Act*. The contracts are not recognized water rights and they do not have any priority under the *Water Act*.

[88] The Director acknowledged he cannot issue new surface water licences in the Bow, Oldman, and South Saskatchewan sub-basins, but this is not the same thing as a new user who enters into a water supply contract with an irrigation district or municipality that holds a current and existing *Water Act* licence or allocation.

[89] In summary, the Director submitted:

1. none of the Appellants are directly affected;
2. public interest standing is not applicable to proceedings before the Board;
3. the Board has no jurisdiction under the *Irrigation Districts Act*;
4. Mr. Hohloch's concerns relate to his private contractual agreement with the Licence Holder and are not issues properly before the Board; and
5. if the appeals proceed to a hearing, the only issue that should be considered is whether the Director, in his consideration of the application

and in issuing the Licence Amendment, acted in accordance with the *Water Act* and the applicable Alberta Environment policies.

D. Appellants' Rebuttal Submission

[90] The Appellants submitted:

1. An appellant's interest may be directly affected by the Director's decision without harm to a natural resource.
2. Water Matters, Alberta Wilderness, and Trout Unlimited are legal entities and may bring an appeal in their own names without establishing the majority of their individual members are directly affected.
3. Water Matters, Alberta Wilderness, and Trout Unlimited are directly affected by the Director's decision.
4. The Board has the power to grant standing to persons who are not directly affected by the Director's decision pursuant to section 95(6) of EPEA when it is in the public interest to grant standing. The appropriate test to determine public interest standing is found in *Finlay*. Water Matters, Alberta Wilderness, and Trout Unlimited meet the test for public interest standing.
5. Ms. Bradley and Mr. Fitch are directly affected in their professional capacities when the Director makes decisions contrary to established law and practice.
6. Mr. Hohloch is directly affected by the potential impacts on the volume, timing, and quality of return flow to the irrigation canal from which he draws water for his livestock and by the unknown nature and status of the types of agreements the Licence Holder proposes contrary to the *Irrigation Districts Act*.
7. The Director, while acting under lawful authority to issue a water licence amendment under the *Water Act*, is liable and acting contrary to law if the implementation of the amendment requires a contravention of the *Irrigation Districts Act*.

[91] The Appellants stated the test for directly affected articulated in *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)*, 1 C.E.L.R. (3d) 134 (Alta. Q.B.) ("*Court*"), requires harm to a natural resource or harm to an appellant's use of a natural resource as an intermediary step not found in the legislation. The Appellants argued the intermediary step might be appropriate when considering health impacts, but it is possible that an

appellant's interests may be directly affected by the Director's decision without harm to a natural resource.

[92] The Appellants stated that, while they allege harm may occur to the natural resource, section 115(1)(c)(i) of the *Water Act* does not require harm as a precondition to find the Appellants directly affected. The Appellants argued they may be directly affected by impacting their ability to:

1. provide accurate information and advice on water management issues, particularly with respect to water licence amendments, to their clients, members, the public, and other organizations;
2. plan and implement their advocacy work on behalf of aquatic environments in the Bow River Basin; or
3. plan and implement their livestock watering operations.

[93] The Appellants submitted that Water Matters, Alberta Wilderness, and Trout Unlimited meet the requirements for a group to obtain standing. The Appellants noted the Board has required, in most cases, that the majority of the individual members of the organization are individually and personally impacted by the project. The Appellants stated the Board has applied the group test to community groups and environmental organizations seeking standing but has not applied the test to other forms of corporate bodies such municipalities or corporations.

[94] The Appellants stated the Board has failed to distinguish why community groups and environmental organizations are required to demonstrate the majority of their individual members are individually and personally impacted, while other forms of corporate bodies are not required to do so in order to establish standing.

[95] The Appellants stated Water Matters, Alberta Wilderness, and Trout Unlimited are incorporated societies and, as legal entities, are able to bring an appeal. They stated each of the organizations submitted Notices of Appeal in their own names, not as representatives of their members. The organizations argued the Director's decision was contrary to law and has a direct impact on the mandate and activities of the organizations themselves, such as their ability to provide accurate information and advice on water management issues, particularly with respect to water licence amendments to their members, the public, and other organizations, and to design

their advocacy work on behalf of aquatic environments in the Bow River Basin. The Appellants argued it is prejudicial to those interests to apply the group majority test to these organizations.

[96] The Appellants submitted the Board should not apply the group majority test to Water Matters, Alberta Wilderness, and Trout Unlimited, and the Board should find the organizations directly affected in their own right.

[97] In the alternative, the Appellants argued Water Matters, Alberta Wilderness, and Trout Unlimited should be granted public interest standing. The Appellants referred to *Doull et al. v. Director, Northern Region, Regional Services, Alberta Environment, re: Inland Cement Limited* (11 October 2002) Appeal Nos. 02-018-041, 047, 060, 061, 073, and 074-ID1 (A.E.A.B.) (“*Doull*”) and noted the Board granted standing to two organizations that were not directly affected but it was in the public interest to grant standing.

[98] The Appellants stated they have a valid and genuine interest in the appeals. They will present information that will assist the Board in preparing its report and recommendations, and they represent a broad public interest in this matter.

[99] The Appellants stated the Board has the power to determine questions of law. They stated questions of law, particularly as related to questions of the statutory authority of administrative decision makers, are justiciable. The Appellants stated a justiciable issue arises when a statutory decision maker acts in a way that exceeds his or her jurisdiction. Therefore, the issues before the Board are justiciable.

[100] Ms. Bradley and Mr. Fitch stated they rely on the fact the Director will make decisions in accordance with established law and policy, and when he makes decisions contrary to established law and policy, he creates uncertainty and undermines their ability to give accurate professional advice.

[101] The Appellants submitted that a person’s activities and interests may be directly affected regardless of whether the person is acting in a volunteer or paid capacity or if the person is retired or employed.

[102] Mr. Hohloch argued the Licence Amendment has the potential to change the volume, timing, and quality of return flow to the irrigation canal from which he draws his water

supply. Therefore, the Licence Amendment has the potential to directly impact Mr. Hohloch's water use. Mr. Hohloch argued the fact the volume, timing, and quality of return flow are not regulated is irrelevant to the consideration of whether the changes in the volume, timing, and quality of return flow may or may not directly impact his water use.

[103] Mr. Hohloch stated that only household purposes agreements and Rural Agreements are known to and permitted by the *Irrigation Districts Act*, and other types of agreements are not permitted. Mr. Hohloch argued the purposes approved by the Director in the Licence Amendment anticipates and is dependent on the other types of agreements which are not permitted by the *Irrigation Districts Act*. Mr. Hohloch stated that, as a holder of a type of agreement expressly permitted by the *Irrigation Districts Act*, he is properly concerned about how the Licence Holder manages its various contracts and how he may be directly affected when the Licence Holder enters into contracts not permitted or regulated by the *Irrigation Districts Act*.

[104] Mr. Hohloch stated he is not represented by any of the organizations that are also Appellants in this matter.

[105] Mr. Hohloch reaffirmed the incident he referred to in his affidavit occurred after he entered into the Rural Agreements in February 2003, and he submitted he never requested water for his dugouts at a time when the canals were shut down or at low levels.

[106] Mr. Hohloch submitted he does not fall into any of the categories of people identified in section 167(1) of the *Irrigation Districts Act* who may bring an appeal before the Irrigation Council.

[107] Mr. Hohloch submitted he should be granted standing, consistent with the Director's finding that he is directly affected.

[108] The Appellants did not challenge the statutory and policy regimes with respect to water licence amendments, and the Appellants did not request the Board amend or rescind the legislation or policy. The Appellants stated their appeals are based on the Director's failure to act in compliance with the existing legislation, which is a matter the Board can hear.

[109] The Appellants agreed that neither the Director nor the Board has the statutory requirement to oversee the Licence Holder's compliance with any legislation other than the *Water Act* and EPEA, and that neither the Director nor the Board has the jurisdiction to make decisions or hear appeals under the *Irrigation Districts Act*.

[110] The Appellants argued the Director, while acting under lawful authority to amend a water licence pursuant to the *Water Act*, is liable and acting contrary to law if the amendment requires a contravention of the *Irrigation Districts Act*. The Appellants submitted the question of whether the Director acted contrary to law in issuing the Licence Amendment is reviewable by the Board.

[111] The Appellants agreed the intent of the changes to the *Irrigation Districts Act* in 2002 was to allow irrigation districts to supply water to other users for non-irrigation purposes under Household Purposes Agreements and Rural Agreements, subject to volume restrictions for each of those types of agreements. The Appellants submitted the intent of the amendments was not to permit irrigation districts to provide an unlimited supply of water to non-irrigation purposes by way of conveyance agreements to parties not holding licences under the *Water Act*. The Appellants stated this is reflected in the language of the debates where there were several references to the limitation of these changes to the 25,000 cubic metres or 25 acre-feet per year permitted under Rural Agreements.

[112] The Appellants argued the interpretation of section 21(2)(a.1) of the *Irrigation Districts Act*⁹ suggested by the Licence Holder would render meaningless the volume restriction on Rural Agreements pursuant to sections 1(mm.1) and 19.1 of the *Irrigation Districts Act* and would be contrary to the intent that users of greater than 25,000 cubic metres of water per year would obtain their own water licence.

[113] The Appellants stated the *Irrigation Districts Act* limits the supply of water to other users for purposes under Rural Agreements to 25,000 cubic metres or 20 acre feet per year. They argued the fact the water licence transfers for amounts less than 20 acre feet are not very

⁹ Section 21(2)(a.1) of the *Irrigation Districts Act* states: "A water conveyance agreement may authorize the delivery of water through the irrigation works of the district for any purpose specified in a water licence issued under the *Water Act*...."

practical or are inconvenient for the Licence Holder is not sufficient grounds to proceed by way of an amendment and avoid the plebiscite or public hearings required by section 11 of the *Irrigation Districts Act*. The Appellants argued the Director was aware of and complicit in the Licence Holder's intent to avoid the plebiscite required by section 11 of the *Irrigation Districts Act*.¹⁰

[114] The Appellants stated the Licence Amendment is contingent on the Licence Holder entering into agreements to provide water in excess of 25,000 cubic metres per year to non-irrigation users for other purposes, but such agreements are contrary to the *Irrigation Districts Act*. The Appellants argued the Director was aware the amendment would require agreements that are contrary to the *Irrigation Districts Act* and, therefore, the Director's approval of the amendment was contrary to law.

[115] The Appellants submitted the Board has the mandate and obligation to determine if the approval of the amendment, which requires a type of agreement not known in the *Irrigation Districts Act*, is contrary to law. The Appellants submitted it is in the Board's jurisdiction to interpret the provisions of the *Irrigation Districts Act* to determine if the Director's decision was contrary to law.

[116] The Appellants stated the intent of the *Water Act*, Water for Life Strategy, and Management Plan is that where an irrigation district intends to provide all or part of its allocation to a non-irrigation user or new non-irrigation enterprise, other than by way of a Household Purposes Agreement or Rural Agreement, such provision would be by way of a transfer under the *Water Act*.

[117] The Appellants stated there is no intent in the *Irrigation Districts Act* that irrigation districts should act as public utilities and provide water service to new users within its boundaries other than through Household Purposes Agreements or Rural Agreements. The Appellants noted the provision of water by irrigation districts is exempt from, and not subject to the protections offered by, the *Public Utilities Act*, R.S.A. 2000, c. P-45.

¹⁰ See: Tab 36 of the Record in a letter from Alberta Environment to the Tsuu T'ina First Nation: "The overall intent [of the EID Application] is to provide water to small users and community projects without the need (and expense) for a plebiscite for each project or agreement as would be required by the *Irrigation Districts Act* for

[118] The Appellants submitted it is within the Board's jurisdiction to determine if the Director's decision to issue the Licence Amendment contravenes the *Water Act*, Water for Life Strategy, Management Plan, and *Irrigation Districts Act* with respect to the provision of water to non-irrigation users by the Licence Holder.

III. ANALYSIS

[119] The preliminary matters that were identified by the Board in its February 11, 2011 letter were:

1. Is the Alberta Wilderness Association directly affected by the Licence Amendment?
2. Is the Water Matters Society of Alberta directly affected by the Licence Amendment?
3. Is Ms. Cheryl Bradley directly affected by the Licence Amendment?
4. Is Mr. Lorne Fitch directly affected by the Licence Amendment?
5. (a) Is Trout Unlimited Canada directly affected by the Licence Amendment?
(b) What is the nature of the property interest identified in the Notice of Appeal of Trout Unlimited Canada and how does this impact its directly affected status?
6. (a) Is Mr. Walter Hohloch directly affected by the Licence Amendment?
(b) Will Mr. Hohloch continue to get his water for stock watering purposes in a manner that is unaffected by the Licence Amendment and how does this impact his directly affected status?
(c) Are Mr. Hohloch's concerns about how the Licence Holder will deliver water to its customer unrelated to the Licence Amendment and how does this impact his directly affected status?
(d) Is the Notice of Appeal filed by Mr. Hohloch a "duplicate" of the Notices of Appeal filed by the other Appellants such that that is not his Notice of Appeal and how does this impact (i) his standing and (ii) the validity of his Notice of Appeal?

- (e) Do the issues raised in Mr. Hohloch's Notice of Appeal not match his Statement of Concern and how does this impact (i) his standing and (ii) the validity of his Notice of Appeal?
- 7.
- (a) Does the Board have any jurisdiction under the *Irrigation Districts Act*?
 - (b) Are any of the issues raised in the Notices of Appeal solely under the jurisdiction of the *Irrigation Districts Act* and how does this impact the validity of the Notices of Appeal?
 - (c) Are there any other issues raised in the Notices of Appeal that are not properly before the Board and how does this impact the validity of the Notices of Appeal?
8. If this matter proceeds to a hearing, what issues included in the Notices of Appeal should be considered by the Board?

[120] The Board will deal with the directly affected status of the three organizations collectively, then Ms. Bradley and Mr. Fitch, Mr. Hohloch, the jurisdictional issues, and the issues for the hearing.

A. Directly Affected Status

1. Directly Affected Test

[121] The Board has discussed the issue of "directly affected" in numerous decisions. The Board received guidance on this issue from the Court of Queen's Bench in *Court*.¹¹

[122] In the *Court* decision, Justice McIntyre summarized the following principles regarding standing before the Board.

"First, the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re: Bildson*, [1998] A.E.A.B. No. 33 at para. 4. ...

Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question. See *Bildson* at paras. 21-24. ...

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the

¹¹ See: *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)*, 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:

What is 'extremely significant' is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a project is not the only way in which an appellant can show proximity between its use of resources and the project in question.

Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See *Mizera* at para. 26. In *Bildson* at para. 39, the Board stated:

[T]he 'preponderance of evidence' standard applies to the appellant's burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a 'potential' or 'reasonable probability' for harm. The Board believes that the Department's submission to the [A]EUB, together with Mr. Bildson's own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area's wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson's factual proof.

In *Re: Vetsch*, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their

standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated.”¹²

Justice McIntyre concluded by stating:

“To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is ‘directly affected’ by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted....”¹³

[123] When the Board assesses the directly affected status of an appellant, the Board looks at how the person uses the area where the project will be located, how the project will affect the environment, and how the effect on the environment will affect the person’s use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the appellant to present a *prima facie* case that he or she is directly affected.¹⁴

[124] In determining whether a person has standing to bring forward an appeal, the Board relies on the principles articulated in the *Court* decision.¹⁵ The onus is on the Appellants to demonstrate to the Board that there is a reasonable possibility they will be directly affected by

¹² *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.) (“*Bildson*”); *Mizera et al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.) (“*Mizera*”); and *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

¹³ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

¹⁴ See: *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

¹⁵ See: *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)*, 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

the decision of the Director. The effect must be plausible and relevant to the Board's jurisdiction in order for the Board to consider it sufficient to grant standing.

[125] At this point in the appeal process, the Board does not have all of the evidence and arguments before it. The determination of directly affected is a preliminary matter. As a result, the test for standing cannot be based on whether there is certainty the appellant is directly affected. Without all of the evidence, that cannot be conclusively determined. An appeal before the Board is a quasi-judicial process. The appeals process must adhere to the principles of natural justice and must be fair to all of the participants. The Board considers it appropriate that, in assessing preliminary matters, the standard should be less onerous than those found in a court. Therefore, the Board considers it appropriate that appellants show on a *prima facie* basis there is a reasonable possibility they are directly affected by the Director's decision.

[126] As stated, the effect must be reasonable and possible. It is not sufficient to show an appellant is possibly affected, they must also show the possibility is reasonable. An affect that is too remote, speculative, or is not likely to impact the appellant's interests will not form the basis to find an appellant directly affected. Both the reasonableness and the possibility of the affect must be shown.

[127] The effect on the appellant does not have to be unique in kind or magnitude.¹⁶ However, the effect the Board is looking for needs to be more than an effect on the public at large (it must be personal and individual in nature), and the interest which the appellant is asserting as being affected must be something more than the generalized interest that all Albertans have in protecting the environment.¹⁷ Under EPEA, the Legislature chose to restrict the right of appeal to those who are directly affected by the Director's decision. If the Legislature had intended for any member of the public to be allowed to appeal, it could have used the phrase "any person" in describing who has the right to appeal. It did not; it chose to

¹⁶ See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection re: Smoky River Coal Limited* (19 October 1998) Appeal No. 98-230-D (A.E.A.B.).

¹⁷ See: *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

restrict the right of appeal to a more limited class. The Legislature, in using the more restrictive language, also did not intend for the Board to provide a general right of review for the Director's decision; it intended it be something narrower.

[128] The Board uses this basic framework for assessing whether a person is directly affected and applies this framework to groups and organizations. The Board does not make a distinction between the right of a natural person to appeal or the right of a group or organization to appeal. However, different information is required when a group files a Notice of Appeal and the group, as a distinct entity, seeks directly affected status before the Board.

[129] There are two pivotal cases in which the issue of a group filing an appeal was addressed - *Hazeldean*¹⁸ and *Graham*.¹⁹ In the *Hazeldean* case, the Community League filed an appeal in relation to a plywood manufacturing plant located immediately next to their community. The approval holder objected to the appeals on the basis that none of the parties that had filed an appeal were directly affected.

[130] In *Hazeldean*, the Board stated:

“The Board notes that the residents of the Community live immediately across the street and in the vicinity of the Zeidler plant. The Community distributed a survey to all of the residents of the Hazeldean area and asked them to respond to certain questions concerning the Zeidler plant and its emissions. The results of the survey were submitted to the Board with the Community's representations. Seventy-five of 105 people who completed this survey indicated that they were very concerned about air quality in the neighbourhood. Over 50% of the residents who responded found the odour to be an unpleasant annoyance at least one-half of the time. The Community stated that its close proximity to the Zeidler plant gave rise to these odour complaints because of the prevailing westerly or south westerly winds which cause the emissions to blanket the community. It also stated that there was a great concern regarding the possibility of other compounds within the emissions that may raise health concerns. Their survey found that 55 of 105 completed responses indicated that the residents were concerned with health effects of the Zeidler emissions. Their concern is that the Approval will directly

¹⁸ *Hazeldean Community League v. Director of Air and Water Approvals Division, Alberta Environmental Protection* (11 May 1995) Appeal No. 95-002 (A.E.A.B.).

¹⁹ *Graham v. Director, Chemicals Assessment and Management, Alberta Environmental Protection*, (1996) 20 C.E.L.R. (N.S.) 287 (“*Graham*”). This case was judicially reviewed and then taken to the Court of Appeal. See *Graham v. Director, Chemicals Assessment and Management, Alberta Environmental Protection* (1997), 22 C.E.L.R. (N.S.) 141 (Alta. Q.B.) and (1997) 23 C.E.L.R. (N.S.) 165 (Alta. C.A.).

result in increased emissions to the atmosphere, where they will remain at a sufficiently low elevation that the plume distribution will undoubtedly affect the neighbours of the facility who have no choice but to breathe the air outside. Unlike the quality of water, which leaves the ultimate choice (to drink or not) to the user, there is no real option to breathing the ambient air. If the people of the Hazeldean district are not directly affected, no one will ever be.

Herein lies the crux of the directly affected dilemma: how does an appellant discharge the onus of proving that he or she is directly affected when the nature of air emissions is such that all residents within the emission area may be directly affected to the same degree? One might be led to the conclusion that no person would have standing to appeal because of his inability to differentiate the affect upon him as opposed to his neighbour. This is unreasonable and it is not in keeping with the intent of the Act to involve the public in the making of environmental decisions which may affect them.”

[131] The group in *Hazeldean* identified their members and provided the results of the survey that was taken to support their position. The major factor in accepting the *Hazeldean* group was that individual members of the group would probably have been determined directly affected since they lived in close proximity to the project.

[132] The *Graham* case involved appeals filed by three organizations. Mr. Graham filed his appeal on behalf of the Alberta Trappers Association. The other two organizations that appealed were the Lesser Slave Lake Indian Regional Council and the Toxics Watch Society (which later withdrew its appeal). The appeals related to an approval granted to the hazardous waste treatment facility located at Swan Hills. In *Graham*, the Board ruled that only one individual of one of the organizations was directly affected. This individual, Mr. Charlie Chalifoux, was a trapper that regularly trapped adjacent to the facility. The appeal proceeded accordingly.

[133] Although the Board assesses each appellant on their individual circumstance, it has been the exception rather than the general rule to have a group deemed to be directly affected. One exception has been the Lake Wabamun Enhancement and Protection Association (“LWEPA”). In the Board’s decision, *Bailey*,²⁰ LWEPA was a group that was found to be directly affected. LWEPA provided a membership list to the Board, and the Board determined

²⁰ *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (13 March 2001), Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011-ID (A.E.A.B.) (“*Bailey*”).

that LWEPA "...was created for the express purpose of engaging in the regulatory approval process, now appealed to the Board. LWEPA is the means by which ... many of the local residents have in fact chosen to carry out their obligations to participate in the TransAlta Approval process."²¹ In addition, two of its members filed separate, valid appeals, and the Board found there was sufficient evidence to determine that LWEPA, whose members surround and use the lake, had status to participate in these appeals. All of its members could have filed appeals in their own right and would have, in all likelihood due to their proximity to the lake, been determined to be directly affected.

[134] The cornerstone of all of the cases before the Board is the factual impact of the proposed project on individuals. It is important to understand that it is acceptable for an organization to file an appeal, but in order to demonstrate the personal impact required by section 91 of EPEA, individual members of the organization should also file an appeal – either jointly with the organization or separately. There will be cases, such as *Hazeldean* or *Bailey*, where an organization can proceed with an appeal on its own. However, in these cases, the Board will need to be clearly convinced the individual members of the organization (effectively the “in personam” of the organization) are individually and personally impacted by the project.²²

2. Water Matters, Alberta Wilderness, and Trout Unlimited

[135] The Board acknowledges the three organizations are legal entities with rights and privileges similar to those of a person, including the right to file an appeal on their own behalf. The organizations have the onus of showing they, as legal entities, are directly affected by the issuance of the Licence Amendment.

[136] Most of the arguments presented by these Appellants related to whether the Director’s decision to issue the Licence Amendment was contrary to law. This does not in and of itself demonstrate a direct affect.

²¹ Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraph 56, (*sub nom. Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation*) Appeals No. 00-074, 075, 077, 078, 01-001-005 and 011-ID.

²² “*In personam*: Against the person. Action seeking judgment against the person involving his personal rights and based on the jurisdiction of his person, as distinguished from his property.” (*Black’s Law Dictionary*, 6th ed.)

[137] All of the organizations are actively involved in the Bow River Basin and the Board recognizes their concerns for the health of the Bow River Basin ecosystem. However, the arguments provided demonstrate a general interest in the area and not an interest that will be impacted by the specific Licence Amendment issued. Their interests are not limited to the EID, and much of their work is done outside of the EID boundaries.

[138] They stated their ability to influence the development of water allocation and transfer policy is affected by the Director's decision. These organizations would still be able to be involved in the policy process as they have in the past. The Licence Amendment does not impact their involvement. Their input would still be valued as policies evolve.

[139] In assessing the directly affected status of a group, the Board usually reviews the membership of the organization to determine if the individual members would be individually and personally impacted by the Director's decision. In this case, none of the organizations provided a membership list. They explained their objectives as an organization and some of the work they have been involved in. This does not demonstrate how their members or the organizations themselves are directly affected by the Licence Amendment.

[140] Water Matters stated it was formed in order to address issues such as the transfer of water allowed under this Licence Amendment. Although LWEPA was formed for a similar reason, specifically to deal with the regulatory approval process around Lake Wabamun, there is a significant difference between LWEPA and Water Matters. The individual members of LWEPA were residents around the lake and would have, in all likelihood, been determined to be directly affected. Water Matters is an organization where it is likely many of the membership does not use the water from the EID or may not even live within the boundaries of the EID. There is no indication what the membership is other than a group of individuals who have a common interest in the Bow River Basin.

[141] The Appellants stated the Board has applied the group test to community groups and environmental organizations seeking standing but has not applied the test to other forms of corporate bodies such as municipalities or corporations. With a corporation all of the stakeholders would have the same interest in the matter and would be affected in the same way. Therefore, by the corporation filing an appeal, it is effectively filing for each stakeholder with

the same interest, thereby meeting the group test for standing. When municipalities appeal, they are representing the interests of the residents. Municipalities have the obligation to act for the benefit of its residents.

[142] In a review of the appeals filed with the Board since its inception, there are few instances where a corporation or municipality has filed an appeal unless it was the approval holder. Depending on the circumstances, corporate or municipal bodies would have a strong argument for being found directly affected by their property or estate interest more than an *in personam* interest. Water Matters, Alberta Wilderness, and Trout Unlimited do not have a property or an estate interest in the Bow River Basin, and they do not have an identifiable *in personam* interest. This distinguishes the position of corporate and municipal entities from groups such as Water Matters, Alberta Wilderness, and Trout Unlimited. This does not mean there will not be circumstances where these groups will be granted standing, but based on the circumstances of these appeals and the submissions provided, they have not demonstrated they are directly affected by the Licence Amendment.

[143] Water Matters, Alberta Wilderness, and Trout Unlimited have not demonstrated they are directly affected by the Licence Amendment. Therefore, the Board dismisses their appeals.

3. Ms. Cheryl Bradley and Mr. Lorne Fitch

[144] Ms. Bradley and Mr. Fitch each have a long history of bringing forth concerns regarding water issues in the South Saskatchewan River Basin. The Board acknowledges their efforts and genuine concern for the riparian and aquatic ecosystems in the area. They have worked and volunteered to protect the ecosystems in the Bow River Basin.

[145] Ms. Bradley and Mr. Fitch argued the Licence Amendment will affect their research and their management and education activities to protect the ecosystems in the Bow River Basin. With respect, the Licence Amendment should not impact their abilities to continue with their research and educational activities. It is possible different research projects could develop as a result of the Licence Amendment.

[146] Ms. Bradley and Mr. Fitch argued the Licence Amendment will impact their ability to advise clients on environmental matters, water management, and the water allocation policy in the South Saskatchewan River Basin. They are aware of the provisions in the legislation that apply to the Director's ability to issue amendments to licences, and even though the information presented may change, the Licence Amendment does not impede their ability to inform their clients on such matters.

[147] Ms. Bradley argued the Licence Amendment will impact her ability to obtain data on water users in the South Saskatchewan River Basin. At this point, her concerns are speculative. The Licence Holder may be willing to share the data with her or Alberta Environment may have additional information that she could access. As stated, the Board cannot base directly affected status on speculation. Therefore, this concern does not demonstrate on a *prima facie* basis that she is directly affected.

[148] Mr. Fitch argued the Licence Amendment undermines his efforts to protect the ecosystems in the Bow River Basin. Mr. Fitch can still assess the ecosystems in the Bow River Basin and continue to promote measures to protect the Bow River Basin.

[149] Ms. Bradley and Mr. Fitch did not demonstrate there is a reasonable possibility they will be directly affected by the Licence Amendment. Therefore, the Board dismisses their appeals.

4. Mr. Walter Hohloch

[150] Mr. Hohloch owns property within the boundaries of the EID and receives water for his livestock under a contractual agreement with the Licence Holder. He expressed concern that, if non-irrigation users are allowed to use water from the EID, his ability to have a secure water supply could be impacted. Mr. Hohloch described an incident in 2004 or 2005 in which water was withheld. The Licence Holder explained the steps it took in 2001 when there was a period of drought and all irrigation was suspended for two weeks. Although there was a disagreement as to when the water suspension occurred, it does demonstrate to the Board that, in the recent past, conditions existed that required the Licence Holder to withhold water from its users. This demonstrates to the Board there is a reasonable possibility that conditions may occur

again that will require water being withheld from water users by the Licence Holder. This would include Mr. Hohloch, because he holds five Rural Agreements with the EID.

[151] Although it is possible for circumstances to reoccur that require a cut back of water from the Licence Holder, Mr. Hohloch still has the onus to show he is directly affected by the issuance of the Licence Amendment. Mr. Hohloch relies on water supplied by the Licence Holder to water his livestock. If additional water users are vying for the same water at a time of a cut back, it is possible Mr. Hohloch could be affected. The Licence Holder's submission did not provide enough information to rebut Mr. Hohloch's argument that he could be impacted due to changes in the amount of water available, the return flow rates, and the quality of the water return, and any priority system that may be established by the Licence Holder.

[152] Therefore, the Board finds Mr. Hohloch has met the test for directly affected and the Board will hear his appeal. At the substantive hearing, the Board will determine if the issuance of the Licence Amendment will actually impact Mr. Hohloch.

[153] The determination of directly affected is a preliminary step in the hearing process. At the hearing, once all parties have provided their evidence and arguments, the Board will weigh the evidence and make its recommendations. It is after all of the evidence has been heard that the Board assesses the level of risk to the environment affecting the appellant. If there is a significant risk the environment will be harmed, including risk of harm to the appellant's use of the natural environment, the Board may recommend the approval be reversed; if there is minimal risk to the environment, then the Board may recommend confirmation of the approval as written; and, if, there is a manageable risk to the environment, the Board may recommend variations to the approval.

5. Public Interest Standing

[154] The Appellants raised the issue of public interest standing. They referred to the *Finlay* and *Reese* cases as being determinative of the matter and discussed the four-part test.²³ The Board notes these cases discuss the concept of public interest standing in relation to a review

²³ See: *Finlay v. Canada (Minister of Finance)* [1986] 2 S.C.R. 607, and *Reese v. Alberta* (1992) 87 D.L.R. (4th) 1 (Alta. Q.B.).

of an administrative decision by a Court. These cases do not address the ability of an administrative tribunal to allow public interest standing in the exercise of its jurisdiction. While the Board does not accept these cases apply in these circumstances, the Board will examine the test in the context of these appeals.

[155] The *Finlay* and *Reese* cases establish a four part test to deal with public interest standing. The first part of the test is whether the issue is justiciable. The powers of the Board are limited to those granted through the enabling legislation. It does not have the inherent powers of the courts. The Board's enabling legislation does not provide it with the powers to determine public interest standing. The first step requires the Board to determine whether the filed appeal is valid. In order for the Board to have the jurisdiction to hear an appeal, the legislation requires the appeal to be filed by someone who has filed a Statement of Concern and is directly affected by the Director's decision. This is a preliminary matter the Board must determine before it can proceed to a substantive hearing.

[156] The second part of the test is whether there is a serious issue that needs to be heard. The Board does not disagree with the Appellants that there is a serious issue to be determined. The Appellants are concerned the Director acted outside his legislated authority and contrary to the law when he issued the Licence Amendment. In addition, Mr. Hohloch is concerned the Licence Amendment will affect his right to access water from the Licence Holder.

[157] The third part of the test is whether the applicant is directly affected or has a genuine interest in the matter. The Appellants are using the public interest test to argue they should be granted standing if they are found to be not directly affected. The Board notes none of the Appellants except Mr. Hohloch is directly affected by the Director's decision to issue the Licence Amendment. The Board acknowledges the Appellants have a genuine interest in the protection of the Bow River Basin. However, what is at issue in the appeals is the Licence Amendment that was issued to the Licence Holder by the Director. It is questionable whether the Appellants, except for Mr. Hohloch, have a genuine interest in the actual Licence Amendment being appealed. Although they have an interest in how the Director issues licence amendments within the Bow River Basin, the appeal is only of the specific Licence Amendment issued to the Licence Holder. Even though the Appellants have a genuine interest in the Bow

River Basin, based on the information provided in their submissions, they only have an interest in the Licence Amendment as it pertains generally to the issuance of amendment licences in the Bow River Basin.

[158] The fourth part of the test requires there be no other reasonable and effective manner for the issue to be brought before the court. In the appeals before the Board, there is another reasonable and effective manner to bring the issues before the Board. What is required is a person who is directly affected by the Director's decision. The Board has found Mr. Hohloch directly affected, and the appeal of his issues will be heard by the Board.

[159] The Appellants referred to the *Doull* decision, arguing that two organizations that were not directly affected were granted "public interest standing." With respect, they were not. In the *Doull* decision, the Board found the two groups, specifically the Edmonton Friends of the North Environmental Society ("EFONES") and the Edmonton Federation of Community Leagues ("EFCL"), did not meet the group standing test and dismissed their appeals. EFONES and the EFCL were allowed to participate pursuant to section 95(6) of EPEA, which allows a person to be added as a party if the Board determines that the person should be allowed to participate in the hearing. The Board allowed these groups to participate essentially as intervenors. If the parties that were found directly affected had withdrawn their appeals, EFONES and the EFCL would not have been able to proceed with the appeals on their own.²⁴

[160] The Board cannot and will not grant public interest standing to the other Appellants in these circumstances.

B. Jurisdictional Issues

[161] The Appellants argued the Board has the right to consider the *Irrigation Districts Act* as it influences the Director's decision when issuing the amendment. All of the Participants agreed the Board does not have the right to hear appeals under the *Irrigation Districts Act*. The Board concurs.

²⁴ It should also be noted that *Doull* was a unique situation in that standing was, in part, determined by an agreement between EFONES, the EFCL, the Director, and the approval holder, Inland Cement Limited.

[162] The jurisdiction of the Board is determined by statute, and under EPEA, the Board can hear appeals of certain decisions made under EPEA, the *Water Act*, the *Government Organization Act*, R.S.A. 2000, c. G-10, and the *Climate Change and Emissions Management Act*, S.A. 2003, c. C-16.7. It does not have any jurisdiction to consider decisions made under the *Irrigation Districts Act*.

[163] The Appellants argued the Licence Amendment anticipates other types of agreements that are not allowed under the *Irrigation Districts Act*. The Director can issue the Licence Amendment, but it is up to the Licence Holder to ensure it is complying with all other applicable legislation. This occurs in many of the licences or approvals issued in that project proponents must ensure they have all the necessary municipal and federal approvals as well as other provincial approvals before the projects can proceed. The Director does not have the responsibility to ensure a licence holder or approval holder is abiding with other legislation that is not within his jurisdiction.

[164] The Board notes the Appellants did not want the Board to amend or rescind the legislation or policy related to water licence amendments.²⁵ The Board cannot amend or rescind any legislation or policy. That is outside the Board's jurisdiction.

[165] Mr. Hohloch described issues he has had in the past regarding access to water from the Licence Holder. The contractual agreements for access to water are between Mr. Hohloch and the Licence Holder and are based on the *Irrigation Districts Act*. These agreements are not under the *Water Act* or any other legislation within the Board's jurisdiction. These are private agreements. The Board recognizes Mr. Hohloch's rights that may be affected by the Licence Amendment exist because of the contracts he has with the Licence Holder. Only to the extent these rights may be affected by the Licence Amendment does the Board have the jurisdiction to consider the contractual arrangements.

[166] Therefore, the Board does not have jurisdiction to hear matters under the *Irrigation Districts Act* or to assess private contractual agreements between the Licence Holder and Mr. Hohloch.

²⁵ See: Appellants' submission, dated April 18, 2011, at paragraph 46.

C. Hearing Issues

[167] In response to the question of what issues should be considered by the Board at a hearing, the Appellants²⁶ raised issues as to whether the Licence Amendment was contrary to law, whether the amendment conceals non-compliance, if the Licence Amendment is contrary to the legislation and applicable policy documents, if there is improper delegation of the Director's authority, and whether insufficient information in the application for the amendment resulted in the Director erring by issuing the Licence Amendment.

[168] The Licence Holder believed the issue was whether any of the Appellants were directly affected. This issue was considered in this decision, but the Board, in a substantive hearing, will determine if there will be an actual impact to Mr. Hohloch.

[169] The Director stated the issue should be whether the Director, in his consideration of the application and in issuing the Licence Amendment, acted in accordance with the *Water Act* and the applicable Alberta Environment policies.

[170] Mr. Hohloch argued it is not reasonable to require the issues raised in a Statement of Concern match the issues raised in a Notice of Appeal. It is not uncommon to have the reasons of concern vary between the Statement of Concern and the Notice of Appeal. When a licence or approval is issued, some of the concerns expressed by a Statement of Concern filer may have been resolved or mitigated and may no longer be an issue. It can also happen that an issue arises as a result of the wording or requirements in an approval or licence that creates a concern for the Statement of Concern filer that was not an issue prior to the issuance of an approval or licence. What the Board does not want to see is a Statement of Concern filer purposely excluding an issue and then blindsiding the licence holder in an appeal.

[171] Only issues related to the issuance of the Licence Amendment and the terms and conditions included in the Licence Amendment can be considered by the Board, since it is the Director's decision to issue the Licence Amendment that is being appealed and that will be

²⁶ The Board recognizes that only Mr. Hohloch has been found to have a valid appeal. However, his submission was incorporated into a single submission with all of the other Appellants, so the Board will consider the issues raised by all of the Appellants in determining the issues for the hearing.

reviewed by the Board. Issues dealing with the *Irrigation Districts Act* and the terms of a third party contractual arrangement are not issues that can be considered.

[172] The Board cannot change legislation or Alberta Environment's policies. The Appellants appeared to be discontented with the present legislative scheme, but there are no remedies available by appearing before the Board if their intent is to have the legislation or policies changed. There are other forums available to create and promote legislative reform.

[173] The Appellants raised concerns regarding non-compliance by the Licence Holder under the *Irrigation Districts Act*. The Board cannot make this determination as it is outside the Board's jurisdiction. If there was non-compliance under the *Water Act*, then an investigation by the compliance team of Alberta Environment could be undertaken. However, that is not an issue before the Board.

[174] The Licence Amendment does not allow the Licence Holder to issue water rights. Any agreements to receive water from the Licence Holder are by contracts, which are entered into pursuant to provisions in the *Irrigation Districts Act*. Therefore, the concern of whether the Director has improperly delegated his authority to the Licence Holder is not an issue that will be considered by the Board in this appeal.

[175] The Board considers the issue of whether the Licence Amendment is contrary to the legislation and applicable policy documents a valid issue. This captures the Appellants' concerns on whether the Director properly used his discretion under the *Water Act*, whether he considered the applicable legislation and policies, including the Management Plan and Criteria, and whether, based on the information before the Director at the time of his decision, the Licence Amendment was appropriately issued.

[176] Therefore, the first issue the Board will hear at the substantive hearing is:

Did the Director, in his consideration of the application and in issuing the Licence Amendment, act in accordance with the *Water Act* and the applicable Alberta Environment policies, including the South Saskatchewan River Basin Water Management Plan and the Water Licence Change of Purpose: Administrative Licencing Criteria?

[177] The Board will also consider the practical affect of the Licence Amendment on Mr. Hohloch and, therefore, the second issue the Board will hear at the substantive hearing is:

What effect will the Licence Amendment have on Mr. Hohloch's water supply for his cattle?

[178] Under section 95(4) of EPEA, if the Board determines a matter will not be included in the hearing of the appeal, no representations may be made on the matter at the hearing. Since the Board has found only Mr. Hohloch directly affected, the Board can only hear arguments on the issues he raised and that are within the Board's jurisdiction and relevant to the Director's decision to issue the Licence Amendment.

IV. CONCLUSION

[179] The Board finds Water Matters Society of Alberta, Alberta Wilderness Association, Trout Unlimited Canada, Ms. Cheryl Bradley, and Mr. Lorne Fitch did not meet the onus of demonstrating to the Board that they are directly affected by the Director's decision to issue the Licence Amendment. The Board dismisses their appeals, and the Board cannot and will not grant public interest standing in these circumstances.

[180] Mr. Hohloch owns land within the EID and has a contract with the Licence Holder to receive water. The Board finds Mr. Hohloch has demonstrated there is a reasonable possibility he will be directly affected by the issuance of the Licence Amendment. Therefore, the Board will hear Mr. Hohloch's appeal on the following issues:

1. Did the Director, in his consideration of the application and in issuing the Licence Amendment, act in accordance with the *Water Act* and the applicable Alberta Environment policies, including the South Saskatchewan River Basin Water Management Plan and the Water Licence Change of Purpose: Administrative Licencing Criteria?
2. What effect will the Licence Amendment have on Mr. Hohloch's water supply for his cattle?

[181] The Board does not have any jurisdiction under the *Irrigation Districts Act* and cannot hear arguments on the matters raised by Mr. Hohloch relating to the *Irrigation Districts*

Act or the contractual arrangements he has with the Licence Holder other than how the issuance of the Licence Amendment may impact his ability to receive water under the contracts.

Dated on August 30, 2011, at Edmonton, Alberta.

- original signed -

D.W. Perras
Chair

- original signed -

Alan J. Kennedy
Board Member

- original signed -

Eric O. McAvity, Q.C.
Board Member