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Reasons for Decision

Ruling on Application of Section 152 of the *Mackenzie Valley Resource Management Act*	
File Number	MV2019C0025 (Type A Land Use Permit) MV2019L2-0011 (Type B Water Licence – Non-Federal area) MV2019L2-0012 (Type B Water Licence – Federal area)
Company	Seabridge Gold (NWT) Inc. ("Seabridge")
Project	Matthews Lake camp, Courageous Lake, NT
Date of Decision	January 16, 2020

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These Reasons for Decision set out the Mackenzie Valley Land and Water Board's (the MVLWB/Board) ruling on questions raised during the review of Seabridge Gold (NWT) Inc.'s (Seabridge) applications; specifically:

- the applicability of s. 152 of the *Mackenzie Valley Resource Management Act* (MVRMA)[1] to Seabridge's Matthews Lake Surface Lease 76/D3-6-6 (Seabridge Lease), and
- whether s. 152 precludes the issuance of a land use permit for activities conducted on lands covered by the Seabridge Lease.

A summary of Seabridge's Type A Land Use Permit (MV2019C0025) Application, which brought s. 152 into issue, is provided in Section 3 below. The Board's regulatory process for addressing the s. 152 questions is set out in Section 4. Sections 5, 6, 7, and 8 set out the factual, legal and evidentiary context for the Board's analysis. Sections 9 and 10 set out the Board's decision and conclusions and guidance on next steps, respectively.

1.0 List of Abbreviations

Anniversary Date	Effective date of Licence as seen on the Licence cover page
Applicant	Seabridge
Applications	Seabridge's submissions in support of Type A Land Use Permit (MV2019C0025), Type B Water Licence for a federal area (MV2019L2-0012), and Type B Water Licence for a non-federal area (MV2019L2-0011).
EA/EIR	Environmental Assessment/Environmental Impact Review
GNWT	Government of the Northwest Territories
GNWT-Lands	Government of the Northwest Territories – Department of Lands
INAC	Indian and Northern Affairs Canada (currently known as Crown-Indigenous Relations and Northern Affairs Canada)
Licence	Water Licence
MVLUR	*Mackenzie Valley Land Use Regulations*
MVLWB or Board	Mackenzie Valley Land and Water Board
MVRMA	*Mackenzie Valley Resource Management Act*
Party	As per the Board's *Rules of Procedure*
Permit	Land Use Permit
WLWB	Wek'èezhìi Land and Water Board

2.0 Summary of Applications

On September 18, 2019, Seabridge submitted Applications to the Board for a:

- Type A Land Use Permit (MV2019C0025)[2];
- Type B Water Licence for a federal area (MV2019L2-0012);[3] and
- Type B Water Licence for a non-federal area (MV2019L2-0011).[4]

Each of the Applications is related to Seabridge's gold exploration activities in the Courageous Lake area.

[1] SC 1998, c. 25 [MVRMA].
[2] See Land Use Permit MV2019C0025 Application, submitted to the MVLWB on September 18, 2019.
[3] See Water Licence MV2019L8-0012 Application, submitted to the MVLWB on September 18, 2019.
[4] See Water Licence MV2019L2-0011 Application, submitted to the MVLWB on September 18, 2019.

This Request for Ruling is associated only with Seabridge's Type A Land Use Permit (Permit) Application.

Seabridge proposes to undertake the following exploration activities in its Permit Application:

- Mineral exploration including diamond drilling,
- Fuel storage,
- Winter road construction/maintenance, and
- Quarrying.[5]

These exploration activities are identical to the activities that Seabridge was permitted to conduct for seven years under Type A Permit MV2012C0025, which expired on December 27, 2019 (Expired Permit).[6]

The scope of work in Seabridge's Permit Application excludes the Matthews Lake camp. The Expired Permit also excluded the Matthews Lake camp.

The Matthews Lake camp is covered by Seabridge's surface lease 76D/3-6-6 ("Seabridge Lease").[7]

Seabridge asserts in its Permit Application that the Matthews Lake camp is "regulated" by the Seabridge Lease, and that pursuant to s. 152 of the MVRMA, the camp is not subject to the MVRMA and its regulations,[8] including the MVLUR.[9] Consequently, Seabridge suggests that any Permit issued by the Board should exclude the Matthews Lake camp and any lands covered by the Seabridge Lease.

2.1 Distribution List

This document refers uses the term "distribution list" for the list of parties to whom materials from this regulatory process were circulated. As this Project is in the Akaitcho Territory and the Wek'èezhìi Resource Management Area, the appropriate core organizational reviewers and government/Indigenous organizations were included in the list. The list was periodically updated, and (when requested) individuals with specific interests in the Project were also added to the distribution list.

3.0 Regulatory Process for Request for Ruling

On November 29, 2019, the Board issued a Directive under its Rules of Procedure to Seabridge as well as the distribution list in response to a letter from Indian and Northern Affairs Canada (INAC) provided by GNWT-Lands dated July 14, 2005.[10] INAC was responsible for the administration of surface leases prior to devolution. The INAC letter advised that surface lease 76/3-6-4, a predecessor of the Seabridge Lease, was subject to the MVLUR and that any activity on lands covered by the lease may require a land use permit.

The INAC letter suggests that s. 152 does not exclude the leased lands and the Matthews Lake camp from regulation under the MVRMA.

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[5] See Land Use Permit MV2019C0025 Application, submitted to the MVLWB on September 18, 2019 at PDF pg. 2.
[6] See Land Use Permit MV2019C0025 Application, submitted to the MVLWB on September 18, 2019 at PDF pg. 2.
[7] See Land Use Permit MV2019C0025 Application, submitted to the MVLWB on September 18, 2019 at PDF pg. 8.
[8] See Land Use Permit MV2019C0025 Application, submitted to the MVLWB on September 18, 2019 at PDF pg. 8.
[9] SOR/98-429 [MVLUR].
[10] See MVLWB Directive re Question of the Applicability of Section 152 of the MVRMA dated November 29, 2019.

The Board determined that the question of the applicability of s. 152 needed to be resolved before the scope/application of a land use permit for Seabridge's current Application could be determined.[11] The Board's Directive set out a work plan and process for making a decision on the application of s. 152 to the Seabridge Lease. The work plan required Seabridge to provide any additional evidence, including a copy of the Seabridge Lease to the Board by December 5, 2019. It was noted that the Seabridge Lease would be held under confidential cover and not placed on the Board's online registry.

Seabridge responded indicating that it would not be submitting any additional evidence and that it would provide further submissions following receipt of other parties' evidence and/or argument.

On December 11, 2019, GNWT-Lands submitted the current Seabridge Lease and its predecessors to the MVLWB as supplemental evidence under confidential cover. Specifically, GNWT-Lands submitted:

- surface lease 76D/3-6-2 granted by INAC to Bathurst Inlet Developments (1984) Ltd. in 1994 for a term of 10 years (commencing January 1, 1994 and terminating December 31, 2003);
- surface lease 76D/3-6-3 granted by INAC to Bathurst Inlet Developments (1984) Ltd. in 1995 for a term of 10 years (commencing May 1, 1995 and terminating April 30, 2005);
- surface lease 76/3-6-4 granted by INAC to Bathurst Inlet Developments (1984) Ltd. in 2005 for a term of 10 years (commencing May 1, 2005 and terminating April 30, 2015);
- an indenture amending the "use" in surface lease 76/3-6-4 issued by INAC to Bathurst Inlet Developments (1984) Ltd. dated July 30, 2010; and
- the Seabridge Lease, i.e., the current surface lease 76D/3-6-6 granted by the GNWT to Seabridge in 2015 for a term of 10 years (commencing May 1, 2015 and terminating April 30, 2025).[12]

Parties which required access to these leases to complete their submissions in this matter were instructed to make arrangements with the MVLWB for such access. The MVLWB did not receive any requests for access to the leases.

On December 16, 2019, the NWT and Nunavut Chamber of Mines submitted correspondence indicating that many mining companies rely upon historical surface leases in the NWT to conduct their operations.[13]

On December 18, 2019, the Tłı̨chǫ Government submitted a letter referencing a recent decision by the Wek'èezhìi Land and Water Board (WLWB and WLWB Decision). The WLWB Decision interprets the scope and application of s. 152 in light of the statutory context, the WLWB's jurisdiction, and the Tłı̨chǫ Agreement. The Tłı̨chǫ Government recommended that the Board determine, as the WLWB did, that s. 152 of the MVRMA cannot prevent the Board from carrying out the permitting functions required by the Tłı̨chǫ Agreement or another modern treaty.[14]

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[11] See MVLWB Directive re Question of the Applicability of Section 152 of the MVRMA dated November 29, 2019.
[12] See GNWT Submission re Applicability of s. 152 of the MVRMA to Seabridge's Surface Lease dated December 11, 2019.
[13] See NWT & Nunavut Chamber of Mines Submission re Applicability of Section 152 of the MVRMA to Historical Surface Leases dated December 16, 2019.
[14] See Tlicho Government Submission re Applicability of Section 152 of the MVRMA to Historical Leases dated December 18, 2019.

On December 19, 2019, GNWT-Lands submitted its final argument acknowledging there have been inconsistencies in the administration of surface lease 76D/3-6-6 (the Seabridge Lease) and its predecessors since the enactment of the MVRMA and its regulations.[15]

On December 23, 2019, Seabridge submitted its final arguments responding to the Tłı̨chǫ Government's submissions. If the Board concludes that s. 152 does apply and a permit is required for activities on lands covered by the Seabridge Lease, Seabridge indicated that it wishes to exclude the lease lands from the current Application and have a new permit issued for the Matthews Lake camp.[16]

The parties' arguments and evidence are discussed further in Section 8 below.

On January 16, 2020, the Board met and considered the Request for Ruling and issued its decision to Seabridge.[17]

4.0 Site History of Matthews Lake Camp

The Matthews Lake camp was previously operated by Bathurst Inlet Developments (1984) Ltd.

Bathurst Inlet Developments (1984) Ltd. leased the lands on which it operated the Matthews Lake camp under three sequential surface leases:

- surface lease 76D/3-6-2 granted by INAC to Bathurst Inlet Developments (1984) Ltd. in 1994 for a term of 10 years (commencing January 1, 1994 and terminating December 31, 2003);
- surface lease 76D/3-6-3 granted by INAC to Bathurst Inlet Developments (1984) Ltd. in 1995 for a term of 10 years (commencing May 1, 1995 and terminating April 30, 2005); and
- surface lease 76/3-6-4 granted by INAC to Bathurst Inlet Developments (1984) Ltd. in 2005 for a term of 10 years (commencing May 1, 2005 and terminating April 30, 2015). The "use" provided for in surface lease 76/3-6-4 was amended by an indenture issued by INAC to Bathurst Inlet dated July 30, 2010.[18]

On April 20, 2001, a Permit application was submitted by Bathurst Inlet Developments (1984) Ltd. covering the camp at the Tundra Mine airstrip, fuel storage, and a winter road. The application was also to support the camp on Matthews Lake (at that time the camp was called Treeline Lodge).[19]

During the application review, Board staff requested additional information relating to various items in the application as well as information relating to the Treeline Lodge.[20]

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[15] See GNWT Final Submission re MVRMA and Associated Regulations and Seabridge Surface Lease dated December 19, 2019.
[16] See Seabridge Final Submission Applicability of Section 152 of the MVRMA dated December 23, 2019.
[17] See MVLWB Determination on Request for Ruling dated January 16, 2020.
[18] See GNWT Submission re Applicability of s. 152 of the MVRMA to Seabridge's Surface Lease dated December 11, 2019.
[19] See Bathurst Inlet Development (1984) Ltd – Land Use Permit Application dated April 20, 2001
[20] See Additional Information request from Board staff dated August 27, 2001;

On November 5, 2001, Bathurst Inlet Developments (1984) Ltd. stated that:

> Treeline Lodge, on Matthews Lake, is a developed tourism camp for eco-tourism and operated primarily during the summer and fall periods. The lodge operations generate greater than 400 person days per year. The lodge also provides logistical support to exploration companies that may be working in the area.[21]

On December 24, 2001, Permit MV2001X0030 was issued to Bathurst Inlet Developments (1984) Ltd. with a commencement date of May 20, 2002 and an expiration date of May 19, 2007. The Permit applied to the Matthews Lake camp (Treeline Lodge).[22]

On July 1, 2009, Bathurst Inlet Developments (1984) Ltd. applied for a new permit to support the existing main lodge (Treeline Lodge), ice roads, fuel storage and a small camp located at the airstrip to accommodate extra staff, with a small satellite camp being used when small groups for mining or tourists that do not require use of the main lodge. In its permit application Bathurst Inlet Developments (1984) Ltd. referenced the inclusion of the main Treeline Lodge in the permit.[23]

Seabridge purchased the Seabridge Lease in 2010.[24]

On August 3, 2010, Bathurst Inlet Developments (1984) Ltd. withdrew its permit application as a result of the sale of the camp to Seabridge.[25]

Seabridge now operates the Matthews Lake camp under the Seabridge Lease, i.e., the current surface lease 76D/3-6-6 granted by the GNWT-Lands to Seabridge in 2015 for a term of 10 years (commencing May 1, 2015 and terminating April 30, 2025).[26]

No land use permit has been issued in relation to the Matthews Lake camp since the expiry of the 2001 Permit.

Since the four surface leases issued to Bathurst Inlet Developments (1984) Ltd. and Seabridge were provided under confidential cover, the MVLWB cannot provide specific details about the leases. However, the Board makes the following comments about the leases:

- the use or purposes of the leases has been altered over time, and the use was specifically amended in 2010;
- the leases include some environmental regulatory conditions relating to restoration, waste disposal and storage of fuel and hazardous chemicals; and
- the leases were each issued for fixed terms of 10 years. Each lease includes an expiry date, and every new lease term commences after the expiry of the preceding lease. The leases do not include renewal clauses, and each new lease has a different number.

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[21] See Additional Information submitted by Bathurst Inlet Development (1984) Ltd. – dated November 5, 2001;
[22] See Issuance of Type A Land Use Permit dated December 24, 2001;
[23] See Bathurst Inlet Development (1084) Ltd. – Land Use Permit Application dated July 1, 2009.
[24] See GNWT Security Estimate Recommendation dated November 7, 2019 at PDF pg. 4.
[25] See Bathurst Inlet Development (1984) Ltd. – Land Use Permit Withdrawal Request – dated August 3, 2010.
[26] See GNWT Evidence for the Applicability of s. 152 of the MVRMA to Seabridge's Surface Lease dated December 11, 2019.

5.0 Legislative Provisions – MVRMA, s. 152

Whether a permit is required for activities that meet the thresholds set out in the MVLUR conducted on Seabridge Lease lands depends on the scope and interpretation of MVRMA, s. 152.

The MVRMA received Royal Assent on June 18, 1998. Part 3 of the Act came into force in 1998. On March 31, 2000 Part 4 of the Act was called into force in the part of the Mackenzie Valley where Seabridge operates.

In the Mackenzie Valley, the MVRMA's land management system replaced the system contained in the *Territorial Lands Act* ("TLA").[27] The TLA system did not provide for permits to be issued when a surface lease was in place. Land claims in the Mackenzie Valley changed that and the MVRMA[28] and MVLUR require permits for all uses of land that are over the thresholds in the regulations,[29] even if the land is leased.

MVRMA, s. 152 is a transitional provision that addresses the continuation of rights and interests in land that existed before the MVRMA came into force. Specifically, s. 152 provides that:

> Rights to the use of land under any lease, easement or other interest in land that was granted under the *Territorial Lands Act* or the regulations made under that Act, or under any territorial law, and that exist on December 22, 1998, with respect to a settlement area, or on March 31, 2000, with respect to any other portion of the Mackenzie Valley, continue in effect, subject to the terms and conditions of exercising those rights (our emphasis).

The Board is not aware of any case law addressing s.152. However, the Wek'èezhìi Land and Water Board ("WLWB") recently considered the legal interpretation of MVRMA, s. 152 in its reasons on Dominion Diamond Mines ULC's Request for Ruling on the Misery Underground Project ("WLWB Decision").[30]

In the WLWB Decision, Dominion proposed to expand the Misery camp located on lands covered by Dominion's historic (pre-2000) surface leases. Dominion's rights to the use of land under the leases existed on March 31, 2000 and therefore pursuant to s. 152, continued in effect subject to the terms and conditions of exercising those rights. Dominion argued that s. 152 prevented the WLWB from imposing terms and conditions on Dominion's pre-existing rights through a permit (i.e., issuing a permit for lands covered by the historical leases).

The WLWB engaged in a detailed statutory interpretation analysis of s. 152. The WLWB concluded that while s. 152 provides for the continuation of land use rights that pre-existed the MVRMA, it does not prevent the WLWB from imposing terms and conditions on those lands by issuing a permit.[31]

Parties did comment on the applicability of the WLWB Decision in their arguments about s. 152 on the Seabridge Request for Ruling. The WLWB Decision and the parties' arguments are summarized below.

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[27] RSC, 1985, c. T-7 [Territorial Lands Act]
[28] See MVRMA, s. 59(1).
[29] See MVLUR, ss. 2(1) and 4.
[30] See WLWB Reasons for Decision – Dominion Diamond Mines ULC – Misery Underground – Request for Ruling dated May 9, 2019.
[31] See WLWB Reasons for Decision – Dominion Diamond Mines ULC – Misery Underground – Request for Ruling dated May 9, 2019 at pg. 12.

6.0 WLWB Decision

The WLWB concluded that "while s. 152 provides for the continuation of land use rights that pre-existed the MVRMA, it does not prevent the Board from imposing terms and conditions on those lands (i.e., issuing a LUP applicable to the leased area)."[32]

The WLWB arrived at this conclusion by applying the modern approach to statutory interpretation, and reading s. 152 in its entire context, in its grammatical and ordinary sense harmoniously with the scheme of the MVRMA, the objects of the MVRMA, and the intention of Parliament.[33]

Grammatical and Ordinary Sense

MVRMA, s. 152 states that rights to the use of land "continue in effect, … [s]ubject to the terms and conditions of exercising those rights."

The WLWB noted that s. 152 does not specify that pre-existing land rights are subject only to terms and conditions (1) that were imposed prior to enactment of the MVRMA, or (2) that are contained in the relevant historical "lease, easement or other interest in land."

The WLWB reasoned that "had Parliament intended pre-existing rights to be subject to such limited terms and conditions, it would have explicitly stated so." The WLWB concluded that "on a plain reading, s. 152 does not preclude the Board from issuing a LUP that imposes new conditions (that are not contained in a historical lease) on the exercise of a lease-holder's land rights."[34]

Object of the MVRMA

Based on a review of the purpose of the MVRMA, the Hansard and relevant case law, the WLWB concluded that the MVRMA was intended to provide a complete and cohesive regulatory process for land and water in the Mackenzie Valley. The WLWB also noted that the MVLUR apply to "all uses of land in the Mackenzie Valley."[35]

Therefore, the WLWB concluded that all land use activities conducted on land encompassed by historical leases are subject to the MVRMA.

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[32] See WLWB Reasons for Decision – Dominion Diamond Mines ULC – Misery Underground – Request for Ruling dated May 9, 2019 at pg. 12.

[33] See WLWB Reasons for Decision – Dominion Diamond Mines ULC – Misery Underground – Request for Ruling dated May 9, 2019 at pg. 12, citing Re Rizzo and Rizzo Shoes Ltd [1998] 1 SCR 27 at 41 and Ruth Sullivan, Sullivan on the Construction of Statutes (6th Ed) at 7 [Sullivan], citing to Elmer A. Driedger, The Construction of Statutes (Toronto: Butterworths, 1974), at 67.

[34] See WLWB Reasons for Decision – Dominion Diamond Mines ULC – Misery Underground – Request for Ruling dated May 9, 2019 at pg. 12-13.

[35] See WLWB Reasons for Decision – Dominion Diamond Mines ULC – Misery Underground – Request for Ruling dated May 9, 2019 at pg. 13, citing MVLUR, s. 2.

The WLWB further concluded that issuing a permit for the area covered by Misery's leases did not constitute "double permitting" because there was no evidence of conflict between the proposed permit conditions and the rights granted by Dominion's leases.[36]

Scheme of the Act

The WLWB considered judicial interpretation of s. 157.1 (another transitional provision in the MVRMA). Based on this analysis, the WLWB concluded that

> "While s. 152 acts to ensure the continuation and use of existing rights under the Historical Leases, it should not be understood to shield activities under the Historical Leases from all future environmental regulation. Section 152 specifically provides for the preservation of rights "subject to the terms and conditions of exercising those rights." The Board interprets this to mean that the MVLUR may constrain the exercise of rights under Historical Leases, but they cannot extinguish these land use rights. The Board therefore believes it has the authority to constrain existing rights by issuing a land use permit as long any rights protected by s. 152 are not significantly affected or extinguished.
>
> [The transitional provisions of the MVRMA] operate to grandfather certain projects and rights into the MVRMA regime, as they were approved prior to the MVRMA's enactment. Section 152 does not preclude consideration of environmental concerns arising from the exercise of pre-existing land use rights, particularly where a proposed land use departs from what was approved and/or contemplated prior to enactment of the MVRMA."[37]

The WLWB also looked at patterns of expression within the MVRMA. Parliament is presumed to use consistent patterns of expression within a statute. If a provision does not follow a pattern of expression used throughout a statute, then it is presumed to have a different meaning.[38]

The WLWB reviewed provisions of the MVRMA and noted that Parliament uses express language to preclude application of the MVRMA to certain areas or activities:[39]

- s. 34 states that Part 2 "does not apply in respect of" parks in a settlement area.[40]
- s. 52(1) states that Part 3 "does not apply in respect of" the use of land or waters in parks subject to the *Canada National Parks Act* or *Historic Sites and Monuments Act*.[41]
- s. 53(1) states that Part 3 "does not apply in respect of" the use of land within a local government's territory if the local government regulates that use.[42]

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[36] See WLWB Reasons for Decision – Dominion Diamond Mines ULC – Misery Underground – Request for Ruling dated May 9, 2019 at pg. 13-14.
[37] See WLWB Reasons for Decision – Dominion Diamond Mines ULC – Misery Underground – Request for Ruling dated May 9, 2019 at pg. 17.
[38] See WLWB Reasons for Decision – Dominion Diamond Mines ULC – Misery Underground – Request for Ruling dated May 9, 2019 at pg. 17, citing Sullivan at 220, 224 and 252.
[39] See WLWB Reasons for Decision – Dominion Diamond Mines ULC – Misery Underground – Request for Ruling dated May 9, 2019 at pg. 18.
[40] MVRMA, s. 34.
[41] MVRMA, s 52(1).
[42] MVRMA, s 53(1).

- s. 97(1) states that Part 4 "does not apply in respect of" the use of land or waters within a park subject to the *Canada National Parks Act* or *Historic Sites and Monuments Act*.[43]
- s. 98(1) states that Part 4 "does not apply in respect of" the use of land within a local government's territory if the local government regulates that use.[44]
- s. 111(2) states that Part 5 "does not apply in respect of" developments outside of the Mackenzie Valley, except for s. 142.[45]
- s. 116 states that the *Canadian Environmental Assessment Act, 2012* "does not apply…in respect of" proposals for developments in the Mackenzie Valley, subject to listed exceptions.[46]
- s. 157.1 states that "Part 5 does not apply in respect of" an undertaking that is the "subject of" a licence or permit issued before June 22, 1984, subject to listed exceptions.[47]

The WLWB noted that throughout the MVRMA, Parliament uses the express language "does not apply in respect of" to exempt the MVRMA's application to an activity. The WLWB also observed that Parliament only excludes application of the MVRMA (or another statute) to an activity if the activity is subject to another legislative scheme or regulated by a different entity.

MVRMA, s. 152 does not follow this statutory pattern. Section 152 does not say that the MVRMA or the MVLUR do not apply in respect of rights to the use of land under any lease, easement or other interest in land that was granted under the *Territorial Lands Act*. Rather, s. 152 states that land use rights granted under the *Territorial Lands Act* regime "continue in effect." The WLWB concluded that had Parliament intended the land use rights referred to in s. 152 to be shielded from application of the MVRMA, it would have expressly stated so in a manner consistent with Parliament's pattern of expression throughout the MVRMA.[48]

Lastly, the WLWB considered the scope of s. 152 in relation to the Board's jurisdiction. The Board's jurisdiction to issue permits in respect of "all uses of land" in the management area for which a permit is required is provided for in the Tłı̨chǫ Agreement, s. 22.3.14 and reflected in MVRMA, s. 59. The Board explained that ss. 59 and 152 cannot be interpreted in a manner that conflicts with the Tłı̨chǫ Agreement.[49]

The WLWB held that "Parliament intended the Board to participate in a complete and cohesive regulatory process for land and water that complies with standards of prudent environmental management. Section 152 should not be interpreted to limit the Board's authority [under s. 59 and the Tłı̨chǫ Agreement] to manage land and ensure the prudent environmental management of new activities proposed on the Historical Leases."[50]

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[43] MVRMA, s 97(1).
[44] MVRMA, s. 98(1).
[45] MVRMA, s. 111(2).
[46] MVRMA, s 116.
[47] MVRMA, s 157.1.
[48] See WLWB Reasons for Decision – Dominion Diamond Mines ULC – Misery Underground – Request for Ruling dated May 9, 2019 at pg. 18-19.
[49] See WLWB Reasons for Decision – Dominion Diamond Mines ULC – Misery Underground – Request for Ruling dated May 9, 2019 at pg. 19.
[50] See WLWB Reasons for Decision – Dominion Diamond Mines ULC – Misery Underground – Request for Ruling dated May 9, 2019 at pg. 20.

The WLWB Decision is the most detailed legal analysis of s.152 produced to date. None of the parties in this proceeding argued that the WLWB's analysis was wrong or even an unreasonable interpretation of the MVRMA. In fact, the Tłı̨chǫ Government supported the WLWB analysis.

7.0 Parties' Evidence and Arguments

The Parties' arguments on the application of s. 152 are outlined below.

7.1 Seabridge's Evidence and Arguments

Seabridge asserts that s. 152 applies to the Seabridge Lease, and therefore Seabridge's rights to use of land under the Seabridge Lease continue in effect, subject to the terms and conditions of exercising those rights. This assertion assumes that (1) the Seabridge Lease was granted under "any territorial law" (see the text of s.152) and that (2) the rights under the Seabridge Lease existed on March 31, 2000.

Seabridge does not provide any detailed legal interpretation of s. 152.

In support of its argument that s. 152 exempts the lease area from permitting requirements, Seabridge asserts that:

- The WLWB Decision is about substantial changes to activities regulated on historical surface lease lands. Activities at Matthews Lake camp have remained unchanged for over 25 years.[51] Since Seabridge is not expanding or altering the use of the Matthews Lake camp, the WLWB Decision does not apply.[52]
- The Seabridge Lease "has consistently been treated by all levels of government as exempt from land use permitting requirements for nearly twenty years,"[53] and the Matthews Lake camp has been regulated by the lease only for over 25 years.[54] Seabridge notes that in 2012, the MVLWB issued Permit MV2012C0025 that excluded the area covered by the Seabridge Lease.[55] Seabridge argues that the MVLWB should prefer an interpretation of s. 152 which is "consistent with well-established practice."[56]
- The material terms of the Seabridge Lease have remained unchanged since the lease was issued in 1994.[57] INAC and GNWT "renewed (not replaced) the Lease pursuant to section 10 of the Territorial Lands Regulations and the Northwest Territories Lands Regulations. Seabridge relies on the Northwest Territories Power Corporation Bluefish Dam permit decision. In that case, the land administrator (INAC) took the position that renewed leases are exempt from land use permitting requirements. MVLWB staff recommended that the Bluefish permit cover only activities not occurring on the surface lease area. The MVLWB agreed and issued a permit that excluded leased lands.[58] Seabridge says the Bluefish case is analogous to Seabridge's situation, and that the

[51] See Seabridge Submission re Applicability of Section 152 of the MVRMA dated December 16, 2019 at pg. 2.
[52] See Seabridge Submission re Applicability of Section 152 of the MVRMA dated December 16, 2019 at pg. 3.
[53] See Seabridge Submission re Applicability of Section 152 of the MVRMA dated December 16, 2019 at pg. 1.
[54] See Seabridge Submission re Applicability of Section 152 of the MVRMA dated December 16, 2019 at pg. 2.
[55] See GNWT Final Submission re MVRMA and Associated Regulations and Seabridge Surface Lease dated December 19, 2019 at pg. 2.
[56] See Seabridge Submission re Applicability of Section 152 of the MVRMA dated December 16, 2019 at pg. 3.
[57] See Seabridge Submission re Applicability of Section 152 of the MVRMA dated December 16, 2019 at pg. 2.
[58] See Seabridge Submission re Applicability of Section 152 of the MVRMA dated December 16, 2019 at pg. 2.

Seabridge Lease must receive the same treatment from the MVLWB.[59] Seabridge asserts that the Bluefish Dam decision made clear that renewals of existing leases continue to be grandfathered pursuant to section 152 of the MVRMA."[60]

In response to the Tłı̨chǫ Government's submissions, Seabridge asserts that "the grandfathering of existing rights under section 152" is consistent with the Tłı̨chǫ Agreement. The Tłı̨chǫ Agreement "acknowledges that certain interests in land, including renewals and replacements, will continue to be granted and administered by the federal government as if those lands had not become Tłı̨chǫ lands."[61]

Seabridge argues that the Board has no jurisdiction to issue a permit for the Matthews Lake camp, because the Seabridge Lease is "grandfathered" pursuant to s. 152 and exempts the leased area from land use permitting requirements under the MVRMA and MVLUR.[62]

In the alternative, Seabridge argues that if the MVLWB concludes that it has jurisdiction to issue a permit, "the Board should not impose land use permit conditions which materially affect or extinguish Seabridge's right to operate a commercial camp" under the Seabridge Lease.[63]

The Board notes that some of the statements in Seabridge's arguments are factually inaccurate. In particular,

- the material terms of the Seabridge Lease have changed since lease was issued in 1994. The purpose/use of the predecessor leases was changed over time (from a tourist facility to a mining camp). The purpose of the Lease was specifically amended by an indenture in 2010, and
- the Seabridge Lease has not been consistently treated by all levels of government as exempt from land use permitting requirements and the Matthews lake camp has not been regulated by the lease only. In 2001, the MVLWB issued Permit MV2001X0030 to Bathurst Inlet Developments (1984) Ltd. for a camp and ice road at Matthews Lake. The permit applied to the lands covered by the Seabridge Lease.

In addition, the Board notes that a reading of s.18.6.1 of the Tłı̨chǫ Agreement does not support the Seabridge response to the Tłı̨chǫ Government's submission. Section 18.6.1 is about third party interests in lands included inside the land area granted to the Tłı̨chǫ First Nation upon ratification of the Tłı̨chǫ Agreement.

7.2 GNWT's Evidence and Arguments

GNWT does not set out an explicit position on the scope of s. 152 in its arguments, nor does GNWT provide any specific textual analysis of this section or the MVRMA.

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[59] See Seabridge Submission re Applicability of Section 152 of the MVRMA dated December 16, 2019 at pg. 3.
[60] See Seabridge Final Submission Applicability of Section 152 of the MVRMA dated December 23, 2019 at pg. 1.
[61] See Seabridge Final Submission Applicability of Section 152 of the MVRMA dated December 23, 2019 at pg. 2.
[62] See Seabridge Submission re Applicability of Section 152 of the MVRMA dated December 16, 2019 at pg. 1.
[63] See Seabridge Final Submission Applicability of Section 152 of the MVRMA dated December 23, 2019 at pg. 2.

The GNWT admits that "there have been inconsistencies in the administration" of the Seabridge Lease since the enactment of the MVRMA.[64]

The GNWT explains that in 2005, AANDC "issued a new surface lease that replaced the surface lease that had been in place prior to the enactment of the MVRMA. In issuing this new surface lease, AANDC explicitly advised the previous lessee, Bathurst Inlet Developments (1984) Ltd., and by copy, the [MVLWB], that the surface lease was now subject to the MVRMA and associated regulations."[65] However, GNWT also states that "surface lease 76D/3-6-6 has subsequently been administered as though it is not subject to the MVRMA and associated regulations."[66]

The GNWT notes that since the enactment of the MVRMA (post-2000), two leases have been issued:

- surface lease 76/3-6-4 granted by INAC to Bathurst Inlet Developments (1984) Ltd. in 2005 for a term of 10 years (commencing May 1, 2005 and terminating April 30, 2015); and
- the Seabridge Lease, i.e., the current surface lease 76D/3-6-6 granted by the GNWT to Seabridge in 2015 for a term of 10 years (commencing May 1, 2015 and terminating April 30, 2025).[67]

GNWT takes the position that these leases are each "new leases" as they were not renewed pursuant to a renewal clause in the lease.[68] Review of the leases indicates that they do not include a renewal clause and of course each new lease is given a new number.

The GNWT also states that:

> …as the MVRMA is a federal law, the GNWT does not have the ability to create through a contract or its own legislation rights that would prevent the application of the MVRMA to a use of land within the Mackenzie Valley or to otherwise pass laws or take action that would prevent the application of this law. The GNWT may only administer a pre-devolution lease contract according to whatever rights it conveyed; nothing the GNWT states in relation to a given contract can alter the impact of the MVRMA. Any rights to be exempt from the regulation of the MVRMA in a contract would have had to have been created prior to devolution, and lapsed rights cannot be revived if contrary to the law of the time of any purported revival. If the Government of Canada properly exercised any authority that it had in 2005 not to perpetuate an exemption from the application of the MVRMA, then the GNWT has no ability to alter this.[69]

Based on this excerpt of GNWT's argument, GNWT's position appears to be that the lands covered by the Seabridge Lease are subject to MVRMA permitting requirements.

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[64] See Seabridge Submission re Applicability of Section 152 of the MVRMA dated December 16, 2019 at pg. 1.
[65] See GNWT Final Submission re MVRMA and Associated Regulations and Seabridge Surface Lease dated December 19, 2019 at pg. 1-2.
[66] See GNWT Final Submission re MVRMA and Associated Regulations and Seabridge Surface Lease dated December 19, 2019 at pg. 2.
[67] See GNWT Evidence on Applicability of s. 152 of the MVRMA to Seabridge's Surface Lease dated December 11, 2019.
[68] See GNWT Final Submission re MVRMA and Associated Regulations and Seabridge Surface Lease dated December 19, 2019 at pg. 3.
[69] See GNWT Final Submission re MVRMA and Associated Regulations and Seabridge Surface Lease dated December 19, 2019 at pg. 3-4.

7.3 Tłı̨chǫ Government's Evidence and Arguments

The Tłı̨chǫ Government asserts that the approach taken by the WLWB in the WLWB Decision is correct in law and is "most consistent with the spirit and intent of the constitutionally-protected Tłı̨chǫ Agreement."[70] Specifically, the Tłı̨chǫ Government notes that the WLWB's Decision was based on the:

> …inevitable conclusion that section 152 must be interpreted to avoid conflict with the Board's jurisdiction to issue land use permits, which is a power granted by section 22.3.14 of the Tłı̨chǫ Agreement and thus guaranteed by section 35 of the *Constitution Act, 1982*.[71]

The Tłı̨chǫ Government recommends that the MVLWB follow the approach taken in the WLWB Decision and concludes that s. 152 does not exempt the area covered by the Seabridge Lease from land use permitting requirements.

7.4 NWT and Nunavut Chamber of Mines' Evidence and Arguments

The NWT and Nunavut Chamber of Mines submits that:

> Many mining companies rely upon historical surface leases in NWT to conduct their operations. Those operators would not expect to require a new land use permit to continue operations on a surface lease, given the past 20 years of conduct by the territorial government, federal government and the Board. We are not aware of any historical surface leases over unmodified operations which have been required to obtain a new land use permit in those circumstances. If a different approach were adopted, it would adversely impact a significant number of mining companies operating in NWT, and create a material disincentive to new companies considering investing in the territory.[72]

The Chamber of Mines recommends that the MVRMA not apply to historical (pre-2000) surface leases "barring a substantial change of use of a historical surface lease."[73]

8.0 Analysis and Decision

The issue which must be decided by the Board is twofold:

- the applicability of s. 152 of the MVRMA to Seabridge's Matthews Lake Surface Lease 76/D3-6-6 (Seabridge Lease), and
- whether s. 152 precludes the issuance of a land use permit for activities conducted on lands covered by the Seabridge Lease.

This is a legal issue which requires an interpretation of s. 152 of the MVRMA.

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[70] See Tlicho Government Submission re Applicability of Section 152 of the MVRMA to Historical Leases dated December 18, 2019 at pg. 2.
[71] See Tlicho Government Submission re Applicability of Section 152 of the MVRMA to Historical Leases dated December 18, 2019 at pg. 2.
[72] See NWT & Nunavut Chamber of Mines Submission re Applicability of Section 152 of the MVRMA to Historical Surface Leases dated December 16, 2019.
[73] See NWT & Nunavut Chamber of Mines Submission re Applicability of Section 152 of the MVRMA to Historical Surface Leases dated December 16, 2019.

In making its decision and preparing these Reasons for Decision, the Board has reviewed and considered:

1) The evidence and submissions from Seabridge received by the Board;
2) The written comments and submissions from other parties received by the Board; and
3) The Staff Report prepared for the Board.

Having due regard to the facts, circumstances, and the merits of the submissions made to it, and to the purpose, scope, and intent of the MVRMA the Board has determined that s. 152 does not apply to the Seabridge Lease and that the Board can issue a permit for the existing camp if deemed required.

The Board's determinations and reasons for this decision are set out below.

8.1 Textual Analysis of MVRMA, s. 152 and Application to Seabridge Lease

There has been a lot of confusion about the legal effect and limits on s. 152 in the period since the MVRMA came into force in the Courageous Lake area. It is clear from the Record that land managers, including INAC and GNWT-Lands have exhibited confusion in their interpretation and implementation of s.152 of the MVRMA. For example, in its final argument GNWT-Lands acknowledged that:

> Frankly speaking, there have been inconsistencies in the administration of surface lease 76D/3-6-6 since the enactment of the *Mackenzie Valley Resource Management Act* (MVRMA) and associated regulations.[74]

Review of the Record indicates historical examples of treatment of s. 152 by the MVLWB which are inconsistent with the WLWB Decision as well.[75] Seabridge argues that the Board should follow the Bluefish precedent and not the WLWB Decision. It seems clear from the Board's review of the evidence that some of the permitting/leasing decisions on the Record were made by officials, but without the benefit of a careful legal analysis.

In the documents on the Record, s. 152 is sometimes said to "grandfather" leases[76] and interests in land. Sometimes the parties claim that s. 152 provides "an exemption" from land use permitting. This kind of loose wording is not helpful. For comparison, s. 157.1 of the MVRMA which has been the subject of Court decisions is a true exemption clause:

> Part 5 does not apply in respect of any licence, permit or other authorization related to an undertaking that is the subject of a licence or permit issued before June 22, 1984, except a licence, permit or other authorization for an abandonment, decommissioning or other significant alteration of the project (our emphasis).[77]

This section clearly says that the environmental impact assessment provisions of the MVRMA do not apply to an undertaking which meets the test set out in s.157.1. The implication of the "exemption"

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[74] See GNWT Final Submission re MVRMA and Associated Regulations and Seabridge Surface Lease dated December 19, 2019.
[75] See Staff Report for MV2009L4-004 & MV2009X0040 NTPC Bluefish Dam licence and permit for Board Meeting dated March 3, 2011.
[76] Below we will only refer to and consider surface leases because that is the type of interest in land in question in this Seabridge ruling.
[77] MVRMA, s. 157.1.

and "grandfathering" arguments made about s. 152 is that that the land use permitting provisions in the MVRMA[78] do not apply to historic leases. But that is not what the actual words of s. 152 say. There are no clear words creating an exemption in s. 152.

As argued by the WLWB in its Decision, had Parliament intended the land use rights referred to in s. 152 to be shielded from application of the MVRMA, it would have created an express exemption in a manner consistent with the pattern of expression throughout the MVRMA, as it did in s. 157.1.[79]

The text of s. 152 is below:

> Rights to the use of land under any lease, easement or other interest in land that was granted under the *Territorial Lands Act* or the regulations made under that Act, or under any territorial law, and that exist on December 22, 1998, with respect to a settlement area, or on March 31, 2000, with respect to any other portion of the Mackenzie Valley, continue in effect, subject to the terms and conditions of exercising those rights (our emphasis).[80]

Reference to the text of s. 152 makes several things clear. First, what s. 152 does is "continue" rights which existed (in the Seabridge case on March 31, 2000) when the MVRMA was called into force for parts of the Mackenzie Valley outside settlement areas. Note as well that the rights that are continued are "subject to the terms and conditions of exercising those rights." That means that the rights granted in a lease issued before March 31, 2000 (a historic lease) continue subject to terms and conditions, including (but not limited to) the terms and conditions of that lease.

But the Board's review of the leasing history and the terms and conditions of the leases for the Seabridge area indicates that the Seabridge Lease and its predecessors did not include a renewal clause. They were issued for 10-year periods and then they expired. A new lease with a new number was then issued.

Therefore, the only rights to use of land under a lease that existed pre-2000 and that "continued in effect" after enactment of the MVRMA were the rights under lease 76D/3-6-3 issued in 1995 to Bathurst Inlet Developments (1984) Ltd.. That lease expired on April 30, 2005. Therefore, the benefits of s. 152 expired on April 30, 2005 when the term of lease 76D/3-6-3 came to an end. This conclusion is consistent with the July 14, 2005 INAC letter to Bathurst Inlet Developments (1984) Ltd. which states that the area covered by lease issued in 2005 (76D/3-6-4) is subject to the MVLUR.

8.2 Board Adoption of WLWB Decision

MVRMA, s. 103(5) provides that a decision made by a regional panel of the MVLWB is a decision of the MVLWB. Therefore, the WLWB Decision is a decision of the MVLWB.

Administrative tribunals are not, of course, bound to follow their previous decisions.[81]

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[78] Found in MVRMA, Parts 3 and 4.

[79] See WLWB Reasons for Decision – Dominion Diamond Mines ULC – Misery Underground – Request for Ruling dated May 9, 2019 at pg. 18-19.

[80] MVRMA, s. 152.

[81] See for example *Vavilov v Canada (Minister of Citizenship and Immigration)*, 2019 SCC 65 at para 129, which explains that administrative decision makers are not bound by the *stare decisis* principle in the same sense as courts (i.e., are not bound to follow their precedents) [*Vavilov*].

However, as the Alberta Court of Appeal stated in *Altus Group Ltd. v Calgary (City)*, prior decisions of administrative tribunals provide "important context for the [tribunal's] analysis." Further, "the demand of predictability, objectivity, and impersonality…require that rules which are established in earlier cases be followed unless they can be fairly distinguished or unless they appear to be unreasonable."[82]

The Court of Appeal went on to explain that, conflicting interpretations of an administrative tribunal on the meaning of legislation are unlikely to be reasonable:

> While some statutory provisions may be amenable to different, yet reasonable interpretations, it is difficult to conceive of meaningful legislation that would allow diametrically opposed interpretations, both of which are reasonable, not to mention correct… in many cases, only one interpretation of a statutory provision will be reasonable…
>
> …while an administrative decision maker is unconstrained by the principles of *stare decisis* and is free to accept any reasonable interpretation of the applicable legislation, the reasonableness standard does not shield directly conflicting decisions from review by an appellate court. In assessing the reasonableness of statutory interpretation by the administrative tribunal, the appellate court should have regard to previous precedent supporting a conflicting interpretation and consider whether both interpretations can reasonably stand together under principles of statutory interpretation and the rule of law.[83]

The Supreme Court also recently commented on the relevance of past practices and decisions to administrative decision-making and judicial review of administrative decisions in *Vavilov v Canada (Minister of Citizenship and Immigration)*. In *Vavilov*, the Supreme Court explained that

> …the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike…[84]

The Supreme Court further explained that

> Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons… a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness...[85]

Accordingly, the MVLWB is not bound to follow previous Board decisions, such as the WLWB Decision and the Bluefish Dam decision. However, the WLWB Decision is based on a careful statutory

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[82] 2015 ABCA 86 at para 18 [*Altus Group Ltd*.].
[83] *Altus Group Ltd*. at paras 27-29 and 31.
[84] *Vavilov* at para 129.
[85] *Vavilov* at para 131.

interpretation of s. 152. While the Bluefish Dam decision briefly addressed the application of s. 152, the scope and interpretation of s. 152 was not clearly in issue in that proceeding and the parties did not file evidence or argument on the scope of s. 152 for the Board's consideration.

The need for predictability and consistency in statutory interpretation may thus compel the Board to adopt the WLWB Decision, unless that decision can be fairly distinguished from Seabridge's situation, or unless it appears to be unreasonable.

The most detailed and compelling legal analysis of s. 152 to date was conducted by the WLWB in its Dominion Decision. This decision is supported by the Tłı̨chǫ Government. The WLWB held that:

> While s. 152 acts to ensure the continuation and use of existing rights under the Historical Leases, it should not be understood to shield activities under the Historical Leases from all future environmental regulation. Section 152 specifically provides for the preservation of rights "subject to the terms and conditions of exercising those rights." The Board interprets this to mean that the MVLUR may constrain the exercise of rights under Historical Leases, but they cannot extinguish these land use rights. The Board therefore believes it has the authority to constrain existing rights by issuing a land use permit as long any rights protected by s. 152 are not significantly affected or extinguished.

The precedents cited by Seabridge are inconsistent. In the Board's view, there is little to be gained by trying to reconcile the conflicting historical examples cited from the Record that were decided without a detailed legal analysis and interpretation of s. 152.

It is the Board's view that the need for predictability and consistency in statutory interpretation compels the Board to adopt the WLWB Decision unless that decision can be fairly distinguished from Seabridge's situation or unless it appears to be unreasonable.

Seabridge did not offer a legally reasoned alternative interpretation of s. 152 based on a textual or statutory interpretation analysis. None of the parties provided a compelling legal argument that the WLWB Decision was unreasonable or incorrect in law. In the Board's opinion the WLWB Decision includes a careful and thorough review of the legislation, cases and authorities. It is a reasonable interpretation of s. 152 and the Board highlights that neither Dominion nor GNWT sought to challenge the WLWB Decision in the courts.

Seabridge does argue that the WLWB Decision should be distinguished because the terms of its lease have remained constant and use of the lease area has not changed. As indicated above this assertion is factually incorrect. The terms of the Seabridge Lease have been amended and the use of the lease area has changed.

Seabridge also argues that the WLWB Decision is distinguishable because in that case, Dominion proposed a change in use of the leased areas in its permit application (expansion of the Misery camp). Seabridge does not propose to expand or change the use of the Matthews camp. The Chamber of Mines similarly suggested in its submission that the MVRMA should not apply to historical leases, unless there is a substantial change in use of a historical surface lease.

In the Board's view, while the WLWB Decision does address Dominion's proposed change of use, the WLWB's analysis is not limited to situations where a change of use is proposed on historical surface

lease lands. The WLWB's textual and statutory analysis concluded that the Board has jurisdiction to regulate activities on areas covered by historical lease areas. The analysis does not turn specifically on whether a change in use is proposed on such lease areas.

In light of the legal authorities including the MVRMA s. 103(5) and cases the Board adopts the WLWB decision. It is reasonable and there is no basis for distinguishing it in this case.

Therefore, the Board concludes that it can issue a permit for the Seabridge Lease area if one is required.

8.3 Co-existence of Surface Leases and Permits

Although the Board concludes that the MVRMA applies to lands covered by historical surface leases, the Board accepts Seabridge's argument that "the Board should not impose land use permit conditions which materially affect or extinguish Seabridge's right to operate a commercial camp" under the Seabridge Lease.[86]

The MVLUR are intended to protect the land and environment, and not to take away land use rights. Consequently, in situations where a permit is to be issued over a historic lease area, the Board is of the view that care should be taken to avoid conflict between lease and permit conditions.

9.0 Conclusion

For the reasons expressed herein, the MVLWB has determined that s. 152 does not apply to the Seabridge Lease and also does not preclude the issuance of a land use permit for activities conducted on lands covered by the Seabridge Lease if required.

The question of whether a permit is required for the Seabridge Lease area is an enforcement and compliance issue based on the MVLUR and therefore a responsibility of GNWT-Lands.

The Board intends to proceed with the regulatory process currently underway for the Applications submitted by Seabridge (i.e., Type A Land Use Permit (MV2019C0025), Type B Water Licence for a federal area (MV2019L2-0012), and Type B Water Licence for a non-federal area (MV2019L2-0011). If it is determined a permit is required because of the activities proposed for the area of Lease 76/D3-6-6, the Board will entertain an application for a land use permit.

SIGNATURE

Mackenzie Valley Land and Water Board

Mavis Cli-Michaud, Chair

February 19, 2020
Date

[86] See Seabridge Final Submission Applicability of Section 152 of the MVRMA dated December 23, 2019 at pg. 2.