Environmental Appeal Board

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DECISION NOS. 2014-WAT-022(a) and 2014-WAT-023(a)

In the matter of two appeals under section 92 of the *Water Act*, R.S.B.C. 1996, c. 483.

BETWEEN:	Bridge Creek Estate Ltd.	**APPELLANT**
AND:	Assistant Regional Water Manager	**RESPONDENT**
AND:	Emcee Holdings (1995) Ltd. and 100 Mile Ranch Ltd.	**THIRD PARTIES**
BEFORE:	A Panel of the Environmental Appeal Board David H. Searle, C.M., Q.C., Panel Chair	
DATES:	November 9, 10, 2015 – Williams Lake BC December 17, 2015 – Victoria BC	
APPEARING:	For the Appellant: Ashley M. Ricalton, Counsel For the Respondent: Karmen Lisaingo, Counsel For the Third Parties: Dale W. Wilcox, Counsel	

APPEALS

[1] The Appellant, Bridge Creek Estates Ltd., appeals the following two decisions made on December 3, 2014 by the Respondent, David J. Weir, Assistant Regional Water Manager, Water Stewardship Division, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"):

- Water Licence Amendment AMD20141104-0003 (Appeal No. 2014-WAT-022); and
- Water Licence Amendment AMD20050114-0245 (Appeal No. 2014-WAT-023).

[2] These decisions apportioned the rights and obligations previously held by one company under two water licences (the "original licences"), between two companies: the Appellant company and Emcee Holdings (1995) Ltd. ("Emcee"). The decisions were made pursuant to section 20 of the *Water Act* as a result of a subdivision of the lands appurtenant to the original licences. Section 20 of the *Water Act* states as follows:

Apportionment of rights under licence

20(1) If satisfied that no licensee's rights will be injuriously affected, the comptroller or the regional water manager may apportion the rights and obligations granted and imposed under a licence among the owners of the several parcels comprising the land to which the licence is appurtenant.

(2) The comptroller or the regional water manager may issue, on the conditions the comptroller or regional water manager considers advisable, one or more new licences in substitution for a licence the rights and obligations under which are apportioned under subsection (1).

[3] As part of his apportionment decisions, the Respondent issued four new conditional water licences in substitution for the original licences: two to the Appellant and two to Emcee. The water rights under the original licences were apportioned under the new licences as follows: the Appellant was allocated 71% of the original water (284 acre-feet per annum), and Emcee was allocated 29% of the original water (116 acre-feet per annum).[1] The apportionment was based upon an estimate of each party's irrigable land. Only the Appellant appealed the Respondent's decisions.

[4] The Environmental Appeal Board has the authority to hear these appeals under section 93 of the *Environmental Management Act* and section 92 of the *Water Act*. Section 92(8) of the *Water Act* provides that, on an appeal, the Board may:

(a) send the matter back to the comptroller, regional water manager or engineer, with directions,

(b) confirm, reverse or vary the order being appealed, or

(c) make any order that the person whose order is appealed could have made and that the board considers appropriate in the circumstances.

[5] Although the Appellant originally asked the Board to rescind the Respondent's decisions and transfer all of the rights under the original licences to it, the Appellant abandoned this remedy during the hearing. It now asks the Board to rescind the Respondent's decisions to apportion 29% of the water rights under the original licences to Emcee, to cancel the two new licences issued to Emcee, and allow Emcee's portion of the water to return to Little Bridge Creek.

BACKGROUND

General

[6] The main facts are not in dispute. The decisions at issue in these appeals relate to ranch lands in 100 Mile House, BC. In 1912, the lands were acquired by William Cecil, an English land-owner, and consisted of nearly 10,000 acres. William's second son, Martin Cecil, immigrated to Canada from England in 1930 to manage the property for his father. Prior to William's death in 1956, he passed the ranch to Martin. The lands were operated as the Bridge Creek Estate ranch. It was a cattle operation.

[7] Martin had a son named Michael with his first wife. With his second wife (Lillian) he had a daughter named Marina.

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[1] Emcee is the registered owner of the land to which two of the new substituted licences are appurtenant. 100 Mile Ranch Ltd. is the beneficial owner of those lands and was given Third Party status in the appeals as a person potentially affected by the decisions. Although the Third Parties are separate entitles, they presented their cases jointly, i.e., they spoke with one voice.

[8] The ranch was bisected by Highway 97, with approximately 2,700 acres on the west side, and 7,700 acres on the east side. In the middle of the western portion lies Exeter Lake. Little Bridge Creek flows from the west, through Exeter Lake towards the highway, under the highway, and onto the southern corner of the eastern land, where it continues in a north-easterly direction. Little Bridge Creek later flows into Bridge Creek.

[9] According to the Appellant's evidence, due to the unreliability of the water supply in Little Bridge Creek over the summer months, in or around 1978, the ranch entered into an arrangement with the District of 100 Mile House (the "District") to irrigate a hayfield on the eastern lands using the District's treated effluent.

The Original Licences

[10] The original licences were issued on March 12, 1986 to Bridge Creek Estate, Ltd. ("Old BCE"). The original licences consist of a diversion licence and a storage licence. The source of the water was Little Bridge Creek.

[11] Original licence #63264 authorized the diversion of 400 acre-feet per annum of water from storage for the purpose of irrigation during the period of April 1st to September 30th (the "Original Diversion Licence"). It was appurtenant to five parcels of land which spanned the western and eastern portions of the ranch. There were three points where the water released from storage could be diverted from the creek under this licence: one on the western portion, and two on the eastern portion. The authorized works were "diversion structures, pump, pipe and sprinkler system". The water could be used to irrigate up to 200 acres of the appurtenant land.

[12] Original licence #63265 authorized the storage of 400 acre-feet per annum of water during the period of October 1st to June 15th in "Exeter Lake and Little Bridge Creek", the storage reservoir (the "Original Storage Licence"). The water was retained in the storage reservoir by the Exeter Lake dam. The plan attached to the licence showed the extent of the "flooding area" for the storage reservoir which, according to the evidence, is approximately 150 acres.

[13] The Exeter Lake dam was constructed in the early 1980's on Little Bridge Creek in collaboration with Ducks Unlimited Canada.[2] It consists of wooden boards ("stop logs"), placed one on top of the other to a full storage height of approximately 50 inches.[3] When flows are higher than the full storage level, the excess water flows over the boards and back into Little Bridge Creek, where it continues its flow to the east. Water may be diverted from the creek when released from storage (April 1st to September 30th) at the three diversion points shown on the Original Diversion Licence.

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[2] According to the Appellant, Ducks Unlimited Canada was involved because the flooding creates waterbird habitat in the spring nesting season.

[3] This is the "assumed" height from the dam base to full storage shown on the Appellant's spreadsheet.

Subdivision of the appurtenant lands

[14] Martin Cecil (the son of the original purchaser, William) died in 1988. The ranch continued to operate as a single business entity until the mid 1990s, when Michael, Marina, and Lillian decided to split the Cecil family ranch and associated businesses between Michael and Marina so they could go their separate ways. The family consulted an accountant as to the simplest way this division of assets might be done, which would also allow some of the taxes to be deferred. The accountant recommended a "butterfly" transaction. In essence, this involved amalgamating all of the businesses into one entity that held all of the family assets, and then dividing those businesses and assets between new companies established by Michael and Marina; i.e., the Appellant company and Emcee, respectively. As part of the division of the lands, Emcee held the Appellant's land in a "bare trust" for a period of time.

[15] In 1995, the legal documents completing the butterfly transaction were executed. Some of the documents will be discussed further in this decision. Of note, none of the documents mention the original licences, or any of the other water licences that were appurtenant to the ranch lands (only the original licences are the subject of these appeals).

[16] Under the butterfly transaction, the original ranch land was divided between the parties using Highway 97 as the dividing line. All land to the east of Highway 97 went to Marina's company (Emcee), and all of land to the west of Highway 97 went to Michael's company (the Appellant). Accordingly, the Appellant received the land with the dam, the storage reservoir (Exeter Lake and part of Little Bridge Creek), and one of the points of diversion.

[17] In 2012, the Appellant sold some of its land to Don and Linda Savjord. Mr. Savjord is the ranch manager for the Appellant's ranch.

The operations of the Appellant and Emcee between 1995 and 2014.

[18] Sometime after the division of assets, both parties changed the nature of their operations. Marina Cecil testified that the primary focus of her ranch on the eastern land – and its main source of income – is now the sale of high quality hay, although it also boards some cattle in the summer and does some logging on the lands.

[19] Michael's son, Anthony Cecil, is a director of the Appellant company, and has been actively involved in the company since 1995. His company developed a custom grazing business: it is hired to graze 4-500 cows, carefully rotating them through a series of pastures which are carefully monitored to ensure there is no overgrazing. The Appellant also has a conventional haying operation, which was recently certified as organic.

[20] Both operations require a reliable source of water for irrigation: without irrigation, these operations will get one crop of hay; whereas with irrigation, two, maybe three, crops of hay may be available.

[21] There is no dispute that, between 1995 and 2014, both the Appellant and Emcee had sufficient water for their operations. The Appellant used the water from storage under the original licences to irrigate its land. Emcee relied upon the

District's effluent water to irrigate its lands and did not use any of the water under the original licences. The Appellant maintains that this is because Emcee understood that the water rights under the original licences went to the Appellant under the butterfly transaction. Emcee denies this claim. Emcee asserts that it simply did not require that water because it had a plentiful supply from the District, and the District was paying for Emcee to use it.

[22] There is also no dispute about the manner in which the Appellant has used its water. The dam was used to flood the storage reservoir on its land. The Appellant would start draining the reservoir in early August in order to dry out two meadows on either side of Exeter Lake: Moose Meadow to the left of the lake (42 acres), and Big Meadow to the right of the lake (156 acres). As they drained, these meadows were used for grazing cattle and cutting hay. According to Anthony Cecil, approximately 150 acres of Big Meadow is within the designated storage reservoir area shown on the Original Storage Licence plan. He testified that these two meadows are very important to the Appellant's operation.

The process leading to the apportionment decisions

[23] Section 16 of the *Water Act* states as follows:

16(1) A licence, approval or permit that is made appurtenant to any land, mine or undertaking and any rights and obligations granted and imposed under the licence, approval or permit pass with a conveyance or other disposition of the land, mine or undertaking.

(2) A person conveying or otherwise disposing of land, mine or undertaking to which a licence is appurtenant, or in respect of which an approval or permit was issued or, in the case of a transmission of land, a mine or an undertaking to the personal representative or other person representing the owner, the personal representative or other person must give written notice of the conveyance or other disposition to the comptroller or regional water manager. [Emphasis added]

[24] The Ministry was never given notice of the change in ownership of the Cecil family ranch land. Consequently, the question of how the original licences should be apportioned appears to have come as a surprise to the parties when, ten years after the butterfly transactions, they received a letter from Connie Haeussler, a Water Technical Officer with the Ministry.

[25] In a letter dated June 29, 2006, Ms. Haeussler wrote to the Appellant and Emcee stating that the original licences "must be amended or cancelled" due to the subdivision of the land appurtenant to those licences. In that letter, Ms. Haeussler proposed an apportionment of the rights under the original licences based upon the irrigable land held by each party as determined from an orthophoto. She determined that, out of a total of 336 acres of irrigable land, the Appellant and the Savjords had 238 acres, and Emcee had 98 acres. Thus, the Appellant had 71% of the total irrigable land, Emcee had 29% of the total, and the water rights would be apportioned based on those percentages. At the end of her letter, Ms. Haeussler advised the parties to provide any objections they may have to the proposed apportionment within 30 days of the date of her letter.

[26] The Appellant objected to the proposed apportionment on two occasions. On July 26, 2006, the Appellant's ranch manager, Mr. Savjord, telephoned Ms. Haeussler to advise that the Appellant did not agree with the recommended apportionment. He stated that all of the water should be apportioned to the Appellant as Emcee irrigates its property using the District water.

[27] In a letter from Anthony Cecil dated October 24, 2012, the Appellant again objected, this time to Roberta Patterson, the new Water Stewardship Officer on the file. Among other things, Mr. Cecil pointed out that, according to Option 1 of the Ministry's *Water Program Policy and Procedures Manual* (the "Policy Manual"), the licences should be apportioned solely to the Appellant based on the "location and area of current (ie. last 3 years) beneficial use". In other words, since Emcee had not been beneficially using the licensed water for the past three years, it should not receive any of the water.

[28] Between 2006 and 2014, the Ministry had sporadic contact with the parties in relation to the apportionment issue. However, due to Ministry reorganizations, staffing and resourcing shortages, no action was taken on the file, and the Ministry did not formally respond to either objection.

[29] Also during this time, the relationship between the parties appears to have deteriorated. The Panel was not advised of when or why this occurred. However, it appears that the Appellant's position that all of the water rights under the original licences belong to it contributed to the conflict.

[30] In 2012, the Respondent, David Weir, was made the Assistant Regional Water Manager in Cranbrook and was given a mandate to reduce the significant backlog of decisions that had developed over the years. A decision regarding the subdivision of the lands appurtenant to the original licences was part of that backlog. The Respondent asked Ms. Patterson to prepare technical reports on the original licences for his review.

[31] On November 27, 2014, Ms. Patterson completed the technical reports on the original licences in which she recommended apportioning the licences in accordance with Ms. Haeussler's 2006 proposal, and issuing new licences to the Appellant and Emcee in substitution for the original licences. The files were then provided to the Respondent for a decision under section 20 of the *Water Act.*

The apportionment decisions

[32] On December 3, 2014, the Respondent decided to apportion the original licences under section 20 of the *Water Act* in accordance with the recommendations of Ms. Haeussler and Ms. Patterson. The Respondent concluded that the 71/29 apportionment was "as fair as it could be". The decision had been outstanding for over nine years since Ms. Haeussler first notified the parties of a proposed apportionment. He was aware that there was conflict between the parties. In his view, the lack of a decision meant that the parties' rights were uncertain, and they could not move on. He saw that the Ministry had not responded to Mr. Cecil's 2012 letter, but was concerned that opening those matters up again with a response and going through additional consultations would further delay the decisions, and he was able to consider the Appellant's 2012 concerns before making his decisions.

[33] The Respondent concluded that the facts of this case fit within Options 2 and 3 of the Policy Manual, not Option 1; that is, the rights should be apportioned "on the basis of established use plus potentially irrigable land" and/or on the basis of "the total irrigable land area". He noted that water rights run with the land, both parties now owned the land that had been appurtenant to the original licences, and both parties had operations that needed irrigation water.

[34] The Respondent issued four licences in substitution of the original licences. Specifically, in substitution of the Original Diversion Licence, the Respondent issued licence C131911 to the Appellant for 284 acre-feet per annum, and licence C131912 to Emcee for the remainder (116 acre-feet per annum), both of which allow the licensees to use the water from April 1st to September 30th (clause "f"). Of note, neither of these licences included the Savjord land, although part of the Savjord land was appurtenant to the Original Diversion Licence.

[35] In substitution of the Original Storage Licence, the Respondent issued licence C131914 to the Appellant for 284 acre-feet per annum, and licence C131915 to Emcee for the remainder (116 acre-feet per annum). The licences allow water to be stored from October 1st to June 15th (clause "f").

[36] The period of time for diversion and storage of the water in clause "f" was the same as in the original licences.

[37] The new storage licences also address the standards to which the Exeter Lake dam must be "designed, constructed and maintained", and require "final construction drawings, Operation, Maintenance and Surveillance Manual and Emergency Preparedness Plan" to be submitted to the Dam Safety Officer.

[38] In his covering letter to the new storage licences, the Respondent states, "You are urged to develop a Joint Works Agreement to clarify issues surrounding your shared works."

[39] There is no dispute that the orthophoto used by Ms. Haeussler to calculate the irrigable land was not considered by the Respondent when he made his decisions. Nor were any of the agreements that made up the butterfly transaction before him when he made his decision.

Use of the water in 2015 after the Decisions

[40] Since the decisions were issued, neither party is satisfied with the situation. Marina Cecil testified that neither she, nor her manager, Greg Messner, are allowed onto the Appellant's land to access the dam and ensure that water flows to Emcee's property. The Appellant requires her to go through a somewhat cumbersome emailing process to get access to the water. She must request the water from Anthony Cecil during certain hours of the day. Mr. Cecil would then direct Mr. Savjord to adjust the dam and take photographs of what he did.

[41] Marina Cecil's requests were never denied, but sometimes the water released from the dam did not reach the diversion point at all. Ms. Cecil testified that, regardless of how many boards were removed to provide her with water, she did not receive the 116 acre-feet that the new licences permitted. She testified that she would have used the entire amount as Emcee's supply of District water stopped on March 31, 2015.

[42] The Appellant is not satisfied with the situation because it believes the original licences went with its land and it has had sole control over the dam and the release of water for 20 years – since 1995. Mr. Cecil testified that having to store Emcee's water on the Appellant's land negatively affects the Appellant's operation because the Appellant must keep water in storage to supply Emcee's diversion licence until September 30th. Keeping water in storage during August prevents the Appellant from using its two meadows for grazing and haying.

[43] As suggested by the Respondent in his cover letter, Emcee had legal counsel draft a joint works agreement addressing an easement, access to the dam, and cost sharing for consideration by the Appellant. A copy of the draft agreement was entered into evidence. However, the Appellant advised that it would not agree to execute an agreement until its appeals have been decided as, if its appeals are allowed, it will not be required to share the water rights under the original licences with Emcee.

The Appeals

[44] The Appellant argues that the Respondent's decision to apportion part of the original licences to Emcee is unfair, unreasonable, and ought to be overturned. The Appellant's specific arguments in support of its appeals are summarized as follows:

1. The Respondent based his decisions on information from Ms. Haeussler and Ms. Patterson which contains errors.
2. The Respondent did not give proper consideration to the following:
    a. The butterfly documents contemplate that the rights under the original licences go to the Appellant;
    b. The works under the original licences were not constructed on the eastern land, and the water under the original licences has never been beneficially used on that land by either Old BCE or the Third Parties, such that those lands ought to have been removed (cancelled) from the original licences pursuant to section 23 of the *Water Act*.
    c. The apportionment of water rights to Emcee significantly impacts the Appellant's right to use the water under the original licences as it wishes, thus impacting the agricultural and financial viability of its land; and
    d. Emcee has three alternate water supplies to irrigate its crops.
3. The Respondent's amendments have wrongfully resulted in a loss of licensed water for the Savjord land which is located on lands to which the original licences were appurtenant.

[45] In its closing argument, the Appellant asked the Board for the following remedies:

1. Cancel the new storage and diversion licences issued to Emcee pursuant to section 23 of the *Water Act*, and allow Emcee's portion of the water to return to the creek.

2. In the alternative, cancel the new storage licence issued to Emcee and order Emcee to arrange for an alternate water storage location that does not encumber the Appellant's land.
3. In the further alternative:
    a. Shorten the period of the year during which the water may be used under the two new diversion licences (clause "f") by one month: change the period from "April 1st to September 30th" to "April 1st to August 1st".
    b. Shorten and change the period of the year during which the water may be stored under the two new storage licences (clause "f") by five months: change the period from "October 1st to June 15th", to "March 1st to June 15th".

Position of the Respondent and the Third Parties

[46] The position of the Respondent is set out concisely at paragraph 81 of his closing arguments:

> 81. The Respondent considers that a fair process was followed in his December 3, 2014 Decisions. Both Parties were given notice of the apportionment decisions and were given an adequate opportunity to express their views. The Respondent considered all information available to him at the time of his decisions, including the views of both Parties as they were presented to him. The Respondent made the decision to apportion the rights and obligations granted and imposed under the Original Licences as 71% allocated to the Appellants and 29% allocated to the Third Party because in his view this apportionment was the most fair and equitable apportionment considering the current relationship of conflict between the Parties, the historic use of the water, the reasonable potential use of the water by both Parties, and administrative fairness.

[47] However, the Respondent also notes that, in these appeals, the Board "stands in the shoes" of the statutory decision-maker and may make any decision that the decision-maker could have made and is appropriate in the circumstances (section 92(8)(c) of the *Water Act*). Accordingly, if the Board determines that there are any injurious affects on the rights of the parties by the apportionment decisions, or an error in the decisions under appeal, the Board may issue new licences in substitution for the original licences, or may send the matter back to the Respondent with directions under section 92(8)(b) of the *Water Act*. In this regard, the Respondent agrees with the Appellant that there was an error in the new diversion licence C131911 as it should have included the Savjord's land in the appurtenancy. The Respondent provided the Board with an "Amendment to Conditional Water Licence No. 131911" (Exhibit 8 at the hearing) which adds a description of the Savjord's land to the appurtenancy, and asks the Board to order this amendment pursuant to its authority under section 92(8) of the *Act*. The Third Parties agree with this amendment.

[48] In general, the Third Parties submit that the Respondent's decision to apportion the rights under the licences between the Appellant and Emcee is appropriate. However, in their closing argument, the Third Parties ask the Board to

amend the licences as a result of evidence that came to light during the hearing, which will be discussed later in this decision. Specifically, they ask the Board to reduce the amount of water allocated to the Appellant and increase the amount of water allocated to Emcee. They also ask the Board to order the parties to enter into a joint use of works agreement and to amend the licences to ensure this is done by a specific date.

[49] The Respondent also advocates for a joint use of works agreement. He asks the Board to (a) make a joint use of works order which identifies the licensee's respective responsibilities, costs of construction, maintenance, renewal and operation of the works under section 33 of the *Water Act*, or (b) send the matter back to the Respondent to do so, with any applicable directions.

[50] As the remedies requested by the Third Parties and the Respondent are predicated on the Board upholding the apportionment decisions and dismissing the appeals, these issues will be addressed, if required, under the final issue in this decision.

The hearing

[51] At the hearing in Williams Lake, the evidence was taken on November 9 and 10, 2015. The Appellant called three witnesses: Anthony Cecil, Don Savjord, and Jeremy Cooke, an expert witness.

[52] The Respondent called one witness: David Weir, the Assistant Regional Water Manager whose decisions are under appeal.

[53] The Third Parties called two witnesses: Marina Cecil and Greg Messner.

[54] Following the evidentiary portion of the hearing, the proceedings were adjourned to December 17, 2015, in Victoria, for closing argument.

ISSUES

[55] Given that all parties agree that the Savjord land ought to be added to the appurtenancy provisions in the Appellant's licences, this remedy is granted by consent. The remaining issues to be decided are as follows:

1. Whether the decisions are based upon information containing errors, such that the decisions ought to be overturned.
2. Whether the decisions are unreasonable because the butterfly documents contemplate that all of the rights under the original licences go to the Appellant.
3. Whether the apportionment of water to Emcee is unreasonable because, contrary to section 23 of the *Water Act*, the water under the original licences has never been used beneficially on the lands east of Highway 97.
4. Whether the decisions will injuriously affect the Appellant's rights by compromising its agricultural and/or financial viability, contrary to section 20 of the *Water Act.*
5. Whether the decisions ought to be rescinded because Emcee has an alternate water supply.

6. Whether the Board should grant the Appellant's alternative remedies to:

    a. cancel Emcee's new storage licence and direct Emcee to arrange for an alternative storage location; or

    b. amend the period of the year in which the substitute licences authorize the storage and use of water so the Appellant can stop storing water in August.

[56] If the Board upholds the Respondent's decisions, the following additional issue must be addressed:

7. Whether the Board should grant any of the additional or alternative remedies requested by the Respondent and the Third Parties, such as a joint use of works order and/or amendments reducing the amount of water allocated to the Appellant and increasing the amount allocated to Emcee.

RELEVANT LEGISLATION

[57] The relevant legislation will be referred to in the decision, as needed. However, for the purpose of context, section 5 of the *Water Act* sets out the rights acquired under a water licence, as follows:

5 A licence entitles its holder to do the following in a manner provided in the licence:

(a) divert and use beneficially, for the purpose and during or within the time stipulated, the quantity of water specified in the licence;

(b) store water;

(c) construct, maintain and operate the works authorized under the licence and necessary for the proper diversion, storage, carriage, distribution and use of the water or the power produced from it;

...

DISCUSSION AND ANALYSIS

1. Whether the decisions are based upon information containing errors, such that the decisions ought to be overturned.

The Appellant

[58] The Appellant submits that the Respondent based his decisions on information that contained errors to the Appellant's detriment. Specifically, the Appellant submits that, in his evidence, the Respondent acknowledged that there were errors in Ms. Haeussler's 2006 proposal letter, and confirmed that he did not have the orthophoto when he made the apportionment decision.

[59] Further, there were errors in Ms. Patterson's technical reports that were also relied upon by the Respondent when he made his decisions. In particular, Ms. Patterson incorrectly stated that "there were no concerns expressed" about Ms. Haeussler's proposal. Further, Ms. Patterson stated that the works on both properties were "fully constructed", which the Appellant disputes. Anthony Cecil

testified that the original licences were never used to water the property east of Highway 97, and the authorized works were never constructed on that land; i.e., no "diversion structures, pump, pipe and sprinkler system" were installed under the Original Diversion Licence, and the two diversion points were never used.

The Respondent

[60] Mr. Weir testified that he has significant experience amending licences due to the subdivision of appurtenant land. With respect to the Cecil family land, he explained his decision-making process as follows.

[61] When Ms. Patterson had finished the technical reports, he was given the entire file. This included the original licences, reports, notes to file and correspondence. He reviewed the entire file as well as the Manual. He had also attended the site with a Dam Safety Officer.

[62] Based upon his review of the file, Mr. Weir saw this as a relatively straightforward apportionment. He intended to keep the new licences as close as possible to the original licences so that there were no injurious affects on the rights holders: they would not be impacted by a reduction in rights. He reviewed Ms. Haeussler's 2006 proposed apportionment of 71% and 29%, which was based on an orthophoto. That document was not in the file, but he considered the maps available to him and believed those proportions to be reasonable at the time.

[63] However, in preparation for the appeals, Mr. Weir was provided with the orthophoto and he believes that Ms. Haeussler's calculation of the irrigable land contains errors. In particular, he noted that Ms. Haeussler identified 98 acres on Emcee's land as irrigable, but the numbers on the orthophoto add up to more than that. He also noticed that Ms. Haeussler did not put values on Emcee's non-irrigable land, but does not know why. Finally, he noticed that the calculation of the Appellant's irrigable land (238 acres) included the storage reservoir area. As the storage reservoir is not for growing crops, Mr. Weir states that it is not irrigable land and should have been subtracted from the amount of irrigable land. According to Anthony Cecil's evidence, this area is approximately 150 acres.

[64] Mr. Weir also testified that he noticed the error in Ms. Patterson's technical report where she stated that there were "no concerns expressed". He ignored this statement as he had reviewed Anthony Cecil's 2012 letter, as well as the memos to file containing objections, and he considered them prior to making his decisions. Specifically, Mr. Weir considered the Appellant's suggestion that the rights under the original licences had not been used on the eastern property. However, in his view, neither party had used the water exactly as intended.

[65] Mr. Weir also testified that he would consider works "constructed" even if they were not permanent, provided that the licence did not require a permanent structure. In this case, the original licences did not require permanent diversion structures.

The Third Parties

[66] The Third Parties submit that any errors in the 2006 letter did not affect the rights of the Appellant, but they did affect the rights of Emcee: that is, Ms. Haeussler overestimated the Appellant's irrigable land and underestimated Emcee's irrigable land.

[67] Regarding the works on Emcee's land, Greg Messner testified that Emcee uses a portable pump which pumps water into a hose and into the pivot sprinklers. The pump can be used at one or both diversion points. This system was used to draw water from the creek in 2015, after the Respondent's decisions. A different system was used for the effluent water, although the underground pipes for that water came up near the diversion point.

The Panel's findings

[68] The Panel finds that Ms. Haeussler's 2006 letter to the parties provided reasonable notice that an apportionment was required due to the subdivision of the Cecil family ranch lands, and provided notice of the specific apportionment proposed. The Appellant was provided with an opportunity to be heard, and provided its views in Mr. Savjord's 2006 telephone call to Ms. Haeussler, in later conversations with the Ministry and, importantly, in Anthony Cecil's October 2012 letter to Ms. Patterson. It had an opportunity to point out the errors in Ms. Haeussler's recommendation on all of those occasions. In addition, all of the Appellant's concerns regarding Ms. Haeussler's proposal, Ms. Patterson's technical reports and the Respondent's decisions, have been raised in these appeal proceedings, and considered by the Panel.

[69] The Panel finds that the process provided notice and a reasonable opportunity to be heard. Any errors in the technical reports by Ms. Patterson, do not, in and of themselves, make the Respondent's decision-making process unfair. Moreover, the evidence before the Panel is that Mr. Weir ignored Ms. Patterson's error about "no concerns expressed", and that there is no error in her statement regarding the works.

[70] Regarding the alleged errors in Ms. Haeussler's calculation of irrigable land, the evidence at the hearing suggests that, if there are in fact errors in her calculation, they were to the benefit of the Appellant and to the detriment of Emcee, not the other way around. Whether these errors ought to be addressed by the Panel in an amendment to the licences forms the basis for some of the remedies sought by the Third Parties. This will be addressed later in this decision.

[71] Based on the above, the Panel finds that any errors in Ms. Haeussler's letter do not justify the decisions being overturned.

[72] This ground for appeal fails.

2. Whether the decisions are unreasonable because the butterfly documents contemplate that all of the rights under the original licences go to the Appellant.

The Appellant

[73] The Appellant submits that the apportionment of water to Emcee contradicts the private agreements between the two parties. In particular, it relies upon the trust agreement between Emcee and the Appellant under which all of the Appellant's land was, for a time, held by Emcee in a bare trust for the Appellant. It was later transferred to the Appellant and taxes were paid to finalize the division of the property.

[74] Under the trust agreement, the Appellant submits that Emcee agreed "that all profits and advantages due or accruing due to the Trust Property do not belong

to the Trustee [Emcee]". The Appellant submits that the imposition of a requirement on the Appellant to support storage for Emcee is an "additional encumbrance not permitted under the butterfly agreement". Anthony Cecil gave evidence for the Appellant on this issue.

[75] Mr. Cecil was in his mid-twenties at the time of the butterfly transaction negotiated between his father and his aunt, and did not take an active part in the negotiations although he attended some of the meetings. He understands that the purpose of the transaction was to evenly divide the Cecil family assets between the new companies formed by his father and his aunt. His aunt's company (Emcee) received more ranch land; his father's company (the Appellant company) received more of the businesses.

[76] Although the original licences were not specifically mentioned in any of the butterfly documents, or listed as an asset, Mr. Cecil believes that this was because the licences were "part of the land". He testified that the spirit and intent of the butterfly process was for each party to go their separate ways and manage their own affairs without entanglement. Mr. Cecil notes that there were other water licences appurtenant to the eastern land, and those stayed with his aunt's land. In his view, the original licences were not forgotten, it was simply understood that they would run with the Appellant's land because the storage and works were all on its land.

[77] Mr. Cecil testified that, after the butterfly transactions, small issues were dealt with amicably between the parties, but they were non-ranching issues. Further, until the Respondent's decisions, both parties' actions were consistent with his understanding of the butterfly transaction: that the water rights under the original licences were the Appellant's. He states that, for the past 20 years, Emcee never used the water, never asked for access to the water, and never paid for maintenance of the dam or control structure.

The Respondent

[78] The Respondent submits that minimal weight ought to be given to the butterfly agreements, including the trust agreement, for the following reasons:

- The Respondent did not have any of them when he made his decisions;
- Water rights "run with the land" which, in this case, was land on both sides of the highway;
- The Ministry is not bound by agreements to which it is not a party; and
- The agreements were made outside of the context of the *Water Act*.

The Third Parties

[79] The Third Parties submit that there was no agreement to transfer the original licences to the Appellant as part of the butterfly transactions, and there is no credible evidence of such an agreement. Rather, all of the water licences were simply overlooked by the parties and their advisors. The Third Parties submit that the only credible evidence on this issue is from Marina Cecil, who was an active participant in the butterfly negotiations and a signatory to the documents.

[80] Marina Cecil testified that the original water licences were never discussed during the negotiations and believes that they were "just missed". In this regard, she points out that none of the other water licences appurtenant to the Cecil family

lands were addressed in the butterfly transactions, but they have since been split depending on whose land they pertained to.

[81] Ms. Cecil understands why Anthony Cecil may have concluded that the licences went to the Appellant, given that the original licences were not referred to in any of the agreements, and given Emcee's irrigation practices over the years. However, she confirmed that she never intended to relinquish any of the rights under the original licences, or to transfer all of the rights solely to the Appellant.

[82] Finally, the Third Parties submit that, if there was a general agreement or understanding that the rights under the original licences would go to the Appellant, the Appellant would have called Michael Cecil as a witness, as he was the other party negotiating the agreements. They submit that the Board should draw an adverse inference from the fact that Michael Cecil was not called as a witness.

The Panel's findings

[83] The Panel has reviewed all of the documents tendered by the parties in relation to the distribution of Old BCE's businesses and assets. Despite attaching an extensive list of the land and inventory covered by the transactions, which includes a woodlot licence and grazing licences, there was no mention of any water licences. Water licences are valuable assets and yet the agreements are silent.

[84] The Appellant argues that, as these licences run with the land, no reference to the licences was required. This ignores the fact that the original licences did not relate solely to the Appellant's land: the licences applied to the *whole* of the subject land: the land to the west and the land to the east of Highway 97. While the dam and the reservoir were located on the Appellant's lands, the licences were appurtenant to five parcels of land that were later divided between the Appellant and Emcee. Therefore, regardless of what the Appellant assumed to be the case, in reality, the parties did not enter into an enforceable agreement that changed the land to which the original licences were appurtenant and/or which may be irrigated.

[85] For all of these reasons, the Panel finds that the butterfly documents do not contemplate that the rights under the original licences go to the Appellant. They are silent. Further, the language in the bare trust document is not sufficiently clear to support the Appellant's claims. A water licence does not comfortably fit within the description of a "profit" or "advantage" as those words are used in the trust agreement.

[86] Finally, even if the agreements could be interpreted as alleged by the Appellant, the Panel agrees with the Respondent that such agreements would not be binding upon the Ministry. While the Ministry would undoubtedly consider such an agreement if the parties' intent was sufficiently clear and its terms were consistent with the legislation, this is not the situation in the present case.

[87] This ground for appeal fails.

[88] Given the Panel's findings on this issue, it need not address the adverse inference argument.

3. Whether the apportionment of water to Emcee is unreasonable because, contrary to section 23 of the *Water Act*, the water under the original licences has never been used beneficially on the lands east of Highway 97.

The Appellant

[89] The Appellant states that the Ministry has never performed a proper site inspection of the properties. If it had, the Appellant submits that the Ministry should have cancelled the rights appurtenant to that land due to a lack of beneficial use and a lack of authorized works under section 23 of the *Water Act* which states:

> **23**(2) The rights of the licensee under a licence are subject to suspension for any time by the comptroller or a regional water manager, and a licence and all rights under it are subject to cancellation in whole or in part by the comptroller or a regional water manager for any of the following:
>
> (a) failure by the licensee for 3 successive years to make beneficial use of the water for the purpose and in the manner authorized under the licence;
>
> (b) failure by the licensee within the time specified to construct the works authorized under the licence;
>
> ...
>
> (f) the licensee's failure to comply with a term or condition of the licence;
>
> ...
>
> (3) Three days' notice of the comptroller's or regional water manager's proposal to suspend rights under a licence must be given to the person exercising the rights or to the person occupying the land to which the licence is appurtenant and, if the comptroller or the regional water manager considers the matter urgent, the rights may be suspended without a hearing.
>
> ...

[90] The Appellant submits that clauses "h" and "i" of the Original Diversion Licence require the works (diversion structures, pump, pipe and sprinkler system) to be installed, and the water used beneficially, on or before December 31, 1988. Anthony Cecil testified that no diversion structures were ever installed on the eastern lands by Old BCE. He states that Old BCE never irrigated those lands with water under the original licences because, since 1978, it used the District's effluent water for irrigation on that land. Therefore, the Appellant submits that the Ministry should have cancelled the portion of the Original Diversion Licence that applied to the eastern land on or about 1988 due to Old BCE's lack of beneficial use and non-compliance with the licence. It further notes that this lack of beneficial use continued until the Respondent's decisions in 2014; i.e., Emcee never used the water under the original licences.

[91] The Appellant submits that, given that there has never been any beneficial use of the irrigation water under the original licences on the eastern land, that land should not have been included in any replacement licences that were issued by the Respondent. It submits that this is consistent with Option 1 of the Ministry's Policy Manual which states, in part:

> …. Unless there are over-riding reasons not to, water rights associated with irrigation licences shall be apportioned on the basis of current (ie. last 3 years) beneficial use.

[92] It further states under Option 1:

> Determine the location and area of current (ie. last 3 years) beneficial use either by conducting a final licence survey or requiring the land owner to provide a plan along with a signed Declaration of Use form. The water rights are then apportioned based on location and area of current beneficial use. This option is preferred when the established use is less than the licensed quantity and the total licensed quantity is being reduced. [Emphasis added]

[93] To understand the Respondent's submissions on this issue, the Panel will review the Third Parties' evidence and argument next.

The Third Parties

[94] The Third Parties submit that, prior to the butterfly agreements, Old BCE did not irrigate under the licences, but the water was beneficially used on other portions of the lands to which the licences were appurtenant. After the butterfly agreements, Emcee did not use the water rights under the original licences to irrigate its land, but it did irrigate crops on those lands during that time albeit with the District's effluent water.

[95] The Third Parties point out that, once the Respondent's decisions were made and the new licences issued, Emcee has irrigated the hay and alfalfa fields located on the eastern lands using the diversion points, and the works authorized. Mr. Messner testified that the water is obtained from the approximate location of the two diversion points. Emcee uses a screened intake, pump, and sprinklers as authorized under the new diversion licence. Ms. Cecil confirmed that she has electric power and that she used the authorized works last summer.

[96] The Third Parties further submit that, if beneficial use is the only test, then the Appellant should not have the licences either. They submit that the Appellant has not been beneficially using the water for the purpose and in the manner required by the original licences. Ms. Cecil and Mr. Messner testified that the Appellant's sprinkler system is "rarely" in operation, and not in the areas specified by the licences, contrary to the Original Diversion Licence.

[97] In addition, the Third Parties refer to statements in an expert report prepared for the Appellant by Jeremy Cooke, a professional engineer (civil engineer), in which Mr. Cooke's statement suggests that the Appellant is using flood irrigation. Mr. Cooke states regarding "figure 2" in his report:

> Area A is flooded by impounding water behind [the] dam from the 1st of October to the 15th of June each year. Area A also serves for wildfowl breeding in Spring. Water levels are also dropped to allow cattle grazing, as well as to allow haying of natural wetland grasses in August for sale by the Bridge Creek Ranch.

[98] The Third Parties submit that this meets the Respondent's definition of flood irrigation in that the Appellant fills up the storage reservoir from October 1 to June 15 each year, then draws down the reservoir level in order to graze cattle and hay the field. As this form of irrigation is not authorized under the original licences, the

Third Parties submit that the Appellant has not made beneficial use of the water "in the manner" authorized by the original licences.

The Respondent

[99] The Respondent was aware that the Appellant wanted the eastern lands removed from the original licences. This was made clear in Anthony Cecil's October 24, 2012 letter.

[100] Mr. Weir testified that regional managers do not cancel rights or licences without very good reasons and that, before doing so, the decision-maker must follow the process set out in section 23 of the *Water Act*. That was not done in this case.

[101] Mr. Weir testified that he was aware of the parties' respective uses of the water, and did not place much emphasis on that use when he made his decisions. That is because, in his view, neither party was in strict compliance with the original licences and he did not want to penalize or reward someone by "slavishly" following the terms of the licences. Further, he was not prepared to start investigating how each party was using water under the terms of the original licences, as this would further delay a long overdue amendment to address the simple subdivision of appurtenant land and, in any event, the Ministry may give a party additional time to make beneficial use under a licence.

[102] Mr. Weir explained the objectives of the options in the Policy Manual. He concluded that Option 1 did not apply to this case because it is intended to address situations where there is a proposed reduction in water quantity, and/or to prevent water speculation.

[103] In Mr. Weir's view, the facts of this case fit within Options 2 and 3 of the Manual, which state:

> Option #2:
>
> Apportion the water rights on the basis of established use plus potentially irrigable land
>
> This option takes into consideration the total irrigated land area as well as potential irrigable areas. The area of the original lot containing both the area of historic use and potential use of irrigable land is calculated and water rights are then allocated proportionately to the newly created lots.
>
> Option #3:
>
> Apportion the water rights on the basis of the total irrigable land area
>
> The total irrigable land area of the original lot is measured and each of the new lots are apportioned a share of the water rights equal to its share of the irrigable land contained within its boundaries. This is the appropriate choice when a portion of the original lot is unsuitable for farming and is not irrigable, ie. a rock outcrop at the edge of a field. If this non-irrigable land is subdivided off for housing, it would not be appropriate to assign a portion of the irrigation rights to these lots.

[104] Mr. Weir testified that the water rights "go with the land" and that both parties own land that was appurtenant to the original licences. Both parties have

viable operations that need irrigation water. Therefore, the rights holders in this case were both the Appellant and Emcee. He saw no reason to favour one over the other.

[105] In addition, there were no reports of non-compliance on the file, and he did not want to inadvertently reward or punish either party in light of the issues between them regarding access to works, and their disputes over the use of the water. It was clear to him that both of the parties were viable hay producing entities that rely on irrigation of fields located within the original appurtenances.

Appellant's reply

[106] The Appellant states that there is nothing in the original licences, or the new licences, that prohibits a licensee from accessing its own lands after appropriate water volumes have been stored and that subsequent access does not constitute flood irrigation.

The Panel's findings

[107] As to the Appellants' argument that new licences should not be issued to Emcee based upon a lack of beneficial use on the eastern lands, the Panel disagrees.

[108] First, the Original Diversion Licence describes the lands appurtenant to the licence in clause "g" and then states "of which 200 acres **may** be irrigated" [Emphasis added]. The described lands in the original licence cover the areas both east and west of Highway 97.

[109] Further, "beneficial use" means that the water is being used within the boundary shown on the licence, during the period of time and in the quantity authorized, and that it is being used for the authorized purpose (i.e., irrigation). Beneficial use does not mean that *all* of the land within the boundary (both western and eastern sides of Highway 97) must be irrigated. This makes practical sense since fields are often left fallow for a period of time, or never used for crops due to soil conditions. The fact that the eastern portion of the lands was not irrigated with water under the original licences does not mean that the original licences were not being beneficially used, as that phrase is meant in the legislation.

[110] Based upon the evidence, the Panel finds that, prior to the 1995 subdivision, the water rights under the original licences were being beneficially used by Old BCE to irrigate some of the land identified in the licence (the western land). After 1995, the water was still being used beneficially, this time by the Appellant. The Panel finds that there is no reason in fact, or in law, to conclude that the eastern lands ought to have been removed from the original licences, or should not have been considered as part of the apportionment decision due to a lack of beneficial use.

[111] Even if this findings is incorrect and the original licences could have been cancelled as they pertained to the eastern land, the Panel agrees with the Respondent that such a decision would have required advance notice to the affected party and, in fairness, an opportunity to be heard. It is highly likely that, faced with such a consequence, the affected party, whether Old BCR or Emcee, would have sought to correct the situation and use the water. As a result, in the long run, the Appellant would not be any further ahead.

[112] Finally, the Panel agrees with the Respondent's decision not to apply Option 1 in the circumstances. There was no request for, or proposal to, reduce the quantity of licensed water.

[113] This ground for appeal is dismissed.

4. Whether the decisions will injuriously affect the Appellant's rights by compromising its agricultural and/or financial viability, contrary to section 20 of the *Water Act*.

The Appellant

[114] This is the Appellant's main concern and its primary reason for filing the appeals. Before and after the butterfly transaction, the land that is now held by the Appellant has had the benefit of all of the water under the original licences and has made operational decisions freely – without interference by, and without consideration of, others. It has used its land and water as "it sees fit". The Appellant's evidence is that, over the years, it has worked with Ducks Unlimited, and others, to protect islands and wetlands and to improve fish habitat. It has also spent money on maintaining and upgrading certain works to improve its operation. The Appellant submits that the Respondent's decisions change this. It states that the new licences change the storage duration and limit its agricultural viability and injuriously affects its rights.

[115] According to Anthony Cecil, both before and after the butterfly transaction, the storage reservoir has been drained in early August. He testified that Old BCE applied for the original storage licence in or around 1984 because Exeter Lake and the surrounding area was flooded each year during freshet. As a result, Old BCE felt that it was a good place to store water. He testified that the area, now referred to as the storage reservoir, would be drained from mid to late summer. He referred to the Ministry's aerial photos from 1986 to establish that Old BCE stored water and used it to irrigate newly cultivated fields in this manner.

[116] Mr. Cecil states that the Appellant's use of the storage reservoir between 1995 and 2014 was similar to the way the land was previously used: the Appellant stored water behind the dam and flooded its private land (the storage reservoir). He states that the flooding covers most of Big Meadow, a large and important hay meadow. The Appellant normally begins draining the reservoir in early August so that it can use the land for grazing cattle or for hay production.

[117] Mr. Cecil's main concern with the Respondent's decisions is the requirement to store Emcee's water on the Appellant's land. He states that this decision negatively affects the Appellant's operation because the Appellant must keep water in storage to supply Emcee's diversion licence until September 30th. Keeping water in storage during August prevents the Appellant from haying the two meadows, and allowing cows to graze there.

[118] Mr. Savjord testified that, as a result of water being stored until late August of 2015, the meadows didn't dry out; they were wet and boggy so the cows would not go into them to eat grass. When he tried to cut hay on the meadow, the tractor got stuck. Mr. Savjord testified that the Appellant was able to cut some hay, but not all of it.

[119] The Appellant submits that "storage of water in this location by 100 Mile Ranch, with the accompanying loss of control of storage timing, will compromise our agricultural viability as a ranch."

[120] In addition, the Appellant submits that the high water levels caused by the storage impacts the Appellant's land beyond the reservoir area shown on the licence. This means that the storage of water on Emcee's behalf adversely affects the Appellant's land outside of the licensed storage location, where the land becomes saturated and difficult to access for agricultural use.

[121] Anthony Cecil testified that he has approached Emcee a number of times over the past year to find a compromise solution, proposing that Emcee's storage be moved to another location, or that Emcee agree to a storage schedule that would match the Appellant's historical use of the storage (stop storing in August). However, Emcee rejected these proposals.

[122] The Appellant also submits that the Respondent's decisions negatively impact its finances: it loses the economic benefit that it normally receives from putting cattle or hay on the two meadows during August and September. Mr. Savjord testified that this loss will now be greater because the Appellant received organic certification, allowing it to charge a higher rate per day for cows (organic cows) and a premium for hay.

[123] According to Mr. Savjord, the Appellant would be satisfied if it could keep the historical storage drawdown of August 1st; i.e., start storing water on March 1st and end on August 1st. In his view, this would also address fish spawning issues. He has contacted the District, and understands that it would be willing to supply the Third Parties with effluent water for the period after August 1st.

[124] In addition, the Appellant would be satisfied if it could begin storing water in March rather than October. It has not been storing water over the winter as it causes serious frost and ice damage to the Appellant's fencing, causes ice risks for livestock, and stunts plant growth on the meadows.

The Respondent

[125] The Respondent submits that agricultural viability and financial impacts are not relevant to the legal issues before the Board and should not be considered. He further submits that, being satisfied that "no licensee's right will be injuriously affected" under section 20 of the *Water Act*, does not mean that a licensee will not be affected at all. The focus of the legislation is on "water rights" - licensed rights – not the right to earn a living or to farm in a particular way.

[126] The Respondent also submits that, even if agricultural viability was relevant, his decisions did not change:

- the total amount of water that the two parties were authorized to store;
- the location of the reservoir; or
- the period of time that the parties were authorized to store water.

[127] Therefore, any loss of agricultural or financial viability claimed by the Appellant cannot be attributed to the apportionment decisions: there has been no change with respect to storage authorized under the original licences. Instead, the Appellant's claims of loss arise because it has not been using the water in accordance with the original licences.

[128] Mr. Weir testified that he reviewed the 1985 Engineer's Report prepared by Ken Kvist, Water Technician for the Ministry, on the application for the original licences. That report explained how Mr. Kvist arrived at the water quantity and time period in the original licences. The Original Diversion Licence allowed irrigation of 200 acres for a period of six months (April 1st to September 30th), and the quantity of water authorized for use (400 acre-feet per annum) was based upon the water being diverted for that six months. Mr. Weir explained that, if the water is not being used for the entire six month period, the licensee is not making beneficial use of the licence. If this is to occur regularly (e.g., for a period of three years), the licensed quantity should be reduced. As the Appellant is not using the stored water in August, in his view, it is not complying with the original (or new) licences.

[129] Mr. Weir testified that a licensee cannot draw down water from storage whenever it wants. He states that, if a licensee does not use the water in storage for the full time period in the licence – in this case, six months – then the calculations change.

[130] In Mr. Weir's view, requiring the Appellant to store water after August 1st in order to satisfy Emcee's licences does not constitute an injurious affect to the Appellant. There is no injurious affect because the time periods in the new licences are the same as the original licences. The water has always been required to be available for diversion until September 30th.

[131] Finally, the Respondent notes that the Appellant's claim of harm or loss results from using flood irrigation to grow the extra crops, and that this is not what was authorized under the original licences.

The Third Parties

[132] The Third Parties submit that, like the Appellant, they also have a viable ranching operation which includes hay production, and they also require water for irrigation. The Third Parties submit that the agricultural viability of their operations will be compromised if Emcee is not allocated sufficient water to irrigate its fields.

The Third Parties submit that the Respondent's decisions resulting in the new licences issued to Emcee have not, and will not, result in the Appellant being injuriously affected. They agree with the Respondent's submissions and add that the land that the Appellant says will be lost by the Respondent's decisions is the same area that is shown as the reservoir area on the plan attached to the Original Storage Licence. Therefore, the Third Parties submit that the Appellant has no valid complaint regarding the location of the reservoir storage area and cannot be injuriously affected by the reservoir being used for water storage in accordance with the express terms of the original licences.

The Panel's findings

[133] Even if loss of agricultural viability and/or financial loss was a relevant consideration under section 20 of the *Water Act*, of which the Panel is not convinced, the Panel finds that such loss was not proven, on a balance of probabilities, to the satisfaction of the Panel (e.g., financial records proving the point were not disclosed).

[134] Further, the Panel agrees with the Respondent that the quantity of water, and the period of time for storage and diversion of the water, has not changed as

between the original and the new licences. The Panel also accepts the Respondent's explanation of how the licensed quantity was determined based upon the duration of storage and diversion. Therefore, any loss suffered by the Appellant, is not one that is a result of the Respondent's decisions.

[135] The Panel understands that the Appellant has been operating this way for 20 years. The Panel further understands that, until 2006, it was unaware that its "world" might change. The Appellant sees Emcee's new water licences as an encumbrance upon its land, limiting its ability to do what it wants to do. The Panel disagrees. While the Respondent's decisions impact the Appellant's past practices, the Panel finds that the apportionment decisions are fair and reasonable in all of the circumstances. Had either of the parties to the corporate re-organization alerted the Respondent of the subdivision of lands in 1995, the apportionment of water rights and obligations could have been accomplished shortly thereafter, and avoided these unexpected changes. The Panel sees the apportionment decisions and the issuance of the new licences, not as encumbrances upon the Appellant's land, but as a continuation of water rights and obligations flowing from the original licences issued on March 12, 1986, for the ranch lands as a whole, of which the Appellant's lands are now only a part.

[136] The Panel finds that there is no basis for the Appellant's claims that the decisions will compromise its agricultural and/or financial viability. The decisions do not change the terms of the original licences with respect to water storage and use, and the timing of those activities, so there will be no injurious affect by the Respondent's decisions.

[137] This ground for appeal fails.

5. Whether the decisions ought to be rescinded because Emcee has an alternate water supply.

The Appellant

[138] The Appellant submits that Emcee has access to water from the District and from two other irrigation licences. It argues that apportioning part of the original licences to Emcee is unreasonable as Emcee does not require the water, and it deprives the Appellant of the water that is has been using for over 20 years. Mr. Savjord also testified that he has been in contact with the District and the District effluent water may still be available to Emcee, but the District will no longer pay Emcee to take it.

The Respondent

[139] Mr. Weir was aware that Emcee had access to other sources of water for irrigation, but concluded that access to other water sources was not relevant in this case. He states that even if someone has a right to use municipal water, he doesn't always disallow or cancel a licence. In this case, both parties have other licences and have obtained irrigation water from other sources.

[140] In any event, the Respondent notes that the Board has previously ruled that regional water managers are not required to investigate of consider alternative sources of water when issuing water licences under the *Water Act*: see *Waldron v. Deputy Comptroller* (Appeal No. 94/42 – Water, January 11, 1996); *Wyett &*

Harbridge v. Deputy Comptroller (Appeal No. 95/13-Water, February 12, 1996); *Halisheff v. British Columbia* (Decision No. 2001-WAT-017, April 16, 2002).

The Third Parties

[141] Marina Cecil testified that the District water was used for many years, but in a letter dated March 18, 2015, the District advised Emcee that the agreement expired on March 31, 2015, and that the District would not be exercising its option to renew the agreement. Without access to the clean water under the licences, Ms. Cecil testified that this cancellation would have been devastating. The ranch would not have water to irrigate its fields and, as a result, would only be able to get one crop. This would cut its profits in half.

[142] Both Ms. Cecil and Mr. Messner testified that Emcee could easily use all of the 116 acre-feet of water allocated under the new licences to irrigate their hay fields. Mr. Messner also described the advantages and disadvantages of using the District's effluent to irrigate the fields. Ultimately, despite any benefits, he would prefer using fresh water for irrigation as the effluent water poses risks to human health and can damage crops, land and equipment if one is not very careful.

[143] The Third Parties also argue that the issue before the Panel is not whether new licences should be issued to Emcee when it may have alternate water sources; rather, the issue is what portion of the water under the original licences should be allocated to Emcee upon the apportionment of those original licences.

[144] The Third Parties also state that the evidence shows that the Appellant also holds a number of water licences for irrigation. However, they submit that neither the Appellant, nor the Third Parties, should unduly benefit from, or be punished by, the apportionment of rights under the original licences.

The Panel's findings

[145] As to the alternate water supplies that may or may not be available to Emcee from the District, the Panel agrees with the Respondent who testified that alternate sources of water are irrelevant. Further, as Mr. Messner testified, the handling of municipal effluent is difficult and, given a choice, he would prefer the clean creek water over effluent.

[146] Accordingly, this ground for appeal fails.

6. Whether the Board should grant the Appellant's alternative remedies to:

a. cancel Emcee's new storage licence and direct Emcee to arrange for an alternative storage location; or

b. amend the period of the year in which the substitute licences authorize the storage and use of water so the Appellant can stop storing water in August.

The Appellant

[147] If the Board upholds the apportionment decisions, the Appellant asks the Board to make one of these alternative orders for the reasons given by the Appellant under Issue 4 regarding agricultural viability and financial loss.

[148] It submits that ordering the first remedy is justified because of the harm to the Appellant from the current storage location. It submits that it is not able to use

its lands as it has over the years. Further, the testimony by its expert witness, Jeremy Cooke, is that a change in storage location would (a) make it easier for Emcee to manage its water, and (b), if the storage is located closer to where it is actually being used (i.e., closer to the diversion points), there will be less water loss.

[149] The Appellant submits that, in the alternative, the Board may authorize an amendment to the period of the year in which the substitute licences authorize the storage and use of water. The Appellant maintains that such an amendment is needed to accurately reflect the current and historical use of water under the original licences by both the Appellant and Old BCE.

The Respondent

[150] In response to the first remedy, the Respondent submits that, for Emcee to have separate storage on its property, it has to apply for a new storage licence under the *Water Act*. He submits that requiring Emcee to apply for a new licence, and duplicating storage works in this way, would be unreasonable in the circumstances and contrary to the objectives of the *Water Act*.

[151] Regarding the second alternative, the Respondent submits that an amendment of this nature is a reduction in the rights granted under the substitute licences and is, therefore, a partial cancellation of the rights granted under these licences. The issue of cancellation of all or part of the rights granted under the substitute licences is not squarely before the Board, and a formal process is required under section 23 of the *Water Act* prior to such an action being taken. No such process has occurred in this case.

[152] In addition, the Respondent submits in his closing argument that:

> 74. … the quantity of water authorized for use and storage under an irrigation licence is based on a calculation of the acreage to be irrigated, the duty of the soil type in the licence's geographic area, and the typical length of the irrigation season required in that area. As the Respondent alluded to in this testimony regarding the engineer's report for the Original Licences, …, the predecessor to the Respondent would have considered all of these factors when determining the quantity of water authorized for use and storage under the Original Licences.

The Panel's findings

[153] The Panel cannot support the alternative remedies requested by the Appellant for the reasons expressed by the Respondent at paragraphs 150-151, above.

7. Whether the Board should grant any of the additional or alternative remedies requested by the Respondent and the Third Parties, such as a joint use of works order and/or amendments reducing the amount of water allocated to the Appellant and increasing the amount allocated to Emcee.

[154] In light of the evidence that was tendered at the hearing, the Respondent, and the Third Parties sought new remedies in their closing arguments. They are addressed separately below.

a. *Should the Panel make a joint use of works order pursuant to section 33 of the* Water Act, *or send the matter back to the Respondent to do so?*

The Respondent and Third Parties

[155] Both the Respondent and the Third Parties submit that a joint use of works agreement is needed to address the operation and maintenance of the dam, among other things. The new licences impose a requirement on the licensees to ensure that the dam is constructed, operated and maintained to the satisfaction of a Dam Safety Officer, and in accordance with the Canadian Dam Association Guidelines. The dam is located on the Appellant's property but, to date, the Appellant has refused to allow the Third Parties access to the dam for any purpose. The Third Parties provided the Panel with a draft easement and joint works agreement which the Appellant has refused to sign. They note, however, the Savjords will need to be added as a party to the agreement if their land is added to the Appellant's licence.

[156] The Respondent and the Third Parties want the Panel to make a joint use of works order if it has sufficient evidence, or for the Panel to send the matter back to the Respondent with directions. Section 33 of the *Water Act* states:

> **33** If satisfied that the joint use of works would conserve water or avoid duplication of works, the comptroller or regional water manager may order the joint use and set its terms. [Emphasis added]

[157] The Third Parties further ask the Board to order that all of the new licences be amended by adding the following clause:

> (n) The rights granted herein may not be exercised if the owner of the lands to which this licence is appurtenant has not entered into a joint works agreement with the owner of the lands to which [licence numbers] are appurtenant for the operation and maintenance of the Exeter Lake dam on terms and conditions satisfactory to the regional water manager on or before March 31, 2016.

The Appellant

[158] The Appellant acknowledges that, in the event that the Panel upholds the Respondent's decisions, it will be necessary for the parties to enter into a joint works agreement for the operation and maintenance of the dam. The Appellant did not see the need for such an agreement until its appeals were decided, given its position that it had all of the water rights under the original licences pursuant to the butterfly transaction. Further, it does not agree with the terms of the draft joint works agreement prepared by the Third Parties.

[159] However, the Appellant advises the Panel that, if the Respondent's decisions are upheld, it will negotiate with the Third Parties in good faith and enter into a joint works agreement that is fair and neutral to both parties. In the event that the parties cannot come to an agreement within a time to be set by the Board, the Appellant suggests that the Respondent set the terms of the agreement in an order under section 33.

The Panel's findings

[160] A high degree of cooperation is required between the licensees to exercise their respective rights under the new licences. This has not occurred to date, as is evident from the evidence repeated in the background section to this decision.

[161] Being satisfied that the joint use of works would avoid the duplication of storage works, the Panel believes that such an order is required in this case if the parties are unable to come to their own agreement. In light of the Appellant's commitment to negotiate a joint use of works agreement in good faith, the Panel will not make its own order at this time. Ultimately, an agreement negotiated by the parties is likely to be more successful in the long term than one imposed by the Board or the Respondent.

[162] However, given the history of conflict, the fact that the obligations under the licences are already in effect, and Emcee has already provided the Appellant with a draft agreement to work with, the period of time required to negotiate should be relatively short. As there was some evidence provided at the hearing that the Appellant's land has been listed for sale, it seems that it would be very much in the interest of the Appellant to have this outstanding matter settled.

[163] In the circumstances, the Panel directs the Respondent to order the joint use of works pursuant to section 33 of the *Water Act*, and to set the terms and conditions, as between the Appellant, Third Parties and the Savjord's, if the parties have not negotiated their own agreement on or before **April 31, 2016**, or such other date as the Board may allow upon request by the parties.

b) Should the Panel amend the licences to reduce the quantity of water allocated to the Appellant and increase the quantity of water allocated to Emcee?

The Third Parties

[164] The Third Parties submit that the new licences were based upon significant errors in Ms. Haeussler's 2006 proposal which only came to light through Mr. Weir's evidence during the hearing. In particular, he testified that Ms. Haeussler should have subtracted the storage reservoir area from the Appellant's irrigable land because, as part of the reservoir, it is not available for crops. According to Mr. Cecil, this area is approximately 150 acres. Had Ms. Haeussler deducted the 150 acres from the Appellant's 238 irrigable acres, the Third Parties submit that the Appellant's irrigable land would be 98 acres. This would have resulted in the Appellant being allocated 47.3% of the water (not 71%) for a total of 189.2 acre-feet per annum. Emcee would have been allocated 52.7% of the water (not 29%) for a total of 210.8 acre-feet per annum.

[165] The Third Parties ask the Board to correct the error and adjust the new licences accordingly.

The Respondent

[166] The Respondent submits that the Board has the authority to correct this error as it "stands in his shoes".

The Appellant

[167] The Appellant submits that granting the Third Parties' proposed amendment would unduly prejudice the Appellant for the following reasons:

- The Respondent's evidence constitutes "off the cuff" comments and there is not enough information before the Board to order the Third Parties amendments.
- Such amendments are a separate matter which are not the proper subject of this appeal and should have been addressed by the Third Parties in a separate appeal.
- This claim for relief was never advanced in the Third Parties' prehearing arguments or during the course of the hearing. As such, the Appellant has not had a reasonable opportunity to respond and provide its own evidence in this regard.

[168] The Appellant submits that any amendments made to the licences to increase or reduce the quantity of water authorized to be diverted or stored requires an "on the ground" assessment of the lands in order to accurately determine the proper allocations, and should address the issues raised by both parties, including those that prejudice the Appellant, such as the Respondent's claim that the 69 acres noted on the orthophoto attached to Ms. Haeussler's letter represents non-irrigable land.

[169] If the Board decides that there is some merit to the assertion that Ms. Haeussler's evaluation of irrigable land is not correct, the Appellant asks that the Panel send the matter back to the Respondent for a more detailed "on the ground" assessment of the irrigable and non-irrigable lands at issue and to correct any errors accordingly. A proper and detailed investigation performed by a qualified professional ought to be performed given the potential prejudice to the Appellant.

The Panel's findings

[170] Given that the new licences apportion the water to the parties on the basis of Ms. Haeussler's assessment of irrigable land, and given Mr. Weir's evidence, the adjustment proposed to the licences by the Third Parties is significant. It would result in a large reduction to the licensed quantity of water that has been used on the western land for 20 years, and a similarly large increase to Emcee; a party that has not needed or used that water until 2015.

[171] Although the Appellant has responded to this information in closing argument, the Panel agrees with the Appellant that there ought to be a further investigation, and a further opportunity to be heard on this matter before determining whether the apportionment should be changed. Accordingly, the Panel sends this matter back to the Respondent, with the direction to review the implications of Ms. Haeussler's error in her 2006 calculation of irrigable land, and determine whether the licences should be corrected to reflect the actual irrigable land in the circumstances. Specifically, whether the Third Parties' requested

corrections to the licences would be "fair and equitable" under the Ministry's Policy Manual.

DECISIONS

[172] In making this decision, the Panel has considered all of the evidence, documents and arguments presented at the hearing, whether or not they have been specifically reiterated herein.

[173] By consent of the parties, the Panel orders that the Appellant's diversion licence C131911 be amended to include the Savjord land as set out in Exhibit 8 "Amendment to Conditional Water Licence No. 131911".

[174] For the reasons set out above, the Panel has decided to send this matter back to the Respondent, with the following directions:

1. If the parties have not negotiated their own joint use of works agreement on or before **April 31, 2016**, or such other date as the Board may allow upon request by the parties, the Respondent is directed to order the joint use of works pursuant to section 33 of the *Water Act*, and to set the terms and conditions, as between the Appellant, Third Parties and the Savjord's.
2. Review the implications of Ms. Haeussler's error in her 2006 calculation of irrigable land, and determine whether the licences should be corrected to reflect the actual irrigable land in the circumstances. Specifically, whether the Third Parties' requested corrections to the licences would be "fair and equitable" under the Ministry's Policy Manual.

[175] The appeals are dismissed.

"David H. Searle"

David H. Searle, C.M., Q.C., Panel Chair
Environmental Appeal Board

March 8, 2016