



Appeal No. 01/83 WAT

D E C I S I O N

Reasons for decision of the Panel of the
Environmental Appeal Board pursuant to
Section 38 of the Water Act and Section 11
of the Environment Management Act

APPELLANT: Mr. Pete Berukoff, Fruitvale, B.C.

1.0. GENERAL

- 1.1. The hearing of the appeal by a Panel of the
Environmental Appeal Board was held at the
Terra Nova Motel in Trail, on March 23, 1983.

The Panel members were:

Mr. H.D.C. Hunter - Chairman
Mr. Valter Raudsepp - Member
Mr. Graham Kenyon - Member

The recorder of the proceedings was Miss
Shirley Mitchell, Secretary to the Board.

- 1.2. The Appellant, Pete Berukoff, was not repre-
sented by a lawyer, but was assisted by his
sons. Two sons and other individuals gave
evidence.
- 1.3. The Comptroller of Water Rights was present
in person, and was represented by Mr. Thomas
MacLachlan, as Counsel, assisted by Miss Livia
Meret.
- 1.4. Mrs. Marlene Wood attended on behalf of her
father, Mr. Barrett, who owns property which
might be affected by an order made by the
Panel.

2.0. THE APPEAL

- 2.1. The appeal was against a decision of the Comptroller of Water Rights, made January 5th, 1983.
- 2.2. The matter before the Panel of the Board had followed a tortuous course during which it had changed its extent but not its essential character.

As it finally came before the Panel of the Board, the application was for permission to clear obstructions and vegetation from a stream, and to lower the bed of the stream. The length of the stream involved is wholly within the borders of the Appellant's land, and ends at the upstream boundary of land owned by Mr. Barrett. The stream is part of Beaver Creek which, in this area, flows in two, widely-separated channels, joining into one on Mr. Barrett's property.

- 2.3. The various documents and letters which evidenced the applications and the decisions, culminating in the decision appealed from, generally used the word "application". The Panel of the Board treated the whole matter as an application for an Approval under Section 7 of the Water Act.
- 2.4. The Appellant wished to clear the stream to improve the flow, thereby lowering the water table on his land, and permitting him to increase the acreage available for hay.
- 2.5. The Comptroller of Water Rights had founded his decision on a representation from the Fish and Wildlife Branch that the work applied for might damage the fishing potential of Beaver Creek, and on evidence from his department that the cost-benefit ratio of the work indicated very marginal benefits to the owner.

3.0. THE APPEAL HEARING

3.1. Mr. Berukoff and his witnesses gave evidence which indicated that some 50 years ago, the stream had been at a much lower level than today, the surrounding field had been drier, and had carried a substantial crop of hay.

Recently, the flow near the boundary with Mr. Barrett's property had been severely retarded by fallen vegetation, sand bars, and beaver dams, and had, in fact, caused the formation of new channels. A flood a few years ago had made a change where the two branches of Beaver Creek divide, and this had diverted gravel and sand down the branch with which the appeal is concerned. This had caused bars to build up and raise the water level. The Water Management Branch had permitted remedial works, which had returned approximately equal flows to each branch.

Evidence was given on behalf of the Appellant that the levels reported by the Branch's engineer were incorrect, and indicated much less of a drop than was the case. It was alleged that removing the blocks would have a much greater effect on the water level than the Comptroller alleged, and, therefore, would improve a much larger acreage than was suggested by the Branch. The basis of the Branch's cost-estimate was also challenged.

3.2. After Mr. Berukoff had presented his evidence and case, and before the Comptroller presented his, the Board visited the site in the company of both parties. This visit was very helpful in understanding the evidence of both parties.

3.3. The evidence for the Comptroller of Water Rights indicated that there would be only a small drop in water level even if the Applicant cleared the stream and, therefore, only a small increase in acreage would be available for hay. There was a direct conflict of evidence regarding existing water levels and, thus, the probable drop. The Panel accepted the evidence of the Comptroller's staff.

The representative of the Fish and Wildlife Branch claimed that Beaver Creek was one of the best trout streams in the Kootenays and he was afraid that any clearing would damage the habitat. He also claimed that there were several other landowners wishing to do things to Beaver Creek who were waiting to see the outcome of this appeal. He could not give any direct evidence on the fish population or spawning importance of this particular stretch of stream as no studies have been done. A study is proposed for this year.

3.4. After the presentation of evidence, Mrs. Wood made a statement on behalf of her father. He was afraid that clearing the channel would increase the danger to his property and to the fish in the creek. He also considered that there would be an increased danger to children on his property, and he alleged that the hay which had been, and could be, produced was not of high quality.

3.5. While summing up, Mr. MacLachlan alleged, and introduced evidence to support his allegation, that the bed of the stream was Crown land under the Land Act. The Panel gave the Appellant time to refute this belated allegation, and he subsequently produced a statement from the Registrar of Land Titles to show that the stream was not shown on any plans of the lands in question.

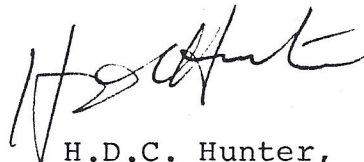
The Panel finds that it does not have to make a ruling on this point as the jurisdiction of the Comptroller depends on the use of water, not on the ownership of land which is covered by water.

Mr. MacLachlan argued that, notwithstanding the change in the application from its inception to the time of the hearing, the Comptroller had jurisdiction to rule on the matter. The Appellant did not argue this point, and as he had no legal representation, was not in a position to do so. The Panel, in this instance, accepts Mr. MacLachlan's submission. However, because

this point was not argued, this decision must not be taken to be a precedent and the point must be considered open to argument in another forum.

4.0. DECISION

- 4.1. The Panel of the Board varies the Comptroller's decision to the extent that the Appellant may proceed with hand clearing of vegetation from the Creek channel at a time or times to be approved by the Fish and Wildlife Branch.
- 4.2. The Panel of the Board upholds the Comptroller's decision at this time not to permit excavation of the creek bed or any form of diversion from the existing channel.
- 4.3. The Panel of the Board recommends to the Fish and Wildlife Branch that the study proposed for this year include an experiment to provide fisheries enhancement by modifying the channel. If such a study is made, the Comptroller's decision shall be varied to allow whatever work may be agreed between the Appellant and the Fish and Wildlife Branch.
- 4.4. If the recommendation contained in 4.3 were to cover reaches 1 to 13 (as shown on the Exhibits), it might help Mr. Barrett, and allay his concerns. As this extension was not in the area before the Panel of the Board, the Panel cannot rule on it.



H.D.C. Hunter,
Panel Chairman
Environmental Appeal Board

Victoria, B. C.
May 16th, 1983