



APPEAL NO. 87/04 WAT

JUDGEMENT:

In the appeal of Mr. D.R. Parker against the two decisions of the Deputy Comptroller of Water Rights of January 22nd, 1987. These decisions were as follows:

- 1) Not to allow alterations at this time to the Waterworks Division Structure on Duhamel Creek which services the licences of the Whitehead Waterworks District and the water users within Lot 7773.
- 2) The appointment of two Water Bailiffs who are charged with the responsibility for control and maintenance of the common works involved. These bailiffs are Mr. Meindert Pol, and in his absence, Mr. Ken Woikin, of the Whitehead Waterworks District.

APPELLANT:

Mr. D. R. Parker
1950 Fleetwood Avenue
Kamloops, B. C.

DECISION:

The Environmental Appeal Board, authorized under the Water Act and the Environment Management Act to hear the appeal of Mr. D.R. Parker against the two decisions of the Deputy Comptroller of Water Rights of January 22nd, 1987, has considered all of the evidence submitted to it at the appeal hearing and during the site inspection trip of May 7th, 1987, and has decided that the two orders (decisions) of the Deputy Comptroller were right and proper under the circumstances involved.

The appeal, therefore, is dismissed.

THE LETTER OF JANUARY 22ND, 1987

The Deputy Comptroller, in his letter of January 22nd, 1987, said, as follows:

"With your letter of January 13, 1986, you submitted a proposal to make certain modifications to the division tank serving the waterlines of the Whitehead Waterworks District and yourself.

As the design for the existing structure was prepared by the office of the Regional Waste Manager in Nelson, I have asked him to review the proposed changes.

In addition, a second independent review of your proposal was undertaken by a senior engineer in Victoria.

The modifications which you proposed included the partition of what you describe as a main settling chamber into two halves and the installation of a second standpipe to provide for the overflow from your half of the modified chamber and to assist with the removal of debris.

The purpose of the division tank is to ensure that the water available in low-flow periods is apportioned in accordance with the quantities and priorities of the various licences on the system. The design separates all licences into two groups, with one compartment serving the licences of the Whitehead Waterworks District and the second compartment serving the water users within Lot 7773.

The diverted flow is discharged firstly into a common tank which is connected to the two compartments by short lengths of steel pipe through the wall. The discharge through these pipes can be controlled by orifice plates which are screwed onto the end of the pipes in the common tank. The connecting pipes are set at various heights in accordance with the relative priority of the subgroups of licences assigned to each compartment.

The operation of the division tank is not automatic and will require manual adjustment to the orifice pipes when the available flow reaches various critical levels.

The function of this common tank is not to remove material from the water by settlement, although that may be a consequence of putting silt and sand laden water through the tank.

The two reviews of your proposal have both concluded that a partition of this common tank as you have suggested would render the purpose of the tank useless.

The removal of silt and sand laden water would require a tank much larger than the common tank in this particular structure.

Some minor modifications could be made to the existing overflow to assist in removing floating debris in the common tank. Clearing of the individual compartments may be simplified by unscrewing the orifice plates and replacement with a cap. The orifice plates are all within fifteen inches of the top of the tank and could be replaced without draining the common tank.

I have asked the Regional Water Manager to give further consideration to these items. In the meantime, no changes to the structure will be authorized.

In the enclosed letter addressed to both yourself and the Whitehead Waterworks District, I have clarified the cost sharing formula, which is based on existing licences. The issue of further licences would require recalculation of the respective share of the users.

In addition, I have addressed the issue of responsibility for control and maintenance of the common works by appointing two Water Bailiffs under the provisions of Section 33 of the Water Act. I have taken this action as a private agreement between yourself had not been reached despite years of negotiation, and I have chosen to appoint Water Bailiffs instead of naming the persons as a term of the joint works under Section 31, in order that the Regional Water Manager in Nelson can retain a supervisory role. This will ensure that the actions of the Water Bailiffs serve the needs of all of the licensees and that there is a degree of control over the costs of maintenance and operation of the works. I recognize your concern over the potential for representatives of the Whitehead Waterworks District to incur expenses in carrying out such work that you may view as excessive. However, insofar as the cost-sharing formula provides that approximately 85% of such costs would be borne by the residents of the District, I would anticipate that the Water Bailiffs would share your interest in keeping these costs as low as possible."

FROM THE EVIDENCE -

1) Intake Site Inspection:

The site inspection was made by all hearing participants immediately prior to the Appellant's presentation of evidence. This visit was highly beneficial to members of the Board in "setting the scene" for the hearing.

The water intake system on Duhamel Creek was built in 1980/81, and was originally designed and built to specifications laid out by the Water Management Branch. It was apparent that some modifications to the system are made from time to time by the water users. Modifications are related mainly to the adjustment or removal of orifice plates which regulate the diversion of water to the Parker and the Whitehead systems. It was also apparent at the time of the Board's visit that there was no shortage of water at the intake site on Duhamel Creek. However, at low water periods, the intake pipe from the creek to the division tank would require shifting from time to time to maintain a full flow into the tank.

A brief inspection was also made of the nearby Gaskel Spring where Parker and an unrelated party to the appeal have water licences. Although Parker has grievances with respect to his domestic licence there, these grievances are irrelevant to this Hearing.

2) Presentation by the Appellant:

Parker made a lengthy presentation to cover many grievances with respect to the design and operation of the existing waterworks system. Some of his main grievances are as follows:

- (a) The joint works on Duhamel Creek occupies Parker's original intake site.
- (b) Parker was not reimbursed for work done by him with respect to pipeline excavation near the site of the intake works.
- (c) With the use of photos, Parker demonstrated that the Parker side of the intake tank sometimes contained little or no water during the dry season.
- (d) A modification of the tank design was proposed by Parker, but this was rejected by the Deputy Comptroller of Water Rights as being unnecessary and more importantly, that it would render the purpose of the tank useless.
- (d) The appointment of bailiffs from the Whitehead Group to regulate the use and division of water at the tank as proposed by the Deputy Comptroller was considered by Parker to be discriminatory against the Parker Group.

3) Presentation by the Respondent:

Mr. J.E. Farrell, Deputy Comptroller of Water Rights provided the main response to Parker's appeal. Farrell, who is an engineer, competently defended the design of the intake tank and its capability to control the division of water according to licence quantity and priority if properly operated.

Farrell also indicated that, in his opinion, the split in costs between the Whitehead and Parker groups should be based on current licencing - that is 85.3% vs. 14.7%, respectively.

Farrell defended his decision to appoint a water bailiff from the Whitehead Waterworks District to regulate the division and use of water and to control the diversion works. The bailiff will be under the supervision of an engineer from the Nelson office.

4) Presentation by Whitehead Waterworks District:

A presentation was made by Mr. P.J. Breck, Chairman of the Trustees, Whitehead Waterworks District. This presentation was supplemented by comments of Mr. L.W. Link from the same group.

Breck felt that any problems experienced in the past with the intake structure were due to the lack of experience of personnel with the installation, and the lack of proper maintenance rather than with faulty design of the works.

Breck was totally in agreement with the appointment of water bailiffs to regulate the division of water to both parties and to check the maintenance of the water works.

Breck pointed out that, since 1980, Parker has made no payments towards the operating and maintenance costs of the water works at the point of diversion.

COMMENTS OF THE BOARD

It is understandable that Mr. Parker should yearn for an exclusive water supply system for his property, regret that he did not appeal the decision to create a joint intake/division tank system with Whitehead about seven years ago and recriminate that he does not always get his "fair" share of water from Duhamel Creek. His lengthy discourse on "years of discrimination by the Regional Water Manager" (devoid of any real grounds for his appeal) only served to confirm that Mr. Parker (the only absent licensee in this area) neither wants to understand the relationship he has with Whitehead nor does he really want to co-operate with his water licence partners. This dispute is even more unfortunate in view of everybody's agreement that Duhamel Creek provides more than enough water for both Parker and Whitehead throughout the year, except for very rare periods during some summers when there can be shortages, which, apparently, can be corrected by adjusting the intake pipe in the creek.

The joint works are a reality which neither Mr. Farrell nor this Board can ignore. The division tank, as designed, distributes water to the joint users as they are legally entitled in accordance with their water licence priorities. Mr. Parker's recommendation to change the division tank might improve his water supply (although that is dubious) but could deprive some of the Whitehead users of their legal priority rights. Mr. Farrell could not approve this alteration without contravening Section 12 of the Water Act.


Since the dispute between Parker and Whitehead remains unresolved and acrimonious, Mr. Farrell, regrettably, had to appoint a bailiff which is his right under the Water Act.

The Board says, regrettably, because imposed arbitration is not a very good substitute for mutual understanding and co-operation between partners who, in reality, are getting far more water over the course of each year than specified in their licences because Duhamel Creek provides a very good supply of water at this location.

OBSERVATIONS AND RECOMMENDATIONS

- 1) The Board has not considered extraneous issues such as the Gaskel Spring problem or the actions of the Wickens, since such matters really have no relevance to this appeal.
- 2) If Parker and Whitehead can privately reach an agreement to create "separate works" in accordance with their licenced water quantities, the Water Management Branch should assist the parties involved in achieving such a separation.
- 3) Letters such as the one written by the Regional Water Manager to Mr. Parker (December 19, 1984) only tend to inflame disputes and are unwarranted. In an area where everybody has ample water, it should not be necessary to intimidate a licensee by threatening to cancel his licence for lack of beneficial use and then not rescind this threat up to the present day.
- 4) It appears that Whitehead has efficiently and expeditiously maintained and protected the joint works at its own cost ever since these works were created. Parker did not explain his failure to contribute towards the care of the system. It is worth reminding Mr. Parker that since he is a non-resident who appears on the scene only two or three times a year, he should be grateful to Whitehead for any and all efforts expended on his behalf, and he should make an equitable contribution to the maintenance of a facility - which provides him and his two tenants with the rights to almost four million gallons of water a year. The Deputy Comptroller's split in costs is fair and equitable and should be paid by both parties.
- 5) During the inspection of the joint works the Board noted that there was virtually free flow through the division tank to the service pipe of each licensee because the metering (orifice) plates had been removed. The Regional Water Manager and the bailiff (as well as the licensees) must be reminded that the orifice plates should be in place (especially during low water) because these are the means by which each party obtains its legal allocation of water in accordance with licenced priorities.

- 6) Mr. Farrell's choice of a bailiff from the Whitehead group is understandable since Mr. Parker is an absent licensee. However, the bailiff may not always be objective. In fact, Mr. Parker's perception of the bailiff is already a cause of acrimony. The Water Management Branch should patiently listen to any and all complaints regarding the bailiff's activity if such arise. The Regional Water Manager, particularly, should not hesitate to recommend a quick change in personnel if there is cause to doubt objective service. In any event, all concerned should regard the appointment of a bailiff as a temporary measure to be discontinued when both parties learn to live together with what is, obviously, a very ample source of water.
7. The Board recommends that the appointed bailiffs be compensated in some way in accordance with their responsibilities. Periods of high water consumption would generally coincide with lower creek levels and the bailiff's attention could be required on a daily basis.



F.A. Hillier, P.Eng.
Panel Chairman
Environmental Appeal Board

Victoria, B.C.
July 2, 1987