Province of
British Columbia

Ministry of
Environment
and Parks

ENVIRONMENTAL APPEAL BOARD
Victoria
British Columbia
V8V 1X5

APPEAL NO. 87/12 WAT

JUDGEMENT:

IN THE APPEAL OF MALCOLM MCLEOD, FRUITVALE, B.C. FROM A DECISION OF THE DEPUTY COMPTROLLER OF WATER RIGHTS TO NOT REGULATE THE USE OF WATER ON LINNIE CREEK.

The appeal was heard in Trail on July 16th, 1987 before a Panel of the Environmental Appeal Board, of

Mr. Ian A. Hayward, P. Eng. - Chairman
Mr. G. E. Simmons, P. Eng. - Member
Mr. J.D. Watts, P. Eng. - Member

The court recorder was Mrs. Rita Colwell.

The appellant was Mr. Malcolm McLeod, Fruitvale, B. C.

The appellant was represented by Counsel: Mr. M. Kew

The respondent was the Deputy Comptroller of Water Rights, Mr. J. E. Farrell.

Note:

Mr. Gregory C. Rehill and Mr. M. Nelson, President of Bramerton Investments Ltd., were invited to the hearing and given full third-party status, on the basis that their water rights could be affected by the Panel of the Board's decision.

SUMMARY

The appellant, Malcolm McLeod, purchased the property acquiring license #1 (62581) on Linnie Creek. At the time of the purchase an intake structure had been constructed by others now deceased. The structure consists of a concrete winged dam which would normally hold four and half feet of water behind it and was, allegedly, approved by the Water Branch in Nelson.

The terms of the license were for five hundred gallons of domestic water daily and irrigation for 14 acre feet per annum.

Having acquired the property in 1960, McLeod found the domestic water supply adequate up until June of 1965 and was able to irrigate land sufficient for 150 head of cattle and six quarter horses.

A person called Veitch acquired water license #2 in June, 1965 and this is now owned by Bramerton Investments Ltd. (B.I.L.) who have an intake in a five foot-deep sump or well at the bottom of a five foot excavation in the creek bed approximately one hundred and fifty feet down stream of the appellant's intake.

1977 was a particularly dry year and a culvert alongside McLeod Road was tapped in order to supply the McLeod intake. In 1979 No. 3 license was issued which inhibited complete irrigation but did not influence the use of McLeod's domestic water. He complained to the Branch and was overruled . In 1981 license #4 was issued and again his objection to the Branch was overruled. This particular license again affected his irrigation rights but did not impede his domestic water use.

His irrigation consists of a one acre garden and several pastures which, over the years, varied between 7 1/2 and 12 acres. His problems began in 1986 which was a particularly dry year and he complained to the Water Rights Branch in Nelson concerning his water shortage. They came and looked at the creek and made some flow measurements. At that time B.I.L. license #2 had no water either.

In 1986 experiments by the Water Branch concerning the Rehill diversion (#3 license) were affected by heavy rainfall over the weekend during which they were conducted and the Branch erroneously concluded that there was sufficient water for all concerned.

In the appellant's view the Branch's investigations had proved that the Rehill intake immediately upstream of his intake impeded the appellant's supply. Tests conducted on August 29, 1986 showed a flow of 2,000 gallons per day at the Rehill intake and this resulted in seepage into McLeod's dam which was not enough for both domestic and irrigation purposes. At this time the Water Branch suggested a relocation of the intake upstream - a measure which the appellant considered to be impractical.

The appellant noted that B.I.L.'s water goes into a holding tank and overflows, thereby irrigating the local grass.

Under cross-examination the Branch was critical of both the dam design and its location which was based totally on holding surface water. They suggested that either a relocation or a redesign of the intake was necessary.

Under examination by the Panel the appellant admitted 1977 was a very dry year; the dam also went dry in 1985 for about two weeks. The appellant gave further evidence with respect to the way in which a flood occurred, the details of his own intake, that of the B.I.L.intake sump arrangement and also the width of the creek in dry and wet years.

Mr. Farrell, in his evidence, produced a summary document which was quite comprehensive and gave a thorough background to the question of the licenses on Linnie Creek. Evidence was given of a series of tests that had been conducted, also of various investigations over the years, and a general review of the development of the intakes by the various licensees on the creek.

The main points made by the Deputy Water Comptroller were firstly that of significant water seepage between the Rehill intake and the McLeod intake down stream of it. Secondly, that the McLeod intake was not designed to take advantage of sub-surface water which the Deputy Comptroller defined as not being ground water but surface water which drained away as a sub-surface flow in porous soils.

The B.I.L.intake (license #2) on the creek took advantage of the sub-surface flows by the well or sump arrangement which Veitch had introduced into the creek. The Water Branch at Nelson had required that B.I.L. License #2, put a float valve on his holding tank thereby eliminating escape water.

One significant point made by the Branch was that in order to provide for complete irrigation and domestic water purposes for license holder #1, i.e. Mr. McLeod, 32,210 gallons per day would be required based on a 120 day irrigation period. The Deputy Water Comptroller's spokesman affirmed that only in one day out of five on which tests were conducted, was that amount of water available at the McLeod intake.

The Deputy Water Comptroller emphasized that the Water Act does not regulate the use of ground water which is acquired either by drilling or digging. He maintained that there would be no advantage to the McLeods by eliminating the use of domestic water by the second license holder who was downstream of the McLeod intake and whose use would not lower the water table sufficiently to impair McLeod's usage. Secondly, it would be improper to eliminate the use of the 500 gallons per day each enjoyed by water license holders No. 3 and 4 upstream of the McLeod intake, as such quantities of water would not materially affect the amount of water enjoyed by Mr. McLeod because of level of seepage which took place between the Rehill intake and the McLeod intake.

The final point made by the Deputy Water Comptroller was that Mr. McLeod should take advantage of the sub-surface water by changing the design and/or relocating his intake further upstream.

Some confusion arose in terms of dates at which there was either a shortage of water or a perceived shortage of water. Clarification was made by the other license holders, specifically Mrs. Nelson on behalf of B.I.L. and Mr. Rehill with respect to the times at which various critical events took place, specifically the cleaning out of the B.I.L. sump/well and the actual commencement of use of water by Rehill.

In his summary, the Deputy Comptroller of Water Rights emphasized that while precedence was an established feature of the licensing system, it did not extend to protection against evaporation and seepage. He observed that under license #2 the B.I.L. intake was designed to accumulate sub surface water, while the McLeod intake did not. He emphasized that a regulation of the No. 2, 3 and 4 water licenses for domestic purposes would not materially influence the situation enjoyed by Mr. McLeod, as the No. 1 license holder.

Mr. McLeod in his summary argued that his license No. 1 exceeded the creek capability and pointed out that because of that other licenses should not have been issued. He went on to argue that the water in the creek was not seepage water but ground water and that only in 1977 did he have a dry water problem and that later shortages could well have been due to water used by B.I.L. and Mr. Rehill, i.e. licenses #2 and #3.

JUDGEMENT

The Panel accept the evidence offered by the appellant that at certain times of a low water year he cannot obtain the quantity of water permitted under license No. 62581 at his existing intake.

The Panel were not given any hard evidence to support the argument that as far as his irrigation requirement is concerned, the curtailment of the domestic supply to the two upstream license holders totalling 1000 gpd. or the downstream license holder would directly benefit the appellant at his present intake.

Consequently the Panel concurs with the Deputy Comptroller of Water Rights that there be no regulation of the two upstream and the one downstream license holders, each being issued entirely for domestic purposes.

Accordingly, the appeal is denied.

The Panel is of the opinion that the quantity of water available to the appellant could be increased significantly by either a modification of the present intake or by relocation of that intake further upstream.

I.A. Hayward, P.Eng.
Chairman

September 4th, 1987