



Province of
British Columbia

Ministry of
Environment
and Parks

ENVIRONMENTAL APPEAL BOARD
Victoria
British Columbia
V8V 1X5

APPEAL NO. 87/19 WAT

JUDGEMENT:

Appeal against the decisions of the Deputy Comptroller of Water Rights, dated June 14 and 18, 1985, heard under Section 38 (1.1) of the Water Act, and Section 11 of the Environment Management Act, relating to the allocation of water under certain water licences.

APPELLANT:

Mr. & Mrs. Donald Carter
Lytton, B. C.

HEARING INFORMATION

The hearing was held in Kamloops, B.C. on September 2, 1987.

The panel of the Board in attendance was:

Ian A. Hayward, P.Eng. - Chairman

Mr. G. Letcher was Counsel for the Panel.

Mrs. Rita Colwell acted as Recorder
of the Proceedings.

REGISTERED APPELLANTS

Mr. & Mrs. D. Carter, represented by
Mr. R. McDiarmid, Counsel.
Mr. Carter gave evidence.

RESPONDENT

The Comptroller of Water Rights, represented by
Mr. P. G. Jarman, Counsel.

Mr. J. E. Farrell, Deputy Comptroller of Water Rights,
and Mr. R. Penner of the Water Management Branch gave
evidence.

INVITED TO PARTICIPATE

Mr. & Mrs. W. Reuter were invited by the Panel under
Section 11 (10) (b) to participate. They were present
and asked questions, but did not give evidence.

Mr. & Mrs. J.A. Fennell were similarly invited to
participate. They were represented by Mr. M.H. Vannier,
Counsel. Mrs. Fennell gave evidence.

INTRODUCTION

The panel was reconvened and the hearing was held pursuant to an order of the Honourable Mr. Justice McKenzie, made on the 23rd day of June, 1986 and entered on the 4th day of March, 1987. The Panel was ordered to hear the appeal of the Petitioners, Donald and Claire Carter from the orders of the Deputy Comptroller of Water Rights, dated June 14th and 18th, 1985.

All parties agreed at the outset that all notice requirements with respect to this hearing had been met.

BACKGROUND

At issue is a long standing dispute between three ranchers with water licenses on Lалуwissen Creek near Lytton, B.C. For approximately 60 years the use of the water on the Creek was the subject of an agreement entered into by these ranchers in 1925. In 1983 the Comptroller of Water Rights proposed certain changes to the licensing arising from the construction of a dam which provided further storage on the Creek. This decision of the Comptroller was appealed to the Environmental Appeal Board and their decision was reviewed as a result of an application by the present appellants to the B.C. Supreme Court. The Court ordered a further hearing of the Environmental Appeal Board.

This was held on May 6, 1985 and the decision of the Board resulted in the issuance of new licenses by the Deputy Comptroller and the revocation of the 1925 Board Order associated with the original 1925 agreement. Furthermore, the Deputy Comptroller

decided to grant additional diversion and storage licenses applied for by the Reuters and the Fennells who were the other two ranchers with licenses on Lалуwissen Creek.

In July, counsel for the Appellants appealed to the Environmental Appeal Board concerning the decisions of the Deputy Comptroller. The Environmental Appeal Board advised the Appellants that it would not hear such an appeal, but in December, 1985 the Appellants appealed both the decision of the Environmental Appeal Board and the Comptroller of Water Rights to the Lieutenant Governor in Council, who upheld the decisions of the Board and the Comptroller of Water Rights.

In June, 1986 upon application for a judicial review, Hon. Mr. Justice McKenzie made a decision which referred the June, 1985 decisions of the Comptroller of Water Rights back to this panel of the Environmental Appeal Board for the hearing of an appeal.

EVIDENCE

Counsel for the Deputy Controller of Water Rights entered as Exhibit A. a background document of the Respondent. He argued that this panel of the Environmental Appeal Board was constrained as was Justice McKenzie from any review of the 1985 decision of the Environmental Appeal Board, since the Lieutenant Governor in Council had let this decision stand. Consequently,

the issues before the panel were confined to whether the Board order of 1925 should have been revoked and secondly, whether the Deputy Comptroller of Water Rights had properly granted extra diversion and storage licenses on Lалуwissen Creek to the Fennells and the Reuters.

The panel agrees with this proposition and such will be the scope of this Appeal together, of course, with determining whether or not the Deputy Comptroller of Water Rights has properly carried forward the directions contained in the May, 1985 Environmental Appeal Board decision.

All parties accepted the jurisdiction of the panel of this Environmental Appeal Board to enquire as to whether or not the Deputy Comptroller of Water Rights was correct in rescinding the 1925 Board Order.

The Appellant offered evidence that prior to the construction of the dam in 1984 he had been able to irrigate considerably more land and recover substantially larger crops from that land than was the case after the construction of the dam and the institution of new licensing.

Prior to the construction of the new dam which had, in part, been paid for by the Fennells and the Reuters and to which he had not contributed, the water in the Creek was shared equally by all three ranchers. He could not say how much water he received each year after the construction of the dam but he was positive that it was not as much as before the construction of the dam.

He did not believe that this was necessarily due to drought conditions which it was suggested prevailed in 1985, 1986 and 1987 but that it had a direct relationship to the new licensing arrangements which allocated considerably more water to his neighbours than to himself.

Prior to the 1925 agreement, the previous owners of his ranch had enjoyed first water rights dating to 1867 on Lалуwissen Creek and these rights were surrendered by the 1925 agreement for an equal share with the other two ranchers of whatever water there was in Lалуwissen Creek. It was his position and understanding that by his non participation in the construction of the dam he should enjoy at least as much water as he had before. This had not occurred and furthermore one of his licenses, #30933 with a priority date of 1941, appeared to have been ignored by the order of the Deputy Comptroller.

He stated that he was prepared to share in the cost of the construction of the dam of 1984 provided that he received an equal share of the water and provided that he recovered his litigation costs to date. Otherwise the original licensing prior to the Agreement of 1925 should apply.

The Counsel for the Appellant produced Exhibit B. which consisted of the Appellants' documents. These included a stream record for Lалуwissen Creek and papers going back to 1915 which covered Lалуwissen Creek and the storage thereon and suggested that this Creek was fully recorded.

The Respondent defended his revocation of the Board Order supporting the 1925 agreement on the basis that it was inconsistent with the six new licenses on Lалуwissen Creek which had been ordered by the Environmental Appeal Board of 1985. The Board in its decision had pointed out that many aspects of the 1925 Agreement were no longer in force. Regarding the issuance of the licenses, the six licenses were part of the order he received from the Environmental Appeal Board which consisted of equal diversion rights and equal storage rights, with a priority of 1925 for all three parties. Two parties, the Fennells and the Reuters who had subscribed substantially towards the construction of the storage dam on Ruddock Lake, were to be given new diversion and storage licenses which reflected the enhanced storage capability of Ruddock Lake through the construction of the dam.

Evidence was given that the fifth license, the Carters' 2nd license #30933, was still in good standing.

Evidence was offered that the Appellants were to receive more water through their diversion license than they had before the construction of the dam and moreover, they would have water storage which they had not enjoyed previously. It was suggested that if the Appellants had not received as much water following the construction of the dam as they had before its construction, this was a function of drought conditions which prevailed after the construction of the dam and which similarly affected the other two license holders on the Creek.

The Respondents stated that the management or regulation of the water in Luluwissen Creek under the licensing arrangements which had been instituted, was not particularly complex. It was carried out by the local office in Kamloops. In fact, this regulation was a function performed by one of the license holders, the Fennells, on instruction from personnel in the Water Management Branch in Kamloops. The Fennells were the only people who had the keys to the dam gate and it was suggested that this was because they had contributed most to the construction of the dam.

The Respondents stated there were far more complex regulation associated with licenses on other creeks and that it would be possible to vary the amount of "old" water and "new" water, notwithstanding the fact that the water may be required at different times by the different licensees for different purposes. No reference was made to the impact on the regulation of the creek by the fifth license - Carters' second license #30933.

In closing arguments, Counsel for the Appellant stated that the Board Order of 1925 should not be revoked and that the water from the Creek should be divided equally among the three licensees on the Creek. If this were not the case and the Board Order of 1925 was revoked then the original licensing priorities should come into play.

Counsel for the Respondent argued that the Deputy Comptroller of Water Rights was attempting to provide an equitable sharing of the water on the Creek, bearing in mind the orders of the Panel of the Environmental Appeal Board of 1985 and the investment made by the Fennells and Reuters in the Construction of the dam on Ruddock Lake upon which their application for further diversion and storage licenses was based.

Counsel for the Fennells argued that the Board Order of 1925 should be revoked and that by virtue of their investment, the Fennells and the Reuters were entitled to additional diversion and storage licenses resulting from their investment in the dam built in 1984 on Ruddock Lake

With the agreement of the parties, the Panel visited the site of the dam and noted that the water behind the dam was quite low. The gate from the dam was open and a small quantity of water was flowing down the Creek. The Panel also visited the site of the weirs where the diversion takes place to all three ranches. All three ranches were taking water. Photographs were taken of the weir and the dam and the area behind the dam.

CONCLUSIONS

The panel accepts the argument offered by counsel for the respondent and holds that the 1985 decision of the Environmental Appeal Board cannot be the subject of this appeal.

The panel holds that the Deputy Comptroller of Water Rights properly carried out the directions of 1985 Environmental Appeal Board.

He has issued equal licenses for storage and diversion of water on Luluwissen Creek for all three parties. This division may be referred to as the equal division of the "old water".

By virtue of their investment in 1984 in the dam at Ruddock Lake, the Fennells and the Reuters are entitled to further diversion and storage licenses, i.e. "new water". Had the Appellants shared in the cost of construction of the dam at Ruddock Lake they would be entitled to share proportionately in the diversion and storage licenses issued to the other two ranchers as a result of the construction of the dam.

It also follows that the new licensing arrangement concerning both the "old" and the "new" water is inconsistent with the agreement of 1925. If current licensing arrangements are to be maintained, then the Board Order of 1925, which has the effect of making the semi-obsolete agreement of 1925 a license, should be revoked.

The status of the fifth license, #30933, i.e. the Carter second diversion license, remains unclear. No reference was made to this license in the directions given to the Deputy Comptroller of Water Rights by the 1985 Environmental Appeal Board.

According to the Deputy Comptroller of Water Rights it remains in good standing but he did not explain why he ignored this license in his letter dated 18 June, 1985 which contained his calculations for "old" and "new" water. This license must be taken into account.

No argument was made in support of the maintenance of diversion license #30934 presumably because the quantity to be diverted is inconsequential.

The regulation arrangements on Lалуwissen Creek seem to have been somewhat arbitrary. It seems appropriate to examine the way in which this somewhat complex system can be operated equitably and with reasonable costs.

DECISION

1. The Panel upholds the Deputy Comptroller's decision to revoke the Board Order of 1925.

2. The Panel upholds the decision of the Deputy Comptroller of Water Rights regarding the allocation of additional water diversion and storage licenses to the Fennells and the Reuters. However, the Deputy Comptroller of Water Rights is to allow for the fifth water license, #30933 of 87.5 acre feet with a priority date of 1941. Accordingly, each of the two additional diversion licenses #62980 and #62982, is to be reduced by 43.75 acre feet.

3. The Deputy Comptroller of Water Rights is to review and improve the existing regulation of Luluwissen Creek and if necessary, appoint a water bailiff.

The Panel suggests, and it is only a suggestion, that an equitable solution to this conflict would be for the Appellants to share in the costs of the dam at Ruddock Lake and therefore, earn a share in the new water diverted and stored.



~~Ian A. Hayward,~~
Panel Chairman.

December 31, 1987
North Vancouver, B.C.