



Province of
British Columbia

Environmental Appeal Board

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DECISION NO. 2005-WAT-013(a)

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

BETWEEN: Randall (Randy) K. McRoberts **APPELLANT**

AND: Assistant Regional Water Manager **RESPONDENT**

AND: Zehnder Farms Ltd. **PARTICIPANTS**
NathanLee Forest and Farms Inc.

BEFORE: A Panel of the Environmental Appeal Board
J. Alex Wood, Panel Chair

DATE: Conducted by way of written submissions
concluding on June 30, 2005

APPEARING: For the Appellant: Randall K. McRoberts
For the Respondent: Ian Johnston
For Zehnder Farms Ltd.: David Zehnder
For NathanLee Forest and Farms Inc.: J.C. Alacoque

APPEAL

Randall (Randy) McRoberts appeals the March 3, 2005 decision of Ian Johnston, the Assistant Regional Water Manager (the "Assistant Manager"), Land and Water B.C. Inc. ("LWBC")¹, refusing Mr. Roberts' application #4004870 for a water licence on Salter Creek.

Mr. McRoberts' water licence application was for 1,000 Imperial gallons per day ("lgpd") for domestic purposes for one dwelling, and an additional 1,000 lgpd for residential lawn irrigation. (1000 lgpd is equal to 0.00186 cubic feet per second ("cfs")). The water licence application was refused on the grounds that the flow in Salter Creek was fully recorded under existing water licences, and there was insufficient water to grant a new licence.

The Environmental Appeal Board has the authority to hear this appeal under section 93 of the *Environmental Management Act* and section 92 of the *Water Act*. Section 92(8) of the *Water Act* provides that the Board may:

¹ Effective June 16, 2005, LWBC became a part of the Ministry of Environment.

- (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 being appealed could have made and that the board considers appropriate in the circumstances.

The Appellant seeks an order reversing the decision of the Assistant Manager on the grounds that the amount of water requested is very small and would not adversely affect the other licensed water users on Salter Creek.

Alternatively, if a conditional water licence is not issued, the Appellant asks that the water licence application fee of \$250 be returned to him.

This appeal was conducted by way of written submissions.

BACKGROUND

Location

Salter Creek is located in the Windermere Valley and flows eastward into Windermere Lake. The closest major town to the site is Invermere, B.C. Salter Creek is reported to have a base flow all year round.

Another creek which originates in the same watershed is an unnamed creek, also known as Vreni Creek, which parallels Salter Creek but is reported to discharge to ground after flowing into the appurtenant land. Both creeks are the subject of existing water licenses that have been issued to landowners through which Salter Creek flows.

In addition, Rogun Creek and Rogun Lake are tributary to Salter Creek, and there are several other water sources reported to flow into Salter Creek downstream of the proposed point of diversion of the most senior water licensee, Zehnder Farms Ltd. ("Zehnder Farms") (see water licence description following). These tributary water sources have not been named, nor has the seasonal flow been quantified. Figure 1 (attached to this decision) shows the creeks, the land to which the existing licences are appurtenant, and the licensed points of diversion.

Existing Water Licenses on Salter Creek and Vreni Creek

The most senior licensee on these creeks is Zehnder Farms. It holds conditional water licence 114556, with a priority date of June 29, 1999, issued to Zehnder Farms for irrigation purposes. The maximum quantity of water that may be diverted is 800 acre-feet per annum, being 500 acre-feet per annum from Salter Creek, and 300 acre-feet per annum from Vreni Creek. This quantity includes both water taken directly to irrigation and water diverted to storage.

Conditional water licence 117114, with the same priority date, was also issued to Zehnder Farms to store 300 acre-feet of water on Rogun Lake. This licence is mentioned in clause "f" of Zehnder Farms' irrigation licence.

Some of the key conditions of the irrigation licence 114556 are as follows:

The owner of the land to which this licence is appurtenant is hereby authorized to divert and use water as follows:

...

- (f) The period of the year during which the water may be diverted to storage under Conditional Water Licence 117114 is October 1st to July 1st. The period of the year during which water may be diverted and used from Salter Creek or Vreni Creek and diverted from storage is 1st April to 30th September [6-month period]. Water taken to storage must be diverted from storage each year in support of irrigation.
- (g) The land upon which the water is to be used and to which this licence is appurtenant is Sublot B of District Lot 4596, Kootenay District, Plan X32 of which 400 acres may be irrigated.
- (h) The works authorized to be constructed are diversion structures, ditch, pipe, dam, pump and sprinkler system, which shall be located approximately as shown on the attached plan [see Figure 2].
- (i) The construction of the said works shall be completed and the water beneficially used prior to the 31st day of December, 2005. Thereafter, the licensee shall continue to make beneficial use of the water in the manner authorized herein.

The Panel notes that while both licenses were issued in 1999, the authorized works had not been completed, and no beneficial use of the water had been made, at the time of the hearing.

Once the works are completed, Vreni Creek will be diverted into Salter Creek through a ditch on Crown Land as shown on Figure 2. The water will then be diverted to storage at location FF from October 1st to July 1st, and then can be used for irrigation between April 1 and September 30.

If the total 500 acre-feet of water is diverted directly from Salter and Vreni Creek during the 6-month irrigation period, the average flow over this period would be 1.38 cfs.² The balance of the flow for the 6-month period, 300 acre-feet, would average 0.82 cfs and would be taken from storage in Rogun Lake.

The third licence, conditional water licence 115254, was issued to NathanLee Forest and Farm Inc. ("NathanLee"). It has a priority date of April 26, 2000, and is issued for power (residential) purposes for one dwelling unit. The maximum quantity of water that may be diverted from Salter Creek is 0.80 cfs throughout the whole year. Some of the key conditions of this licence state:

² During the irrigation period, the licensee is permitted to take 500 acre-feet from Salter Creek and Vreni Creek, and the balance of the flow (800 acre-feet - 500 acre-feet = 300 acre-feet), from storage. This is in accordance with clause (f) above. The total licensed quantity of 800 acre-feet includes water taken directly to irrigation and storage. The water would be diverted to storage during the period October 1 to July 1 and then reused from storage during the irrigation period, April 1 to September 30. The 800 acre-feet is still available for irrigation, but the storage component reduces the flow to 500 acre-feet (1.38 cfs) that has to be diverted directly from the creeks during the dry summer period.

The owner of the land to which this licence is appurtenant is hereby authorized to divert and use water as follows:

...

- (g) The land upon which the water is to be used is Sublot 4, District Lot 347, Kootenay District, Plan X11 on which a powerhouse is situated and the land to which this licence is appurtenant is said land.
- (h) The works authorized are diversion structure, penstock, powerhouse, tailrace and transmission line. The construction of the said works shall be completed and a plan/drawing showing the actual location and nature of the works shall be submitted to the Land and Water Manger prior to December 31, 2005.

The evidence before the Panel is that the licensee does not have all the works completed and/or documents submitted at the time of this hearing. However, the Licensee has confirmed that the power generation facility is operational.

A review of the LWBC file relating to this licence indicates the following:

1. The Zehnder Farms' upstream senior water licence 114556, for 500 acre-feet for irrigation purposes from Salter Creek, could result in insufficient flow being available downstream to operate the turbine during the period of minimum summer flows. The turbine in this application is a pump, mounted in reverse, connected to a synchronous generator rated at 4 kw.
2. A condition of the licence is that the works must be completed and detailed drawings submitted by December 31, 2005. Failure to provide this information by this date "will mean that your licence is subject to cancellation."
3. In the original application, it was stated that the hydroelectric system would consist of a 10-inch diameter penstock 1,800 feet in length operating under 115 feet of head. This was reported to produce 4 kw of power. The maximum power generated was anticipated to be 8 kw, an average of 6 kw and a minimum of 4 kw.

Based on the pipeline size and head specified above, the Panel is of the view that the 4 kw output appears reasonable for a licenced flow of 0.80 cfs. The maximum of 8 kw can only be produced at a flow greater than 0.80 cfs or by operating at a higher head. However, the actual as-built field conditions may be different than those submitted with the original application, particularly with reference to the head available.

Flow measurements in Salter Creek

The evidence before the Panel is that there are no hydrometric records on Salter Creek. However, some spot flow measurements were taken in relation to an abandoned conditional water licence (licence 52812).

These spot measurements were:

September 21, 1977 = 0.62 cfs

September 26, 1978	=	0.45 cfs
March 7, 1979	=	0.66 cfs

LWBC's file for this abandoned licence states that these flows "were taken at times of lower than normal flow", and that 400,000 lgpd (0.74 cfs) would be available most of the time. The point where these flows were measured is shown on Figure 1, and is upstream of the confluence with the outlet stream from Rogun Lake and Salter Creek.

LWBC's file also states that the flow in Salter Creek on August 19, 1999 was estimated at 1.5 to 2.0 cfs. It was also stated in the file that 1999 was a high freshet year and the summer of 1999 had above average precipitation. Flows in 1999 were not considered indicative of an average low flow year.

It should be noted that these base flows were measured prior to the diversion of Vreni Creek (the diversion that is authorized under the Zehnder Farms' licence, but has not yet been constructed). In the file associated with Zehnder Farms, Vreni Creek is reported to have an average annual flow of 223,000 lgpd (0.412 cfs).

There is no evidence before the Panel regarding the flows in Vreni Creek during the critical dry period in the summer and early fall.

The Application for a Water Licence

The Appellant's water licence application is appurtenant to Lot A, District Lot 347, Kootenay District, Plan NEP 74709. He applies for 1,000 lgpd for domestic use for one dwelling unit, and an additional 1,000 lgpd for residential lawn irrigation.

The location of the Appellant's property is shown on Figure 1. It is located downstream of the Zehnder Farms' property, and upstream of NathanLee's property.

The proposed point of diversion is on Salter Creek, located on the southwest quadrant of Lot A. The proposed facilities are entirely located on Lot A; therefore, an easement on Crown Land is not required. The water at the point of diversion would be pumped and drawn from Salter Creek through a short intake. The water would be pumped to a buried 10,000-gallon plastic storage tank located adjacent to the proposed dwelling. The Panel understands that the water would then be re-pumped to provide pressurized water to the proposed dwelling.

By letter dated March 3, 2005, the Assistant Manager refused the application on the grounds that Salter Creek is fully recorded and there is not sufficient water in the source to grant a new licence.

The Appeal

On April 7, 2005, the Appellant filed an appeal of the Assistant Manager's decision with the Board. He maintains that the Assistant Manager failed to properly consider the application in that the volume requested, less than one gallon per minute, would not in any way affect the issued licences. He states that one gallon per minute would be 1,440 lgpd "and the request here is for 1,000 gallons a day".

The Appellant asks the Board to reverse the Assistant Manger's decision and issue him a licence for one to two gallons per minute "with whatever checks deemed necessary".

Alternatively, he asks the Board to order LWBC to return the application fee of \$250.

Following the conclusion of the parties written submissions, the Board wrote to the Assistant Manager, asking a number of follow-up questions. The Appellant had an opportunity to reply to the Assistant Manager's answers.

After all of the submissions had been received, the Panel noted that the two other licenses that could be impacted by the decision on this appeal had not been given notice of the appeal and invited to participate. Specifically, the licenses held by Zehnder Farms and NathanLee. Therefore, by letter dated October 20, 2005, the Panel provided them with the appeal notice and the submissions filed to date and offered them an opportunity to participate in the appeal.

ISSUES

The main issues in this appeal are as follows:

1. Whether there is sufficient flow in Salter Creek to grant the Appellant a licence for 1,000 lgpd for lawn irrigation and 1,000 lgpd for domestic purposes.
2. If not, whether the Respondent should reimburse him for the \$250 licence application fee.

RELEVANT LEGISLATION

The following sections of the *Water Act* are relevant to the issues on the appeal:

Rights acquired under licences

- 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;

...

Who may acquire licences

- 7 A licence for any one, 2 or 3 of the purposes defined in section 1 may be issued by the comptroller or the regional water manager to any of the following:
 - (a) an owner of land or a mine;

...

Procedure to acquire licences

- 10** (1) Subject to subsection (2), a person who applies for a licence must, within the time prescribed by regulation,
- (a) comply with any requirements established by regulation,
 - (b) comply with the directions of the comptroller or the regional water manager with respect to filing the application, giving notice of it by posting, service or publication and paying the prescribed fees, and
 - (c) provide the plans, specification and other information the comptroller or the regional water manager requires.
- (2) The comptroller or regional water manager may
- (a) shorten or extend the time prescribed under subsection (1), or
 - (b) if no time has been prescribed, set a time for compliance with a direction or requirement under subsection (1) (b) or (c).

Precedence of licences on same stream

- 15** (1) Except as otherwise provided in subsections (2) and (3), the respective rights exercisable under 2 licences authorizing the diversion of water from the same stream have precedence in law according to the respective priorities of the dates from which the licences take precedence as set out in them.
- (2) The respective rights exercisable under 2 licences taking precedence from the same date have precedence in law according to the ranking of the respective purposes for which water is authorized to be used under the licences respectively, and the ranking of the several purposes for which water may be used under licences are, from highest rank to lowest rank: domestic, waterworks, mineral trading, irrigation, mining, industrial, power, hydraulicking, storage, conservation, conveying and land improvement purposes.
- (3) The rights exercisable under 2 licences taking precedence from the same date and authorizing the diversion of water from the same stream for the same purpose have equal precedence in law.

Records

- 22** The following persons must keep the prescribed records and any other records that the comptroller, a regional water manager or an engineer directs, and must produce those records for inspection when required:
- (a) an applicant;

- (b) a licensee;
- (c) a holder of an approval;
- (d) a person who, in accordance with the regulations or an order, makes changes in and about a stream or diverts or uses water.

DISCUSSION AND ANALYSIS

1. Whether there is sufficient flow in Salter Creek to grant the Appellant a licence for 1,000 lpgd for lawn irrigation and 1,000 lpgd for domestic purposes.

Appellant's Submissions

The Appellant identified the flows available in Salter Creek during the dry period in late summer and early fall. He states that these were taken from a March 22, 2005 letter that he received from the Assistant Manager. He submits that according to the LWBC records, these are the only spot flow measurements available.

Flow Rates (Salter Creek):

Low: 449 cfs = 224 gallons per minute (US gallons)

High: 1.5 cfs = 673 gallons per minute (US gallons)

(Note: The Appellant has used a conversion to US gallons per minute. All other flows quoted in gallons, or gallons per minute, in this document refer to Imperial gallons.)

Based on the March 22, 2005 letter from the Assistant Manager, the Appellant submits that the existing licenses are for the following amounts:

Issued Licences:

114556	2.8 cfs
115254	.8 cfs
Total:	3.6 cfs = 1,615 gpm (US gallons)

The Panel notes that Zehnder Farms' licence 114556 is shown as 2.8 cfs. This is based on using all the licenced water in Salter Creek, 500 acre-feet, over a 3-month period. If the water use is spread over the 6-month period (April 1st to September 30th), as allowed for in the licence, the irrigation flow would reduce to 1.38 cfs.

With respect to the Zehnder Farms' licence 114556, the Appellant submits that the licence is for watering stock. He submits that the cattle range over thousands of acres in this area, and Salter Creek is only one creek of many in the "Range Area." He submits that the cattle do not, in fact, use anywhere near the amount noted on the licence.

The Panel notes that licence 114556 is for irrigation and that, at this time, the diversion works and pumping facilities have not been constructed and none of the water is being consumed for its licenced use.

The definition of "irrigation purpose" in section 1 of the *Water Act* is as follows:

"irrigation purpose" means the beneficial use of water on cultivated land and hay meadows to nourish crops;

The Panel agrees with the Board's finding in *David Hindson v. Assistant Regional Water Manager (Priscilla Hindson, Third Party)* (Appeal No. 2004-WAT-011(a), May 16, 2005) (unreported), that the "seeding, watering and care of the grass in pastureland for the express purposes of feeding and supporting the Ranch's livestock meets the definition of 'irrigation purposes' under the *Act*".

The Appellant also argues that the only licence downstream of the Appellant's property is held by NathanLee and is for hydro-power, which means that it is not being withdrawn from the creek; rather, it is temporarily diverted to produce electricity. In addition, he states that, "it is my understanding that not all of the water flows through the pipe, which supplies the turbine, but a large volume does in fact flow around and past the intake for the diversion."

The Appellant estimates that the flow past the intake to the turbine is much greater than his water licence application of one to two gallons per minute.

It is not clear whether the forgoing is based on the Appellant's observations or the observation of others. In either case, no estimate of the flow bypassing the intake has been provided.

In his submissions, the Appellant points out that his property is "off of the electrical grid". Therefore, he is restricted to some form of solar or related power to operate the pump he proposes to divert the water from Salter Creek.

The balance of the Appellant's submission is that, if only the domestic component of his application is considered, he is only seeking a very small flow from Salter Creek - 1,000 Igpd - which amounts to 0.69 Imperial gallons per minute ("Igpm"). The other licences on the creek are relatively very large: power generation = a maximum of 0.80 cfs (300 Igpm), and irrigation = 1.38 cfs (517 Igpm). The Appellant's main point is that the small flow requested in his application is insignificant compared to what has been granted under the existing water licences. He submits that the flow rate on this creek is variable between a low of .5 cfs to a high of 1.5 cfs. Using the low rate of 0.5 cfs, he maintains that the flow would amount to approximately 3.7 gallons per second, or 222 gallons per minute (US gallons), and submits that "surely the removal of 1 to 2 gallons per minute out of a flow rate of 222 gallons per minute could not adversely affect anyone on this creek".

Respondent's Submissions

The Assistant Manager submits that Salter Creek is fully recorded and all licences exceed the total flow available for most of the year.

In addition, if he issued a licence to the Appellant and then Zehnder Farms started using their licence (which is not currently being used), the Appellant would have to allow the *total* flow to pass his proposed point of diversion to satisfy the priority license downstream (i.e., NathanLee). Under the *Water Act*, licences with a later priority date must allow the downstream, previously licensed amounts to pass before utilizing the source.

If Zehnder Farms does not complete its works by the required date of December 31, 2005, the Assistant Manager explained that the normal LWBC procedure is to follow up with the licensee to determine whether the works will be constructed during the following season of use. If the works will not be constructed, the licensee can request an extension of time under section 18(1)(a) of the *Water Act*: licence cancellation is not automatic, but would be considered following a thorough investigation by LWBC. The Assistant Manager stated that beneficial use is required once the works are completed. The relevant sections of the *Water Act* are as follows:

Amendment and substitution of licence or approval

18 (1) Subject to subsection (1.1), on notice to all persons whose rights would be injuriously affected, and after consideration of any objections filed and after notifying the objectors of his or her decision, the comptroller or the regional water manager may amend a licence to do any of the following:

(a) extend the time set for beginning construction of the works;...

Suspension and cancellation of rights and licences

23 (2) The rights of a 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;...

Regarding the NathanLee licence, the Panel notes that the licence, which allows a maximum of 0.8 cfs for residential power production, was issued even though Salter Creek and Vreni Creek were noted as "fully recorded" in LWBC's file for Zehnder Farms. The Assistant Manager advised that:

...power generation is considered a non-consumptive use, as all water used is returned to the stream. As such, it is not considered in the supply demand calculation. Also, the use is not considered critical as the licensee can rely on alternative sources of power if water is not available.

Participants' Submissions

An undated letter was received on November 29, 2005 from Zehnder Farms. It confirms that Zehnder Farms' future irrigation needs required all of the water authorized under their existing license 114556. It also advises that it will be applying for an extension of time to build the authorized works. As outlined earlier in this decision, the authorized works are to be completed

prior to December 31, 2005. Zehnder Farms did not provide any additional comments on the merits of the appeal.

The Board also received a letter dated November 21, 2005 from NathanLee. NathanLee is concerned that the flows in Salter Creek are not sufficient to supply someone else with water. It states that "a lot of the time, we do not have 0.8 cubic feet per second to run the turbine." In addition, NathanLee is concerned that when Zehnder Farms commences using its licensed flow, there will be a further reduction in flow at NathanLee's point of diversion.

NathanLee also included a copy of a letter dated February 14, 2004 to LWBC in Cranbrook. Apparently, the February letter was written as a result of Mr. McRoberts' water licence application. In the letter to LWBC, NathanLee stated that:

- only 1/2 to 2/3 of its licensed flow of 0.8 cfs (i.e. 0.4 to 0.6 cfs) was available most of the year;
- its small hydro power plant produced up to 4 kw of power at the licenced flow of 0.8 cfs;
- it is not presently connected to the public utility grid; and
- all water used for domestic and livestock consumption is supported from a 300-foot deep groundwater well.

In addition to NathanLee's concern with supplying water to "others" upstream of the point of diversion, its major concern is that, when Zehnder Farms utilizes its licensed flow for irrigation, the water available for power generation will be substantially reduced.

The Appellant replied to the Participants' submissions by letter dated December 2, 2005. His key point is that his application for one to two gallons per month is so small that it could not affect anyone.

The Panel's Findings

Based on the evidence, the Panel estimates that, on an average basis during the period of irrigation use (April 1st to September 30th), the *maximum* average demand directly from Vreni Creek and Salter Creek would be approximately 1.38 cfs, and 0.82 cfs from storage in Rogun Lake. As previously stated, according to LWBC's file for the abandoned licence the base flow in Salter Creek, available most of the time during a dry period, is 0.74 cfs. A small flow may be added from Vreni Creek when the diversion authorized by the Zehnder Farms' licence is constructed, assuming that it will be constructed. During periods of low flow in Salter and Vreni Creeks, additional flow can be taken from storage in Rogun Lake and then offset with increased flows directly from Vreni and Salter Creeks when flow conditions are favourable. However, based on the foregoing flow information, Vreni and Salter Creeks are fully recorded at the "Point of Diversion and Use" under Zehnder Farms' licences 114556 and 117114.

The Panel acknowledges that the water allocation authorized by Zehnder Farms' licence is not yet being used, but once it commences to use the maximum licenced flow, the water available to NathanLee for power generation will be dramatically

reduced. In fact, it may not be available for most of the summer and early fall months, as well as other dry periods of the year.

A hydraulic turbine (or pump operated as a turbine) can only operate between a specific range of flows which is based on the performance curve of the equipment. In this regard, there is a minimum flow after which the turbine will not operate and produce power.

As was stated earlier, there are several inflows to Salter Creek below the point of diversion to Zehnder Farms. If Zehnder Farms removed all of the water at their point of diversion, there would still be a residual flow in Salter Creek from other tributary sources, including the tributary outlet stream from Rogun Lake and Sandy's Marsh. Therefore, the Panel finds that it is highly probable there will be a base flow in Salter Creek that is too low to operate the turbine, but suitable for other uses.

The foregoing scenario is based on Zehnder Farms utilizing the water available under their existing licences. If the works are not completed by December 31, 2005, the Assistant Manager may initiate investigations that could result in an extension of time for completion of the works, or cancellation of the licence pursuant to section 23(2)(b) of the *Water Act*. In addition, the Panel notes that the Assistant Manager can modify the existing licences in a number of other ways as listed in section 18 of the *Water Act*.

In light of the finding that the creeks are fully recorded, the Panel finds that there is clearly no justification for issuing a licence for residential lawn irrigation to the Appellant. The Panel notes that, under the *Water Act*, this purpose is ranked lower than other uses under section 15(2). Conversely, domestic use ranks the highest. Section 15(2) states:

- 15** (2) The respective rights exercisable under 2 licences taking precedence from the same date have precedence in law according to the ranking of the respective purposes for which water is authorized to be used under the licences respectively, *and the ranking of the several purposes for which water may be used under licences are, from highest rank to lowest rank: domestic, waterworks, mineral trading, irrigation, mining, industrial, power, hydraulicking, storage, conservation, conveying and land improvement purposes.* [emphasis added]

"Domestic purposes" is defined in section 1 of the *Water Act* as the "use of water for household requirements, sanitation and fire prevention, the watering of domestic animals and poultry and the irrigation of a garden not exceeding 1,012 square metres adjoining and occupied with a dwelling house."

While the Vreni and Salter Creeks are fully recorded, the Panel has considered whether a new licence of 1,000 Igpd (0.69 Igpm) would impact the existing licences. From the submissions and data provided, the Panel concludes as follows:

- A licence issued to the Appellant would not impact the Zehnder Farms' licences because Zehnder Farms' point of diversion is upstream of the

proposed point of diversion indicated in the Appellant's water licence application.

- If Zehnder Farms diverted every drop of water under its licence, and this resulted in no flow past their point of diversion, Salter Creek would still have some base flow downstream as it is acknowledged that there are inflows to Salter Creek downstream of Zehnder Farms' point of diversion. There is no evidence before the Panel which quantifies this base flow.
- As discussed earlier, the power generation equipment of the NathanLee licence (downstream of the Appellant's property) can only operate over a specific range of flows. At very low flows, a licence issued to the Appellant of 0.69 Igpm (1,000 Igpd) would not affect the power plant because the plant could not operate. The plant would have a possible operating range (i.e. turn down ratio from the licenced flow of 0.8 cfs) of 2 to 1 to 0.40 cfs, before the turbine (pump) would not operate effectively.
- When there is sufficient flow in Salter Creek to operate the turbine at the licenced design flow of 0.80 cfs (300 Igpm), a licence issued to the Appellant for 0.69 Igpm would impact the NathanLee licence and power generation by 0.23%. This would not be measurable on standard instrumentation that is commercially available for monitoring voltage, amperage and power (kilowatts).
- If Zehnder Farms completes their authorized works and commences beneficial use of the water, there will be extended periods of time when the downstream flows will not be sufficient to operate the power generation facility but there could still be sufficient flow for the Appellant's domestic licence of 1,000 Igpd (0.69 gpm).

As stated by the Assistant Manager, NathanLee's licence 115254 is for "non-consumptive use" and is not considered critical as the licensee can rely on alternative sources of power. It appears that the licence held by NathanLee for power generation is "opportunity based", as there will only be sufficient flow to operate the turbine for a portion of the year, assuming the Zehnder Farms' upstream licence is being utilized.

The Panel notes that in the LWBC file for NathanLee's licence 115254, the recommended wording for the cover letter to the water licence³ states, "there may be periods of the years when the source may not provide the licenced quantity as an upstream water licence on Salter Creek (Zehnder Farms Ltd.) authorizes the diversion and use of 500 acre feet per annum for irrigation purposes."

In the Assistant Manager's letter to the Appellant dated March 22, 2005 this point is further stressed: "Once Zehnder Farms commences use, supply will

³ A copy of the final cover letter was not in evidence.

be dramatically reduced and NathanLee may have no supply to operate the turbine under current licensing."

Under section 92(8) of the *Water Act* the Board may "confirm, reverse or vary the order being appealed", or "make any order that the person whose order is being appealed could have made and that the board considers appropriate in the circumstances."

The Panel finds that the Appellant's application for a domestic water licence should be granted on the grounds that it will not impact the upstream licence holder (Zehnder Farms) and that, at low flows, it will not impact the downstream licence holder (NathanLee). When the downstream licence holder has sufficient flow to generate power for residential purposes, the impact of a new licence issued for domestic purposes to the Appellant for 1,000 Igpd (0.69 gpm) would be very small or relatively insignificant. In brief, the rights of the existing licensees will not be injuriously affected by issuing a conditional water licence to the Appellant.

The Panel directs the Assistant Manager as follows:

1. A conditional water licence shall be issued for domestic purposes to the Appellant for the whole year.
2. The point of diversion shall be on Salter Creek within the Appellant's property and located to optimize inflows to Salter Creek and, preferably, downstream of the confluence of the Rogun Lake/Sandy Marsh outlet creek with Salter Creek.
3. The licence issued to the Appellant shall be for domestic purposes only and should be for 1,000 Igpd. The portion of his application requesting an additional 1,000 Igpd for lawn irrigation is denied as it is not a critical or priority ranking of use as defined under section 15(2) of the *Water Act*.

The Panel appreciates that section 15(1) of the *Water Act* gives priority to NathanLee's licence. The Panel also appreciates that according to the priority system under the *Act*, when flows are insufficient for all licensees, the lower priority licensee (i.e., the Appellant in this case) is normally required to release the water to ensure the higher priority licensee obtains as much of his/her licensed quantity as possible.

However, in this case, the Panel finds that the Appellant should not be required to release all of the water for the downstream licence, despite the stream being fully recorded, and despite it being fully recorded before his licence was issued. This situation is unique. Unlike other licensing cases (e.g., where the downstream priority licence is for irrigation), the present case involves a downstream licence for power purposes. The water will only be of use to that downstream licensee when there is sufficient flow to operate the turbines. To reiterate the Panel's reasoning above, when the downstream licence holder has sufficient flow to generate power for residential purposes, the impact of a new licence issued for domestic purposes to the Appellant for 1,000 Igpd would be very small or relatively insignificant. When flows are low, the downstream licensee will not be able to operate its turbines, regardless of whether the 1,000 Igpd are released downstream: it would not make any difference.

Thus, in this particular case, the Appellant should be able to take his 1,000 Igpd from the stream. The priority system is intended to protect the rights of earlier licensees. In this case, the Appellant's domestic licence will not impact the earlier licensee's rights.

2. Whether the Respondent should reimburse him for the \$250 licence application fee.

With reference to the Appellant's request for return of the water licence application fee of \$250 if the licenses for both domestic and lawn irrigation are not approved, this request is denied. Under section 100 of the *Water Act*, the fees are set by the Lieutenant Governor in Council, by regulation. The relevant fees are set out in Schedule A, Part 1, 3(a) and (b) of the *Water Regulation*, B.C. Reg. 205/88.

There is no provision in the legislation that would allow the Panel to waive or modify the fees for any individual making a water licence application.

DECISION

In making this decision, the Panel has considered all the documents and written submission by the parties, whether they have been specifically reiterated here.

For the reasons provided above, the Environmental Appeal Board reverses the Assistant Manager's decision and orders him to issue a conditional water licence to Mr. McRoberts for domestic purposes only in accordance with the above-noted directions.

The appeal is allowed, in part.

"J. Alex Wood"

J. Alex Wood, Panel Chair
Environmental Appeal Board

December 14, 2005

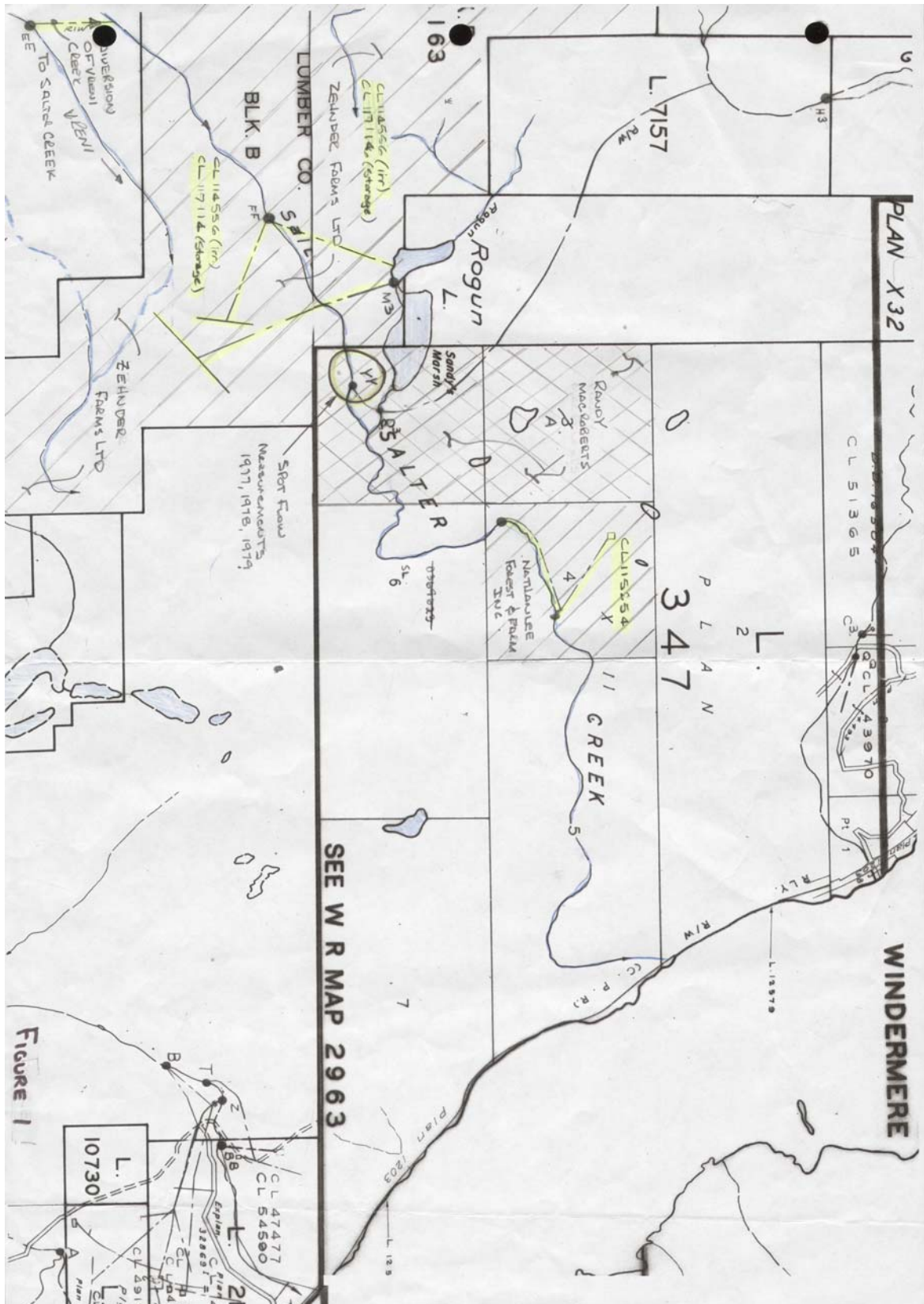
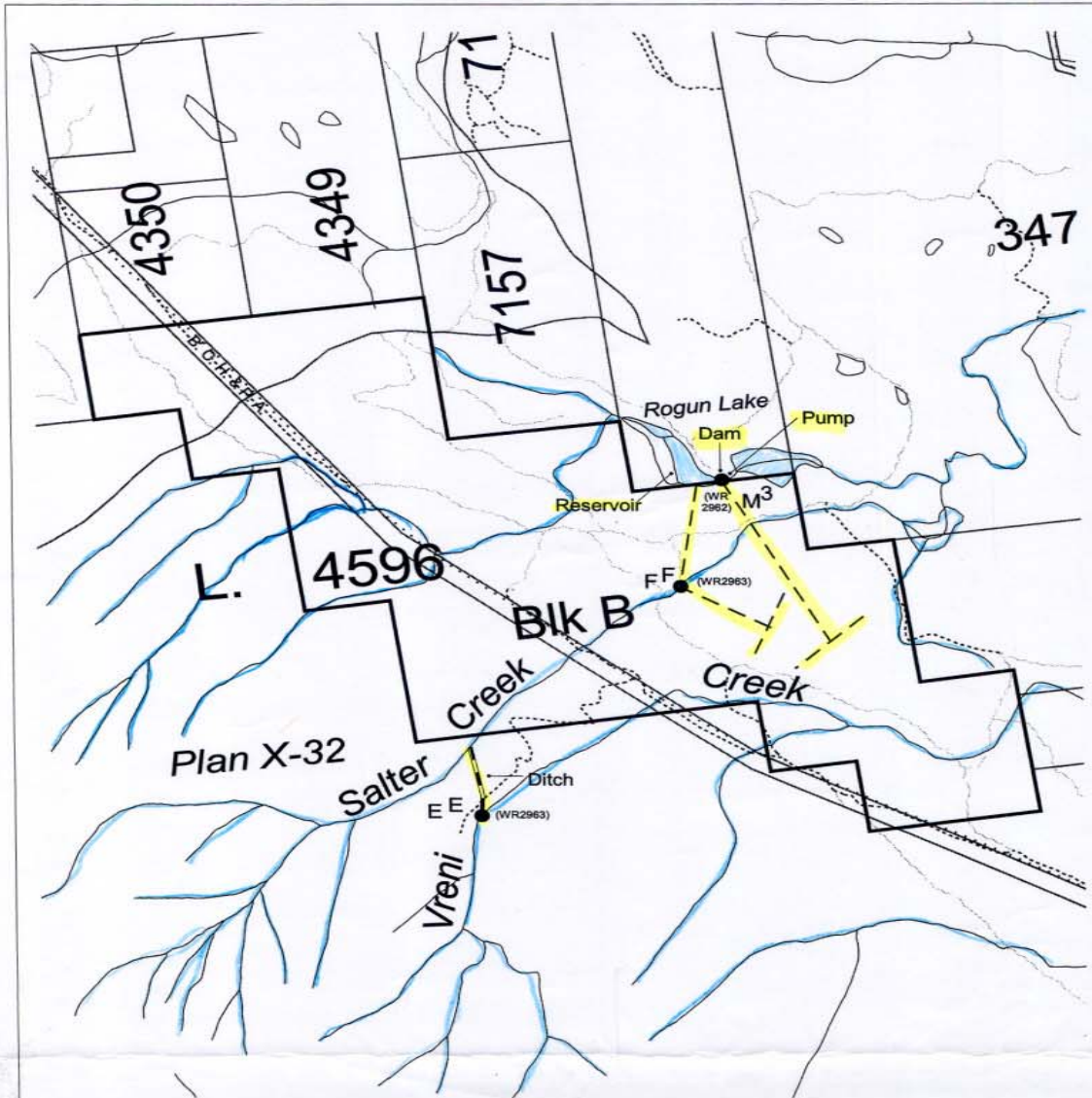


FIGURE 1

Province of British Columbia



WATER DISTRICT: GOLDEN
 PRECINCT: WINDERMERE
 LAND DISTRICT: KOOTENAY

LEGEND
 Scale: 1:25000
 Point of Diversion: ●
 Map Number: 2962 & 2963
 Pipe & Ditch: - - - - -
 Permit over Crown Land: _____

The boundaries of the land to which this licence is appurtenant are shown thus: _____

Signature: *[Handwritten Signature]*
 Date: APR 02 2002

C.L. 114556
 File 4004027
 P.C.L. 23925

For Storage see C.L. 117114

FIGURE 2