



Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.eab.gov.bc.ca
E-mail: eabinfo@gov.bc.ca

DECISION NOS. 2012-WAT-016(a) & 2012-WAT-031(a)

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

BETWEEN:	Southeast Kelowna Irrigation District	APPELLANT
AND:	Assistant Regional Water Manager	RESPONDENT
AND:	Edward F. Lawrence	THIRD PARTY #1
AND:	Brian and Kimberley McDivitt	THIRD PARTY #2
BEFORE:	A Panel of the Environmental Appeal Board David H. Searle, CM, QC, Panel Chair Robert G. Holtby, Member Douglas F. VanDine, Member	
DATE:	May 31, 2013	
PLACE:	Kelowna, BC	
APPEARING:	For the Appellant: For the Respondent: For the Third Party #1 For the Third Party #2	Toby Pike Livia Meret, Counsel Edward F. Lawrence did not appear

APPEALS

[1] The South East Kelowna Irrigation District (the "SEKID") appeals two decisions issued by Conrad Pryce, Assistant Regional Water Manager (the "Water Manager"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). The two decisions were issued on August 21, 2012 and August 29, 2012, and grant conditional water licenses C128719 and C128857, respectively, to Edward F. Lawrence and to Brian and Kimberley McDivitt. Licence C128719 authorizes Mr. Lawrence to withdraw water from Minnow Lake for domestic purposes. Licence C128857 authorizes Mr. and Mrs. McDivitt to withdraw water from Browne Lake for domestic purposes. Appeal No. 2012-WAT-016 pertains to licence C128719, and Appeal No. 2012-WAT-031 pertains to licence C128857.

[2] The SEKID holds various water licenses on a number of water sources, for both the storage and diversion of water. Those water sources include Minnow Lake and Browne Lake.

[3] The two appeals were heard together. Both of the licences have similar circumstances and conditions.

[4] The Environmental Appeal Board has the authority to hear these appeals under section 92 of the *Water Act*. Section 92(8) of the *Water Act* provides that, on an appeal, the Board may:

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

[5] The SEKID requests that the Board reverse the Water Manager's decisions, and "revoke" licences C128719 and C128857.

BACKGROUND

[6] The SEKID is an incorporated improvement district, and manages the storage and use of water for ratepayers within a specific geographic area.

[7] To manage water storage, the SEKID operates a system of water reservoirs. The SEKID holds water licences that date back to 1908, to store water in the McCulloch Reservoir, the Turtle Lake Reservoir, and the Fish, Browne and Long Meadow Lakes Reservoir, collectively known as the "upland reservoirs". The McCulloch Reservoir consists of several lakes, including Minnow Lake. The total "live" storage in the upland reservoirs is approximately 15,900 acre-feet (ac-ft)¹. "Live" storage refers to the volume of water that can be stored above the level of the outlet works for the reservoir, and therefore, can be utilized without being pumped from the reservoir.

[8] The SEKID also has water licences that date back to 1908 to annually divert up to 20,600 ac-ft of water (19,370 ac-ft for irrigation and 1,230 ac-ft for water works) from a point of diversion on Hydraulic Creek. The water from the upland reservoirs flows into Hydraulic Creek, then into Mission Creek, and then into Okanagan Lake.

[9] In 1964, the Ministry designated the Mission Creek watershed as "fully recorded." The meaning of the phrase "fully recorded" is discussed later in this decision, but in general, a fully recorded stream is a stream on which all of the water available for licensed use has been allocated. One of the issues in these appeals is whether Minnow Lake and Browne Lake are also fully recorded.

¹In this decision, large quantities of water have been converted to ac-ft and the original units (where not expressed in ac-ft) are provided in parentheses; 1 ac-ft = 1.23 cubic decametres (da m³) = 1.23 million litres (ML).

[10] Mr. Lawrence, Third Party #1, leases a recreational Crown lot that borders Minnow Lake. He owns a recreational cabin on that leased lot.

[11] Mr. and Mrs. McDivitt, Third Party #2, lease a recreational Crown lot that borders Browne Lake. They own a recreational cabin on that leased lot.

The Third Parties' licence applications

[12] On February 24, 2008, the McDivitts applied for a domestic water licence for 500 gallons per day (gpd), which equals 2.27 cubic metres/day (m³/day), for their cabin on Browne Lake.

[13] On May 13, 2008, Front Counter BC received an objection to the McDivitt application from Toby Pike, the SEKID's General Manager, on the grounds that "Browne Lake fully subscribed".

[14] On April 19, 2009, Mr. Lawrence applied for a domestic water licence for ± 150 gpd (0.68 m³/day) for seasonal use at his cabin on Minnow Lake.

[15] On June 19, 2009, Front Counter BC received an objection to the Lawrence application from Mr. Pike, on the grounds that "McCulloch Reservoir (Hydraulic, Minnow + Hayes Lakes) storage is fully allocated."

[16] On September 21, 2009, a conference call was held between representatives from the SEKID and the Ministry (then the Ministry of Environment)². Mr. Pike represented the SEKID. The Water Manager and Jane Bender, a Water Stewardship Officer, represented the Ministry. Mr. Pike expressed several concerns with respect to both Mr. Lawrence's and the McDivitts' licence applications. These included:

- the SEKID holds the licences for water storage in the upland reservoirs, and for the diversion of this water;
- the upland reservoirs are tributary to Mission Creek, which is "fully recorded";
- the SEKID's water supply is "stressed";
- the recreational cabins that border the upland reservoirs present a water quality concern and are outside the SEKID's jurisdiction; and
- the SEKID is opposed to the sale or renewing the leases of the recreational Crown lot that border the upland reservoirs, similar to the position of the Water Supply Association of BC.

[17] During the same conference call, Mr. Pike noted that most owners of recreational cabins that border the upland reservoirs were already drawing water from the reservoirs, without holding licences to do so.

² The Water Management Section of the Ministry of Forest, Lands and Natural Resources Operations was previously part of the Ministry of Environment.

Mr. Lawrence's licence

[18] Sometime in November 2009, the Water Manager prepared a draft letter to Mr. Lawrence to accompany a draft conditional water licence 124781. A copy of each draft document was also sent to Mr. Pike for review and comment.

[19] On November 27, 2009, Mr. Pike sent a letter to the Water Manager objecting to the draft letter and water licence for Mr. Lawrence. The SEKID's objection was stated in Mr. Pike's letter, as follows:

... With there being no unrecorded water in Minnow Lake, the issuance of a water licence to Mr. Lawrence would be inconsistent with provincial legislation and a direct conflict with water licences held by SEKID.

[20] On March 5, 2010, the Water Manager sent a letter to Mr. Lawrence, inviting him to respond to the SEKID's objection. A copy of the SEKID's November 27, 2009 letter was attached. The Water Manager's letter states, in part:

... the District is a licensee and, as such, is able to file an objection to your water licence application. A review of technical information relating to the supply and demand on the water source has taken place by ministry staff, confirming that Minnow Lake is indeed considered fully recorded. In view of the preceding, I am considering whether your application for a water licence should be refused.

[21] On March 16, 2010, Mr. Lawrence sent a letter to the Water Manager outlining some considerations in deciding whether to issue the water licence. The considerations provided by Mr. Lawrence have been summarized by the Panel, as follows:

- the amount of water being requested was very small, and Mr. Lawrence has been drawing water by pail from Minnow Lake for approximately 40 years;
- during normal Spring periods, excess water is spilled from the McCulloch Reservoir;
- other users of the reservoir water include domestic cattle, and campers at the provincial government campgrounds; and
- the SEKID condones or allows some water wasting activities and practices in its jurisdiction.

[22] On September 2, 2010, Mould Engineering, consultants to the SEKID, sent a letter of opinion to the SEKID recommending that Mr. Lawrence's application "should be denied since there is no unlicensed water in the watershed or on McCulloch Reservoir."

[23] To assist the Water Manager in assessing Mr. Lawrence's application, a Technical Report dated August 21, 2012 was prepared by Patrick Little, a Water Stewardship Officer with the Ministry. The Water Manager endorsed the Technical Report on August 21, 2012. The Technical Report references the Ministry's *Water Allocation Guidelines*, which contain policies to assist in assessing water licence applications. The Technical Report notes that the SEKID objected to the water licence application, but recommends that the objection be dismissed. The Technical Report states several reasons for dismissing the objection, including the following:

There is water available to meet the licensed demand. Although there is not unrecorded water available at all times of the year there is consistently unused recorded water in the reservoir. The quantity of this licence is insignificant relative to the total reservoir volume.

[24] Based on the findings summarized in the Technical Report, including an analysis of the water balance (supply versus demand) for the McCullough Reservoir, Mr. Little recommended that a water licence should be issued with conditions to mitigate concerns and protect existing water licences.

[25] On the same date, conditional water licence C128719 was issued to Mr. Lawrence, and the SEKID was informed. The salient conditions of the licence are:

- e) The maximum quantity of water which may be diverted for domestic use is 0.68 cubic meters [sic] (150 gallons) per day.
- f) The period of the year during which the water may be used is 1st May to 31st October.
- ...
- k) This licence does not authorize the diversion of water at any time when the water level of McCullough Reservoir (Minnow Lake) falls below 30% of live storage volume. This equates to a depth of 5.4 metres (17.6 feet).
- l) This licence terminates on May 5, 2016. Prior to the termination date, the licensee may apply... to amend this licence to extend its term.
- m) The licence holder is required to install a flow metering device to record the volume of water diverted under this licence. You will be required to submit in writing to the Assistant Regional Water Manager a record of total annual water use (cubic metres per year) by November 30th of each calendar year.

[26] It should be noted that condition l), above, limits the term of the licence to the term of Mr. Lawrence's recreational Crown lot lease. It should also be noted that the letter that was issued with the licence states, in part, as follows:

It is understood that most of the water that has been licensed for domestic purpose will be for indoor use on a seasonal basis, and conservation measures will be applied.

[27] On September 17, 2012, Mr. Lawrence replied to the Water Manager regarding the licence approval. Among other things, he stated that the requirement for a water meter was "massive overkill and practically impossible to implement at any reasonable level of expense...."

Mr. and Mrs. McDivitt's licence

[28] On August 29, 2012, a Technical Report on the McDivitts' application was prepared by Mr. Little. That report is similar to the one that was prepared regarding Mr. Lawrence's application.

[29] On the same date, conditional water licence C128857 was issued to the McDivitts, and the SEKID was informed. The salient conditions in the McDivitts' licence are essentially the same as in Mr. Lawrence's water licence, except that

condition k) pertains to the water level in Browne Lake, and condition l) limits the term of the licence to March 22, 2042 in accordance with the term of the McDivitts' recreational Crown lot lease. As in Mr. Lawrence's case, the letter issued with the McDivitts' licence includes a statement that "most of the water that has been licensed for domestic purpose will be for indoor use on a seasonal basis...."

The SEKID's appeals

[30] On September 13, 2012, the SEKID filed a Notice of Appeal against the issuing of C128719 to Mr. Lawrence. The grounds for appeal have been summarized by the Panel as follows:

- the water source is fully recorded and there is no unlicensed water available to support the licence;
- the condition permitting diversion only when the reservoir level is above 30% of live storage is meaningless in terms of supply management of the reservoir during periods of drought, as it will allow Mr. Lawrence to enjoy full use of his licence when the users of SEKID's system will already be under drought restrictions;
- the Technical Report that accompanies the licence does not account for the SEKID's agreement to discharge conservation flows under the Mission Creek Water User Plan;
- there is no compensation by the licensee to the SEKID for its capital, renewal, and operating costs; and
- this licence could set a precedent for other recreational Crown lot lease holders that border the SEKID's upland reservoirs.

[31] On October 9, 2012, the SEKID filed a Notice of Appeal against the issuing of C128857 to the McDivitts. The grounds for the appeal have been summarized by the Panel as follows:

- there is no surplus water available in the watershed unless the SEKID does not require the entire quantity of water it is licensed to use in a given year;
- the availability of water is dependent on works owned and maintained by the SEKID, and the licensee is not required to contribute to the construction and operation of those works; and
- Browne Lake is tributary to Mission Creek, which has been designated as "fully recorded" since 1963. No water licences have been issued since that time unless supported by water storage. Since the licensee is not providing water storage, the licence should not have been issued.

[32] The Water Manager submits that the issuance of the two licences will not materially affect SEKID's prior licensed water rights, particularly given the limited quantity of water that can be used under the licences, the limited time period when the water may be diverted, and the other licence conditions that restrict the diversion and use of water from Browne Lake and Minnow Lake.

[33] Mr. Lawrence attended a portion of the hearing and provided opening remarks, but did not appear as a witness or provide written submissions.

[34] Mr. and Mrs. McDivitt did not attend the hearing or provide written submissions.

RELEVANT LEGISLATION

[35] The following sections of the *Water Act* are relevant to these appeals:

Vesting water in government

2 (1) The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.

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;

...

Rights subject to Act

6 The exercise of every right held under a licence is always subject to this Act and the regulations, the terms of the licence, the orders of the comptroller and the engineer and the rights of all licensees whose rights have precedence.

Precedence of licences on same stream

15 (1) ... 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.

ISSUES

[36] The following issues arise from these two appeals:

1. Whether Minnow Lake and Browne Lake are fully recorded.
2. If Minnow Lake and Browne Lake are fully recorded, is sufficient water available to support the issuance of the two conditional water licences?
3. If the issuance of the two conditional water licences was appropriate, are the associated conditions appropriate?

DISCUSSION AND ANALYSIS

1. Whether Minnow Lake and Browne Lake are fully recorded.

The SEKID's submissions and evidence

[37] The SEKID submits that the Mission Creek watershed was designated as fully recorded in 1964, and the water sources for the Third Parties' licences are tributary to Mission Creek. The SEKID submits, therefore, that those water sources are fully recorded, and there is no unrecorded water available to support the licences.

[38] Mr. Pike was the only witness for the SEKID.

[39] The SEKID provided evidence in the form of the letter dated March 5, 2010, from the Water Manager to Mr. Lawrence, which states, in part:

A review of technical information relating to the supply and demand on the water source has taken place by ministry staff, confirming that **Minnow Lake is indeed considered fully recorded.**

[emphasis added]

[40] The SEKID also relied on the September 2, 2010 letter from Mould Engineering, which states that "the application from Lawrence should be denied since there is no unlicensed water in the watershed or on McCullough Reservoir." In addition, the SEKID referred to the Technical Reports that Mr. Little prepared regarding the Third Parties' licence applications. Those Technical Reports are discussed below.

The Water Manager's submissions and evidence

[41] The Water Manager submits that there is unrecorded water entering the McCullough Reservoir (Minnow Lake) and Browne Lake at certain times of the year. Specifically, during Spring freshet, water is spilled from the McCullough Reservoir and Browne Lake. The Water Manager submits that the spilled water is available for licensing.

[42] In addition, the Water Manager submits that, in *Peter and Joan Sanders v. Assistant Regional Water Manager* (Decision No. 2009-WAT-002(a), issued April 6, 2011) [*Sanders*], the Board held that a "fully recorded" notation provides guidance to Ministry decision-makers, but does not bind them. In that case, an Assistant Regional Water Manager had denied an application for a licence to divert 12 ac-ft of water per year for irrigation purposes, on the basis that the water source was fully recorded and had insufficient flow for further licensing, given the existing licensed demand and the minimum stream flow needed to support fisheries. However, based on evidence presented at the appeal hearing, the Board decided that there was sufficient stream flow to support a licence for 6 ac-ft between May 1 and June 30 annually, without any negative impact on existing downstream licensees or fisheries. At paragraphs 36 to 38 of *Sanders*, the Board found that, while Ministry policies provide useful guidance, they are not legally binding and need not be followed, especially if the circumstances

of a particular case indicate that a deviation from the policy will not violate the objectives or requirements of the legislation.

[43] Mr. Pryce, the Water Manager, and Mr. Little, Water Stewardship Officer, were the witnesses for the Water Manager.

[44] The Water Manager provided copies of the Technical Reports prepared for both licences, and those reports state that "Mission Creek was fully recorded in 1964." In addition, the Technical Report regarding Mr. Lawrence's licence states on page 1 that "There is no unrecorded water in this [McCullough] reservoir, except possibly when water is spilling during the spring freshet." Similarly, the Technical Report on the McDivitts' licence states that "There does not appear to be unrecorded water in this reservoir [Browne Lake], except possibly when water is spilling during spring freshet."

[45] The Water Manager also provided a copy of an internal Ministry document titled "Memorandum to file 2012-WAT-016 – Minnow Lake (McCulloch Reservoir)", dated March 15, 2013, in which the Water Manager reviewed and replied to the issues raised by the SEKID's appeal against Mr. Lawrence's licence. In response to the SEKID's submission that Minnow Lake is fully recorded, the memorandum states, in part:

Hydraulic Creek, Minnow Lake or McCulloch Reservoir had not been specifically designated as fully recorded until the appealed licence was issued. Upon issuance of this licence [C128719], McCulloch Reservoir was designated as "Fully recorded except for small seasonal domestic recreation licences (150 GPD May 1-Oct 31) with restrictive clauses to protect priority licences. **The encompassing Mission Creek watershed was designated as fully recorded in 1964** (Appendix A). However, since that time 27 domestic water licences, unsupported by storage, have been issued on Mission Creek itself (Appendix B) and other licences have been issued in streams tributary to Mission Creek... .

During our initial review for this water licence it appeared that there was not usually unrecorded water available in the reservoir except possibly during spring freshet. However, detailed analysis reveals that there may also be unrecorded water available during some summer months.

...

[emphasis added]

[46] Similarly, the Water Manager provided a copy of an internal Ministry document titled "Memorandum to file 2012-WAT-031 – Browne Lake", dated March 15, 2013, in which the Water Manager reviewed and replied to the issues raised by the SEKID's appeal against the McDivitts' licence. In response to the SEKID's submission that Browne Lake is tributary to Mission Creek, which is fully recorded, the memorandum states, in part:

Mission Creek has been designated as fully recorded since 1964 (Appendix A). Since 1964, 27 domestic water licences unsupported by storage..., have been issued on Mission Creek (Appendix B). Furthermore, there have been other licences issued in tributary streams within the Mission Creek watershed

since 1964. It is not unusual for domestic water licences to be issued in fully recorded watersheds.

The Water Allocation Guidelines state "An individual domestic licence is insignificant, from a quantity perspective, on all but the smallest sources. Unless special circumstances exist, small domestic licences should issue [sic] and will include the maximum daily demand." (Appendix C)

The Panel's Findings on Issue 1

[47] The Board held in *Sanders* that designating a stream as "fully recorded" is an administrative notation that is used by the Ministry to guide licensing decisions. The Panel agrees with that finding, and notes that neither the *Water Act* nor its regulations contain any statutory authority for designating a stream as fully recorded. This is in contrast to the *Fish Protection Act*, which sets out a statutory limitations on the issuance of water licences on streams that are designated under the *Sensitive Streams Designation and Licensing Regulation* (see *Sanders*).

[48] The Water Manager's book of authorities included a document dated September 2005, entitled "What is a Water Allocation Restriction?" That document states, in part, as follows:

Fully recorded indicates that **based on the information available at the time of the last inspection**, no further licences should be considered on this stream.

[emphasis added]

[49] Based on this policy guidance, the Panel finds that the question of whether a stream is fully recorded involves an analysis of the most recent information available about the stream, to determine whether the supply of water in the stream can support further licensed use.

[50] It is clear from the evidence, including the Technical Reports regarding the Third Parties' licence applications, that Mission Creek was designated as fully recorded in 1964. The letters that the Water Manager issued with the Third Parties' licences state that "The watershed is fully recorded...." Both Minnow Lake and Browne Lake are within the Mission Creek watershed, as they are tributary to Mission Creek (via another stream). Consequently, the Panel finds that Minnow Lake and Browne Lake were included when Mission Creek was designated as fully recorded in 1964.

[51] However, the Panel finds that this does not necessarily preclude the issuance of new water licences on these water sources, especially if a new licence involves a small quantity of water relative to the total stream flow, or if updated information about the water source indicates that the water balance can support further licensed use. As noted above, the Board has previously granted water licences on fully recorded streams in certain circumstances, such as where very small quantities of water are involved and stream flow information indicates that there would be no harm to fisheries or downstream licensees (see *Sanders*; and *Randall (Randy) K. McRoberts v. Assistant Regional Water Manager*, Decision No. 2005-WAT-013(a), issued December 14, 2005). This approach is consistent with the Ministry's Water Allocation Guidelines which state that "An individual domestic

licence is insignificant, from a quantity perspective, on all but the smallest sources. Unless special circumstances exist, small domestic licences should issue [sic]....”

2. If Minnow Lake and Browne Lake are fully recorded, is sufficient water available to support the issuance of the two conditional water licences?

The SEKID's submissions and evidence

[52] The SEKID submits that there is no unrecorded water available to support new licensing on either Minnow Lake or Browne Lake.

[53] In addition, the SEKID submits in its Notice of Appeal that:

While the overall volume of water associated with these water licences seems small, if this approach to water licensing is sustained, it would have a significant cumulative impact on the [SEKID's] water supply.

[54] Furthermore, the SEKID submits that Mission Creek, into which the water from the upland reservoirs flows, has conservation and fishery values that were not considered by the Water Manager when he issued the licences.

[55] In regard to Minnow Lake, the SEKID referred to the September 2, 2010 letter from Mould Engineering, which states as follows:

McCulloch Reservoir is the main water storage reservoir supplying the District. SEKID has water licences dating back to 1908 to store 13,490 ac-ft in the Reservoir, licences to divert 19,370 ac-ft for irrigation purposes, and 1,230 ac-ft for water works purposes from Hydraulic Creek. A list of licences held by the District is attached.

The storage reservoir was constructed by the District to capture spring snow melt runoff and release the storage when natural flows in Hydraulic Creek cannot meet demand. No surplus water exists in the system during summer and winter periods, or SEKID would not have constructed storage. In years of low runoff, the reservoir does not fill. The average annual runoff into McCulloch Reservoir, as estimated by Ministry of Environment staff, is 11,788 ac-ft. The water licences held by the District exceed the average annual runoff by a considerable amount; therefore, no surplus water exists in the watershed.

In summary, the application from Lawrence should be denied since there is no unlicensed water in the watershed or on McCulloch Reservoir.

[56] At the appeal hearing, Mr. Pike presented the following information regarding the water quantities in the SEKID's system:

20,600 ac-ft:	total licenced diversion;
15,870 ac-ft:	live storage in the upland reservoirs;
13,520 ac-ft:	long term dependable annual yield (29 out of 30 years) from the upland reservoirs plus two groundwater wells (12,930 ac-ft from the reservoirs plus 590 ac-ft from the wells);
13,234 ac-ft:	current demand; and

284 ac-ft: current surplus.

[57] Mr. Pike testified that 80 percent of the water demand in the area served by the SEKID is for irrigation, and that, between 1960 and 1998, the demand for irrigation decreased from 2.5 ac-ft/year to 2.25 ac-ft/year due to changes in irrigation systems and other conservation measures.

[58] The SEKID also produced a 2010 report by Water Management Consultants, prepared for the SEKID among others, which indicates that the SEKID's upland reservoirs have 15,910 ac-ft [19,617 million litres (ML)] of live storage, and that the average annual demand (interpreted by the Panel as actual use) from 1995 to 2007 was 8,986 ac-ft [11,080 ML]. The same report states that "about 85% of the demand is for agricultural uses", and the report references Mr. Pike as the source of that information.

[59] Mr. Pike testified that a total of 22 recreational Crown lot leases border the upland reservoirs (seven bordering the McCulloch Reservoir; and 16 bordering the Fish, Browne and Long Meadow Lakes Reservoir), and two Forest Service campgrounds that border the McCulloch Reservoir have approximately 45 campsites each. He also stated that a strata development with approximately 30 parcels that border the McCulloch Reservoir is being developed (the McCulloch Lake Resort).

[60] In addition, Mr. Pike testified that most of the recreational Crown lot lease holders use outhouses or composting toilets to dispose of their human waste, and use rock pits to dispose of their grey water.

[61] Mr. Pike acknowledged that most of the recreational Crown lot lease holders have been drawing water (without licences) from the upland reservoirs for many years or decades, and he doesn't know the quantities of water involved. He presumes that campers at the two Forest Service campgrounds draw water from the McCulloch Reservoir, but he doesn't know the quantities involved. Mr. Pike doesn't know if the strata development bordering the McCullough Reservoir draws its water from the McCulloch Reservoir.

[62] Mr. Pike indicated that all of the above human activity is on Crown land outside the SEKID's jurisdiction, and that he is upset that people outside the SEKID's jurisdiction can use its "finite resources" (the water in the upland reservoirs) that should only be available to residents in the area served by the SEKID.

[63] Mr. Pike testified that he is the Chair of the Water Supply Association of BC, and that, for water quality and quantity reasons, the Water Supply Association of BC does not want any provincial recreational Crown lots to be sold or leases renewed.

The Water Manager's submissions and evidence

[64] The Water Manager submits that the Third Parties' licences will not materially affect SEKID's prior licensed water rights.

[65] In addition, the Water Manager provided evidence that since 1964, when the Mission Creek watershed was fully recorded, 29 (27 domestic and two irrigation) water licences, unsupported by storage, have been issued in the Mission Creek watershed. These 29 water licences, when combined, amount to 144.9 ac-ft/year.

[66] The Water Manager also referred to a 2010 report, titled "Capital Works Program, 2010 – 2019," that was prepared for the SEKID by Mould Engineering. That report presents the following water quantities for the SEKID's "main system" (supplied from the upland reservoirs plus two groundwater wells):

- 15,870 ac-ft: live storage in the upland reservoirs;
- 13,520 ac-ft: long term dependable annual yield (29 out of 30 years) from the upland reservoirs plus two groundwater wells (12,930 ac-ft from the upland reservoirs plus 590 ac-ft from the wells);
- 13,180 ac-ft: demand in 2009;
- 13,290 ac-ft: project demand in 2019; and
- 230 ac-ft: projected surplus in 2019.

[67] The same 2010 report by Mould Engineering indicates that the average actual water usage (as opposed to demand) decreased from 9,800 ac-ft (12,000 da m³) in 1976 to 8,029 ac-ft (9,900 da m³) in 2009.

[68] In addition, the 2010 report by Mould Engineering concludes in the section on water availability for the SEKID's "main system" that:

The actual annual water use is less than theoretical calculation [interpreted by the Panel as demand] for several reasons.

1. Not all Grade 'A' land [a classification of agricultural land] is using water.
2. The theoretical calculation is based on the driest, hottest year on record (1970) prior to 1980.

Since actual use over the years has been less than the theoretical calculation, the District has a significant built-in safety factor against water shortages.

[69] In addition, the Water Manager submits that the Ministry's Water Allocation Guidelines support the issuance of the licences in this case. The Water Manager provided a copy of the Water Allocation Guidelines found in the Ministry's Policy and Procedures Manual, dated January 8, 1996 (Section 2, Appendix .03.01.05 D). Page 8 of Appendix .03.01.05 D of the Water Allocation Guidelines states as follows:

5. ALLOCATION DECISIONS

The combination of peak daily demand and the appropriate streamflow information forms the basis for the issue of a water licence. A shortfall in supply should not automatically result in the refusal of the application. In such cases, further evaluation of opportunities to augment supply through the development of storage **or a review of actual water use compared to licenced demand is mandatory.**

5.1 Domestic Purpose

An individual domestic licence is insignificant, from a quantity perspective, on all but the smallest sources. Unless special circumstances exist, small domestic licences should issue [sic] and will include the maximum daily demand.

Licences which issue for domestic purposes should state "The maximum gallons per day of water that may be diverted is ___ gallons per day of which 250 gallons is for in-house use."

...

[emphasis added]

[70] The Technical Summaries that Mr. Little prepared for the Third Parties' licences reviewed the SEKID's water supply versus demand from the upland reservoirs for an average year, followed by a 1:5 year drought. From those estimates, there would be:

- 15,870 ac-ft: live storage in the reservoir when filled by the freshet in June;
- 9,734 ac-ft: live storage in December after an average year of demand and evaporation;
- 14,336 ac-ft: live storage in June of the following year after a 1:5 year drought in the intervening January to December; and
- 7,375 ac-ft: live storage in October of the following year after a 1:5 year drought in the intervening January to December and after an average year of demand and evaporation.

[71] As a condition of both C128719 and C128857, the Water Manager stipulated:

- e) The maximum quantity of water which may be diverted for domestic use is 0.68 cubic meters [sic] (150 gallons) per day.
- f) The period of the year during which the water may be used is 1st May to 31st October.

[72] In the Technical Report regarding Mr. Lawrence's licence, Mr. Little estimates that, if that water licence was fully used each year, the quantity of water would equate to approximately 0.1 ac-ft, or 0.03 mm of a full McCulloch Reservoir, compared to approximately 434 mm of evaporation that occurs during a typical year between May 1 and October 31.

[73] Similarly, in the Technical Report regarding the McDivitts' licence, Mr. Little estimates that, if that water licence was fully used each year, the quantity of water would equate to approximately 0.1 ac-ft, or 0.5 mm of a full Browne Lake Reservoir, compared to approximately 430 mm of evaporation that occurs during a typical year between May 1 and October 31.

[74] The Water Manager estimates that, if all 22 of the recreational Crown lease lot holders that border the two upland reservoirs had water licences similar to C128719 and C128857, the maximum seasonal demand on the reservoirs would be 2.2 ac-ft per year.

[75] In the memorandum to file "2012-WAT-016 – Minnow Lake (McCulloch Reservoir)" dated March 15, 2013, the Water Manager stated that:

WSD [Water Stewardship Division] staff were unaware of the conservation flow agreement under the Mission Creek Water Use Plan. Under this plan SEKID agreed to discharge a minimum of 31 L/s below their PoD on Hydraulic Creek (WMC [Water Management Consultants] 2010).

[76] In the same memorandum to file, the Water Manager referenced the 2010 report by Water Management Consultants, which indicates that the SEKID tries to maintain an "optimal" level of in-stream flow greater than 200 L/s between July and October, and during average Summer months the SEKID discharges "greater than their target optimal levels of conservation flows." For example, from 2001 to 2004, discharges ranged from 1000 L/s in July to 500 L/s in October.

[77] In the same memorandum to file, the Water Manager estimates that the maximum water demand for the Third Parties' licences combined is 0.016 L/s between May 1 and October 31, and he stated that this volume:

... should not materially affect SEKID's ability to discharge conservation flows.

... although there is not always unrecorded water available, there appears to be sufficient unused water available in SEKID's reservoirs to support the beneficial use of 0.2 AF/year (0.016 L/s), more frequently that 4 out of 5 years.

Mr. Lawrence's submissions and evidence

[78] Mr. Lawrence's March 16, 2010 letter to the Water Manager indicates that he had been drawing water from Minnow Lake for approximately 40 years prior to the issuance of C128719.

[79] In Mr. Lawrence's opening statement, he indicated that even though his licence is for 150 gpd of water between the period of May 1 and October 31, he requires less than 50 gpd for three days a week during that period.

The Panel's findings on Issue 2

[80] The Panel has already found under Issue 1 that designating a stream as "fully recorded" is an administrative notation. It may be used to alert Ministry staff of current or potential water allocation concerns. The Ministry's September 2005 policy document, "What is a Water Allocation Restriction?" states that a fully recorded designation is to be "considered, along with all other relevant information, when making future water allocation decisions".

[81] The Panel has also found that Ministry policies, such as the Water Allocation Guidelines, are not binding in law, but provide guidance to decision-makers as to how they can exercise their discretion in certain circumstances.

[82] As recommended by the Water Allocation Guidelines, the Water Manager considered supply and demand estimates for the subject water sources. The Panel notes that the Ministry's analysis started with live storage in the upland reservoirs of 15,870 ac-ft, as opposed to the long term dependable annual yield of 12,930 ac-ft (as stated in the "Capital Works Program, 2010 – 2019" report prepared by Mould Engineering). However, for the following reasons, this difference does not affect the Panel's conclusion on this issue.

[83] Both the SEKID and the Water Manager recognize that the quantities of water associated with the Third Parties' licences are small. The combined quantity is 0.2 ac-ft, which is relatively small when compared to the current surplus (supply minus demand) of 284 ac-ft, and the 2019 projected surplus (supply minus demand) of 230 ac-ft.

[84] In 2009, the last year of record available to the Panel, the average actual annual water usage was 8,029 ac-ft, while the annual demand was 13,180 ac-ft, according to the "Capital Works Program, 2010 – 2019" report by Mould Engineering. In other words, in 2009 usage was approximately 61 percent of demand. Therefore, the combined quantity of the Third Parties' licences is an even smaller proportion when compared to water supply minus usage, as opposed to water supply minus demand.

[85] No evidence was presented as to the quantity of water withdrawn by the approximately 90 Forest Service campsites.

[86] The strata development on the McCulloch Reservoir does not have a water licence on, or an application to withdraw water from, the McCulloch Reservoir, and no evidence was presented as to where that development obtains its water.

[87] Mr. Pike admitted that most of the recreational Crown lot lease holders discharge their grey water into rock pits. The Panel finds that it is logical to conclude that at least some of this water makes its way back into the upland reservoirs.

[88] Mr. Pike acknowledged that most Crown lease holders have been drawing some water from the upland reservoirs for many years or decades. Mr. Lawrence admitted to having drawn water from Minnow Lake for approximately 40 years. Although the Panel does not condone drawing water without a licence, section 42(2) of the *Water Act* states that "It is not an offence for a person to divert unrecorded water for domestic purpose..., but in a prosecution under this Act the person diverting the water must prove that the water is unrecorded." It is the Panel's opinion that any such water, and any water drawn by campers in the Forest Service campgrounds, would have been unknowingly accounted for in the supply side of any supply and demand studies that were carried out during the period of these withdrawals.

[89] Although the Water Manager did not initially consider the SEKID's conservation flow agreement with respect to Mission Creek when he decided to issue the Third Parties' licences, the memoranda to file in the Water Manager's evidence indicate that conservation flows were considered by the Water Manager after the appeals were filed, and the Panel agrees with his conclusion that the

maximum combined demand of the Third Parties' licences is so small that it should not affect SEKID's ability to discharge conservation flows.

[90] In summary, in making its finding on Issue 2, the Panel considered the following:

- the implications of the water sources' designation as "fully recorded";
- the guidance provided by the Water Allocation Guidelines, which the Water Manager followed;
- the relatively small amount of water that can be used under C128719 and C128857, compared to both the water demand and the actual water usage on the upland reservoirs;
- the fact that, for years if not decades, most of the recreational Crown lot lease holders have been drawing water from the upland reservoirs and disposing their grey water into rock pits; and
- the Water Manager's submissions regarding the SEKID's conservation flow agreement with respect to Mission Creek.

[91] Based on the evidence the Panel heard during the appeal hearing, the following two points are also compelling in arriving at this decision:

- Mr. Pike admitted that the appeals were initiated on the basis of principle. His opposition to the two conditional water licences was clearly more concerned with the precedent that the issuance of the two licences could establish, and the possibility that a number of other unlicensed water users could apply for water licences in the future, than the impact that these two licensees would actually have on the availability of water in the reservoirs.
- Two documents that were prepared specifically for the SEKID by Mould Engineering, consultants to the SEKID, were presented as evidence: a report, titled "Capital Works Program, 2010 – 2019," dated August 2010; and a letter prepared at the request of, and sent to, the SEKID on September 2, 2010. In the absence of an expert witness called to speak to the two documents and be subject to cross-examination, it was left to the Panel to determine the weight to give to these documents. Because the report appeared to be objective, whereas the letter advocated that Mr. Lawrence's water licence application be denied, the Panel accepts the conclusions of the report and places no weight on the letter.

[92] Taking into account all of these considerations, the Panel finds that there is sufficient water to support the Third Parties' licences, and the issuance of the two licences was appropriate in the circumstances.

3. If the issuance of the two conditional water licences was appropriate, are the associated conditions appropriate?

[93] For convenience, the Panel has summarized the salient conditions of the two licences below:

- e) the maximum quantity of water that can be diverted is 150 gpd (0.68 m³/day);
- f) the diversion period is from May 1 to October 31;
- k) diversion is not authorized when the reservoir level is less than 30 percent of live storage;
- l) the term of the licence is limited to the term of the recreational Crown lot lease; and
- m) a flow meter is required to be installed and records of the quantity of water use must be submitted annually to the Water Manager.

[94] Conditions e) and f) have largely been addressed under Issue 2. However, as discussed below, the Water Manager suggests an amendment to condition e) for clarification. Condition l) was not contentious, and therefore, the Panel makes no findings on it. Thus, Issue 3 primarily addresses conditions k) and m).

The SEKID's submissions and evidence on condition k)

[95] With regard to condition k), the SEKID submits that the threshold of 30 percent of live storage does not adequately protect the SEKID's licensed rights, which have priority over the Third Parties' licences based on the licenses' precedence date (i.e., the date when the licence application was filed with the Ministry), according to section 15(1) of the *Water Act*. The SEKID submits that condition k) ignores when that threshold is reached, and ignores the SEKID's complex water storage system.

[96] The SEKID indicated that stage 2 drought restrictions come into effect for users of its system when the upland reservoirs reach approximately 68 percent of live storage, and stage 3 drought restrictions come into effect when the upland reservoirs reach approximately 36 percent of the live storage. However, when users of the SEKID's system are under stage 2 and 3 restrictions, the Third Parties still enjoy full use of their licences. The SEKID submits that this is unfair.

[97] Mr. Pike testified that 2009 was a year of drought in the region, and that the McCulloch Reservoir only filled to 67 percent of its capacity.

[98] Mr. Pike testified that stage 2 drought management was implemented by the SEKID in 2003 and 2009, but stage 3 drought management has never been implemented.

[99] The 2010 report by Water Management Consultants indicates that prior to 2009, stage 2 drought management was implemented by SEKID in 1955, 1978, 1982 and 1984.

[100] Mr. Pike testified that during 2009, the SEKID was prepared to pump from the "dead" storage of its upland reservoirs (i.e., the volume of stored water below the level of the reservoirs' outlets), but it didn't do so.

[101] Mr. Pike submitted that the only acceptable threshold for condition k) would be 100 percent of live storage. In other words, the licensees should only be allowed to draw water from the upland reservoirs when the reservoirs are spilling (i.e., when the reservoirs are at their capacity and inflow exceeds outflow).

The Water Manager's submissions and evidence on conditions e) and k)

[102] The Water Manager testified that condition k) protects the SEKID's licensed water rights, which have priority over the Third Parties' licences based on their precedence date. The Water Manager submits that the 30 percent threshold is slightly lower than the level that would result from a 1:10 year drought.

[103] Referring to the Kelowna Coordinated Drought Plan (2010), which the SEKID has adopted, the Water Manager indicated that the normal condition of the two licences (i.e., a maximum of 150 gpd for domestic use only) is more restrictive than the SEKID's stage 3 drought restrictions. Specifically, the Water Manager submits that the Third Parties' licences are intended to authorize water use for indoor domestic purposes only, and do not authorize the use of enough water to support lawn watering. The Water Manager submits that this equates to the SEKID's stage 3 restrictions, as stage 2 allows lawn watering two days per week, whereas stage 3 prohibits outdoor watering except for hand watering of food gardens.

[104] However, the Water Manager suggests that a further clause could be added to the Third Parties' licences to clarify that only "indoor" domestic use is authorized. In this regard, the Panel notes that the letters issued with the licences indicate that the water is for indoor domestic use, but condition d) of the licences simply states that the purpose for which the water may be used is "domestic."

Evidence relevant to condition m)

[105] With regard to condition m), the Water Manager's evidence included the September 17, 2012 letter from Mr. Lawrence to the Water Manager, in which Mr. Lawrence states:

I would also like you to reconsider condition 5. "Meter required to be installed and water records submitted annually" – this appears to be a massive overkill and practically impossible to implement at any reasonable level of expense.

The Panel's findings on Issue 3

[106] The Panel finds that not all aspects of conditions k) and m) of the licences are appropriate or reasonable in the circumstances.

[107] With regard to condition k), the Panel finds that the Water Manager has protected the SEKID's priority rights by including a condition indicating when diversion under the two licences is not authorized. However, the Panel agrees with the SEKID that the 30 percent threshold is cumbersome to implement and enforce, and is inconsistent with the SEKID's thresholds for imposing water restrictions on users of its system during droughts. The Panel finds that the 30 percent threshold is too low, given that stage 3 drought restrictions are imposed at 36 percent for

users of the SEKID's system and have never been imposed. Moreover, the SEKID's water uses permitted under stage 3 restrictions are similar to the uses permitted under the Third Parties' licences, yet the SEKID's licences have priority over the Third Parties' licences under section 15 of the *Water Act*. In these circumstances, the Panel finds that it is more appropriate to not allow diversion under the Third Parties' licences when the SEKID is under stage 2 drought restrictions, as defined by the Kelowna Coordinated Drought Plan (2010). The Panel finds that this will better protect the SEKID's priority rights, yet should not frequently affect the Third Parties, as the evidence shows that stage 2 restrictions have only occurred six times since 1955.

[108] With regard to condition m), the Panel agrees with Mr. Lawrence that installation of a flow meter may not always be practical or reasonable, and that there may be more practical and less costly ways for licensees to measure and record their water usage.

[109] The Panels agrees with the Water Manager's suggestion that the wording of condition e) should be clarified by adding reference to "indoor" with respect to domestic use. This is consistent with section 5.1 on page 8 of Appendix .03.01.05 D of the Ministry's Water Allocation Guidelines, which is reproduced under Issue 2.

[110] Accordingly, as empowered by section 92(8)(c) of the *Water Act*, the Panel varies conditions e), k) and m) as follows:

- e) The maximum quantity of water that may be diverted is 0.68 cubic metres per day (150 gallons per day), all of which is for indoor domestic use.
- k) This licence does not authorize the diversion of water during the implementation of, and after notification by, the South East Kelowna Irrigation District of stage 2 drought restrictions, as defined in the Kelowna Coordinated Drought Plan (2010).
- m) The licence holder is required to measure and record the volume of water diverted under this licence, and to submit in writing to the Assistant Regional Water Manager a record of annual use (Imperial gallons per year or cubic metres per year) by November 30 of each calendar year.

DECISION:

[111] In making this decision, the Panel has considered all of the evidence in common to the two appeals, as well as the evidence that applies only to each of the Third Parties, as well as the submissions in respect of each appeal, whether or not specifically reiterated herein.

[112] For the reasons set out above, the Panel finds as follows:

The issuance of conditional water licence C128719 to Edward F. Lawrence on August 21, 2012, and the issuance of conditional water licence C128857 to Brian and Kimberley McDivitt on August 29, 2012, are confirmed as to all of the conditions, except that licence conditions e), k), and m) are varied as directed by the Panel.

[113] In all other respects, the appeals are dismissed.

"David H. Searle"

David H. Searle, Panel Chair

"Robert G. Holtby"

Robert G. Holtby, Member

"Douglas F. VanDine"

Douglas F. VanDine, Member

July 11, 2013