



Environmental Appeal Board

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DECISION NOS. 2012-WAT-034(a) and 2012-WAT-035(a)

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

BETWEEN: Robert Ackerman, Julie Nurse,
Kenneth Hampson, and Alix Macdonald **APPELLANTS/
THIRD PARTIES**

Dieter Haubold and
Swissterra Land Corporation **APPELLANTS/
THIRD PARTIES**

AND: Assistant Regional Water Manager **RESPONDENT**

AND: David Mario Lang and Elizabetha Lidia Lang **THIRD PARTIES**

BEFORE: A Panel of the Environmental Appeal Board
Gabriella Lang, Panel Chair

DATE: July 16, 17 and 18, 2013
Concluded by written argument on August 28, 2013

PLACE: Penticton BC

APPEARING: For the Appellants/Third Parties:
Robert Ackerman, Julie Nurse, Kenneth Hampson
and Alix Macdonald: Pat Harris
Dieter Haubold and Swissterra Land
Corporation: Dieter Haubold
For the Respondent: Livia Meret, Counsel
For the Third Parties:
David Mario Lang and Elizabetha Lidia Lang: did not appear

APPEALS

[1] The Appellants appeal the November 19, 2012 order (the "Order") of Conrad J. Pryce, the Assistant Regional Water Manager (the "Regional Manager"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), cancelling conditional water licence number 51177 ("CWL51177").

[2] 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, 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.

[3] Robert Ackerman, Julie Nurse, Kenneth Hampson and Alix Macdonald filed a joint notice of appeal, and submitted the same evidence and arguments in support of their appeal. Therefore, the Panel will hereafter refer to them as the "Ackerman Appellants". They request that the Board set aside the Regional Manager's Order. They also request that the Board direct the Regional Manager to survey Loveridge Spring to identify its correct location and then determine whether there is water available for licensing,

[4] Dieter Haubold and Swissterra Land Corporation filed a joint notice of appeal, and submitted the same evidence and arguments in support of their appeal. Mr. Haubold also stated that he represents the Haubold family, namely himself, Renate Haubold and Peter Haubold. Therefore, the Panel will hereafter refer to them as the "Haubold Appellants". They object to the cancellation of CWL51177, and request that the Board reverse the Regional Manager's Order. In addition, they request that the Board direct the Regional Manager to amend CWL51177 to show a point of diversion ("POD") on Strutt Spring, which they claim is actually the POD on Loveridge Spring, and to deny the Ackerman Appellants' applications for more water.

[5] The Board provided the Ackerman Appellants with Third Party status in the appeals of the Haubold Appellants, and vice versa.

[6] The Board also offered Third Party status to David Mario Lang and Elizabetha Lang, but they did not respond to the Board's letters, and they did not appear at the appeal hearing.

BACKGROUND

[7] In 1977, Keith Loveridge applied for a water licence for an unnamed spring located on his property near Penticton, BC. He applied for 50 acre feet of water for irrigation purposes.

[8] On October 26, 1978, that application resulted in CWL51177 being issued to Keith and Helen J. Loveridge. The licence authorized the diversion and use of 50 acre feet of water per year from Loveridge Spring for irrigation purposes, and specifically, to irrigate 20 acres of appurtenant land described as Lot 2551, Similkameen Division of Yale District except Plans 25747, 15862 and 28125 and except part lying west of the road and except part shown as road on Plan 28125. The works authorized to be constructed under this licence were "diversion structure, pump, pipe and sprinkler system". The licence stated that the construction "of the said works has been commenced and shall be completed and the water beneficially used on or before the 31st of December 1981".

[9] The sketch plan attached to the licence application shows the POD as being about 550 feet southwest of the northeast corner of Lot 2551. CWL51177 shows the Loveridge Spring POD in the same location. According to Ministry records, CWL51177 is the only licence that was ever issued on Loveridge Spring.

[10] In 1977, Mr. Loveridge applied for a second and separate water licence for diversion from a second and separate spring. For that licence, he applied for 500 gallons of water per day for domestic uses. Subsequently, on November 9, 1978, CWL51315 was issued to him, and it authorizes the diversion and use of the requested amount of water for domestic purpose. CWL51315 shows the POD as Strutt Spring, and the POD was described in the licence application as being located 500 feet from the northeast corner of Lot 2551, although the sketch plan attached to the licence application showed the POD as being about 300 feet from Strutt Creek. Subsequently, the Ministry amended CWL51315 for reasons described in the Regional Manager's submissions, which are set out later in this decision.

[11] In August 2012, the Ministry was reviewing its licences and determined that CWL51177 required amendment to reflect the property subdivisions that had occurred within the licensed area. It identified five properties as being entirely or partly within the appurtenancy of this licence. Those properties are owned by Mr. Ackerman and Ms. Nurse, Mr. Hampson and Ms. Macdonald, David Lang and Elizabetha Lang, Swissterra Land Corporation, and Dieter, Renate and Peter Haubold.

[12] On August 13, 2012, the Regional Manager sent letters to the owners of those five properties regarding an appropriate amendment of CWL51177, potential eligibility for consideration of ongoing water rights, and instructions to complete and return a Beneficial Use Declaration. The letter directed the owners to either complete the abandonment request part of the Beneficial Use Declaration if they were not using water from this source, or to complete the application for apportionment form if they were applying for a portion of the licensed volume of water.

[13] Mr. Ackerman and Ms. Nurse returned the application for apportionment of CWL51177, requesting 5 acre feet of water per year to irrigate 2 acres. Mr. Hampson and Ms. MacDonald submitted a similar application.

[14] The Haubold Appellants responded by having their agent, Len Fox, contact the Ministry to clarify the requirements. Mr. Haubold wrote to the Regional Manager on behalf of the Haubold Appellants, disputing the location of Loveridge Spring and objecting to the other apportionment applications. Mr. Haubold also requested a site inspection, which occurred in November 2012.

[15] In September and October 2012, the Ministry conducted a further review of CWL51177, including information from staff site visits on September 14 and 24, 2013 to the area identified in the Ministry's records as the location of the Loveridge Spring POD. The staff reports indicated that there was no water at that site, and no indication of recent beneficial use of water in accordance with the licence.

[16] The Regional Manager then sent a letter dated October 18, 2013 to the same parties, with a Notice of Proposed Cancellation for CWL51177. In that letter, he wrote that Loveridge Spring may not have adequate water supply to support the

licence, and that Water Stewardship technical staff had visited Loveridge Spring to investigate water availability. They noted that there was no water present at Loveridge Spring. The Regional Manager concluded, therefore, that beneficial use of CWL51177 was impossible.

[17] In that same letter, the Regional Manager stated that Water Stewardship technical staff also investigated a non-licensed source of water located approximately 110 meters to the southwest of Loveridge Spring. The Regional Manager wrote that this non-licensed source is unrelated to Loveridge Spring, and does not contain a sufficient quantity of water to support irrigation.

[18] Enclosed with the letter was the Regional Manager's Notice of Proposed Cancellation under section 23 of the *Water Act*, dated the 18th of October, 2012, which stated:

IN THE MATTER of Conditional Water Licence 51177 on File 0340795 authorizing the use of water from Loveridge Spring for the following purpose, within Lot 2551, Similkameen Division of Yale District, except Plans 25747, 15856 and 28125 and except part lying west of the road and except part shown as road on Plan 28125; of which 20 acres may be irrigated:

Irrigation – 50 acre feet per annum

WHEREAS it appears that the above mentioned licence has become subject to Cancellation for:

- 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.

YOU ARE HEREBY NOTIFIED that, unless cause to the contrary is shown on or before November 17TH, 2012, said Conditional Water Licence Number 51177 will be cancelled.

[19] The October 18, 2012 letter and notice were sent to: Dieter, Renate and Peter Haubold; Swissterra Land Corporation; Robert Ackerman and Julie Nurse; Kenneth Hampson and Alix MacDonald; and David Mario Lang and Elizabetha Lang.

The Order and the Appeals

[20] On November 19, 2012, the Regional Manager, issued the Order under section 23 of the *Water Act*. The Order states as follows:

In accordance with the Notice of Proposed Cancellation, dated the 18th day of October, 2012,

Conditional Water Licence CO51177 is hereby cancelled.

[21] The Order was sent to: Dieter, Renate and Peter Haubold; Swissterra Land Corporation; Robert Ackerman and Julie Nurse; Kenneth Hampson and Alix MacDonald; and David Mario Lang and Elizabetha Lang.

[22] David Mario Lang and Elizabetha Lang did not respond to any of the Regional Manager's letters or the Order.

[23] The Ackerman Appellants appealed the Order on the basis that the Ministry records do not have the correct location for the Loveridge Spring POD as originally intended by Mr. Loveridge, the applicant for the licence. They ask the Board to set aside the Regional Manager's Order. They also ask the Board to direct the Regional Manager to survey Loveridge Spring to confirm the location that they identify as the Loveridge Spring POD, and then to determine whether there is available water for licencing purposes under the *Water Act*.

[24] The Haubold Appellants ask the Board to reverse the Regional Manager's decision to cancel the licence, to direct the Regional Manager to amend CWL51177 to show the POD for Loveridge Spring to be where the POD for Strutt Spring is currently shown in Ministry records, and to deny the applications for more water from each of the Ackerman Appellants. The Haubold Appellants maintain that Loveridge Creek and Loveridge Spring were renamed to what the Ministry records indicate are Strutt Creek and Strutt Spring.

Hearing Site Visit

[25] Before the Panel heard any testimony in this appeal, the Panel and the parties made a site visit to the three separate locations that the Ackerman Appellants, the Haubold Appellants, and the Regional Manager claim is the Loveridge Spring POD and the Strutt Spring POD. That site visit occurred on July 16, 2013, and was attended by the named parties, except for Mr. Ackerman. Mr. Ackerman was represented by Ms. Nurse and Mr. Pat Harris. Keith Loveridge also participated in the site visit. Mr. Haubold was accompanied by Mr. Queen, who acted as his interpreter during the site visit and during the first day of the hearing, July 16, 2012. No evidence was heard during the visit. The Panel and the parties participated for information purposes only.

[26] The Regional Manager prepared and distributed a site map for the visit, with the following locations noted on the map:

- Site 1 - the location of the Loveridge Spring POD as identified in the Ministry's records.
- Site 2 - the location of the Loveridge Spring POD that the Ackerman Appellants maintain is the correct location for the Loveridge Springs POD.
- Site 3 - the location of the Loveridge Spring POD according to the Haubold Appellants, but identified as the Strutt Spring POD in the Ministry's records.

[27] The parties agreed that this map reflected their respective positions. Therefore, the map was entered into evidence during the evidentiary portion of the hearing. During the hearing and in their submissions, the parties referred to these three locations as Site 1, Site 2 and Site 3.

[28] The Panel has considered and reviewed all submissions and evidence, including all of the documents submitted as evidence during the hearing, even if not specifically referred in this decision.

ISSUES

[29] The main issue to be decided by the Panel is whether it is reasonable in the circumstances to cancel CWL51177 pursuant to section 23(2) of the *Water Act*.

[30] Under this issue, the Panel has considered the following two sub-issues:

1. Whether the Ministry's records correctly identify the site of the Loveridge Spring POD; and,
2. Whether there is any evidence of the irrigation works or the beneficial use of the water, as required in the conditions of CWL51177.

RELEVANT LEGISLATION

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

Definitions

1 In this Act:

...

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

...

Vesting water in government

2 (1) The property in and 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.

...

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;

...

(f) the licensee's failure to comply with a term or condition of the licence.

DISCUSSION AND ANALYSIS

Whether it is reasonable in the circumstances to cancel CWL51177 pursuant to section 23(2) of the *Water Act*.

The Ackerman Appellants' submissions

[32] The Ackerman Appellants submitted that their first knowledge of CWL51177 and Loveridge Spring was the Ministry letter of August 13, 2013, regarding the potential for additional water, a Beneficial Use Declaration, and an application for apportionment.

[33] The Ackerman Appellants argue that the Ministry's Water Map, the map attached to CWL51177, the Ministry's digital records, and in fact, all of the Ministry's records for the location of the Loveridge Spring POD, are wrong. Their position is that Site 2 is the correct location.

[34] To support their position, the Ackerman Appellants relied on the testimony of Keith Loveridge, the original licence applicant and licensee for CWL51177. He testified about applying for the Loveridge Spring water licence, but he said he did not remember any surveys being done when he applied. He thought that he may have walked the property in 1977 with Jack Botham, who was from the Ministry's Water Management division. He thought that, at that time, he and Mr. Botham sat down for "kitchen table talks" regarding the application. According to Mr. Loveridge, nothing was measured, but he and Mr. Botham agreed that the approximate location for Loveridge Spring's POD was about 550 feet southwest of the northeast corner of his property, and that is how the sketch plan in the application was drawn. Mr. Loveridge described those water licencing days as like the "wild west".

[35] Mr. Loveridge also took part in the July 16, 2013 site visit. He testified that he felt that Site 2 was the actual location of Loveridge Spring. He maintained that in the sketch plan that was provided with his application, and is attached to the licence, Loveridge Spring was misplaced. He also said that there is an old pipe close to Site 1 that collapsed and was never used. However, on cross-examination, he also admitted that he did not remember too much about his original application or about walking his property with Jack Botham.

[36] When asked about the irrigation works required to be constructed, and the other conditions in CWL51177, Mr. Loveridge said the works had been planned, but he admitted that he "never got around to any irrigation works". He said that, in 1977, he deepened a ditch and put in a PVC pipe to carry water from Strutt Spring to property on the west side of DL 2551. Later, he put in a water trough and hose for cattle. He said he had plans for a house and cattle, but that was future planning. He found he could not farm that property and make money, so nothing was built.

[37] The Ackerman Appellants provided no other evidence to support their assertion that the Ministry incorrectly mapped and recorded the location of the

Loveridge Spring POD during the several decades since Mr. Loveridge made his application.

[38] The Ackerman Appellants also referred to the Regional Manager's testimony, discussed below, about amending CWL51315 (i.e., the original Strutt Spring licence) to correctly reflect the Strutt Spring POD. They submitted that the Regional Manager could make the same type of amendment to the Loveridge Spring licence, CWL51177, to show Site 2 as the POD rather than Site 1.

The Haubold Appellants' submissions

[39] The Panel notes that the final written argument from the Haubold Appellants referred to matters that are not relevant to the issues in this appeal, and contained new evidence. The new evidence cannot be considered by this Panel because, as the Panel advised the parties, the evidentiary portion of the hearing ended, and the record closed, on July 18, 2013. Further, the Panel will only consider arguments and evidence relevant to the issues stated above.

[40] The Haubold Appellants submitted that the Ministry changed the name of Loveridge Spring to Strutt Spring. They also submitted that their appeal regarding the cancellation of CWL51177 involves two legal titles; that is, title L2551-1 owned by Swissterra Land Corporation, represented by its Director, Dieter Haubold; and L2551-2, owned by the family of Dieter, Renate and Peter Haubold, also represented by Dieter Haubold. The Haubold family members are shareholders of Swissterra Land Corporation. They have owned these properties since about the mid-1980s.

[41] Mr. Haubold testified on behalf of the Haubold Appellants. He testified through an interpreter, Claudia Eichbauer, who also interpreted for him throughout the hearing on July 17 and 18, 2013.

[42] Mr. Haubold testified that Loveridge Spring has approximately the same intake point as Site 3. He said that what Ministry records identified as "Loveridge Spring is now Strutt Spring". He said that the site visit map does not show where Strutt Creek is, and that the "real Strutt Creek is located far away in lot 16." Mr. Haubold also said that the co-ordinates for the locations of Site 1 and Site 3, as referred to in the Ministry's records, are inaccurate. Mr. Haubold stated that the intake location at Strutt Creek changed, but he provided no explanation or information to support this position. In his testimony, Mr. Haubold just kept referring to Loveridge Spring as the new Strutt Spring.

[43] Mr. Haubold submitted some documents into evidence to support his argument. The Panel notes that these were just first pages or parts of documents that are part of the Regional Manager's evidence in the record. The Panel has reviewed those documents, and finds that there is nothing about changing the names of creeks or springs in the documents.

[44] The Haubold Appellants also object to the Ackerman Appellants receiving more water from sources on property owned by the Haubold Appellants. The Haubold Appellants submitted that there is insufficient or no water to provide for the Ackerman Appellants' requests. Mr. Haubold said that the Ackerman Appellants

wanted and received larger quantities of water without any easement amendments and without any consultation with the Haubold Appellants. He alleged that the Haubolds were not spoken to, written to, or asked about other users on Strutt Creek.

[45] Mr. Haubold stated that, where there is no water on one of their properties, no water can be distributed. He also said that he assumed that the licence for their own property would always be available to them at all times.

[46] When asked about any irrigation works, Mr. Haubold replied that he did not install any, because too much equipment was stolen from their properties, so they stopped all work and decided not to proceed with irrigation. Their property was not really inhabited. In response to a question asking whether the Haubold Appellants ever made use of the water allowed under CWL51177, Mr. Haubold answered that they couldn't. They had plans to do so, but didn't follow through. They did not go ahead with their own house or with planting of meadows. They only used the land for grazing cows.

[47] On cross-examination, Mr. Haubold's attention was directed to many of the Ministry's records that were submitted as evidence at the hearing. These records include documents showing where Loveridge Spring and Strutt Spring are located. They also include a water licence application from 1989, which Mr. Haubold signed. Mr. Haubold was directed to the part in that application showing that Loveridge Spring is located in the same place as shown in the Ministry records from 1978. When the Ministry ascertained that there was no water at Loveridge Spring, the 1989 application was changed to an application for water from Strutt Spring. The Ministry's Engineer's Report from that time indicates that Al Hare, a Ministry technician, visited the area and inspected the Strutt Spring location with Mr. Haubold.

[48] Mr. Haubold maintained that he just signed the documents, and that a mistake was made by his agent at the time, Len Fox, a local realtor. Mr. Haubold did not explain what the mistake was or how it came about. He also did not say whether he asked Mr. Fox to fix the alleged mistake.

[49] Mr. Haubold also maintained that he was unaware of a number of factors related to his water licences, including the province's interest in surface water as set out in section 2 of the *Water Act*. Yet, at the same time, Mr. Haubold testified that in the past, starting in the mid-1980s, his family and Swissterra Land Corporation used a notary and agent, Dr. Hoetter of Vancouver, BC. Mr. Haubold said that Dr. Hoetter informed him of important documents, but Mr. Haubold continued to maintain that he did not know about water licences for the properties the Haubolds purchased in the 1980s.

[50] The documents submitted into evidence by the Regional Manager include correspondence from Dr. Hoetter to the Ministry regarding Swissterra Land Corporation's interest in water licencing matters. Those documents also include letters to and from Mr. Haubold and the Ministry, regarding the Haubold Appellants' licences, one of which is an October 12, 2012 letter from Michael Epp, a Ministry employee, listing all the current water licences belonging to Swissterra Land Corporation and the Haubold Family.

[51] The Regional Manager's evidence also includes documents showing that Mr. Fox was still involved in matters related to the Haubold Appellants' licences in 2012. In fact, those documents and the testimony from Mr. Epp confirm that Mr. Haubold wrote to the Regional Manager in September 2012 and referred to Mr. Fox as his point of contact regarding the Regional Manager's August 13, 2012 letter. Mr. Fox also participated in a conference call and site visit with Mr. Epp and Mr. Haubold in 2012.

The Regional Manager's submissions

[52] The Regional Manager maintains that Site 1 on the site visit map is, and has always been, the correct location for the Loveridge Spring POD. He submits that all of the Appellants have failed to prove otherwise.

[53] The Regional Manager also submits that the conditions in CWL5711 have never been fulfilled. First, there has been no evidence of water at Site 1, the Loveridge Spring POD location, since at least the 1980s. Further, there is no evidence of any irrigation in the area. The works authorized by the licence were never built, and no beneficial use of the water has been demonstrated. He submits that, for those reasons, cancelling CWL51177 was a reasonable exercise of his discretion under section 23 of the *Water Act*.

[54] Mr. Epp and the Regional Manager testified in support of the Regional Manager's submissions. They both referred to and relied on many documents from Ministry records, which were submitted in evidence to support the Regional Manager's position. They pointed out that those documents are mainly public records.

[55] Mr. Epp is a Water Stewardship Technician with the Ministry. He has a degree in natural resource sciences and six to seven years of experience related to his position. In his position with the Ministry, his duties include dealing with sections 18 to 20 of the *Water Act*; that is, amendments and apportionment of existing licences. He said that, at times, he also works on new licence applications. For those, he investigates to establish if there is a water supply which can be licenced, and then he recommends refusal or acceptance of applications based on the available water supply.

[56] At the hearing, Mr. Epp was qualified as an expert in identifying locations based on the Global Positioning System ("GPS") and other mapping technologies that are used as a tool for field locations with respect to water licences. Mr. Epp has taken courses in using mapping software to make maps, and has had several employment experiences requiring him to use hand held GPS units for mapping and identifying specific locations. He is also experienced in using the Universal Transvers Mercator ("UTM") coordinate system for locating sites.

[57] Mr. Epp testified that he first reviewed the CWL51177 file in August 2012 as part of the Ministry's effort to address water record backlogs, and especially to bring its water records up to date with property ownerships. Mr. Epp said that, as part of his review of CWL51177, he reviewed Ministry records, spoke with several Ministry employees, and conducted site visits. He also reviewed water licence

maps, Ministry staff field notes, licence records, correspondence, licence applications, easements and other documents

[58] Mr. Epp stated that he scanned the Ministry's Water Rights Map and the licence plan for CWL51177, and digitized both. He added digital shapefiles, such as property ownership, points of diversion and streams. Mr. Epp said that the maps and figures, which are in the record, show that Loveridge Spring is a completely different source to the southwest of, and at quite a distance from, Strutt Spring, which is about 239 metres away. He also said that the Ministry's records confirmed that there had always been two separate licences for these two sources.

[59] Mr. Epp also testified about his site visits in 2012, and using the UTM as the coordinate system for his review of the locations in question. The UTM system provides for a unique number to be assigned to every square metre in BC. Mr. Epp said that he used the UTM coordinates for the Loveridge Spring POD to walk the area, searching for Loveridge Spring. He said that he did not locate any sign of a spring, any licensed works or any beneficial use of water at the site indicated in CWL51177. In addition, based on his review of the Ministry records, there never was any beneficial use at that location. Therefore, he recommended that CWL51177 be cancelled.

[60] When Mr. Ackerman received the letters and notices from the Ministry, he provided Mr. Epp with coordinates for where, the Ackerman Appellants argue, Loveridge Spring is located. Mr. Epp said he investigated the site at those coordinates. According to Mr. Epp, that site was not a spring. Rather, it was a run-off channel. Mr. Epp said that, when he was at that location, water was not flowing, but there was a trace amount of standing water there. Further down, he also noticed a dugout. Based on his observations, Mr. Epp determined that Site 2 was not a spring, and the source at Site 2 did not have sufficient water to support irrigation. In addition, Mr. Epp said that Site 2 was too far away from the Loveridge Spring POD, about 100 meters away.

[61] In response to the Ackerman Appellants' argument that CWL51177 could be amended in the same way as CWL51315 was amended, Mr. Epp distinguished the two circumstances. He explained that the works authorized under the original Strutt Spring licence (CWL51315) were actually built in a different place than what was first authorized under the licence. Mr. Epp stated that the PVC pipeline described by Mr. Loveridge was surveyed, and an easement dated November 22, 1978 was put in place for it.

[62] Mr. Epp also explained that in 1985, CWL51315 was replaced by CWL62264 after a transfer of appurtenancy to Lot A of Lot 2551. Then in 1991, when the Ministry reviewed some of its records, the Ministry amended the Strutt Spring water licence, now CWL62264, to show the pipeline location to be consistent with its location in the survey for the easement indicated on Plan A13915 at the Land Titles Office. Mr. Epp said that there was, however, no change in name for the POD or the source of water. The POD was still Strutt Spring, and the rest of the licence remained the same.

[63] Mr. Epp said that, ordinarily, amendments for distances of 100 meters or more would not be considered, because another person or other owners might be

affected by a change. However, in this case, the Ministry made the amendment because it reflected the actual location of constructed works and ongoing beneficial use, and it conformed to the Land Titles Office's records.

[64] In contrast, Mr. Epp said the works under the licence for Loveridge Spring were never built, at either Site 1 or Site 2. Therefore, an amendment would not be appropriate because the Ministry has no evidence to support a conclusion that Site 2 is really the POD for Loveridge Spring, and in any event, no works were constructed.

[65] Mr. Epp also responded to the Haubold Appellants' argument that Loveridge Spring is actually at Strutt Spring, and that Loveridge Spring was renamed to Strutt Spring. Mr. Epp used the coordinates for both the Loveridge Spring POD and the Strutt Spring POD, and determined that they are not the same. Mr. Epp pointed out that there is a distance of about 239 meters between the two locations. Mr. Epp also referred to Ministry records which indicated that Mr. Botham inspected both the Loveridge Spring and the Strutt Spring sites with Mr. Loveridge in 1977. Mr. Botham prepared separate field notes for each site visit; that is, one for Loveridge Spring, and another for Strutt Spring.

[66] Based on Mr. Botham's field notes and the Engineering Reports for each of Mr. Loveridge's applications, Mr. Epp noted that the Strutt Spring domestic application was about 300 feet away from the Loveridge Spring irrigation application. He also noted that, in the reports, the points of diversion are clearly shown as separate water sources in two different locations. Mr. Epp then referred to the locations of the PODs in the two licence documents, where they were added to the Water Rights Map and, most recently, in the Ministry's digital record. According to Mr. Epp, all of these records show that the Loveridge Spring POD and the Strutt Spring POD have always been two separate sources of water in two separate locations some distance apart, and in two different water licences for two separate uses.

[67] Mr. Epp also said that he reviewed a July 1989 inspection report by Al Hare, Technician, Water Management Program in the Ministry. In June 1989, the Haubolds had applied for a water licence on Loveridge Spring for domestic uses. Mr. Hare's notes indicate that, in July 1989, he inspected the area with Mr. Haubold. Mr. Hare determined that there was no flow from Loveridge Spring, and Loveridge Spring was nonexistent. Mr. Hare noted that any flow at that location was likely from a leak or tap into the pipeline from Strutt Spring. Because there was no flow where Loveridge Spring POD was located, Mr. Hare recommended that Mr. Haubold's application be investigated as showing the source as Strutt Spring, instead of Loveridge Spring. However, that 1989 application by the Haubolds was denied in May 1991, because Strutt Spring was fully recorded. Mr. Epp said that the records indicated that there was not enough water for more licencing at that time, and this has not changed.

[68] With respect to Mr. Haubold's assertions, Mr. Epp stated that Site 3 is not the Loveridge Spring POD, and it never was. Also, based on his review of the records, there was never any change of name as Mr. Haubold submits. Rather, there were only changes to the Strutt Spring licence, as described above.

[69] In addition, Mr. Epp said that, based on his review of the Ministry's records, and conversations with Ministry staff, no irrigation works were ever found during any Ministry staff site visits at or near Site 1. He confirmed that this was still the case during his July 16, 2013 site visit, and his previous visits on September 14, 2012, September 24, 2012, October 4, 2012 and November 7, 2012. He testified that, in his review of the Ministry's records, there also were staff visits in 1989 and in 2009. During those visits, no irrigation works were noted at or near Site 1, and no crops were seen.

[70] The Regional Manager testified about his review of the Ministry's records, including information from Mr. Epp about his site visits and Mr. Epp's technical reports. The Regional Manager also referred to his site visit on July 16, 2013.

[71] With respect to the Ackerman Appellants' submissions, based on his own observations and his review of Mr. Epp's reports, the Regional Manager stated that the drainage at Site 2 was ephemeral and is not a viable source of water for *Water Act* licensing purposes, and there is not even enough for domestic purposes.

[72] The Regional Manager also said that licences can be amended if there are changes to flow, capacity and locations, but only if the location change is within five to ten metres, and that would be reflected in amended drawings. But, if the locations are 100 metres apart, as with Site 1 and Site 2, that would involve a new licence application for a new source, because the sites would not be considered as the same source, even if the first source somehow resulted in the second source. The Regional Manager advised that this is how water has been allocated in last 100 years.

[73] The Regional Manager explained that, as more accurate locations are developed, such as through surveys for easements, the Ministry tries to update its files, as it did with the Strutt Spring POD. The POD for Strutt Spring had not been moved or physically changed. Only the licence plan was amended to conform to the pipeline location, as surveyed and shown in the related easement filed at the Land Titles Office.

[74] As for the Haubold Appellants' submissions, the Regional Manager referred to his review of the records, the technical and field information from Mr. Epp, and his own site visit. The Regional Manager maintained that Strutt Spring is clearly a different source to the northeast of, and at a considerable distance from, Loveridge Spring. The two springs and their respective PODs have been identified as separate from the time of the initial applications.

[75] The Regional Manager also testified about his review of the records to determine if any of the conditions in CWL51177 had been met. Based on that review and reports from Mr. Epp, including the site observations in 2012, the Regional Manager determined that none of the required works were constructed, and there had been no beneficial use of water under the licence. Therefore, he proceeded with the process to cancel the CWL51177, and then issued his November 2012 Order.

The Panel's Findings

Whether the Ministry's records correctly identify the site of the Loveridge Spring POD

[76] The Panel will first address the parties' different answers to the question: "Where is Loveridge Spring?" Both groups of Appellants claim that Loveridge Spring is neither where the Ministry claims it is, nor where the Ministry's records indicate it has been since CWL51177 was issued in 1978.

[77] First, with respect to the Ackerman Appellant's contention that Site 2 is the location for the Loveridge Spring POD, the Ackerman Appellants submitted only the evidence of Mr. Loveridge. That evidence was basically Mr. Loveridge's memory from a walk about his property in the late 1970's, a kitchen table sketch developed with Mr. Botham, and the July 16, 2013 site visit. The Panel finds that this testimony is unreliable and inaccurate, because Mr. Loveridge admitted that there was no precision in 1977 in identifying the location of Loveridge Springs or how it was recorded on the licence application. Mr. Loveridge stated that he and Mr. Botham sat at the kitchen table to sketch the location, but he also said he had no real recollection of that visit. As for Mr. Loveridge's statement that Site 2 is where he intended the Loveridge Spring POD to be, the Panel finds that he provided no basis for that opinion.

[78] In contrast, the Panel notes that the Regional Manager relied on Ministry records dating from the late 1970s, numerous site visits by various Ministry water section staff, field notes and recent investigations by Mr. Epp. The Panel finds that this evidence is both reliable and accurate. According to that evidence, throughout the decades the location of the Loveridge Spring POD did not change in the Ministry's records.

[79] In addition, Mr. Epp testified that he investigated the Ackerman Appellants' location for Loveridge Spring. He and the Regional Manager both found that Site 2 did not have enough water for *Water Act* purposes. The Panel finds that the Ackerman Appellants submitted nothing to contradict this evidence. Based on Mr. Epp's evidence, the Panel finds that, even if Loveridge Spring is where the Ackerman Appellants claim it to be, there is not enough water to support any *Water Act* licencing.

[80] As for the Haubold Appellants, who have owned property in this area since the 1980s, they provided no evidence whatsoever that the Loveridge Spring POD was renamed as the Strutt Spring POD, or that Site 3 was ever called anything but Strutt Spring. Mr. Haubold's testimony regarding what he claimed was Loveridge Spring, and where he thought Strutt Spring was located, was unclear. The locations he described did not correspond to any of the documents entered into evidence by the Regional Manager. Mr. Haubold also provided no evidence, and particularly no records, surveys, or other documents such as maps, to support his contentions regarding the location of the Loveridge Spring POD or the Strutt Spring POD.

[81] The Haubold Appellants also provided no evidence about what they claim was a change in name. Mr. Haubold also did not indicate that, as purchasers of rural

property, they looked into existing water licences, the locations of water sources, the history of water rights in the area, or even provincial water laws.

[82] In fact, the Panel finds that the evidence is uncontradicted that Mr. Loveridge applied for two separate water licences, at two distinct locations that were distant from one another, for two entirely different purposes. The Ministry issued one licence for Loveridge Spring for irrigation purposes, and an entirely separate licence for Strutt Spring for domestic purposes. Just before CWL51177 was cancelled, there continued to be two separate licences for two separate locations for two different purposes, and for different amounts of water. The only change that had occurred since the two licences were issued in 1978 was the minor location adjustment for the Strutt Spring POD to conform to a survey and land title records.

[83] Having considered all of the evidence, the Panel finds that the Regional Manager's evidence regarding the location of Loveridge Spring is far more compelling than that of either the Ackerman Appellants or the Haubold Appellants. The Panel thus finds that the Ministry's records have correctly identified the site for the Loveridge Spring POD for several decades.

Whether there is any evidence of the irrigation works or the beneficial use of the water, as required in the conditions of CWL51177.

[84] Next, the Panel will consider whether there is any evidence of the irrigation works or beneficial use of the water, as required by CWL51177.

[85] Under section 23(2) of the *Water Act*, a licence and all rights under it are subject to cancellation if certain requirements are not met. For example, under subsection (a), a licence may be cancelled if the licensee fails for three successive years to make beneficial use of the water for the purpose and in the manner authorized under the licence. Under subsection (b), a licence may be cancelled if the licensee fails, within the time specified, to construct the works authorized under the licence. Similarly, under subsection (f), a licence may be cancelled if the licensee fails to comply with a term or condition of the licence.

[86] The Panel finds that, even if Loveridge Spring was located somewhere other than where the Ministry's records show it to be, both groups of Appellants failed to demonstrate that any of the conditions in CWL51177 were met, or that there was any beneficial use under CWL51177 at any time.

[87] The Ackerman Appellants did not establish that there were any irrigation works or beneficial use at either Site 1 or Site 2. Their own witness, Mr. Loveridge, admitted that he did not construct any irrigation works or irrigate any fields, and there was no evidence that any subsequent owners did so.

[88] Mr. Haubold also admitted that water was not used for irrigation, and no irrigation works were put in place on the properties owned by the Haubold Appellants.

[89] Additionally, Mr. Epp testified that, during his site visits, he found no evidence of constructed works, irrigation, or beneficial use as required under CWL51177. Specifically, he noted no constructed irrigation works at either Site 1 or Site 2. From his review of the Ministry's records, notably field notes from staff site

visits and his own site visits, Mr. Epp determined that there was probably no water at the Loveridge Spring POD from at least 1989 to the date of cancellation.

[90] Based on this evidence, the Panel finds that the evidence clearly establishes that the conditions in CWL51177 were never met. The required works were not constructed, the water was not used for irrigation, and in fact, there was no beneficial use of the water for many years.

[91] In these circumstances, the Panel further finds that it is reasonable to cancel CWL51177 pursuant to section 23(2) of the *Water Act*.

DECISION

[92] In making this decision, the Panel has carefully considered all of the submissions and the arguments provided, whether or not specifically reiterated in herein.

[93] For the reasons provided above, the Regional Manager's Order is confirmed.

[94] The appeals are dismissed.

"Gabriella Lang"

Gabriella Lang
Panel Chair
Environmental Appeal Board
October 28, 2013