



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 NO. 2013-WAT-002(a)

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

BETWEEN:	Katrina Sigloch	APPELLANT
AND:	Assistant Regional Water Manager	RESPONDENT
AND:	Patricia and Richard Prescott	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board Loreen Williams, Panel Chair	
DATE:	August 14, 2013	
PLACE:	Kamloops, BC	
APPEARING:	For the Appellant: Berndt Sigloch For the Respondent: Philip Madeley For the Third Party: Patricia Prescott	

APPEAL

[1] Katrina Sigloch appeals a November 16, 2011 decision of Craig Beeson, the Assistant Regional Water Manager, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry") to issue Conditional Water Licence C125933 (the "New Licence") to Patricia and Richard Prescott, in substitution of Conditional Water Licence C052994 (the "Original Licence"). The New Licence authorizes the Prescotts to divert 500 gallons of water per day ("gpd") from McLeod Lake for domestic use, and 1,000 gpd for industrial (stock watering) purposes. The land upon which the water is to be used, and to which the New Licence is appurtenant, is Lot B, Sections 29 and 30, Township 18, Range 17, West of the 6th Meridian, Kamloops Division, Yale District Plan KAP70469 ("Lot B"). The Prescotts own Lot B, which is located approximately 6.5 kilometers south of Kamloops, BC, near Knutsville, and borders McLeod Lake.

[2] The Appellant, Katrina Sigloch, owns an adjacent property jointly with her father and mother, Berndt and Linda Sigloch, and her two sisters, Marianne and Anja. The Appellant's property is referred to in this decision as "Lot A". The Appellant argues that a portion of the 1,500 gpd of water allocated to Lot B in the New Licence should have remained appurtenant to Lot A, as Lot A was part of the land covered by the Original Licence.

[3] The Appellant learned of the decision to issue the New Licence by email on December 27, 2012, and commenced an appeal of the decision by Notice of Appeal dated January 2, 2013.¹

[4] 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* empowers the Board as follows:

- (8) On an appeal, the appeal board may
 - (a) send the matter back to the comptroller, regional water manager or engineer, with directions;
 - (b) confirm, reverse or vary the decision 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 Appellant seeks an order from the Board reversing the Respondent's decision to issue the New Licence. Alternatively, the Appellant seeks an order substituting the Original Licence with two licences: one water licence appurtenant to Lot A, allowing the diversion of 500 gpd for domestic and industrial purposes; and one conditional water licence appurtenant to Lot B, allowing the diversion of 1,000 gpd for domestic and industrial purposes.

[6] The Prescotts were added as Third Parties to this appeal.

BACKGROUND

[7] The Original Licence was issued in 1979 to David Clarke. It allowed the diversion and use of 1,500 gpd of water from McLeod Lake for domestic use, and was appurtenant to the property described as "that part of South East ¼ of Section 30, Township 18, Range 17, West of the 6th Meridian, lying north and east of McLeod Lake" (the "Original Property").

[8] In December of 1989, Sunny Hills Ranch Ltd. purchased the Original Property from Mr. Clarke. Douglas Haughton and Mary MacGregor were the principals of Sunny Hills Ranch Ltd.

[9] Sunny Hills Ranch Ltd. applied to subdivide the Original Property into three lots: Lots A, B and C.

[10] In December of 2001, the subdivision was registered. Ms. MacGregor was the registered owner of Lot B. Sunny Hills Ranch Ltd. was the registered owner of Lots A and C. The western boundary of each lot borders McLeod Lake.

¹ In a letter dated March 1, 2013, the Board accepted the Appellant's appeal as being filed within the statutory appeal period of "30 days after notice of the order being appealed is given".

[11] In February of 2001, Ms. MacGregor and Sunny Hills Ranch Ltd. submitted an "Application for the Apportionment" of the Original Licence. They sought a 100% apportionment of the rights and obligations under the Original Licence to Lot B only. At the time of the application, Sunny Hills Ranch Ltd., the owner of Lots A and C, consented to the apportionment application. According to the Respondent, the application "remained unaddressed" until conversations in 2009 between Ms. MacGregor and Ministry official Mike Edwards.

[12] In 2003, the Appellant, together with her other family members, purchased Lot A from Sunny Hills Ranch Ltd. All five members of the Sigloch family continue to own Lot A jointly. At the time of purchase, the Appellant knew that the Original Licence had not been apportioned between the subdivided properties. At some point shortly after the Siglochs' purchased Lot A, Ms. MacGregor asked for their consent to apportion the rights and obligations under the Original Licence to Lot B, but the Siglochs did not consent.

[13] The Appellant's father and mother, Berndt and Linda Sigloch, are the primary users of Lot A. They reside in Kamloops but travel to Lot A frequently. During the summer months, they tend the fruit trees that they planted on Lot A, and an annual vegetable garden. They do not have livestock on the property, nor a dwelling structure.

[14] In July of 2009, Ms. MacGregor submitted a statutory declaration in further support of her earlier Application for Apportionment of the Original Licence. In her statutory declaration, she described the historical and beneficial use of the Original Licence on the Original Property as having occurred solely on the portion of land that, upon subdivision, became Lot B.

[15] In 2010, the Third Parties, Mr. and Mrs. Prescott purchased Lot B from Ms. MacGregor. At the time of purchase, the Prescotts knew that the Original Licence had not been apportioned.

[16] On February 11, 2010, Ernie Scherly and Duane Wells, Natural Resource Officers with the Ministry, conducted a field inspection of Lots A and B as part of the licence apportionment application process. They completed a "Field Inspection Form – Water Licence Amendment [apportionment]" on that day. On that form, they identified the source of the water, the status of beneficial use, the licensed works, the appurtenant land, among other things. Under the heading "recommendations", Mssrs. Scherly and Wells write:

No visible use of water was noted on Lot A. No stock droppings were visible on this lot.

All water lines to the house and a garden area were noted on Lot B as indicated in a declaration completed by Mary McGregor [sic].

As it appears historical use of the water has been to the house on Lot B as well as a garden area and there were droppings from cows or horses on Lot B it is recommended that the full allocation of 1500 g/d be apportioned to Lot B.

The owners of Lot C who are also part of the original appurtenancy have signed off the apportionment application indicating they accept a zero apportionment.

[17] In a letter dated February 12, 2010 to the owners of Lot A (the Siglochs), Mr. Scherly advised that the Original Licence needed to be amended or cancelled due to the subdivision of the Original Property to which the licence was appurtenant. To determine whether the owners of Lot A "may be entitled to a portion" of the Original Licence, Mr. Scherly asked them to complete a specified part of the Beneficial Use Declaration that was attached to the letter. Mr. Scherly also explained in the letter that a fee was required for an amendment, as well as the obligations to pay any outstanding rentals. He then stated, "If you are not prepared to accept this obligation, please complete Section B to abandon your interest in the licence." No response to this letter was received by the Ministry.

[18] On November 16, 2011, Mr. Scherly prepared a Technical Report relating to the apportionment application. Mr. Scherly recommended that the Original Licence be apportioned to Lot B.

[19] In his decision dated November 16, 2011, the Respondent advised the Prescotts that he was issuing the New Licence allowing diversion and use of the 1,500 gpd by Lot B, in substitution of the Original Licence. He also advised that the New Licence was issued for "domestic and industrial (stock watering) purposes".

[20] The Appellant was unaware of the decision until December 27, 2012.

[21] According to the Respondent, McLeod Lake is fully recorded so no new water licences will be issued for the lake.

The Appeal

[22] The Appellant maintains that she did not receive notice of the apportionment application or notice that the respondent was considering that application. She contends that, as an owner whose property might be affected by any change to the Original Licence, she should have received notice of the apportionment application before the Respondent made his decision on November 16, 2011. Further, the Respondent's decision to give 100% of the water rights to Lot B, failed to take into account the interests of the Appellant, an owner of Lot A. In addition, she submits that an apportionment of water rights should have been made between Lot A and Lot B.

[23] The Respondent submits that, since this was an existing water licence, he was not required under the *Water Act* or the *Water Regulation* to give notice to parties like the Appellant. However, despite the fact that this was not required by the legislation, the Respondent notified the owners of Lot A, by mail, in the letter dated February 12, 2010. The Respondent received no response to that letter from any of the owners of Lot A.

[24] The Respondent submits that his decision of November 16, 2011 should be confirmed, as it was made after consideration of all relevant information and applicable legislation and policies. He says further that the decision was an appropriate exercise of discretion.

[25] The Prescotts submit that the decision to issue the New Licence to Lot B should be confirmed. They argue that the Respondent exercised his discretion appropriately by taking into account the necessary facts, and that his decision to issue the New Licence was correct.

ISSUES

[26] The Panel has considered the following issues:

1. Was the Respondent required to give the Appellant notice of the apportionment application prior to making his decision? If so, did he comply with that requirement?
2. Did the Respondent exercise his discretion appropriately when he considered the Application for Apportionment and issued the New Licence?

RELEVANT LEGISLATION

Water Act

[27] Section 1 of the *Water Act* includes the following definitions that are relevant to this appeal:

"domestic purpose" means the use of water for household requirements, sanitation and fire prevention, the watering of domestic animals and poultry and the irrigation of a garden not exceeding 1 012 m² adjoining and occupied with a dwelling house;

"industrial purpose" means any use of water in British Columbia designated by regulation as a use for industrial purpose, but does not include

- (a) the use of water for any of the other purposes defined in this section, or
- (b) the carriage or supply by a person of water to or for use by any other person;

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

"owner" means a person entitled to possession of any land, mine or undertaking in British Columbia, and includes a person who has a substantial interest in the land, mine or undertaking;

[28] Section 16(1) of the *Water Act* states:

- 16** (1) A licence, approval or permit that is made appurtenant to any land, mine or undertaking and any rights and obligations granted and imposed under the licence, approval or permit pass with a conveyance or other disposition of the land, mine or undertaking.
- (2) A person conveying or otherwise disposing of land, a mine or an undertaking to which a licence is appurtenant, or in respect of which an

approval or permit was issued or, in the case of a transmission of land, a mine or an undertaking to the personal representative or other person representing the owner, the personal representative or other person must give written notice of the conveyance or other disposition to the comptroller or regional water manager.

[29] Section 20 of the *Water Act* which addresses "apportionment of rights" under a licence. It states:

- 20** (1) If satisfied that no licensee's rights will be injuriously affected, the comptroller or the regional water manager may apportion the rights and obligations granted and imposed under a licence among the owners of the several parcels comprising the land to which the licence is appurtenant.
- (2) The comptroller or the regional water manager may issue, on the conditions the comptroller or regional water manager considers advisable, one or more new licences in substitution for a licence the rights and obligations under which are apportioned under subsection (1).

[30] Section 22.01 addresses Beneficial Use Declarations as follows:

- 22.01** (1) A licensee must submit to the comptroller, regional water manager or engineer a signed declaration in accordance with subsection (2) when directed to do this by the comptroller, regional water manager or engineer.
- (2) A declaration required under subsection (1) must
- (a) state whether the licensee has
 - (i) during the 3 years preceding the date of the declaration, made beneficial use of the authorized quantity of water for the purpose authorized under the licence,
 - (ii) during that period, diverted and used the water in the manner authorized under the licence, and
 - (iii) complied with all other terms and conditions of the licence,
 - (b) include any other information required by the comptroller, regional water manager or engineer, and
 - (c) be in the form required by the comptroller, regional water manager or engineer.

Water Regulation, B.C. Reg. 204/88

[31] The following sections of the *Water Regulation* were referred to by the Parties to the appeal in relation to the issue of notice.

Part 2 — Acquisition of Water Rights

Application for licence

- 2 (1) An application to the comptroller or regional water manager for a licence must be signed in duplicate by the applicant or his agent and shall include the following information:

...

Notice requirements

- 3 (1) The comptroller or regional water manager may require that the applicant place signed copies of the application in a secure manner at locations specified by the comptroller or regional water manager.
- (2) At a time or times the comptroller or regional water manager considers appropriate during consideration of an application for a licence, notice of the application shall be given to
- (a) any licensee or applicant for a water licence whose rights will not be protected by the precedence of his licence or application,
 - (b) any riparian owner whose rights may be prejudiced by the granting of the application,
 - (c) any owner whose property may be physically affected by the applicant's works, and
 - (d) any other person, agency or minister of the Crown whose input the comptroller or regional water manager considers advisable.
- (3) The comptroller or regional water manager may, in an appropriate case, require the applicant for a licence to publish notice of the application in a newspaper approved by the comptroller or regional water manager.
- (4) The time within which a notice of objection to the granting of an application for a licence may be filed under section 11 (1) of the *Act* is the 30 day period commencing on the day notice of the application is given.
- (5) A licensee, riparian owner or applicant for a licence who considers that his rights would be prejudiced by the granting of a licence and who satisfies the comptroller or regional water manager that he was not given notice of the application for the licence may file an objection to the granting of the licence at any time before issuance of the licence applied for.

[32] There are also a number of policies and procedures that were referred to at the hearing; in particular, section 2, subsection 03.02.03B (96.01.08, as amended) of the water program's "Policy and Procedures Manual" (the "Manual"), which establishes guidelines for Ministry staff dealing with "Apportioning of Water Rights". The relevant portions of the Manual are as follows.

Water Program Policy and Procedures Manual: Apportioning of Water Rights

Background

When appurtenant land has been subdivided it becomes necessary to amend the existing water rights and apportion those rights in a manner that is both fair and equitable. ... Apportionments can be categorized into two types: those cases which involve distributing water rights on subdivided land for irrigation or storage purposes and those cases where the diversion and use of water is tied to a structure or specific location on a property.

... in those cases where the licensed diversion and use of water is tied to a structure or specific site on a property, (ie. domestic, mining, power and some industrial purposes) the licensed quantity will be limited to that property where the structure or specific site is located. Unless there are over-riding reasons not to, water rights associated with irrigation licences shall be apportioned on the basis of current (ie. last 3 years) beneficial use.

Apportioning water rights for Conditional Water Licences

There are four options to be considered when apportioning water rights for irrigation purpose.

Option #1

Complete a final licence survey under Section 14 of the *Water Act* and apportion the water rights on the basis of established use under the authorized purpose

Determine the location and area of current (ie. last 3 years) beneficial use either by conducting a final licence survey or requiring the land owner to provide a plan along with a signed Declaration of Use Form. The water rights are then apportioned based on location and area of current beneficial use. This option is preferred when the established use is less than the licensed quantity and the total licensed quantity is being reduced.

Option#2

Apportion the water rights on the basis of established use plus potentially irrigable land

This option takes into consideration the total irrigated land area as well as potential irrigable areas. The area of the original lot containing both the area of historic use and potential use of irrigable land is calculated and water rights are then allocated proportionately to the newly created lots.

Option #3

Apportion the water rights on the basis of the total irrigable land area

The total irrigable land area of the original lot is measured and each of the new lots are apportioned a share of the water rights equal to its

share of the irrigable land contained within its boundaries. This is the appropriate choice when a portion of the original lot is unsuitable for farming and is not irrigable, ie. A rock outcrop at the edge of a field. If this non-irrigable land is subdivided off for housing, it would not be appropriate to assign a portion of the irrigation rights to these lots.

Option #4

Apportion the water rights in proportion to the subdivided lot sizes

A fairly straight forward process where the water rights, from an existing licence, are simply divided proportionally amongst the subdivided lots based on the area of the new lots, ie. a 100 ha parcel is subdivided into four 25 ha parcels, therefore, each of the parcels receive a 25/100th share or 25% of the existing water rights.

...

Applying Options

Although 4 options for apportioning water rights for both conditional and final water licences have been given, there may be exceptions where other methods can be used. For example, in cases where an application to apportion water rights on subdivided land includes a copy of an agreement signed by the owner(s) of the affected land, this agreement may form the basis of the apportionment decision.

It should be determined which persons hold a valid interest in lands within the appurtenancy of the original water licence and those individuals should be sent notices with a 30-day time period in which to respond. Notification may not be necessary in those cases where the nature of the existing land use is such that it would not be possible to use water on that portion of the land for the purpose or in the manner specified in the licence. The apportionment report should contain a recommendation on whether or not notification is required.

The approach to investigation of apportionments should have regard for:

...

-notification to anyone whose rights may be injuriously affected.

DISCUSSION AND ANALYSIS

- 1. Was the Respondent required to give the Appellant notice of the apportionment application prior to making his decision? If so, did he comply with that requirement?**

The Appellant

[33] The Appellant, Katrina Sigloch, did not attend the hearing. Mr. Berndt Sigloch, the Appellant's father, represented the Appellant and gave oral evidence at the hearing.

[34] Mr. Sigloch referred to the notice provisions set out in section 3(5) of the *Water Regulation* and submitted that, as owners of Lot A, the Respondent should have notified all of the members of the Sigloch family about the Application for Apportionment before making his decision. He submits that, as owners of Lot A, he and his family were licensees whose rights might not be protected and “who considers that his rights would be prejudiced” by the apportionment of the Original Licence.

[35] Mr. Sigloch testified that his daughter learned of the November 16, 2011 decision over a year after it had been made (on December 27, 2012). To the best of his knowledge, none of the other members of the Sigloch family who own Lot A received any notice from the Respondent. As soon as they learned of the decision, his daughter appealed it.

The Respondent

[36] The Respondent submits that section 3(5) of the *Water Regulation* only relates to applications for the issuance of new water licences; it does not apply to the apportionment of existing water licences. The Respondent submits that there is no statutory requirement to notify land owners in the circumstances of this appeal.

[37] Philip Madeley represented the Respondent at the hearing. He also provided the Ministry’s evidence in relation to the decision-making process as Mr. Beeson has retired.

[38] Mr. Madeley is currently the Section Head for Water Allocations in Kamloops. In his evidence, Mr. Madeley referred to the Manual. He explained that this Manual provides guidance for assistant regional water managers when they consider applications for the apportionment of water licences.

[39] Despite his submission that the notice provisions in the *Water Regulation* do not apply in the circumstances of this case, Mr. Madeley stated that his office did notify the owners of Lot A of the Application for Apportionment. In support, he referred to Mr. Scherly’s February 12, 2010 letter addressed to Berndt, Linda, Katrina, Marianne and Anja Sigloch, the owners of Lot A. Mr. Madeley explains that the Ministry obtained the Appellant’s mailing address by conducting a title search of Lot A. The letter was sent by regular mail to the Appellant’s address in Kamloops. The letter included a Beneficial Use Form to be completed by the owners of Lot A. Mr. Madeley stated that the Ministry’s records do not indicate that the letter was returned as “undelivered”. There was no response to the letter received from the Appellant.

[40] Although the Appellant says that she did not receive the letter, the Respondent argues that it does not mean that the Ministry failed to provide notice to the Appellant. The Respondent reiterates that it is not required to do more than notify parties by regular mail.

The Third Parties

[41] Mrs. Prescott attended the hearing as a representative of the Third Parties. Mr. Prescott did not attend the hearing. The Prescotts made no submissions on the issue of notice to the Appellant.

The Panel's Findings

[42] The Panel agrees with the Respondent that section 3(5) of the *Water Regulation* does not require notice to be given to parties whose rights, and whose land, may be affected by of the apportionment of a water licence. Section 3 falls under Part 2 of the *Water Regulation* titled "Acquisition of Water Rights". Section 2 of that part is titled "Application for licence", section 3 is titled "Notice requirements" and section 3.1 is titled "Quick licensing procedures". Given the context within which section 3 (notice requirements) falls, the Panel finds that this part of the *Water Regulation* deals with applications for new water licences. Although the apportionment decision in this case resulted in the "New Licence", that licence was issued in substitution of the Original Licence as a consequence of the apportionment. It is a different factual situation, and the decision is based upon different considerations under the legislation.

[43] However, that does not mean that there was no legal obligation on the Ministry to notify the owners of Lot A. The Panel notes that the water program's Manual states:

Applying Options

It should be determined which persons hold a valid interest in lands within the appurtenancy of the original water licence and those individuals should be sent notices with a 30-day time period in which to respond. Notification may not be necessary in those cases where the nature of the existing land use is such that it would not be possible to use water on that portion of the land for the purpose or in the manner specified in the licence. The apportionment report should contain a recommendation on whether or not notification is required.

The approach to investigation of apportionments should have regard for:

...

- notification to anyone whose rights may be injuriously affected.

[Emphasis added]

[44] This Manual provides guidance to regional managers faced with an apportionment application. As is evident from the above, the Manual recommends that notice be given to individuals, such as the owners of Lot A, who hold land "within the appurtenancy of the original water licence".

[45] The Panel finds that, while not strictly required to do so by the *Water Regulation*, the Respondent was obliged to notify the Appellant as part of the general rules of procedural fairness, as is captured by the Manual, because the Appellant's rights as a land owner might be affected by the Application for Apportionment of the Original Licence.

[46] The Panel also finds that there was an attempt to notify the owners of Lot A. The Ministry's letter dated February 12, 2010 was sent to the mailing address listed on the land title search for Lot A. This is the same address used by the Appellant at the time of this appeal. While the Appellant's evidence is that no letter (notice) was

received, the Panel finds that this notification by regular mail was reasonable in the circumstances. In particular, at that time, there was no clear indication that the rights and obligations under the Original Licence had been exercised on Lot A, or by the owners of Lot A. Thus, there was no evidence that the owners of Lot A might be affected by the apportionment.

[47] Finally, as a result of this appeal hearing, the Appellant (on behalf of the owners of Lot A) has had notice of the Respondent's decision, as well as an opportunity to make full submissions on whether the water rights and obligations under the Original Licence should have been apportioned 100% to Lot B. Consequently, this hearing has cured any defects in the Respondent's notification procedure.

2. Did the Respondent exercise his discretion appropriately when he considered the Application for Apportionment and substituted the Original Licence with the New Licence?

The Appellant

[48] Mr. Sigloch testified that, when he participated in the purchase of Lot A in 2003, he hoped that the property would become a retirement property on which he would build a house and have a vegetable garden and some fruit trees. At the time of purchase, Mr. Sigloch knew that Lot A did not have a separate water licence. He understood that the Original Licence had been issued for the larger, unsubdivided Original Property. While he hoped that he would get some water rights, he knew that there was no guarantee that this would occur.

[49] Mr. Sigloch recalls a conversation with the previous owner of Lot B, Ms. MacGregor, shortly after he bought Lot A, in which she asked him to consent to the apportionment of water rights to Lot B. He did not agree to her request. Hearing nothing further about the matter, Mr. Sigloch assumed that the matter was "at an end". He states that, at that time, he was very busy with his work and did not pursue the matter further.

[50] Since 2003, the Sigloch family members have planted some fruit trees, some lilac shrubs for shade, and have created a vegetable garden (approximately 20 x 30 feet in size) in which they grow vegetables each year. Mr. Sigloch and his family members use the property as a daytime retreat. In his evidence, Mr. Sigloch states that, for a variety of reasons, he has no plans to build a dwelling on the property. The only structure currently on Lot A is a 12 x 24 foot open barn structure. He has tentative plans to build a more substantial structure in the future.

[51] In 2003, Mr. Sigloch dug a trench at the lake edge to get water, by bucket, for his vegetable garden and fruit trees. He also dug a well 267 feet deep and installed a hand pump. He installed two one-thousand gallon water tanks for storage. Mr. Sigloch states that he does not currently fill the tanks, but could do so by paying to have them filled by a water truck, or by pumping them from the well. Mr. Sigloch elected not to install a pump and draw water from the lake because he was unsure about the status of the water licence.

[52] The well provides 2.5 gallons per minute, but it is time-consuming and very hard work. Mr. Sigloch advises that it takes him approximately three minutes to pump 2.5 gallons of water using the manual pump. He states that it is easier for him to fill containers of water at his home in Kamloops, and drive 12 kilometers to Lot A, than it is to pump water manually on site.

[53] Mr. Sigloch agrees that he is not limited to manual pumping; however, since there is no electrical service to the property, and it is very costly to obtain, he would have to purchase a generator at a cost of approximately \$8,000 to have power assisted pumping of water from the well.

[54] If Mr. Sigloch were to obtain an apportionment of the Original Licence and pump water from the lake, he states that he would have to purchase a gas powered pump, a firefighter's pump, or a solar-powered pump to put in the lake. He would need approximately 300 feet of piping from the lake to his property since the lake level has dropped, and would require a distribution box to split the line between the vegetable garden, fruit trees and other uses on the property. He was not sure of the total cost to implement those works.

[55] At some point after learning of the Respondent's decision to apportion 100% of the water covered by the Original Licence to Lot B, the Appellant spoke to the Prescotts in an attempt to reach a resolution. The Appellant proposed that the Original Licence be shared such that Lot B would have 1000 gpd, and Lot A would have 500 gpd. This attempt to resolve the matter was unsuccessful.

[56] Mr. Sigloch took issue with some of the comments made in the Field Inspection Form completed by Mr. Scherly and Duane Wells on February 11, 2010. In particular, he found the statement "No visible use of water was noted on Lot A. No stock droppings were visible on the lot" to be inaccurate because there were fruit trees on the lot, and troughs near the lake and the barn. Mr. Sigloch also states that, since the inspection took place in the month of February, it would have been impossible for the inspectors to have seen the vegetable garden, which is the Sigloch's principal use of the property.

[57] Mr. Sigloch also refers to the four options set out in the water program's Manual regarding apportioning water rights. Mr. Sigloch submits that the Respondent failed to consider options #1, #2 and #4.

[58] Option #1 states:

Complete a final licence survey under Section 14 of the *Water Act* and apportion the water rights on the basis of established use under the authorized purpose

Determine the location and area of current (ie. last 3 years) beneficial use either by conducting a final licence survey or requiring the land owner to provide a plan along with a signed Declaration of Use Form. The water rights are then apportioned based on location and area of current beneficial use. This option is preferred when the established use is less than the licensed quantity and the total licensed quantity is being reduced.

[59] Mr. Sigloch contends that the vegetable garden and fruit trees on Lot A should have constituted beneficial use, and should have been considered by the Respondent in the apportionment decision.

[60] Mr. Sigloch states that the Respondent should also have considered option #2:

Apportion the water rights on the basis of established use plus potentially irrigable land

This option takes into consideration the total irrigated land area as well as potential irrigable areas. The area of the original lot containing both the area of historic use and potential use of irrigable land is calculated and water rights are then allocated proportionately to the newly created lots.

[61] Mr. Sigloch states that this option requires the Respondent to consider potential irrigable areas, historical use, and potential use on the newly created lots. Mr. Sigloch has plans for greater use of Lot A, therefore, "potential use" was not considered.

[62] Finally, Mr. Sigloch relies upon option #4:

Apportion the water rights in proportion to the subdivided lot sizes

A fairly straight forward process where the water rights, from an existing licence, are simply divided proportionally amongst the subdivided lots based on the area of the new lots, ie. a 100 ha parcel is subdivided into four 25 ha parcels, therefore, each of the parcels receive a 25/100th share or 25% of the existing water rights.

[63] Mr. Sigloch submits that this is the fairest option in this case. The Respondent should have apportioned one third of the Original Licence to Lot A (ie., 500 gpd), since the Original Property with 1,500 gpd was subdivided into three, roughly equal, lots.

[64] By failing to consider those options in relation to the apportionment of the Original Licence between Lots A and B, the Appellant submits that the Respondent failed to exercise his discretion fairly.

The Respondent

[65] Mr. Madeley did not consider the application for apportionment personally. Mr. Beeson, the Assistant Regional Water Manager at the time, made the decision now under appeal. In Mr. Madeley's view, the Respondent exercised his discretion appropriately in reaching that decision.

[66] Mr. Madeley explains that decisions relating to the apportionment of water licences are very challenging, hence the development of the Manual. Mr. Madeley sought to clarify that the guidelines, and in particular options #1, #2 and #4, as referred to by Mr. Sigloch, specifically relate to applications for the apportionment of water licences for irrigation purposes, which is not the case in this appeal. In this case, the application related to the apportionment of a water licence for domestic and industrial purposes.

[67] Mr. Madeley also submits that, when it comes to the apportionment issue in this case, the Board should focus on the overarching principles set out in the “Background” section of the Manual, rather than on the specific options listed. In particular, he submits that the focus should be on the principle that the use of water be tied to a structure or specific location on a property. He states that it is the Ministry’s policy to favour the granting of water rights to structures, or specific sites, based on the historical and beneficial use.

[68] From his review of the file, Mr. Madeley believes that the Respondent relied on many pieces of information when he exercised his discretion and reached the apportionment decision, including:

- the statutory declaration from Ms. MacGregor, made on July 9, 2009, regarding the historical and beneficial use of the Original Licence, which states at paragraph 12: “Beneficial use has only occurred on Lot B, Plan KAP70469”;
- the observations from the field inspection contained in the Field Inspection Report completed by Mr. Scherly and Mr. Wells;
- the conclusions in the Technical Report completed by Mr. Scherly that beneficial use continued on Lot B in accordance with the terms of the Original Licence;
- that the owners of Lot C had declared no interest in the water licence;
- information from the Prescotts about their current and future use of the water under the Original Licence on Lot B; and
- the conclusion that the owners of Lot A, the Siglochs, were not interested in apportionment because he had received no response from them to the letter of February 12, 2010.

[69] Based on this information, Mr. Madeley submits that it was reasonable to conclude that the historical and beneficial use of the Original Licence was tied to the dwelling and livestock activities located on Lot B and, thus, to apportion the Original Licence 100% to Lot B.

[70] Mr. Madeley observes that the Respondent did not have a completed Beneficial Use Form from the owners of Lot A when he reached his decision. However, even if that form had been completed by the Appellant, it is unlikely that the Appellant would have demonstrated a beneficial use that would have led the Respondent to apportion some of the water licence to Lot A. Mr. Madeley suggests that the absence of a dwelling structure on Lot A to which the Original Licence was linked, a lack of evidence of historical beneficial use, and the fact that the Appellant had elected not to use water from the lake since 2003, were significant factors.

The Third Parties

[71] Most of the evidence of the Prescotts took the form of photographs of their activities on Lot B. It is clear that the Third Parties have done considerable work on their property, and that their activities require them to draw water from McLeod Lake under a water licence.

[72] Mrs. Prescott testified that, when she and her husband purchased Lot B from Ms. MacGregor, they expected that they would have a 100% apportionment of the Original Licence because the water had always been used by Ms. MacGregor for her

house, garden and livestock, on what became Lot B. Mrs. Prescott states that she knew that the owner of Lot C had no interest in the Original Licence. In 2013, she became aware that the Siglochs had an interest in a portion of the Original Licence.

[73] While there is no meter on the pump from the lake, the Prescott's estimate that they currently use all of the 1,500 gpd authorized by the Original Licence for their garden, lawns and livestock. She states that, in addition to the water from the lake, she and her husband use water from a well on their property for their domestic household uses.

The Panel's Findings

[74] The Panel finds that the Respondent considered information from a number of sources in reaching his decision, namely:

- The statutory declaration from Ms. MacGregor, the previous owner of Lot B, who solemnly declared that the beneficial use of the water licence had always occurred on the land located in newly created Lot B. Further, that it had been used every year for domestic use, watering lawns and gardens, and for stock watering.
- The Field Inspection Report prepared by Mr. Scherly and Mr. Wells on February 11, 2010 stating that:
 - there was no electrical service or dwelling on Lot A,
 - "no visible use of water" on Lot A,
 - "no stock droppings" on Lot A,
 - no evidence of water use from the lake in the form of a pump or pipes on Lot A,

and that:

- the licensed "works" (a jet pump and pipes) were observed on Lot B,
- "all water lines to the house and a garden area" were on Lot B,
- "historical use of the water has been to the house" and garden area on Lot B, and
- there were "droppings from cows or horses" on Lot B.
- The Technical Report written by Mr. Scherly and dated November 16, 2011, incorporates the results of the field inspection and other pertinent information, such as the lack of interest by the owner of Lot C to receive a portion of the water from the Original Licence.
- A letter dated January 21, 2010 from the Third Parties indicating their intention to apply for "farm status". This letter also set out their understanding that the Original Licence had always been apportioned 100% to the house on Lot B and that, without 100% of the water under that licence, they would have insufficient water to water their livestock. This was evidence of current and potential use of the Original Licence by Lot B.

- A Beneficial Use Declaration form that had been sent to the Siglochs with the February 12, 2010 letter, but had not been returned.

[75] The Panel finds that the Respondent exercised his discretion appropriately in apportioning 100% of the water rights under the Original Licence to Lot B, and in substituting the New Licence for the Original Licence.

[76] It is clear that reaching decisions about the apportionment of water licences can be a very challenging undertaking, particularly where, as in this case, no more water licences are available for McLeod Lake. It is because of such challenges that the Manual was created. The Panel finds that the overriding principle from the Manual is that water rights are tied to a structure or specific site, and should be apportioned on the basis of historical and beneficial use.

[77] In this case, as the Manual directs, the Original Licence fell into the category where "the diversion and use of water is tied to a structure or specific location on a property" and "... in those cases where the licensed diversion and use of water is tied to a structure of specific site on a property (ie. domestic...) the licensed quantity will be limited to that property where the structure or specific site is located. Unless there are over-riding reasons not to, water rights associated with irrigation licences shall be apportioned on the basis of current (ie. last 3 years) beneficial use."

[78] The Panel finds that the Appellant has not demonstrated an historical or beneficial use of the Original Licence on Lot A that is tied to a structure or specific location. In fact, the Appellant has elected not to use the water from McLeod Lake except by the bucketful during the summer months.

[79] The Panel finds that the evidence reveals that the historical beneficial use of the Original Licence was on Lot B. Since purchasing Lot A, the Appellant has not taken any steps to demonstrate a beneficial use of the Original Licence, such as: installing a pump or works to divert water from the lake, or constructing a dwelling which would necessitate domestic use of the Original Licence.

[80] The Panel finds that Mr. Sigloch's assertion that the Respondent should have considered "potential uses" of the land, as set out in option #2 of the Manual, is not applicable in this case. Option #2 clearly refers to irrigated land.

[81] In any event, the Panel is not convinced that "potential uses" – as those words are used by the Appellant - are sufficient to justify an apportionment in this case. There were no details, timelines or concrete plans provided in relation to Mr. Sigloch's "potential uses". The Panel finds that decisions in relation to the allocation of water rights, or the apportionment of existing water rights, cannot be based on vague plans for the future. The legislation is based upon a "use it or lose it" system. That is clear from section 22.01 of the *Water Act* (above), which sets out the requirements for a beneficial use declaration, as well as the following provisions of the *Act*:

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;

...

- 14 (1) When the time for completing the works authorized under a conditional licence expires or the licensee completes the works, the comptroller or the regional water manager may issue to the licensee a final licence authorizing the diversion and use of the quantity of water that the comptroller or the regional water manager finds to have been used beneficially for the purpose authorized under the conditional licence.

...

- 23 (2) The rights of a licensee under a licence are subject to suspension for any time ..., and a licence and all rights under it are subject to cancellation in whole or in part ... 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;

...

- (7) If an engineer or an officer reports in writing to the comptroller or a regional water manager ... that he or she examined the place of use referred to in the licence and found no indication of recent beneficial use of water in accordance with the licence, the onus lies on the licensee to prove that the licensee has complied with this Act, the regulations and the licence.

[Emphasis added]

[82] The Panel finds that the Appellant has not demonstrated any tangible plans for potential use such as plans to build a dwelling house or take on livestock which would necessitate use of the Original Licence.

[83] Mr. Sigloch also argues that the Respondent should have simply apportioned the Original Licence between Lots A and B, as suggested in option #4 of the Manual. The Panel finds that this approach fails to take into account the principle that water rights should be apportioned based on beneficial use tied to a dwelling or a specific site.

[84] Although the Manual is a document that has been created to guide decision-makers and is not law, the Panel finds that the considerations identified in the Manual reflect the focus of the legislation on beneficial use of the water. The Panel finds that there is no reason to deviate from the Manual in this case.

[85] For all of these reasons, and having reviewed the material submitted by all parties, the Panel agrees with the Regional Manager's decision under the *Water Act* and *Water Regulation* to apportion the water licence 100% to Lot B: the Panel finds that he exercised his discretion appropriately in the circumstances.

DECISION

[86] In making this decision, the Panel of the Environmental Appeal Board has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated here.

[87] For the reasons stated above, the Panel finds that the decision of the Respondent dated November 16, 2011 should be confirmed.

[88] The appeal is dismissed.

“Loreen Williams”

Loreen Williams, Panel Chair
Environmental Appeal Board

October 18, 2013