



Environmental Appeal Board

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DECISION NO. 2016-WAT-010(a)

In the matter of an appeal under section 105 of the *Water Sustainability Act*, S.B.C. 2014, c. 15.

BETWEEN:	Jack and Linda Chisholm	APPELLANTS
AND:	Assistant Water Manager	RESPONDENT
AND:	Byland Floors Ltd. and Donald Lancaster	PARTICIPANTS
BEFORE:	A Panel of the Environmental Appeal Board Gabriella Lang, Panel Chair Reid White, Member Lorne Borgal, Member	
DATE:	July 4-7 and 10-11, 2017	
PLACE:	Cranbrook, BC	
APPEARING:	For the Appellants: Oliver Thomaе For the Respondent: Meghan Butler, Counsel Johnny Van Camp, Counsel	
	For the Participants: Byland Floors Ltd. Donald Lancaster	Margaret Eaton Donald Lancaster and Leanne Colombo

APPEAL

[1] Jack and Linda Chisholm appeal the November 25, 2016 decision (the "Decision") of Thomas Cummings, Assistant Water Manager, Resources Authorizations – Water Stewardship, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), Nelson BC.

[2] In the Decision, the Respondent denied the Appellants' request to amend their Conditional Water Licence C68000 (the "Licence"). The Licence authorizes the diversion of water from Cameron Creek near Cranbrook BC for irrigation purposes. The requested amendment is to correct an alleged error in the Licence. The Appellants alleged that the Licence does not reflect the correct location of their authorized Point of Diversion ("POD"), which was authorized at the time of the original water grant in 1904. The Appellants also requested an amendment to the

Licence to authorize works that have historically been used for irrigation on their property (described below).

[3] The Appellants filed their appeal with the Board on December 9, 2016.

[4] The Board notified potentially affected persons of the appeal and offered them the opportunity to participate. Donald Lancaster and Byland Floors Ltd. accepted the opportunity. However, at the beginning of the hearing, Byland Floors Ltd. advised the Board that it would not be participating further in the hearing and it made no submissions in the appeal.

[5] The Environmental Appeal Board has the authority to hear this appeal under section 93 of the *Environmental Management Act* and section 105 of the *Water Sustainability Act* (the "Act"). Section 105(6) of the *Act* provides that, on an appeal, the Board may:

- (a) send the matter back, with directions, to the comptroller, water manager or engineer who made the order being appealed,
- (b) confirm, reverse or vary the order being appealed, or
- (c) make any order that the person whose order is being appealed could have made and that the board considers appropriate in the circumstances.

[6] The Appellants ask the Board to reverse the Respondent's Decision. They further ask the Board to, among other things, amend the Licence to move the POD back to its historic location on Cameron Creek (i.e., POD "A" as it is shown on the predecessor Licence maps before 1977), and to authorize the existing works on Sublot 13 of the Appellants' property.

[7] The Respondent maintains that what the Appellants claim is the historic location of the POD is no longer on Cameron Creek but is on a different stream - Heldon Brook. The Respondent further maintains that the works on Sublot 13 that the Appellants want to have authorized were never authorized and are located on Heldon Brook – not Cameron Creek.

BACKGROUND

[8] During the hearing of the appeal, the parties submitted binders of documents, maps and sketches to establish the locations of applied for and authorized water rights relevant to this appeal. To assist with understanding that evidence and this decision, the Panel has added Schedule "A" to this decision. Schedule A depicts the history of the relevant licences, maps and sketches that relate to the applicable water rights' applications and authorizations, all of which are from Ministry files. Not all the items in Schedule A are referred to below.

The Appellants' Property and Current Water Rights

[9] The Appellants own C5 Ranch in Cranbrook BC. They purchased the ranch in 2001. They describe C5 Ranch as one of the oldest and largest ranches in the area, dating from about 1902.

[10] Their property is comprised of Lot A, District Lot 331, Kootenay District Plan 15185 (the "Property"). Lot A is a consolidation of Sublots 12, 13 and 14 of District Lot 331. The configuration of the Sublots is shown on A.5 of Schedule A.

[11] Four conditional water licences ("CL") are appurtenant to the Property:

- a. The subject Licence, which authorizes the diversion of 57 acre feet per annum from Cameron Creek to irrigate 22.9 acres. (The authorized works and Licence conditions are set out, in detail, below.)
- b. CL67999, which authorizes the diversion of 76 acre feet per annum from Thos Creek to irrigate 30.3 acres. The authorized works are a pipe and irrigation system servicing Lot A.
- c. CL63154, which authorizes the diversion of 200 acre feet per annum from Cameron Creek to irrigate 80 acres. The authorized works are a diversion structure on Cameron Creek and rediversion structure on Thos Creek; pipe and irrigation system servicing Lot A.
- d. CL132172, which authorizes the diversion 4.546 m³ per day from Totten Spring for stockwatering. The authorized works are diversion structure, pipe and troughs servicing Lot 12246.

[12] Each licence has a map attached showing the stream on which the water right is authorized, the POD for the water right, and appurtenant property lot numbers.

The Licence

[13] The water rights in the Licence were originally granted on January 5, 1904 as a Grant of Water Rights. That grant provided the following description of Cameron Creek: "a creek which rises west of Lot 331 and sinks on the Cassynayook Indian Reserve" (the "Reserve") [A.1 - Schedule A].

[14] The Licence was issued on May 9, 1988 to Lawrence Michael Belway, who sold the Property to the Appellants. The Licence authorizes the licensee to divert and use water as follows:

- (a) The stream on which the rights are granted is Cameron Creek, with a re-diversion of water from Thos Creek.
- (b) The points of diversion and rediversion are located as shown on the attached plan.
- (c) The date from which this licence shall have precedence is 5th January, 1904.
- (d) The purpose for which this licence is issued is irrigation.
- (e) The maximum quantity of water which may be diverted is 57.0 acre feet per annum.

- (f) The period of the year during which the water may be used is 1st April to 30th September.
- (g) The land upon which the water is to be used and to which this licence is appurtenant is Lot A of Lot 331, Kootenay District, Plan 15185, of which 22.9 acres may be irrigated.
- (h) The works authorized to be constructed are diversion structures, pipe and sprinkler system, which shall be located approximated as shown on the attached plan.
- (i) The construction of the said works has been completed and the water is being used. The licensee shall continue to make a regular beneficial use of the water in the manner authorized herein.
- (j) This licence is issued in substitution of Conditional Water Licence 48458.

[15] The Licence map indicates a POD "W" on "Cameron Creek" (PD23413) and a point of re-diversion "X" on Thos Creek (PD23402) [A.15- Schedule A].

Appellants' Amendment Application

[16] The Appellants describe their ranch as mostly agricultural land reserve, with all the irrigated portion lying within that reserve. The Appellants raise approximately 130 cattle, which are fed hay grown on just over 20 acres in the northwest quadrant of their Property.

[17] They stated that their northwest field, in Sublot 13, was originally partly irrigated by flood irrigation; however, it was later irrigated using a pond, pump house and other infrastructure located next to the stream running through Sublot 13 and near the northwest hay field. Mrs. Chisholm testified that, based on her research, a previous owner (Mr. Dearden) put that infrastructure in place in the mid-1960s.

[18] The Appellants irrigated the northwest field using that infrastructure until they were stopped by the Ministry in 2014. They stated that, in 2014, there was a lack of water for irrigation in the area, and especially from the stream servicing the pond and pump house. This led to disputes with upstream water licensees and users, including Mr. Lancaster.

[19] In May 2015, after field inspections, the Ministry advised the Appellants that their pond, pump house and other infrastructure were not authorized by any of their licences. The Ministry also advised that they did not have any precedence rights over upstream licensees on that stream.

[20] The Appellants testified that it would not be economically viable for them to truck in hay to feed the cattle they raise, and that they considered alternatives to the pond and pump house irrigation system. For example, they considered using the irrigation pipe serviced by their other licences, CL67999 and CL63154. However, they determined that the pressure and volume carried by that pipe would not be sufficient to cover the northwest field in addition to the area it serves currently.

[21] They also considered constructing new works to the northwest field from their other licensed sources. However, as the northwest field is approximately 1.2 kilometres away from their other licensed PODs, the Appellants stated that it would be costly to build new works. Further, it would place a barrier (a pipeline or ditch) across parts of the Property that are used for other purposes.

[22] The Appellants researched the history of their licences and the historic water use on the Property. They obtained copies of Ministry records and discussed the licensing history with Ministry staff. Based on this research, the Appellants concluded that the Licence was incorrect. They, therefore, applied to the Ministry for an amendment to the Licence.

[23] On May 5, 2015, the Appellants submitted a Water Licence Amendment and Change of Works application (the "Application"). In the Application, the source for the Licence is cited as Cameron Creek. The Appellants described what they wanted, and why, as follows:

This license shows no works but there is a holding pond, pump, pump house, pipes and sprinkler system. I have been here for 14 years and the previous owner for approximately 16 years and the works have always been there. There were changes made years ago that we just became aware of. We are wanting to get everything put as it should be so that we don't encounter any future issues. The license has been in effect since 1904 and as far as I am aware there has always been works on this license but not listed correctly.

[24] In the Application, the Appellants also indicated that no new works are required, and no other lands would be physically affected by the works.

[25] The Application described the land where the water is used as "22.9 AC of SL 12 13 14 of L331 KOOTENAY DIST PLAN X40 EXC CPR R/W (PLAN 524RI) & HWY 3 (PLAN R178)." The details regarding the purpose on record for the Licence is shown as:

Purpose: irrigation

Quantity: 70,308.36 m³/yr

Irrigated area: 9.267 ha.

[26] In the Application, the Appellants did not state the exact changes to the Licence that they wanted. Based on the evidence submitted at the hearing, including the Appellants' submissions to the Respondent made prior to the Decision, the Panel finds that, when they applied to "get everything put as it should be", they were applying for the following amendments to the Licence:

1. Restore the location of POD "W" (PD23413) authorized by the Licence on Cameron Creek to the correct location on what they refer to as "lower" Cameron Creek on Sublot 13, with corresponding corrections to the Licence map, and maintain the priority date of January 5, 1904.

2. Recognize the pond, pump, pump house, pipes and sprinkler system as existing works, which the Appellants were using on that part of "lower" Cameron Creek running through Sublot 13.

[27] The Panel notes that, in their submissions and evidence, the Appellants referred to the stream running through Sublot 13 as "lower" Cameron Creek. As the Panel discusses later in this decision, "lower" Cameron Creek is, in fact, the downstream portion of the stream historically called "Cameron Creek". To avoid confusion, the Panel will not use the adjective "lower"; rather, it will just refer to Cameron Creek. The Respondent now refers to this stream as "Heldon Brook".

The Decision

[28] On October 20, 2016, before issuing his decision, the Respondent met with the Appellants and their agent, Oliver Thomae, to discuss the Application. He invited the Appellants to make additional written submissions for his consideration.

[29] On November 2, 2016, the Appellants, through their agent, submitted two documents: earlier correspondence to the Ministry dated March 31, 2016, and new correspondence dated November 2, 2016. In both submissions, the Appellants maintained that historical mapping errors and renaming of streams had led to their water rights on Cameron Creek being usurped.

[30] The Respondent issued his Decision on November 25, 2016. In it, he referred to the October 20, 2016 meeting, the Appellants' November 2, 2016 submissions, and his commitments to the Appellants.

[31] The Respondent wrote that he was refusing the Application for the following reasons:

- The re-naming and re-mapping of sources and points of diversion took place in conjunction with water licence amendments in approximately 1988; the source locations were confirmed in an Environmental Appeal of an application on Heldon Brook in 1993.¹ The status of Conditional Water Licence 68000 is current [emphasis in original] and there is no error to correct under Section 26(1)(e) of the *Water Sustainability Act*.
- The old channel between the historical points of diversion (PD 23411) and the authorized points of diversion (PD23413 and PD23402) is not discernible. The historical point of diversion, which you have requested to use via this change of works amendment application, is now on a different source, Heldon Brook. The authorization of works to divert a new quantity of water on a source requires an application for new water rights; amending a licence to a different source is not permitted under Section 26(1)(d) of the *Water Sustainability Act*, which allows for

¹ This appeal was made to the Comptroller of Water Rights, not the Board.

the authorization of additional or other works than those previously authorized.

[32] The Respondent also enclosed a document titled "Supplement and Information Peripheral to AMD 20150602-0001", in which he provided substantial commentary on many points and assertions that the Appellants had made throughout the process, and provided information to assist them, not just with respect to the Application.

The Appeal

[33] In their Notice of Appeal, the Appellants cited several grounds for appeal. The Panel has summarized the Appellants' position from those grounds, from their pre-hearing Statement of Points, and from their opening and closing statements at the hearing, as follows:

1. The Respondent erred by refusing to acknowledge and correct stream naming and mapping errors made throughout the history of the Licence, and by failing to properly apply the *Act* contrary to his responsibilities as a statutory decision-maker. The Respondent failed to acknowledge that the naming and mapping errors inadvertently usurped the Appellants' historic water rights.
2. The Respondent also erred by considering their Application as an attempt to seek new or additional water rights by prescription. They are not seeking new or additional water rights, just an amendment to the Licence that restores the POD to its original, longstanding source.
3. The Respondent relied on the outcome of an appeal on a neighboring licence application, without advising them that he was considering this as evidence.

[34] In their closing statement, the Appellants also argued that the Respondent and Ministry staff demonstrated a lack of objectivity, substantial bias and disregard for the assertion of errors by the Appellants. The Panel addresses these last grounds in its discussion of the Board's jurisdiction below.

[35] The Appellants ask the Board to rescind the Decision and that the Board make the following decision:

1. Amend the Licence to move the Licence POD W (PD23413) back to its historic location on Cameron Creek, and to authorize the existing works near that location; that is, the pond, the pump, the pump house and sprinkler.
2. Re-establish the name of the stream flowing through the northwest corner of Lot A of the Property to "Cameron Creek", as shown on all Ministry records up to 1987-8.
3. Correct the maps attached to all CLs issued for the Property, and the licences held by others on the same streams, to reflect the

historically correct stream sources so that water licence holders will have correct licences and be aware of their respective water rights.

[36] The Respondent requests that the appeal be dismissed.

[37] The Participant, Mr. Lancaster, supports the Respondent's position.

The Board's Jurisdiction and Preliminary Matters

[38] The Panel first will address the Appellants' submissions regarding bias, lack of objectivity and similar allegations about the Respondent and Ministry staff.

[39] Section 105(5) of the *Act* provides that the Board may conduct an appeal by way of a new hearing. That means that the Board has the authority to consider new evidence and that parties can examine and cross-examine witnesses. This Board has adopted this hearing approach in most of its previous hearings, including the following: *Hindson v. Assistant Regional Water Manager*, (Decision No. 2004-WAT-011(a), May 16, 2005); and, *Chief Sharleen Gale (Fort Nelson First Nation) v. Assistant Regional Water Manager*, (2012-WAT-013(c), September 3, 2015).

[40] The Panel conducted this appeal as a new, oral hearing over six days. The Panel provided the parties with the opportunity to submit evidence, including witness testimony and documentary evidence, to cross-examine witnesses and to submit opening and closing arguments. Therefore, any potential bias, lack of objectivity or prejudicial steps by the Respondent or Ministry staff have been cured by the new hearing. Even if this new hearing did not cure these defects, based upon the evidence before the Panel, the Appellants' allegations were not proven on a balance of probabilities.

[41] At this time, the Panel will also address an issue that the parties raised in their pre-hearing Statements of Points and in their opening statements; that is, whether there is available water flow in Heldon Brook or Cameron Creek.

[42] During the appeal hearing, the parties submitted evidence regarding the estimated water supply for and/or demand in that stream based on the present licensed allocations, and whether there would be sufficient flow for a diversion where the pond, pump and pump house are located on the Property.

[43] The Respondent argued that the flow or estimates of flow in the stream are not relevant to the issue of the extent of the Respondent's authority to correct errors under section 26(1)(e) of the *Act*. At the end of the hearing, the Appellants stated that they agreed with the Respondent that flow estimates are not relevant to this issue.

[44] Therefore, based on the parties' submissions at the end of the hearing, the Panel will not consider the evidence or arguments submitted on this point. This includes the testimony and report of the Respondent's witness who the Panel qualified to give expert opinion evidence in certain areas of hydrology. The Panel also will not consider the Ministry's Environmental Flow Needs policy, which was referred to during the hearing.

ISSUE

[45] The sole issue in this appeal is whether the Decision is reasonable in the circumstances; that is, whether the Respondent reasonably determined that he does not have the authority to move the Licence POD to POD "A" as it is shown on pre-1977 licence maps, that there is no error to correct in the Licence, and that he does not have the authority to authorize the existing works on Sublot 13.

RELEVANT LEGISLATION

[46] The following sections of the *Act* apply to this appeal.

Definitions

1 (1) In this Act:

...

"authorization", except in references to drilling authorization, means a licence or use approval;

"beneficial use",

...

(b) in relation to a use of water other than under an authorization, means using the water for a water use purpose

(i) as efficiently as practicable,

(ii) in accordance with any applicable regulations, and

(iii) in accordance with the provisions of this Act or the regulations that apply in relation to the use of water without an authorization;

...

"conditional licence" means a licence, issued under this or a former Act, that authorizes the licensee to construct works, or divert and use water, before the issue of a final licence.

...

"licence" means a conditional licence or a final licence;

...

Vesting water in government

5(1) The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except insofar as private rights have been established under authorizations.

...

(3) No right to divert or use water may be acquired by prescription.

Amendment or substitution of authorization, change approval or permit

26(1) On application by the holder in accordance with section 12 [*application and decision maker initiative procedures*], or on his or her own initiative, the comptroller or a water manager may amend an authorization and a permit issued in relation to the authorization, and the comptroller, a water manager or an engineer may amend a change approval and a permit issued in relation to the change approval, to do any of the following:

...

(d) authorize additional or other works than those previously authorized;

(e) correct an error in the authorization, change approval or related permit.

...

...

SUMMARY OF THE EVIDENCE

[47] At the beginning of the hearing, the parties submitted two Document Agreements which admitted, by consent, most of the Appellants' and the Respondent's documents. The parties also submitted an Agreed Statement of Facts (the "Agreed Facts"), which also cites documents admitted into the record at the hearing. The Panel notes that most of those documents are copies of Ministry records made or kept in the ordinary course of business.

[48] When making this decision, the Panel has carefully considered the binders of documents, mainly copies of Ministry records, that it accepted into evidence, as well as the witnesses' testimony. The Panel has not repeated all that evidence; rather, it has summarized the evidence and facts relevant to the issue to be decided.

Appellants' Witnesses

[49] Mr. and Mrs. Chisholm testified at the hearing, as did their agent Mr. Thomae. Most of their testimony was a review of the Ministry records entered into evidence.

[50] Mrs. Chisholm testified about her efforts to contact Ministry staff about their water shortage issues in 2014, and subsequent numerous contacts with the Ministry. She went over all of the telephone conversations, emails and meetings with Ministry staff. Mrs. Chisholm also explained how she researched, reviewed, and interpreted numerous Ministry records, especially older licence documents applicable to the Property.

[51] Mr. Chisholm testified about the ranch's operations, and especially about the importance of irrigating the northwest hay field located next to the pond and pump house. He also described his field investigations of streams and diversions with Mr. Thomae.

[52] In early 2016, the Appellants retained Mr. Thomae to assist them with their water licensing issues, and especially to investigate the history of the water sources and PODs associated with their licences. They also retained Mr. Thomae to assist them with their communications with the Ministry.

[53] Mr. Thomae is a registered Professional Forester. He has a Bachelor of Science degree in Forestry. During the past 30 years he has held several positions in the forest industry and with the Ministry. Mr. Thomae is now an independent consultant. He operates a forestry consulting company that serves a variety of clients in areas such as preparing and developing geographic information system (GPS)-based models, completing mapping projects, and preparing data analysis reports in timber supply areas.

[54] For this appeal, the Appellants applied to have Mr. Thomae qualified to give expert opinion evidence in hydrology. The Respondent objected, arguing that Mr. Thomae is not sufficiently independent to qualify as an expert witness. The Respondent submitted that, in fact, Mr. Thomae is the Appellants' advocate in this appeal.

[55] After considering the parties' arguments and reviewing Mr. Thomae's role in this matter since March 2016, the Panel found that Mr. Thomae was not sufficiently independent from the Appellants to qualify as an expert witness. In many submissions to the Ministry, including the Application and for this appeal, Mr. Thomae is named as the Appellants' agent. He signed correspondence on their behalf and used pronouns such as "we", "us" or "our", indicating a position closely aligned with and, in fact, advocating for, the Appellants. Mr. Thomae also played a major role in preparing the Appellants' submissions for this appeal. Mr. Thomae did testify for the Appellants, just not as an expert witness.

Respondent's Witnesses

[56] The Respondent (Thomas Cummings) and Benjamin Cross testified at the hearing.

[57] The Respondent is a Senior Authorizations Specialist with the Ministry. Since February 2016, he has been designated as Assistant Water Manager authorized to make statutory decisions under the *Act*. He had a similar designation under the predecessor *Water Act*, R.S.B.C. 1996, c. 483 ("*Water Act*"). He also directly supervises three Water Stewardship Officers.

[58] Previously, the Respondent was a Water Stewardship Officer with supervisory responsibilities and duties, including technical aspects of water licence amendments and applications, and addressing and resolving complex licensing issues and complaints.

[59] The Respondent testified that he has made approximately 100 decisions involving water rights' authorizations and, in the past, some of his work involved reviewing water licences dating back to the 19th century. The Respondent is also a registered Professional Agrologist.

[60] The Respondent testified about the steps that he took before issuing the Decision. These included assigning Benjamin Cross to undertake an extensive review of the history of the relevant licences and their corresponding files.

[61] Mr. Cross is a Water Stewardship Officer with the Ministry in its Nelson BC office. He has held this position since November 2015. Mr. Cross has extensive experience in data analysis and has worked on technical assessments of water applications and amendments. His responsibilities include: decision support for water authorizations and approvals, conducting hydrometric measurements, and developing and maintaining stakeholder relationships. Mr. Cross has a Master's degree in Resource and Environmental Management.

[62] Mr. Cross testified, in detail, about his review of Ministry records to track the history of the Licence, and other licences in the area. He met with the Ministry staff who had investigated, or were familiar with, the licensing history. For example, Mr. Cross met with Mike Daigle, a Stewardship Forester with the Ministry, who had some on the ground knowledge of the area from site visits. Mr. Cross prepared a Technical Report for the Respondent dated November 25, 2016. Previous unsigned versions of that report, with attachments, were also provided to the Respondent for his review.

[63] Most of Mr. Cross' testimony is summarized in the Agreed Facts, and in the documents identified in Schedule A to this decision.

Summary of Facts Not in Dispute: water licences on the relevant streams

[64] At the hearing, most of the oral testimony from the parties was a repetition of the Agreed Facts, with detailed references to the contents of the admitted documents. The witnesses reviewed the history of property ownerships in the area, the chronological history of various licences in the area, stream and source references, licences' maps, and actions taken by various Ministry staff throughout that history. Therefore, before considering the parties' positions with respect to the issues, the Panel has summarized the Agreed Facts, as well as other facts that are not in dispute.

History of the Licence from 1904

[65] On January 5, 1904, the first water right in the history of the Licence was issued as licence number 115 to Thomas and Colin Cameron for "one hundred inches of water out of Cameron Cr and [illegible] which rises west of Lot 331 and sinks on the Cassynayook Indian Reserve". The POD is a single point of diversion "at a point near the west line of said Lot 331" and the authorized works are a ditch and flume to be constructed over the grantee's lands [A.1 - Schedule A].

[66] On June 10, 1913, Determination and Order No. 944 was issued to Thomas Cameron granting rights to take up to 700 acre feet from Cameron Creek. The order stipulates that the amount taken from Cameron Creek is to be reduced by the amount allotted from Thos Creek under certain circumstances [A.2 - Schedule A].

[67] On May 12, 1914, CL C374 was issued to Mr. Cameron, giving effect to Order No. 944. The source is named Cameron Creek and the POD is described as a single point of diversion "A". The authorized works are described as a ditch completed

and located approximately as shown in an exhibit to Order 944, and new works necessary for the distribution of water to all parts of irrigable lands set out in clause 2(g) of Order 944. The accompanying map identifies Cameron Creek and Thos Creek and locates POD "A" on Cameron Creek on the western boundary of Sublot 13 [A.3 - Schedule A].

[68] On May 14, 1914, Order 946 was issued for the diversion of water from Thos Creek to Cameron Creek and the construction of a ditch from Thos Creek to Cameron Creek. The sketch with this order shows that Cameron Creek is not connected naturally to Thos Creek; in fact, they diverge from each other on Sublot 13 [A.4 - Schedule A].

[69] On July 8, 1925, licence F4860 was issued to Thomas Cameron in substitution of CL C374 (issued in 1914). The precedence date is January 5, 1904. The source is named "Cameron Creek, Tributary of Kootenay River". The licence grants 57 acre feet per annum to irrigate 22.9 acres on Sublot 13 of Lot 331. The POD is described as a single point of diversion "A" shown at the western boundary of Sublot 13 [A.5 - Schedule A]. The authorized works are a ditch to divert and carry water. This licence map shows Cameron Creek and Thos Creek as separate streams. Thos Creek has a separate tributary flowing from the west.

[70] In about 1960, Murray B. Dearden and his family became the owners of the Property and other lots. In about 1965, Mr. Dearden installed an intake pond and pump house on Cameron Creek about 300 metres downstream from POD "A". These are the works that were later used by the Appellants for irrigation of the northwest field until 2014.

[71] In about 1970, Robert J. Totten purchased the Property and other lots from Mr. Dearden. Mr. Totten later sold some of that property to Mr. Urban and to Mr. Lancaster.

[72] On April 1, 1975, Mr. Totten applied for additional water in the form of a new water right and a new licence to divert and use water out of "Thos Cr & Centre Creek" which flows "East" and discharges "into the Ground" [A.6 - Schedule A]. He requested the point of diversion to be "located at 550 from the S.W. corner of L. 12246". The quantity of water to be diverted or stored would be 200 acre feet. The water was to be used for irrigation on Sublots 13 and 14 of Lot 331. Mr. Totten attached a sketch with his application, which shows part of Cameron Creek and shows Thos Creek with the tributary described in paragraph 69 above. He referred to this tributary as "Centre Creek" [A.7 Schedule A]. He described the proposed new works as a "dugout & gravity feed irrigation by aluminum pipe to field, then sprinkler irrigation".

[73] The dugout required a permit over Crown land because it was outside of the Property. In his application for this permit, Mr. Totten used a different sketch and described the source as "Thos and unnamed Centre Creeks" [A.8 & A.8.1- Schedule A]. The sketch for the permit over Crown land and for the water licence both show Centre Creek and Thos Creek near the southern boundary of Lot 12246. The size of Lot 12246 relative to the other lots is different on the two sketches. Mr. Totten made a note on his application for a permit over Crown land that: "This drawing is as close as I can make it".

[74] A memorandum authored by the Regional Engineer at the time, T.H. Oxland, described internal Ministry discussions about Mr. Totten's licences F4860 and F4861, as well as his request to divert and redivert 200 acre feet from a tributary to Thos Creek. That request was given Ministry file number 0328465. The Ministry's records indicate that Ministry staff decided that it was not possible to make Cameron Creek licence F4860 supplementary to licence F4861 because there was not enough water to meet the demand of 76 acre feet. Also, the memorandum noted that:

It was agreed, since ... Mr. Totten, has control of all licences on the creek, and, since his application 0328465 is an attempt to completely record the creek that he would be asked to file T/As [transfers of appurtenancy] for both F4860 and F4861. The recommendations for the T/As would be for new conditional licences, one for Cameron for 57 ac. ft. and one on Thos for 76 ac. ft.

[75] In the same Ministry records, there is an "Engineer's Report on a Water Application" prepared by A.D. Zackodnik, dated July 3, 1975. That report indicates that there was an on the ground inspection for 0328465. It names the source as "Cameron Creek with a point of rediversion on Thos Creek" and under "Trib. to" the report states "sinks on the Cassimayook Indian Reserve". The report describes the "appurtenant land" as "Part of Sublot 12, Sublot 13 and Sublot 14 of District Lot 331", and the "works being constructed" as "diversion structure and pipeline. Joint works with FL. 6788, 4861 and FL 4860".

[76] Mr. Zackodnik recommended that the application be granted for irrigation for 200 acre feet, for 80 acres; the period would be from April 1 - September 30.

[77] In correspondence to Mr. Totten dated July 15, 1975, H.D. DeBeck, then Comptroller of Water Rights, confirmed that Mr. Totten's application would result in a licence being issued. He enclosed Transfer of Appurtenancy application forms to be signed. He wrote that: "When processed these forms will result in two new licences bearing the same priority date as Final Water Licences 4860 and 4861."

[78] Mr. Totten submitted two applications for transfer of appurtenancy dated December 5, 1975:

- One for F4860 on "Cameron Creek" requesting a transfer of 57 acre-feet to "sublot 12, subplot 13, subplot 14 of D.L. 331, Kty Dist, Plan X40" instead of "part of subplot 13 of D.L. 331, Group 1, Kty District"; and,
- One for F4861 on "Thos Creek" requesting a transfer of 76 acre-feet to "sublot 12, subplot 13, subplot 14 of D.L. 331, Kty Dist, Plan X40" instead of "part of subplot 13 and subplot 14 of D.L. 331, Kty District Plan X40", and additionally requested new works, namely "diversion structure & pipeline".

[79] In April 1977, Mr. DeBeck informed Mr. Totten that his applications for transfer of appurtenancy were investigated and new licences would be issued. A map was attached to the letter [A.9 - Schedule A]. This map shows Cameron Creek

in Block A, a POD "A" on Cameron Creek in Sublot 13 and notes a diversion structure on Cameron Creek.

[80] On July 4, 1977, CL48458 was issued to Mr. Totten (substituting licence F4860) for 57 acre feet of water per annum. The precedence date is January 5, 1904. The source is named "Cameron Creek". The authorized works are described as diversion structures and pipe, located approximately as shown in Water Rights Map No. 1401 dated July 4, 1977. The licence map has "L" located on Cameron Creek and "N" on Thos Creek [A.10 - Schedule A]. Water Rights Map 1401 is the Ministry's official record of all water rights issued by the province and is held by the Comptroller of Water Rights.

[81] Sometime after 1977, Lawrence Belway purchased the Property from Mr. Totten. Mr. Belway used the irrigation infrastructure on the Property, including the pond and pump house installed by Mr. Dearden in the 1960s that are located on Cameron Creek, the part flowing through Sublot 13.

[82] On January 23, 1984, Mr. Belway applied for the apportionment of CL48458. In May 1985, Mr. Belway was advised by the Ministry that, to complete the requested amendment of CL48458, he would need to apply for a transfer of appurtenancy. Instead, on June 13, 1985, Mr. Belway requested that CL48458 be amended to confirm the use of water on "Lot A of District Lot 331, Kootenay District plan 15851", noting there were "no new works to be done".

[83] In a memorandum dated November 26, 1987, Ministry employee E.A. Shaw wrote to the Regional Water Manager, advising that there were errors in the maps attached to Mr. Belway's licences. He included a new map that he had drawn.

[84] In all of the earlier maps referred to above, Cameron Creek is shown flowing west to east through Block A. In this new map from Mr. Shaw, Cameron Creek is shown flowing from the southwest to the northeast, starting south and west of Lot 12246, and slightly intersecting the southeast corner of Block A. On Mr. Shaw's map, Thos Creek is shown in a location near where it was indicated in earlier licence maps [A.13 - Schedule A].

[85] At about the same time, the Ministry was considering a water licence application from Mr. Lancaster. In the same November 26, 1987 memorandum, Mr. Shaw wrote that the "spring that Mr. Lancaster currently draws water from will be renamed and the creek Mr. Belway diverts into Thos will be named Cameron Creek. ... I do not believe the relocation of the creeks should affect our decision on Mr. Lancaster's application (4000621)" [Emphasis added]. Mr. Lancaster was, at that time, drawing water from Cameron Creek.

[86] In a memorandum dated November 26, 1987, the Regional Water Manager recommended that the maps for CL48458 and CL48459 be replaced with the new map prepared by Mr. Shaw [A.14 - Schedule A].

[87] On May 9, 1988, Mr. Belway was provided with the replacement for CL48458; that is, the Licence. The source is named "Cameron Creek with a re-diversion of water from Thos Creek". The POD is identified as "W" (PD23413) on Cameron Creek, and the point of rediversion from Thos Creek is identified as "X" (PD23402) [A.15 - Schedule A]. The authorized works are diversion structures,

pipe and sprinkler system, located approximately as shown on Water Map No. 1401 dated May 9, 1998. The Licence has a new map similar to Mr. Shaw's November 26, 1987 drawing. The precedence date is January 5, 1904.

History of Licence 67999 on Thos Creek from 1906

[88] On July 6, 1906, Licence 169 was issued to Thomas and Colin Cameron for 30 inches of water. The source is described as "Two unnamed creeks rising on Block 4591 and sinking on Lot 331" [A.20 - Schedule A]. The POD is described as a single POD, "about 200 yards west of the west boundary of said Lot 331." The authorized works are "a dam, ditches and flumes to be constructed over Crown Lands."

[89] On May 14, 1914, Determination and Order No. 946 was issued to Thomas Cameron, granting rights to take up to 700 acre feet from Thos Creek to irrigate 280 acres on parts of Sublots 13 and 14. The order stipulates that the amount taken from Thos Creek is to be reduced by the amount allotted from Cameron Creek under order 944 in certain circumstances.

[90] The POD on the map attached as Exhibit A to the order is a single POD at Intake "B", shown west of the western boundary of Sublot 13 of Lot 331 [A.4 - Schedule A]. The authorized works are described as a ditch, completed and located approximately as shown in Exhibit A of Order 946, and new works necessary for the distribution of water to all parts of irrigable lands set out in clause 2(g) of Order 946.

[91] On May 15, 1914, CL406 was issued to Mr. Cameron, giving effect to Order 946. This licence is supplementary to CL374 for Cameron Creek.

[92] On July 8, 1925, licence F4861 was issued to Thomas Cameron in substitution of CL406 for 76 acre feet per annum. The source is named as Thos Creek. The PODs are described on the attached map as "B", shown west of the western boundary of Sublot 13 of Lot 331, and re-diversion "A", shown east of the western boundary of Sublot 13 of Lot 331. The authorized works are "dam and ditches", located approximately as shown in Exhibit A of the licence [A.5b - Schedule A].

[93] On July 4, 1977, CL48459 was issued to Mr. Totten in substitution of licence F4861 for 76 acre feet per annum. The source is named as Thos Creek. The POD is described as a single point of diversion "N" (PD23402) and the authorized works are "diversion structure and pipe", located approximately as shown on Water Rights Map No. 1401 dated July 4, 1977. The map for CL48459 shows Cameron Creek flowing through Block A, through Sublot 13 and to the Reserve [A.11 - Schedule A].

[94] On May 9, 1988, CL67999 was issued to Mr. Belway in substitution of CL48459 for 76 acre feet per annum. The source is Thos Creek. The POD is described as a single point of diversion (labelled "X" on the map) and the authorized works are "diversion structure, pipe and sprinkler system" located approximately as shown on Water Rights Map No. 1401 dated May 9, 1988. This licence has a new map [A.21 - Schedule A].

Mr. Lancaster's Licences

[95] In October 6, 1921, Edward Hill was granted CL5803 on Cameron Creek with a precedence date of August 5, 1921. The final water licence 6788 was issued on March 15, 1929 to divert 8 acre feet at POD "C" from Cameron Creek, as shown on the attached map [A.22 - Schedule A].

[96] On July 25, 1977, Mr. Lancaster, a succeeding holder of licence 6788, applied to have the licence apportioned. The other lots to which this licence was appurtenant were owned by Mr. Totten. The application was re-submitted with a date of April 7, 1981. That application referred to licence 6788 on Cameron Creek. The sketch accompanying the Ministry's report on the application is at A.23 of Schedule A to this decision. The report recommended that the apportionment be granted.

[97] Donald and Helen Lancaster received CL56718 on May 3, 1982. This licence granted them water rights on Cameron Creek [A.12 - Schedule A] and was issued in substitution of licence 6788. The map with the licence shows Cameron Creek flowing from the west through Sublot 13 and to the Reserve.

[98] In about 1984-1986, Mr. Lancaster applied for new water rights on Cameron Creek. The Ministry denied that application because there was insufficient flow due to the water rights precedent in the Licence. Mr. Lancaster submitted this application before the Ministry re-located Cameron Creek on its maps in 1987. Mr. Lancaster appealed the denial to the Comptroller of Water Rights.

[99] In the Ministry's "Appeals Unit Report" dated November 30, 1993, Ministry staff recommended granting Mr. Lancaster a water licence for irrigation purposes in the quantity of 12.5 acre feet per annum to irrigate an area of 5 acres from April 1 to September 30th. That report states: "Source: Heldon Brook Trib. To: Cameron Creek." In a decision dated December 21, 1993, the Comptroller of Water Rights allowed Mr. Lancaster's appeal and issued CL104244 for "Heldon Brook", with a priority date of March 29, 1984 [A.17 – Schedule A].

DISCUSSION AND ANALYSIS*The Appellants' Position*

[100] In their evidence, the Appellants referred to the stream flowing through Sublot 13 and into the Reserve by its historical name, "Cameron Creek", instead of the Respondent's current use of "Heldon Brook".

[101] The Appellants stated that they want to have the Licence amended to have the Licence POD where it was originally on Cameron Creek (before 1977), so that they can irrigate their northwest field.

[102] The Appellants submitted that, under the *Act*, the Respondent has the authority to make the requested amendments to the Licence. They also emphasized that they are not seeking new or additional water rights.

[103] The Appellants maintained that the Licence map does not correctly show Cameron Creek's location. To support their position, the Appellants testified about

their review of all the historical records, mostly from the Ministry's files, and their interpretation of the actions taken by the Ministry. They especially focused on the licences that preceded the Licence, and the licences granted on Thos Creek. The Appellants argued that those documents consistently show that Cameron Creek flows from the west through Block A, and Sublot 13, and into the Reserve. They submit that the Licence map needs to be corrected to reflect this.

[104] The Appellants referred to several internal Ministry memoranda, which they say identified Ministry mapping errors and added to the confusion in the records. For example, they referred to a memorandum by Mr. Daigle (the Stewardship Forester) in which he summarized his review of water licence files dating back to the early 1900s. He referred to the stream the Respondent calls Heldon Brook as the original Cameron Creek. The Appellants also pointed to the memorandum written on November 26, 1987 by Mr. Shaw, about relocating streams on Ministry maps.

[105] The Appellants especially relied on the work conducted for them by Mr. Thomae. Mr. Thomae detailed his review of historical licences, maps, memos and other Ministry records. He also described his field investigations in 2016. Mr. Thomae took numerous photographs and prepared a C5 Ranch Water Supply Review Map, showing details of the area. Mr. Thomae testified about the historical channel of Cameron Creek and other streams in the area, based on his study of the records and field investigations.

[106] The Appellants and Mr. Thomae stated that, based on their investigations, the stream flowing through their Property was and still is Cameron Creek, not Heldon Brook as the Respondent calls it. Further, they submitted that the Respondent has the authority under the *Act* to have the Licence map corrected to show Cameron Creek in its correct, historical location, with the Licence POD where POD "A" was originally placed on Cameron Creek [A.5 - Schedule A].

[107] The Appellants acknowledged that the works consisting of a pond, pump house and other infrastructure, installed approximately 300 metres downstream from where POD "A" is shown on earlier maps, were never authorized. However, they testified that they, and preceding landowners, made continuous and active beneficial use of the pond, pump house and other works to irrigate the Property until they were directed to stop in 2014. Therefore, they want the Licence amended to authorize these works.

The Respondent's Position

[108] The Respondent's position is that:

- (a) there are no errors to correct in the Licence and, if there are any errors (which the Respondent does not admit), he does not have the authority to correct previous errors, particularly errors made in 1977 and 1988;
- (b) he does not have the authority to move the Licence POD as requested by the Appellants because he does not have the authority to transfer water rights between different and

unconnected streams through an amendment application under section 26(1)(d), or any part of section 26 of the *Act*; and

- (c) he does not have the authority to authorize new works (namely, the pond, pump house and sprinkler system) as part of such a transfer of water rights.

[109] To support his position, the Respondent relied on the Agreed Facts and numerous Ministry records to demonstrate how, over the years, changes were made to various licences, stream names and maps. The Respondent also testified that he carefully considered the Appellants' submissions, the Ministry's records and Mr. Cross' Technical Report.

[110] The Respondent cited Ministry policies regarding water licence amendments, which he reviewed prior to making the Decision. They are as follows.

[111] The first policy is titled: "Water Licence Amendment, Assessment for Decision".

[112] The second policy, signed in November 2003, is titled "Issuing of Water Licence Amendments". Its stated purpose is to assist technical and processing staff involved with water licence amendments. This policy applied to section 18(1)(e) of the *Water Act*, the previous water legislation for amending a licence, which is similar to section 26 of the *Act*. It states that section 18(1)(2) is used to either correct an error in the licence made at the time of issuance or an error from a situation created later, such as an official renaming of a source, re-describing the authorized place of use through registration of a new survey, etc.

[113] The third policy that the Respondent considered is titled "NAME OF PROCEDURE: Water Licence Amendment, Initial Processing", and states: "APPLICATION: Applies to the amendment of a water licence." This policy also references the *Water Act*. The applicable parts of this policy state, at page 7, as follows:

4.1 Minor Amendments

A minor amendment, under section 18 of the *Water Act*, is the amendment of generally up to three conditions of a water licence. An Order may be issued to change provisions of the original water licence, while maintaining the original licence. A new water licence may also be issued which amends and replaces the original licence. ...

Change of Works:

- The licensee will submit a request to amend a water licence in order to change the type of works, or the location of the placement of works on a stream, or both. [Emphasis added]

Correcting an error:

- A water licence is amended to correct an error which occurred for the following reasons:
 - an administrative error made at the time the licence was issued;

- an official renaming of a source specified in the licence; or,
 - to update the legal description of a water licence – for example, a licence which authorizes domestic use will tie-down the location of water use to a particular dwelling; however, the property description may change due to a new road right-of-way or subdivision plan.
- This amendment is initiated either as an internal amendment or from a letter which is submitted by the licensee.

[Emphasis added]

[114] The Respondent pointed out that, under this policy, a request for a “change of works” applies to a “change ... on a stream”. He testified that, in his opinion, this means that this policy does not apply to moving works from one stream to another.

[115] In response to questions about errors in licence maps, the Respondent testified that, even if a stream is drawn incorrectly on a licence map, that does not affect the legality of a water right. What is important is the location of the legally established water right, and that does not change. He said that, unless there are other water rights on the stream (for example, downstream), where a stream is shown on a licence map has no impact on the legal position of a water right. The Respondent testified that, in his opinion, licence maps are just an aid to illustrating stream areas and diversions.

[116] The Respondent, however, did acknowledge that licence maps are part of a licence.

[117] The Respondent stated that the Appellants asked him to, in their words, “correct errors” in Ministry decisions from the 1970s and 1980s. The Respondent submitted that any decisions made during those times were never appealed by the affected licensees and, therefore, the time to correct those decisions has passed.

[118] The Respondent also maintained that, if there were any errors in the earlier licences, those licences have been superseded by new licences so that the former licences ceased to have any legal effect. The Respondent said that this is evident from clause j of the Licence which states that “this licence is issued in substitution of Conditional Water Licence 48458”.

[119] In addition, the Respondent submitted that, based on his review of the files, of Mr. Cross’ work and of information that he received from the Appellants, he determined that the Licence is entirely correct.

[120] The Respondent further argued that he does not have the authority to move a licence POD from one stream to a different, unconnected stream. He interpreted the Appellants’ request as an application to move the Licence POD from what, he testified, is now “Cameron Creek” (diverting into Thos Creek) to what he said is a new location on Heldon Brook. He noted that, on the map produced by Mr. Cross during his technical review [A.19 - Schedule A], what he refers to as Cameron Creek is not connected to Heldon Brook.

[121] The Respondent testified that he also interpreted the Appellants’ Application as an application for new water rights; that is, for a new water supply on Heldon

Brook, but with a 1904 priority date. The Respondent's position is that section 26(1) of the *Act* does not give him the authority to authorize a new licence on a new stream, while maintaining a 1904 licence priority date. He also said that Heldon Brook is oversubscribed.

[122] As for the existing infrastructure in place for irrigation on Sublot 13, the Respondent submitted that the evidence is clear that no licence appurtenant to the Appellants' Property has ever authorized the pond, pump, pump house, and other existing infrastructure. Further, the fact that the Appellants and the previous owners used the pump and other works to irrigate their field does not give them the right to use that infrastructure to divert the water from that stream. To support his position, the Respondent cited section 5(3) of the *Act*, which states that no right to divert or use water may be acquired by prescription. That is, beneficial use of water for any amount of time is not a basis for granting authorization to divert water or use water.

[123] For all these reasons, the Respondent submits that the Decision to deny the Appellants' Application was reasonable and appropriate in the circumstances.

The Participant's Position

[124] Mr. Lancaster supports the Respondent's position. His property, Block A, is west of the Appellants and he relies on water sources for irrigation and other uses for which he holds CLs. If the Licence POD is moved to where the Appellants want, Mr. Lancaster maintains that his water rights would be negatively impacted because there would be insufficient water for him to divert under his licences.

The Panel's Findings

[125] The Panel finds that the licences with their respective maps, as well as other maps and sketches in the Ministry's records, provide the most compelling evidence. The Panel has, therefore, given the most evidentiary weight to those documents. The Panel further finds that most of the relevant facts in this appeal are not in dispute.

[126] The Appellants applied for an amendment to their Licence to have the Licence map corrected to show where, they allege, Cameron Creek historically flowed, and still flows through their Property. They also want the Licence amended to put their Licence POD back to where it was historically (pre-1977), and to have the existing works (pond, pump, pump house, etc.) authorized by that amendment.

[127] First, the Panel will consider the Respondent's position that he does not have the authority under section 26 of the *Act* to amend the Licence to fix the alleged errors. He submits that the previous licensees (Totten and Belway) did not advise the Ministry of potential errors and did not appeal the errors (although that right was available to them). Also, he submits that the Appellants' Licence supersedes preceding ones. Therefore, the time to fix any errors has passed.

[128] The Panel finds that the Respondent does have the authority to amend the Licence to fix an error under section 26 of the *Act*. Under that statute, the Respondent may, on application of a licence holder or "on his own initiative",

amend an "authorization" to correct an error in the authorization. The "authorization" in this case is the Licence, which was issued in its current form in 1988 to Mr. Belway. Even one of the Ministry's policies cited by the Respondent states that licence amendments can be initiated internally.

[129] Therefore, as an authorized statutory decision-maker under the *Act*, the Respondent has the authority, at any time on his own initiative, to fix errors, to make amendments or, in the alternative, to issue a new water licence which amends and replaces the original licence.

[130] The Respondent submits that he has no authority to move a licensed POD from one source to a different source. Therefore, he stated that he cannot move the Licence's POD on what is shown on the Licence map as Cameron Creek, to what he refers to as Heldon Brook.

[131] The Respondent asserts that the stream that flows through Sublot 13 is Heldon Brook. However, the Respondent did not provide supporting evidence in the form of an official Ministry document that showed that the water course on Sublot 13 is currently named Heldon Brook. The current Water Rights Map 1401 is not in evidence. What is in evidence are historical maps and sketches and Ministry-issued water licences with attached maps. All the maps from 1914 up to the 1988 Licence show a water course through Sublot 13 that is named Cameron Creek.

[132] On January 5, 1904, the Ministry granted the then Property owner the right to divert water from Cameron Creek. Subsequent licences consistently identified Cameron Creek as the source for the right to divert 57 acre feet. Each of those licences have maps showing the licenced POD on Cameron Creek; that is, the May 12, 1914 licence C374, then licence F4860 issued on July 8, 1925, and then CL48458 issued on July 4, 1977.

[133] The May 12, 1914 licence map shows Cameron Creek flowing through Sublot 13 of the Property. Each successive licence map shows Cameron Creek flowing through Sublot 13. The Licence map shows Cameron Creek, still flowing through Sublot 13 and into the Reserve. These maps are consistent with the original January 5, 1904 grant, which named the source of the water right as Cameron Creek.

[134] Therefore, the Panel finds that, from 1904 to the present, the owners of the Property have held a licence granting water rights on Cameron Creek, which always flowed through Sublot 13 to the Reserve, and continues to do so, notwithstanding what the Respondent wants to name that stream.

[135] As another reason for denying the Appellants' request, the Respondent stated that he does not have the authority to move a licence POD between streams that are not connected. If that is correct, then the statutory decision-maker did not have the authority to move the Licence POD to location "W" when he issued Mr. Belway the Licence in 1988.

[136] The Panel heard considerable evidence regarding the physical location and naming of streams. However, the Panel notes that this is an appeal about water rights, not the location of or naming of streams. The rights granted to a person to divert water are as set out in a water licence, which always identifies the source for

that water right. In this appeal, the Licence grants the right to divert 57 acre feet from Cameron Creek, which is shown on the map attached to the Licence to flow through Sublot 13. The Appellants are asking only to move the POD on Cameron Creek. The Respondent also submitted that Mr. Lancaster's appeal of the denial of a licence for Cameron Creek settled matters related to Cameron Creek. Based on the evidence in the record, the Panel finds otherwise. The CL that Mr. Lancaster had at the time of his appeal identified the source as Cameron Creek, flowing through Block A. His application for additional water rights also identified Cameron Creek as the intended source. The Ministry's records demonstrate that the Regional Water Manager, who rejected Mr. Lancaster's application, considered a Cameron Creek flowing through Block A as the intended source for Mr. Lancaster's application.

[137] It was only after the Ministry "relocated" Cameron Creek in its maps in 1987, that it was possible for the Ministry to issue additional water rights to Mr. Lancaster. The Ministry decided that Mr. Lancaster could have water rights on what it was calling "Heldon Brook", even though that stream was the historic channel of Cameron Creek. The Panel finds that the resolution of Mr. Lancaster's appeal settled nothing related to Cameron Creek and may, in fact, have contributed to the confusion about the location of water rights identified in this appeal.

[138] As another reason for not moving the Licence POD or recognizing it on the historical lower portion of Cameron Creek, the Respondent maintained that "Heldon Brook" is over-subscribed so the Licence POD cannot be moved to where the Appellants have requested. In this case, the Appellants are not asking for a new water right, or even additional water rights; they are simply asking for the Licence's POD to be put back to where it was from 1904 to 1977. The Panel finds that the stream that the Respondent now refers to as Heldon Brook is the historical portion of Cameron Creek, as shown on earlier licensing maps, and that changing the name of a source does not change any priority rights on that source.

[139] Even if the Appellants are asking for a new water licence, this Board has previously determined that a new licence can still be issued for a stream that the Ministry states is oversubscribed. For example, in *Retzlaff v. the Assistant Water Manager* (Decision No. 2016-WAT-011(a), November 10, 2017), and in *Southeast Kelowna Irrigation District v. Regional Water Manager* (Decision Nos. 2012-WAT-016(a) & 2012-WAT-031(a), July 11, 2013), the Board held that, even if a source is "fully recorded", that does not necessarily preclude the issuance of a new licence in certain circumstances.

[140] Also, the Panel notes that, until 2014, licensees such as Mr. Belway, Mr. Lancaster, and the Appellants, all used Cameron Creek. They apparently were able to share that resource for their needs until a dry spell in 2014. The Panel suggests that the Appellants and the Lancasters can continue to work together at sharing that water resource.

[141] Based on the continuous grant of a water right on Cameron Creek, and the continuous location of Cameron Creek flowing through Sublot 13 in the licences granted by the Ministry, the Panel finds that it was unreasonable for the Respondent to deny the Appellants' application to move the Licence POD to its historic, pre-1977 location in Sublot 13.

[142] The Panel next turns to the Respondent's assertion that there are no errors to correct in the Licence, including the map. The Respondent described licence maps as plans, sketches or illustrations intended to show the general location of streams and PODs for licences; however, he did agree that licence maps are part of a licence.

[143] When the Ministry grants a water right by licence, the licence states the quantity of water that can be diverted, the source of the water right, and the purpose of the licensed use. In its review of the various licences submitted in evidence, the Panel noted that every licence has a clause comparable to section "b" of the Licence that refers to the POD "as located on the attached plan" or map. Every licence also has a map identifying the source for the water right granted, and the location of the POD on that source, with respect to the land to which that licence is appurtenant.

[144] Therefore, the Panel finds that licence maps are a fundamental part of a licence and must, in all aspects, be accurate and consistent. If licence maps are not accurate, licensees, subsequent property owners, and surrounding licence holders will not have accurate information about their respective authorized water rights. Inaccuracies can lead to disputes and misunderstandings about water rights. This appeal is a good example of the consequences of inaccuracies and inconsistencies in licence maps. Given that historical maps were not created with the benefit of GPS technology, the statutory decision-maker's authority to correct an error in a licence is an important power to provide rights holders with some degree of certainty.

[145] In this case, the Panel finds that the Licence map [A.15 - Schedule A] does not show the correct, historical location of Cameron Creek, except for a portion of the creek in Sublot 13, and the continuation into the Reserve. Based on its review of all the maps and sketches in evidence, the Panel finds that the correct location of Cameron Creek is approximately as shown in A. 11 - Schedule A, which is about where the Respondent has put "Heldon Brook" in A.19 - Schedule A. Therefore, it was unreasonable for the Respondent to deny the Appellants' request for corrections to the Licence map.

[146] During the hearing of this appeal, the Respondent had an opportunity to provide an accurate map of the relevant streams and PODs for the Appellants and the Lancasters. Instead, the Respondent submitted the map that Mr. Cross prepared for the Ministry's technical review of the Appellants' Application, and which Mr. Cross admitted was in some parts inaccurate [A.19 - Schedule A]. For example, the Panel notes that this is the first map in the history of these water rights that does not show Cameron Creek flowing into the Reserve.

[147] The Respondent also denied the Appellants' request to amend the Licence to authorize the existing works on "lower Cameron Creek", which the Appellants want to use for the purpose and the amount authorized by the Licence. He argued that, just because the Appellants and previous owners used those works, that use does not give them the right to divert or use the water. The Respondent relied on section 5(3) of the *Act*, which refers to the inability to acquire the right to use water through prescription.

[148] The Panel finds that the Licence already grants the Appellants the right to use water from Cameron Creek. The existing works are how they intend to divert and use that water when the Licence POD is returned to its historical location. Section 26(1)(d) of the *Act* gives the Respondent the authority to amend the Licence to authorize additional or other works than those previously authorized. The pond, pump, pump house, etc. are "other works than those previously authorized" (section 26(1)(d) of the *Act*). Therefore, the Respondent has the authority to amend the Licence to authorize these works.

Conclusion

[149] The Panel finds that the Respondent had, and has, the authority to grant the above-noted requests in the Appellants' Application. The Panel further finds that it is reasonable and appropriate to amend the Licence map to show the POD in its 1904 to 1977 Cameron Creek location; that is, where POD "A", is shown on the maps prior to 1977 on that part of Cameron Creek that flows through Lot A of Lot 331, Kootenay District Plan 15185.

[150] The Panel further finds that the Appellants' request for an amendment to the Licence authorizing the existing works was reasonable in the circumstances and ought to be granted.

DECISION

[151] In making this decision, the Panel has considered all the evidence and submissions before it, whether specifically reiterated herein.

[152] Pursuant to section 105(6) of the *Act*, the Board's powers on an appeal are as follows:

- (a) send the matter back, with directions, to the comptroller, water manager or engineer who made the order being appealed,
- (b) confirm, reverse or vary the order being appealed, or
- (c) make any order that the person whose order is being appealed could have made and that the board considers appropriate in the circumstances.

[153] The Panel has considered exercising its jurisdiction under subsection (c); however, because of the technical nature of what must be done, the Panel has decided to return this matter to the Respondent with directions.

[154] The Panel directs the Respondent to, within 30 days of this Panel's decision, issue a new licence to the Appellants in substitution for the Licence on the following terms and conditions:

1. The maximum quantity of water to be diverted is 57 acre feet per annum from a source to be called Cameron Creek.
2. The Point of Diversion is located at approximately POD "A" on Cameron Creek, as shown on Water Rights Map 1401 before 1977.

3. The land to which the licence is appurtenant is described as Lot A of Lot 331, Kootenay District Plan 15185.
4. The water may be diverted using a diversion structure, ditch, pond, pump, pump house, pipe and sprinkler system.
5. The priority date is January 5, 1904.
6. Attach a new map to correctly show the location of POD "A" and Cameron Creek in Lot A of Lot 331, Kootenay District, Plan 15185.

[155] The Respondent is directed to retain all other Licence conditions but may add such other conditions as the Respondent considers appropriate.

[156] In addition, the Panel makes the following recommendations to the Respondent:

1. Amend all licences that divert water from Cameron Creek and Thos Creek to be consistent with this decision.
2. Amend all licences that divert water from tributaries to Cameron Creek or Thos Creek to be consistent with this decision.
3. Rename the source on which Water Rights Map 1401 shows POD "W" is located.
4. Consider making the recording and reporting of volumes and times of diversion a condition of licences in the Cameron Creek and Thos Creek catchment.

[157] The appeal is allowed.

"Gabriella Lang"

Gabriella Lang, Panel Chair
Environmental Appeal Board

"Lorne Borgal"

Lorne Borgal, Panel Member
Environmental Appeal Board

"Reid White"

Reid White, Panel Member
Environmental Appeal Board

July 16, 2018