



Environmental Appeal Board

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APPEAL NO. 1998-WAT-23

In the matter of an appeal under section 40 of the *Water Act*, R.S.B.C. 1996, c. 483.

BETWEEN:	A.M. Anderson, R.J. Anderson, S.G. Anderson and M.P. Edwards	APPELLANTS
AND:	Assistant Regional Water Manager	RESPONDENT
AND:	Lower Nicola Indian Band Highland Valley Copper Corporation Phyllis Leese Fish and Wildlife Branch, Ministry of Water, Land and Air Protection Bruce Vichert and Simon Klaudt Fisheries and Oceans Canada	THIRD PARTIES
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	June 11-15, 2001 Concluded by way of written submissions on October 1, 2001	
PLACE:	Kamloops, B.C.	
APPEARING:	For the Appellants:	A. Michael Anderson Michael P. Edwards
	For the Respondent:	Stephen Antle, Counsel Livia Meret, Counsel
	For the Third Party:	Matthew Kirchner, Counsel
	Lower Nicola Indian Band Fish and Wildlife Branch, Ministry of Water, Land and Air Protection Bruce Vichert and Simon Klaudt Fisheries and Oceans Canada	Ian McGregor Simon Klaudt Michael Crowe Shannon Williams, Counsel

APPEAL

This is an appeal of the July 17, 1998 decision of A.D. Zackodnik, Assistant Regional Water Manager (the "Assistant Manager"), to refuse the Appellants' application for a water licence to divert water from Guichon Creek for storage and irrigation purposes. The Appellants seek to use the water to irrigate a ranch they own near Savona, B.C.

The Environmental Appeal Board has the authority to hear this appeal under section 11 of the *Environment Management Act*, R.S.B.C. 1996, c. 118, and section 40 of the *Water Act* (the "Act"). Section 40(6) of the *Act* provides that the Board may:

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

The Appellants seek an order reversing the Assistant Manager's decision. They also ask the Board to issue them a water licence for Guichon Creek.

This appeal has been conducted as a new hearing pursuant to section 40(5) of the *Act*.

BACKGROUND

There is a long history of ranching in Savona. Water is highly valued by ranchers and farmers in this area, as the region is dry and semi-arid, and irrigation water is often needed to grow hay and other crops. In addition to providing water for human uses, the local lakes and streams provide an important fish habitat. Many of the lakes and streams, including Guichon Creek, are populated by trout, salmon, and other fish species. The area has become known as a destination for recreational fishing in recent years.

The Creek

Guichon Creek and its tributaries flow into the Nicola River, located to the south of the Guichon watershed. However, water works installed in the upper reaches of Guichon Creek divert a significant amount of water from the Guichon watershed into the Tunkwa/Durand watershed, which lies to the north and flows into Kamloops Lake. Specifically, from the point of diversion on Guichon Creek ("Point of Diversion"), the water flows through a 2-½ mile ditch to Burnt Corral Lake (the "Diversion Ditch"). From there, the water travels to Tunkwa Lake, Leighton Lake and then into Tunkwa Creek, Durand Creek and, eventually, into Kamloops Lake. Water is also diverted out of Chartrand Creek, a tributary of Guichon Creek, into Tunkwa Lake. There are dams on Tunkwa and Leighton Lakes. During freshet, these lakes are filled to store water for irrigation during the summer. At various points along Tunkwa and Durand Creeks, ranchers divert water to irrigate their lands.

Guichon Creek flows from north to south into the Nicola River. As stated above, the Point of Diversion is located in the upper Guichon Creek area. From the Point of Diversion to the mouth of Guichon Creek there is a distance of about 50 km. Downstream of the Point of Diversion, many tributaries flow into the creek. The creek flows through Mamit Lake, which is located approximately midway between the Point of Diversion and the mouth of the creek. There is a dam on Mamit Lake, but there is no fish ladder on the dam so there is no migration of fish between upper Guichon Creek and lower Guichon Creek.

Hector Creek is a tributary of Guichon Creek located downstream of Mamit Lake, between Mamit Lake and the mouth of the creek. There are a number of diversions near the mouth of the creek, where the creek flows into the Nicola River.

In 1985, the Mamit Lake dam was reconstructed and resulted in 3,400 acre feet of new storage in Mamit Lake. This storage was apportioned 1,700 acre feet to the Guichon Creek Water Users Community (the majority shareholders are the Lower Nicola Indian Band (the "Band") and the Ministry of Environment, Lands and Parks (now the Ministry of Water, Land and Air Protection)), and 1,700 acre feet to the Provincial Fish and Wildlife Branch. A licence was issued to the Guichon Creek Water Users Community, but not to the Fish and Wildlife Branch.

There are a number of water gauges located along the creek that are used by Water Management to measure the flow of water in the creek. Of relevance to this appeal is water gauge 08LG056, located above the Point of Diversion, and water gauges 08LG003/032, located above Mamit Lake/below Quenville Creek (the latter gauges will be referred to as the Mamit Lake gauge).

The Water Licence Application

In 1987, the Appellants collectively purchased a ranch in Savona. The Anderson family has been farming in the Savona area since 1928. At the time of purchase in 1987, the newly purchased ranch already had 30 acres of hay fields and a water licence on Guichon Creek for irrigation. However, to improve the viability of the ranch, the Appellants developed a plan to put an additional 100 acres of land into hay production. To implement this plan, the Appellants needed more water than is available under their existing water licence. Thus, on December 31, 1987, the Appellants submitted water licence application number 3001151 (the "Application"). This led to a lengthy series of events, resulting in the hearing of this appeal, 14 years later.

The Application states that the Appellants seek to divert 250 acre feet of water per annum from Guichon Creek for the purposes of storage and irrigation, although the Appellants now request only 210 acre feet of water per annum. The water would be diverted from Guichon Creek using the existing Diversion Ditch and stored in Tunkwa Lake until it is needed for irrigation.

When the Appellants submitted the Application, there were already a number of outstanding applications for water licences on Guichon Creek and elsewhere in the Nicola River watershed. Both the Nicola River watershed and the Guichon Creek

watershed are chronically water-short drainages, where water management is very difficult. Regional Water Management staff with the Ministry of Environment, Lands and Parks (now Land and Water British Columbia Inc.) (the "Ministry"), had not issued decisions on all of these applications because they believed that there was insufficient water to justify granting them at that time, although they hoped that the shortage may be remedied in the future. Water Management staff were working on various initiatives to address the shortage, such as trying to persuade existing licensees to reduce evaporation losses from open irrigation ditches, and to start relying on other water sources besides Guichon Creek.

In particular, Water Management staff were working on the Nicola Basin Strategic Plan which included a plan to build the Nicola Lake Dam. This dam, which has never been built, would have assisted to resolve fisheries issues on the Nicola River and would have provided water for licensees on Guichon Creek.

Nevertheless, Water Management staff referred the Application to existing holders of water licences on Guichon Creek. In 1988, it received objections to the Application by the Lower Nicola Waterworks District and the Ministry's Habitat Protection Section.

Several years passed before the Appellants received a decision on their Application. Meanwhile, in 1991, Water Management granted applications 3001495 and 3001496, made by the Band, to divert 384.5 acre feet of water from Hector Creek (a tributary of Guichon Creek), for storage and irrigation. The priority date of the Hector Creek licences is July 20, 1989. Further, during the early 1990's, it appeared to the Appellants that the irrigation system at the west end of another local ranch, commonly known as Six Mile Ranch, was no longer in use. The west end of Six Mile Ranch had historically been irrigated with water from Guichon, Durand and/or Chartrand Creeks, with storage in Tunkwa and Leighton Lakes. The owner of Six Mile Ranch held several licenses authorizing the use of this water.

On July 18, 1994, A. Michael Anderson, on behalf of the Appellants, wrote to the Water Management Branch and indicated that several water licences held by the owner of Six Mile Ranch, and water licence F45453 held by Muir Watson on Guichon Creek, had not been used for at "least 3 consecutive years." Mr. Anderson stated that these licences "should be cancelled." The letter made a number of other points, which Mr. Anderson submitted were "more than ample in support of the issuance of a licence for 250 acre/feet of irrigation and storage." Water Management never responded to this letter.

On April 8, 1996, Mr. Anderson wrote another letter to Water Management enclosing a copy of his July 18, 1994 letter. Water Management did not respond.

On July 12, 1996, Mr. Anderson went to the Ministry's Kamloops office to find out what was happening with the Application and his subsequent letters. He met with Bob Petrie, the Water Management Officer who was assigned to the file. Mr. Anderson followed up with a letter dated July 13, 1996, enclosing copies of his two previous letters and requesting a review of the licences referred to in his letter of July 18, 1994. Mr. Petrie responded in a memorandum dated July 16, 1996,

acknowledging receipt of the letters. There was no further response to Mr. Anderson. On July 18, Mr. Petrie asked Paul Doyle, a hydrologist and head of the Engineering Section with the Ministry, to determine water availability on Guichon Creek.

In a letter dated September 9, 1996, Mr. Petrie followed up with Mr. Doyle. Mr. Doyle arranged for Des Anderson of the Engineering Section to undertake the analysis. Des Anderson completed some preliminary calculations, which were discussed with Mr. Petrie, but his calculations were not finalized.

On August 25, 1997, Mr. Anderson wrote a letter to William Irwin, Manager, Lands and Water Management, in Kamloops, complaining of the inaction by other officials. In response, Allan Zackodnik, then Assistant Manager, telephoned Mr. Anderson to say that he would make the Application a priority. Although he asked other staff to work on the Application, nothing further was done for almost one year.

In summer 1998, the Appellants discussed their situation with the then Minister of Environment, Lands and Parks. As a result, the Assistant Manager was instructed to adjudicate the Application. He then asked Mr. Doyle to calculate the water availability on Guichon Creek. Mr. Petrie analyzed the licensed water demand on the creek. The information prepared by Mr. Doyle and Mr. Petrie was considered by the Assistant Manager and his analysis of their information was recorded on a document titled "Sheet 1." According to this analysis there was a deficit of 17 acre feet of water in Guichon Creek.

In a letter dated July 17, 1998, the Assistant Manager refused the Application on the basis that "[i]nvestigation has shown that Guichon Creek is fully recorded under existing licences and there is insufficient water in the source to enable me to grant a new licence." Ordinarily, a decision on a water application would be based on an Engineer's Report of water availability. In this case, the Assistant Manager based his decision on the analysis of water availability in Sheet 1. Despite the fact that the decision was already made, an Engineer's Report, containing a recommendation on the Application, would still have to be prepared.

In a letter to the Assistant Manager dated July 22, 1998, the Appellant Raymond J. Anderson requested copies of the material considered by the Assistant Manager in reaching his decision. On July 24, 1998, the Assistant Manager responded that he was not prepared to provide the requested information because "several outstanding and complex issues are being worked on within the Guichon Creek watershed," and that the "estimated date of completion of the above noted items is September 30, 1998."

Subsequent Events and the Appeal

On August 7, 1998, the Board received the Appellants' Notice of Appeal of the Assistant Manager's July 17, 1998 decision. At the request of the Appellants, the appeal was held in abeyance until the Appellants received the material requested in Mr. Anderson's July 22, 1998 letter.

Three months after the Assistant Manager issued his decision, the Engineer's Report was completed recommending that the Application be refused. By a letter dated October 16, 1998, the Assistant Manager provided the Appellants with a copy of the Engineer's Report, prepared by Mr. Petrie (the Engineer) and approved by Mr. Smith (also an Assistant Regional Water Manager), concerning the Application.

Also on October 16, 1998, the Assistant Manager issued a decision refusing to cancel the licences held by the owner of Six Mile Ranch. That decision was the subject of a separate appeal filed by the Appellants. The two appeals were originally scheduled to be heard together, but the Respondent objected to this on the basis that the two decisions appealed involved the consideration of different factors and affected different parties. In a letter dated May 11, 1999, the Board agreed to hear the appeals separately, with the appeal of the October 16, 1998 decision (the refusal to cancel the licences) to be heard first and the other appeal (the refusal of the Application) to be held in abeyance pending a decision in the first appeal.

On December 3, 1999, the Board upheld the Assistant Manager's decision refusing to cancel the licences held by the owner of Six Mile Ranch (*A.M. Anderson, et al. v. Assistant Regional Water Manager*, (Appeal No. 98-WAT-29, December 3, 1999) (unreported)).

The Appellants subsequently requested, and the Respondent agreed, that the appeal of the July 17, 1998 decision should be held in abeyance pending decisions on other water licence applications on Guichon Creek which were filed before the Appellants' Application.

By a letter dated October 31, 2000, counsel for the Assistant Manager advised the Board that, of the four applications for water licences on the Guichon Creek watershed that were filed before the Application, two had been granted, one had been denied, and one remained outstanding.

The Board subsequently invited a number of parties that could be affected by the appeal to participate in the proceeding as third parties. The Band, Highland Valley Copper Corporation, Phyllis Leese, Fish and Wildlife Branch of the Ministry, Bruce Vichert and Simon Klaudt, Department of Fisheries and Oceans Canada ("DFO"), and Glen and Lois Torgerson accepted the invitation to participate as third parties. Before the hearing commenced, Glen and Lois Torgerson advised that they no longer wished to participate as parties in the appeal.

In its Statement of Points filed on June 1, 2001, the Band advised that it intended to raise a constitutional question regarding the Board's jurisdiction to hear matters pertaining to aboriginal rights. However, after considering submissions by the other parties concerning whether the Board should adjourn the appeal as it pertained to the constitutional question and continue with the remainder of the issues under appeal, the Board decided that it could adjudicate the appeal without hearing submissions on the constitutional question.

The Positions of the Parties

The Appellants maintain that they require 210 acre feet of water for irrigation purposes with storage in Tunkwa and Leighton lakes. The water would be used to irrigate approximately 100 acres, of which 85 acres lie within the Agricultural Land Reserve ("ALR") and is therefore restricted to agricultural use. They argue that there is sufficient water on the creek to satisfy their Application, and that the Assistant Manager erred in his assessment of the water availability. They further argue that Water Management treated their Application inconsistently and unfairly, and that this treatment has prejudiced their Application. They request that the Board allow the appeal and grant the Application.

In the alternative, the Appellants request that the Board issue a letter to the ALR in support of recommending the removal of these lands from the ALR, and that the Board recommend a Province-wide review of lands within the ALR that lack sufficient water licensing. With respect to these latter requests, it is beyond the jurisdiction of the Board under the *Act* to consider the Appellants' request.

Simon Klaudt and Bruce Vichert hold a licence on the Nicola River downstream of the mouth of Guichon Creek and support the Appellants' position.

The Assistant Manager maintains that there is insufficient water available in Guichon Creek to justify granting the Application. He submits that he has broad discretion to grant an application for a water licence. In deciding whether to issue the licence, he must exercise his discretion fairly and consistently within the objects of the *Act*. The Assistant Manager submits that his decision was not only a proper and valid exercise of his discretion under the *Act*, but that it was also correct.

The Assistant Manager notes that the Guichon Creek watershed is a chronically water-short drainage where water management is very difficult. The main problems include:

- The area receives little precipitation.
- It generally has high evaporation rates because of its high summer temperatures.
- The area has generally porous soil. Natural streambed losses to groundwater appear to be significant.
- Most of the available water is concentrated in the freshet in April to June, and must be stored for use in the dry summer and fall.
- Most of the water licences in the area are old, and their irrigation works consist largely of open ditches. Ditch losses to groundwater and evaporation are high.
- The Band occupies land in the Guichon Creek drainage and is the largest member of the Guichon Creek Water Users' Community. The Band has been very vocal about water management and has objected to water being taken out of the Guichon Creek drainage.

- While the streams in the area, including Guichon Creek, were once productive of both migratory salmon and resident trout and other fish, the current low water levels, resulting from the factors set out above, have greatly impaired their ability to support fish.

The Assistant Manager argues that the Board should confirm his decision refusing the Application.

The Band submits that, because there has been no consultation in this case, the Board cannot allow this appeal and grant the licence. It submits that consultation must take place in order to assess whether the Band's rights to its reserved waters are fully met and to ensure that the Band's present and future water needs are met. It states that the most the Board can do is remit the Application back to the Assistant Manager with a direction to consult with the Band. The Band submits that consultation must be carried out by the Water Manager himself.

On the Application itself, it is the Band's position that there is not enough water in Guichon Creek to issue the licence.

Both the Provincial Fish and Wildlife Branch and DFO support the Assistant Manager's refusal of the Application due to their respective concerns with the water level of the creek, and its impact on fish conservation. DFO submits that an adequate supply of water is required below Mamit Lake for anadromous chinook and coho salmon and steelhead trout, as well as upstream of Mamit Lake for resident rainbow trout and other non-salmonid fishes. DFO indicated that it has serious conservation concerns with coho and chinook salmon and steelhead trout in the Thompson/Nicola drainage basin.

By letter dated June 10, 2001, the Third Party, Phyllis Leese, advised that she would not be appearing at the hearing. Further, Ms. Leese expressed concerns about fish values in Guichon Creek and requested that caution be used when considering the removal of water from the creek.

The Third Party, Highland Valley Copper Corporation, did not appear at the hearing and made no submissions regarding the appeal.

ISSUES

The main reason for refusing the Application was the lack of water available on Guichon Creek. Therefore the issues in this appeal are:

1. Whether there is sufficient water available in Guichon Creek to grant the Application.
2. Whether the Appellants' Application was treated inconsistently and unfairly by Water Management.

RELEVANT LEGISLATION

The *Act* provides a system under which a person can acquire the right to divert and use water for various purposes. Section 5 provides:

- 5** A licence entitles its holder to do the following in a manner provided in the licence:
- (a) divert and use beneficially, for the purpose and during or within the time stipulated, the quantity of water specified in the licence;
 - (b) store water;
 - (c) construct, maintain and operate the works authorized under the licence and necessary for the proper diversion, storage, carriage, distribution and use of the water or the power produced from it;
 - (d) alter or improve a stream or channel for any purpose;
 - (e) construct fences, screens and fish or game guards across streams for the purpose of conserving fish or wildlife.

Under section 7 of the *Act*, a comptroller or regional water manager may grant a landowner a licence to divert and use water for domestic or other purposes recognized by the *Act*. A "regional water manager" is defined in section 1 to include someone who is appointed as an assistant or acting regional water manager.

At the time of the decision, the procedure for acquiring a licence was set out in section 10 of the *Act*:

- 10** A person who applies for a licence must comply with the directions of the comptroller or the regional water manager with respect to filing the application, giving notice of it by posting, service or publication and paying the prescribed fees, and must provide the plans, specifications and other information the comptroller or the regional water manager requires.

Objections to an application may be filed and considered in accordance with section 11 of the *Act*:

- 11** (1) A licensee, riparian owner or applicant for a licence who considers that his or her rights would be prejudiced by the granting of an application for a licence may, within the prescribed time, file an objection to the granting of the application.
- (2) The comptroller or the regional water manager has authority to decide whether or not the objection warrants a hearing, and he or she must notify the objector of his or her decision.

- (3) If the comptroller or the regional water manager decides to hold a hearing, the applicant and objectors are entitled to be notified, to be heard and to be notified of his or her decision following the hearing.

A comptroller or regional water manager has a broad discretion when deciding whether to grant an application for a water licence under the *Act*. Section 12(1) of the *Act* states:

- 12** (1) With respect to an application, whether objections to it are filed or not, the comptroller or the regional water manager may
- (a) refuse the application,
 - (b) amend the application in any respect,
 - (c) grant all or part of the application,
 - (d) require additional plans or other information,
 - (e) require the applicant to give security for the purposes and in the amount and form the comptroller or the regional water manager considers in the public interest, and
 - (f) issue to the applicant one or more conditional or final licences on the terms the comptroller or the regional water manager considers proper.

When there is more than one licence on the same stream, section 15 sets out the precedence of the licences.

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

DISCUSSION AND ANALYSIS

1. Whether there is sufficient water available in Guichon Creek to grant the Application.

The Ministry's *Water Programs Policy & Procedures Manual: Water Allocation Guidelines* provides as follows:

The adjudication of an application for a water licence is essentially an assessment of supply and demand. Supply is the rate of flow of water which can be expected to be equally [sic] or exceeded at a specific time of the year and demand is the temporal water requirements of the specific purpose.

The Assistant Manager relied upon the water supply analysis on Sheet 1 to make his decision on the Application. During the course of the appeal, he referred to 3 analyses which, he submits, all show that there is insufficient water available on Guichon Creek to justify granting the Application. Two of the analyses assessed water supply on the basis of the Mamit Lake gauge (Sheet 1 and the Engineer's Report), the other assessed supply on the basis of the gauge at the Point of Diversion. He states that the first 2 analyses show that there is insufficient water available at the Mamit Lake/Quenville Creek location to justify granting the Application. The third analysis shows that there is a deficit in the amount of water available at the Point of Diversion, without any allowance for the rights of existing downstream licensees, or fisheries requirements.

The Mamit Lake Gauge Analyses

Sheet 1

This is the analysis that was used by the Assistant Manager to support his decision to refuse the Application. He analysed water availability at the Mamit Lake gauge, on a 1 in 5 drought basis, for the period of October 1 to June 30. This analysis was based on the period of record from 1969 to 1996. [A 1 in 5 drought basis is the standard Water Management method of analysis. It is a measure of the lowest amount of water likely to be in the creek once every five years.] The result was a deficit of 17 acre feet.

Engineer's Report

The Engineer analysed water availability at the Mamit Lake gauge on a 1 in 5 drought basis, for the period of October 1 to June 15. This analysis was based on the period of record from 1912 to 1967. The result was a deficit of 3,565 acre feet.

After the total amount of available water was determined, the Engineer:

- subtracted an amount to account for the licensing of Witches Brook. [Total water availability on the Guichon Creek was based on measurements before the Highland Valley Copper Corp. began diverting almost the entire flow of Witches Brook, a tributary of Guichon Creek, for its mining operations.];

- estimated and added water flows (into Mamit Lake) from Dupuis Creek and other streams;
- subtracted an amount for evaporation and seepage losses for water stored in Mamit Lake;
- determined and subtracted the amount of existing storage rights in Mamit Lake with priority over the Application, as well as subtracting 1,700 acre feet for the application that Water Management Branch intends to grant the Fish and Wildlife Branch for storage on Mamit Lake (application 300843);
- determined and subtracted the “unsupported baseflow demand.” [Unsupported baseflow demand is the amount of water licensed for use below the Appellants’ proposed diversion, which has priority over the proposed diversion but is not fully backed by storage. Because it is not fully backed by storage, this amount must be allowed to flow down the stream to those licensees with priority.]; and
- subtracted 1,400 acre feet to account for the federal fisheries minimum freshet requirement (15 cubic feet/second (“cfs”).

The Panel notes that there are differences between the figures in the Engineer’s Report and in Sheet 1. The Assistant Manager submits that the differences in the figures are not statistically significant and adds that the differences found in Sheet 1 are likely due to the hurried nature of the analysis.

The Point of Diversion analysis

The Assistant Manager also analysed water availability on Guichon Creek above the Point of Diversion (water gauge 08LG056). He analysed water availability on a 1 in 5 drought basis, for the period of October 1 to June 15. This analysis was based on the entire period of record through 1999. The result was a deficit of 221 acre feet.

To come to this conclusion, the Assistant Manager performed a frequency analysis to determine the total amount of water available at the Point of Diversion. He submits that the Point of Diversion is the ideal point of analysis for the Application. [He notes that the Mamit Lake gauge was used for the other analyses because it was the most practical point of analysis.]

An amount was then subtracted for existing licensed diversions and an amount was deducted for water seepage through the bottom of the Diversion Ditch. [Water flows from Guichon Creek to Tunkwa Lake through the Diversion Ditch, which is 2 ½ miles long. Water Management Branch allows 10% per mile for a total 25% of the licensed amount to compensate for ditch losses so the licensee actually gets the licensed amount at the end of the ditch].

In deciding whether to approve the Application, the Assistant Manager states that one of the factors he considered was the presence of fish in the creek. He adds that an important objective of the *Act* is the protection of fish habitat, including the

quantity and quality of water on which fish depend to live. In addition, he considered that the fishery has significant economic benefits.

The Assistant Manager submits that the fisheries flow requirements are 15 cfs during the freshet period and 7 cfs during the rest of the year. He notes that it now appears that even 7 cfs may not be enough to protect the fish in the non-freshet period. [Freshet is the occurrence of water flows resulting from rain or melting snow. The usual freshet period is from April 1 to June 15, during which many farmers divert and store water for use during the summer.]

In addition, in adjudicating the Application, the Assistant Manager considered that licensees were over-diverting water to compensate for ditch losses. He notes that, because the works are largely open ditches in porous soil, ditch losses are high and as a result licensees divert more than the licensed amount. Water Management Branch is entitled to make allowances for such losses under section 39(1)(h) of the *Act*, which provides that an Engineer (which includes the regional manager) may determine the allowances of water to offset evaporation, seepage and other losses.

In an attempt to address the over-diversion situation, Water Management, DFO, and the Fish and Wildlife Branch have been working to have ditches properly maintained, and to move the licensees from Guichon Creek to the Nicola River or to groundwater wells.

The Appellants argue that all of these analyses are flawed in that they underestimate the actual amount of water that is available by taking into consideration factors that shouldn't be considered, and failing to take into consideration factors that should be considered. Their arguments fall under the following headings:

A) Factors incorrectly taken into consideration by the Assistant Manager:

1. 1 in 5-year drought analysis
2. Federal fisheries requirement

B) Factors the Assistant Manager failed to take into consideration:

1. Groundwater contributions and contributions from Tunkwa Creek
2. Actual use of the water licences on Guichon Creek
3. Storage will be during freshet
4. Carry over storage

The Parties positions on these matters (if any) are set out under the individual headings with the Panel's findings on all of the matters in a separate section below.

A) Factors incorrectly taken into consideration by the Assistant Manager**1. 1 in 5 year drought analysis**

The Appellants submit that because the results are based on a 1 in 5 year drought analysis at the Mamit Lake gauge, more water is actually available on Guichon Creek. The Appellants submit that this was confirmed at the hearing by the testimony of Water Management staff who indicated that more water would be available every 2 years. Therefore, the Application will not affect downstream rights because there is sufficient water available in Guichon Creek to justify granting the Application, without compromising downstream rights.

The Assistant Manager agrees that more water is available in Guichon Creek 4 years out of 5. However, he submits that it would not be sound water management to grant licences knowing the water to satisfy it would only be available 4 years out of 5.

2. Federal Fisheries requirement

A great deal of evidence and argument was presented both at the hearing and in the written submissions regarding the fisheries situation on the creek.

The essence of the Appellants' position on this matter is that 1,400 acre feet should not have been allocated (and subtracted) for federal fisheries requirements because these requirements are already satisfied. [1,400 acre feet is equivalent to 15 cfs.]

- The Appellants submit that downstream of Mamit Lake, fisheries flows are satisfied by existing baseflows. They refer to a report titled *Water Available in Guichon Creek downstream of Mamit Lake* which estimates the volume of water in the creek, downstream of Mamit Lake, to be 4,240 acre feet for the period of October 1 to June 30. This report makes reference to *Hydrology Section Report: Guichon Creek* by William Obedkoff, Senior Hydrologic Engineer, Hydrology Section, Water Management Branch, dated May 12, 1987.
- The Appellants submit that fisheries flows are also satisfied upstream of Mamit Lake. They refer to a report titled *Water available in Guichon Creek upstream of Mamit Lake* which estimates the volume of water in Guichon Creek, upstream of Mamit Lake, to be 1,651 acre feet. They also indicate that the Nicola Basin Strategic Plan sets fisheries flow requirements at 7 cfs and states that "[f]isheries flows of 7 cfs (0.20 m³/sec) are not met at the mouth [of Guichon Creek] due to diversions. These flows are available upstream." The Appellants add that a senior government official signed off the plan and that it can not be varied at will by the Assistant Manager.
- The Appellants submit that there is a problem with low water flows at the mouth of Guichon Creek. The low flows are a result of over-diversion by intakes near the mouth of Guichon Creek, not because of water shortage. The Appellants refer to a letter dated April 27, 1992, from Ian McGregor, Fisheries Section

Head, Ministry of Environment, Lands and Parks, to the Lower Nicola Indian Band. Mr. McGregor states that

The major problem is the antiquated water delivery system. Ditches used for irrigation withdraw far too much water, therefore leaving inadequate flows for fish. The existing ditches are extremely porous consisting of alluvial substrate such as gravels and highly porous fines, and result in water diversions being up to 10 times that permitted by licence.

The Third Parties, Vichert and Klautdt, also take issue with the fisheries allocation since DFO does not have a licence to divert 1,400 acre feet.

DFO made extensive submissions on this matter. It submits that an adequate supply of water is required *below* Mamit Lake for anadromous chinook and coho salmon and steelhead trout, as well as *upstream* of Mamit Lake for resident rainbow trout and other non-salmonid fishes. DFO has serious conservation concerns with coho and chinook salmon and steelhead trout in the Thompson/Nicola drainage basin. It states that one of the most critical factors for the recovery of these species is the maintenance of sufficient flows in streams to permit egg incubation, juvenile rearing, juvenile and adult migration and adult spawning. With respect to Guichon Creek, DFO has taken steps to reduce water use in the system and has opposed further licensing of water from Guichon Creek. DFO has taken extraordinary management measures to protect these fish including closing of commercial, recreational and most aboriginal fisheries; seeking special designation for the creek under provincial legislation; requesting the Water Management Branch to release water; and initiatives to rebuild the habitat base.

DFO submits that the number of coho salmon and steelhead trout returning to spawn in the Thompson/Nicola basin has declined steadily since the mid-1980s. Presently, DFO is preparing a report for review by the Committee on the Status of Endangered Wildlife in Canada to determine the Thompson coho's designation as an endangered species under the proposed federal *Species at Risk Act*. Population declines can be attributed to insufficient water flows, habitat degradation, over-harvesting, and high water temperatures.

Due to serious fisheries concerns in the Nicola Basin, the entire drainage basin has been nominated by the provincial government as a candidate for *Sensitive Stream Designation* under the Provincial *Fish Protection Act*, S.B.C. 1997, c. 21. DFO submits that this designation would increase the level of protection for fish, water and fish habitat and would require the development and implementation of a recovery plan.

Despite the fisheries management measures taken, DFO continues to measure and observe inadequate fish flows in Guichon Creek. DFO has observed spawning fish not being able to enter Guichon Creek because of low flow conditions. On October 1, 1998, Dean Watts, an employee of DFO, measured and calculated a flow of 4.9 cfs at or near the mouth of Guichon Creek. This amount, he submits, is not enough for fish to spawn.

It is the opinion of DFO that a minimum flow requirement of 10 cfs is required in Guichon Creek. DFO submits that present flows in Guichon Creek are below 10 cfs, and flows of 7 cfs are frequently not met. It submits that flow requirements are important for migration, spawning, incubation, and summer and winter rearing. Maintaining peak flows is critical because peak flows flush fine sediment from gravel used for spawning and transport bed-load material throughout the system. DFO submits that any issuance of additional licences will contribute to the further decline of fish stocks and their habitat.

The Third Party, Fish and Wildlife Branch, supports DFO. Mr. McGregor stated that rainbow trout and other populations of fish in Guichon Creek above Mamit Lake require 11.2 cfs during freshet, and 5.6 cfs for the rest of the year. Mr. McGregor also testified that protecting the rainbow trout resident in the upper Guichon Creek requires flows of about 1 cfs in Guichon Creek at the Point of Diversion, which converts to about 509 acre feet over the October 1 to June 15 period.

The Assistant Manager submits that the reports that the Appellants rely upon appear to have been prepared by Mike Edwards (who is one of the Appellants and is a Water Management Officer).

The Assistant Manager submits that the analyses in the reports are technically flawed, are inconsistent with the evidence of actual flows in Guichon Creek and are of no assistance in this appeal.

The Assistant Manager submits that the analysis of water availability relied on by the Appellants in Guichon Creek between Mamit Lake and the mouth of the creek is based on data for the Hector Creek drainage. The Assistant Manager submits that the Hector Creek drainage is not valid for the entire lower Guichon Creek drainage, and that using the Hector Creek figure for the entire lower Guichon Creek drainage gives an inflated picture of water availability in that drainage.

The Assistant Manager further submits that the Appellants analysis of water availability is flawed because their calculations are largely based on Mr. Obedkoff's May 12, 1987 report, which, the Assistant Manager submits, is not useful in determining water availability in this case. He provides four reasons why Mr. Obedkoff's report is not useful:

- First, Mr. Obedkoff's unit runoff estimates are derived from graphs that are based on only one point of measurement. Having only one point of measurement, there is no certainty that those graphs accurately represent runoff in that zone.
- Second, Mr. Obedkoff's estimates were based on data available to him in 1987. The period of record on Guichon Creek above Tunkwa Lake now extends to 1998. It is apparent from the additional data that the Guichon watershed's freshet has been getting smaller over time.

- Third, Mr. Obedkoff's unit runoff estimates were based on streamflow records above Mamit Lake only, but the Appellants used them as representative of the whole Guichon Creek drainage.
- Finally, Mr. Obedkoff's estimates are based on analysis of data which has been averaged over a year. Averaging data over such long periods tends to make low flows over shorter periods, and gives a poor picture of the stream flow variability which is important in this kind of analysis.

The Assistant Manager submits that another way of evaluating the Appellants' analyses is to compare them with actual measurements of flow in Guichon Creek for the period October 1 to March 31. The Assistant Manager submits that this comparison shows that the water actually flowing in the creek is about 38% of what the Appellants' analyses predict.

B) Factors the Assistant Manager failed to take into consideration

1. Groundwater contributions and contributions from Tunkwa Creek

The Appellants submit that the Assistant Manager fails to take into account that evaporation losses from Tunkwa and Leighton Lakes could be compensated for by water from Tunkwa Creek, which flows into Tunkwa Lake. Further, they point out that the Assistant Manager suggests that there are streambed losses from Tunkwa/Durand Creek but did not consider that there are groundwater contributions to these creeks as well.

The Assistant Manager submits that the Appellants have provided no evidence to support either of these assertions.

2. Actual use of the water licences on Guichon Creek

The Appellants submit that, contrary to Ministry policy, the Assistant Manager failed to review the actual use of the water licences on Guichon Creek, compared to licenced demand. The Appellants submit that assuming that actual withdrawals equals the licenced quantities would result in an underestimation of the quantity of water actually available.

The Appellants note that the *Water Programs Policy and Procedures Manual* states "A shortfall in supply should not automatically result in the refusal of the application. In such cases, further evaluation of opportunities to augment supply through the development of storage or a review of actual water use compared to licenced demand is necessary."

The Assistant Manager submits that he relied on actual flows in Guichon Creek. He does not assume that actual withdrawals equal licenced quantities. The Assistant Manager prefers to rely on actual flow only.

3. Request is to Store during Freshet

The Appellants submit that their Application should be granted because it only proposes to divert water from Guichon Creek for storage in Tunkwa and Leighton Lakes, during the freshet. Further, they request that the storage period for their licence be extended to June 30. They argue that they should be allowed to take advantage of a delayed freshet. The Appellants indicate that they already hold a licence on Guichon Creek which allows for the extension of the storage period beyond June 15.

The Assistant Manager disagrees that the period of storage for the licence should be October 1 to June 30. However, he submits that the point is irrelevant to whether the application should be granted. He submits that the Appellants should not be entitled to take advantage of a delayed freshet.

4. Carry over storage

The Appellants argue that the Application will not affect downstream rights because it will be fully backed by storage, with unused water carrying over to the next year. The *Manual of Operation Hydrology in British Columbia*, produced by the Hydrology Section of Water Management, explains that

With a very large storage capacity, it is possible to carry over water in storage from one year to the next, so the annual water use may be greater than the total annual runoff in a 'dry' year.

The Appellants propose to divert water during the freshet or during peak flows. The Appellants submit that their Application should be granted because it would not permit them to store water in July, August, or September (when flows are of concern).

The Appellants explain that a storage licence authorizes a licensee to store an authorized quantity of water. Carry over storage means that if, for example, on a wet year, the licensee does not use all of the stored water, the licensee can carry some the stored water over to the following year. The Appellants submit that carry over storage is an accepted Water Management practice. They note that Water Management's *Manual of Operational Hydrology* discusses the benefits of carry over storage. In addition, they submit that carry over storage is used in the management of water supplies in several watersheds in the Southern Interior Region. Further, the Appellants submit that the Assistant Manager considered carry over storage in the adjudication of other applications on Guichon Creek. The Appellants submit that this is a good water management practice because it may actually result in water conservation.

Although the Appellants did not apply for a licence based on carry over storage, they submit that they asked Water Management to consider carry over storage in their 1994 letter. The Appellants submit that the unlicensed storage capacities of the Tunkwa and Leighton Lakes are large enough to allow for carry over storage. The Appellants submit that the Assistant Manager failed to consider carry over

storage and, therefore, failed to consider all of the relevant factors in making his determination.

The Assistant Manager submits that the Appellants should not be granted a licence based on carry over storage because carry over storage is unmanageable and inconsistent with current licensing practice and policy. The Assistant Manager testified that he did consider carry over storage in adjudicating the Application, but that he rejected the idea because it is not Water Management policy to licence carry over storage.

The Assistant Manager indicates that carry over storage complicates the release of water and can lead to over-diversion, because licensees first use the carried over amounts and then their licensed amounts. He also submits that there is no evidence that carry over storage has ever been approved in the Southern Interior Region.

Ron Smith, an Engineer and Head of the Water Planning Section for the Ministry, testified that, to his knowledge, carry over storage has never been approved in the Southern Interior Region where he has worked since 1985. He testified about the difficulties associated with carry over storage including the difficulty of determining if there is surplus water for storage until after the freshet, and the difficulty of determining the amount of carry over storage to licence and the amount of water in a reservoir that is the result of carry over storage as opposed to inflow.

The Panel's Findings

The Panel finds that the Assistant Manager has broad discretion under section 12 of the *Act* to issue water licences. In exercising his discretion, the decision of the Assistant Manager must be made having regard to the objects of the *Act*. The licensing provisions focus on allocation of water and priority of water licences. The Panel notes that there have been some recent amendments to the *Water Regulation*, B.C. Reg. 204/88, addressing "Changes in and about a stream" which expressly require consideration of environmental impacts and water quality. The Panel finds, therefore, that it has a limited jurisdiction to consider the impacts of proposed diversion of water on fish habitat downstream.

The issue under appeal is whether there is sufficient water available in Guichon Creek to grant the Application. On the issue of water availability, the Panel notes that it has before it analyses from the Assistant Manager, the Engineer and the Appellants, each with different results. The Panel notes that part of the reason for the conflicting results may be due to the fact that the analyses use different points of analysis and different periods of analysis, data from different periods of record, and rely on different reports.

However, on review of the three analyses, the Panel prefers the Engineer's Report. That report is the most comprehensive and has been carried out by a professional engineer qualified to make such findings.

Further, it is noted that this appeal has been conducted as a new hearing. Accordingly, the Panel will consider the amount of water using the best available evidence.

The Panel accepts the evidence of the Assistant Manager that the standard period of analysis used by Water Management in determining water availability, is the April 1 to June 15 period. As well, the Engineer's Report indicates

The freshet 1st April to 15th June should be used for this adjudication as flow during the October 1st to March 31st period may be required to satisfy evaporation/streambed losses and instream requirements. Any further storage development (if available) within the Guichon Creek watershed should be restricted to 1st April to 15th June.

The Appellants request a provision entitling them to extend the period of storage from June 15 to June 30, to take advantage of a delayed freshet. While the Panel accepts that some of the freshet may be delayed because it originates on the North side of Forge Mountain, the Panel agrees with the Assistant Manager that a delayed freshet applies to all licence holders on Guichon Creek and that the Appellants should not have preferential access to it.

The Panel also accepts the evidence of the Assistant Manager that the 1 in 5 year drought basis is the standard Water Management method of analysis. The Appellants referred to the Nicola Basin Strategic Plan, which establishes general water management objectives for the Nicola watershed. The plan provides:

1. Water supplies for domestic and industrial uses from surface sources to meet licensed requirements at all times.
2. Water supplies to meet licensed demand for irrigation fourteen years out of fifteen with an absolute minimum of four years in five.
3. Fishery resource maintenance flows to support targeted populations of anadromous and resident fish in designated streams to occur under average flow conditions (1 in 2 years) in unregulated streams and 14 in 15 years in regulated streams.

The Nicola Basin Strategic Plan indicates that an analysis of water availability for agriculture should be based on the 1 in 5 drought basis at the minimum, and that any consideration for the conservation of fish requires a more stringent method of analysis. The Panel finds that the 1 in 5 drought basis is the absolute minimum acceptable standard, and is the standard used by Water Management.

Therefore, the issue now before the Panel is whether there is additional water available in Guichon Creek for the period of April 1 to June 15, on a 1 in 5 drought basis.

The Panel accepts the calculation in the Engineer's Report indicating that a frequency analysis of actual flow measurements on Guichon Creek (water gauge 08LG056) above the Point of Diversion for the period of April 1 to June 15, for the

period of record through 1996, shows that, on a 1 in 5 drought basis, 1,090 acre feet of water is available.

Further, the Engineer's Report shows that the flow for the same period above Mamit Lake is 5,610 acre feet.

This flow of 5,610 acre feet includes all of the flow that has been allowed to pass the Point of Diversion. The Engineer then calculated all of the other demands on Guichon Creek and added the inflow from Dupuis Creek. After making all of these calculations, he concluded that there is a deficit of 3,565 acre feet of available water at Mamit Lake.

The Engineer made a similar analysis for the period from October 1 to June 15 and determined that there was a deficit of 2,065 acre feet of available water at Mamit Lake.

Therefore, the water at the Point of Diversion must be allowed to flow down the creek to satisfy downstream demand. The Panel accepts the evidence of the Appellants that there is room in the Tunkwa and Leighton Lakes for storage, however, the Panel finds that, regardless, there is insufficient water in Guichon Creek to store in Tunkwa and Leighton Lakes.

In addition, the Panel finds that, because the Guichon watershed is a chronically water-short drainage with serious water use conflicts and water management problems, any diversions of water out of the watershed should be avoided. Under the Application, water would be diverted out of the Guichon watershed into the Tunkwa/Durand watershed, which flows into Kamloops Lake. The Panel notes that once water is diverted out of a watershed, it is removed from the watershed permanently. The Panel accepts the reasoning in the Engineer's Report recommending against any diversion of water out of the Guichon watershed.

The objectives of the Nicola Basin Strategic Plan would be jeopardised by any additional export of water from the watershed. The diversion of water out of the watershed would put additional stress on instream and off stream users within the watershed. Any use of water within a given watershed will have some portion return to/remain in the system. Any water removed from a watershed via an interwatershed diversion will basically be totally lost to that system with no return flows available.

Given the objectives of the *Act*, the Panel finds that it has limited jurisdiction to consider the impacts of the proposed diversion on fish and fish habitat. The Panel accepts that in order to provide adequate water for spawning and fish habitat there must be a constant flow of water in Guichon Creek. The Panel notes that DFO argued that this flow should be a minimum 10 cfs and the Assistant Manager argued that it should be 15 cfs during freshet, and 7 cfs for the rest of the year. The Appellants refer to the Nicola Basin Strategic Plan that sets a 7 cfs minimum flow requirement. The Panel also notes that there was considerable evidence presented at the hearing that 7 cfs is inadequate to protect the fisheries resource.

The Panel finds that the most persuasive evidence regarding the adequacy of the flow of the creek for fisheries purposes is that of Dean Watts, measuring the flow of water on October 1, 1998, at or near the mouth of Guichon Creek, at 4.9 cfs. Based on this evidence, the flow of water at the mouth of Guichon Creek doesn't even meet the minimum flow requirement of 7 cfs. The Panel also accepts the evidence of Mr. Watts that 7 cfs at the mouth is an inadequate amount of water for fish to spawn. As a result, the Panel finds that further diversions upstream on Guichon Creek will result in a decrease in the storage capacity in Mamit Lake and a corresponding decrease in the flow at the mouth of the creek.

It is important to note that DFO is recommending that the Thompson coho be designated as an endangered species and that the Nicola Basin has been nominated by the provincial government as a candidate for *Sensitive Stream Designation* under the Provincial *Fish Protection Act* (even though it was not accepted). These factors emphasize the importance of the maintenance of an adequate supply of water in the watershed.

The Appellants argue that granting them a licence based on storage during the freshet will not affect the fisheries in Guichon Creek. However, the Panel finds that maintenance of the flow during the freshet is equally important to the protection of fish habitat and the health of the stream.

Given the critical need to protect fish and fish habitat, the Panel finds that the reservation for 1,700 acre feet of water at Mamit Lake for that purpose is reasonable. It is apparent that even this amount is inadequate based on the low flow measurements that have been collected at the mouth of the creek.

In addition, other demands on the creek including seepage losses from inefficient ditches and evaporation, preclude the approval of any other licences at this time.

Having determined that Guichon Creek cannot bear any further demands on it at this time regardless of the season, it is unnecessary to consider the Appellants' submissions regarding the carry over storage capability in Tunkwa or Leighton Lakes. Guichon Creek is not capable of providing over storage to those lakes at this time.

Similarly, the issues of ground water contribution and actual use need not be considered further.

In conclusion, the Panel finds that there is insufficient water available in Guichon Creek to grant the Appellants' Application.

2. Whether the Appellants' Application was treated inconsistently and unfairly by Water Management.

The Appellants argue that Water Management treated their Application inconsistently and unfairly, and that this treatment has prejudiced their Application.

The Appellants submitted their Application to Water Management in 1987, but it was not adjudicated until 1998, 11 years later. There was evidence at the hearing

that a report on the Application was compiled as early as 1988. It is the Appellants' position that Water Management "deleted" this report from the file. They point to the evidence of Mr. Petrie that when he was assigned to the file in 1996, the 1988 report was on the file.

The Appellants' submit that, over the years, they sent four letters to Water Management regarding the status of their Application all of which were ignored. They note that the Application was only adjudicated after they applied pressure on Water Management by directly contacting the responsible Minister. It is the Appellants' position that the Assistant Manager's failure to adjudicate the Application within a reasonable time has prejudiced their chance of the Application being granted. They submit that the delay has also resulted in the loss of farming income.

In addition, the Appellants note that their Application has an earlier priority date than the Hector Creek applications that were granted by Water Management in 1991 and 1992. The evidence is that Water Management granted the Hector Creek applications to divert 384.5 acre feet from Hector Creek, within 2 and 3 years of the dates of application (July 20, 1989). The Appellants submit that in granting the Hector Creek applications, the Assistant Manager contravened section 15 of the *Act*. Section 15 states, according to the Appellants, that the precedence of two licences on the same stream depends on their respective priority dates, with the earlier priority date taking precedence.

The Appellants further contend that they have been prejudiced because, in the meantime, the Supreme Court of Canada released its decision in *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (hereinafter *Delgamuukw*) establishing that there is a duty to consult First Nations on their Application. The Court held that the Crown is required to consult First Nations if its actions may infringe aboriginal rights or title. The Appellants argue that, if the Application had been dealt with fairly and consistently, it would have been decided prior to the *Delgamuukw* decision. However, because the Assistant Manager delayed his decision until after the *Delgamuukw* decision, his delay has prejudiced the Application. The Appellants submit that the Province should have adjudicated the Application on its relative merits prior to 1997, therefore prior to the *Delgamuukw* decision.

The Assistant Manager acknowledged that the Appellants wrote letters of enquiry that were received by Water Management. He submits, however, that the Ministry had no legal obligation to reply to the letters. He did, however, consider the information in the Appellants' July 18, 1994 letter. In addition, Mr. Petrie met with the Mr. Anderson on July 12, 1996. The Assistant Manager submits that, in response to the Appellants' August 25, 1997 letter, he phoned the Appellants to let them know that their Application would be given priority.

It is the Assistant Manager's position that there is no requirement that he adjudicate applications in any order or within any particular time, although he testified that the average time frame for adjudication of a licensing application varied from 2 to 4 years. Applications do not have priority dates, only licences have priority dates. The Assistant Manager submits that section 15 of the *Act* says

nothing about the order in which applications are to be adjudicated. It deals with priorities among granted licences on the same stream, not the adjudication of applications for licences on different streams.

The Assistant Manager admits that the Water Management Branch could have done a better job of handling the Application. However, he adds that the issue in this appeal is not how the Application was handled or adjudicated, but whether the Application should have been refused. In this regard, he maintains that had the Application been adjudicated in the early 1990s, it would have been refused. The Application was for an inter-watershed diversion of water from a chronically water-short drainage with serious water use conflicts and water management problems. He states that he delayed adjudicating the Application in the hope that the situation would improve to the point that he could grant the Application. However, his hope did not materialize.

The Assistant Manager also submits that it was appropriate under the circumstances that he refuse the Application before the Engineer's Report was completed. The Assistant Manager notes that, as a result of pressure from the Appellants, he had to adjudicate the Application within two or three days and had to streamline the process in order to do so. The Assistant Manager admits that it was unusual for him to have made his decision before a formal report was prepared, however, he did conduct an analysis, which was recorded in Sheet 1.

The Assistant Manager submits that the Hector Creek applications were adjudicated in 1991 and 1992 because they would not adversely affect the rights of any other licence holders and because that applicant also pressured Water Management for a decision. At the hearing, Mr. Smith indicated that in the adjudication of the Hector Creek applications, Water Management did not consider the Appellants' prior application on Guichon Creek. When the Hector Creek applications were granted, Water Management expected the Nicola Lake dam to be completed and to then be able to grant any prior applications.

The Panel accepts the evidence of the Assistant Manager that Water Management delayed adjudicating the Application in the hope that the availability of water on Guichon Creek would improve. The Panel also notes that during the 11-year application period Water Management failed to respond to letters sent by the Appellants concerning their Application. This is clearly unacceptable. In the Panel's view, there should have been better communication between Water Management and the Appellants in the course of the 11 years. In particular, if Water Management was delaying adjudication of the Application because of concerns with water availability on Guichon Creek, this should have been communicated to the Appellants.

The Panel finds that granting the Hector Creek applications may have prejudiced the Application. However, the Panel finds that there is insufficient information before it regarding the Hector Creek applications to make any specific findings on whether granting the Hector Creek applications was inappropriate.

Further, the Panel finds that section 15 of the *Act* sets out the priority of licenses on the same stream. When an application for water use is submitted pursuant to section 10, the date it is submitted is referred to as the priority date. However, the priority date has no legal effect unless and until the application is granted. If the Appellants' licence had been granted, its priority would have been earlier than those on Hector Creek. Therefore, the date of application has no legal authority until the permit is actually issued.

Finally, the Panel finds that consistent with the Supreme Court's ruling in *Delgamuukw*, the Assistant Manager has a duty to consult First Nations if his actions may infringe aboriginal rights or title. The Band submits that it has an aboriginal right to access and use the water flowing through its reserves, including Guichon Creek, to meet both the present and future needs of the Band. It is the position of the Band that they have priority access to water in Guichon Creek ahead of all other interests. Because of this priority, the Band submits that the Province cannot issue a water licence to any interest other than the Band without consulting with the Band.

The Panel agrees that the Assistant Manager has an obligation to consult First Nations with respect to an application to divert water from Guichon Creek, which may infringe the Band's aboriginal rights to access and use water from Guichon Creek. However, in this case, the Panel is satisfied that the Band has been consulted in accordance with the *Act* and has expressed its objection to the approval of the licence. In addition, the application has been refused. Accordingly, no further consultation is required until such time as the application is, or may be, reconsidered.

The Panel therefore finds that even though, on the face, the Appellants' Application was treated with undue delay, there is simply not enough water available in Guichon Creek to justify granting the Appellants' Application.

DECISION

In making this decision, the Panel considered all of the evidence and arguments provided, whether or not they have been specifically reiterated here.

For the reasons set out above, the Panel has decided that the Assistant Manager's decision to deny the Appellants' water licence application is confirmed.

The appeal is dismissed.

Alan Andison, Chair
Environmental Appeal Board

October 1, 2002