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Hop(p)s and Water: A Nice Little Water Rights Decision Out of British Columbia

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Decision Commented on:

Carolyn Hopp v Assistant Regional Manager Water, [2012-WAT-033\(a\)](#) (EAB).

The Environmental Appeal Board (EAB) of British Columbia is starting to build up a body of jurisprudence on water rights and especially water licensing decisions in the context of fully allocated or fully recorded streams.

In this case Madeley, the relevant decision maker, rejected Hopp's application for a water licence for domestic purposes on the grounds that the stream was fully recorded. Hopp appealed relying on two main grounds of appeal. The first was that Madeley should have granted the licence because there could be no prejudice to existing senior licensees (in this case Cizinsky) since they would still have priority and would be able to shut Hopp down if they were unable to access their full allocation. The second ground of appeal was that there would be sufficient water if the Department were to cancel the Cizinsky licence on the grounds that Cizinsky was not putting his licence to beneficial use.

The panel chair, Blair Lockhart rejected both grounds of appeal. While it is true in a prior appropriation or allocation system that the senior licensee always has the express or implied right to shut down a junior appropriator, Lockhart appeared to acknowledge the government's position that it must have regard to the costs of administering priority. The respondent put the point this way (quoted at para 22) "there is no justification for creating a situation of having to enforce inevitable water regulation requirements when none would be necessary if we did not issue that additional licence." Panel Chair Lockhart seemingly endorsed this approach at paragraph 31. It may be relevant to note that this was clearly an intermittent watercourse and there was no discussion of the need to leave water instream for ecological purposes.

As for the beneficial use argument the short answer might well be that this was not properly before the Board on an appeal of the Manager's refusal to issue Hopp a licence (see at para 38); but even if it were there was evidence that the Cizinsky was currently making some limited use of its licence even if it was true that there were some years in which the licence had been left unused.

BC's *Water Act*, [RSBC 1996, c 483](#), unlike Alberta's expressly refers to beneficial use and provides that a licence may be cancelled for failure to make beneficial use of licensed water:

23 (2) The rights of a licensee under a licence are subject to suspension for any time by the comptroller or a regional water manager, and a licence and all rights under it are subject to cancellation in whole or in part by the comptroller or a regional water manager for any of the following:

- (a) failure by the licensee for 3 successive years to make beneficial use of the water for the purpose and in the manner authorized under the licence;
- (b) failure by the licensee within the time specified to construct the works authorized under the licence;

Alberta's Act (*Water Act*, [RSA 2000, c W-3](#)) makes no mention of beneficial use although it does similarly provide for cancellation in the event of non-use. The Department appears to interpret this in "all-or-nothing terms" with the implication that there is no authority to cancel a licence (or even the unused part of the licensed volume) so long as some water is being put to use.

55(1) The Director may suspend or cancel a licence

- (i) there has been no diversion of any of the water allocated in the licence, or there has been a failure or ceasing to exercise the rights granted under the licence, over a period of 3 years.

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