ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – October 9, 2018

IN THE MATTER OF sections 91, 92, 95, and 97 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal filed by Benga Mining Ltd. with respect to the cancellation of *Water Act* Licence No. 88 in the Oldman River and Licence No. 3 on Gold Creek by the Director, South Saskatchewan Region, Alberta Environment and Parks.

Cite as: *Benga Mining Ltd.* v. *Director, South Saskatchewan Region, Alberta Environment and Parks* (9 October 2018), Appeal No. 16-001-D (A.E.A.B.).

BEFORE: Mr. Alex MacWilliam, Board Chair.

SUBMISSIONS BY:

Appellant: Benga Mining Ltd.

Director: Ms. Kathleen Murphy, Director, South Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Jodi Hierlmeier, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) cancelled a Licence previously issued under the *Water Act* to Joseph Margetak. The Licence was originally issued in 1908 and was cancelled in 2016.

Benga Mining Ltd. appealed the cancellation of the Licence, arguing the proper parties were not notified of the cancellation as required in the legislation.

The Board received and reviewed submissions on whether the appeal was properly before the Board.

Based on the submissions and the Director's record provided, the Board found Benga Mining Ltd. did not have the right to appeal. Under section 115(1)g) of the *Water Act*, only the licensee may appeal the cancellation of the Licence, and Benga did not provide evidence that is was the licensee.

The Board dismissed the appeal.

TABLE OF CONTENTS

I. INTRODUCTION

[1] These are the Environmental Appeals Board's decisions and reasons for the preliminary matter raised in respect of the cancellation of *Water Act* Licence No. 88 in the Oldman River and Licence No. 3 on Gold Creek (collectively, the "Licence") by the Director, South Saskatchewan Region, Alberta Environment and Parks ("AEP" or the "Director") under the *Water Act*, R.S.A. 2000, c. W-3 on March 4, 2016. The decision to cancel the Licence was appealed by Benga Mining Ltd. (the "Appellant") on April 22, 2016. The Licence allowed for the withdrawal of water from Gold Creek in the Municipality of Crowsnest Pass.

[2] The Director raised a motion asking the Environmental Appeals Board (the "Board") to dismiss the appeal, because the Board lacked jurisdiction to hear the matter on the basis that, under section 115(1)(g) of the *Water Act*,[1] the Appellant did not have standing to appeal the decision. The Director also argued the appeal was filed past the 30-day time limit prescribed in section 116(1)(b) of the *Water Act*.[2]

[3] The Board received and reviewed the submissions from the Appellant and the Director and final comments from the Appellant on the motion.

[4] Based on the submissions and the information before the Board, the Board determined the appeal is not properly before the Board. Therefore, pursuant to section 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"),[3] the Board dismissed the appeal.

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[1] Section 115(1)(g) of the *Water Act* states:
"A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances…
(g) the approval holder, preliminary certificate holder, licensee or registrant, if the Director suspends or cancels an approval, licence or registration or cancels a preliminary certificate…."

[2] Section 116(1)(b) of the *Water Act* provides:
"A notice of appeal must be submitted to the Environmental Appeals Board…
(b) in any other case, not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from."

[3] Section 95(5)(a) of EPEA states:
"The Board

II. SUBMISSIONS

A. Appellant

[5] The Appellant explained it was in discussions with the Alberta Energy Regulator ("AER") and AEP to identify opportunities to acquire surface water rights and allocations for the Grassy Mountain Coal Project.

[6] The Appellant said that on April 1, 2016, it became aware the Director cancelled File No. 207 on March 4, 2016. The Appellant stated it was appealing the Director's decision to cancel the Licence and requested the Licence be reinstated to provide time to put the works in good standing and transfer the allocation to the Appellant's project area adjacent to Gold Creek.

[7] The Appellant listed the following reasons for reinstating the Licence:

1. the Appellant advised the government of its interest in the Licence on numerous occasions;
2. the Licence was in the name of Mr. Joseph Margetak since July 1948, but it may have been transferred to the Municipality of Crowsnest Pass ("Municipality") even though there is no formal paperwork to validate this. No documents were provided to show any other person had been assigned ownership of the Licence with exclusive right to approve cancellation;
3. the Appellant owns land immediately downstream of the diversion point and through which the Licence has appurtenant works. Benga could develop water access points on this land for the mining operation;
4. diversion works are still present in Gold Creek which form a barrier to the intermingling of fish species which is important to preserve unique species of fish; and
5. cancellation was not expected as imminent with works in place.

[8] The Appellant noted that, up until at least January 2016, the government website showed J. Margetak as the licence holder of an allocation on Gold Creek. The Appellant said it was unable to find Mr. Margetak and, given the age of the Licence, concluded Mr. Margetak abandoned his responsibilities under the Licence.

(a) may dismiss a notice of appeal if

(iii) for any other reason the Board considers that the notice of appeal is not properly before it…"

[9] The Appellant stated the Licence was not amended to reflect any disposition at the time of the cancellation so, therefore, section 80(3) of the *Water Act*[4] applies and Benga, as a landowner appurtenant to the Licence, is jointly liable for carrying out the duties, responsibilities, and obligations specified in the Licence.

[10] The Appellant noted there is no definition of "licensee" in the *Water Act*. The Appellant believed that if a person is responsible for the duties, responsibilities, and obligations of a licensee, they must be considered a licensee as it is that responsibility that a person acquires when a document is issued in their name. The Appellant said it would be unworkable if a licensee dies or abandons a project without instruction as to its disposition and the appurtenant landowners become jointly liable and responsible with none of the rights of a licensee to manage the project.

[11] The Appellant claimed to be a joint licensee of the former J. Margetak Licence along with all other land and lot owners appurtenant to the Licence.

[12] The Appellant stated it deferred its formal application to become the sole licensee as it understood the Municipality was seeking to claim the portion of the Licence that may have applied to other joint licensees.

[13] The Appellant argued that, if the Director communicated with the Municipality on the basis the Municipality represented the lot owners appurtenant to the Licence, then the Director accepted the lot owners status as joint licensees in the absence of Mr. Margetak. The Appellant said it also should be accepted as a joint licensee since it is a landowner appurtenant to the Licence. The Appellant stated its interests are not represented by the Municipality.

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[4] Section 80(3) of the *Water Act* states:

"If an owner of land, approval holder, preliminary certificate holder, licensee or registrant who disposes of land or an undertaking to which the approval, preliminary certificate, licence or registration is appurtenant fails to provide notice to the Director in accordance with this section, the owner of the land, approval holder, preliminary certificate holder, licensee or registrant and the purchaser of the land or undertaking to which the approval, preliminary certificate, licence or registration is appurtenant

(a) are jointly and severally liable for carrying out the duties and responsibilities specified in the approval, preliminary certificate, licence or registration, and

(b) are subject to the duties and obligations under this Act including those related to the approval, preliminary certificate, licence or registration."

[14] The Appellant noted there is precedence where a licensee moved on without leaving any notice or instruction on the disposition of the licence. Notice was provided to all landowners shown to be appurtenant to the licence, and they were given licensee status until the licence was divided up among willing landowners.

[15] The Appellant stated it did not expect the Licence to be cancelled without any notice to all the joint licensees.

B. Director

[16] The Director argued the Appellant did not have standing to appeal the decision because it was not the licensee or joint licensee. The Director said the Appellant was not entitled to notice before the Licence was cancelled. The Director argued the Appellant did not meet the onus of proving it is the licensee in order to satisfy section 115(1)(g) of the *Water Act*. The Director argued the appeal should be dismissed.

[17] The Director provided the following summary of the history of the Licence:

- The Licence was used to divert water from Gold Creek at NE 31-7-3-W5M to supply water to the Village of Frank. The dam structure was located on NE 31 and a wooden pipe transported the water across part of SW 31 to the Village of Frank.
- The Licence was first issued in 1908. In 1926, the Licence was issued to Naylor, Murray, and Goyette for municipal purposes. A caveat was registered against SW 31 in 1926 and remained on title when the Appellant acquired SW 31 in 2013.
- The Licence was changed into the name of Joseph Margetak in 1948, and the purpose of the Licence was changed to domestic purposes for stock watering.
- After the Village of Frank acquired the waterworks-system, the Municipality applied in 1979 to have the Licence changed to the Municipality's name.
- The Licence was not initially changed because an inspection of the waterworks-system found the works were not constructed according to the plan filed with the Licence.

- The Municipality was issued a licence for groundwater to supply the Village of Frank. The Municipality did not pursue the requirements to provide updated plans to complete the name change on the Licence.
- The Municipality contacted AEP about the Licence on July 31, 2015, inquiring about the water transfer process as it had been contacted by the Appellant to transfer the Municipality's allocation of water under the Licence to the Appellant.
- The Director notified the Municipality on January 22, 2016, the Licence was not in good standing, which is a requirement for a transfer application to be processed. The Director provided the Municipality with 30 days notice before canceling the Licence.
- The Director advised the Municipality on March 5, 2015, the Licence was cancelled.

[18] The Director noted that, under the *Water Act*, only the licensee has the ability to appeal a licence cancellation. The Director explained the *Water Act* does not expressly define "licensee," but a plain reading of the *Water Act* indicates the licensee is the person who holds the licence and, therefore, holds the right to divert and use the water.

[19] The Director stated only Mr. Margetak or the Municipality could be the licensee. The Director said there is no indication the Appellant is Mr. Margetak or his heir or that it had any interest in the land or undertakings owned by Mr. Margatek.

[20] The Director said the Municipality applied to be named on the Licence, owns the undertakings appurtenant to the Licence, and was responsible for the Licence since the 1970s. The Director noted the Appellant identified the Municipality as the licensee when it contacted the Municipality about transferring the water allocation under the Licence to the Appellant.

[21] The Director submitted the Licence is appurtenant to the undertaking, not to the land. The Director noted the *Water Act* requires the licence to specify the land or undertaking to which the licence is appurtenant, and predecessor statute, the *Water Resources Act*, included similar language.

[22] The Director explained it was not unusual for senior licences to be silent on appurtenance, but she examined the Licence and information in the Record to determine if the Licence was appurtenant to the land or the undertaking. The Director noted the Licence was

used for municipal purposes to supply water to the Village of Frank and, according to Alberta's Guidelines Regarding Appurtenance, municipal purposes are appurtenant to the undertaking.

[23] Therefore, the Director submitted the Licence is appurtenant to the undertaking. The Director said the Municipality owned the undertaking since the 1970s, and ownership of the undertaking changed hands along with the name on the Licence until the Municipality did not pursue the final requirements to complete the name change on the Licence.

[24] The Director noted the caveat registered on the Appellant's title indicated the previous owners of SW 31 consented to having the undertaking for the Village of Frank water works system cross their land. The Director argued this caveat, which indicates a right to use a portion of SW 13 for the undertaking, undermines any claim the pipeline itself is appurtenant to the title now held by the Appellant.

[25] The Director submitted the Appellant has no claim to the Licence as owner of SW 31.

[26] The Director submitted section 80(3) of the *Water Act*[5] was not triggered to obligate the Appellant to take on responsibilities under the Licence. The Director stated section 80(3) only applies when there is a failure to provide notice to the Director that the land or undertaking to which the licence is appurtenant has changed ownership. The Director explained she received notice the Municipality became owner of the undertaking in the 1970s, and the Municipality applied to change the Licence into the Municipality's name in 1979. The Director stated section 80(3) does not require the name change to be perfected or processed, but only for notice to be provided. The Director noted the *Water Resources Act* did not have a statutory

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[5] Section 80(3) of the *Water Act* states:

> "If an owner of land, approval holder, preliminary certificate holder, licensee or registrant who disposes of land or an undertaking to which the approval, preliminary certificate, licence or registration is appurtenant fails to provide notice to the Director in accordance with this section, the owner of the land, approval holder, preliminary certificate holder, licensee or registrant and the purchaser of the land or undertaking to which the approval, preliminary certificate, licence or registration is appurtenant
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> (a) are jointly and severally liable for carrying out the duties and responsibilities specified in the approval, preliminary certificate, licence or registration, and
>
> (b) are subject to the duties and obligations under this Act including those related to the approval, preliminary certificate, licence or registration."

requirement equivalent to section 80 of the *Water Act*, but name change applications were made in an attempt to ensure the person responsible for diverting the water was reflected on the licence.

[27] The Director said the Municipality has been responsible for the obligations under the Licence since the 1970s.

[28] The Director noted the Appellant did not provide any arguments to support its assertion that, in previous decisions made by AEP regarding licence amendments, notice was provided to all landowners appurtenant to the licence. The Director explained that, if the Appellant was referring to the Beaver Creek licence amendments, the circumstances were different. The Director explained the Beaver Creek amendments involved a private irrigation licence that was appurtenant to the land that was subsequently subdivided. The licence allocation was apportioned amongst the lot owners in proportion to their irrigable area.

[29] The Director stated in the present case the Licence was appurtenant to the undertaking, the Municipality owned the undertaking and, therefore, notice to others was not required.

[30] The Director said she provided notice to the Municipality of her intent to cancel the Licence, and if a transfer application or an agreement to transfer was in place, the Director would have expected to receive a response from the Municipality before the Licence was cancelled.

[31] The Director noted a water transfer is a voluntary process, and one party cannot force a licensee to transfer a water allocation to them. The Director said a licensee can choose whether or not to bring their licence into good standing to fend off cancellation.

[32] The Director requested the Board find the Appellant did not have standing to appeal the cancellation of the Licence and dismiss the appeal.

C. Rebuttal Submission

[33] The Appellant argued it has the same standing as the Municipality when the Director treated the Municipality as a licensee even though the only name on the licence was

Margetak. The Appellant said if one party can be interpreted as a licensee, so must the other, and if neither is a licensee then the cancellation is void.

[34] The Appellant stated the Director did not provide any documentation to show the Licence had been used to divert water to the Village of Frank. The Appellant noted the licence says it is for watering stock and the plan only showed an intent at some time to deliver water to Frank. The Appellant said there was no explanation why the Licence was issued for the purpose of stock watering, and the only land suitable for raising stock was the land now owned by Benga and land where the dam is located.

[35] The Appellant stated the documents confirm the Village of Frank acquired the municipal portion of the waterworks system, but there was no document from Margetak regarding the intended disposition of the Licence.

[36] The Appellant said the inspection of the waterworks-system was not conclusive as to the use or non-use of water on SW 31-7-3-W5M, and there was a letter from the Department confirming the Licence would not be transferred to the Municipality.[6]

[37] The Appellants explained it contacted AEP and expressed interest in the Licence, because the website stated the licensee was Margetak and he could not be found.

[38] The Appellant noted AEP treated the Municipality as the licensee even though the Department refused to do so previously and Margetak was still listed as the licensee.

[39] The Appellant noted the Director acknowledged cancelling the Licence created unauthorized works (the functioning dam). The Appellant said there was no inspection report or any indication anyone visited the site since 1979 when it was reported the dam was still functioning and diverting water. The Appellant stated there was no report or recommendation that indicated anyone checked to determine if there was any landowner using any part of the Licence even though Benga, whose land is shown on the plans, had indicated its intent to use the Licence. The Appellant noted the decision relied on the 37-year old inspection report, which said the inspection should be repeated when ground conditions were clearer, and it recommended the Licence not be cancelled while the dam was still functioning.

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[6] See: Director's Record at Tab 12, Letter from D. Cable, Water Resources Branch, Alberta Environment.

[40] The Appellant said holding a licence is not the same as owning the works, and Margetak was the only name on the Licence and was the licensee at the time of the cancellation, since the Municipality's application to become the licensee was denied in 1979.

[41] The Appellant agreed it is not Mr. Margetak, but said neither is the Municipality. The Appellant said it expressed interest in the licence in 2015, but was turned away just as the Municipality was 37 years earlier. The Appellant stated it owns land that was identified on the plan attached to the Licence, being land that could have held livestock watered under the Licence. The Appellant said there was no recent inspection by the Department to determine who relied on the Licence's water allocation.

[42] The Appellant noted the Municipality's application was denied, and there were no undertakings connected to the abandoned dam. The Appellant said the Municipality was not the licensee.

[43] The Appellant explained that when it contacted the Municipality about transferring the water allocation under the Licence, the Appellant was following the Department's instructions. The Appellant said the Department website showed Margetak was the Licensee. The Appellant explained it was unaware the Municipality was denied licensee status 36 years before. The Appellant stated it was unreasonable to assume it had done a complete file review and by contacting the Municipality about transferring the water allocation, the Appellant had agreed with the Department as to who was the licensee. The Appellant said the Department ignored the information in the letter to the Municipality indicating the Appellant's intended use of the licence.

[44] The Appellant said it was prepared to incur additional costs and steps for it to become the sole holder of the Licence or of any portion of the Licence the Municipality would not object to the Appellant holding.

[45] With respect to the Director's determination the Licence was appurtenant to the undertaking and not the land, the Appellant noted there was no record to show the Director considered appurtenance before he cancelled the Licence. The Appellant argued the Director's position was one of convenience after the fact to justify a position already taken. The Appellant noted the title searches were done by the Department to determine Benga's land status months

after the decision to cancel the Licence was made. The Appellant stated the searches could not have formed part of the Director's decisions to cancel, to establish licensee status, or to determine appurtenance. The Appellant said there was no record to indicate the Director examined the Licence, or how she decided to exclude all other landowners identified on the plan.

[46] The Appellant agreed the most recent documents demonstrate the water under the Licence was used for municipal purposes, but the Appellant noted the most recent Licence, which was issued to Margetak, demonstrated the Licence was issued for stock watering purposes. The Appellant argued the whole picture must be considered, not just a selective view of the most convenient information.

[47] The Appellant stated Alberta's Guidelines Regarding Appurtenance suggests appurtenance to an undertaking may represent the intent of an applicant for new municipal purposes, but it does not provide clarity when interpreting old licences. The Appellant said the Licence appears to reflect a "fenceline" appurtenance where the licenced allocation applies to water use within the project area identified on the plan. The Appellant stated this was an appurtenance to land, and noted the Licence only specifies a total allocation of water for the area, not for each specific turnout or use.

[48] The Appellant said it was unclear what the intent of the Margetak Licence was, there was no mention of any disposition of the Licence by the Licensee, and there is only a claim by the Village of Frank that it acquired the water delivery system before 1979. The Appellant noted there was no sale agreement or any document signed by Margetak or any Village official confirming the Director's claim the undertaking changed hands with the name on the Licence. The Appellant said it could also be speculated that Margetak did not want to turn the Licence over to the Village, because it may not have been able to manage the stock watering portions of the Licence outside of the Village boundary. The Appellant stated the only land suitable for the licenced purpose of stock watering is the lands owned by Benga and the public land where the dam is located.

[49] The Appellant explained the delivery system to the Village of Frank in the early 1900s had to cross the Benga lands, so registering a caveat on those lands would be a common practice where the security of the project that crosses the land must be protected. The Appellant

said the caveat does not say anything about whether water was delivered to the land as part of the Licenced purpose and allocation.

[50] The Appellant stated it was not claiming the pipeline made the land appurtenant, but the pipeline made delivery possible to the land, the purpose of stockwater was reasonable and, therefore, Benga was part of the allocation in Margetak's Licence. The Appellant argued this demonstrates it has an interest in the Licence that was not considered by the Director.

[51] The Appellant stated it has a claim to at least a portion of the allocation and an interest in using all of the Licence that no one else claimed.

[52] The Appellants stated section 80(3) of the *Water Act* had been triggered for Benga as much as it had for the Municipality. The Appellant noted the Municipality did not provide notice of interest in the Licence until years after it acquired the pipeline system and only after it was approached by AEP. The Appellant said it provided notice of interest in the Licence after it acquired the SW31, but neither was recorded on the Licence before it was cancelled.

[53] The Appellant argued that failure to provide notice must include notice of rejection. The Appellants said it provided notice of its interest in 2015 before any Licence disposition decision was made. The Appellant noted that, at the time of the cancellation, the Licence was still in the name of Margetak.

[54] The Appellant said it did not know what the Municipality acquired in the 1970s, and although the Municipality provided notice, it was not accepted for a disposition of licence decision. The Appellant stated it also provided notice that was not accepted and, therefore, Benga and the Municipality have equal status as rejected notice providers. The Appellant said, at the time of the cancellation, Margetak was the licensee, with two notices of interest on file, the Municipality claiming to have acquired non-existent pipelines and Benga claiming to own land served by the Licence.

[55] The Appellant argued that when the *Water Act* came into effect in 1999, section 80 could be interpreted as the Municipality being responsible for the Licence, but until a decision was made, it was possible for another party to give notice and become jointly responsible. The Appellant said if a proper decision process was undertaken before Benga provided notice, it likely would have determined there were lands other than those the Municipality served that

benefited from the Licence, and the owners of those land parcels would have been given an opportunity to be involved in the decision. The Appellant argued:

> "Just because the Municipality is deemed to have provided notice first does not exclude others, nor does section 80 intend to provide an opportunity for a race to be first to give notice to automatically acquire exclusive rights to an abandoned licence."[7]

[56] The Appellant disagreed with the Director's conclusion that section 80(3) of the *Water Act* does not apply to the Appellant. The Appellant argued either the Municipality and Benga are licensees or neither are licensees. The Appellant said notice to one party before a decision is made does not have the effect of making that party a licensee to the exclusion of the other party.

[57] The Appellant stated the Director did not record a decision on appurtenance before canceling the Licence. The Appellant said notice of cancellation must be provided to the licensee, which in this case was Margetak, but notice was not provided to him. The Appellant said if the Municipality was a deemed licensee by way of notice, then so was Benga.

[58] The Appellant suggested the Municipality did not respond to the Director's notice of his intent to cancel the Licence because the Municipality did not have plans to rebuild its portion of the licenced use. The Appellant said it did not proceed with a transfer agreement because the Municipality had not been recorded as the Licensee to be able to transfer the Licence.

[59] The Appellant stated the Municipality wrote to the Department to ask how it could accommodate Benga's request to transfer the Margetak Licence to Benga. The Appellant said it deferred to the Municipality to allow it the first opportunity to have the Licence registered in its name as a step in the transfer process.

[60] The Appellant requested the Board find Benga had standing to appeal the cancellation of the Licence. The Appellant noted only the portion of the Director's Record that supported her position and documents created after the decision was made were provided.

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[7] Appellant's rebuttal submission, at paragraph 34.

[61] The Appellant acknowledged this was an old Licence so it was important to proceed carefully and inclusively to fill as many gaps as possible.

[62] The Appellant noted the basin is closed to new allocations, and this was the only Licence on Gold Creek. The Appellant said the Director knew there was an interest in the Licence for a project that would remediate a long standing public reclamation liability. The Appellant stated there was no other person or environmental issue the Department was anxious to protect with the Director's decision.

III. ANALYSIS

[63] The Board does not have jurisdiction to hear an appeal unless the decision being appealed is specified under section 115 of the *Water Act*, and the person appealing the decision is identified in the legislation as having the right of appeal. The Board does not have the jurisdiction to hear appeals of any decisions not included in the legislation and cannot accept appeals from those without the right to appeal. What is at issue before the Board is the cancellation of a water Licence originally issued in 1908 and whether the Appellant has the right to appeal the Director's decision to cancel the Licence pursuant to section 115 of the *Water Act*.

[64] Under section 115(1)(g) of the *Water Act*, it is the licensee who has the right to appeal a cancellation of the Licence. Therefore, in order for the appeal to be valid, the Appellants must be the licensee of the Licence that was cancelled.

[65] The Board has reviewed the submissions and the Director's limited record to determine if this appeal is validly before the Board.

[66] The ownership of the Licence was traceable over the years, although some confusion as to ownership arose in the 1970s when the Village of Frank appeared to want to have the Licence transferred to it. However, it does not appear the transfer was, in fact, completed. Later, the Municipality requested a transfer, but since the waterworks were not in compliance with the conditions in the Licence, the transfer did not occur. The government website was likely correct when it showed J. Margetak as the owner of the Licence.

[67] The Licence is either appurtenant to the land or the works. The Municipality operated the waterworks for some time even though the transfer of title was not perfected. It is

generally accepted that when a municipality receives water from specific works under a licence, the licence is appurtenant to the works. The Municipality was in charge of the works during the time water was diverted under the Licence to supply water to the Town. Since the Municipality had an interest in the Licence, it seems reasonable it was notified of the intended cancellation of the Licence. Based on the information before the Board, it appears the Municipality no longer used the Licenced water and, therefore, was not concerned about the cancellation of the Licence.

[68] The Appellant was not responsible for maintaining the works used to divert the water from Gold Creek and, therefore, was not in the same position as the Municipality who used the works. Expressing an interest to acquire the Licence for use on Benga's property does not constitute the type of interest in the Licence required to file a Notice of Appeal. The delivery system crossed the Appellant's land, but there was no indication the Appellant was responsible for the waterworks in any way except allowing a caveat be placed on its title to protect the project.

[69] The alternative issue is whether the Licence is appurtenant to the land. The Licence allows water to be diverted from works located at NE 31-7-3-W5M. Benga owns the SW 31-7-3-W5M. The works allowing for the diversion of water are not located on the Appellant's property. Although there is an easement on the Appellant's property for pipes to allow water to flow from the Licence diversion point to the Town of Frank, this does not support a conclusion that the works are appurtenant to the Appellant's lands.

[70] The Appellant argued its lands were suitable to support the purpose identified on the Licence, being stock watering. There is no indication water diverted under the Licence was used on the Appellant's property for any purpose, including stock watering. Even it had been used on the Appellant's lands, it is not sufficient to find the Licence appurtenant to the Appellant's property given appurtenance attaches to the point of diversion, not consumption. The point of diversion, and therefore the lands to which the Licence is appurtenant, is on the adjacent quarter section of land to the Appellant's property.

[71] Based on the available information, the Board finds the Appellant did not have an interest in the Licence that would provide it the right to file a Notice of Appeal of the cancellation of the Licence.

IV. CONCLUSION

[72] The Board finds the decision made by the Director to cancel the Licence cannot be appealed by Benga Mining Ltd. Therefore, the Board dismisses the appeal pursuant to section 95(5) of EPEA.[8]

Dated on October 9, 2018, at Edmonton, Alberta.

Alex MacWilliam
Board Chair

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[8] Section 95(5) 0f EPEA provides:

"The Board

(a) may dismiss a notice of appeal if

(i) it considers the notice of appeal to be frivolous or vexatious or without merit,

(ii) in the case of a notice of appeal submitted under section 91(1)(a)(i) or (ii), (g)(ii) or (m) of this Act or section 115(1)(a)(i) or (ii), (b)(i) or (ii), (c)(i) or (ii), (e) or (r) of the *Water Act*, the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,

(iii) for any other reason the Board considers that the notice of appeal is not properly before it,

(iv) the person who submitted the notice of appeal fails to comply with a written notice under section 92, or

(v) the person who submitted the notice of appeal fails to provide security in accordance with an order under section 97(3)(b)…."