



January 26, 2018

VIA EMAIL

Alberta Environmental Appeals Board
306 Peace Hills Trust Tower
10011-109 Street
Edmonton, AB
T5J 3S8

Attention: Valerie Myrmo
Registrar of Appeals

Dear Ms. Myrmo:

**RE: Notice of Appeal
Brower Ranching Co. Ltd. and Aaron Brower
Traditional Agricultural User
Appeal of Director's Denial of 2001 Application for Diversion of Water**

I am legal counsel for Brower Ranching Co. Ltd. and Aaron Brower.

The Brower family operates a large fourth-generation ranch on lands along the United States' border east of the Aden border crossing in the Milk River basin. The ranch was originally established over a century ago by the North West Mounted Police as an outpost.

The original water source on the ranch was developed by the North West Mounted Police in 1910.

The Brower family developed further water sources at number of times since including 1954, 1957, 1988 and other years. During this time, water use in Alberta was regulated by the *Water Resources Act*, RSA 1980 cW-5. That law allowed farmers and ranchers to use water for livestock watering and household uses without the requirement to obtain a licence.

In 1996, when the new *Water Act* was enacted, provisions were included to allow existing farmers and ranchers to continue their traditional use of water and to apply to bring their existing water use within the new regulatory framework of the *Water Act*.

The 1996 *Water Act* required that farmers and ranchers apply to codify their traditional user water rights prior to December 31, 2001 (sec. 73(3)). Alberta Environment developed a simply application form wherein farmers and ranchers would describe their existing water use and sources. The department would then determine which of the points of diversion met the requirements for a "Registration", "Licence", or an "Approval".

The Act further provided that a Registration would be assigned a priority number consistent with the date of first water use by the traditional agricultural user (sec. 28 and 30). A Registration is permanent and does not expire. Similar provisions provide that applications for a licence would be assigned a priority based on the date of the licence application.

On November 29, 2001, Aaron Brower's late father, Warren Brower, completed an application on Alberta Environment's form describing the traditional agricultural water uses on the ranch. The application was stamped received by Alberta Environment on December 7, 2001 (attached)

In the years subsequent to 2001, Alberta Environment made a couple of requests for additional information. The Brower family provided the information requested. In 2011, Alberta Environment had a government employee attend at the ranch to take GPS readings of the water source locations.

Subsequent to 2011, the Brower family received no requests for information from Alberta Environment. Section 73(5) of the *Water Act* allows the Director to request additional information and set a deadline for the applicant to respond:

73(5) The Director may require an applicant for a registration to submit any additional information the Director considers necessary within any time period required by the Director.

Similar provisions exist regarding licence applications under sec. 50(2).

The Brower family is not aware of any request from the Director for any information subsequent to 2011 and no deadlines for a response were set.

Without warning or notice, on December 27, 2017, the Brower family received a troubling registered letter from the Director dated December 20, 2017 (attached). In that letter the Director advised that she was closing the Brower file with respect to the 2001 Brower applications because "efforts were made to contact you requesting this additional information, but no response has been received".

Here is the main body of that letter:

Alberta Environment and Parks is in the process of reviewing our files and found an application made on November 29, 2001 for water allocations from three wells and two dams in S.E. 03-001-08-W4M, one dam in S.E. 08-001-08-W4M and two wells in N.W. 24-001-10-W4M for household and stockwatering purposes. Review of the submission revealed that further information is required in order to consider your application complete. The file information states efforts were made to contact you requesting this additional information, but no response has been received.

This is to advise that the application is considered incomplete under the provisions of Section 29(1) of the *Water Act*. Therefore, I am returning the incomplete application to you and closing File Nos 00212491, 00212492, 00212847, 00212848, 00212850 associated with the application.

Please note that the diversion of any water from these well(s) or dams without a licence is a contravention of the *Water Act*.

In the event you wish to reapply, you will be required to submit a new and complete application, including all the required information in support of the submission.

Again, the Brower family is not aware of any request for information. This letter came as a complete surprise to the Brower family.

What is more, is that the Brower family cannot simply reapply as the Director suggests. The right to apply to codify traditional agricultural user rights expired on December 31, 2001 as per sec. 73(4)(d) of the Act. The Director's actions improperly strip the Brower family of their traditional agricultural users rights. Furthermore, if the Brower's were to apply for a licence, that licence would be given a very low priority number based on a 2018 date. Accordingly, the Director's conduct and decision causes serious prejudice to the Brower family.

After having received the December 20th letter, Aaron Brower made extensive attempts to resolve this matter in order to preserve the ranches' historic water rights. He contacted several government officials and was able to arrange a meeting with Mr. Jeff Gutsell of Alberta Environment and Parks on January 4, 2018 in Lethbridge. He explained that his family had not received any request for additional information from the department. Mr. Gutsell was unable to provide any documentation to show that there were requests for information that were not responded to by the Brower family. Mr. Brower asked for an explanation as to why it has taken the department over 16 years to work on his family's application. Mr. Gutsell offered no explanation for the department's extreme delays. However, and very troublingly, Mr. Gutsell advised Aaron Brower that the government would soon be closing the Milk River basin to any new surface water allocations. If true, and depending on the timing, the result could be that the Brower family would be prevented from obtaining any legal right to use the water that exists on their ranch and which is critical the survival of their livestock and business.

Mr. Brower advises that he pleaded with several government officials to simply hold the existing application open, advise him of the additional information that the department seeks

and that he would promptly provide it. He explained that doing so would be proper and fair. It would allow the department to complete its review and issue the Registrations.

Alberta Environment and Parks refused Mr. Brower's reasonable request that he be told what information was needed and that he be afforded the opportunity to provide it. He was further warned that his case would be handed over to the Compliance and Enforcement Officers of the department because he is now operating his ranch without proper water rights.

Below is the last provision of notice of the Director's decision as communicated by Mr. Gutsell dated January 9, 2018. The emphasis is Mr. Gutsell's original:

From: Jeff Gutsell <Jeff.Gutsell@gov.ab.ca>
Date: January 9, 2018 at 1:58:49 PM MST
To: "brower@xplornet.com" <brower@xplornet.com>
Cc: Alexis M Kambeitz <Alexis.M.Kambeitz@gov.ab.ca>
Subject: water well and dam licensing

Hello Aaron,

Further to our meeting on January 4, 2018 in Lethbridge regarding your outstanding licence applications and your questions and concerns, I have been in conversation with both our District Compliance and District Approvals Managers for clarification .

In regards to your questions about the letter dated December 20, 2017 and potential Compliance actions, I have been informed by our District Compliance Manager that they will be in contact with you shortly to discuss your options.

In conversation with our District Approval Manager regarding the status of your outstanding licence applications for water wells and dams associated with File No's 00212491, 00212492, 00212847, 00212848, 00212850, as stated in our December 20, 2017 letter the above noted files have been closed and the applications associated with each determined to be incomplete. **We unfortunately cannot reopen the files, therefore you must to reapply and submit a new and complete licence application (i.e. including but limited to water well logs, pump test data, water chemistry analysis, dam construction details etc.) for each of the water wells and dams on the previous files, in addition to any other wells or dams that are in use that were not noted in the previous licence applications.**

I have included a link to the licence application form below and Livestock Water Requirements Worksheet as a separate file in this email.

<http://aep.alberta.ca/water/forms-applications/documents/ApplicationWaterActApproval-Form-Jul2016.pdf>

Please note that at present that the Milk River Basin is still open to the licensing of small stock watering operations from surface water sources and aquifer sources determined to be connected to surface water, however, legislation is in process that will likely close the basin to all surface water sources, leaving true groundwater aquifer sources as potentially the only option. That said

I would encourage you to reapply as soon as possible

Should you have any questions or concerns regarding what is required for resubmission to form a complete licence application please give me a call to discuss.

Thank you for your understanding.

Jeff Gutsell M.Sc., P.Geol.
Hydrogeologist
Operations Division
Alberta Environment and Parks
South Saskatchewan Region
2nd Floor, Provincial Building
200-5 Ave. South Lethbridge, AB

During the January 4, 2018 meeting, Mr. Gutsell advised that there were many other ranches in the Milk River basin that received the same letter closing 2001 traditional agricultural user right applications as the Brower family received on December 27, 2017. It is clear from Mr. Gutsell's email that the department is aware that closing the basin would cause existing ranches and farms to not be allowed to divert water. The Brower family believes that the department may be attempting to increase the amount of surface water available to the department to reallocate to non-agricultural uses within the Milk River basin. If the Brower's fears are accurate, it would amount to a gross abuse of power by the officials in Alberta Environment and Parks which will have to be addressed in another forum.

Alberta law requires traditional agricultural user rights to be recognized and the department's conduct of claiming that it is forced to close files and cannot reopen them is both wrong at law and an improper attempt to defeat the protections the Alberta Legislature afforded to farmers and ranchers under the *Water Act*.

The Director's decision to close the Brower's application amounts to a refusal to grant a Registration or Licence. Section 116 of the *Water Act* affords the Brower family the right to appeal to the Alberta Environmental Appeals Board a decision of the Director to refuse a Registration or Licence.

Please accept this letter as a notice of appeal pursuant to section 116 of the *Water Act* and section 91 of the *Environmental Protection and Enhancement Act*.

It is our respectful submission that the Director's decision was premature, unfair, improper, and unlawful.

The Director breached the department's duty of fairness by failing to notify the Brower family of any missing information and providing the Brower family with an opportunity to supply that information.

As noted above, the *Water Act* requires the Director to notify an applicant when additional information is required and to set a time period for the information to be supplied. The Director did not do so.

The Director has misinterpreted the law and incorrectly asserted that she does not have the authority to continue to process the Brower family's application. There is nothing in the *Water Act* or in Alberta law that prevents the Director from completing the processing of the Brower application.

The Director's actions are high-handed and without a factual and lawful basis. The Brower family will suffer extreme prejudice if the Director's actions are not corrected. The Brower family could be forced out of business without the right to use the water on their fourth-generation ranch.

The Brower family is requesting that the Board direct the Director to continue to process the 2001 application. In the alternative, the Brower family requests that the Board issue the Registrations and Licenses based on the 2001 application.

The Brower family may set out other grounds for this appeal upon receipt and review of the Director's Record.

Please contact me if you have any questions or require additional information. Thank you.

Yours truly,



KEITH WILSON
IKW/sc

cc: Brower Family
Kathleen Murphy, Director under the Act
Craig Knaus, Compliance Manager, AEP
Jeff Gutsell, AEP

Attachments

- Director's decision
- Dated Stamped Brower *Water Act* Application
- Complete Brower *Water Act* Application