

April 9, 2010

Attn: Randy Poon, P. Eng.
Approvals
Alberta Environment, Southern Region
#200, 2938 –11th St. NE Calgary AB T2E 7L7

Director
Alberta Environment Regulatory Approval Centre,
9th Floor Oxbridge Place,
9820 106 St.
Edmonton AB T5K 2J6

Re: file # 631 (00071066) licence priority no.1998-07-13-002

Dear Director,

The Environmental Law Centre is pleased to provide you with the following statement of concern. The Environmental Law Centre (ELC) is a charitable organization incorporated in 1982 to provide information on environmental law and policy in Alberta and Canada. The ELC's mission is to ensure that laws, policies, and legal processes protect the environment. One of the specific goals of the ELC is to ensure that environmental laws in Alberta are effective at protecting healthy aquatic ecosystems.

The application for change of purpose by the Eastern Irrigation District (EID) is to change the purpose of its existing licence from irrigation purposes only to a variety of purposes. The applicable section of the *Water Act* is section 54.¹ Section 54 lists a number of ways the Director can amend a water licence. This section does not expressly grant the Director the power to make changes to the purpose of a licence. One salient issue raised by the proposed use of this provision is whether or not the proposed approach to change of purpose for large licence holders is fundamentally inconsistent with the transfer provisions in sections 81-83 of the *Water Act*.

In this case the EID licence is very clearly for irrigation purposes only: the terms of the EID 1998 licence² expressly incorporates this limitation from the 1963 licence.³ The *Irrigation Districts Act* does not allow any irrigation district to enter into any agreement that goes beyond the purposes in their *Water Act* licence. The powers of irrigation districts are expressly limited

¹ *Water Act*, R.S.A. 2000, c. W-3, s.54.

² Licence no. 00071066-00-00 File No. 631-A Diversion of water cl. 1.

³ Licence No. 111A in the Bow River Drainage Basin, Licence 19A on Bow River. The Minister in Charge of Water resources to Eastern Irrigation District – License to divert water for irrigation purpose from the Bow river at a point on Blackfot [sic] I.R. W. of Sec6-21-18-4. Date of Issue 4th January, 1963.

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by their *Water Act* licences in s.6 of the *Irrigation Districts Act* to “to divert and use quantities of water in accordance with the terms and conditions of its licence under the *Water Act*.”⁴

The EID's application for change of purpose dated January 26, 2010 indicates that the EID has previously entered into and is a party to a variety of existing non-irrigation agreements. These include a variety of what it refers to in its application as “rural water use *purposes* agreements” for municipal, agricultural, and recreation purposes. This non-compliance is potentially very substantial: the EID 2009 annual report indicates that it could be an existing *de facto* purpose change and transfer of over 50 million cubic metres per year, not including agricultural uses.

It is our view that the EID had no valid authorization to enter into any non-irrigation agreements with any other water user as to do so is a violation of its existing water licence. The concept of a rural water use *purpose* agreement is unknown. It is our view that this places the EID in non-compliant standing under its current licence. We note that if any of these unauthorized transfers took place under the licence in question they may constitute an offence under the *Water Act*.⁵

Under these circumstances there is a statutory bar for the EID to apply for a transfer under the *Water Act*.⁶ Logically, this failure to maintain good standing ought to also make it ineligible for a requested change of purpose, which is directed at curing the defects in *de facto* existing unlawful transfers with a view to continuing and expanding them.

It should also be noted that the EID's licence is limited to certain times of year, reflecting that it is for irrigation purposes only.⁷ The proposed new "purposes" are for activities that occur year-round. This would require an amendment permitting the EID to use water at other times of year than the April 1- October 31 restrictions in the licence. No application has been made to amend this aspect of the licence. It is not within the scope of the change of purpose policy to amend a licence restriction of this nature. Since the change of purpose policy doesn't include this type of change, and no such application for this change has been made, these re-allocations must be effected by way of transfer, not change of purpose.

The licence also lacks enough detail to ascertain if the water is going to be used on or off the irrigation lands specified in the licence.⁸ The location, quantity and the nature of the proposed end-uses is unknown. Under the change of purpose policy and the *Water Act*, a transfer must be applied-for if the water is to be used off those lands.

The application further fails to describe how the water allocation that is subject of the application will be used, works required to deliver the water, and any necessary re-distribution this may entail. It is our view that simply listing quantities next to the purposes requested is insufficient to satisfy these requirements. As a result of this lack of relevant detail, the public is not "aware" of

⁴ *Irrigation Districts Act*, R.S.A. 2000, c. I-11.

⁵ *Water Act*, *supra* note 1, s.142(1)(h) provides that a person commits an offence who “commences or continues an activity except under an approval or as otherwise authorized by this Act”

⁶ *Supra* note 1, Section 81(7)(c) provides that an applicant for transfer must be in good standing.

⁷ *Supra* note 2 cl.3 limits the time of year of this licence to April 1-October 31 only.

⁸ *Supra* note 2 cl.2 restricts the licence to the works shown on plan nos. 631-P628.

appropriate details about the application under the terms of the change of purpose policy and the application does not comply with the policy.⁹

The change of purpose policy is silent on the use of allocations of irrigation districts by other users and is also silent regarding the relevant enabling provision of the *Water Act*. It is our view that water use by other parties than the irrigation district is a “transfer” under the *Irrigation Districts Act* and the *Water Act*, triggering the protections of applicable sections of those acts.¹⁰ Even if this were not the case, it is not reasonable to allow the change of purpose amendment because the application fails to comply with the change of purpose policy and the applicant is not in good standing in its licence. The proposed change of purpose would circumvent the protections specified in the *Water Act* and the *Irrigation Districts Act* in relation to transfers.

Accordingly, the application for a change of purpose should be denied. The only means to effect a change of this nature to water allocations currently held by the EID is by way of transfer.

We thank you for the opportunity to submit this statement of concern.

Yours Truly,

Laura Bowman
Staff Counsel
Environmental Law Centre

⁹ Alberta Environment, *Water Licence Change of Purpose: Administrative Licensing Criteria*, (Edmonton: Regulatory Approvals Branch, 2009) at 2.

¹⁰ *Water Act*, *supra* note 1, ss.81-83 and *Irrigation Districts Act*, *supra* note 4, s.11.