

Equity and the *Water Act*: First in Time, First in Right and Water Transfers Raise Questions of Public Interest

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The *Water Act*¹ and its predecessor legislation² are based on a water allocation system that gives priority access to water to licence holders who were first to obtain a licence. This system of prior allocation (or appropriation in the United States), more commonly referred to as First in Time First in Right (or FITFIR) in Alberta, was a method of water allocation that promoted settlement on lands with no water source associated with them. This system gives priority to those who obtained licences earlier over those who obtain a licence later. In water short periods this may result in no water being available to meet the licence allocations of later licence holders.

The *Water Act* also enables the transfer of licence allocations from one party to another for differing uses. The transfer provisions of the Act enable a limited form of buying and selling of water allocations, i.e., a regulated market in licences. Finally, the *Water Act* is clear that the Crown owns the water within the province's boundaries, that is to say that water is a public resource. The combined effect of these legal realities raises significant questions about water use, water sale and environmental and social equity.

These questions are of particular significance in the arid portion of the province where the main tributaries of the South Saskatchewan River Basin (SSRB), with the exception of the Red Deer River, are over allocated and the government has "closed" the basin to further allocations from the majority of surface waters. The closure of the basin has focused a reflection on FITFIR's inadequacies. Namely, FITFIR may not be an appropriate system in an over allocated watershed to achieve an end goal of maintaining the integrity of the aquatic environment. Variations in water supply and priority needs of the FITFIR participants ensure that instream flow needs will rarely be met. Similarly, the FITFIR model, when linked with a transfer system, raises serious issues of social and environmental equity.

On the social front, historically we gave water away for laudable reasons of inviting settlement and economic growth. The main costs associated with a licence were found in the building of infrastructure to facilitate water diversion and transport, with government often providing subsidies to assist in the building of these works. A heavy reliance existed on engineering to provide an ongoing water supply, as it does to varying degrees to this day.

Water facilitated colonization, begetting greater water diversion and use. Over time it became evident that the aquatic environment could not be sustained with the level of diversions and in 2006 the SSRB was closed.³ The result? A fortuitous boon for licencees in the SSRB by way of a cash windfall for those able and willing to transfer a water allocation. Now water allocations are worth money, in the realm of \$2000-\$5000 per acre-foot by some estimation (although details about these amounts are

difficult to determine as the sale amounts have not been reported). Older licences, with higher priority, can likely leverage more money for the sale of an allocation. At this stage it is important to remember that water is legislatively a public resource, owned by the Crown.

Some would argue that the transfer of the water licence and resulting payments is akin to appropriating water, a public resource, for significant private gain. Yet public debate on this issue remains limited. The social equity of paying potentially millions of dollars to someone who, by happenstance, obtained a water licence many years ago must be debated. How does the use of water, a public resource, in the past justify windfall profits?

This inequity becomes less quantifiable when one considers the environment. The same legal system that grants licences also ensures that returning water to support environmental integrity will be difficult. Users have a priority over the environmental flows, unless the government decides that there may be a significant adverse effect on the environment and suspends or cancels a licence.⁴ This protection may give rise to the payment of compensation to the licence holder.⁵ An incremental return is also enabled by allowing the government to hold back up to 10% of the amount of a water licence that is subject to a transfer.⁶ Perversely, the public may end up paying licence holders significant amounts of money for historical use of a public resource, even though this public resource has already provided licence holders with substantial private gains over time. Indeed, the current legislative framework may make things worse, as the allowance of transfers may see a net increase in actual water use, potentially resulting in greater environmental degradation.⁷

Another anachronistic outcome of the system is that it favours basin closures and high use of riverine ecosystems. Licence holders in open basins may wish to promote water intensive uses and industries to move into the area so they too can benefit from a cash windfall when the basin closes and water transfers are the only remaining tools.

Tradable water allocations may very well produce efficiencies but when combined with the FITFIR system, social and environmental inequities are likely to result. The government should provide some justification for not addressing these inequities if the public's trust in the water management system is to be maintained.

¹ R.S.A. 2000, c. W-3.

² Including the *Water Resources Act*, R.S.A. 1980, c. W-5.

³ Alberta Environment, "Approved Water Management Plan for the South Saskatchewan River Basin (Alberta)" (August 2006), online: Alberta Environment <http://environment.alberta.ca/documents/SSRB_Plan_Phase2.pdf>.

⁴ *Supra* note 1 at s. 55(2).

⁵ *Ibid.*

⁶ *Ibid.* at s. 83.

⁷ The potential for further degradation will depend on the change in use and the resulting quantity and quality of return flows.

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