

Who's it "FIT FIR"?

Provincial allocation review looms large for water users and the environment

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The "first in time, first in right" (FIT FIR) system of water allocation is a system whereby the first at the table gets first access to the water.¹ While such a system deals directly with issues of water scarcity, i.e., the earliest arrivals get it all; it does not do well at providing equitable access to water nor to managing degradation to the environment. The FIT FIR system, in isolation, is a system that produces winners and losers.

Allocation of water under FIT FIR – also referred to as prior allocation – poses significant challenges in over-allocated major basins, such as the South Saskatchewan River Basin (SSRB), for both economic development and environmental protection. In response to these pressures, the Alberta Government announced a review of the water allocation system in 2009. This review is ongoing and public consultation is expected in Spring of 2010.

As part of the review, the province received advice from three bodies: the Alberta Water Council, regarding the water transfer system specifically (an overhaul of the FIT FIR system was not considered, as this group had already begun meeting prior to the announced review)²; a Minister's Advisory Group (MAG)³; and the Alberta Water Research Institute (AWRI)⁴.

The three reports make similar recommendations regarding how water allocation could be changed to deal with various issues.⁵ Common themes include:

- Establishing protected water and/or the setting of water conservation objectives,
- Facilitating water transfers of licenced allocations, and
- Not touching FIT FIR.

Interestingly, the two reports (MAG and AWRI) that could have analyzed FIT FIR in greater detail did not walk down that road to any significant degree. The MAG report simply concluded in its forwarding letter that "overall, the advisory group believes that the current system as outlined in the Water Act, including the system of prior allocation (commonly called first-in-time, first-in-right or FIT FIR), continues to be a reasonable basis for allocating and reallocating water in Alberta at this time".⁶ The AWRI report, on the other hand, observes that "there is still much debate about whether [the FIT FIR] approach is still relevant and appropriate for addressing the full range of water management issues facing Alberta".⁷

Tackling FIT FIR, (the use of an aggressive sports metaphor is intended), is certainly no easy task. Altering the fundamentals of Alberta's water allocation system will not be without strong opponents. Perhaps the authors of the reports realized that the vast majority of Albertans, who

have limited knowledge of FIT FIR, may be ill prepared to force change, even if they felt it was worthwhile.

And yet, we would argue, if the government aims to “address the full range of water management issues”, it is imperative that FIT FIR become part of public discourse around water. The public needs to ask “who’s it FIT FIR?”.

Among the issues that justify a serious debate about FIT FIR are Crown ownership and equity and environmental risks during drought.

As a precursor to the equity issue it must be remembered that the water itself is owned by the Crown. The equity issue is a result of the how the FIT FIR system operates where a cap is placed on the issuance of further water licences and transfers are enabled, i.e., a water market is allowed to develop. Now that the SSRB is closed, new industries and developments are struggling to find water. With tradable licences, the FIT FIR system ensures that newcomers will pay a handsome price: a price not paid by original licencees. In the case of original licences, the primary expense to a licence holder was infrastructure to move the water. The water itself was basically given away. In some instances, the infrastructure may have garnered further public investment. One could say that the Crown (public) was subsidizing licence holders’ ventures by not charging for the water itself. This was viewed as reasonable, as it was a means of encouraging settlement and development in the West.

Licence holders used the water for private gain and some return for use of the public resource resulted by way of taxes. The more recent capping of licences, however, has enriched these licence holders immensely – some more than others – as they can now seek to transfer a licence for Crown owned water for significant amounts of money. Further, the cost of environmental harms in an over-allocated system is also borne by the public. The FIT FIR system (and licence transfers), like markets generally, treats the environment as an externality. This inequity is the result of having a regulatory system evolve into a market system (and is not unique to Alberta).⁸ Whether this approach is acceptable to the broader Alberta public, as ultimate owners of this resource, needs to be addressed.

A second issue of significant relevance to a review of water allocation is the risks to the environment in an over-allocated basin, particularly in drought years.⁹ The FIT FIR system is largely based on volumes and blind to seasonal supply. While some conditions on licences exist for maintaining environmental flows, only a few appear to be regularly used (primarily dams). For this reason, the primary holder of risk is the environment in an over-allocated basin. During extremely low flow periods, the FIT FIR system (barring a senior licence held for instream flows being in place) is not overly efficient or flexible in how it maintains environmental flows.

Allowing for a licence transfer system may foster conservation, but not for conservation purposes. Rather, it fosters the sale of water to other users. Environmental gains, if they are obtained through the transfer, are largely collateral to the transfer’s main purpose. Currently, the ability to hold private instream licences (as reflected in a water conservation objective) is limited.¹⁰ All three reports recommend allowing issuance of private licences for environmental goals but some argue that this power should have limits.¹¹ In this regard, flow conservation largely relies on the Crown taking 10% holdbacks under the *Water Act* during a transfer, something which is not likely to bring significant environmental gains.

In short, FIT FIR is a blunt but relatively easily administered water allocation tool. It provides a level of certainty to licenced water users. In over-allocated basins, it provides a high level of uncertainty to the environment and new users. Further, it appears to be perpetuated in a social

and political vacuum. In times of short supply, is it truly expected that senior licence holders will be able to cut off diversions for human health and environmental disasters? Certainly the *Water Act* foresees such situations where the priority system will need to be overridden.¹² Where environmental harms are likely, a level of compensation is required.¹³ But these “backstop” provisions of the *Water Act* merely perpetuate the idea that private entities own the water itself. This is a dangerous view, and one that minimizes the likelihood of fostering a water management system that provides for environmental flows.

If one speaks of balancing environmental, social and economic outcomes, FIT FIR has already tipped the scales. Who’s it FIT FIR? It’s a valid question, and many who want effective environmental protection see it as a barrier rather than a solution.¹⁴

¹ The “first in time, first in right” system is codified in the *Water Act*, R.S.A. 2000, c. W-3, at Part 3.

² Alberta Water Council, *Recommendations for Improving Alberta’s Water Allocation Transfer System* (Edmonton: Alberta Water Council, August 2009), online: Alberta Water Council <http://www.albertawatercouncil.ca/Portals/0/pdfs/WATSUP_web_FINAL.pdf>.

³ Minister’s Advisory Group, *Recommendation for Improving Alberta’s Water Management and Allocation* (August 2009), online: Alberta Environment <<http://environment.gov.ab.ca/info/library/8239.pdf>>.

⁴ Alberta Water Research Institute, *Towards Sustainability: Phase I, Ideas and Opportunities for Improving Water Allocation and Management in Alberta* (Edmonton: Alberta Water Research Institute, 2009), online: Alberta Water Research Institute <http://www.waterinstitute.ca/pdf/summary_report_future.pdf>.

⁵ The Water Council report regarding licence transfers, the only report that was the result of a multistakeholder decision-making process, included several non-consensus items of environmental significance, *supra* note 2.

⁶ *Ibid.* at iii.

⁷ *Supra* note 4.

⁸ See, for example, the approaches taken in Western United States and Spain.

⁹ The questions about the levels of precipitation and impacts of seasonal flows from diminished glacial contributions in meltwater are of central relevance. See, for example, E.A. Bash, S.J. Marshall, and E.C. White, “*Glacial meltwater contributions to the Bow River, Alberta, Canada*”, (Paper presented to the 2009 American Geophysical Union Fall Meeting, San Francisco, December 14-18, 2009), abstract online: Bibliography of Canadian Geomorphology <<http://cgrg.geog.uvic.ca/abstracts/BashGlacialAssessment.html>>.

¹⁰ *Water Act*, *supra* note 1 at s. 51(2).

¹¹ See Alberta Water Council *supra* note 2 at 16.

¹² *Water Act*, *supra* note 1 at ss. 54-55.

¹³ *Ibid.* at s.55 (2).

¹⁴ See Water Matters Society of Alberta and EcoJustice, *Share the Water: Building a Secure Water Future for Alberta* (Vancouver: EcoJustice, 2009), online: Water Matters Society of Alberta <<http://www.water-matters.org/docs/share-the-water.pdf>>.

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