

Water Law: Historical Perspective

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Palliser's Triangle



Features of Western Canadian Water Law

- Directly traceable to U.S. Doctrine of Prior Appropriation
- Founded on N.W.Irrigation Act (1894)
- Declaration of Crown Ownership of Water
- "Suppression" of Riparian Rights

Licences Provide Right to Use

- Crown Allocation of Rights to Use and Divert by Licence
- Licences formerly granted without term and considered perpetual by Licensees
- Early licences granted large quantities of water, not limited by principle of beneficial use.

4

Exceptions to Crown Ownership

- Except for and until some right in or to the use [of water] inconsistent with the right of the Crown is established
- No diversions permitted without a licence except in exercise of legal right existing at the time of such diversion
- Riparian right to domestic use

Nature of Licences

- During shortages, right to take water governed by prior allocation principle (FITFR)
- Traditionally, water licences tied to land and "inseparable therefrom"

6

How Does Prior Allocation Make Room for Newcomers?

- How to accommodate new users in a fully allocated basin
- In the US, through “reserved rights” under Winters doctrine
- What options are available to government

7

Manitoba Water Rights Act

14(1) Where a person applies to the minister for a licence to use or divert water... and all the water available for use or diversion...has already been allocated...or...further allocation would negatively affect an aquatic ecosystem, if the purpose for which the applicant will use the water is higher in priority... than the purpose ofother licensees, the minister may issue the licence to the applicant and... may cancel or restrict the rights... of any one or more of those other licensees ranking lower than the applicant...

8

Saskatchewan Water Corporation Act (1984)

Cancellation of right to water granted prior to this Act

42(1)... [T]he corporation may cancel the right of any person granted prior to the coming into force of this Act to the use of any water where the corporation considers it to be in the public interest to do so.

(2) No action or proceeding lies against the Crown, any officer of the Crown, the corporation or any officer or employee of the corporation for anything done by the corporation pursuant to subsection (1).

9

Alberta Solution: Transfers

Water allocation transfer under a licence.

Alberta's *Water Act* allows the transfer of the *right* to divert a volume of water from a source of water supply, under a certain priority. There is no physical transfer of water from the land. This type of transfer is voluntary, with a willing seller and willing buyer.

AEP FactSheet on Transfers

10

Constitutional Changes

- Creation of Alberta & Saskatchewan (1905)
- Natural Resources Transfer Agreement 1930
- NRTA Amendment Acts 1938
