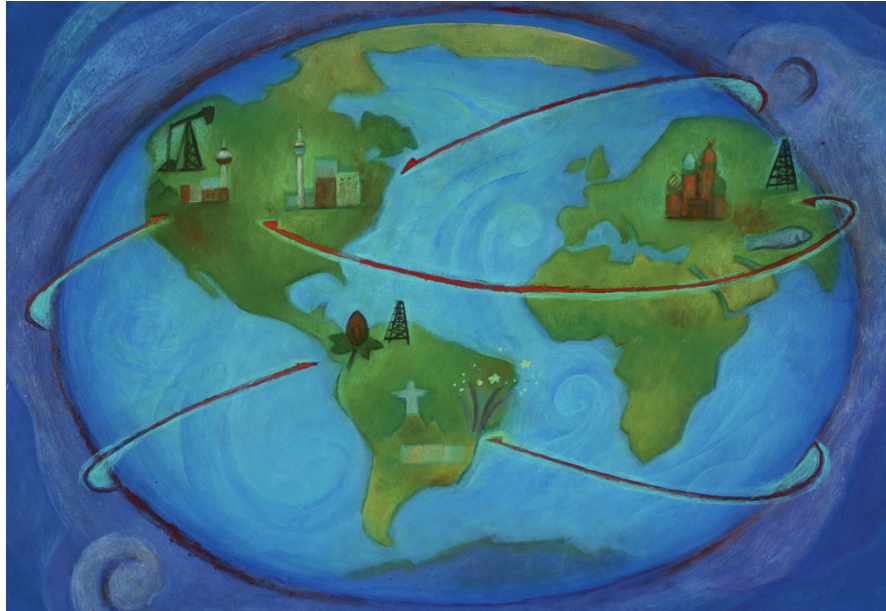


**Water Technology Symposium 2009  
Banff, Alberta - April 29 - May 1, 2009**

**Buying and Selling Alberta Water Rights:  
Legal and Regulatory Requirements and Challenges**



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## I. The Regulatory Framework

- *Water Act*
- *Water (Ministerial) Regulation*
- *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order*

## II. Buying and Selling Water Rights

- Assignment/Transfer/Amendment
- Good Standing
- Changing Diversion Points

# Outline

- Changing Use Points
- Changing Purpose
- 10% Holdback

## **III. Some Experience to Date**

- Water Rights Purchase and Sale Agreements
- Lessons Learned?

## *Water Act*

- Property in all water and right to divert/use is vested in Crown
- "Licence" for diversions of surface or groundwater
- "Preliminary Certificate"
  - A promised allocation
  - Does not allow diversion

## *Water Act*

- "Approval" for activities in or near water
  - infilling water body for roads, construction, etc.
  - erosion protection
  - drainage or realignment of water body
- "Registrations" for riparian landowners or landowners with groundwater who on January 1, 1999 diverted water for raising animals or applying pesticides

## Water Act - Licences

- Licence required for diversion, except for:
  - Traditional agricultural uses
  - Household purposes
  - Riparian/groundwater rights
  - Regulation exemptions
- Licence priorities: "First in time, First in right"
- Licence runs with the land

# Water Act - Plans and Objectives

- Approved Water Management Plans
  - Cabinet-approved plans setting out factors to consider when issuing water allocations and rights or restricting allocations or rights
  - South Saskatchewan River Basin Water Management Plan
    - 56% - 72% of average annual flow allocated

# Water Act - Plans and Objectives

- Water Conservation Objectives
  - Amount and quality Director thinks is necessary to protect aquatic environment, tourism, recreation, transportation, waste assimilation and/or fish and wildlife
  - Applies to new licences and existing licences with WCO terms



## *Water (Ministerial) Regulation*

- Exemptions from need for Licence
  - Camps/dugouts/livestock grazing/fire fighting, etc.
  - Saline groundwater (TDS > 4,000 mg/l)
    - no priority system: future oil sands disputes?
  - Geographical areas

## Water (Ministerial) Regulation

- Exemptions from need for Approval
  - Listed activities (docks/landscaping/dugouts, etc.)
  - Geographical areas
  - Activities carried out under *Codes of Practice*
    - Hydrostatic testing
    - Pipeline and telecommunication crossings
    - Watercourse crossings
    - Outfall structures
  - Geothermal if closed loop system

## *Water (Ministerial) Regulation*

- Major river basin boundaries
- Licence purposes
- Licence expiry dates
  - Subject to Approved Water Management Plan, Ministerial Order or water guideline
  - Generally 10 years
  - 25 years if municipal, agricultural or irrigation purpose or to implement Water Conservation Objective
- Water wells
- Dam and canal safety

# *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order*

- All surface water and groundwater hydraulically connected to surface water not allocated under existing Licence, Preliminary Certificate or Registration is reserved for allocation by Director
- Director may allocate only for
  - First Nations
  - Water Conservation Objectives
  - Storage if to protect aquatic environment or improving supply to existing licensees

# Licence Assignments

- A written contract to allow temporary diversions by another licensee with access to same water source
- Only allowed between two licensees or licensee and traditional agricultural user
- A new Licence is issued
- Cannot assign water already diverted under a Licence

## Licence Assignments

- Allows for change in use or diversion point (or additional diversion points) within the same contiguous land ownership unit
- Must be on same waterbody

# Licence Transfers

- All or part of the allocation is transferred temporarily or permanently
- Application for transfer only considered if authorized by Cabinet Order or approved Water Management Plan
- Must not be a Licence issued under a previous transfer with a reversion right
- Must not be a Preliminary Certificate or a temporary Licence

# Licence Transfers

- Director must consider:
  - Existing, potential or cumulative effects on:
    - Aquatic environment
    - Hydrology, hydrogeology
    - Household users
    - Traditional agricultural users
    - Other licensees
    - Public safety



# Licence Transfers

- Historical use
- Good standing
- Public response following notice
- Factors in approved Water Management Plan

# Licence Transfers

- SSRB Plan factors
  - No significant adverse effect on aquatic environment, Water Conservation Objective, groundwater, public health, safety or operations of other licensees or infrastructure
  - Industry standards/best practices followed for efficiency of use
  - If irrigation, new land to be irrigated is Class 4 or better
  - Master Agreement on Apportionment is respected

# Licence Transfer

- Amend existing Licence if transfer temporary or only part of allocation transferred
- Cancel and issue new Licence if permanent transfer or all of allocation transferred
- May also need Approval for new works
- Paperwork required:
  - Form TWA-1
  - Certificates of title
  - Landowners' consent
  - Plan/drawing showing layout of new works
  - Fees

## Good Standing

- May only amend, assign or transfer if Licence in good standing
- Good standing means:
  - All previous amendments, assignments, transfers recorded
  - Not expired, cancelled or suspended or considering same

## Good Standing

- Subject to cancellation if:
  - No diversions over previous 3 years
  - No reasonable prospect licensee will resume diversions
- No investigation, management order or enforcement order

## Good Standing

- No outstanding complaint, lawsuit or appeal
- Existing works exist and able to divert full allocation
- Points of diversion and use as per approved plans
- Terms and conditions historically met, including:
  - Water use returns
  - Purpose met and no other
  - Seasonal restrictions respected
  - Specific terms and conditions

# Changing Diversion Points

- Moving diversion point upstream and downstream
- Moving diversion point between groundwater and surface water
  - Same or new aquifer
  - Hydraulic connection

# Changing Diversion Points

- Replacement and supplementary wells and diversion points
  - Transfer needed if moving outside contiguous land ownership unit
  - Amendment if within same contiguous land ownership unit and on same water body



## Changing Use Points

- No restrictions to change of use if not changing diversion point
- Cannot change point of use outside major river basin
- Irrigation project may require agricultural feasibility report
- Done by Amendment

## Changing Purpose

- Amendment if no change to diversion or use points or timing of diversions
- Transfer if change to diversion or use points or timing of diversions
- Public notice required for Transfer
- Policy of 2% limit where adding new purposes
- Apply only to 3 years historical use
- Uncertainty as to return flow obligations

## 10% Holdback

- Trigger is if Director thinks it is in public interest to protect aquatic environment or Water Conservation Objective, and holdbacks authorized by Cabinet Order or approved Water Management Plan
- SSRB Plan recommends 10% holdback unless compelling reason to holdback less
- Holdback only on volume being transferred

## 10% Holdback

- Generally heldback volume remains in water body with same priority number to enhance aquatic environment
- Cannot pay cash in lieu
- Cannot donate transfer to environmental group

# Water Rights Purchase and Sale Agreements

- Legal, engineering and environmental due diligence
- Good standing?
  - Capital upgrades?
- Correct buyer and seller?
- Conditional on Director's approval
  - Who applies?
  - Responding to objections?

# Purchase and Sale Agreement

- New diversion point?
- New use point?
- New purpose?
- Options and deposits?
- Net of holdbacks?

# Purchase and Sale Agreement

- Multiple sales
- Coincidental with land sale
  - Not caveatable
  - Mortgage?

# Representations and Warranties

- Representations and warranties
  - Authority to buy and sell
  - Valid title to Licence, free of liens, claims, options and other encumbrances
  - Signing agreement does not violate law, existing contracts, orders, judgments, etc.
  - Agreement is valid and binding
  - Licence is in good standing



# Representations and Warranties

- Licence not issued from previous transfer with a reversion right
- Condition of the works
- Existence and validity of surface rights
- Licence priority

# Purchase and Sale Agreement

- Confidentiality, disclosure and FOIP
- Exclusivity
- Re-sales and assignments
- Surface rights
- Force majeure
- Indemnities

## Lessons Learned?

- Fraud
- No registry or notice
- Administrative uncertainty and risks
- Uncertainty of appurtenancy
- Non-transparent market
- Not-so-good standing
- Timing of transfer

## Lessons Learned?

- Need for Approval and *Environmental Protection and Enhancement Act* approval
- Need for municipal subdivision and development permits
- Federal *Fisheries Act*
- Federal *Navigable Waters Protection Act*
- *Canadian Environmental Assessment Act*

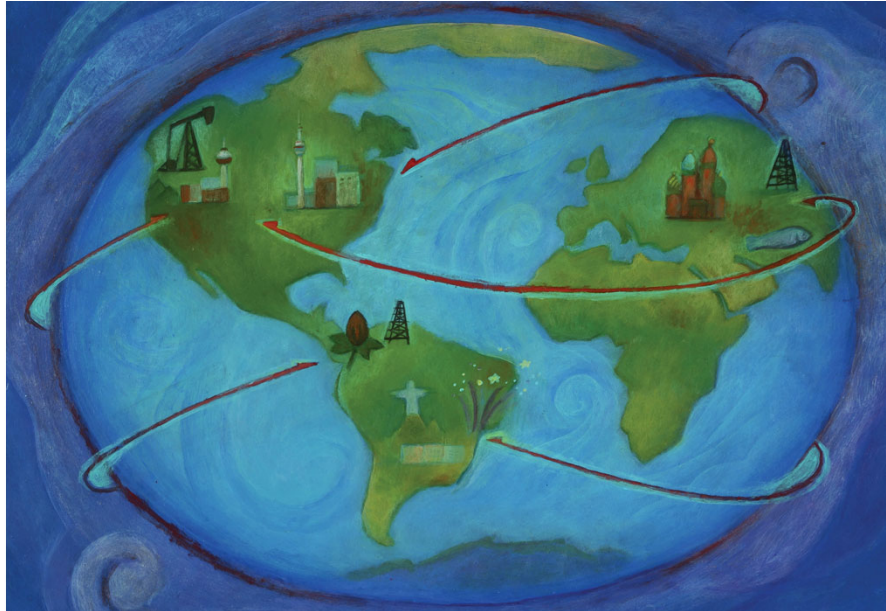
# Conclusions

- A thorough understanding of a complex legislative scheme is necessary
- Water trading is new, with corresponding significant legal and regulatory uncertainty
- Further regulatory practices and policies are needed

# Questions and Comments?

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