

Water Law and Rural Property Transactions

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Family Farm Issues

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WATER LAW AND RURAL PROPERTY TRANSACTIONS - AN OVERVIEW

The occupation and use of rural land throughout Alberta is often governed to a large degree by the proximity of a source of potable water and water for irrigation use. Water can be trucked for household use, but doing the same for stock watering is not cost justifiable and for irrigation is impossible. With few exceptions patterns of settlement were governed by the availability of water. Much of this is still true today. Prior to 1931 the Federal **Irrigation Act** governed the access to water for all but domestic purposes. After the **Natural Resources Transfer Act** of 1931, the Alberta **Water Resources Act** governed all water allocations within the province. The **Water Resources Act** remained essentially unchanged until replaced by the **Water Act** in 1999.

There are more than 2,908 private irrigation licenses, other than the 13 irrigation districts, irrigating a total of 311,258 acres of farmland in Alberta.¹ These projects vary in size from less than 5 acres to over several thousand acres. Each of these projects is licensed to an individual or a group of producers. The feasibility of these projects is overseen by Alberta Agriculture and the licensing is regulated by Alberta Environmental and Parks.

Water licenses are, for the most part, concentrated in the south of the province, reflecting the demographics, weather patterns and usage. Existing water licenses can be viewed on line at <http://waterlicences.alberta.ca/>.

WATER ACT

The new **Water Act** came into force on January 1, 1999. It replaced the old **Water Resources Act**. The diversion and use of water in Alberta is governed by this act. I will not deal with riparian rights, since for household purposes they are preserved by the act² and no special treatment of them is necessary in a transaction involving the conveyance of an interest in real estate. However, other entitlements to the diversion of water governed by the Act do merit special attention.

Generally the diversion of water for other than household purposes requires permission granted under the Act. These purposes include stock watering, irrigation, municipal and industrial use. For irrigation purposes, even a riparian owner, required a license under the **Water Resources Act** to divert water. Those licenses were issued on a first come first served basis, on what we call a “first in time first in right” system. The first to make an application for the water received their entire

¹ As of 2016

² Section 21 - riparian owners have the right to divert water for household purposes without a license.

requested allocation before the next application in time, and so on. Over time, as some older licenses fell into disuse or their full likened allocation was not subject to continuous use, the controller of water resources would either cancel the inactive license or restrict the allocation of the under-utilized license to the amount actually being used. This would make that water available to fill later applications. The statutory framework was somewhat restrictive and the allocation system tended to preserve the older uses and allocations and as a consequence when the water available was fully licensed, new development became difficult. The new Act provides a number of tools to increase the ability to re-allocate water for contemporary needs.

Under the old Act licenses were appurtenant to the parcel or undertaking for which they were issued and inseparable therefrom. This meant that when the land was transferred they went with it without any special mention. In addition the old licenses were issued without a term. They were essentially perpetual unless lost by non-use.

Deemed Licenses

Under the new Act all old licenses are grand-fathered into the new Act with the same priority and allocation that they enjoyed under the old Act.³ They continue with a perpetual existence without a term, either in the term of the license or imposed by statute. All deemed licenses also had terms contained as part of the license within the license documents.⁴ Often these terms and conditions were contained in an Interim License. An interim license was often issued prior to the final license and which granted approval for the construction of the diversion project and the diversion of water during the construction period and before the final license was issued. Once the final license is issued it and the interim license become paired as a single document. The new Act refers to these interim licenses as preliminary certificates.⁵

New Licenses

These licenses are those that are issued after the advent of the new Act.⁶ Subject to certain

³ Section 18(1) - Every authority or license . . . granted under a predecessor Act, that on the date this Act comes into force, authorizes the diversion of water is a deemed license that has the same priority number that corresponds to the priority number of the original authority or license.

⁴ Section 18(2)

⁵ Section 66.

⁶ Section 49 - ASubject to subsection (2), no person shall commence or continue a diversion of water for any purpose, or operate a works.

except pursuant to a license unless it is otherwise authorized by this Act.