

Using water reservations to protect the aesthetic values associated with water courses: a note on the Spray River (Banff)

By Nigel Bankes

Documents commented on::

Order in Council 546\49; *South Saskatchewan Basin Water Allocation Regulation*, Alta. Reg. 307/1991 (rescinded by Bow, Oldman and South Saskatchewan River Basin Water Allocation Order, Alta. Reg. 171/2007); Alberta Environment, TransAlta Utilities (TAU) licence for the Spray River development.

I have been doing some work on Crown water reservations over the last few months and in the course of that came across an example of what at first glance seemed to be the use of a water reservation to preserve the aesthetic qualities of a watercourse. The example also has an interesting constitutional twist that is worth reflecting on.

When Alberta was created in 1905 it took its place in confederation without the ownership or administration and control of its natural resources, including water. Canada (the Dominion) continued to manage lands and resources in the province for the benefit of the national interest. That included using Dominion lands to encourage immigration, but it also included the creation, maintenance and expansion of national parks to encourage tourism and to protect spectacular landscapes.

With the transfer of the administration and control of natural resources from Canada to Alberta in 1930 it was necessary to deal with retained federal lands. These lands included Indian reserves (about which there has been a lot of litigation over the years) and national parks (which have seen less litigation). I wrote about the constitutional status of national parks a good number of years ago: "Constitutional Problems Related to the Creation and Administration of Canada's National Parks" in J.O. Saunders (ed.), *Managing Natural Resources in a Federal State* (Carswell, Toronto, 1986) at pp. 212 to 234. But at that time I never got to the bottom of paragraph 16 in the Natural Resources Transfer Agreement (NRTA), which reads as follows:

16. The Government of Canada will introduce into the Parliament of Canada such legislation as may be necessary to exclude from the parks aforesaid certain areas forming part of certain of the said parks which have been delimited as including the lands now forming part thereof which are of substantial commercial value, the boundaries of the areas to be so excluded having been heretofore agreed upon by representatives of Canada and of the Province, and the Province agrees that upon the exclusion of the said areas as so agreed upon, it will not, by works outside the boundaries of any of the said parks, reduce the flow of water in any of the rivers or streams within the same to less than that which the Minister of the Interior may deem necessary adequately to preserve the scenic beauties of the said parks.

I had always thought that since the Rocky Mountain National Parks were largely headwater parks (“the mountains as our watertowers”) that the reference to waters flowing *in to* the National Parks was a bit of dead letter. But obviously I hadn’t spent enough time reflecting on my annual ski down Goat Creek or enough time thinking about the re-drawing of the maps that occurred over the 10 – 15 years that followed the NRTA and the results of the commercial exclusions referred to in paragraph 16.

One of the developments that was contemplated and implemented was the construction of the Spray Reservoir, now within Kananaskis Country. The result of this development was to change the drainage patterns in the upper Spray River (now outside the Park) by developing the Spray Reservoir and diverting a portion of the flows of the Spray River out of the Spray River and Goat Creek drainages so that they could be passed through a series of generating facilities culminating with the [Rundle Dam](#) (the facility that one sees between the Canmore Nordic Centre and the Bow River just upstream of Canmore), with the result that this water enters the Bow just above Canmore rather than several miles upstream close to the Banff Springs Hotel.

This development did have the potential to affect the scenic values of the Bow River in Banff and the Minister of the Interior therefore did establish a minimum flow level for the Spray at the junction with the Bow River. All of this is recited in Order in Council (Alberta) 546/49 which states as follows:

Whereas the National Parks Amendment Act, 1949, having been enacted [this is the amendment that changes the Park boundaries to exclude areas of commercial value from the Park] ... the Minister of Mines and Resources of Canada has [pursuant to the authority of para. 16 of the NRTA] fixed a minimum flow of 200 cubic feet per second during the months of June, July and August in each year in the Spray River at its junction with the Bow River as all the flow of water which he deems necessary adequately to preserve the scenic beauties of the said Park.

That Order in Council continued with a further recital to the effect that “it is deemed advisable to reserve the hereinafter described unappropriated waters which are vested in the Crown in the right of the Province”. This led to the operative language which reserved, “so that the Lieutenant Governor in Council may determine how the same may be used to the best advantage” not only “all the waters of the Spray River” but also the waters of the Smith Dorrien and the waters of the Bow River in the region of Bearspaw (the latter area with no direct connection to the Spray River, but also the site of a future dam).

I had originally thought that it was the reservation that was being used to deliver on Alberta’s commitment to Canada, but a moment’s reflection confirms that this is an overly optimistic interpretation of the reservation. Instead, it seems clear that this reservation was designed to protect Calgary Power’s (now TAU’s) interest in building the Spray development. The reservation was in fact repealed in 1991 by the *South Saskatchewan Basin Water Allocation Regulation*, Alta. Reg. 307/1991 (now itself repealed or spent as a result of the “close the basins” regulation - Bow, Oldman and South Saskatchewan River Basin Water Allocation Order, Alta. Reg. 171/2007).

It eventually dawned on me that a more obvious place to look for Alberta’s implementation of the obligation to maintain a minimum flow would be in the terms of TAU’s licences for the Spray development. And indeed the consolidated licence for the Spray development contains the following clause:

7. The Licensee will not by works outside the boundaries of Banff National Park reduce the flow of water in the Spray River at its junction with the Bow River in Banff National Park to an amount less than 200cfs during each of the months of June, July and August in each year hereafter during the term of this Final Licence.

Interestingly, the licence includes two additional flow requirements. The first is a commitment to supply a sewage dilution flow for the Banff Springs Hotel: “such amount of water as may reasonably be required by Banff Springs Hotel for essential sewage and water supply.” The second is a duty to maintain a discharge valve (presumably at Canyon dam) capable of diverting up to 100cfs for “such water as may be necessary for the purpose of fighting fires in Banff National Park”.

This account prompts four observations. First, it serves to remind us that considerable horse trading occurs when park boundaries are established (that is why the Exshaw eyesore continues to adorn the entrance to Banff National Park).

Second, it suggests that those concerned with protecting instream flows should be wary of relying on prerogative-style instruments like reservations (the current Bow, Oldman and South Saskatchewan River Basin Water Allocation Order, Alta. Reg. 171/2007) since, as they come, so may they go. Real protection is most likely to be delivered through the terms of a licence.

Third, the licence terms reveal what we value. What begins as a scenic flow order expands to include dilution flows for sewage and fire fighting flows. The dominant value in creating parks at the end of the 19th Century and in the first part of the 20th Century was undoubtedly the protection of spectacular landscapes and scenic values rather than the goal of ecological integrity of the current *National Parks Act*, SC 2000, c.32, s.8(2) or that of aquatic ecosystem health (the goal of Alberta’s [Water for Life](#)). This explains the reference to scenic values in the NRTA which was effectively carried through into the licence. But there were other values at stake in this watershed. Several papers by David Schindler, for example, note that the Spray River was valued as a significant cutthroat trout fishery. That fishery was destroyed by the diversion (see e.g. Schindler, 29(7) *Ambio* 401 at 404) and associated stocking of the Spray Reservoir. “Scenic flows” in sum do not necessarily produce the natural flows and channel flushing flows required to sustain healthy stream and riparian habitat.

And finally, we might reflect on the chameleon nature of Crown water reservations. Sometimes they may be used to close basins, sometimes they may be used to reserve minimum flows, and sometimes they may be used to foster a particular type of development be that an irrigation development or a power development.

I have more work to do on the Spray. I understand that there may be informal arrangements between Parks Canada and the licensee that vary the minimum flows described above, but further digging on that will have to wait for another day.

Nigel Bankes’ work on water law issues in Alberta is supported by a grant from Alberta Ingenuity