

The legal status of the commitment by Alberta's irrigation districts to share the shortage

By Nigel Bankes

Document commented on:

[Declaration re: Sharing Water for Human Needs and Livestock Sustenance During Water Shortages](#), Alberta Irrigation Projects Association

Last week, on World Water Day, March 22, Alberta's thirteen irrigation districts (acting through the Alberta Irrigation Projects Association) passed a declaration entitled "Sharing Water for Human Needs and Livestock Sustenance During Water Shortages". The Declaration is an important political statement by Alberta's Irrigation Districts. The purpose of this blog is to assess the legal significance of the Declaration. Before doing that I will set out the Declaration and explain just what it is that the Declaration is trying to do.

The Declaration provides as follows:

WHEREAS the member districts of the Alberta Irrigation Projects Association have been granted water licences, by the Government of Alberta, of considerable quantity for irrigation under the principle of prior allocation; and

WHEREAS the member districts of the Alberta Irrigation Projects Association have prior right to some licensed water relative to the right of some municipal licensees and other domestic water users in the area of the Province of Alberta within and surrounding the irrigation districts, and

WHEREAS the members of the Alberta Irrigation Projects Association recognize that water is vital to sustain human health and well-being, and that of livestock, and

WHEREAS drought conditions are recurrent in southern Alberta as a result of variability of the weather;

THEREFORE the member districts of the Alberta Irrigation Projects Association agree to the following:

In the case of water shortage due to drought conditions that can occur in southern Alberta, the member districts of the Alberta Irrigation Projects Association assure, within their right to control, the following:

- i) the member districts will participate in water sharing by temporary assignments with other licence holders with lower priority, in accordance with section 33 of the Water Act, R.S.A. 2000, c. W-3, in good faith, so that sufficient water can be distributed for human needs and livestock sustenance, and
- ii) no fee will be assessed for these temporary assignments of water for meeting human needs and livestock sustenance.

Temporary assignments may specify a proviso for water conservation measures that is reasonable and appropriate given conditions of the drought and water supply at the time.

Alberta's *Water Act* (RSA 2000, c.W-3) is a prior allocation statute which accords priority to competing water users on the basis of first in time first in right (FITFIR) - with the "first" referring to the first (most senior) licences to be issued on the relevant water body. The Act does *not* assign priority based on purpose (e.g. municipal uses over irrigation uses). Alberta's irrigation districts happen to hold large volume and very senior licences on some of the most important streams and rivers in southern Alberta, including the Bow, Oldman, St. Mary, Belly and Waterton. In most years there is enough water to meet all licensed users (although not enough to provide adequate instream flows to assure aquatic ecosystem health in all areas), but in dry years not all users can take their full licensed amount. In such a case the *Water Act* allows senior licensees to shut down junior licences so that the senior licensee can take its full entitlement. In recent practice, however, senior licensees have been unwilling to claim their full legal entitlement and have preferred to "share the shortage", an arrangement in which all participating licensees take a proportionate reduction in their allocations. The best documented example of this occurred in 2001 (written up in Rood and Vandersteen, "Relaxing the Principle of Prior Appropriation: Stored Water and Sharing the Shortage in Alberta, Canada" (2010), 24 *Water Resources Management* 1605 – 1620).

The preferred legal technique for accomplishing this sharing is a so-called s.33 assignment - referring to s.33 of the *Water Act*. This section of the *Act* permits a licensee (L1) to enter into a written agreement with another licensee (L2) allowing L2 to use some or all of L1's licensed volumes. An assignment does not permit L2 to divert or use any more water than it was entitled to under its licence but it does effectively improve L2's priority.

With this as background we can say that the Declaration is a commitment that the Irrigation Districts ("IDs", the L1s) will participate in good faith in negotiating and implementing s.33 sharing arrangements where necessary in the future, in times of drought. The intended beneficiaries (the L2s) are municipal licensees "and other domestic water users" (who must also be licensees or traditional agricultural users, because that is what the *Act* requires) who need water for human needs or livestock purposes. The beneficiaries (at least on the face of the Declaration) do not include other agricultural users who require water for non-livestock purposes, industrial users (including agricultural processing plants) or the environment (i.e. instream flow needs).

As to its legal status the Declaration has none. It is not a contract (there is no offer, acceptance or consideration) and the *Act* does not provide for or recognize a Declaration such as this. The Declaration is also expressed as a Declaration of the Association rather than a Declaration made individually and in some more authoritative way by each of the IDs. In short, this is an important political Declaration that the IDs will find it hard to walk away from but it has no legal weight. It

is not something that a livestock owner can take to the bank to establish that its 2005 licence is just as good as a 1930 licence in terms of priority. And it is not something a junior licensee will be able to use before a court when an ID (say in five years time) changes its mind and thinks that a livestock owner who wants security of water should pay for it by acquiring a transfer of a senior water right.

And there is one other possible legal problem with s.33 assignments that the IDs might need to address. IDs in Alberta are subject to two statutes: the *Water Act* and the *Irrigation Districts Act (IDA)* (RSA 2000, c. I – 11). An ID holds its licence under the *Water Act* but the *IDA* controls the types of contractual arrangements that IDs can enter into and the duration and relative priority of those arrangements. The *IDA* also (s.11) establishes some pre-conditions that an ID must meet before it enters into a transfer (s.81 of the *Water Act*). But the *IDA* is completely silent as to agreements assigning priority under the *Water Act*. I think that there is a fairly strong argument that the *IDA* establishes a complete rule book as to the types of water use agreements that an ID can enter into. Since the *IDA* does not mention an agreement to assign priority I think that there is an equally strong argument that an ID cannot enter into a s.33 “share the shortage” agreement. Or, to put it another way, a disgruntled owner of irrigable acreage who sees his or her allocation reduced in a dry year as a result of an ID entering into a s.33 assignment may well have standing to contest the validity of that assignment agreement.

I acknowledge that there is an alternative view that holds that since s.6 of the *IDA* provides that an ID “has the capacity and, subject to this Act, the regulations and the bylaws, the rights, powers and privileges of a natural person” it must be able to enter into a s.33 assignment agreement. I think that the difficulty with this argument is that the *Act* addresses the forms of water supply and delivery agreements that an ID may enter into. If an ID can enter into any water supply or delivery agreement, why would the legislature go to such pains to specify the terms, conditions and priorities associated with different types of sanctioned agreements?

In conclusion, the Declaration itself is not legally binding on anybody. There may be a question as to whether an ID can actually enter into a s.33 assignment agreement at all, but this is a more contested issue. But there is also a broader policy question at issue here which is whether this is the sort of fix to Alberta’s water laws that we should be encouraging? Should the right of a municipality to a secure source of water depend upon the largesse of the province’s irrigation districts? Are there other alternatives that we should be considering? Should IDs be required to enter into transfer agreements to provide a secure source of water to municipalities? And if so under what circumstances? Should we be relying on the IDs to decide who should benefit from the Declaration or are these (and other issues such as providing for instream flows) properly issues on which the province should be taking a leadership role?

Eighteen months ago the province, through the Minister’s office and through the Alberta Water Council and the Alberta Water Research Institute, released a series of papers which promised a review of Alberta’s water allocation legislation and policies, with the concept of “protected water” (minimum flows to support aquatic ecosystem health) high on the agenda of those reviews. [The three reports are available [here](#) and I commented on them at length (too much length some would say) in “Policy Proposals for Review of Alberta’s Water (Re)Allocation System” (2010), 20 *Journal of Environmental Law and Policy* 81 – 126.] But nothing seems to have happened. The Alberta Irrigation Projects Association may in part have been responding

to that void in provincial leadership in adopting the Declaration (and we should applaud it for that), but it is clear that the Declaration cannot and does not address the full range of issues identified in the reports released in November 2009.