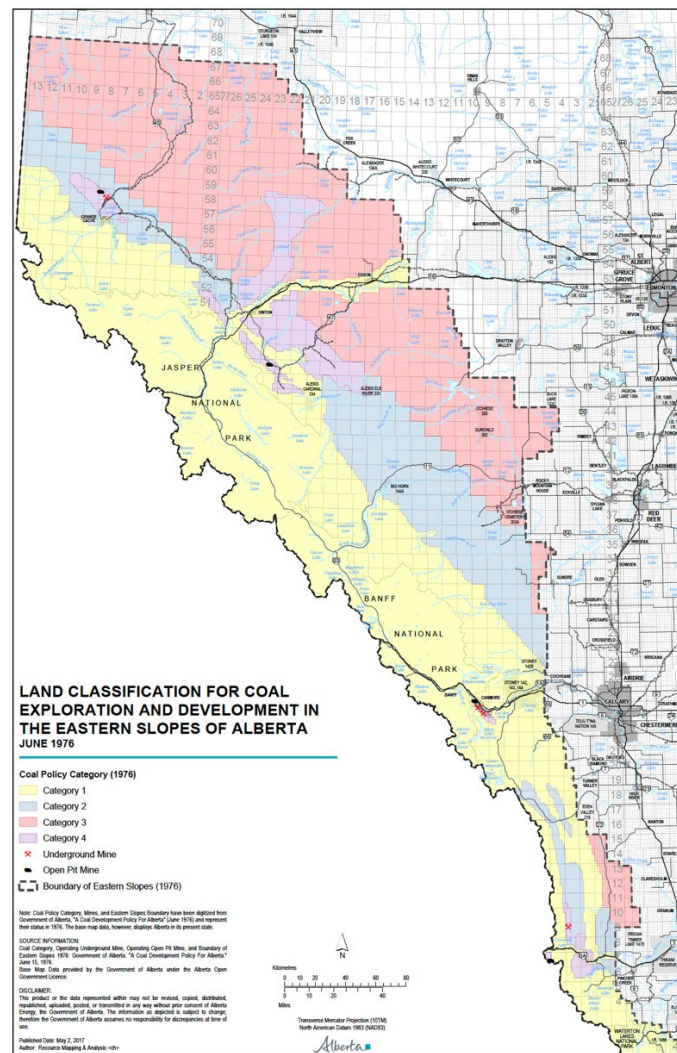


Water for Coal Developments: Where Will It Come From?

By: Nigel Bankes and Cheryl Bradley

Matters Commented On: [A Coal Development Policy for Alberta](#) (1976, rescinded June 1, 2020); Oldman River Basin Water Allocation Order, [Alta Reg 319/2003](#)

The Government of Alberta (GoA) is [hell-bent](#) on facilitating the development of new coal mines in the Province. To that end, it purported to rescind the long-standing Coal Development Policy (CDP) of 1976 effective June 1, 2020. The CDP prevented development of coal resources in Category I lands on the eastern slopes of the Rockies and only permitted the development of new underground mines (rather than open-pit mines) in Category II lands (see Figure 1, below, also available [here](#)).



Many civil society groups have objected to the rescission of the CDP on both substantive and procedural grounds: see [here](#) for the positions of the Canadian Parks and Wilderness Society (CPAWS) and [here](#) for the Alberta Wilderness Association (AWA). The Narwhal's coverage of this issue is available here: Ainslie Cruickshank, "[Alberta's renewed bet on coal: what Kenney's policy shift means for mining, parks and at-risk species](#)" (28 July 2020).

An application for judicial review of the decision to rescind the CDP is pending: [Blades et al v Alberta](#).

Meanwhile, several new coal mining projects are at various stages of review. These projects include [Riversdale/Benga's Grassy Mountain Project](#) currently under review by a joint review panel of the Impact Assessment Agency of Canada and the Alberta Energy Regulator (AER), [Montem's Tent Mountain Mine](#), [Atrum's Elan and Isolation Mines](#), and the [Cabin Ridge Coal Project Ltd.](#) (for further details see Oldman Watershed Council, [Coal Mining in the Oldman Watershed](#), July 30, 2020).

These mines will all require approvals under the *Coal Conservation Act*, [RSA 2000, c C-17](#) and other regulatory statutes, but they will also require something else – water. And water in the South Saskatchewan River Basin (SSRB) – and especially within the Oldman River Basin – is in short supply. Indeed, the SSRB (with the exception of the Red Deer Basin) has long been considered to be over-allocated in terms of licensed appropriations and accordingly it (outside the Red Deer Basin) has been closed to new licence applications since 2007 (with some exceptions discussed below). In closing the basin, the GoA was giving effect to the terms of the approved [Water Management Plan for the South Saskatchewan River Basin \(SSRB WMP\)](#). The WMP stated the rationale for this decision as follows (at 7):

It has been determined during preparation of this plan that the limits for water allocations have been reached or exceeded in the Bow, Oldman and South Saskatchewan River sub basins and flow regimes have been altered by water diversions. This has created risks for both water users and the aquatic environment. In drier years lower priority licences are not able to receive their total allocation. Existing diversions have also adversely affected the aquatic environment including the riparian vegetation, in the Bow, Oldman and South Saskatchewan River sub basins. Increased withdrawals of water within existing licences further degrade aquatic ecosystem health. Issuing more licences compounds these adverse aquatic effects and increases risk to existing licences.

The GoA gave effect to the closure through the adoption of the Bow, Oldman and South Saskatchewan River Basin Water Allocation Order, [Alta Reg 171/2007](#) (BOSS Allocation Order) under the terms of section 35 of the *Water Act*, [RSA 2000, c W-3](#). This is a ministerial order rather than a cabinet order and, as has previously been noted (Nigel Bankes, "Basin Closing Orders and Crown Reservations: Two Tools to Protect Instream Flows?" (2012), 23 J Envtl L & Prac 17), section 35 is a discretionary provision and the ministerial order is subject to amendment on equally discretionary grounds. That said, unless and until amended, the Basin is closed to new allocations except in accordance with the terms of the BOSS Allocation Order. The Department of Environment and Parks has given effect to this by rejecting new applications

that cannot bring themselves within one of the exceptions established by the Order. The Environmental Appeal Board has confirmed that practice: see Intervenor Decision: *Municipality of Crowsnest Pass v Director, Southern Region, Environmental Management, Alberta Environment* (23 September 2009), [Appeal No. 08-016-ID1 \(AEAB\)](#) and ABlawg post [here](#) (note that this decision predates the 2010 amendment of the Oldman Allocation Order discussed below). The GoA has recently reaffirmed this position in its [Water Allocation Policy for Closed River Basins in the South Saskatchewan River Basin Directive](#) (September 2016) which provides that “This Directive affirms the government’s expectation since the approval of the Plan by Cabinet in April 2006 that applications for any new water withdrawals from the closed sub-basins will not be considered unless the applications fit within the specific exceptions in the Regulation” (at 1).

As a result, any party that cannot fit within one of the exceptions can only obtain an allocation of water by acquiring water rights from an existing licensee by way of an approved “water transfer” (essentially, a water market). This has proven to be a difficult and time-consuming process but the [Review of the Implementation of the Approved Water Management Plan for the South Saskatchewan River Basin](#) (2018) confirms (at 7) that there had been 210 approved transfers (as of 2017) in the closed part of the basin since 2007. This suggests that the water market, while time consuming, is in fact functioning as it was intended to: it permits water to be transferred to those who value it most while ensuring that transfers cause no harm to existing users and “will not cause a significant adverse effect on the aquatic environment” (*Water Act*, s 82(3)(c)).

The Exceptions

The BOSS Allocation Order establishes four exceptions to the general closing of the Basin and it *continues* one additional exception created by the terms of an earlier ministerial Order, the Oldman River Basin Water Allocation Order, [Alta Reg 319/2003](#) (Oldman Allocation Order). The four exceptions under the BOSS Allocation Order (ss 4 – 9) are for: (1) licences for First Nation projects, (2) licences for water conservation objectives (WCOs), (3) licences for storage projects provided that the project is “for the protection of the aquatic environment and for improving the availability of water to existing licence holders and registrants”, and (4) licences for any purpose, provided that the application was complete at the time the Order was filed. The priorities for licences issued under the BOSS Allocation Order are as follows: the Order filing date for First Nation licences; that date + 1 day for a WCO licence; and, in accordance with the *Act*, for storage licences or pending applications (i.e. date and time of completed application). The priority date is important insofar as Alberta operates “a first in time first in right” system in which senior rights holders can call for junior appropriators to cease diverting water in low flow years (although in practice the parties may also agree to “[share the shortage](#)”).

It is clear that a licence for a coal project would *not* fit within any of these exceptions unless it was an existing application (which seems unlikely). However, section 10 of the BOSS Allocation Order also grandparents the contents of the earlier Oldman Allocation Order. This earlier Order reserves 11,000 acre-feet of water for “use within the region” for projects that divert water from the Oldman Reservoir, the Oldman River upstream of the Piikani Reserve, the Castle and Crowsnest Rivers, and their tributaries. The “region” is defined as:

That portion of Alberta that lies within the area described by the boundaries of the Municipal District of Pincher Creek, the Municipality of Crowsnest Pass and the Municipal District of Ranchland No. 66, as those boundaries may be amended from time to time.

For the purposes of clarification, the Region includes land within any municipality that is within the outside boundaries of the Municipal District of Pincher Creek, the Municipality of Crowsnest Pass or the Municipal District of Ranchland No. 66, including, for example, the Town of Pincher Creek.

All of the above-listed coal projects are within this area.

Section 3 of the Oldman Allocation Order provides that an allocation may only be made for one of seven purposes (municipal, commercial, recreation, community water supply, agriculture, irrigation and industrial purposes). Allocations for industrial purposes must not exceed 150 acre-feet, and allocations for uses other than irrigation must not exceed 1,500 acre-feet. The bulk of the 11,000 acre-feet reservation is therefore for irrigation purposes. It bears noting that the original version of this Order (in force until 2010) reserved the *entire* 11,000 acre-feet for irrigation. The priority date for any licence issued with respect to this 11,000 acre-feet is the date that the Order is filed (s 4). While that date is clearly 2003 for any irrigation licence issued under the authority of the Order, it is less clear that this should be the effective date for a licence issued for other purposes, since that only became possible when the Order was amended. It is possible therefore that an industrial licence could only obtain a 2010 priority – the date that the Order was amended to allow for licences for industrial purposes. The Department however takes the view that all licences issued under the Order should receive a 2003 priority.

The Oldman Allocation Order therefore offers mining projects collectively (and along with any other proposed industrial uses) the opportunity to acquire a share of this 150 acre-feet *notwithstanding that the Basin is generally closed*. But these volumes are clearly not sufficient for even one of these mining operations. For example, in an early [Notice of Application issued by the AER](#) for the Benga Mine in October 2017, the AER described the Benga *Water Act* applications as follows:

Benga has filed under the provisions of the *Water Act* and of the *Oldman River Basin Water Allocation Order* (the Order) for the diversion of 185 022 cubic metres (m³; 150 acre-feet) of water per year reserved for industrial purposes under the Order. Benga proposes to divert surface runoff and seepage, which will be collected within the mine fence line area and stored in a reservoir located in the southwest quarter of Section 24, Township 8, Range 4, West of the 5th Meridian (SW-24-008-04W5M). Surface runoff and seepage water not diverted and collected would normally flow to Blairmore Creek and Gold Creek.

Benga has filed an application to permanently transfer 123 348 m³ of water under a licence issued to divert water from the Crowsnest River in NE-02-008-05-W5M to surface runoff/seepage collection and diversion at SW-24-008-04-W5M. The allocation

of water to be transferred was licensed to Devon Canada Corporation with priority number 1961-12-14-02. The purpose of the transferred water will remain industrial.

Benga has filed an application to temporarily transfer 250 400 m³ of water (203 acre-feet) under a licence issued to divert water from York Creek at NW-34-007-04-W5M to surface runoff/seepage collection and diversion at SW-24-008-04-W5M. The allocation of water to be transferred was licensed to the Municipality of Crowsnest Pass with priority number 1910-09-19-01 for a total allocation of 308 370 m³ (250 ac-ft). The purpose of water use will be changed from municipal (urban water supply for Blairmore) to industrial (coal washing and mine operations). (at 2–3, emphasis added)

This is quite a list! We appreciate that it may have been amended since, but this is perhaps the proponent’s “wish list” for water.

Proposed Amendment to the Oldman Allocation Order

The GoA is apparently proposing to amend the Oldman Allocation Order to make it easier for industrial users (e.g. future possible coal mines) to access more of the 11,000 acre-feet. The [GoA’s presentation deck](#) for the proposal indicates that Alberta Environment and Parks proposes “updating” the Order to “[b]etter reflect current needs and improve economic opportunity in the area” and to “[r]emove artificial barriers to water sourcing options” (at 6). In addition, the Department considers that there are limited opportunities for large scale irrigation above the reservoir. The deck also acknowledges that since the Order was put in place in 1991, “[f]isheries needs and instream requirements have emerged, with two particular species of concern in the upper Oldman: Westslope cutthroat trout and bull trout, with active or pending recovery plans under *Species at Risk Act*” (at 10). In fact there are final Recovery Plans in place for both Westslope cutthroat trout (see [here](#)) and bull trout (see [here](#)) and both Plans include significant critical habitat designations within the Upper Oldman Basin, although both Plans contemplate the need for further work on the identification and designation of critical habitat, and the formal designation of critical habitat for bull trout is pending. (On the relationship between the federal *Species at Risk Act*, [SC 2002, c 29](#) (*SARA*) and provincial water rights see: Nigel Bankes, “Protecting listed aquatic species under the federal *Species at Risk Act*: the implications for provincial water management and provincial water rights” (2012), 24 J Env’tl L & Prac 19).

The proposal has two elements. First, the amendment would set aside 2,200 acre-feet for environmental needs and aquatic species (at 13). It is not clear what form this set-aside would take or what priority would be accorded to this set-aside or how it would provide for the flows required for critical habitat purposes. Second, the GoA would remove use restrictions from the remaining 8,800 acre-feet, thus allowing the Director to issue licences for any of the current listed purposes (at 13). This would allow the Director to allocate all of this amount (to the extent that it has not already been licensed or otherwise allocated) for industrial purposes, including coal purposes (subject to consideration of the matters and factors listed in table 2 of the SSRB WMP (at 15), and subject to the duty of any licensee not to destroy critical habitat under sections 58 and 61 of *SARA*).

This development raises a number of procedural and substantive concerns. First, it draws attention to the problems associated with using Crown reservations under section 35 of the *Water Act* to close water basins . This is because of the Minister’s broad discretionary powers under this section:

35(1) The Minister may by order reserve water that is not currently allocated under a licence or registration or specified in a preliminary certificate

- (a) in order to determine how the water should be used, or
- (b) for any other purpose.

(2) When making an order under subsection (1), the Minister may

- (a) include terms and conditions,
- (b) ..., and
- (c) specify
 - (i) the purposes for which,
 - (ii) how,
 - (iii) to whom, and
 - (iv) the time period within which,

an allocation of the reserved water may be made by the Director.

(3) The Director may

- (a) retain the water reserved in the water body in accordance with the terms and conditions of an order made under subsection (1),
- (b) issue a licence for the temporary diversion of the reserved water, unless prohibited by an order made under subsection (1),
- (c) if an order under subsection (1) allows, issue a licence for the diversion of the reserved water and in accordance with an order made under subsection (1), and
- (d) refuse to accept an application for a licence for the reserved water unless the refusal is contrary to an order made under subsection (1).

...

(6) If the Minister

- (a) repeals an order made under subsection (1), or

(b) amends an order made under subsection (1) so that part of the reserved water is no longer reserved,

any of the reserved water that has not been allocated under a licence or does not remain reserved must be dealt with in accordance with this Act unless otherwise provided for in an order by the Minister.

Not only does the section not establish any conditions precedent for the repeal of or an amendment of an order, there is also no link between this power and the terms of an approved water management plan. Furthermore, there is no express requirement for notice and no requirement for reasons. This is extraordinary authority to confer on a Minister, especially when one considers that Crown reservations may, at least in the case of the BOSS Allocation Order if not the original Oldman Order, be used to implement the terms of a plan that has been approved at the cabinet level. Because it is such a broad discretionary power it provides an opportunity for lobbyists to secure favours and perhaps to secure an allocation of water outside the market. (For the lobbyist registration for Benga Mining referencing acquisition of water rights see [here](#).) This not only raises questions of fairness but may also prejudice the orderly development of a market in water rights in the South Saskatchewan Basin.

As noted above, there is currently a functioning market in water rights in southern Alberta. It is not the most liquid market and it has high transaction costs but it will be unfortunate for the future development of that market if potential participants perceive that they have an alternative means of securing water rights – *i.e.* lobbying. And those who have participated in good faith in the market, including municipalities who have had to secure additional water rights at the expense of their rate payers, will have a legitimate sense of grievance if they see others acquiring water rights through the back door. New markets work best when the rules remain stable and governments avoid changes that afford a preference to particular players. This government has applied that learning to the nascent electricity market in Alberta; it should apply the same learning to the even more recent and more fragile water market in Alberta.

Markets provide an efficient way of allocating scarce resources but it is also important to pay attention to the ground rules in order to ensure that the market does not impair the maintenance of ecological values and instream flow requirements. The principal vehicle for this in Alberta is the stipulation of water conservation objectives (WCOs) for particular bodies of water (and, in a few cases, supporting that by instream flow licences issued under s 51(2) of the *Water Act*).

The existing WCOs for the Oldman River above and below the Oldman reservoir were established by an [Order of the Director in 2007](#) pursuant to the terms of the SSRB WMP. They establish a very low minimum flow requirement (45% of natural flow) – well below the instream flows based on [A Desktop Method for Establishing Environmental Flows \(Instream Flow Needs\) in Alberta Rivers and Streams](#) published by the GoA in 2011. Rivers and streams that are critical habitat for Westslope cutthroat trout and bull trout need more comprehensive assessment to define instream flow requirements based on habitat suitability criteria.

The question for present purposes is whether the proposed amendment to the Oldman Allocation Order will serve to establish adequate environmental flows for the Oldman River and its

headwater tributaries in the region, and indeed adequate flows for bull trout and Westslope cutthroat trout recovery planning. The answer must be that we do not know, since the information available to date does not allow us to make that assessment. In order to make such an assessment, we would need an instream flow assessment for the tributaries of the Oldman River above the reservoir and some sense of how the Minister proposes to give effect to the allocation of 2,200 acre-feet for aquatic environmental needs. At a minimum, we would need to know how this allocation would be distributed between the headwater streams. We would also need to assess this against the finalized recovery plans for bull trout and Westslope cutthroat trout. It is premature to issue any new licences for industrial purposes without engaging in this analysis.

The form of the allocation for aquatic environmental needs is also important. Only the issuance of instream flow water licences offers security against further political interference that favours the government's chosen industrial sectors at the expense of other sectors and ecological values.

We noted above that the Minister has broad authority with respect to Crown reservations. But no statutory authority is unlimited and all statutory decisions for which there is no appeal may be assessed against a reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#). Reasonableness demands not only that the decision should be internally consistent but also that it be justified in light of any relevant legal and factual considerations. In the present case these considerations must include not only the SSRB WMP but also the implications of any decision for the implementation of the recovery plans for the two threatened species of trout.

In sum, there are important questions that need to be answered *before* the Minister takes any further steps towards amending the Oldman Water Allocation Order. These questions address both economic and environmental values. On the economic side, the Minister needs to address how the proposed amendment will affect the evolution of the water market in southern Alberta as well the perceptions of unfairness associated with a two-track system for acquiring water rights. On the environmental side of things, the Minister needs to demonstrate how the proposed amendment restores and protects environmental flows in the Oldman Basin, especially flows in the mainstem and headwater tributaries above the Oldman Dam. The Minister will also owe a duty to consult First Nations (especially the Piikani) who may be affected by this decision, but we have not explored the implications of that duty in this comment (but see *Tsuu T'ina Nation v Alberta (Environment)*, [2010 ABCA 137 \(CanLII\)](#) and the ABlawg comment on that decision [here](#)).

Finally, the Province needs a statutory scheme for effecting basin closing orders that establishes clear rules for how basin closing orders are to be established or amended. These rules need to provide for adequate public consultation based on appropriate scientific studies. The current approach based on Crown reservations under section 35 of the *Water Act* is much too discretionary.

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