

## Alberta's Water Sharing "Agreements"

By: Nigel Bankes

**Matter commented on:** [Water Sharing Agreements for the South Saskatchewan Basin](#), April 2024

Last month (April 19, 2024), [Minister Schulz announced](#) that what she referred to as the "largest water sharing agreements in Alberta's 118-year history are now in place to help respond to the risk of severe drought." The press release referred to a package of four such water sharing "agreements" (WSAs). Each of these four agreements are in fact titled as a Memorandum of Understanding (MoU). The four MoUs are as follows: (1) an MoU in relation to the [Red Deer River Basin](#), (2) an MoU in relation to the [Bow River Basin](#), (3) an MoU in relation to the [Oldman South Saskatchewan Basin](#), and (4) an MoU in relation to the [Southern Tributaries](#) (that is to say, the southern tributaries of the Oldman River, namely the Waterton, Belly, and St. Mary Rivers. All of the MoUs bear the header date of April 2, 2024, suggesting that they were all finalized as of that date.

As explained in greater detail below, these MoUs are *not* legally binding agreements although their overall purpose is to change the default legal rule for allocating a shortfall in supply from the statutory rule of first in time, first in right (FITFIR), which favours the interests of the irrigation districts (IDs), to an allocation rule that favours all other interests at the expense of ID interests. However, the allocation rule only changes when an MoU is *activated* – a concept that is also discussed in more detail below.

### Background to the MoUs

In spite of the rhetoric in the Minister's press release, water sharing agreements, or "sharing-the-shortage agreements", are not new in Alberta. I described this background in a 2011 ABlawg post ["The legal status of the commitment by Alberta's irrigation districts to share the shortage"](#) as follows:

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 *Water Act*, [RSA 2000, c W-3](#) (at s 33) does have a provision that addresses how licensees may assign water temporarily as between themselves by way of a written, signed agreement and subject to a number of other conditions, but it seems fairly clear that the MoUs under discussion here are not “agreements to assign water” within the meaning of that section. This perhaps suggests that the parties consider the section to be unworkable (I discussed s 33 of the *Water Act* some years ago in “The Legal Framework for Acquiring Water Entitlements from Existing Users” (2006) 44 *Alberta Law Review* 323, [2006 CanLIIDocs 159](#) at 338 – 343).

Minister Schultz initiated the process that has resulted in the current MoUs in early February of this year when she “stood up” the Province’s “Drought Command Team” and directed that Team to bring

... together major water licence holders to negotiate water sharing agreements.

Water licence holders will be asked to voluntarily take less water in order to ensure that there is water available for as many users as possible. These negotiations will be the largest water-sharing effort that has ever been initiated in Alberta and the first since 2001. ([Schultz letter to licensees, undated](#); Press Release, [Water Sharing Negotiations Start of Feb. 1](#))

Minister Schulz also (February 7, 2024) established a new [Water Advisory Committee](#) to advise on measures to deal with an anticipated drought. Many (see, for example, Alberta Wilderness Association, [here](#) and Alberta Waterkeepers, [here](#)) criticized Schulz’s selection of Committee members on the basis that the Committee included representation for the oil and gas industry while excluding Indigenous, hydrological, and ecological experts. Finally, the [GoA retained](#) consultants ([WaterSMART Solutions](#)) to engage in modelling exercises and to facilitate the water sharing discussions.

## **The Structure of the MoUs**

All four MoU have a common structure.

Each begins with a set of preliminary statements and a list of the parties to the MoU. This is followed by a statement of the purpose of the water sharing MoU. The next significant heading in each MoU deals with the conditions for activation or deactivation of an MoU. The following section of each MoU deals with “Water Sharing MOU Principles” and the final section addresses the “Commitments” of parties.

## Preliminary Statements

The first paragraph of each MoU stipulates that the MoU covers “the period of April 1 to December 31, 2024”. The next two paragraphs emphasise that the MoUs are not intended to create a binding legal relationship between the “parties” to the MoUs. Each MoU contains the following language:

A Party’s participation in this MOU is voluntary and this MOU is not legally binding. The MOU is not a regulatory instrument of the *Water Act* and does not amend the terms of any underlying Water Act licences.

The Parties recognize that any action or omission by a Party under or pursuant to this Water Sharing MOU is voluntary and does not operate to bind, sever, or limit a Party’s entitlements under its water licences, and nothing in this Water Sharing MOU operates to amend or surrender any water licence or part thereof. Any Party to this MOU may withdraw from the MOU immediately upon written notice to the other Parties hereto, without penalty or further obligation.

In sum, the four MoUs are merely expressions of intent. They are not contracts between the parties since they clearly do not intend to create legal relationships. And they are not written and signed agreements for the purposes of s 33 of the *Water Act*.

## The Parties Involved

Each MoU indicates the Parties to the MoU; thirteen in the case of the Red River Basin MoU; seven in the case of the Bow River MoU (including the Eastern and Western Irrigation Districts (EID and WID) and Bow River Irrigation District (BRID)); four in the case of the Oldman MoU (including the Lethbridge Irrigation District (LID)); and seven in the case of the Southern Tributaries MoU. The Southern Tributaries MoU is unusual, insofar as its only parties are six irrigations districts (Magrath Irrigation District (MID), Mountain View Irrigation District (MVID), Raymond Irrigation District (RID), Southwest Irrigation District (SWID), St. Mary River Irrigation District (SMRID), United Irrigation District (UID)) and only one non-ID, the County of Warner.

According to the press release, “[Major water sharing agreements ready for Alberta](#),” the parties “represent up to 90 per cent of the water allocated in the Bow and Oldman basins and 70 per cent in the Red Deer River basin.” In addition to the IDs mentioned above (and there are no IDs in the Red Deer Basin), the parties include cities, municipalities and towns (e.g., Calgary, Lethbridge), regional water commissions, energy generators (e.g., TransAlta (TA), Alberta Power/Heartland Generation) and other industrial users (e.g., Dow Chemical, NOVA Chemicals, Vesta Energy etc.).

While the list of parties seems impressive, the list is far from inclusive. For example, why is Calgary the only municipal party to the Bow River Basin MoU? Why does the list not include towns like Canmore, Cochrane, Okotoks, and Nanton, even though at least some of these towns or municipalities (e.g. [Cochrane](#)) apparently support the MoU? Why is there only one industrial licensee, [Nutrien Ltd.](#), listed as a participant in the Bow River Basin MoU, whereas many industrial licensees are listed in the Red Deer Basin MoU? Why is the list of participants way more extensive for the Red Deer Basin (the least stressed sub-basin in terms of water allocations, compared with the other sub-basins in the South Saskatchewan and the reason why it is not a “closed” sub-basin

i.e., closed to the issuance of new licences)? And why are First Nations not included as parties? There is also no evidence of broader civic engagement. No doubt the response to that is that non-governmental organizations generally don't hold water licences and therefore have no standing – except for Ducks Unlimited which holds licences and is a party to the Bow River Basin MoU.

The Government of Alberta is not a party to any of these MoUs although the MoUs all contain the recital that “[t]he Government of Alberta (GOA) Water Sharing Memorandum of Understanding Operational Support document (March 28, 2024) is intended as a companion document to this MOU.” Frankly, I am not sure what document this is a reference to. The document is not hyperlinked in the MoUs and a full text search on Google with this title only offers returns to the MoUs themselves.

One MoU also contains another carve-out of potential GoA involvement. This is the Bow Basin MoU. The provisions of that MoU dealing with TransAlta state that any commitments made by TA “specifically excludes any storage managed by the GOA under the 2016 Water Management Services Agreement (“2016 Agreement”) between TransAlta and GOA.” I believe that this a reference to the post-2013 flood arrangements that Alberta negotiated with TA dealing with the operation of the storage behind the Ghost Dam. There are summaries of the original 2016 agreement and the successive extensions of this agreement available on Alberta's Open Government site [here](#), but, so far as I know, the various iteration of the TA/GoA agreement are not part of the public record. The relationship between the terms of these instruments may create interpretive problems, but we can be pretty sure that the confidential (and probably far more precise) terms of the TA/GoA binding agreement will trump the unenforceable, and likely more general, terms of the Bow Basin MoU (although the public, as outsiders to this agreement, will not be able to understand the ramifications of that trumping). To put this more simply, there is a significant lack of transparency here.

## Statement of Purpose

Next, each of the MoUs contains a statement of purpose to the effect that:

- This Water Sharing MOU sets the Parties' commitment to:
  - Continue collaborating voluntarily to manage prolonged drought at a basin level.
  - Continue collaborating, with GOA support, to define criteria and/or basin conditions to consider voluntary activation of water use reductions.
  - Where practical, take steps to enact the water restriction commitments outlined in this MOU if and when the agreed criteria and/or basin conditions are met for activation of this MOU.
- Establish a cooperative and voluntary Water Sharing MOU in pursuit of more users having some water by having many users take less water.
- Encourage flexibility between licence holders to balance competing interests and priorities in the event of water shortages.
- Allow large water licence holders to coordinate their approach to water sharing through their voluntary, non-binding commitments to reduce water use, as outlined in this Water Sharing MOU.

While the MoUs are all stated to “cover” the period from April 1 through to December, the next provision in each MoU indicates that the individual MoUs will only be “collaboratively activated” based upon the criteria laid out in each MoU. “Collaboratively activated” presumably means that all of the parties to the MoU agree to its activation based on sub-basin meetings.

The distinction between temporal “coverage” and activation of commitments presents some interpretive challenges or just plain inconsistencies in the MoUs. This is most obvious in the case of the Bow Basin MoU and a specific provision dealing with TA, a significant holder of storage and hydro licences on the Upper Bow River and its tributaries. The MoU acknowledges that,

TransAlta recognizes the environmental issues that can occur on the Bow River at low water flows, in particular with effluent dilution issues downstream of the City of Calgary, in addition to potential impacts on riparian ecosystems, and will work with the GOA (and their storage within the TransAlta system) and other water users to achieve acceptable minimum flows throughout the year to the extent possible. To achieve this, TransAlta will endeavor to fill reservoirs as early in the season as possible when excess water is available in the system (note that these actions risk spilling if there is a late season storm event) while maintaining acceptable flood risk mitigation and with the expectation that there will be limited water available to put into storage during peak irrigation season. In September, TransAlta will collaborate with the Irrigation Districts based on storage volumes within the Irrigation Districts and storage volumes within TransAlta’s reservoirs to ensure there is sufficient water in storage for the late fall and winter, including sufficient quantities of storage to satisfy predicted instream environmental flow needs and emergency power demands. (at 4)

Do you see the difficulty? This is part of TA’s commitment in the MoU and thus only triggered when the MoU is activated. While it is only an “endeavour” commitment, it is a commitment to endeavour to fill reservoirs early in the season. That is now! And yet if the MoU has not been activated, TA doesn’t even owe this non-binding, “endeavour” commitment.

It is also useful to consider what is missing from the statement of purpose, just as I asked who was missing from the list of parties. Here are a few statements of purpose that might have been on my list:

- Some reference to a human right to water. After all, “human needs” was a central element of a Declaration first adopted by Alberta’s IDs in 2011, “Sharing Water for Human Needs and Livestock Sustenance During Water Shortages” (as discussed in the ABlawg post referenced above);
- Some reference to maintaining ecological flows in stressed streams as well as water quality objectives; and,
- Some reference to the importance of meeting Alberta’s sharing obligations under the Prairie Provinces Water Allocation Agreements and schedules.
- One might also imagine that if treaty Nations were included in these discussions, those Nations might have sought to include a reference to Indigenous rights.

### **The Conditions for Activation (or Deactivation)**

As introduced in the last section, each of the MoUs distinguishes between the duration of the MoU and its “activation”. Each MoU provides that the decision to activate will be informed by consideration by the parties of a number of conditions. For example, the Bow River Basin MoU refers to the following conditions:

- Current reservoir storage, minimum winter reservoir storage, and reservoir storage to support late season and winter flows through Calgary.
- Observed and forecast river flows, with consideration for instream objectives (IO).
- Expected river flow timing (both managed and unmanaged).
- Water supply and demand

The other MoUs generally follow this approach (but without the specific reference to Calgary flow targets). The Red Deer MoU is a little different insofar as it establishes two additional and primary relevant criteria, namely:

- Reservoir storage at Dickson Dam.
- Winter reservoir storage at Dickson Dam with consideration for inflows and outflows.

Each of the MoUs further articulates what “water supply and demand” means in the context of each MoU. On the supply side, each MoU simply refers to “Water Supply Outlook (March to September), released by the River Forecasting Centre”. On the demand side, each MoU has its own list of considerations, although there is a common pattern. The summary tables illustrate the commonalities as well as some differences.

**Table 1: Demand Considerations for the Bow and Red Deer Basin MoUs**

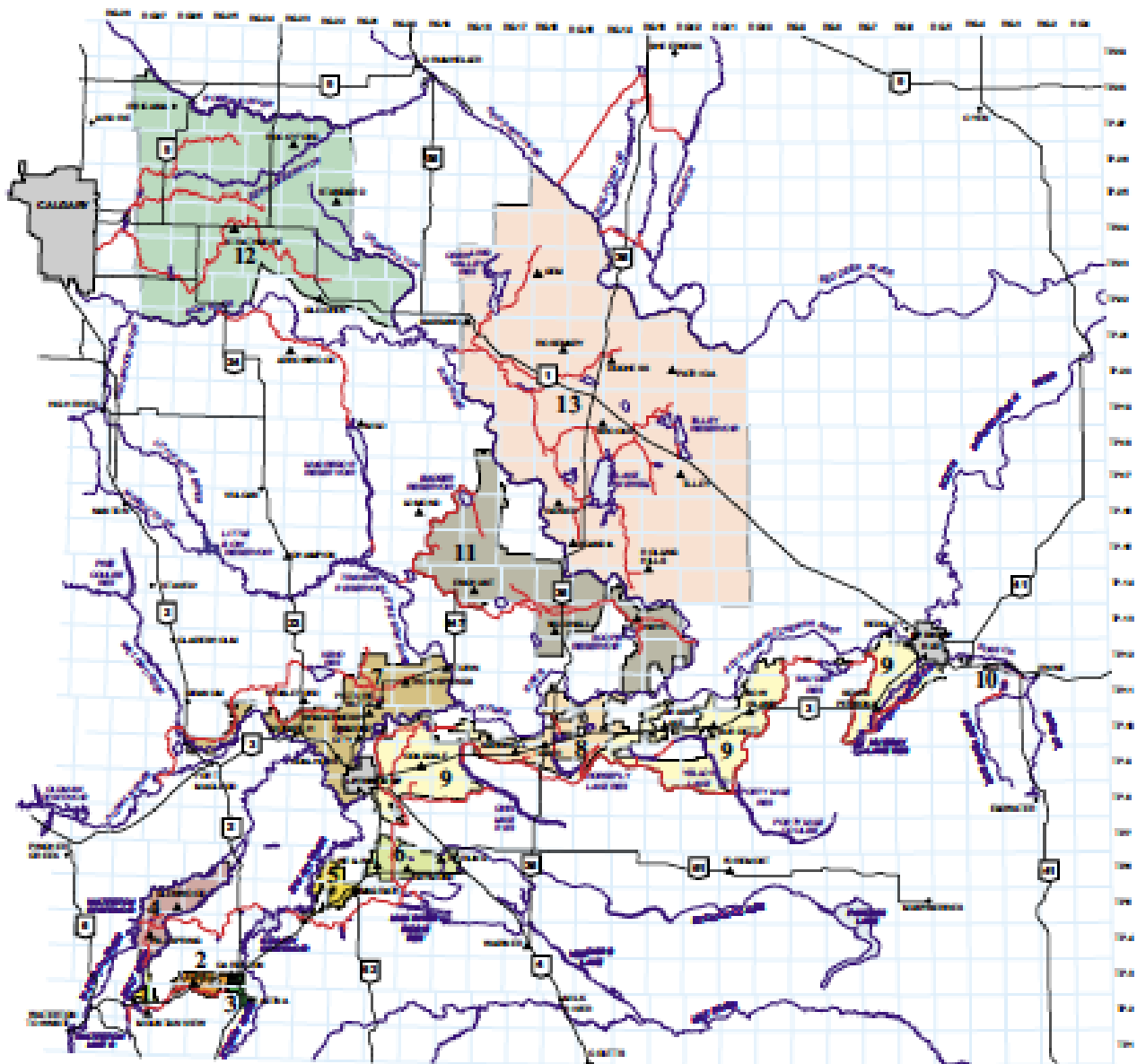
<b>Bow River Basin</b>	<b>Red Deer Basin</b>
<ul style="list-style-type: none"> <li>• Environmental Flows on the Main Stem (instream objective downstream of the Bearspaw Dam)</li> <li>• Irrigation District Demands</li> <li>• Private Irrigation Licences</li> <li>• First Nation Licences</li> <li>• Small Municipal Demands</li> <li>• Large Municipal Demands</li> <li>• Industrial Demands</li> </ul>	<ul style="list-style-type: none"> <li>• Environmental Flows on the Main Stem (instream objective downstream of the Dickson Dam)</li> <li>• Private Irrigation Licences (at full licence allocation)</li> <li>• First Nation Licences (at full licence allocation)</li> <li>• Small Municipal Demands (at full licence allocation)</li> <li>• Large Municipal Demands (at net of full allocation)</li> <li>• Industrial Demands (at full licence allocation)</li> </ul>

**Table 2: Demand Considerations for the Oldman Basin and Southern Tributaries MoUs**

Oldman River Basin	Southern Tributaries
<ul style="list-style-type: none"> <li>• Environmental Flows on the Main Stem (defined as the IO downstream of Medicine Hat)</li> <li>• Irrigation District Demands (at assessed acres and limited duty - “supplied” by the IDs as 13 inches)</li> <li>• Private Irrigation Licences (at full licence allocation)</li> <li>• First Nation Licences (at full licence allocation)</li> <li>• Small Municipal Demands (at full licence allocation)</li> <li>• Large Municipal Demands (at net of full allocation)</li> <li>• Industrial Demands (at full licence allocation)</li> </ul>	<ul style="list-style-type: none"> <li>• Environmental Flows on the Main Stem (defined as the IOs at the mouths of each of the tributaries)</li> <li>• Irrigation District Demands (at assessed acres and limited duty – an amount supplied by the IDs as 13 inches)</li> <li>• Private Irrigation Licences (at full licence allocation)</li> <li>• First Nation Licences (at full licence allocation)</li> <li>• Small Municipal Demands (at full licence allocation)</li> <li>• Large Municipal Demands (at net of full allocation)</li> <li>• Industrial Demands (at full licence allocation)</li> </ul>

Several points deserve comment. First, all of the above are simply considerations relevant to determining whether to activate an individual MoU. None of the considerations, not even the environmental flows (referred to in the tables as instream objectives), are treated as absolutes. Second, activation is said to be a *collaborative* exercise of the parties. Presumably, and especially in the context of such a voluntary arrangement, this must mean that activation requires consensus. Any individual party can therefore delay activation by resisting a declaration of consensus. Senior licensees (principally IDs) have a significant interest in delaying activation since it is only when activated that the allocation system changes from temporal priority (first in time, first in right – or FITFIR) to a largely use-based priority, in which scheme all other users except ID users have priority (see below). Third, government has no formal role in activating any of the MoU since it is not a party; and only the parties, acting collaboratively, can activate. Fourth, deactivation is subject to the same rules as activation. On the face of it this means that activation changes the balance of power dramatically since if the consensus rule applies to deactivation as well as activation, as seems to be the case, once activated, any single party can signify that it does not assent to a restoration of the FITFIR rule. That said, if a party used that power arbitrarily one might anticipate that an ID would simply withdraw from the MoU and demand restoration of the legal *status quo* (i.e., FITFIR).

Finally, it is important to note how the demand table treats irrigation district demand, since this treatment spills over into the allocation rules that will apply on activation. First, the table distinguishes between the needs of IDs and non-ID irrigation water licences. Second, the Red Deer MoU has no reference to IDs but that is simply because there are no IDs in the Red Deer Basin. Here is a map of Alberta’s 13 IDs:



- 1 Mountain View Irrigation District
- 2 Leavitt Irrigation District
- 3 Acton Irrigation District
- 4 United Irrigation District
- 5 Magrath Irrigation District
- 6 Raymond Irrigation District
- 7 Lethbridge Northern Irrigation District
- 8 Taber Irrigation District
- 9 St. Mary River Irrigation District
- 10 Ross Creek Irrigation District
- 11 Bow River Irrigation District
- 12 Western Irrigation District
- 13 Eastern Irrigation District

- Communities receiving irrigation water
- Communities not receiving irrigation water
- Headworks and major canals

## Alberta's Irrigation Districts



Credit: Government of Alberta, [Alberta's Irrigation Infrastructure](#).

Third, and perhaps most importantly, notice the distinction between the treatment of ID demand in the Bow Basin MoU table and the treatment of ID demand in each of the Oldman and Southern tributaries MoU tables. For the Bow Basin (which includes the large Western and Eastern Irrigation Districts) the table simply refers to ID demand that might allow these IDs to decline to activate the MoUs until their full (licensed) demand is met. But in the case of the Oldman and Southern Tributaries, demand is qualified by reference to a “limited” “duty of water” of 13 inches. “Duty of water” refers to the amount of water required for a given area to produce a particular crop: in this case 13 per irrigated acre. Some of that water might be supplied by precipitation, the balance by irrigation. To put this in perspective on the irrigation part of the balance, in the 2023 growing season, the St. Mary River Irrigation District (SMRID) indicated that it expected to make an allocation of [15 inches per acre](#); but for this growing season (2024), SMRID has announced an allocation of [8 inches per acre](#). What remains unclear to at least this writer is the relationship between the “limited” duty of water, the ID allocations, and the “activation” of the MoUs.

### **Licensees Linked to Generating Facilities**

A further limitation of the MoUs that is expressly referenced in two of them (the MoUs for the Bow Basin and Red Deer Basin) relates to licensees whose water use is linked to power generation. This is most obviously the case for hydro facilities, such as those of TA in the Bow River system. Hydro use is mostly non-consumptive, in the sense that all the water that runs through the turbines returns to the watercourse, although in some cases (not generally the case in Alberta but see Lake Diefenbaker in Saskatchewan) large storage reservoirs can result in significant evaporation losses. But in addition to hydro, steam-based generators may also hold water licences for that purpose.

In both cases generators owe an obligation to bid the generating capacity into Alberta's power market (the so-called no physical withholding rule of the *Electric Utilities Act* [SA 2003, c E 5.1 1](#) and *Fair Efficient and Open Competition Regulation*, [Alta Reg 159/2009](#)). As a result, both the Bow and Red Deer MoUs contain the following acknowledgement:

The Parties recognize that the ability of any Party to this Water Sharing MOU that participates in the electricity market through the storage and retention of water is constrained by the Alberta Electric System Operator's (“AESO”) rules, especially during times of high electrical demand. The Parties, to whom such rules apply, must offer all their available capacity under the AESO rules into the wholesale electricity market and must comply when called on by the AESO to provide service. As such, during the term of this MOU, some of the Parties may not be able to comply with their commitments below if they are required to use water in order to comply with the AESO rules.

What is remarkable about these provisions is the level of detail that TA and Heartland must have insisted on; a level of detail and clarity that we simply do not see when it comes to articulating the trigger to activation of the MoUs or the actual commitments of IDs.

### **Party Commitments: What Sorts of ‘Commitments’ do the Parties Make?**

The Party ‘commitments’ vary from MoU to MoU although each begins with a commitment of each of the parties to the MoU to the effect that:

Each Party to this Water Sharing MOU commits to not call priority pursuant to the terms of its water licence if the terms of this Water Sharing MOU are met.

While framed as a commitment of all parties, in reality it is actually a “commitment” by senior licensees (in other words, the large irrigation districts) not to call priority since they would be the only ones to benefit from such a call. When a call is made within a basin, the senior licensee (i.e. the earliest recorded licences on the water body) has the right to its entire entitlement before the next senior licences are entitled to anything (see *Water Act* at ss 30 & 32). The *purpose* for which the licensee holds the licence is not relevant to its priority. The only exception to this rule is that riparian owners (i.e., the limited number of people who own land actually abutting a creek, river, stream, or lake) have a statutory priority to use a limited amount of water for household purposes (see *Water Act* at ss 21 & 27).

Hence, in times of shortage, senior licensees have the legal right to use all the available water for their licensed uses before junior licensees (e.g., licensees for municipal purposes) are entitled to take any water for their licensed purposes. There may be other limits on the right of senior licensees to take all available water from a waterbody. For example, all licences have maximum diversion rates and many, especially more recent licences, may require a licensee to cease diverting in order to meet a minimum flow requirement, or meet a water conservation objective (WCO) established in an approved water management plan such as that adopted for the [South Saskatchewan Basin](#) in 2006 (see especially at 8 to 10).

### **So What Happens if Senior Licensees Don’t Call Priority?**

The “commitment” not to call priority does not of course create any more water; neither will it necessarily mean that more water is left in streams for the environment. In times of shortage, we still have the physical reality that total licensed diversions exceed water available in the streams and associated storage. So how will the available water be allocated under these MoUs, including an allocation for instream flows, if FITFIR is not the allocation rule?

The MoUs do not provide a clear answer to this crucial question. Instead, each MoU contains a section entitled “2024 MOU Water Sharing Principles”.

Each MoU leads off with a common clause under this heading to the effect that “[r]egular communication between the GOA and the Parties under this Water Sharing MOU is a key component to the success of this effort.” While this provision seems innocuous, it does demand some comment. First, it will be recalled that the GoA is not a party to the agreement. Second, the clause does not impose a “commitment” on anybody. It does not, for example, state that the parties commit to communicate regularly with the GoA; and of course, since it is not a party, the GoA does not “commit” to anything under the terms of the MoUs. Third, this clause speaks to cooperation generally – it has nothing specific to say about sharing and really does not belong in this more specific section of the MoUs. And fourth, the MoU does not elaborate on the modalities of this communication. Which begs the question: if communication between the GoA and the parties is so crucial to the success of these MoUs (as this recital claims), why don’t the MoUs provide a lot more detail as to how this communication is to occur?

Each of the MoUs also contains an identical provision dealing with the implications for municipalities:

Municipalities which have been engaged in the collaborative Water Sharing MOU development have committed to implementing drought response measures which are anticipated to result in a reduction in water use of 5-10% compared to expected 2024 summer demands (maximum from May to October) if no measures were actioned.

Municipalities which have been engaged in the collaborative Water Sharing MOU development across the South Saskatchewan River Basin (SSRB) will strive for common actions and outcomes, depending on the needs of each basin.

But once again, while this sounds good, the provision says *absolutely nothing* about how to share the shortage. If anything, the provision belongs in the commitments section of each MoU rather than in a section on “water sharing principles”.

There is also a provision in three of the MoUs dealing with the sharing implications for irrigation districts within the relevant basin:

*Once other system demands have been accounted for*, including municipal use, First Nations use, and industrial use, the Irrigation Districts in any given basin will share the remaining water volume, within their licenced allocation, based primarily on acres. (emphasis added)

Unlike the clauses just referenced, this really is a sharing or allocation principle since it effectively affords priority to “other system demands” expressed in terms of municipal, First Nation, and industrial uses, regardless of temporal priority. If these MoUs were legally binding agreement I would have a number of follow-up questions such as whether the “uses” referred to are limited to licensed uses. In the case of industrial and municipal uses the answer must be that it can only cover licensed users and volumes. Why? Because only a licensed user can divert water and there is nothing in any of the MoU that can extend those rights to others. This is important because it sends the message to municipalities in the closed parts of the South Saskatchewan Basin (the entire Basin except the Red Deer sub-basin) that they can’t rely on these temporary sharing agreements to obtain expansion volumes; they will still need to use the licence transfer market to acquire additional licensed volumes from other licensees.

That is less obviously the case for First Nations who may have a right to use water based on Indigenous normative orders (see most recently: *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, [2024 SCC 5 \(CanLII\)](#); and *Dickson v Vuntut Gwitchin First Nation*, [2024 SCC 10 \(CanLII\)](#)).

But while this clause really is a sharing principle, it may also pose other interpretive difficulties. For example, how does the clause relate to the conditions on activation? In other words, when does the priority system change from temporal priority to use priority (anybody but irrigation districts). On the face of it, the priority rule only changes when the MoU is activated; but is that when an ID has already obtained its reduced “duty of water” or at some other point in time? And what do the parties mean when they say that remaining water volumes will be shared “principally” on the basis of acreage? What other factors will be relevant?

The ID sharing principle is further elaborated in the section of the MoUs dealing with commitments. This is particularly so in the case of the Bow River Basin (but recall that there is no commitment to a reduced duty of water in the Bow Basin) and Southern Tributary MoUs since each Basin contains multiple IDs:

Once other system demands have been accounted for, including municipal use, First Nations use, and industrial use, the Irrigation Districts in the Southern Tributaries [ Bow River Basin] will share the remaining water volume, within their licenced allocation, primarily based on acres, while considering other water users supplied by Irrigation District systems under their own licences. Based on this principle the Irrigation Districts agree to manage the water available to the districts among themselves; Irrigation District boards will decide on how the volumes will be allocated.

The provision for the Oldman MoU is slightly different since there is only one ID within the Lethbridge area (Lethbridge Northern ID or LNID) but it too similarly preserves autonomy over internal allocations. The principle of autonomy makes sense within an ID, but it is not clear to me how those decisions will be made between different IDs. This applies to the Bow and Sothern Tributaries MoU, but it seems to me that it may also be an issue (not acknowledged in the MoUs) as between the IDs in the Southern Tributaries area and LNID since LNID is downstream from these IDs and dependent on the same storage facilities.

## Conclusions

The MoUs have been welcomed by many (for some of the coverage, see CBC (Dryden and Turner) [here](#), and *Narwhal* (Anderson) [here](#)). Even those who see the need for a more fundamental rethinking of Alberta's allocation system, consider that the MoUs are a step in the right direction (e.g., Evan Davies quoted in the CBC piece, above). I certainly agree that the MoUs will serve to continue, if not start, an important conversation. And, while I have emphasised in this post that the MoUs are only expressions of intent and are not legally enforceable, I do understand and acknowledge that law is not everything. The late Elinor Ostrom in *Governing the Commons: The Evolution of Institutions for Collective Action* (New York: Cambridge University Press, 1990) and other writings, long ago reminded us that community norms about water use can be as important, if not more important, than legal norms in managing a shared resource. But while waters users within a single irrigation district may have a sense of community, I perceive little, if any, sense of community as between different use allocations in large river basins; a sense of mutual vulnerability perhaps, shared more by downstream users than upstream users, but something far less than shared community values. And while the MoUs may help foster a broader sense of community, that sense of community seems false when it is government that is directing the MoU process without actually becoming a party and when only certain parts of the community are involved in the conversation.

But even if I can agree that the MoUs are a step in the right direction, I have also used this post to point to a number of problems with this approach and the particulars of these MoUs. These problems include the following:

- It is dishonest to characterize these MoUs as agreements. They are not. They are expressions of intent. By characterizing them as agreements the GoA messages that the MoUs will be more effective than they will prove to be (only time will tell on that score).
- The role of government within the MoUs is ambiguous. The GoA is not a party but it seems to be conducting the orchestra or pulling the puppet strings (but who is the puppet and does the orchestra have the same score?). Perhaps by not being a party the GoA believes that it can distance itself if the outcome is unsatisfactory by blaming the “parties” for poor or incomplete implementation, or for failing to live up to the terms of the “agreement”.
- While the MoUs apply to the period beginning April 1, an MoU does not bite (and then only in the limited sense that an expression of intent can bite at all) once an MoU has been activated. There is no clear trigger to activation in the MoUs (just a list of considerations) and it is possible that a party may delay activation by withholding content to activations. IDs stand to lose the most by activation and it would be hardly surprising if those irrigators who own irrigable acres put pressure on ID managers and directors to delay activation.
- It is clear that activation will change the rule of allocation from FITFIR to a rule that favours all other uses than ID uses. But is far from clear how the new allocation rule will work in practice.
- The MoUs are not inclusive of all users – not even all licensees. While Ducks Unlimited seems to have had a seat at the table in the case of one MoU (Bow Basin), with that limited exception acknowledged, environmental and civil society interests have not been included in the negotiations.
- The MoUs are all time limited. Even if activated an MoU will expire by its own terms either when deactivated or at the end of the calendar year, whichever is earlier. At that time, the rule of allocation will revert to FITFIR. In other words, while the MoUs may offer the opportunity for learning (and we should recognize the value of that and make sure that we take full advantage of this opportunity), they do not offer long-term solutions to the challenges posed by multi-year droughts and climate change.

The government’s decision to seek a solution to an impending water shortage by encouraging negotiations between licensees that seek to alter, at least on a temporary basis, the fundamental rule of allocation in the *Water Act* may suggest that the current system is broken and needs more fundamental reform. That is one possibility, and it is perhaps confirmed by the fact that the parties have implicitly concluded that s 33 of the *Water Act* is unworkable. From time to time, the Province has toyed with more fundamental reform of its water allocation rules. I surveyed some of that debate more than a decade ago (“Policy Proposals for Reviewing Alberta’s Water (Re) Allocation System” (2010) 20 *Journal of Environmental Law and Practice* 81). Another possibility, however, is that this government simply does not want to use the powers that it already has under Part 7 of the *Water Act* to manage emergencies. This is consistent with the current government’s professed – albeit inconsistently – libertarian stance, which predisposes it to favour individual liberties and market-based solutions. The difficulty is that those solutions are notoriously ineffective when dealing with collective action problems (whether global warming, species conservation, water conservation, or a pandemic), especially where the ground rules for protecting environmental values (here, instream flow values) are poorly developed, and where there is little community cohesion about outcomes. While we can all hope that these water sharing MoUs will help southern

Albertans through anticipated water shortages during 2024 in a way that meets both the needs of Albertans and the ecological health of freshwater ecosystems, it would not be surprising if the government is also eventually pushed to use its emergency powers.

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