

WATER AND NAFTA:
A DOZEN REASONS NOT TO WORRY AND WHY THEY WON'T HOLD WATER

Wendy R. Holm, P.Ag.
The Holm Team holm@farmertofarmer.ca

The following are the most frequently cited reasons why Canadians shouldn't worry about our water resources, and why these explanations, quite literally, don't hold water.

To date, the majority of public discussion has focused on "exports" – but as the very first myth explains, the problems go well beyond exports. Under NAFTA, American companies using water in Canada for domestic purposes have superior rights than do Canadians.

MYTH #1: As long as we can prohibit exports, what's the problem? For reasons explained in the rest of this paper, so long as water is part of FTA and NAFTA, we cannot "prohibit exports". But even more importantly, exports are only one dimension of the water/trade dilemma.

Although much of the public discussion (and hence the rebuttals presented in this paper) still relate to the water/trade issue as an export concern, the problem goes well beyond exports. Any time an American company (or a firm with American investors) uses water in Canada, that water use is covered by NAFTA. Whether Canada's water is being used domestically by an oil and gas company (water flooding: pumping water into the ground to extract oil and gas), a manufacturer, a hydro-electric company or a public private partnership managing municipal supplies, if that company is American or has American investors, their rights to use that water are vested in NAFTA and are clearly superior to the rights of Canadians. And if those rights are denied, they have a right to compensation under NAFTA Chapter 11.

MYTH #2: Exporting one drop of water puts all of Canada's water at risk... The Myth of the First Drop arose from a misinterpretation of the statement by US Trade Representative Mickey Kantor (October 28, 1993):

The current U.S. – Canada Free Trade Agreement (CFTA) and the NAFTA are silent on the issue of Interbasin transfers of water. Interbasin transfers of water in which water is not traded as a good are not governed by either trade agreement. However under the CFTA and the NAFTA, when water is traded as a good, all provisions of the agreements governing trade in goods apply, including National Treatment provisions (Article 301)."

Kantor's "when" (meaning "each and every time") was taken to mean "once" and the myth of the "trigger" was born:

"...once one drop of water is exported, all of Canada's water will automatically be considered a good of trade..."

"...as long as we don't call water a good it won't be one..." and

"...if exporting one drop puts all of Canada's water at risk, banning exports will save it..."

Water is already a good of trade. BC sells bulk, non-Treaty water out of the Columbia to the US every year as part of a long-term contract entered into over a decade ago. The Washington State town of Point Roberts is supplied by Canadian water. Numerous private sector firms have their profit centres tied to the sale of bottled Canadian water, much of which is shipped south. Large industrial users such as the oil and gas industry (for water flooding – accountable for up to 60% of groundwater withdrawals in Alberta's oil patch), manufacturers (e.g. pulp mills) and ski hill operators (for snow-making) rely on licenses to use water (or operate ungoverned by provincial statute).

Under NAFTA, Americans have water access rights that Canadian farmers – and Canadian communities - can only dream about. The first water export is not a trigger - that trigger has already been pulled.

Exports from one province would make that province more vulnerable because under NAFTA's investment chapter, US companies have a right to best-in-province treatment. This does not extend to best-in-nation.

MYTH #3 Canada can't ban exports because that would automatically make water a "good" under the NAFTA, triggering compensation claims. Canada can't ban exports because Canada has relinquished the right to impose quantitative restrictions on HCCS 22.01 (water) under the NAFTA. Placing a temporary moratorium on exports until a NAFTA exemption for water is secured will minimize the number of compensation claims arising from firms engaged in water exports. It will not mitigate claims from US-owned, Canadian-based industrial water users such as the oil patch. Domestically, a federal ban on water exports raises constitutional issues with the provinces because under the Canadian Constitution Act, the management of water, including for export, falls under provincial jurisdiction.

MYTH #4 The Farmers Resolution is about banning exports. No. It is about retaining the sovereign right to make decisions concerning Canada's water resource in the interests, first and foremost, of Canadians and Canadian communities. To do this, water must FIRST be exempted from the goods, services and investment provisions of the NAFTA (and the FTA). The decision to export water or not to export water falls to the democratic processes of individual provinces. But any foray by a province in the direction of water exports is policy suicide so long as water is included in the NAFTA.

MYTH 5. There is nothing in the NAFTA that could force Canada to start exporting water to the US. ("Americans can't turn on the tap.") There are a number of "turn on the tap" scenarios. Irrigation is a clear one. If Canada is contemplating a project that the Americans want to participate in, our choice may well be inclusion or compensation. Consider the example of an irrigation project being undertaken to bring the southern area of a Prairie province under irrigation. American farmers – armed with expert reports - would be perfectly within their rights to argue: "Water is a good managed by the province on behalf of Canada's farmers. American farmers have a right to National Treatment in the management of that resource. Here is the analysis that justifies a project capable of also meeting the needs of American farmers, here are the reports showing little environmental consequence, here is the money to pay for the upscaling; American farmers want to share in the irrigation benefits provided to Canadian farmers. The Project cannot be undertaken solely for the benefit of Canadian farmers if American farmers wish also to participate."

And its not as if the tap is not already open... There are several incidences of Canada's ongoing provision of water to the US. The border town Pt. Roberts is one example, as are large scale, ongoing bulk water purchases from the Columbia River system above and beyond the US entitlement under the Columbia Treaty.

Consider further the fact that water use – where it is regulated - is secured through the issuance of a license by the Crown conferring rights to withdraw a given volume of water from a given source. As water becomes an increasingly scarce commodity (and as society begins to adopt appropriate conservation technologies) profitability associated with water sales will drive demand for licenses and exports. Under the NAFTA, any attempt by a province to restrict the use of a license to block benefits to American buyers would clearly violate National Treatment provisions. (National Treatment means the Crown cannot restrict the benefits of water licenses to only Canadians. The difference between a license to put water on a field and a license to put water in a tanker is moot.) The choice? Capitulation or Compensation under a Chapter 11 challenge for lost profits.

MOST IMPORTANTLY, policy concerns arising from water's inclusion in the NAFTA are not limited to situations of water export; American firms doing business in Canada have NAFTA-based rights to water which are superior to the rights of Canadians operating along side of them, including farmers. (For example, water flooding: the use of water in the oil patch to extract the last 20% of oil and gas reserves.)

MYTH #6 There is nothing in the NAFTA that could force a province to increase the volume of export beyond the level agreed. It will be the profit expectations of the private sector that fuel water market development. The essence of the NAFTA is that the State cannot intervene in the business of markets. The government does not "own" the water, Canadians do; provincial governments simply manage the resource in the interests of Canadians. The profit incentives of the private sector (water entrepreneurs) and the refusal to accept limits to growth (global demand) will bid up offerings. Water licenses will increase in value proportionate to profit opportunities.

MYTH #7 The concept of National Treatment applies to imports not to exports. Once upon a time but not anymore. FTA changed this back in 1987 when it substituted the word "trade" for "imports" when importing in GATT definition of National Treatment. The FTA still stands. Further, NAFTA imports (explicitly includes) Article 711 of FTA, which includes water as an agricultural good. All international statements to date (e.g. Kantor) acknowledge that National Treatment rights extend to water.

MYTH #8 Canada made explicit amendments to the NAFTA legislation prohibiting the bulk export of water. In the days leading up to the 1988 election, Canada introduced amendments to our domestic enabling legislation to ban bulk water export. The trouble is, Canada's domestic enabling legislation does nothing to change the terms of the international agreement. After signing the FTA and the NAFTA, each Party was obliged to go home and enact an omnibus bill that gives full force and effect to the terms and conditions agreed to at the international table. Neither side vets or approves these domestic bills. It is the FTA and the NAFTA that prevail, not Canada's domestic enabling legislation.

MYTH #9 Recent changes Canada made to the International Boundary Waters Treaty Act prohibit bulk exports of water. The Act applies only to "boundary waters" – the Great Lakes, Lake of the Woods and portions of the St Lawrence, Upper St John and St. Croix rivers. It does not apply to waters west of the Ontario border, in Quebec and much of the Maritimes. The amendments to the Act do not ban bulk removals of water from drainage basins but rather restrict removals to licensed withdrawals at the pleasure of the Minister of DFAIT, who also gets to define what is meant by "drainage basins". (The last time the feds attempted this definition — the failed Voluntary Provincial Accord — they stated that Canada has 5 drainage basins, the Atlantic, the Pacific, the Arctic, James Bay and the Gulf of Mexico.)

MYTH #10 The leaders of Canada, the United States and Mexico signed a joint declaration that water in free flowing lakes and rivers is not the subject of the NAFTA.

Water in free flowing lakes and rivers is not at issue. The joint statement signed by Chrétien, Clinton and Salinas (below) was a) not binding on NAFTA and b) expresses the same point made by Kantor – once water enters into commerce and becomes a good of trade, all provisions of the NAFTA apply:

Unless water, in any form, has entered into commerce and becomes a good or product, it is not covered by the provisions of any trade agreement, including NAFTA. And nothing in the NAFTA would obligate any NAFTA Party to either exploit its water for commercial use, or to begin exporting water in any form. Water in its natural state, in lakes, rivers, reservoirs, aquifers, water basins and the like is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement.

Once there is human intervention in the flow of a river to provide water when and in the quantity needed, a “good” is created. And there is plenty in the way water licenses are issued that will prevent provinces from discriminating on potential water uses that will benefit Americans. It will be the market that will pressure private entrepreneurs to seek water export licenses,

MYTH #11 If Canada does decide at some point to allow the export of water it must make sure that it has a binding legal agreement that allows it to reduce or cease the supply in the future. The point is, NAFTA is the binding agreement and NAFTA does not allow such flexibility.

MYTH #12 The Americans will never allow it (exempting water from the NAFTA). The problem to date has been to raise sufficient political will to get our politicians to stand up to the Americans and say “here is the rock, here is the hard place. It’s an error and the people of Canada want it fixed.” America does this all the time. Every contract has an out clause and the US frequently threatens to walk if their interests are compromised. Well, in this case, Canada has the goodies on the table. We just need the political will to stand up and speak out.

With Canada’s farmers stepping forward in leadership and Canada’s consumers showing strong and visible support, the pressure to “go thru the gate” and get ‘er done will prevail. Else we do not live in a democracy.