Public Lands, Private Conservation: Bridging the Gap

A Background Paper for the Workshop
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by

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Alberta Environment and Parks

ABMI

Alberta Biodiversity Monitoring Institute

CBFA

Canadian Boreal Forest Agreement Secretariat

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I. INTRODUCTION

Like the television show *Seinfeld*, this paper is about nothing. More particularly it is about the nothing that exists where there is an increasing social expectation of something. I speak of the expectation that private parties, philanthropic individuals and agencies, and for-profit businesses, undertake actions to improve the environmental state of our landscapes. In Alberta law and policy, where there might be tools and instruments to facilitate such action and to secure the ecological gains from them on public lands, there is currently nothing. The purpose of this paper and the workshop which it is written to inform, is intended to explore how that void may be most prudently and practically filled.

This paper approaches the issue by describing the nature of the void through an examination of the legal and policy tools and dispositions which otherwise govern private action and state conservation on provincial public lands. It begins with a general overview of the nature of public lands and their governance. In part three the current conservation toolbox is reviewed, starting with the tools available on private lands and then moving to the tools available to the Province on public lands. The fourth part of the paper briefly examines the system of land management and resource dispositions which applies on the unprotected "working" public lands of Alberta. This section will make clear that allowing private parties to take control of provincial resources is far from a novel concept and in fact is relied on as one of Alberta's social and economic foundations.

Alberta has occasionally been subject to criticism for the unco-ordinated way its multiple use policy on public lands has been developed and applied. To avoid adding to that confused picture, the paper touches on the complex issue of how conservation-oriented dispositions or designations can best be reconciled and co-ordinated with other interests that might be recognized on the land.

Following that I very briefly review some of those arrangements which currently exist which involve private parties in the environmental management of public lands. These arrangements are touched on in the hope that they may offer some lessons on the practicalities of public-private partnerships for ecosystem management.

Because this paper is intended primarily to inform the discussions to occur at the *Public Lands, Private Conservation: Bridging the Gap* workshop, various questions for consideration are interspersed throughout this paper. These are intended to stimulate ideas, and not necessarily be addressed one by one in the workshop itself.

It is my hope that this paper and the discussions which it is intended to spur will form the mortar which will gradually allow us to fill the hole that exists in this area of public policy.

II. Overview

A) Land and Resource Tenure in Alberta

In terms of tenure the Alberta provincial landscape[1] is divided between two legal regimes. Deeded private lands are available for private ownership, governed by the laws of private property (both common law and statutory) with title and interests being recorded and secured through the Torrens system of the *Land Titles Act*[2] [*LTA*]. Public lands are owned by the Crown in right of Alberta and managed under the direct authority of the provincial government. While private parties may take a variety of forms of interest in public lands, all of these are temporary and subject to terms dictated by the provincial Crown. Public lands constitute approximately sixty percent of the area of Alberta.[3]

Another dimension is literally added to this picture when one considers rights to sub-surface minerals. Alberta, as many other jurisdictions, has a system of split title, with sub-surface rights usually being dealt with separately from those applicable on the surface. The majority of mineral rights are reserved to the Crown, but many of the Crown rights underlie private lands. Mineral rights are governed in law mainly by the *Mines and Minerals Act*.[4] In general the rights to the surface are subordinated to the rights of access to mineral rights holders.

b) Economic and Environmental Significance

The use of the surface and sub-surface public resources represents a very large portion of the Alberta and Canadian economy. It also contributes substantially to the public treasury, directly through lease payments, royalties and other charges, and indirectly through taxation of the economic activity that it generates. The nature, extent and stability of these benefits is tied to the form of legal arrangements that are used in developing these resources, so any reform of those arrangements must be sensitive to economic ripples it may cause.

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[1] By the "provincial landscape" I exclude that approximately ten percent of the province that is governed under federal jurisdiction and aboriginal and metis lands. For a good review of all types of non-private lands see Arlene J Kwasniak, *A Legal Guide to Non-Private Lands in Alberta* (Calgary: Canadian Institute of Resources Law, in press; page numbers in this paper may vary from final published version).

[2] RSA 2000, c L-4. For a concise accessible guide to the nature of private property rights in Alberta see Eran Kaplinsky & David Percy, *A Guide to Property Rights in Alberta* (Edmonton: Alberta Land Institute, 2014), online: Alberta Land Institute <http://www.albertalandinstitute.ca/public/download/documents/10432>.

[3] Government of Alberta, *Handbook of Instruments Pursuant to Public Lands Act & Public Lands Administration Regulation* (np: Alberta Environment and Sustainable Resource Development, 2013) [PLAR] at 6, online: Alberta Environment and Parks <http://aep.alberta.ca/lands-forests/public-lands-administration-regulation/documents/PLARHandbookInstruments-Feb19-2014A.pdf>.

[4] RSA 2000, c M-17.

Public and private lands are not evenly distributed on the landscape. The great majority of public lands fall within the forested "green zone" lying in the northern and western parts of the province, as is shown on the map on Figure 1.

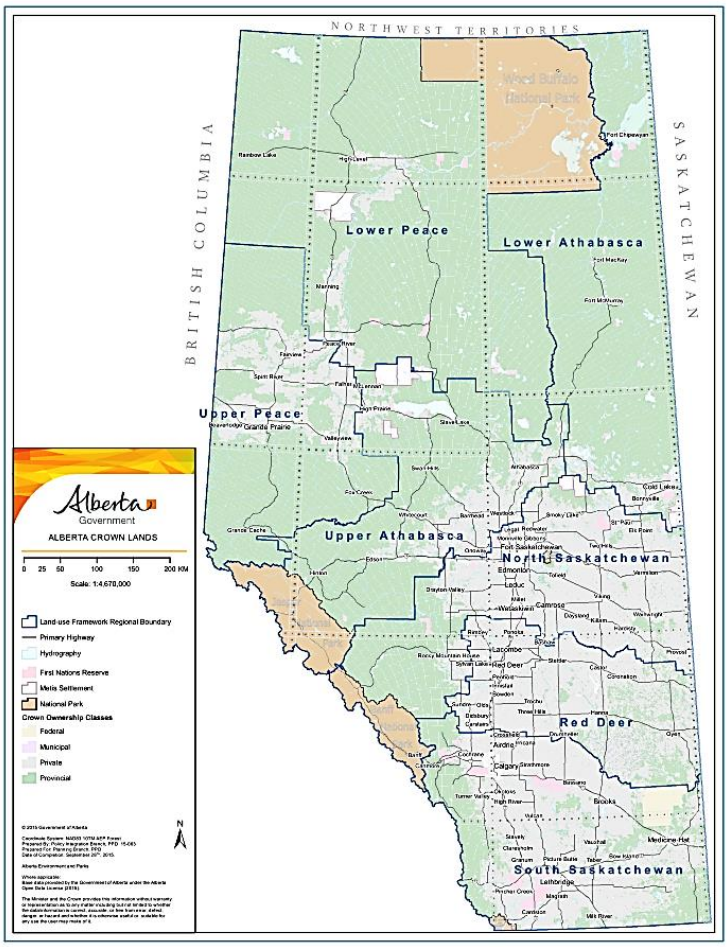

Figure 1: Map of Alberta land tenure, public lands in green.

In terms of natural features, public lands predominate in the boreal forest, Rocky Mountain and foothills natural regions. A significant part of the provinces remaining native prairie also is on public lands in the extreme southeast of the province. The provinces natural regions are shown on Figure 2.

Some of Alberta's most significant economic activity is occurring on public lands. In days of better prices not so long ago, the pursuit of natural gas in the mountains and foothills brought aggressive plans to further penetrate and develop those regions. Of course, the oil sands development on the public lands of the boreal forest is the current focus of much of Alberta's and Canada's economic activity and future plans.

While many of the province's species at risk reside on private lands, particularly in the grasslands region, some particular priorities are found on public lands. Woodland caribou, a species of particular priority for the federal and Alberta governments, and of high interest to the Alberta public, dwell almost exclusively on public lands (see the caribou range map: Figure 3). Grizzly bears, another high profile species of concern, are clustered largely on the public lands of the eastern slopes of the Rocky Mountains, where the bear's best hope for recovery lies (see Figure 4). This means that public lands are a particular focus of conservation concern for both government and the general public.

The coinciding of great economic potential and high environmental concern has made the management of Alberta's public lands a target of controversy and debate. Much of that debate has focussed on whether public authorities are doing enough to protect the environment in the face of

aggressive resource development. For a variety of reasons some private parties have wished to undertake action of their own to take effective environmental action, including on public lands. The next section considers the variety of motivations that may drive private conservation action. It also considers how one of those motivations carries requirements that must be considered in public policy.

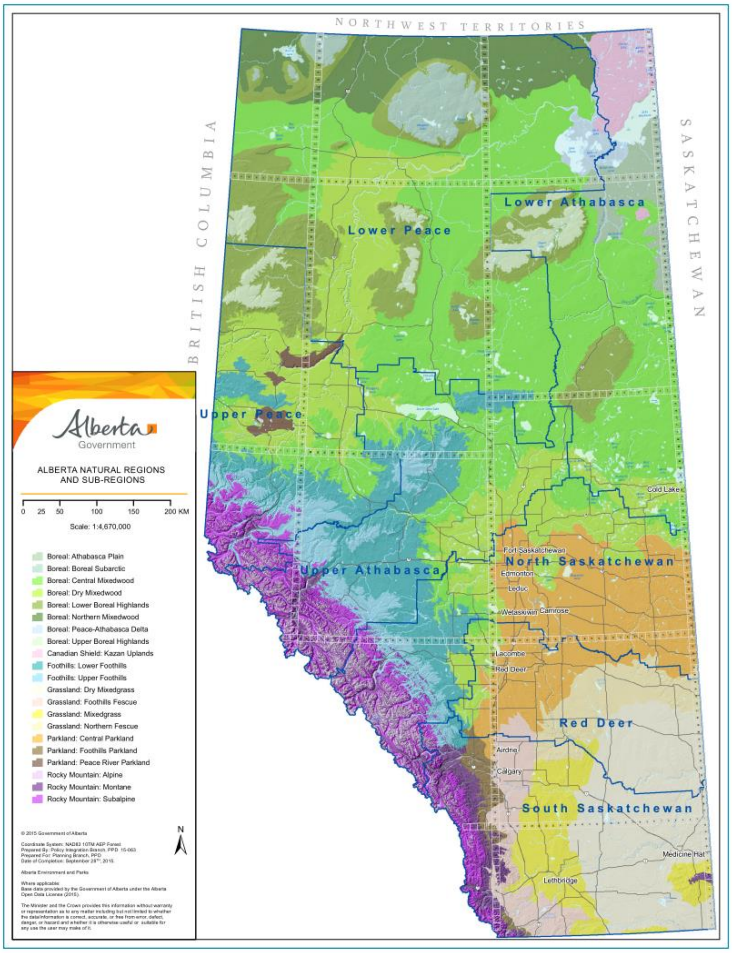

Figure 2: Natural regions and Sub-Regions of Alberta

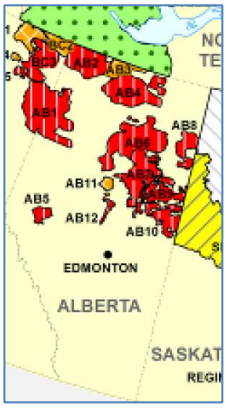

Figure 3: Woodland Caribou Ranges in Alberta[5]

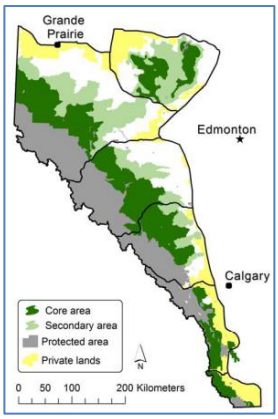

Figure 4: Grizzly bear conservation areas (primary and secondary) in Alberta *per* Neilsen et al 2009. [6]

[5] Environment Canada, *Recovery Strategy for the Woodland Caribou (Rangifer Tarandus Caribou), Boreal Population in Canada*, *Species at Risk Act* Recovery Series (Ottawa: Environment Canada, 2012) at 3, online: Environment Canada < http://www.registrelep-sararegistry.gc.ca/document/default_e.cfm?documentID=2253>.
[6] Scott E Neilsen, Jerome Cranston & Gordon B Stenhouse, "Identification of Priority Areas for Grizzly Bear Conservation and Recovery in Alberta, Canada" (2009) 5 Journal of Conservation Planning 38 at 52, online: Journal of Conservation Planning < http://www.journalconsplanning.org/2009/JCP_V5_4_Nielsen.pdf>.

For Consideration:

- ***What policy considerations are applicable to regarding whether private parties be facilitated to undertake and secure conservation action on public lands? What conditions or limitations, if any, should be placed on those opportunities?***

III. Motivations and Implications

A conservation group or environmentally-minded individual may wish to undertake conservation action on private or public land for purely philanthropic reasons. Landscape conservation is, in fact, the *raison d'être* of many conservation groups, including land trusts. This activity has long been recognized as a valid contribution to the public interest, at least when exercised on private lands.

Commercial and industrial operators may also wish to undertake such action as a means of creating goodwill in a particular community, or more generally enhancing their reputation and social license. Some more progressive companies may have policies of their own committing to particular environmental outcomes, such as no net loss of a valued ecosystem component. In all these circumstances the action is voluntary, though perhaps invested with great importance to the actor.

Conservation offsetting (or biodiversity offsetting, as it is also known) ties an opportunity to develop resources to a commitment to undertake conservation action.. It has been defined as, "measurable conservation outcomes resulting from actions designed to compensate for significant residual adverse biodiversity impacts arising from project development after appropriate prevention and mitigation measures have been taken."[7] The concept envisions that the residual environmental degradation from the development of one site (the "development site" or "impact site") will be compensated for by an equivalent or greater environmental enhancement on another (usually more or less proximate and similar) site or suite of sites (the "offset site(s)").[8]

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[7] Business and Biodiversity Offset Programme, *To No Net Loss and Beyond: an Overview of the Business and Biodiversity Offsets Programme* (Washington: Forest Trends, 2013) at 4, online: BBOP <http://www.forest-trends.org/biodiversityoffsetprogram/guidelines/Overview_II.pdf>. The Business and Biodiversity Offset Programme ("BBOP") is an international collaboration of more than eighty companies, financial institutions, government agencies, researchers, and civil society organizations working to establish and promote best practices in the use of the mitigation hierarchy to achieve no net loss, or a net gain, to biodiversity. For more information see BBOP's website:< http://bbop.forest-trends.org.>.

[8] For a fuller discussion of the concept see *ibid*; Joseph W Bull, "Biodiversity Offsets in Theory and Practice" (2013) Fauna and Flora International, Oryx, 1; David W. Poulton, *Biodiversity Offsets: A Primer for Canada* (Ottawa: Sustainable Prosperity, 2014), online: <http://www.sustainableprosperity.ca/article3857>.

While conservation offsetting may be undertaken voluntarily for the reasons set out above, regulators are imposing offset conditions on development permits with increasing regularity in Canada. Some recent examples are:

- Between 2010 and 2012 the National Energy Board three times made approval of pipeline development by Nova Gas Transmission in caribou habitat in the Horne River region contingent upon the design and provision of habitat compensation.[9]

- The federal-provincial Joint Review Panel which considered Total E&P's application for the Joslyn oilsands mine closely examined and critiqued the proponent's own offset plans, as did intervenors. The JRP imposed a condition that habitat for species-at-risk be created (preferred) or protected "in locations relatively near the project" so as to offset residual impacts on species at risk. While the condition itself focused on species at risk, the JRP made clear that the offsets should be include sufficient lands to allay concerns with other valued wildlife, vegetation, wetlands, and cumulative effects overall.[10]

- The federal Joint Review Panel charged with examining the impact of Enbridge's controversial Northern Gateway pipeline project recommended approval of the project subject to 209 conditions including nineteen conditions requiring five different kinds of biodiversity offsets (caribou habitat, wetlands, rare plants and ecological communities, fish and fish habitat, marine habitat). [11]

- The federal-provincial Joint Review Panel considering Shell Canada's application to expand the Jackpine oilsands mine released its report in July 2013.[12] The Panel noted that oilsands mining and preservation of natural values on the site were fundamentally difficult to reconcile, but stated

[9] National Energy Board, *Reasons for Decision: NOVA Gas Transmission Ltd. GH-2-2010* online: NEB <https://www.neb-one.gc.ca/ll-eng/Livelink.exe/fetch/2000/90464/90550/554112/590465/601085/665334/665172/A1X3T2_-_Reasons_for_Decision_GH-2-2010.pdf?nodeid=665173&vernum=0>; National Energy Board, *Reasons for Decision: NOVA Gas Transmission Ltd. GH-2-2011* online: NEB <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90550/554112/666941/685859/793577/793570/A2Q5J5_-_Reasons_for_Decision_-_GH-2-2011.pdf?nodeid=793571&vernum=0>; National Energy Board, *Reasons for Decision: NOVA Gas Transmission Ltd. GH-004-2011* online: NEB <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90550/554112/666941/704296/833910/833909/A2V3A0_-_Reasons_for_Decision_-_GH-004-2011.pdf?nodeid=834064&vernum=0>.

[10] ERCB Decision 2011-005/CEAA Reference No. 08-05-37519 online: ERCB <http://www.total.com/MEDIAS/MEDIAS_INFOS/4458/FR/full-report-of-joint-review-panel-january27-2011.pdf>.

[11] Canada, National Energy Board, *Report of the Joint Review Panel for the Enbridge Northern Gateway Project, Volume 2: Considerations* (Calgary: National Energy Board, 2013) online: NEB <http://gatewaypanel.review-examen.gc.ca/clf-nsi/dcmnt/rcmndtnsrprt/rcmndtnsrprt-eng.html>.

[12] 2013 ABAER 011, online: ABAER <http://www.aer.ca/documents/decisions/2013-ABAER-011.pdf>.

its belief that "biodiversity offsets (or allowances) provide a potentially viable mechanism for mitigating these effects without sterilizing bitumen resources . . . ."[13] It encouraged federal and provincial permitting authorities to work together to consider the use offsets for the project.[14]

- In August of 2015 the National Energy Board issued a list of draft conditions for the Trans Mountain Expansion proposed by Kinder Morgan Canada. Among these were conditions for offsetting for disturbance of caribou habitat, sowaqua spotted owl habitat, rare ecological communities, wetlands, riparian habitat, and greenhouse gasses.[15]

Meanwhile, we are seeing a series of expressions of interest from the Government of Alberta in making conservation offsetting a tool of land stewardship, one endorsed and structured by regulation or policy. The Alberta *Land-Use Framework* [*LUF*] of 2008 was key, indicating the Province's openness to new market-based tools, including conservation offsets, for land stewardship.[16] Other official documents indicating interest include the Lower Athabasca Regional Plan,[17] the South Saskatchewan Regional Plan, [18] and the provincial plan for the oil sands.[19] Of more legal weight, a regulatory regime of offsetting, including an exchange of offset credits, is enabled by the *Alberta Land Stewardship Act*[20] [*ALSA*].

Offsetting provides the framework for the *Alberta Wetland Policy*,[21] announced in 2013, currently being implemented in the white zone and scheduled for implementation in the green zone in 2016. Under the policy any destruction of a wetland requires a permit, which will be conditional upon the proponent undertaking "wetland replacement" (i.e. offsetting). Alberta Environment and Parks is using the *Wetland Policy* implementation to pilot concepts and principles which are intended to form an overall conservation

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[13] *Ibid* at para 1824.
[14] *Ibid* at para 1828.
[15] Online: National Energy Board < https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2810090&objAction=browse>.
[16] Government of Alberta, *Alberta Land-Use Framework* (n.p.: Government of Alberta, 2008) at 33-34, online: Alberta Environment and Sustainable Resource Development <https://www.landuse.alberta.ca/Documents/LUF_Land-use_Framework_Report-2008-12.pdf > [*LUF*].
[17] Government of Alberta, *Lower Athabasca Regional Plan 2012-2022* (np: Government of Alberta, 2012) online: Alberta Environment and Sustainable Resource Development <https://landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%202012-2022%20Approved%202012-08.pdf>.
[18] Alberta Government, *South Saskatchewan Regional Plan 2014-2024* (np: Government of Alberta, 2014), online: Alberta Environment and Sustainable Resource Development <https://www.landuse.alberta.ca/LandUse%20Documents/SSRP%20Final%20Document_2014-07.pdf>.
[19] Alberta Government, *Responsible Actions: A Plan for Alberta's Oil Sands* (Edmonton: Government of Alberta, 2009) online: Alberta Energy < http://www.energy.alberta.ca/pdf/OSSgoaResponsibleActions_web.pdf>.
[20] SA 2009, c A-26.8, s 45-47.
[21] Alberta Government, *Alberta Wetland Policy* (np: Alberta Government, 2013) online: Water for Life <http://www.waterforlife.alberta.ca/documents/Alberta_Wetland_Policy.pdf> [*Wetland Policy*].

offset framework applicable to other program areas and environmental media. Drafts of that framework have been informally circulated for comment and feedback.[22]

It is interesting to note that the policy documents listed above draw little distinction between the application of offsets on public and private land. Indeed, the LUF makes explicit that offsets are to be evaluated for use on both public and private land.[23] Given that there appears to be a rising expectation that developers will undertake conservation offsetting on public lands, and perhaps may be required to, it is important to consider whether Alberta provides a convenient means for them to do so.

The motivation for seeking to produce an ecologically beneficial outcome – whether for philanthropy, for corporate interests, or for regulatory compliance – may or may not be of any relevance to the tools available to accomplish that end. If the outcome is to be assessed and credited for offsetting purposes, however, then certain special factors are required. Firstly, offsetting is founded on the notion of *additionality* – that the outcome produced by the offset action would not have come about otherwise.[24] On public lands the "otherwise" refers to the expected management of the land by public authorities. Thus offsetting requires that public lands will be managed differently, with better conservation outcomes, than would have otherwise been expected from the management of public authorities.

Secondly, under an offsetting system it is envisioned that the offset credit produced will be used by the development party to compensate for some development. This means that the conservation outcome must be *attributable* to a particular party or setoff parties. This is in contrast to the diffuse constellation of interests that interact to produce many management actions and outcomes on public land in the ordinary course of things.

For Consideration:

- ***Should the opportunities and tools available to a conservation actor vary according to the actor's motivation? For example, should a company acting in compliance with conditions imposed by a regulator be able to take action that it could not if it were acting voluntarily?***

[22] Alberta Environment and Parks, "A Framework for Alberta Conservation Offset", draft dated May 25, 2015 (unpublished, copy on file with the author). For a full discussion of the current evolution of Alberta's approach to conservation offsetting see David W Poulton, *Biodiversity and Conservation Offsets: A Guide for Albertans* (Calgary: Canadian Institute of Resources Law, May 2015) CIRL Occasional Paper #48, online: CIRL <http://prism.ucalgary.ca/retrieve/44155/BiodiversityOP48x.pdf>.
[23] LUF, *supra* note 16 at 34.
[24] BBOP, *supra* note 7 at 6 (Principle 6); Poulton, *supra* note 8 at 34-35.

Currently Alberta has no legal or policy framework enabling a private actor to take conservation action on public land. This does not mean that such action has never been taken. There are selected projects, such as the Algar project to restore caribou habitat[25] and Cenovus' Linear Deactivation (LiDea) project,[26] but these are exceptional and *ad hoc* arrangements which are highly context dependent. There is little which is inherently secure about the outcomes produced in these cases. If they are secure, it tends to be because of factors unrelated to the conservation objective, such as the location of the LiDea project on the Cold Lake Air Weapons Range.

In the following section I deal first with those current options for actively secure lands for conservation in Alberta. In order to more fully consider the absence of such options for private actors on public land, first I review the options for a private actor on private land, and then the options for the Government of Alberta to take action on public land. It is hoped that highlighting these two approaches might stimulate some thought about how either might be adapted to the public land/private action gap. Thereafter I very briefly examine the nature of land management on the unprotected "working" provincial public land base, in order to raise the question of whether it may be made more amenable to private actors wishing to undertake conservation on those lands.

a) The Current Conservation Toolbox

i) Private Land

A private party wishing to undertake conservation action, and secure the results, on private land has two common legal options. The first is outright acquisition of the land. The owner of a fee simple interest in land may use the land in any way that is not prohibited by law, providing he or she avoids civil liability to his or her neighbors. This allows for the broadest possible suite of land management options, including undertaking ecosystem restoration or simply avoiding disturbance of the existing ecosystem.

There are some inherent limitations in law to private land ownership. Firstly, the bed and shores of any permanent naturally occurring waterbodies that exist on private land do not form part of that land, but rather are the property of the provincial Crown.[28] Secondly, the water itself is the property of the provincial Crown,[29] and any diversion of the water requires, with certain limited exceptions, a provincial water license.[30] The landowner may not, therefore, interfere with waterbodies on the land, even for a valid

[25] COSIA, "Algar Restoration", online: COSIA <http://www.cosia.ca/uploads/files/Media%20Resources/Media%20Kit/Algar%20Restoration.pdf>.
[26] "Cenovus's Linear Deactivation Project" (April 2014) online: Cenovus < http://www.cenovus.com/news/docs/LinearDeactivationProjectFactSheet.PDF>.
[28] *Public Lands Act*, RSA 2000, c P-40, s 3(1) [*PLA*].
[29] *Water Act*, RSA 200, c W-3, s 3(2).
[30] *Ibid*, s 49.

conservation purpose, without receiving the authorization of provincial authorities via the issue of a water licence. (Whether a water license itself may be held by a private party for the conservation purpose of maintaining in-stream flow is currently a matter before the Alberta courts.[31])

An interested party may take a more limited interest in land for conservation purposes. An instrument such as a lease may entitle the party to make use of the land for a defined period of time, but instruments such as this are primarily economic and not usually designed to accomplish conservation or other social goals.

A conservation-oriented party may also take an interest in the land which is specifically designed for conservation goals. A conservation easement is an interest in land, specifically enabled by statute. Using such an easement a qualified third-party (usually a government agency or non-profit land trust) may acquire an interest in land for the purposes of restricting activities on the land to accomplish an environmental, aesthetic, or agricultural purpose.[32] The conservation easement may be registered against title and, if registered, its restrictions bind the current and future owners of the land. Conservation easements are typically entered into by landowners who wish to secure certain values on the landscape, either as a donation (which may bring favourable tax treatment) or resulting from the purchase of that interest by the third party. They are, in other words, a voluntary commitment from the landowner to the qualified conservation-oriented third-party. While conservation easements are often arranged for indefinite terms, there is nothing in Alberta law which precludes time-limited conservation easements.[33]

Conservation easements are not wholly secure. As with other interests in the surface of the land, conservation easements do not preclude the granting and development of interests in the subsurface, with potential threat to natural values that entails. Conservation easements may be modified or terminated by order of the responsible Minister.[34] As with any agreement or interest in land, they are also subject to legal challenge as to their validity in particular circumstances and the scope of restrictions they apply. They may be particularly susceptible to such legal challenges over time as a future owner of the land may not embrace the conservation goals of the easement, and may be motivated to remove or minimize it as a means of maximizing the economic value of the land.

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[31] *Water Conservation Trust of Canada v Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development* (8 March 2013), Appeal No. 10-056-R (A.E.A.B.). Judicial review of the EAB decisions by the Court of Queen's Bench was heard on September 15, 2015. The decision has been reserved.
[32] *ALSA*, *supra* note 20,, s 28-35.
[33] For an excellent review of the nature of conservation easements and how they may be used see Miistakis Institute, "Conservation Easements for Alberta: An Online Resource for Landowners" online: Miistakis Institute <http://www.rockies.ca/ce_guide/index.php>.
[34] *ALSA*, *supra* note 20, s 31(b).

Together the outright acquisition of land and the arrangement of conservation easements are the major conservation tools on private land in Alberta, and the stock in trade of the land trust community. Neither, however, is a convenient option on public land, because they may only be granted by "a registered owner of land", a phrase which is only applicable to the lands administered under the *LTA*.[35]

There is, however, a vehicle to bring public lands under the *LTA*. Section 29 of the *LTA* allows any piece of public land to be converted to registered fee simple land, and for title to be bestowed on any owner, including the provincial Crown.[36] If the Crown came to hold registered title in this manner, presumably it could grant a conservation easement in the same manner as a private landowner. The development of a policy to facilitate the process of creating Crown registered title and the granting of conservation easements might facilitate its use as means of allowing a private party to secure conservation actions on public land. In this regard, general direction might be found in *ALSA*'s provisions enabling the exploration of market-based stewardship tools,[37] the granting of conservation easements,[38] and the development of regional plans including regional objectives.[39] Read together, these aspects may point to the use of conservation easements as a tool for the stewardship if the land toward regional objectives on both private and public land, if public authorities were motivated to take up that approach.

For Consideration:

- ***Should the application of conservation easements be broadened to facilitate private conservancy on public lands? If so, how might that best be done?***

ii) Public Land

A. Parks and Protected Areas [PPAs]

Parks and protected areas are pieces of public land under special legal designation for the purpose of protecting natural values and experiences based upon those values. Such designation usually prohibits or prescribes certain activities, and sometimes dispositions, within the boundary of the area for that purpose. Alberta law provides for the designation of eight different kinds of PPAs of varying degrees of prescriptiveness and flexibility. These are as follows (in approximate declining order of protection):

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[35] *Ibid*, s 29.
[36] *LTA*, *supra* note 2 s 29. The procedure for such a transfer is described in the *Alberta Land Titles Procedural Manual*, Procedure CRG-1, online: Service Alberta <http://www.servicealberta.gov.ab.ca/pdf/ltmanual/CRG-1.pdf>. I am indebted to Arlene Kwasniak for drawing my attention to this provision.
[37] *ALSA*, *supra* note 20, s 23
[38] *Ibid*, s 28-33.
[39] *Ibid*, s 8(1).

Designation	Legislation	Establishment Method
Wilderness Area	*Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*[40] [*WAERNAHR*]	Schedule to statute
Ecological Reserve	*WAERNAHR*	Order in Council (after public notice)
Willmore Wilderness Park	*Willmore Wilderness Park Act*[41]	Specified in legislation
Provincial Park	*Provincial Parks Act*[42]	Order in Council
Provincial Wildland Park	*Provincial Parks Act* and *Provincial Parks (General) Regulation*[43]	Order in Council
Heritage Rangelands	*WAERNAHR*	Order in Council (after public notice)
Natural Area	*WAERNAHR*	Order in Council
Recreation Area	*Provincial Parks Act*	Order in Council

It will be noted that all of these designations are established by government action at a high level: Order in Council or directly by statute. Only the rare events of establishment or variation in boundaries of ecological reserves and heritage rangelands require any public notice, and even then there is little required opportunity for public input.[44]

The process of designating parks and protected areas is thus largely the exclusive purview of the provincial government with little input or involvement from private parties or members of the public. At least, that is so in law. In fact, many park proposals have become the subjects of vigorous public campaigns and have frequently become heavily politicized. For example, the recent announcement of new protected areas in the Castle Wilderness of southwest Alberta came after decades of public activism by many environmental and recreational groups, followed by a commitment from the New Democratic

[40] RSA 2000, c W-9 [*WAERNAHR*].
[41] RSA 2000, c W-11.
[42] RSA 2000, c P-35.
[43] Alta Reg 102/85.
[44] *WAERNHR*, *supra* note 40 s 4.2 stipulates that the public notice must give the name and address of a person to whom representation may be made, but gives no indication of how those representations are to be considered. It also requires that *if* a public meeting is to be held (which is optional) the notice is to indicate the place, time and date.

Party in its platform in the 2015 election. Similar activist campaigns have preceded other parks and protected areas, including the Whaleback and Spray Valley protected areas.

The opportunity for a private party to formally propose a park or protected area does not currently exist. That has not always been so. From 1995 to 2000, during the provinces *Special Places 2000* program, protected areas nominations were invited from members of the public, including individuals, corporations and civil society groups. Nominations could also come from within the government. Hundreds of nominations were submitted. They were initially screened by government staff, then submitted for consideration to a Provincial Co-ordinating Committee and a Local Co-ordinating Committee comprised of representatives of stakeholders at the provincial and local levels respectively. The recommendations of each of those committees were considered by the government in deciding the appropriate action.

The involvement of stakeholders in the selection process did not necessarily stem the political aspects of consideration. Stakeholders were active in the public arena and in the backrooms of government promoting or discouraging consideration of particular sites, policies, and the program as a whole.[45] This was stimulated in part by the lack of principled and consistent process to review and consider public nominations.

While parks and protected areas are formally established by statute or Order in Council, it would be possible to establish a nomination system which would allow private parties to advance particular pieces of land for consideration to that end. If such a system were established it might include a requirement to consider the financial costs of reviewing the nomination or even the establishment and management of the PPA itself. By this means the process might pave the way for not just the nomination, but for the private sponsorship of PPAs.

If a private party were to be allowed to sponsor a PPA for the purposes of offsetting, then the conservation provided would have to meet the test of additionality. That would require that the added value of the private action be distinguished from the baseline land management provided expected to be provided by public PPA authorities. The importance and the difficulty in drawing this distinction, has recently been a subject of international academic debate, with some pointing to the danger that private

[45] The author represented the Canadian Parks and Wilderness Society on the Special Place 2000 Provincial Co-ordinating Committee and both observed and participated in these activities.

conservation initiatives and financing might simply displace those which would otherwise come from public authorities, resulting in no actual improvement of management or conditions on the ground.[46]

For Consideration:

- ***Should Alberta provide the opportunity for a private party to nominate an area for legal protection under the Province's PPA legislation?***
- ***What requirements or restrictions would apply to such a nomination?***
- ***Should the Province provide the opportunity for a private party to financially sponsor the establishment of new PPA?***
- ***What process, if any, should be established to consider such application?***

B. Public Land Use Zones [PLUZs]

Public Land Use Zones are areas designated by the *Public Land Administration Regulation*[47] [*PLAR*] wherein (with very limited exceptions) recreational opportunities (particularly motorized recreation) are restricted.[48] The users of a PLUZ are subject to broad duties to "keep the land and improvements in a condition satisfactory to an officer" and to "restore the public land used . . . to as nearly as possible a clean and tidy condition."[49] Further, an officer may order a person to refrain from any activity in order to ensure safety or protect the management of any road, trail, or route.[50] An area within a PLUZ may be closed completely by order of the responsible director.[51]

While motorized recreation appears to be the primary concern of the designation, related activities such as camping, kitchen shelters, and fires are also subject to restrictions. Similar restrictions apply to smaller areas designated as public land recreation areas and public land recreation trails.

PLUZs, public land recreation areas, and public land recreation trails are all designated in schedules to the *PLAR*, which is promulgated by Order in Council.[52] The regulation makes no provision for the private designation, nomination or sponsorship of such areas.

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[46] John D Pilgrim & Leon Bennun, "Will Biodiversity Offsets Save or Sink Protected Areas?" (2014) 7:5 Conservation Letters 423; Martine Maron et al, "Stop Misuse of Biodiversity Offsets" (2015) 523 Nature 401; Leon Bennun, "The Impact of Biodiversity Offsets on Protected Areas" (July 30, 2015) recorded webinar, online: Vimeo <https://vimeo.com/134976112>.
[47] Alta Reg 187/2011 Part 9 [*PLAR*].
[48] *Ibid* s. 185(3).
[49] *Ibid* s. 183.
[50] *Ibid* s 182.
[51] *Ibid* s. 184.
[52] *PLA*, *supra* note 28 s 9.

C. Reservations and Notations

Section 18(c) of the PLA conveys to the Minister (currently, of Environment and Parks) a broad authority to

> . . . reserve public land for any reason and for any period and permit the use of that land for any period and subject to any terms and conditions that the Minister prescribes by the Crown in right of Canada, by any department of the Government or by any person, without executing a disposition for it, . . . [53]

Notice of such reservations on particular pieces of land are provided through the Geographic Land Information Management Planning System [GLIMPS], a searchable inventory maintained by Alberta Environment and Parks of policies, plans, intentions, interests, and dispositions respecting activities on the surface of the land.[54] (Crown sub-surface dispositions are similarly recorded in Alberta Energy's Alberta Mineral Information.[55]) The placement of a reservation "represents a specific commitment for integrated management of public lands."[56]

The GLIMPS system also allows for the placement of notations on particular pieces of land. These are notices of policies, plans, decisions, or other aspects that may affect the use of that land, which operate to alert prospective users to potential conflicts.[57] There are several different types of notations applicable to different types of interests and concerns. The most relevant for our purposes here are:

- Consultative Notation Company (CNC) – "Indicates a company or individual with a justified interest in the land wishes to be consulted prior to any commitment or disposition of the land;"[58]
- Consultative Notation (CNT) – gives notice that an agency wishes to be consulted prior to any commitment or disposition of the land, but does not impose any restriction;[59]
- Protective Notation (PNT) – "identifies land and water systems requiring special management practices to protect resource values"[60] including, among many other aspects, site-specific administrative or policy controls on land use.[61]

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[53] *Ibid* s 18(c).
[54] Alberta Environment and Parks, "GLIMPS", online: Alberta Environment and Parks <http://aep.alberta.ca/forms-maps-services/industry-online-services/glimps/default.aspx>; Alberta Sustainable Resource Development, *Public Lands Reservation Information Guide*, (np: Alberta Sustainable Resource Development, 2006), online: <http://aep.alberta.ca/forms-maps-services/forms/lands-forms/guides-forms-completion/documents/ReservationNotationManual-Jan-2006.pdf> [Reservation Guide]
[55] Alberta Energy, Searches, online: Alberta Energy <http://www.energy.alberta.ca/OurBusiness/1069.asp>; Kwasniak, *supra* note 1, at 102.
[56] Reservation Guide, *supra* note 54 at A-1.
[57] Kwasniak, *supra* note 1 at 103.
[58] Reservation Guide, *supra* note 54 at B-1
[59] *Ibid* at B-1.

It is important to note that notations do not in themselves convey rights or restrictions on use, but merely provide notice of interests originating in other ways. As set out above, their primary function is to encourage consultation among parties who might otherwise inadvertently be in a position of conflict.

Reservations and notations are placed in GLIMPS upon application by a government agency, with no apparent provisions for such action to be initiated or sponsored by a private party.[62] According to Seiferling, the Government also has the authority to amend or cancel reservations and notations if it is deemed in the public interest to do so, rendering these tools less than fully secure.[63]

For Consideration:

- ***If the Crown contracted with a party to carry out conservation activities, and secured the results using the reservation system, would that be an effective enough means of securing the outcome?***
- ***Is there a concern with the Crown fettering its discretion in this situation?***

D. *Public Lands Act* Protection Programs

In addition to the above specific designations of land for conservation purposes, the *Public Lands Act* provides:

> 11.1 The Minister may establish and support programs and initiatives for the purpose of conservation and resource management including, without limitation, programs and initiatives
>
> (a) to assist in resource protection and enhancement,
> (b) for the purposes of education and research, and
> (c) to assist in the resolution of multiple use concerns.[64]

This section does not appear to provide for the granting of secure rights, though conceivably it might be used in support of conservation actions not requiring rights.

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[60] *Ibid* at C-1-1.
[61] *Ibid* at C-1-5.
[62] *Ibid* at G-1 to H-3.
[63] Morris Seiferling, *Opportunities to Move Forward with Conservation Offsets in Alberta* (np: Alberta Biodiversity Monitoring Institute, 2015) at 12, online: Alberta Biodiversity Monitoring Institute <http://www.abmi.ca/home/publications/351-400/390.html;jsessionid=354DBAC7CA105490D5EBF2BF64A361EA?mode=detail&time=May+2015>.
[64] *PLA*, supra note 28 s 11.1.

iii) Current Conservation Toolbox Summary

Current Alberta policy appears to be based on the assumption that private action will be enabled on private land, and public action on public land, and this division will apply to conservation as to other activities. Stated so simply, it appears to be a logical division of authority and responsibility. I suggest, however, that the distinction is not so crisp, for our law not only allows, but our government and economic arrangements facilitate and rely on a broad range of private interests participating in the public lands and the management of resources found thereon. Is there a place, therefore, for private conservation interests to participate on a similar footing?

b) Public Land Management and Dispositions

The *PLA* empowers the provincial cabinet to make regulations authorizing and governing dispositions on public lands,[65] which authority is the basis for the *PLAR*.[66] The *PLAR* lays out a procedure by which a private party may apply for a disposition,[67] whereupon the responsible government agency may issue or refuse the disposition, or apply any terms or conditions to the disposition it considers appropriate.[68] As well, the *PLA* provides for the regulation of occupation and use of public land through the issue of authorizations and licenses of occupation.[69] The tracking of all of these types of dispositions on public land is accomplished provided through GLIMPS.

A multitude of disposition and authorization types area available under the *PLAR* and other legislation and regulations. These include:

- grazing leases
- grazing licences
- grazing permits
- farm development leases
- mineral surface leases
- surface material leases
- pipeline installation leases
- miscellaneous other leases
- licenses of occupation

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[65] *Ibid* s 8(1).
[66] *Supra* note 47.
[67] *Ibid* s 9.
[68] *Ibid* s 10.
[69] *PLA*, *supra* note 28 s 20; *PLAR*, *supra* note 47 s 12.

- commercial trail riding permits
- various easements (especially utility easements)
- mineral exploration licenses and permits
- forest management agreements
- timber quotas and licenses
- timber permits
- fur management agreement
- access permits
- hay permit authorizations.

This list is not exhaustive. An Alberta government list of disposition types from September 2014 is sixteen pages long.[70]

It is important to note that there is no obligation on the Province to create or issue any particular disposition. In addition to the general authority to refuse or set terms and conditions when a disposition is applied for, it is within the authority of the Minister to restrict the issue of dispositions within any specified area, or to prescribe the conditions under which dispositions in such an area may be made.[71]

To the author's knowledge, all of the dispositions and authorizations provided for in Alberta's public land regime contemplate or require the use or development of the land or natural resources. None are designed to prevent or forestall such use of development for conservation purposes, though there is nothing in the *PLA* or the *PLAR* which precludes the development of a conservation disposition. In the absence of such a disposition designed for the purposes of conservation, any conservation action relies on *ad hoc* arrangements, which by their nature are uncertain and inefficient to administer.

Is it possible, however, to undertake the *de facto* protection of public lands by obtaining a use or development disposition with the intention of holding the resource unused, or deferring the development of the land or resource? In other words, is it possible to obtain a "right of non-use" to public land or resources through simply holding a disposition and not acting on its rights? This possibility is precluded by the fact that virtually all Alberta resource dispositions contain "use it or lose it" provisions. If the resource use for which the disposition provides is not undertaken within a specified time, the disposition expires, often to be re-issued to another party on the same terms. This condition, while routine, is not legally necessary, however. The *Mines and Minerals Act*, for one important piece of legislation, enables

[70] Alberta Government, *Disposition Plan Types/Formats* (September 2014) online:<http://esrd.alberta.ca/lands-forests/land-management/documents/DispositionPlanTypesFormats-Sep29-2014.pdf>.
[71] *PLA*, *supra* note 28 s 14.

the Minister of Energy to extend the term of a mineral lease if the Minister is of the opinion that it is in the public interest to do so.[76] Conceivably this authority could be used to allow long term leases for non-development or deferred development of sub-surface resources. Such an approach would only suspend the threat from one source of development, however, and not provide the full suite of protection that might be desired.

For Consideration:

- ***Should development dispositions be altered to allow a private party to purchase them for the purpose of avoiding or deferring the subject development to the long term?***
- ***If so, should the conservation-motivated party acquire the disposition on the same basis (usually a bidding process) as development-motivated parties?***

IV. Conservation and Integrated Resource Management

The diffuse authority to issue public land and resource dispositions and authorizations, and the lack of co-ordination or any identified overall purpose governing the use of public lands has been a long-standing criticism of Alberta's public lands regime.[77] It was this concern that was reflected in the *Alberta Land-Use Framework*, which stated:

> Today's rapid growth in population and economic activity is placing unprecedented pressure on Alberta's landscapes. Oil and gas, forestry and mining, agriculture and recreation, housing and infrastructure are all in competition to use the land – often the same parcel of land. There are more and more people ding more activities on the land. This increases the number of conflicts between competing user groups and often stresses the land itself. Our land, air and water are not unlimited. They can be exhausted or degraded by overuse.[78]

The *LUF* provided the policy basis for *ALSA* and regional planning intended to govern land use with a view to setting economic, environmental and social objectives, plan for the needs of current and future generations, co-ordinate decisions respecting land-use, natural resources and the environment, and enabling sustainable development and cumulative effects management. Regional planning is, of course, underway throughout Alberta, with the Lower Athabasca Regional Plan and the South Saskatchewan Regional plan complete (though with some components outstanding). At the same time work proceeds

[76] *Supra* note 4 s 8(1)(h).
[77] See, for example Steven A Kennett and Monique Ross, *In Search of Public Land Law in Alberta*, CIRL Occasional Paper #5 (Calgary: Canadian Institute of Resources Law, 1998), online: CIRL <http://dspace.ucalgary.ca/bitstream/1880/47207/1/OP05Search.pdf>.
[78] *LUF*, *supra* note 16 at 6.

within the Government of Alberta to better co-ordinate and integrate the multiple aspects of land and resource management.

If we are to work toward the alignment of the large array of land interests into an overall vision for the management of our lands, as has long been advocated and now may be taking shape, then any disposition to enable conservation must be co-ordinated with other dispositions and authorizations on or under the same piece of land. This is obviously so if the conservation is not to be undermined (perhaps literally). Such an integration requires the development of a set of criteria to determine priorities of rights on a particular piece of land. Some possible criteria may be easy to administer, but not serve our land use objectives. For example, a "first in time, first in right" priority system, such as governs water licenses, would see more recent dispositions subordinated to older ones. That would almost certainly mean that new conservation dispositions would be weakened, and possibly rendered meaningless, by older development rights, perhaps to the detriment of regional conservation priorities.

If the priority of rights to land use is to be determined by reference to regional objectives set through the regional planning process, then some older rights for incompatible uses may be reduced in priority, reducing or perhaps eliminating their value. This may create a substantial liability, which would have to be accounted for.

In any case, there is a long-standing need to reconcile the many competing rights which exist on many parts of the Alberta landscape. The development of a conservation-oriented disposition applicable on public land may highlight this need, and should be accompanied by a considered plan to resolve conflicts between dispositions and between disposition holders.

For Consideration:

- ***How could conservation-oriented dispositions be reconciled and co-ordinated with other dispositions on the same or nearby lands?***
- ***What principles and priorities should apply?***

V. Models for Conservation Partnerships?

In discussions about the relationship between the Province of Alberta and the developers who bring expertise and capital to the job of developing public resources, it is common to refer to a (non-legal) partnership between the two parties whose interests in development align. Are there any reasons why such partnerships should be limited to the development of resources, and not extended to the public interest in a healthy environment or in ecosystem services? Both economic development and

environmental protection are often cited as matters of public interest, so the provision of multiple public-private mechanisms for the one and few if any for the other is at best asymmetric.

In fact, there may currently exist some models of how such a partnership might work. We have a small number of arrangements where private parties undertake ecosystem management responsibilities in return for being to derive some special and private benefit from a piece of public land. We see such an arrangement in the cases of Heritage Rangelands, Forest Management Agreements, and Public Recreational Trails.

- As discussed above, Heritage Rangelands are a class of protected area on public land. On heritage rangelands a rancher and grazing lease holder may receive special favourable lease terms in return for undertaking certain ecosystem management activities and assuring a certain integrity of the landscape, under the oversight of the Department of Agriculture. While few such heritage rangelands have been established, those that have been appear to operate well.
- Under a Forest Management Agreement a forestry operator receives the right to harvest timber products from a large landscape. In addition to taking on the usual reforestation duties, an FMA holder may take on extra obligations related to ecosystem management in order to assure the integrity of the forested landscape. Much of Alberta's public lands are covered by FMAs, which means that the ecological well-being of these landscapes is, at least in part, already the responsibility of a private party.
- The *PLAR* allows for a private organization – usually a club – to undertake the stewardship of a designated trail or trail system. While the club receives exclusive access, it is also accountable for the management of the trail system to assure that it does not unduly impact the landscape in which it is found.

Though each of these arrangements pairs a private benefit with an ecosystem management obligation, might we use them, adapt them or create some new but similar mechanism to enable private conservation action in partnership with public authorities to the benefit of the public interest in the environment.

VI. Conclusion

Alberta currently lacks a convenient toolbox to enable a private party to undertake conservation action, and secure the beneficial outcomes, on the sixty percent of the province that is public land. This

void in law and policy disappoints and frustrates a segment of the public that is motivated by private or public interests, or by regulatory direction.

The above review indicates, however, that we have components of such a tool in the mechanisms we have designed mainly for other circumstances or purposes. We have designed conservation easements to allow a private party to hold a conservation interest in land, and to limit and direct when that interest may apply. We have various types of public protection which allow for protective regimes to be established to meet specific conditions and goals. Finally, we have a broad and active disposition process on public land, which encourages public-private partnerships for activities deemed in the public interest. Perhaps any of these mechanisms might be adjusted to facilitate the connection between a private party, the public interest in conservation, and access and security on public lands. That is unlikely to happen be default, however. This paper and the workshop it is intended to inform are intended to start a discussion about how we can consciously make an appropriate series of decisions to address this situation.

For Consideration:

- ***What new tools could be developed to facilitate private conservancy on public lands?***
- ***Is a change of laws needed, or simply new policy guidance?***