ENVIRONMENTAL LAW CENTRE

May 9, 2003

The Hon. Mike Cardinal, MLA
Minister, Sustainable Resource Development
420 Legislature Bldg.
10800 - 97 Avenue
Edmonton, AB T5K 2B6

Dear Mr. Cardinal:

RE: Bill 16: *Agricultural Dispositions Statutes Amendment Act, 2003*

In response to Bill 16, *Agricultural Dispositions Statutes Amendment Act, 2003* we are providing our comments on the changes proposed by the Bill and the draft *Recreational Access Regulation* ("the draft Regulation").

The Environmental Law Centre is a charitable organization that has operated in Alberta since 1982. The Centre provides services in legal education and assistance, research and law reform to achieve its objective of making the law work to protect the environment. Accordingly, we have prepared comments on Bill 16 and the draft Regulation, which were made available to us during an Alberta Sustainable Resource Development (ASRD) consultation with stakeholders on May 2, 2003.

Our principal concerns regarding the Bill and the draft Regulation are that the natural values of the lands under agricultural disposition be recognized and protected, and that the public have free access to those lands. In addition, the economic benefits derived from public lands should support rangeland conservation and other public purposes. With these priorities in mind, the following remarks address some significant provisions of Bill 16 and the draft Regulation.

Occupiers' liability

Section 1 of the Bill provides that recreational users are to be considered "trespassers" for the purposes of the *Occupiers' Liability Act*. We support this amendment. Disposition holders should not be liable for injuries sustained by recreational users, except where the occupier intentionally created a hazard.

204, 10709 Jasper Avenue, Edmonton, Alberta T5J 3N3 Tel: (780) 424-5099 Fax: (780) 424-5133
AlbertaToll Free 1-800-661-4238 E-Mail: jmallet@elc.ab.ca Home Page: http://www.elc.ab.ca

Access for recreational users

In our view, the Province owns public land for the benefit of all Albertans, and not primarily for those who benefit economically from the lands. Public lands should be open, free and not exclusive to any user except in carefully defined circumstances.

Section 3(23) of the Bill requires holders of specified agricultural disposition to provide, in accordance with the regulations, reasonable access to recreational users. The practical effect of this section and the draft Regulation will be to require recreational users to obtain permission from the leaseholder before entering the land. Such a requirement is reasonable for motorized transportation, or for access otherwise restricted under an established recreational management plan. Such a requirement is not reasonable for foot access in general, and imposes an unnecessary and unfair burden upon such users.

Recreational users will be obliged to determine whether lands they wish to enter are under disposition, find contact information for the disposition holder, and contact the disposition holder to obtain permission (draft Regulation, section 5). If access is denied, or the leaseholder fails to respond to a request to enter the leasehold, the burden of applying for review under the dispute resolution procedure will, practically speaking, fall upon the recreational user also.

We recommend that the draft Regulation be revised to exclude foot access from the consent requirement, except where such access is contrary to an established recreational management plan. Under this approach, recreational users on foot could be required by the Regulation to provide notice to either the leaseholder or Public Lands; this information would provide a basis for recreational management plan development, where warranted. The Regulation could be further revised to require visitors on foot to stay off land under cultivation and maintain a specified distance from grazing animals.

The remainder of our comments address issues for all forms of access under the Bill and draft Regulation. However, in the event that our recommendations regarding foot access are followed, the following comments may not apply to foot access.

While the Bill and the draft Regulation require the leaseholder to allow reasonable access, they do not require him to respond within a reasonable time. It is to be expected that leaseholders unhappy with the new requirements will fail to respond promptly. The Bill and the draft Regulation do not indicate when a failure to respond to a recreational user's inquiry constitutes unreasonable refusal of access, if ever. This imbalance could be overcome in two ways. The Regulation could require leaseholders to make available to the public through a Public Lands Recreational Access website or

204, 10709 Jasper Avenue, Edmonton, Alberta T5J 3N3 Tel: (780) 424-5099 Fax: (780) 424-5133
AlbertaToll Free 1-800-661-4238 E-Mail: jmallet@elc.ab.ca Home Page: http://www.elc.ab.ca

hotline the conditions under which access is reasonable and permitted. Alternatively, the Regulation could provide that, in the event of a failure to respond within 24 hours, access to the recreational user is permitted, according to the Regulation, once the information required under section 5 is provided to Public Lands.

At the May 2, 2003, ASRD consultation, Mr. Keith Lyseng indicated that the department planned to allow leaseholders to waive the right to be contacted personally by providing information regarding permitted access on the planned recreational access website. However, section 5 of the draft Regulation requires that the recreational user "contact the disposition holder's contact person." The draft Regulation should be revised to clearly provide that where information on permitted access has been made available by the leaseholder on the recreational access website, the requirement for personal contact does not apply except as indicated on the website.

The Bill and the draft Regulation do not explicitly provide the leaseholder with the authority to exclude recreational users. While we believe such a broad authority to be unnecessary, the failure of the Bill or Regulation to address this point leaves the rights of the parties unclear. In particular, the Bill and the Regulation fail to address the conflicts that are likely to arise where a recreational user and leaseholder differ on whether the leaseholder is required to allow access. For example, consider a recreational user who, having complied with contact requirements, is wrongfully refused entry by the leaseholder. The recreational user enters the property regardless, and in so doing does not contravene the Regulation, which does not require compliance with the leaseholder's refusal. The Bill and the Regulation fail to set out the rights of each party in such a case.

The Regulation is clearer regarding terms and conditions imposed by a leaseholder. Section 9(d) of the Regulation requires that the recreational user comply with such terms and conditions. In this case, as in other cases where the recreational user is in contravention of the Regulation, the leaseholder may contact a local settlement officer for dispute resolution, or any peace officer to have the recreational user removed from the property. However, there is no provision for the case in which access is refused.

The Regulation should be revised to provide that where a leaseholder denies access, or does not consent, or imposes terms and conditions, and believes that a recreational user's presence on the leasehold contravenes sections 5, 6 or 9 of the Regulation, the leaseholder's sole remedy is to contact a local settlement officer. The alternative is for the Bill or the Regulation to clearly provide that entering a leasehold without leaseholder consent is a contravention. As stated above, in our view this second alternative is an unbalanced solution, unnecessarily excluding foot access that poses no threat to the lease interest. However, either alternative would be an improvement over the current lack of clarity.

204, 10709 Jasper Avenue, Edmonton, Alberta T5J 3N3 Tel: (780) 424-5099 Fax: (780) 424-5133
AlbertaToll Free 1-800-661-4238 E-Mail: jmallet@elc.ab.ca Home Page: http://www.elc.ab.ca

Apprehending trespassers

The earlier, unproclaimed *Agricultural Statutes Amendment Act* (R.S.A. 2000, Chap. 1(Supp)) provided that peace officers and disposition holders would be authorized to apprehend unauthorized recreational users in certain circumstances. We support the provision of Bill 16 (section 3(23), adding section 62.1(3) to the *Public Lands Act*), which limits the power to apprehend to peace officers.

Industrial and commercial access

At present, the compensation being paid to agricultural disposition holders in connection with industrial and other non-recreational activities on the property often bears little relation to the value of the disposition itself, or any damage that may be caused to the disposition interest. This over-compensation represents an unwarranted public subsidy of the agricultural disposition holder. Legislative reform is needed to redirect these funds for public purposes. Our view is that these funds should support rangeland conservation purposes.

The earlier, unproclaimed *Agricultural Statutes Amendment Act* required that, before dispositions could be granted for most industrial, commercial, and provincial or municipal infrastructure purposes, the Minister must withdraw the needed land from any current agricultural disposition affecting the same lands. The rent for the withdrawn lands was to be paid by the operator directly to the Province. The operator was liable to pay the agricultural disposition holder only for damages arising out of the operations. These provisions of the unproclaimed Act represent a balanced and effective approach to managing the interests of agricultural disposition holders, industrial, commercial and government infrastructure users, and the public.

These needed changes have been deleted from Bill 16. Because it fails to provide for mandatory withdrawals, Bill 16 essentially perpetuates the status quo, and allows for the continued overcompensation of agricultural disposition holders at public expense. In our view, the agricultural disposition holder should be entitled to compensation only for direct, demonstrable losses to the rights granted by the disposition, such as interference with grazing. The value of those losses should be measured in relation to the rent paid by the agricultural disposition holder.

Conclusion and recommendations

In general, Bill 16 and the draft Regulation construe agricultural dispositions as including a right of exclusive possession, subject to a review procedure. This approach unfairly benefits the holders of these dispositions, and unfairly restricts public access to public lands. We therefore recommend that the draft Regulation be amended to exclude foot access from the consent requirement, except where such access is contrary to an established recreational management plan.

204, 10709 Jasper Avenue, Edmonton, Alberta T5J 3N3 Tel: (780) 424-5099 Fax: (780) 424-5133
AlbertaToll Free 1-800-661-4238 E-Mail: jmallet@elc.ab.ca Home Page: http://www.elc.ab.ca

Bill 16 also fails to address the over-compensation of disposition holders in connection with industrial and other uses. We recommend that the Bill be revised to provide for mandatory withdrawals.

On behalf of the Environmental Law Centre, thank you for providing us with the opportunity to attend the May 2 consultation and review the draft Regulation prior to passage of the Bill. Should you have any questions regarding our comments, or would like further assistance or input from our office, please do not hesitate to contact me at (780) 424-5099, extension 310.

Submitted by,

James Mallet
Staff Counsel

204, 10709 Jasper Avenue, Edmonton, Alberta T5J 3N3 Tel: (780) 424-5099 Fax: (780) 424-5133
AlbertaToll Free 1-800-661-4238 E-Mail: jmallet@elc.ab.ca Home Page: http://www.elc.ab.ca