

CONSERVATION DIRECTIVES:

**ALBERTA'S UNKNOWN AND UNTESTED
CONSERVATION TOOL**

October, 2015



**Environmental
Law Centre**

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The Environmental Law Centre (Alberta) Society is an Edmonton-based charitable organization established in 1982 to provide Albertans with an objective source of information about environmental and natural resources law and policy.

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EXECUTIVE SUMMARY

This report offers vision and recommendations for use of conservation directives under the *Alberta Land Stewardship Act (ALSA)*. These findings are based on consideration of relevant policy and legislation, interviews with key people, a literature review and a search for similar tools in other jurisdictions.

A conservation directive is one of multiple new Conservation and Stewardship Tools created by *ALSA* to protect “environmental, natural scenic, esthetic or agricultural values” and is intended for use in regional planning under *ALSA*. It is also a unique tool for several reasons. The conservation directive is the only conservation tool in *ALSA* tools that can be imposed on unwilling landowners or land users, and the only one that requires a regional plan for it to be used. Compared to tools in other legislation it may be the only one to combine a conservation purpose and legal enforceability with flexibility regarding terms, durations and management authority. It is also the only conservation tool in Alberta and perhaps Canada that provides landowners with rights to apply for compensation.

Seven years after *ALSA* came into force the conservation directive tool remains unknown and untested. Barriers to the use of the tool include politicized debate over property rights and local autonomy, the need for regional plans, and lack of policy or regulations to guide use of the tool.

Overcoming these barriers will require ground-up involvement in development of the tool and a broader exploration of its possible uses. Conservation directives could possibly be used in a wide variety of scenarios on public or private land, or to create a network of public and private land. Possible uses that warrant pilot projects include support for voluntary private conservation and as a legal tool for wildlife corridors.

To overcome the barriers and enable use of conservation directives, the Environmental Law Centre recommends that the Province of Alberta:

- Develop policy and regulations to guide the use of conservation directives.
- Create opportunities for leadership in conservation and stewardship by providing the Land Use Secretariat with sufficient independence, leadership functions and resourcing to advance the *ALSA* tools.
- Develop the conservation directive tool through pilot projects that explore multiple ways for the tool to be used. Pilot projects could include:

- Completion of wildlife corridors (e.g. Bow Valley, grasslands, and south eastern slopes)
- Voluntary private conservation and/or municipal planning;
- Management tools for working landscapes (public land); and
- To guide agricultural practices in ecological sensitive areas.

The potential of *ALSA* to fill gaps in the law and on the landscape is significant but conservation directives need to be fully enabled to realize this potential. Alberta will be well served if the conservation directive tool receives the priority and direction to be used effectively.

INTRODUCTION

The Province of Alberta has often been perceived as the land of plenty: plenty of land, plenty of water, and plenty of resources. Yet the pace and extent of economic and population growth in Alberta is bringing realization that there are not only stresses, but limits on the capacity of our land, water, and resources. This realization has fueled increasing interest in “conservation” and “stewardship”: saving our natural wealth for the future, and caring for it in the present. The Land Stewardship Centre has previously defined these concepts as: “...recognition of our collective responsibility to retain the quality and abundance of our land, air, water and biodiversity, and to manage this nature capital in a way that conserves all of its values, be they environmental, economic, social or cultural.”¹

In recent years Albertans have seen significant public and private land set aside for conservation purposes. In some cases these public and private parcels are part of the same connected landscape:

- To protect the natural landscape of the OH Ranch -- one of Alberta’s oldest ranches-- more than 10,200 acres of valuable wildlife habitat and wetlands are now under a Heritage Rangeland designation on public land and conservation easement agreements on private land.²
- The Waldron Grazing Cooperative Ltd. and the Nature Conservancy of Canada agreed to protect 30,535 acres the Eastern slopes of the Rocky Mountains, creating the largest conservation easement in Canadian history. ³ The area also includes public land stewarded by the grazing lease holders.

These example uses of “conservation tools” mean that ranching traditions can continue while the natural values of the landscape such as native grasslands, wildlife habitat and headwaters will be there in the future.

“From a land use perspective, Alberta’s supercharged economy has spawned a host of issues and challenges at all spatial scales. A province that only a few decades back was perceived as vast with few people is now viewed as small and crowded with conflicting land use objectives...”

Dr. J. Brad Stelfox, *A Green Paper*, Alberta Institute of Agrologists 2010 Banff Conference on Land Use, Energy and Sustainability, March 2010, at p.2.

¹Land Stewardship Centre of Canada, *A Stewardship Roadmap for Canada, National Stewardship Conference, 2009*, online: Land Stewardship Centre <landstewardship.org/about/stewardship>.

²Government of Alberta, Backgrounder, online: Southern Alberta Land Trust <http://www.salts-landtrust.org/docs/press/D_080913_OH_GOA_press_backgrounder.pdf>.

³ Nature Conservancy of Canada, *Agreement sets the stage for conservation of largest privately held landscape on the Eastern slopes, Sept 11, 2013*, online: Nature Conservancy of Canada <http://www.natureconservancy.ca/en/who-we-are/news-room/news-releases/waldron_agreement_signed.html>.

The purpose of this report is to explore one of those tools -- the conservation directive -- and to offer a vision and recommendations for its use. The report tackles questions including:

- What is a conservation directive?
- How does the conservation directive fit into the land policy context and the larger conservation tool box?
- What are its origins and why was it included in *ALSA*?
- What makes the conservation directive a unique tool?
- Is there a need for conservation directives in Alberta?
- What are the barriers to using conservation directives?
- Are there similar tools in other jurisdictions?
- What are the possible uses of conservation directives?
- What policies or regulations are needed to enable use of conservation directives?
- How to should the use of conservation directives be attempted?
- What are the potential roles of the Alberta government and other stakeholders in making use of conservation directives?

The research supporting these findings included:

- A review of the law and policy context surrounding conservation directives;
- A review of literature on the tool, of which there is very little;
- A search for similar tools in other jurisdictions;
- Personal interviews with current and past government officials involved in the development of *ALSA*, and experts in the fields of law, land use planning and conservation. The goal of these interviews was to gain insight into the thinking behind the origins of conservation directives in Alberta.

WHAT IS A CONSERVATION DIRECTIVE?

A conservation directive is a form of regulatory zoning that the province of Alberta may use on public or private land as part of a regional plan. Its purpose resembles that of conservation easements that individual private landowners may voluntarily agree too, but a conservation directive could be used in a coercive manner on public or private land.

The tool is one of several conservation and stewardship tools included in *ALSA* and did not exist in Alberta before this legislation. The specific provision of *ALSA* states that:

- 37(1) A regional plan may permanently protect, conserve, manage and enhance environmental, natural scenic, esthetic or agricultural values by means of a conservation directive expressly declared in the regional plan.

The definition of a conservation directive in *ALSA* is that:

- 2(1)(c) “conservation directive” means a conservation directive expressly declared to be established in a regional plan

ALSA's provisions on the details that a conservation directive must include are fairly minimal:

- 37(2) A conservation directive must
- (a) describe the precise nature of the conservation directive, its intended purpose and the protection, conservation, management or enhancement that is the subject of the conservation directive;
 - (b) identify or prescribe a means of identifying the parcels of land that are the subject of the conservation directive.

These provisions indicate that a conservation directive can only be created through regional plans but they do not really describe what the tool is. They indicate that the tool is available to maintain specific values on specific parcels, but provide little indication of the specifics.

ALSA also provides that:

- 37(3) A conservation directive does not constitute an estate or interest in land.

This means that conservation directives are simply regulation of land use. They do not provide the province with a legal interest in the land as would happen if the province expropriated land or a landowner granted a conservation easement to the province. The landowner would retain ownership of the land, and land use would be determined by the “nature” or specifics of the directive. The possible legal weight of a conservation directive could be similar (but not more than) the possible legal weight of a regional plan under *ALSA*.⁴ This weight is discussed at length below.

ALSA further provides that “[a] title holder whose estate or interest in land is the subject of a conservation directive”:

- Must be given notice of the conservation directive⁵, and
- Has a right to apply for compensation according to the process set through *ALSA*.⁶

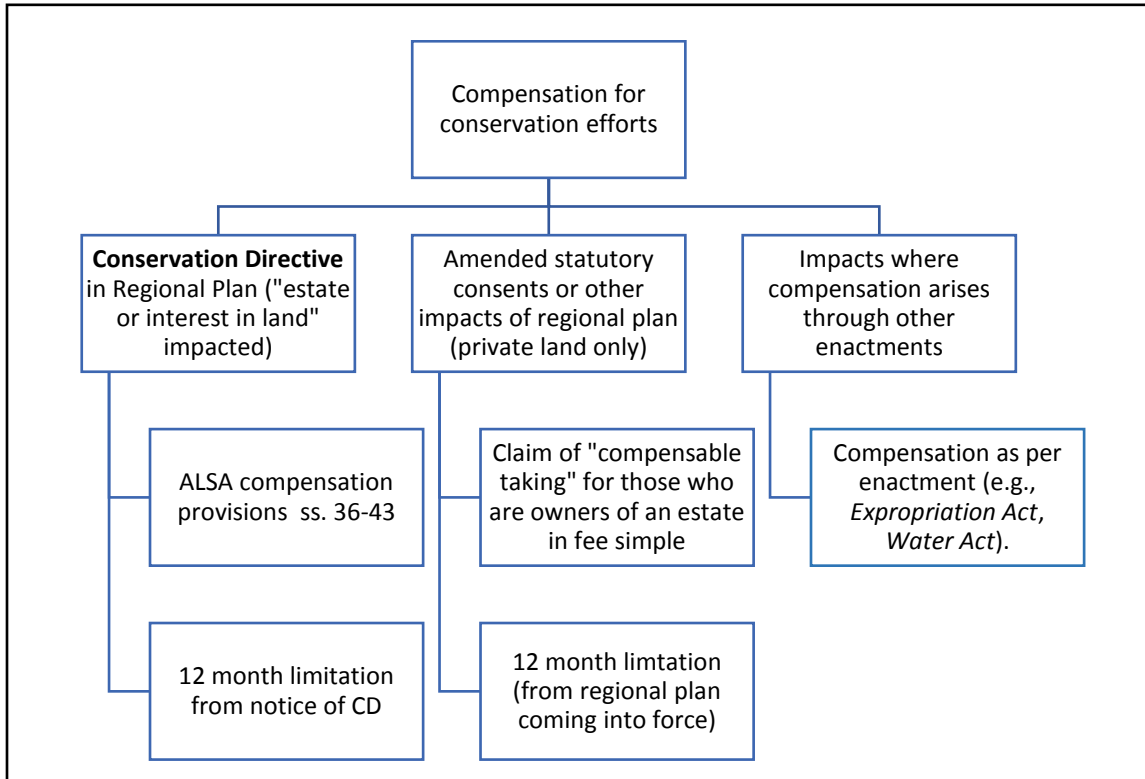
⁴ *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8. (*ALSA*)

⁵ *Ibid.* at s. 38 and Part 3 of the *Alberta Land Stewardship Regulation*, Alta. Reg. 179/2011(*ALSA Reg*) at s.4.

⁶ *Ibid.* at s.36

The total provisions on the right to apply for compensation are more extensive than the provisions on the conservation purpose of the tool.⁷ There are also extensive provisions on the compensation application process in the *Alberta Land Stewardship Regulation* under ALSA.⁸

Figure 1: Potential compensation resulting from regional plans



The right to compensation only clearly belongs to private landowners whose parcels are the subject of the directive but it is possible that other people may qualify. The definition of “title holder” includes registered “fee simple” landowners and other persons with estates or interests on the records at land titles or the department administering the land.⁹ It also includes any other person who is in “possession or occupation” of the land But excludes mineral disposition holders (lease holders). Freehold mineral owners would qualify to apply for compensation as a registered interest holder in relation to the use and impact of a Conservation Directive.¹⁰ ALSA further grants Cabinet power to make regulations defining title holders.

⁷ Ibid. at ss.39, 40, 41 &42.

⁸ ALSA Reg, supra note 5 at s.23-35.

⁹ Supra note 4 at s. 2(1)(gg).

¹⁰ Similarly, a freehold mineral holder would be able to apply if they felt there was a compensable taking as a result of the regional plan. It appears however that, if issuance of a conservation directive occurred any claim would be limited to that portion of the Act and additional claims for “compensable takings” would fail. (The framing of ALSA indicates that an implied exclusion of a Conservation Directive as a compensable taking, rather it is a conservation tool that necessitates compensation, where a taking did not occur at common law).

What is more certain is that compensation rights would not apply to landowners whose parcels were not subject to the conservation directive (i.e. claims of injurious affection to adjoining landowners are not dealt with in the legislation). Compensation is not automatic or guaranteed. ALSA only creates a right to apply for compensation and sets a process to follow. The landowner must apply for compensation within twelve months of receiving notice of the directive.¹¹

First they must make an application to the Stewardship Commissioner (the head of the Land Use Secretariat, which is the government agency responsible for the implementation of ALSA).¹² The Stewardship Commissioner must decide whether compensation is payable and the amount, or they may refer the matter to the Land Compensation Board.¹³

The amount of compensation will be based on a decrease in market value of the land, damages for other losses specified in the regulations, and damages for “injurious affection”, a term that may be contentious to define but would mean other losses incurred personally by the landowner.¹⁴ If there is a dispute over compensation the landowner may seek to have it resolved by the Land Compensation Board or the Court of Queen’s Bench at their choice.¹⁵ Appeals from both the Land Compensation Board and the Court of Queen’s Bench are to the Alberta Court of Appeal.¹⁶ The compensation is payable by the provincial government.¹⁷

This focus on compensation more than conservation dates back to the origins of conservation directive. It is part of what makes the tool unique and creates a barrier to its use. All of these points are discussed at length below.

Where Do Conservation Directives Fit Into The Policy Context?

In 2008, the Alberta government provided official recognition of the impacts and pressure of growth by releasing the Land Use Framework (LUF). The LUF could be described as a high level policy on making future plans, policies and strategies to address land use issues. It calls itself “a blueprint for land-use management and decision-making that addresses Alberta’s growth pressures.”¹⁸

¹¹ *Supra* note 4 at s.39.

¹² *ALSA Reg*, *supra* note 5 s.25.

¹³ *Ibid.* at s.29.

¹⁴ *Supra* note 4 at s.39.

¹⁵ *Supra* note 4 at s.41

¹⁶ *Supra* note 4 at s.42

¹⁷ *Supra* note 4 at s. 40

¹⁸ Government of Alberta, Land-Use Framework (Edmonton: Government of Alberta, 2008) at 7, online: Land Use Framework <<https://landuse.alberta.ca/LandUse%20Documents/Land-use%20Framework%20-%202008-12.pdf>>

The LUF proposes specific strategies to manage public and private lands and natural resources. These strategies include:

- **Regional Planning:** The LUF carves the province into seven land-use regions and calls for the development of a regional plan for each region.
- **Efficient Land Use:** The LUF proposes reduction of the land use footprint.
- **Conservation and Stewardship:** The LUF proposes the development of a new strategy and tools for conservation and stewardship of public and private lands.

The LUF also identifies specific areas of provincial interest where there are gaps in existing policy. These include [paraphrased]:

- Coordination of minerals and surface activity;
- Agricultural land fragmentation and conversion;
- Recreational use of public land;
- Transportation and utilities corridors;
- Under-representation of ecological regions in the protected area system; and,
- Flood Risk Management.

“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 ... our land, air and water are not unlimited. They can be exhausted or degraded by overuse.”

Alberta Land-Use Framework
(Government of Alberta, 2008)

The Alberta Land Stewardship Act (ALSA)

ALSA is the key piece of legislation for implementing the LUF.¹⁹ The purposes of *ALSA* include providing a means for government to identify objectives for the province, a means to “plan for the future”, coordinate decisions, and to enable sustainable development by responding to cumulative effects.²⁰ *ALSA* further provides that it prevails in the event of a conflict or inconsistency with other legislation.²¹

Three key features of *ALSA* are the enablement of regional planning, a suite of multiple conservation and stewardship tools, and the creation of a quasi-independent administrative agency called the Land Use Secretariat under the oversight of a Stewardship Commissioner and Stewardship Minister.

¹⁹ Often referred in its legislative form Bill-36.

²⁰ *Supra* note 4 at s.1(2).

²¹ *Ibid.* at s.17(4).

Regional planning

ALSA provides the power and procedure for regional planning.²²

- **Powers:** Planning power is provided to provincial cabinet.
- **Procedures:** There is a general requirement for public consultation on development of regional plans and the review and amendment of regional plans.²³ This consultation requirement is very general so there may not be consultation on every planning stage or decision. There are also no requirements for consultations on sub-regional plans that can be incorporated into regional plans, or on ad-hoc cabinet reviews of regional plans.²⁴ Once plans are in place rights are fairly limited. Directly affected people have rights to seek review of plans and title holders have rights to seek variances.²⁵ In contrast, complaints about non-compliance about regional plans must be made to the Stewardship Commissioner.
- **Purposes:** The LUF and the purpose section of *ALSA* imply that the purpose of regional planning is to balance conservation with resources development and other land-use pressures in pursuit of a “triple bottom line” of environmental, social and economic outcomes. In this regard regional planning under *ALSA* resembles much other land use planning.

“Past approaches segregated land, air and water, with different departments often having different and competing responsibilities. This resulted in departmental conflict. There was no overarching legislation that could look at the whole picture and give provincial direction to departments, municipalities, regulatory boards and the public. The mechanism to achieve provincial direction was regional plans. This approach was intended to overcome the problems that are within different departments, agencies and municipalities.”

Interview with David Elliott,
legislative drafter responsible for
drafting *ALSA*
(Nov 27, 2014 and email March 5,
2015.)

Regional plans under *ALSA* are “statutory plans” – plans that are specifically enabled by legislation. Statutory plans are a hybrid of legislation and policy in that they are policies that can have legal weight. *ALSA* affirms this status by stating that regional plans are expressions of public policy and also legislative instruments.²⁶ While the most common legal effect of statutory plans is to direct future decision making, regional plans under *ALSA* can directly regulate land use. Furthermore, regional plans under *ALSA* can have the effect of “super regulations” that prevail over other regulations, regulatory decision-making and statutory consents issued by those decision makers:

²² *Ibid.* at Parts 1 and 2.

²³ *Ibid.* at Part 1, Division 1.

²⁴ However, these other plans would only take effect upon amendment to the regional plan.

²⁵ *Supra* note 4 at s.15.1.

²⁶ *Ibid.* at s.13(1)(2).

- **Super regulations:** *ALSA* provides that regional plans are regulations for the purpose of other enactments (other statutes).²⁷ If there is a conflict or inconsistency between a regional plan and a regulation under other legislation then the regional plan prevails.²⁸
- **Compliance:** Regional plans under *ALSA* can require that all types of official decision makers to comply. The definition of decision makers focuses on those with authority to grant statutory consents.²⁹ *ALSA* provides that when a regional plan is made, every “decision-making body” (including provincial government departments and agencies) and “local government body” (including municipalities) affected by the regional plan must review the regional plan, decide if any changes to its own regulatory instruments are required to comply with the plan, and make necessary changes or implement new initiatives to comply with the plan, and file a statutory declaration to that effect.³⁰
- **Statutory Consents:** *ALSA* provides that regional plans may alter statutory consents or classes of statutory consents for the purpose of achieving the objectives of a regional plan.³¹ This power is discussed further with respect to property rights, below.

The Conservation and Stewardship Tools

A major part of *ALSA* provides for several conservation and stewardship tools.³² This continues the intentions of the LUF to develop a strategy and policy instruments for conservation and stewardship of public and private lands.³³ This part of *ALSA* mandates general support for “instruments” and “programs” to implement *ALSA* and regional plans, and the use of pilot projects to test instruments for these purposes. Beyond this general expression of support for new tools, it includes four specific tools:

- Conservation easements;
- Transfer of development credits;
- Conservation offsets; and,
- Conservation directives.

This toolkit provides a mix of voluntary action, market-based instruments and mandatory tools, and it provides a mix of tools available for public land, private land or both. *ALSA* provides Cabinet with authority to fund conservation easements, conservation directives and market-based instruments.³⁴ It further allows functions concerning conservation tools to be delegated to the Stewardship Minister.³⁵

²⁷ *Ibid.* at s.13(1)(2).

²⁸ *Ibid.* at s.17(1).

²⁹ *Ibid.* at s.2(1)(3)

³⁰ *Ibid.* at ss. 20, 21.

³¹ *Ibid.* at s.11(1).

³² *Ibid.* at Part 3.

³³ *Supra* note 18 at strategy 4, page 20.

³⁴ *Supra* note 4 at s.25.

³⁵ *Ibid.* at s. 26.

The ALSA tools are intended to work together as a complete tool kit and could possibly be used in tandem with each other. However the first step is an understanding of the individual tools.

Conservation Easements

Perhaps the most familiar tool is the conservation easement. The introduction to this paper highlighted two high profile examples in Alberta: the OH Ranch and the Waldron Ranch.

Conservation easements are voluntary agreements to protect private land. ALSA provides that conservation easements may be used to protect, conserve or enhance the environment, natural scenic or aesthetic values, agricultural land or land for agricultural purposes.³⁶ It also provides land uses consistent with these purposes including: recreational use, open space use, environmental education, research and scientific studies of natural ecosystems.³⁷

Conservation easements are a restriction on land title and create obligations between the land owner and easement holder. Government powers to expropriate or issue orders allowing surface access (for activities like developing oil and gas wells) are not restricted by a CE.

The use of conservation easements need not be connected to regional plans. They were included in provincial legislation prior to ALSA and were predated by common law covenants used to protect private land. Easements have been used in Alberta for almost twenty years and have been used extensively across the country and internationally.

Conservation Easements are the only conservation and stewardship tool in ALSA for which regulations are in place.³⁸

They are also the tool most supported by government programs, most notably the Land Trust Grant Program under the Alberta Land Stewardship Fund. This program provides funding for easements that align with provincial priorities.

The original funding priority was on native rangeland, which is fairly consistent with the intention of the LUF to tackle the under-representation of some ecological regions in the protected area system. This rangeland priority for funding has been continued in the regional plan for Southern Alberta (the South Saskatchewan Regional Plan or SSRP).³⁹ The use of conservation easements is further supported by non-government organizations, including the land trusts that hold easements, and the Conservation Easement Registry maintained by the Land Stewardship Centre.

A conservation easement is:

“A private, legal agreement whereby a landowner voluntarily restricts certain rights or opportunities related to their land use in favor of a qualified organization (land trust) or government agency in order to support identified conservation goals. The agreement is registered on title, and is binding on all future landowners.”

Miistakis Institute, “*Conservation Easements in Alberta* an on-line resource for landowners”

³⁶ *Ibid.* at ss. 29 (a), (b), &(c).

³⁷ *Ibid.* at s.29(d).

³⁸ See *Conservation Easement Registration Regulation*, Alta Reg. 129/2010.

³⁹ See the Government of Alberta, *South Saskatchewan Regional Plan, 2014-2024* (Edmonton: Government of Alberta, 2014), online: Land Use Framework <https://landuse.alberta.ca/LandUse%20Documents/SSRP%20Final%20Document_2014-07.pdf>.

Transfer of development credit schemes (TDCs)

TDCs are market-based instruments. Like conservation easements they are voluntary tools used to protect private land. However, a TDC addresses conflicting pressures on the land by providing an incentive to redirect development away from a location where it is not desired to one where it is. This may involve the sale of a development opportunity or “credit” from one landowner to another. If the same landowner owns the parcel to be saved and the one to be developed then they would be transferring the credit to themselves. Typically the deal would be sealed by a conservation easement or other form of legal protection on the parcel where development should not occur.

The idea behind TDCs is that by relocating future development, important landscapes values such as wildlife habitat, agricultural land or open space are protected, while still allowing growth and recognition of landowner interests. TDC programs have been used in several jurisdictions, especially in the US.⁴⁰ They are said to show potential in situations where there is a strong culture of property rights.⁴¹

ALSA provides that TDC schemes can only be established in accordance with ALSA.⁴² They may be established by regional plan or by one or more local authorities (municipalities) with the approval of Cabinet.⁴³ TDC schemes must include the designation of conservation areas with purposes and consistent uses similar to those required for conservation easements.⁴⁴

TDC schemes must be implemented by municipalities through municipal plans and bylaws.⁴⁵ To date, a few Alberta municipalities have implemented TDC programs and others are exploring options in developing TDC Programs. There are no regulations under ALSA to guide the use of TDCs although proposals for such regulations have been made. This is a deterrent to use of TDCs as the courts have affirmed that all TDCs must comply with

Transfer of Development Credits

“TDC programs allow municipalities to direct development away from areas which are threatened by it, and toward more suitable areas. Landowners in designated TDC conservation areas...are given credits that they are able to sell on an open market to landowners/developers in designated TDC development areas...who in turn are able to increase development potential (e.g. increased housing units/acre, increased parking spaces, increased building heights, etc.) beyond the base amount allowed by zoning. TDC conservation area parcels receive long-term protection through a title-restricting mechanism, which limits certain land use activities in order to conserve the valued landscapes.”

Transfer of Development Credits in Alberta (Miistakis Institute, March 2008)

⁴⁰ Miistakis Institute, *Transfer of Development Credits in Alberta: A Feasibility Review* (Calgary: Miistakis Institute, 2008), online: Miistakis Institute <http://www.rockies.ca/project_info/TDCFeasibilityReviewMiistakis.pdf>.

⁴¹ *Ibid.*

⁴² *Supra* note 4 at s. 48(1).

⁴³ *Ibid.* at s. 48(2).

⁴⁴ *Ibid.* at s. 49.

⁴⁵ *Ibid.*

ALSA.⁴⁶

Conservation Offsets

Conservation offsets are another example of a MBI and another voluntary tool. In essence, a conservation offset allows or requires land use industries to offset the adverse effects of their activities or development by supporting conservation efforts on other lands.

ALSA does not enable the use of conservation offsets to the same extent as conservation easements or TDCs. It mostly enables the creation of regulations to set out the details on how such a tool would be used. This includes regulations to “counterbalance the effect of an activity”, establish “stewardship units” and create a system of “exchange” for these units.⁴⁷ To date, however, there are no such regulations.

The province has indicated that it remains interested in offsets and this interest is apparent in both regional plans to date.⁴⁸ Furthermore, in September 2013 the Alberta Government released its Wetland Policy, which does not use the term “offset” but calls for wetland “replacement” where permanent loss of wetland cannot be avoided.⁴⁹ In these circumstances, the policy offers the developer the option to restore, enhance, or construct another wetland or pay an in-lieu fee to attempt to make up for the permanent loss of a wetland.⁵⁰ The government has also commissioned evaluations of offset designs and has various discussion papers of Conservation Offset policy in circulation.⁵¹ There are also several offset pilot projects in Alberta, some of which have government endorsement. For example the Southeast Alberta Conservation Offset which involves activities to compensate for industrial disturbance of native grassland has been endorsed by the South Saskatchewan Regional

Conservation Offsets

“The concept proposes that the 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) site or suite of sites, the “offset site(s)” “.

Poulton, David W. *Conservation Offset Policy for Alberta: A Comparative Legal Analysis* (2014) at 14-15.

⁴⁶ *Keller v. Municipal District of Bighorn No. 8*, 2010 ABQB 362 (CanLII), <<http://canlii.ca/t/29zpb>> retrieved on 2015-07-30.

⁴⁷ *Supra* note 4 at ss. 45-47.

⁴⁸ Government of Alberta’s Land Use Management Plan, October 2014, under the *Lower Athabasca Regional Plan, 2012-2022* (LARP)(Edmonton: Government of Alberta, 2012); Government of Alberta, *South Saskatchewan Regional Plan, 2014-2024* (Edmonton: Government of Alberta, 2014) Appendix H: Southeast Alberta Conservation Offset Pilot (SEACOP).

⁴⁹ Alberta Government, *Alberta Wetland Policy*, (Edmonton: Alberta Government, 2013) at 14, online: <waterforlife.alberta.ca/documents/Alberta_Wetland_Policy.pdf>.

⁵⁰ *Ibid*, at p. 18.

⁵¹ Marian Weber, *Experimental Economic Evaluation of Offset Design, Options for Alberta* (November, 2011 Prepared for the Alberta Land Use Secretariat by Marian Weber, Alberta Innovates Technology Futures); Draft Wetlands Offset Restoration Design Protocol, (October 31, 2014, Environment and Sustainable Resource Development); Draft Wetland Offset Validation Protocol, (October 31, 2014, Alberta Environment and Sustainable Resource Development); Alberta Conservation Offset Policy Framework Discussion Paper, October 24, 2014, Alberta Environment and Sustainable Resource Development).

Plan.⁵² Despite these steps there is much to be done to establish a market for conservation offsets in Alberta.

Why were conservation directives included in ALSA?

Conservation directives were not initially included in *ALSA* during the early stages of legislation development.⁵³ At that time it was believed that conservation and stewardship objectives could be achieved through voluntary tools and through other legislation.

The Minister responsible for leading the development of the LUF and *ALSA* 2006 to 2009 believed there was a tool missing from the conservation and stewardship toolbox to support land use planning.⁵⁴ Alberta needed a means to protect important landscape features, while recognizing the value of private property.⁵⁵

The original vision basically resembled an involuntary conservation easement with compensation. This tool was also intended to be a tool of last resort for situations when voluntary tools would not work. Even so, at the time *ALSA* was being created there was a division of opinion in government on whether such a tool was needed, as this vision of conservation directives resembles how municipalities use land use zoning and in that situation no compensation is required.

How Are Conservation Directives A Unique Tool?

The conservation directive has similar purposes to the other conservation and stewardship tools in *ALSA*: it can “permanently protect, conserve, manage and enhance environmental, natural scenic, esthetic or agricultural values”.⁵⁶ However, conservation directives differ in several ways from all of the other *ALSA* tools and from pre-existing tools.

Differences from the other ALSA tools

Conservation directives differ from all the other *ALSA* tools in two ways: they can be imposed and they must be created through regional plans.

Conservation directives can be imposed

The province can impose conservation directives on a parcel even if the landowner or other parties whose legal interests are affected do not agree. All of the other conservation and stewardship tools in

⁵² See South Saskatchewan Regional Plan 2014-2024 *supra* note 39.

⁵³ Personal communication, Ted Morton.

⁵⁴ Personal communication, Ted Morton.

⁵⁵ *Ibid.*

⁵⁶ *Supra* note 4 at s. 37(1).

ALSA are voluntary. While it is possible that affected parties might consent to a conservation directive, the tool can definitely involve unilateral regulation of land use.

Conservation Directives must be created through a regional plan

The section of ALSA that creates the conservation directive tool provides that: “A regional plan may permanently protect, conserve, manage and enhance environmental, natural scenic, esthetic or agricultural values by means of a conservation directive expressly declared in the regional plan”.⁵⁷ While not a clear provision, it suggests that conservation directives must be created through regional plans in a clear way. This type of requirement for expressed declaration often relates to showing deliberation where rights are affected by legislative decisions.

There are multiple points in regional planning process where cabinet decisions on the plan are made, specifically:

- In the adoption of the regional plan itself;⁵⁸
- A five year review process;⁵⁹
- Review and renewal of the plan, including the scope of any review⁶⁰; and
- Sub-regional plans and issue-specific plans that can be incorporated into the regional plan.⁶¹

ALSA also provides that Cabinet can require the preparation of a list of areas that are candidates for conservation directives.⁶² Overall there are many points in the regional planning process that might allow for creation of conservation directives. The real pre-requisites for creating conservation directives may be:

- The level of specificity or detail in regional plans. As described above, ALSA requires a level of specificity in describing the nature and location of the directive.
- Public consultation: While not captured in the words of ALSA, some of the original thinking behind the requirement that conservation directives be created through regional plans was to ensure that a public consultation would occur. One rationale for consultation was that conservation directives can be imposed on the unwilling. Another rationale was that if government must pay compensation using taxpayer’s money, then it should consult with taxpayers.

ALSA itself does not require that a consultation be held in order to create conservation directive, nor do the general requirements to hold consultations on regional plans mean that all planning decisions are

⁵⁷ *Ibid.* at s. 37(1).

⁵⁸ *Ibid.* at s. 4.

⁵⁹ Where directed specifically by the regional plan. The Land Use Secretariat must undertake a review at least once every 5 years (ALSA s. 58).

⁶⁰ *Supra* note 4 at ss.6 & 51.

⁶¹ *Ibid.* at s.10.

⁶² *Ibid.* at s.51(1)(f).

subject to consultations. From a purely legal perspective it is likely possible to create a conservation directive without a consultation on that issue provided that the planning instruments are specific enough.

Differences from non-ALSA tools

Compared to tools under legislation other than *ALSA*, the conservation directive is the only one that combines a conservation purpose and legal weight, with flexibility concerning the specific objectives of the directive, allowable land uses, duration and management authority. It can be used together with other tools and is available on public and private land.

A conservation purpose

Except for parks and protected areas, the tools available under land-use legislation⁶³ other than *ALSA* lack a clear conservation purpose. This is true of Alberta's *Public Lands Act*, the most important legislation other than *ALSA* for managing use of public land. This lack of conservation purpose extends to the regulatory tools under this act. This includes zoning tools like Public Land Use Zones whose primary effect is to regulate public access to public land.⁶⁴ Statutory consents like leases and dispositions that provide the consent holder with some control over access may help avoid the challenge of management vacant public land, but they are not issued for conservation purposes. This problem has been partly rectified concerning grazing leases as there is a Stewardship Code of Practice in place.⁶⁵ The South Saskatchewan Regional Plan further proposes an incentive for stewardship in the form of longer leases.⁶⁶ Leases also provide leaseholders with some controls over access.

A conservation purpose is also missing from the *Municipal Government Act* which is the key land use legislation other than *ALSA* respecting private land. The province has created land use policies under the act but these are not binding on municipalities. Municipal plans and bylaws could definitely be used for purposes akin to those provided to the *ALSA* conservation and stewardship tools in many cases. However, there is no clear legislative direction to use these tools in this way, nor can municipalities regulate land use outside of their own boundaries.

Legal nature of conservation

Other tools that do have conservation purposes outside of parks and protected areas lack legal enforceability. This is the case with protective notations, which act more like a "buyer beware" to the land use industries than a constraint on regulatory decisions. It is the case with the Eastern Slopes Policy which includes a water supply priority and wildlife habitat zoning but is unenforceable on its own. This

⁶³ There is the ability to designate habitat conservation areas under the *Wildlife Act* but legislation is not generally focused on land use.

⁶⁴ *Public Lands Act*, RSA 2000, c P-40.

⁶⁵ Alberta Sustainable Resource Development *Grazing Lease Stewardship Code of Practice* (Edmonton, ASRD, 2007), online: Alberta Environment and Parks <<http://esrd.alberta.ca/lands-forests/grazing-range-management/documents/GrazingLeaseStewardshipCodePractice-2007.pdf>>

⁶⁶ *Supra* note 39.

lack of legal weight is also the case with provincial land use policies under the *Municipal Government Act* that concern private land.

Regional plans under *ALSA* are legally enforceable against public and private land without using conservation directives. This requires regional plans to be written in a binding form, which has yet to occur, with plans being more aspirational and directional in nature. The South Saskatchewan Regional Plan is an example as the proposed conservation strategies and tools are all in the non-binding part of the plan. Both regional plans to date have been very high level and have avoided the detail that conservation directives could provide.

Flexibility

Other tools with a conservation purpose lack the flexibility of conservation directives with respect to specific objectives, allowable uses, duration, and management authority. The primary conservation approach is the designation of parks and protected areas. These designations clearly have conservation purposes but they have fairly narrow objectives, require strict zoning of what activities can or cannot occur. They may be viewed as more permanent designations as well, with regional plans (and related conservation directives) being reviewed on specific timelines.⁶⁷ Park and protected area designations are also only available on public land except for some provisions for the leasing of land to the Crown for parks purposes. They have also tended to result in management by a parks department separate from other land and natural resource agencies.

Conservation directives can even be used in addition to other land use designations.

- **Purpose:** The purpose of conservation directives is to pursue a fairly broad range of values as compared to parks and protected areas. The availability of the tool to protect agricultural values clearly contemplates a “working landscape”, while its availability to protect scenic values does not necessarily entail environmental quality.
- **Allowable uses:** Depending on the nature of the directive it would be possible for statutory consents to be issued or to continue if they already exist. Conservation directives could alter how uses occur while allowing them to occur as an alternative to a strict yes/no zoning of uses. It could allow a parcel to be managed for an objective rather than for a use, allowing multiple uses to exist so long as the objectives are met. (Conservation easements on Crown land may be feasible but legal issues may arise around how government may be fettering their discretion by entering into conservation related contracts with third parties, particularly if they intended to be honoured in perpetuity.)
- **Duration:** *ALSA* provides that conservation directives can “permanently protect” a parcel.⁶⁸ This permanence would be consistent with a conservation purpose and the provision of compensation. However, conservation directives must be created through regional plans which

⁶⁷ *Supra* note 4 at s. 6 (1) states that the regional plan must be reviewed at least once every 10 years.

⁶⁸ *Ibid.* at s.37(1).

are subject to 5 year review, ten year renewal, and ad-hoc cabinet review. This suggests options for setting and altering the duration of conservation directives.

- **Public and Private Land:** *ALSA* makes the conservation directive tool available for use on public and private land – basically anywhere under provincial jurisdiction.⁶⁹ A conservation directive potentially apply on multiple private parcels, on public land alone, or on a network of public and private land.
- **Management authority:** the conservation directive provisions in *ALSA* do not assign management authority to a specific agency in the manner of parks, public lands and natural resource legislation. Other provisions of *ALSA* authorize the delegation of authority to implement regional plans.⁷⁰ The manager could possibly be any of the existing land and resource agencies for public land. It could be a private landowner or one or more municipalities for private land. It could be a leaseholder, building on the stewardship functions of some lease types. It could even be a new form of delegated authority.
- **Overlapping designations:** Conservation directives can be used in addition to other land use designations. For example a conservation directive could be used where a conservation easement is in place or on public land where a park or Public Land Use Zone is in place.

Finally, it is worth recalling that unlike pre-existing tools, conservation directives were intended to support land use planning. While not expressed in the conservation directive provisions, the tool could require multiple decision makers to comply.

The right to compensation

As stated above, *ALSA* provides that “a title holder whose estate or interest in land is the subject of a conservation directive” has “the right to apply for compensation” in accordance with the division of *ALSA* that concerns conservation directives.⁷¹ Technically speaking this right is to “apply” for compensation not to receive it, but it is nonetheless significant.

Then Minister Morton had a strong interest in private property rights and believed in the importance of compensation where land use rights were adversely impacted in the public interest.⁷² This extended to compensation for private landowners in situations where land is not expropriated but land use is restricted, as in these situations the market value of the land typically goes down.⁷³

⁶⁹ *Ibid.* at s.37(1).

⁷⁰ *Ibid.* at s.8(2)(m).

⁷¹ *Ibid.* at Division 3, Part 3.

⁷² Personal Communication, Ted Morton.

⁷³ This theory flowed from research into property rights in the United States. In the US property rights are entrenched in the Constitution, particularly the “taking clause” of the Fifth Amendment which states “... nor shall property be taken for public use, without just compensation.” This has led to the recognition of “regulatory takings”: situations are not true expropriations as the public authority does not acquire title to the land, but that trigger landowner rights to compensation for restrictions on land use. In some US states this concept of regulatory taking is codified.

In Canada there is no constitutional protection of property rights comparable to that which exists in the US. The general rule is that rights to compensation for the regulation of land use or the expropriation of land must come from legislation. Several Alberta statutes authorize expropriation, and the process and resulting compensation are set by the *Expropriation Act*.⁷⁴ However, if the public authority does not acquire the land but merely regulates its use or imposes restrictions on it, then a landowner is not entitled to compensation. The exception to this rule is where the restriction of the landowner's rights are so drastic that they should be regarded as an expropriation within the meaning of the *Expropriation Act*. This is known as a "constructive", implied or *de facto* expropriation.⁷⁵

The need for conservation directives in Alberta

The uniqueness of conservation directives is a fine example of legislation being created for a reason. They can do what cannot be done by any of the other ALSA tools or any of the pre-existing conservation tools. Furthermore, they exist specifically to support land use planning and they create compensation rights that do not otherwise exist.

The answer to the question of whether conservation directives are needed in Alberta is likely "yes". This or a comparable tool is likely needed to fill a gap in the existing conservation tool box in Alberta with or without ALSA. The debate has been muddied by the focus on compensation over conservation, but what matters is the uniqueness of conservation directives as a conservation tool.

What Are The Barriers To The Use Of Conservation Directives?

The perception of conservation directives as a draconian government edict to limit property rights is a key barrier to future use of the tool. The need for them to be expressly described in regional plans, compensation concerns and a lack of clarity around how they should be administered are also practical

Compensation under ALSA:

A regional plan may curtail the right of a landowner to use or develop his or her land, but . . .as long as some reasonable private use of the property is left to the owner, no compensation is payable.

In contrast, where a regional plan places land under a "conservation directive" to protect or enhance environmental, scenic or agricultural values, ALSA confers an express right to compensation to the title holder whose interest or estate is the subject of a conservation directive – as if expropriation has taken place. In this regard, the legislation is generous, compared with other provinces.

Eran Kaplinsky and David Percy, *A Guide to Property Rights in Alberta* (Alberta Land Institute, University of Alberta)

⁷⁴ *Expropriation Act*, R.S.A. 2000, c E-13. The word use of a "taking" is reflective of the US approach as typically the "takings" language is absent in Canadian law, insofar as basic assumption that regulation does not result in any type of compensable taking of property rights (i.e. short of expropriation, there is not a recognized "taking" of property rights.)

⁷⁵ See *R. v. Tener*, [1985] 1 SCR 533, 1985 CanLII 76 (SCC), <<http://canlii.ca/t/1fv0m>> retrieved on 2015-09-14.

barriers to their use. Conservation directives have received almost no attention and, one might argue, have been swept under the carpet.

The time constraints on drafting *ALSA* meant that the use of conservation directives was not explored in a concrete way prior to the legislation being created. The intention was that future regulations would provide the details, this has yet to occur, and there is a shortage of helpful precedents from other jurisdictions.

Property rights and centralized planning

ALSA was not well received by some in Alberta because it was seen to increase the power of the provincial government. *ALSA* centralizes planning power in the provincial Cabinet and provides little constraints on planning or accountability for outcomes. Some fears were that regional planning would infringe on private property rights while others were that it would infringe on the powers of municipalities to regulate private land. While these are different legal issues they get merged in a general concern with local autonomy.

The conservation directive tool has drawn particular criticism, notwithstanding the compensation provision.⁷⁶ There remains a perception that conservation directives take away private property rights even though the government already has the power to alter property rights and restrict private land use, and even though conservation directives create compensation rights that did not otherwise exist. What also seems forgotten is that the Alberta government prefers a voluntary approach to conservation and stewardship, particularly where there are private property rights concerns, and that conservation directives were originally imagined as a tool of last resort.

Following this contention the province created a Property Rights Task Force to listen to landowners and prepare a report on the issues. The report shows concerns with multiple pieces of centralized planning legislation from the same electoral cycle. *ALSA* was not singled out or even the focus of debate.

Furthermore, the main debate did not concern “property rights vs. the environment”. The dominant landowner concerns were with provincially approved developments impacting private land rather than with provincial regulation of private land use. Only six landowner comments in the entire report mention the environment, and all of these comments favor increasing priority on the environment. Examples include “getting serious” with the oil and gas industry and providing better information about industrial impacts on local communities. The report makes brief mention that some landowners want compensation for delivering ecosystem services, but it makes no mention of conservation directives.

ALSA was amended in 2011 partly to address property rights concerns. The purpose of the Act was revised to expressly state: “the government must respect the property and other rights of individuals and must not infringe on those rights except with due process of law and to the extent necessary for the

⁷⁶ Report of the Property Rights Task Force: Engagement with Albertans (Government of Alberta, February 2012), http://justice.alberta.ca/programs_services/about_us/prao/assets/PropertyRights_TaskForce-Report.pdf.

overall greater public interest.”⁷⁷ The amendments included extensive regulations that really create more procedures for aggrieved parties rather than substantive rights. Thus there is still debate over whether ALSA detracts from property rights, increases property rights, or makes no change. The primer created by the Alberta Land Institute in response to this confusion suggests that the one real change to property rights as a result of ALSA is compensation for conservation directives.⁷⁸

During the last provincial election prior to 2015, land use policy was a factor in rural locations where the government lost numerous seats. Since that time there has been no apparent champion for what the LUF and ALSA were intended to achieve. The LUF remained on the Cabinet agenda but the focus was on regional planning rather than developing the conservation and stewardship tools.⁷⁹

Rigid process and compensation questions

The original requirement that conservation directives must be expressly prescribed in a regional plan undermines its flexibility. Regional plans are proving difficult to create, especially with the level of detail needed for conservation directives. Interpreting this requirement strictly will undermine the potential flexibility of the conservation directive tool and therefore much of its potential. Clarity as to how conservation directives can be created is needed and could be provided through the regulations that have yet to be developed.

The compensation requirements around the directives are also a source of regulatory chill as governments typically do not want to pay compensation claims. In US jurisdictions where compensation legislation is more established it has had a deterrent effect on land use planning and regulation even if there would be positive overall effects.⁸⁰

Without clear direction, it is likely that provincial treasury officials will be reluctant to support anything but the most timid regional plans so as to minimize any risk to provincial funds from possible compensation claims.

Lack of precedents

In Canada the conservation directive is unique to Alberta, and while similar concepts can be found in international jurisdictions they are of limited applicability so the lessons learned are few.

⁷⁷ Bill 10, the *Alberta Land Stewardship Amendment Act, 2011*, 4th Sess., 27th Leg., Alberta, 2011, s.5 [Bill 10]]. The amendments to ALSA that followed the property rights debate were criticized for their potential to promote “regulatory chill”. Banks, Nigel, “Regulatory chill, weak regional plans, and lots of jobs for lawyers: the proposed amendments to the Alberta Land Stewardship Act”, ABlawg.ca, (March 4, 2010), http://ablawg.ca/wp-content/uploads/2011/03/blog_nb_bill10_mar2011.pdf

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⁷⁹ This is somewhat ironic as it emphasized the most contentious aspect of ALSA while downplaying that which offers compensation and incentives to property rights holders.

⁸⁰ Grout, C., Plantinga, A.J., and Jaeger, W.K. “Pay or Waive: An Economic Assessment of Property Owner Compensation Laws in the United States” (2014) *Review of Environmental Economics and Policy* 8:1 at 117.

We have seen directives used in the conservation context in Europe. These include the Habitat Directive on the Conservation of Natural Habitats of Wild Fauna and Flora (Habitats Directive),⁸¹ and the Birds Directive, on the Conservation of Wild Birds.⁸² The primary focus of these directives is on protecting and restoring species and habitats through a network of protected sites across the European Union called Natura 2000.⁸³ A directive is binding upon all European Union (EU) member states to which it is addressed.⁸⁴ Each EU member state then has a legal obligation to implement these directives by transposing them into national law.⁸⁵ Private landowners with plots within these designated areas may be required by their respective governments to change an existing land use or practice to meet the requirements of the directive. One exception is France where the government chose to ignore the mandatory regulatory approach of the Habitats Directive, and instead pursued a voluntary contractual approach with impacted landowners. This brought success in terms of landowner support for the process, but also resulted in a “watered-down list of sites of smaller size”.⁸⁶

The Albertan and European directives are similar in that they:

- Identify and apply to a specific area of land;
- Describe the precise nature of the directive and its intended purpose; and,
- Are coercive in nature: a landowner who is served notice of the directive is required to abide by the directive.

However, they European directives differ from Alberta concerning compensation. From the perspective of EU Constitutional Law, payment of compensation is not a right and may not be required because the directives do not *per se* take private property rights nor do they mandate the authorities to severely restrict uses so that a *de facto* expropriation is caused.⁸⁷ The specifics of compensation regimes depend on the laws of each Member State and compensation issues may be dictated by budgets and policy, rather than legal rights.⁸⁸ For example, in Ireland farmers have

“My third criticism is the compensation issue. It will drive (more likely stop) decisions to conserve through regional plans. It runs counter to the no compensation for zoning provisions of the MGA. There is no rationale for compensating if a conservation directive is used but not if a municipal plan is used.”

Interview with David Elliott, legislative drafter responsible for drafting ALSA (Nov 27, 2014 and email March 5, 2015.)

⁸¹ European Commission, *Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora*, online: EUR-Lex <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992L0043&from=EN>>

⁸² European Commission, *Directive of 30 November 2009 on the conservation of wild birds (2009/147/EC)*, online: EUR-Lex <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0147&from=EN>>. see also the Water Framework Directive, Directive 2000/60/EC).

⁸³ *Natura 2000*, European Commission, ec.europa.eu/environment/nature/nature2000/index

⁸⁴ *Treaty of the Functioning EU States*, Article 288.

⁸⁵ Transposition is a legal act, which means to adopt national measures to achieve the results stipulated by the directive. (Eur-Lex.europa.eu). See Council Directive 92/43/EEC *supra* note 81 at Article 6.1.

⁸⁶ Snethlage, M., *et al.* “Sectoral Experience with Natura 2000”, (Tilburg: ECNC Group, 2012) at 24.

⁸⁷ See Cliquet, A., *et al.* “Managing Natura 2000 Sites: the provision of Article 6 of the Habitat’s Directive 92/43/EEC” at 222 of *The Habitat’s Directive in its EU Environmental Law Context: European Nature’s Best Hope?* (Charles-Hubert Born ed.) (Rutledge, 2015).

⁸⁸ The potential for compensation being justified in individual member states has not been assessed as part of this project.

had to significantly change their farming methods due to the Birds or Habitats Directives. A compensation plan was established but subsequently halted in 2010 due to lack of funding.⁸⁹

If there is a lesson to be learned from other jurisdictions it might be to consider the practical requirements for use of such tools. These requirements appear to include receptivity to implementation on the part of local authorities, the need for landowners to play stewardship roles, and government ability to pay.

Lack of policy or regulations

The intention at the time that *ALSA* was drafted was for future regulations to provide the details for the use of the conservation and stewardship tools. These details could be provided through regional plans (as regulations) or through regulations under *ALSA*.

Regulations for conservation directives would assist in dealing with:⁹⁰

- Compensation application procedures including criteria for compensation, application costs, and time for appeals;
- Reductions in compensation due the terms of agreements, other statutes, statutory consents or regional plans, or due to compensation received for loss of interests in land.
- Notice to title holders, registration on land titles and duties of the registrar;
- The terms and conditions that must be incorporated into conservation directives;
- Enforcement of conservation directives by an appointed person including the Stewardship Minister, government departments, local authorities (municipalities) or a “qualified organization” (an organization allowed to hold conservation easements under *ALSA*, usually a land trust.);
- Remedies to contraventions of conservation directives;
- The terms conditions and duration of enforcement appointments; and
- Amendments or termination of conservation directives.

The only regulations on conservation directives to date provide procedures to apply for compensation. Thus there are many gaps in the details needed to enable use of the tool.

Some of these gaps were noted above. These include:

- How conservation directives can be created through regional plans.
- Who issues the conservation directive, although this would likely be cabinet due to the regional planning context.

⁸⁹ See Ireland National Parks and Wildlife Service, “NPWS Farm Plan Scheme”, online: NPWS <<http://www.npws.ie/farmers-and-landowners/schemes/npws-farm-plan-scheme>>, accessed on September 14, 2015.

⁹⁰ *ALSA*, s. 43.(1)

Some gaps are directly foreseen by the list of regulation making powers. For example:

- The terms or conditions of conservation directives.
- The delegation of administrative, land management and enforcement functions needed to implement conservation directives.
- How notice of conservation directives is provided and registered on title.
- The amount of compensation and how it will be determined.
- How long conservation directives would last, and how they can be amended or terminated.

Some gaps may be outside of the regulations, for example what provincial government department budget would pay compensation. Compensation could foreseeably be payable by the Land Use Secretariat, the Ministry with oversight over the land base where the directive applies, from departments with regional planning functions, from the Alberta Land Stewardship Fund or from Cabinet-accessed funds. There is further need to consider the timing of funding processes within government and the potential to make funding available.

Since *ALSA* came into force regional planning has taken priority over the conservation tools. In that regard conservation directives are no different from the other *ALSA* tools for which there are almost no regulations or policy. During the previous electoral cycle even regional planning lost priority to other natural resource matters including the creation of a single regulator for oil and gas (the Alberta Energy Regulator or AER) and an environmental monitoring system (the Alberta Environmental Monitoring, Evaluation and Reporting Information Service or AMERA). Arguably the Land Use Secretariat, which was originally intended to have fairly independent oversight over the implementation of *ALSA*, lacked the independence or resources to ensure that the land use planning initiative progressed and was respected by different departments.

In the case of conservation directives there has been outright aversion to developing the tool. This aversion has probably been fueled by debate over property rights and local autonomy and by uncertainty concerning compensation and management responsibility. It is a somewhat circular dilemma as policy or regulations are needed to settle these issues.

How Should The Conservation Directive Tool Be Developed And Tested?

While the value of conservation directives could be significant the chance of the tool not being used is currently high. Developing the tool will likely require exploring the possibility that it could be used in a more voluntary way and for uses beyond the original vision. Conservation directives may need to be tested through ground-up pilot projects that explore multiple different ways for the tool to be used.

Ground-up involvement

The barriers to use of conservation directives suggest need for ground-up involvement in development of the tool. Conservation directives were originally imagined as being imposed and they could be, but in practice conservation directives could be voluntary or desired, and the legislation contemplates compensation by agreement. Some landowners, leaseholders or municipalities may want or accept provincial conservation designations on land in which they have legal interests. These parties also have important recommendation roles in provincial planning for conservation and development, or at least they should. This ground up approach would require that proponents of conservation directives begin with groundwork such as identifying:

- A specific location.
- The status of regional planning in that location.
- Other provincial policies that would support conservation in that location.
- The existence of environmental, esthetic, natural scenic or agricultural values or land that conservation directives could foreseeably protect.
- Other indications of public interest in conservation in that location.
- The stakeholders on the landscape, especially those with legal interests including land titles and statutory consents. This could be a source of roadblocks or a source of support for conservation directives. Do stakeholders want done what a conservation directive could do?
- The costs on government if compensation is payable.
- Whether compensation can be decided so as to be fair while limiting exposure to liability.
- The costs on other stakeholders, and whether or not they could be entitled to compensation.
- Is there potential for partnerships or cost sharing with municipalities, landowners, qualified organizations (land trusts) or other non-government organizations?
- What roles the stakeholders want to play in implementation, such as program administration, land management and enforcement. In a sense, where is the “stewardship” to accompany “conservation”?
- Is there are good news story or potential for quiet success?

Possible uses and pilot projects

The flexibility of the conservation directive tool becomes clear when one considers its potential uses on private land, public land or both. The following examples are possible uses while others propose concrete pilot projects. Pilot projects were anticipated by ALSA and are needed as part of a ground up approach to developing the tool.

Viewshed protection

Using a conservation directive as a tool that could protect the scenic view travelling west from Calgary towards the mountains was of interest to the Minister responsible for framing *ALSA*. Maintaining this open space along the Eastern Slopes is an important public interest, however; it would be an ambitious first use of the new tool and would require new regulations. The area would have to be identified in the South Saskatchewan Regional Plan and this identification would have to be more specific than current provisions emphasizing the general importance of the Eastern Slopes. The conservation directive would have to apply to specific parcels which could be anything west of Calgary and perhaps everything west of the Cowboy Trail (Highway 22X). The conservation directive would have to describe its precise nature, which would be protection of the viewshed and would have to impose restrictions on land uses that impede the view. Each titleholder whose estate or interest in land falls within this area would have a right to notice of the conservation directive and the right to apply for compensation which could amount to a massive procedure and costs.

Nonetheless, viewshed protection is an important use of the tool that is captured in the provisions of *ALSA* that make the tool available to protect aesthetic and natural scenic values. The view west is the obvious location and the tool might be pilotable on a smaller scale.

Support for voluntary private conservation

There are several ways in which conservation directives could be used to support the efforts of landowners and land trusts, who in turn may want conservation directives on their land.

Examples include:

- Protecting conservation easements from minerals activity including oil, gas and mining.
- Protecting conservation easements from activities on adjacent land.
- Act as a regulatory backstop to easements to ensure that easements get executed and that they meet the terms sought by government, municipalities and land trusts.
- Disperse the costs of private land conservation between government, municipalities, landowners and qualified organizations.
- Assist with the purchase of lands for conservation purposes by providing compensation for lost market value to a qualified organization that purchases land at market value. The qualified organization could then put a conservation easement on its own land to provide permanent protection, and could then sell it at no net loss.
- Providing alternatives to conservation easements while keeping the same conservation purposes.

The use of conservation directives as alternatives to easements requires some elaboration. Barriers to creating conservation easements include the facts that easements holders often seek out easements granted in in perpetuity and there can be difficulties in ensuring sufficient funding exists for ongoing

monitoring and stewardship. The landowner faces reduced development potential indefinitely but the landowner and land trust may lack capacity to maintain the conservation value. These are particular barriers to landowners in the farming and ranching sectors where keeping the land base under those uses takes work and the market value is much higher for municipal development uses. A Conservation directive with limited duration and dispersed payments could serve as a form of trial marriage or stewardship agreement.

A similar need for alternatives to easements may exist in the development sector. Land developers are asked to enter easements as conditions to development but may have no interest in stewarding or owning the parcel. A conservation directive could delegate stewardship responsibilities to a third party. Alternatively the landowner could sell the parcel for the reduced market value after having received the compensation.

Support for municipal planning

A municipality could benefit from conservation directives on private land if the tool was used to:

- Help settle disputes between local development and conservation interests by providing some certainty to both.
- Provide greater clarity on what is required for municipal planning and development decisions to comply with regional plans.
- Provide municipalities with a form of protection against litigation brought by developers by establishing public interest and regulatory compliance reasons for municipal decisions, as well as evidence of compensation paid.

Use with market based instruments

Conservation directives could help get market based instruments working. They could:

- Enable offsets and transfer of development credit schemes by setting limits on activity .
- Act as a regulatory backstop to ensure that conservation projects carried out as part of offset and TDC schemes. This would allow an authority to intervene if it becomes necessary to ensure that the terms of the offset agreement or TDC scheme are followed. For example:
 - If a developer agreed to restore a wetland as part of a conservation offset, issuing a conservation directive on that specific land would ensure that it occurs.⁹¹
 - A conservation directive on the parcel to be protected through a TDC scheme could help ensure that conservation easements get executed.

⁹¹ This type of use for conservation directives raises concerns around the enforcement mechanism of conservation directives which should be dealt with in regulations.

Networks of public and private land

Conservation directives can help build networks of conserved land under different ownership, dispositions and management authority by:

- Bringing public and private land under one single designation.
- Putting conservation directives on public land adjacent to conservation easements as a form of reciprocity for the landowner.
- Putting conservation directives on private land adjacent to public land protected areas.
- Providing an alternative to strict zoning by allowing activities to be screened based on compatibility with the conservation purpose.

Multiple use public land

Conservation directives may assist with conservation of the working public landscape by:

- Preventing development rushes or land grabs in advance of planning decisions.
- Providing an alternative to or “add-ons” for other conservation initiatives, such as parks or public lands designations which are politically contentious .Providing time limited conservation areas.
- Acting as place-specific regulations for an industry while leaving province-wide regulatory regimes in place.
- Requiring that all approval agencies on a given landscape comply with the directive.
- Allowing statutory consents to continue.

Agricultural operations and practices

The provisions of *ALSA* are broad enough that conservation directives might be available to improve land stewardship practices rather than simply protecting land from development.

Farming, feedlots and overgrazing create numerous environmental impacts. Examples include altered watercourses, and the contamination of soil, groundwater and surface water. Many agricultural impacts are felt downstream or by neighbors and there are costs on government related to cleanup and restoration. Furthermore these activities often occur on private land where there are less regulatory options than on public land. For example, in the case of grazing on private land there is no equivalent to the “environmental protection orders” used to promote the cleanup of substances that are regulated under the *Environmental Protection and Enhancement Act*.⁹²

⁹² *Environmental Protection and Enhancement Act*, R.S.A. 2000, c E-12, s 113.

It might be possible to issue conservation directives to help the farming or livestock sectors alter practices so as to protect watercourses while alleviating economic harm to the operator. The operator would be required to meet the terms of the conservation directive, for example grazing fewer cattle, reducing the number of livestock in feedlots or updating facilities and management practices. Operators that met the terms of the directive would be allowed to continue operations and they would be compensated. The specifics of the directive could be negotiated between the landowner-operator, the impacted neighbors, and the municipal and provincial government to suit the particular circumstances.

The use of conservation directives in this way raises several questions around the desirability of compensation and the amount of that compensation. This is a case where it is legally allowable to regulate land use without compensation, and while the tools do not exist for every situation they do in some. For example the NRCB can shut down feedlots until impacts on water quality are fixed without providing compensation.⁹³ Compensation could be seen as rewarding bad behavior as it would be providing payment for not degrading ecosystem services. However, others might see it as a positive alternative to penalties and loss of land use privilege that provides greater chance for long term improvements in land stewardship. This may be important where the government lacks enforcement capacity. The amount of compensation may also be difficult to determine if it is based on producing fewer cattle or improving environmental quality. Finally, the compensation would have to be used as a short-term, one-off measure to help the landowner-operator transition into a new state of compliance going forward.

Wildlife Corridors

One significant opportunity to pilot conservation directives is as wildlife corridors. This option could be used on public land, private land or both.

Wildlife, especially wide-ranging at-risk species such as grizzly bears and wolverines, need protected areas that are connected across landscapes to move in search of food and to ensure genetic diversity, thus maintaining biodiversity.⁹⁴ Conservation directives could be used to maintain connectivity corridors between parks and protected areas to ensure that habitat at either end or along the way remains viable.

The South Saskatchewan Regional Plan recognizes the importance of connectivity, calling it “critical to the long-term survival of grizzly bears, wolverines and lynx, which require connectivity from north Montana and through Kananaskis.”⁹⁵ One of the “strategic directions” for the region is to “conserving and maintain the benefits of biodiversity.”⁹⁶ This section of the plan states that maintenance of biodiversity is linked to the conservation of landscapes and that connectivity is an important factor.

⁹³ *Agricultural Operations Practices Act*, R.S.A. 2000, c. A-7 s. 39.

⁹⁴ See Soule, M. and Terborgh, J., *Continental Conservation: Scientific Foundations of Regional Reserve Networks*. Rewilding Institute, 1999.

⁹⁵ *Supra* note 39 at 57.

⁹⁶ *Supra* note 39 at 40 and 56.

There are at least four possible pilot locations in the South Saskatchewan Region: A “special management area” west of the proposed Pekisko Heritage Rangeland, the Rock Creek corridor, the Southeast Grasslands and the Three Sisters project in Canmore:

The Pekisko Special Management Area: The plan proposes that a new Pekisko Heritage Rangeland be created on public land roughly between the Highwood River to the north and the Porcupine Hills to the south. This would be a legislated protected area and one of the most significant conservation areas flowing from the plan and it follows from the proposal of local landowners and leaseholders.

The plan further proposes a “special management area” in between the Pekisko Heritage Rangeland to the east, Bob Creek Wildland Park to the southwest, and a proposed expansion of Don Ghetty Wildland Park in Kananaskis Country to the west. These same lands would also help to preserve wildlife habitat north-south from Waterton to Kananaskis as a subset of the Yellowstone to Yukon ecoregion.

The issue is that the plan does not propose any tool to implement this “special management area” and as described above the available tools under public lands legislation lacks either a conservation purpose, legal weight or both. A conservation directive in this location has several advantages. The “specific nature” and details of the directive could be fairly simple by requiring that activities not impair wildlife movement through the area. The text and maps of the SSRP may assist with the requirement that conservation directives be created through regional plans. This requirement could further be met through a pending biodiversity framework under the plan. There would be no rights to compensation for a conservation directive as the land is public land so there are no land title holders. This would reduce the burdens of providing notice as well. Several notable uses of the area such as grazing, hunting and forestry could likely continue. A conservation directive might have little impact on current leaseholders at all. Given the origins of the Pekisko Heritage Rangeland there might be local support for a conservation directive, desire to partner on stewardship and potential for delegated authority.

“Connectivity of wildlife habitat across landscapes, within the region and across regions, is also an important factor in maintaining biodiversity. Connectivity is needed to prevent habitat fragmentation and isolation of populations. It also allows for: the interchange of genetic material between populations and maintaining genetic diversity of populations; the movement of juvenile animals to new ranges; access to important seasonal ranges; and in the case of large carnivores reduces the potential for negative wildlife-human interactions in landscapes where there is a high level of human activity. The southeast area of the region provides important connections for wildlife movement between Alberta, Montana and Saskatchewan.”

South Saskatchewan Regional Plan (Government of Alberta, 2014) at p. 57. https://landuse.alberta.ca/LandUse%20Documents/SSRP%20Final%20Document_2014-07.pdf

The Rock Creek Corridor is a mix of public and private land north and south of Highway 3 east of Crownest Pass. In the centre of the corridor is a highway crossing critical to wildlife that has been the

source of ongoing investments from a conservation and public safety perspective. Like the Pekisko – Kananaskis connector, the regional plan does not identify the area for a legislated protected area but the alternatives are inadequate. A conservation directive in Rock Creek would preserve native grassland which is an SSRP priority, it would support private conservation and it would help create a network of public and private land.

The Grasslands in the South and East of the province were proposed as a location for expanded conservation areas through the South Saskatchewan Regional Planning process. A primary conservation concern is surface disturbance by oil and gas activity. The public consultations revealed that some local landowners and grazing leaseholders are in favor of conservation measures on these lands, and some industry operators recognize that the impacts are undesirable in some locations. However there is ongoing debate over the appropriate designation, the management authority, and the potential impact on leaseholders. The final plan includes a map of “potential grassland conservation areas” adjacent to existing Heritage Rangelands.⁹⁷ The text of the plan states that:

“Opportunities for further conservation management approaches, including the potential for additional conservation areas, in areas of grasslands will be explored using a collaborative approach. The focus will be on areas where there are significant gaps in protection for grasslands Natural Subregions and where there are important species and habitat. This collaborative approach will include discussions with stakeholders and will also build on the work of partners in the region such as grazing associations, conservation organizations, local organizations and other stewardship groups.

Thus a further consultation on sub-regional planning and conservation tools is foreseeable. Conservation directives may provide the flexibility to expand the existing protected areas while meeting the specific interests of these constituents.

The 3 Sisters in Canmore is a private land development project with regional significance for wildlife. It has also been the subject of protracted financial and legal uncertainty. Much of this uncertainty originates from provincial decisions on conservation and development. The original project proposal in the 1980s was for a recreation and tourism resort in the Wind Valley further east of Canmore. The parcel in question was privately owned by a mining company and sold to development interests. To protect the Wind Valley, the province entered a land swap where it acquired the parcel in question in exchange for a parcel adjacent to the Town of Canmore. This new parcel was then subject to a provincial environmental assessment which triggered a review by the provincial Natural Resources Conservation Board (NRCB). In 1992 the NRCB approved a “recreation and tourism” project as being in the public interest on the condition that the land includes a wildlife corridor based on the best available science and to the satisfaction of the province.⁹⁸ The NRCB has no ongoing regulatory oversight over this project and the municipality is prohibited by legislation from denying projects approved by the NRCB. Consequently the municipality must implement the project through municipal plans and bylaws. This

⁹⁷ *Supra* note 39.

⁹⁸ NRCB, *Application to Construct a Recreational and Tourism Project in the Town of Canmore, Alberta Decision Report Application #9103 – Three Sisters Golf Resorts Inc.*, online: NRCB <<https://nrcb.ca/Portals/1/Documents/Decisions/Three-Sisters/decision-report.pdf>>.

creates a significant challenge for the municipality, the developer and conservation interest. Concerning development, the market demand and community need has shifted over time from tourism resorts to residential housing. Concerning conservation, the municipal instruments must create a wildlife corridor that passes scientific assessment and provincial approval. Furthermore the viability of this wildlife corridor depends on the locations of conservation and development in the broader sub-region.

There have been voluntary efforts to identify wildlife corridors in the sub-region. Most notable is the “The Bow Corridor Ecosystem Advisory Group” – which includes the town of Canmore, the Municipal District of Bighorn, Parks Canada and the government of Alberta – and aims to preserve wildlife corridors and habitat patches from Banff to Kananaskis.⁹⁹ However, this sub-regional initiative could be frustrated by development pressure in any of the jurisdictions. The initiative has no collective authority and a legal tool would be needed to create corridors that cross jurisdictional boundaries.

Use of conservation easements as the legal tool for Three Sisters has raised concerns for development interests and conservation interests. Developers may have concerns around management of conservation easement and there are concerns that the province can unilaterally alter the terms of conservation easements. Meanwhile the conservation community has expressed concerns that easements will not be executed or will not meet the standards required for the wildlife corridor. Furthermore, any type of conservation area in this location could be expensive for one single organization to purchase or manage, regardless of whether that organization is the provincial government, the municipality, or a land trust. Finally, there may be demand to alter a statutory consent if the NRCB approval has lost relevance due to age.

In sum, provincial involvement in municipal planning and private land regulation is already occurring and is necessary to resolve the legal issues, the wildlife issues and potentially the financial issues. It is a situation that may favor a form of conservation and development deal or partnership involving the developer, the municipality, the provincial government and potentially a further qualified organization to hold or manage the wildlife corridor. A conservation directive may have the sufficient flexibility and potential to settle a protracted dispute in a manner that recognizes private property, conservation, and community interests.

Conclusions and Recommendations

Many Albertans still perceive their province as one abundant in healthy land, air, water, biodiversity and in resources. When the provincial government created the LUF in 2008 it was a recognition that the pressure of growth on the landscape has taken us to a tipping point where “what worked before will not work for our future”.¹⁰⁰ The LUF made a commitment to developing new strategies for the conservation and stewardship of public and private lands, and the creation of the ALSA conservation and stewardship tools was a major step towards delivering on that commitment. Conservation directives were the one tool included to protect important landscape features while recognizing that private property rights may be impacted.

⁹⁹ Bow Corridor Ecosystem Advisory Group, *Wildlife Corridor and Habitat Patch Guidelines for the Bow Valley, Updated 2012*, online: Biosphere Institute <<http://biosphereinstitute.org/wp-content/uploads/2015/01/BCEAGFinalReport2012.pdf>>.

¹⁰⁰ *Supra* note 18.

Seven years later, regional planning has clearly taken priority over development of the conservation tools, and even regional planning may have lost momentum. Apart from competing priorities, there was belief within government that only market forces related to scarcities of clear air, land or water would spur development of the conservation tools. As for conservation directives little has been written, there are no regulations to answer uncertainties, no leadership on use of the tool and few concrete visions for its use. Really the entire concept of a conservation directive remains unknown and untested. This is a long way from the ALSA call for the tools to developed with funding, guided by regulations and tested through pilot projects.”¹⁰¹

The conservation directive could have been removed from *ALSA* when the Act was amended in 2011, but it was not. On the contrary, the Property Rights Task Force report from the time indicated that provincial action on the environment was not the big concern as compared to centralize planning, and it might actually win landowner support. The conservation directive has the flexibility to tackle this complex scenario. The following recommendations will allow the conservation directive tool to keep this flexibility while recognizing that it exists to support regional planning:

#1. Create policies and regulations to enable the use of conservation directives and the other *ALSA* conservation and stewardship tools.

Policies and regulations should provide the details on conservation directives missing from *ALSA*. The matters to be covered and whether they can be covered in policies or regulations will depend with the intended use of conservation directives. Use for coercive action on private land will require the most detail. In general regulations should include:

- How conservation directives may be created through regional plans, including:
 - Opportunities for public consultation on decisions that may cause spending of public funds and impacts on property rights;
 - Mechanisms to apply for application or nominate areas that may be appropriate for conservation directives (i.e. voluntary);
 - Mechanisms for inclusion of conservation directives into regional plans after the original plan is finalized (i.e. amendment process).
 - An obligation to provide reasons of why conservation directives are appropriate (or not) to fulfill conservation objectives of regional plans.
- Prescribe what government authority would issue a conservation directive and on what basis.¹⁰²
- How long conservation directives may last and how they may be amended or terminated.

¹⁰¹ *ALSA* s.23. *ALSA*, Part 3, ss. 23-50.

¹⁰² Consideration should also be given to amend *ALSA* to enable delegation of the power to issue and approve conservation directives (which currently resides in Cabinet).

- The role of landowners, statutory consent holders, government departments, municipalities and qualified organizations in the implementation of conservation directives. Regulations assigning roles in implementation should cover enforcement of conservation directives.
- How notice to landowners, registrations on land titles, and records of conservation directives will be done and by whom.
- How conservation directives may be used to meet conditions of statutory consents (and outlining when such an application of the tool would not justify compensation).
- What impacts on landowner interests give rise to compensation, including detail on what counts as reduced property value, loss of use or injurious affection.
- How the amount of compensation to impacted landowners will be determined, including criteria for determining this amount.
- Compensation amounts and impacts giving rise to compensation should be fair to impacted landowners but there should be limits on government's exposure to financial liability for conservation decisions made in the public interest.
- Transparency and accountability for decisions on entitlement to compensation and the amount of compensation, especially if determined by the Stewardship Commissioner rather than the Court or the Land Compensation Board.
- Direction on what department's budget will be used to pay compensation and assurance that funding will be available.

#2. Provide the Land Use Secretariat with the independence, leadership functions and resources needed to develop the ALSA conservation and stewardship tools.

- The Land Use Secretariat should have independence from ministry departments and report directly to Cabinet. To enable this the Stewardship Minister should be recognized as its own portfolio as provided by *ALSA*, and the Stewardship Commissioner should have depute minister status. The Land Use Secretariat under this leadership should be responsible for developing the priorities concerning implementation of *ALSA* and should be provided with sufficient human and financial resources to do so. This resourcing should include sufficient funds to pay conservation directives if the Land Use Secretariat is responsible for payment.

#3. Test conservation directives through pilot projects that establish ground-up support for the tool and explore multiple ways for the tool to be used.

- These pilot projects should include a mix of voluntary and mandatory conservation, public and private land, and long and short term conservation directives. Pilot projects should include

wildlife corridors, especially wildlife corridors on public land, and particularly the Special Management Area proposed by the South Saskatchewan Regional Plan adjacent to the Pekisko Heritage Rangeland.

In closing, most of the larger pieces needed to manage growth in this province are in place. The LUF had broad public support and ALSA, despite some flaws, provides the tools needed to make land use planning real. From a plan implementation perspective, conservation directives may be the most important tool in Alberta. Get conservation directives wrong, and the evidence from other jurisdictions is that rights to compensation for regulation of land use will discourage conservation. Get conservation directives right and they can do much to reconcile environmental protection with private property rights, and legal-political boundaries with ecological regions. Simply put, conservation directives can fill the gaps that other tools cannot.

The approach to conservation directives recommended here would maintain the intended flexibility of the tool while recognizing that it exists to serve regional planning. It would also allow for stakeholder involvement in developing a range of ways to use the tool. Alberta will be well served if the government gives the conservation directive tool the priority it deserves.