



# Habitat Law in Alberta

## VOLUME 2: Barriers to Effective Habitat Management and Protection in Alberta

Environmental Law Centre  
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# The Environmental Law Centre (Alberta) Society

The Environmental Law Centre (ELC) has been seeking strong and effective environmental laws since it was founded in 1982. The ELC is dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in the Province of Alberta. The ELC's mission is to educate and champion for strong laws and rights so all Albertans can enjoy clean water, clean air and a healthy environment. Our vision is a society where laws secure an environment that sustains current and future generations.

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- [Habitat Law in Alberta: Executive Summary](#)
- [Habitat Law in Alberta Volume 1: The State of Habitat Laws in Alberta](#)
- [Habitat Law in Alberta Volume 2: Barriers to Habitat Management and Protection in Alberta](#)
- [Habitat Law in Alberta Volume 3: Jurisdictional Review of Habitat Laws](#)
- [Habitat Law in Alberta Volume 4: Recommended Reforms to Habitat Management & Protection Regulations in Alberta](#)



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## Introduction

This paper is part of a series of papers examining habitat management and protection law in Alberta. The first volume, [Habitat Law in Alberta Volume 1: The State of Habitat Laws in Alberta](#), identified and discussed species at risk legislation and other legislation providing direct and indirect opportunities for habitat management and protection in Alberta. These pieces of legislation were evaluated using five criteria:

- monitoring, assessment and planning tools;
- area based conservation tools, namely the creation of protected areas;
- localized/biophysical conservation, such as protection for nests, dens, or other habitat features;
- habitat consideration in decision-making, focusing on how habitat considerations are embedded in the decision-making process and in conditions for authorizations; and

- conservation compliance which would include administrative orders and violations.

This report is the second in the series and examines these pieces of legislation and their interactions to identify challenges that exist in habitat management and protection law today. The third report looks at habitat management and protection law in other jurisdictions, considers how challenges have been addressed in those jurisdictions, and makes recommendations for law reform designed to provide better protection for Alberta's habitats.

The critique of Alberta's current habitat law and policy provided by this report is based on an ecosystem management approach and assumes that biological diversity and ecosystem diversity should be encouraged. In Alberta, legislative impact on habitat management and protection comes from several pieces of legislation, some of which deal directly and expressly with habitat. Other legislation deals with matters (such as resource management) that have inevitable impacts on habitat. Several challenges emerge from this "quilt" of legislation that makes up Alberta's habitat law:

- fragmented planning and decision-making,
- a major legislative gap caused by the absence of dedicated endangered species legislation,
- a highly discretionary disposition process which does not address habitat needs proactively or effectively,
- pervasive legislative shortcomings which reveal a timid governmental approach to habitat management and protection, and include:
  - a disconnect between law and science (for example in the selection and level of protection provided by protected areas, and listing of species at risk);
  - lack of flexibility and resiliency to respond to rapidly changing ecosystem conditions and knowledge; and

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- excessive discretion in decision-making that impacts upon habitat and a lack of sufficient mechanisms for democratic accountability providing limited avenues for individuals to challenge, question or require laws to be upheld.

This paper looks at each of these challenges in Alberta's existing legislative framework for habitat management and protection. As mentioned, another paper in this series looks at the approaches taken in other jurisdictions and makes recommendations to better achieve Alberta's habitat management and protection goals.

This series of reports cannot effectively address issues associated with indigenous lands and, accordingly, these issues are scoped out of the reports. Suffice it to say that, with respect to indigenous lands, provincial legislation needs to be reviewed to identify ways in which to effectively protect and accommodate the rights of Indigenous Peoples.<sup>1</sup>



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<sup>1</sup> Monique M. Ross, Aboriginal Peoples and Resource Development in Northern Alberta, CIRL Occasional Paper #12 (January 2003) Canadian Institute of Resources Law, University of Calgary.

## State of Habitat in Alberta

As outlined in the first report of this series, Habitat Law in Alberta Volume 1: The State of Habitat Laws in Alberta, Canada is a signatory to the United Nations Convention on Biological Diversity under which the Aichi Biodiversity Targets were set.<sup>2</sup> One of the Aichi Biodiversity Targets is conservation of at least 17% of land and inland waters through networks of protected areas and other effective area-based conservation measures by 2020. How does Alberta compare to this target?

In May 2018, the Alberta Government designated five new Provincial Parks around Wood Buffalo National Park creating the largest contiguous boreal forest protected area in the world and increasing total landscape protection in Alberta to 14.9%. It has been recommended that Alberta achieve the 17% target by protecting the Bighorn Backcountry and northwest portion of critical habitat identified in Alberta's Caribou Habitat Plan.<sup>3</sup> However, even if the 17% target is met in this way, "there will still be significant gaps to fill to complete an effective interconnected, network of protected areas throughout the province that will safeguard Alberta's wildlife, wildlands and communities in the face of climate change".<sup>4</sup>

Although an essential element of an effective habitat management and protection regime, designation of protected areas are only a piece of the puzzle. Within protected areas, issues such as the level of protection provided (or level of human activity allowed), management decisions and activities, and monitoring and enforcement tools are key considerations. As well, buffer zones around protected areas and connectivity between protected areas need to be considered and achieved for effective habitat management and protection.

Outside protected areas - on both public and private lands - planning and development decisions and other human activities have repercussions for habitat

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<sup>2</sup> The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69).

<sup>3</sup> Canadian Parks and Wilderness Society, What's Next: Parks and Protected Areas to 2020 and Beyond (July 2018) available at [https://cpaws-southernalberta.org/wp-content/uploads/2018/07/CPAWS\\_ParksReport2018\\_web.pdf](https://cpaws-southernalberta.org/wp-content/uploads/2018/07/CPAWS_ParksReport2018_web.pdf).

<sup>4</sup> CPAWS, *supra*. note 3 at 51.

management and protection. Key considerations on public and private lands include the capacity to evaluate and protect habitat in decision-making (such as the issuance of dispositions on public lands or approvals for activities), the availability of tools such as banking and offsets to achieve desirable outcomes in the face of development, and monitoring and enforcement capacity.

Although Alberta has extensive legislation dealing either directly or indirectly with habitat, there are still significant challenges to achieving an effective habitat protection and management regime. In his 1996 paper, Elder identifies several policy responses to deal with loss of biodiversity:<sup>5</sup>

- conservation legislation,
- endangered species legislation,
- biodiversity management of all land, and
- general environmental policy.

Elder recommends a number of legal reforms including the addition of explicit purpose sections in relevant legislation, the imposition of a positive duty on decision-makers to consider sustainability and biological diversity, and the creation of incentive programs to encourage private property owners to set aside habitat areas.<sup>6</sup> He states that the unifying concept for legislative reform is adoption of an ecosystem approach to conservation.<sup>7</sup>

Considering these potential policy responses and the totality of Alberta's existing legislation which, either directly or indirectly, impacts upon habitat conservation, there are some clear challenges. These challenges are:

- fragmented planning and decision-making,
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<sup>5</sup> P.S. Elder, Biological Diversity and Alberta Law, (1996) 34:2 Alberta Law Review 293.

<sup>6</sup> Elder, *supra*. note 5.

<sup>7</sup> Elder, *supra*. note 5.

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- a major legislative gap caused by the absence of dedicated endangered species legislation,
- a highly discretionary disposition process which does not address habitat needs proactively or effectively,
- pervasive legislative shortcomings which reveal a timid governmental approach to habitat management and protection, and include:
  - a disconnect between law and science (for example in the selection and level of protection provided by protected areas, and listing of species at risk);
  - lack of flexibility and resiliency to respond to rapidly changing ecosystem conditions and knowledge; and
  - excessive discretion in decision-making that impacts upon habitat and a lack of sufficient mechanisms for democratic accountability providing limited avenues for individuals to challenge, question or require laws to be upheld.



## Fragmented Planning and Decision-Making

It is trite to say that ecosystems do not respect jurisdictional boundaries. A single ecosystem may encompass federal public lands, provincial public lands, municipal lands and private lands.<sup>8</sup> In addition, that ecosystem may be subject to numerous public and private interests such as mineral leases, grazing rights, timber rights, or roads. Decisions impacting that ecosystem may be made by several levels of government and several different governmental departments, often with conflicting mandates and objectives.

The result is fragmented planning and decision-making within a single ecosystem. This result reflects both a multi-use approach to planning and decision-making (as opposed to an ecosystem approach) and the continued use of sector-by-sector regulatory regimes with insufficient consideration of cumulative effects on habitat.

*At some point we cannot have both habitat protection and unabated energy development - there are choices to be made.<sup>9</sup>*

*Shaun Fluker, University of Calgary*

Ecosystem management has been proposed the preferred basis for managing public lands and resources.<sup>10</sup> Ecosystem management provides principles and operational guidelines for managing human activities in a manner that allows co-existence with ecological processes. This contrasts with a multi-use approach to land management which has been criticized for its:<sup>11</sup>

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<sup>8</sup> Arlene J. Kwasniak, *Reconciling Ecosystem and Political Borders: A Legal Map* (Edmonton, AB: 1997, Environmental Law Centre).

<sup>9</sup> Shaun Fluker, *R v Syncrude Canada: A Clash of Bitumen and Birds* (2011) 49:1 Alberta Law Review 237.

<sup>10</sup> Steven A. Kennett, *New Directions for Public Land Law*, CIRL Occasional Paper #4 (1998) University of Calgary, Canadian Institute of Resources Law. See also Craig Aumann, Daniel R. Farr and Stan Boutin, "Multiple use, overlapping tenures, and the challenge of sustainable forestry in Alberta" (2007) 83:5 The Forestry Chronicle 642 and P.S. Elder, *supra*. note 5.

<sup>11</sup> Steven A. Kennett, *supra*. note 10. See also Steven A. Kennett and Monique M. Ross, *In Search of Public Land Law in Alberta*, CIRL Occasional Paper #5 (1998) University of Calgary, Canadian Institute of Resources Law.

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- inconsistency between the almost unconstrained administrative and political discretion vs basic tenets of democracy and rule of law,
- weak normative basis of multiple use where public lands and resources are subject to increasing demands and ecological processes are at risk, and
- tendency of multiple use regimes to accord undue weight to narrow, well-organized interest groups in determining land and resource use

Looking at the totality of Alberta's legislation impacting on habitat, either directly or indirectly, a multi-use approach to land management is clearly reflected. For example, the *Public Lands Act* (PLA)<sup>12</sup> is underlain by an assumption of multiple uses occurring on public lands (see, for example, section 11.1 which enables the development of programs to resolve multiple use concerns). Similarly, depending on its designation, land set aside for "conservation" under provincial legislation may still be subject to multiple uses including industrial development.<sup>13</sup>

The multi-use approach to land management historically used in Alberta contrasts with an ecosystem management approach. The ecosystem management approach embodies a land ethic, gives rise to substantive goals for management, requires integration of science and public policy, takes into account the role of humans in ecosystems and the importance of human values in land management, and requires intergovernmental and interagency coordination.<sup>14</sup> Implementation of ecosystem management requires determination of the amount of disturbance that can be sustained within an area without destroying ecosystem viability and choosing the appropriate mix of land uses to be permitted.<sup>15</sup>

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<sup>12</sup> *Public Lands Act*, R.S.A. 2000, ch. P-40 (PLA).

<sup>13</sup> [Habitat Law in Alberta Volume 1: The State of Habitat Laws in Alberta](#).

<sup>14</sup> Steven A. Kennett, *supra*. note 10.

<sup>15</sup> Steven A. Kennett, *supra*. note 10.

## Jurisdictional Fragmentation

Jurisdictional fragmentation occurs along ownership lines (federal, provincial, or private ownership), and along authority lines (federal, provincial, or municipal<sup>16</sup> responsibility). Jurisdictional fragmentation can also exist within one level of government along departmental lines (a.k.a. departmental silos). In light of jurisdictional fragmentation, a single ecosystem can be subject to numerous legislative and policy regimes which may have diverse and even conflicting objectives. In terms of achieving effective habitat management and protection, this is a challenging situation.

Approximately 60% of Alberta's land is provincial public land.<sup>17</sup> This potentially provides an excellent land base to anchor an effective habitat management and protection regime throughout the province. Generally speaking, management of Alberta's public land is guided by the *PLA* but it does not have an express habitat management and protection purpose (although it does contain zoning tools and statutory consents which could be employed to protect public land). In fact, the *PLA* contains "no general purpose section, no general provisions setting out the principles that are to guide decisions, and no standards for the management of public lands as a whole".<sup>18</sup>

In an analysis dating from 1998, Steven A. Kennett and Monique M. Ross set out four key attributes that should exist in public land law.<sup>19</sup> These attributes are:

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<sup>16</sup> For municipal aspects, see Judy Stewart, "Do Recent Amendments to Alberta's Municipal Government Act Enable Management of Surface Water Resources and Air Quality?" (2018) 55(4) Alberta Law Review 1009.

<sup>17</sup> See Alberta Wilderness Association website at <https://albertawilderness.ca/issues/wildlands/public-lands/>. About 28.5% is private land and 10% is federal public land.

<sup>18</sup> Craig Aumann, Daniel R. Farr and Stan Boutin, *supra*. note 10 at 642.

<sup>19</sup> Steven A. Kennett and Monique M. Ross, *supra*. note 11. See also Steven A. Kennett, *supra*. note 10.

- Clear principles, objectives and standards that provide meaningful direction to decision-makers and include an ethical commitment to ecosystem management.
- Planning process designed to provide an integrated strategic framework for public land management (both planning process and plans should have a legal basis).
- Include mechanisms to ensure a logical progression among the various stages of decision-making (establishment of general policies regarding land use objectives and priorities to particular regulatory requirements tailored to specific projects).
- Legal mechanism to promote or require interagency and inter jurisdictional coordination in areas where issues and policies exhibit spill-over effects

The 1998 review of Alberta's legislation concluded that public land law, as defined by these four attributes, was virtually non-existent. A significant amount of Alberta's legislation deals with resource management on a sector-by-sector basis and establishes general environmental protection requirements. However, this patchwork of legislation did not create a coherent and integrated body of public land law.

Without consideration of cumulative environmental effects at local and regional levels, maintaining ecosystem sustainability is not likely to be successful.<sup>20</sup> Historically, the management and administration of Alberta's natural resources has happened on a sector-by-sector basis as opposed to management on a regional or ecosystem basis. The result is development approvals being granted in spite of (and often without consideration of) other activities within the same region with little, if any, effort to coordinate activities and reduce impacts.

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<sup>20</sup> Steven A. Kennett, *Spinning Wheels in the Castle: A Lost Decade for Sustainability in Southwestern Alberta*, CIRL Occasional Paper #14 (October 2003) Canadian Institute of Resources Law, University of Calgary.

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A sense of the oftentimes disconnected sector-by-sector approach to management and administration of Alberta's natural resources can be gained by looking at the numerous pieces of legislation and regulators involved. Forestry activities are regulated under the *Forests Act*<sup>21</sup> which is administered by Alberta Agriculture and Forestry. Oil and gas activities are regulated pursuant to many pieces of legislation under the umbrella of the *Responsible Energy Development Act* (REDA)<sup>22</sup> which are implemented by the Alberta Energy Regulator. The utilities sector – which includes energy developments such as wind farms – is governed by a variety of legislation under the umbrella of the *Alberta Utilities Commission Act*<sup>23</sup> which is implemented by the Alberta Utilities Commission. Other activities that may occur on public lands – such as grazing or recreation – are governed by several pieces of legislation, including the PLA, which are administered by Environment and Parks.

Each regulatory body, enabled by its legislation, has a distinct purpose and mandate focused on its own sector. Alberta Agriculture and Forests' mandate is providing:<sup>24</sup>

...policies, legislation, regulations and services necessary for Alberta's agriculture, food and forest sectors to grow, prosper and diversify; inspires public confidence in wildfire and forest management and the quality and safety of food; supports environmentally sustainable resource management practices; and leads collaboration that enables safe and resilient rural communities.

The Alberta Energy Regulator's stated mandate is:<sup>25</sup>

The Alberta Energy Regulator ensures the safe, efficient, orderly, and environmentally responsible development of hydrocarbon resources over their entire life cycle. This includes allocating and conserving water resources,

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<sup>21</sup> *Forests Act*, R.S.A. 2000, ch. F-22 (*Forests Act*).

<sup>22</sup> *Responsible Energy Development Act*, S.A. 2012, ch. R-17.3 (REDA).

<sup>23</sup> *Alberta Utilities Commission Act*, S.A. 2007, A-37.2.

<sup>24</sup> See website at <https://www.agric.gov.ab.ca/app21/ministrypage>.

<sup>25</sup> See AER 2016/17 Annual Report at <https://www.aer.ca/documents/reports/AER2016-17AnnualReport.pdf>.

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managing public lands, and protecting the environment while providing economic benefits for all Albertans.

The Alberta Utilities Commission states its role and mandate is “to be a trusted leader that delivers innovative and efficient regulatory solutions for Alberta”.<sup>26</sup> Alberta Environment and Parks states that its vision is “[a] healthy and clean province where Albertans are leaders in environmental conservation and protection, enjoy sustainable economic prosperity, quality of life and outdoor recreation opportunities”.<sup>27</sup> As can be seen, consideration of habitat needs or addressing cumulative effects within a single ecosystem is not a major focus of any of the above regulatory bodies.

With the introduction of the *Alberta Land Stewardship Act* (ALSA)<sup>28</sup> in 2009, an additional layer of planning and decision-making has been added to Alberta’s PLA and resource management legislation. ALSA provides an integrated regional approach to planning and, as such, is a promising piece of legislation from a habitat management and protection perspective. Under ALSA, the province is divided into 7 planning regions (roughly around watersheds).<sup>29</sup> The legislative intent is to develop a plan for each region which will identify objectives (economic, environmental and social) within that region and which will provide co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources, and the environment.

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<sup>26</sup> See AUC website at <http://www.auc.ab.ca/Pages/role-and-mandate.aspx>.

<sup>27</sup> See AEP’s website at <http://aep.alberta.ca/about-us/default.aspx>.

<sup>28</sup> *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8 (ALSA).

<sup>29</sup> See Government of Alberta website for maps of the 7 regions:

<https://landuse.alberta.ca/ResultsResources/Pages/MapsandShapefiles.aspx>.

## Alberta Land Stewardship Act: An Incomplete Response to the Challenge of Fragmented Planning and Decision-Making

In addition to individual pieces of legislation impacting on habitat, the province of Alberta has also adopted integrated land management (ILM) as a means to reduce the human footprint on public lands.<sup>30</sup> This ILM approach is geared toward landscape conditions affected by multiple human activities and inter-industry cooperation. ILM uses tools such as land use zoning rules, ecological objectives and limits of acceptable ecological impacts, limits on extent and characteristics of development footprints, limits on intensity of activities, and temporal sequencing of activities (phased development). A key outcome of ILM is meant to be “human-caused disturbance on the land is less than disturbance which would have occurred without integration”.<sup>31</sup>

In addition to the efforts under ILM, land management planning on a larger, regional scale in Alberta is guided by the Land-Use Framework (LUF)<sup>32</sup> and implemented by ALSA. As discussed in the first report of this series,<sup>33</sup> the LUF adopts several strategies to implement land-use management as an “approach to manage public and private lands and natural resources to achieve Alberta’s long-term economic, environmental and social goals” and provide “a blueprint for land-use management and decision-making that addresses Alberta’s growth pressures”.<sup>34</sup> The LUF provides that decision-making is to be guided by several principles including:<sup>35</sup>

- Sustainable development which is defined as “[d]evelopment which meets the needs of the present without compromising the ability of future generations to
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<sup>30</sup> Government of Alberta, *Describing the Integrated Land Management Approach* (undated) ISBN No. 978-0-7785-8902-0 (Online Edition) Pub No. I/422.

<sup>31</sup> Government of Alberta, *supra*. note 30 at 4.

<sup>32</sup> Government of Alberta, *Land-Use Framework* (2008), ISBN No. 978-7785-7713-3 (Printed version) ISBN No. 978-0-7785-7714-0 (Online version) Pub No. I/321 (LUF).

<sup>33</sup> [Habitat Law in Alberta Volume 1: The State of Habitat Laws in Alberta](#).

<sup>34</sup> LUF at 7.

<sup>35</sup> LUF at 15-16.

meet their own needs. Contemporary land-use decisions will balance current economic, environmental and social benefits with the consequences for future generations. This principle of inter-generational responsibility applies to all forms of human land use (residential and industrial, agriculture and forestry, energy and transportation)."

- Supported by a land stewardship ethic which means "accepting the responsibility to ensure that our land-use decisions are mindful of consequences for future generations. This responsibility applies to urban planning, forestry and agriculture, habitat and wildlife, watersheds and riparian areas, and all other decisions affecting land use. Where appropriate, market mechanisms will be used to promote stewardship practices."

There is no mention of ecosystem management in the LUF (although respect for private property rights makes an appearance). Similar principles appear in the purpose provisions of ALSA:<sup>36</sup>

- provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives
- provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples
- to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment
- to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.

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<sup>36</sup> ALSA, s. 1.

Again, there is no mention of an ecosystem approach to land use planning in ALSA. However, despite this, ALSA is legislation that implements land-use planning on a regional scale and has potential to implement an ecosystem approach.

At first blush, ALSA seems to offer a means to address fragmented decision-making and planning in Alberta (for provincial public lands and private lands, and across provincial government departments). However, there are shortcomings in the legislative framework provided by ALSA and in its implementation.

Firstly, much of ALSA is drafted in a discretionary manner.<sup>37</sup> While ALSA has a purpose provision which mentions environmental objectives in a general sense, there is no mention of ecological integrity or ecosystem management. Cabinet maintains almost unconstrained discretion to independently create, amend and implement regional plans with limited public participation in their development.<sup>38</sup> The only legislated requirements for a regional plan are to “describe a vision for the planning region” and “state one or more objectives for the planning region”.<sup>39</sup>

Secondly, and very importantly, only 2 of 7 regional plans have been developed to date (there is no legislated timeframe for development of the plans). Without development of the regional plans, ALSA’s potential to address cumulative effects and resolve jurisdictional fragmentation will not be achieved. The 2 plans that have been developed are the Lower Athabasca Regional Plan (LARP) and South Saskatchewan Regional Plan (SSRP). The LARP contains positive steps from a habitat conservation and management perspective. The LARP policy objectives include enhancement of the regional network of conservation as to support biodiversity and ecosystem function, and avoidance or mitigation of land disturbance impacts to biodiversity. Regional biodiversity objectives have been developed for various terrestrials and aquatic indicators within the LARP planning region. However, the LARP provides no enforcement teeth for those objectives. Furthermore, the Biodiversity

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<sup>37</sup> Jenette Poschwatta-Yearsley and Adam Zelmer, “The Alberta Land Stewardship Act: Certainty or Uncertainty?” (2009) 106 Resources 1.

<sup>38</sup> ALSA, s. 5.

<sup>39</sup> ALSA, s. 8.

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Management Framework and the Landscape Management Framework are still outstanding despite being key planning initiatives under the LARP and initially anticipated to be finished within 1 year of finalization of the LARP (i.e. by September 2013).

The other completed regional plan, the SSRP, has a major shortcoming. While it did set aside areas for conservation, it continues to honour existing oil and gas tenure within those areas undermining their conservation value. Regional biodiversity objectives are still being developed for the SSRP.<sup>40</sup> Currently, development of the North Saskatchewan Regional Plan is underway<sup>41</sup> but the remaining four regional plans have not been started to date.<sup>42</sup>

Thirdly, while ALSA provides tools designed to encourage stewardship on both public and private lands, these may not necessarily achieve the desired level of habitat conservation and management. These conservation tools are in addition to traditional tools used to reduce impacts of development on biodiversity (such as species at risk legislation, protected areas legislation, and private conservation).<sup>43</sup> These tools cannot operate in a vacuum and need to be used in support of broader ecosystem and habitat objectives.

Conservation easements have been used successfully in Alberta for many years;<sup>44</sup> however, other tools in the ALSA tool-kit have been used less often (if at all).<sup>45</sup> For

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<sup>40</sup> Alberta Environment and Parks, DRAFT Development of the South Saskatchewan Regional Biodiversity Management Framework Update (January 10, 2018).

<sup>41</sup> See Government of Alberta website for plan status:

<https://landuse.alberta.ca/REGIONALPLANS/Pages/default.aspx>.

<sup>42</sup> See Government of Alberta website *supra*. note 41.

<sup>43</sup> David W. Poulton, *Biodiversity and Conservation Offsets: A Guide for Albertans*, CIRL Occasional Paper #48 (Calgary, AB: 2015, Canadian Institute of Resources Law).

<sup>44</sup> Arlene Kwasniak, "Conservation Easements: Pluses and Pitfalls, Generally and for Municipalities" (2009) 46:3 Alberta Law Review 651 and Arlene Kwasniak, "Facilitating Conservation: Private Conservancy Law Reform" (1993) 31:4 Alberta Law Review 607.

<sup>45</sup> See *Buying a Better Environment?*, a four volume series published in 2016 by the Environmental Law Centre: Volume 1: An Introduction to Market-Based Instruments & the Alberta Land Stewardship Act; Volume 2: Transfer of Development Credits under the Alberta Land Stewardship Act; Volume 3: Conservation Offsets under the Alberta Land Stewardship Act; and Volume 4: Stewardship Units & the Exchange under the Alberta Land Stewardship Act.

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example, the conservation directive tool, while potentially powerful, can only be used if a regional plan is in place which makes it inapplicable in most of the province. Furthermore, there is no supporting policy or regulation in place making its use difficult (and to date no conservation directives have been issued).<sup>46</sup> Similarly, the use of Transfer of Development Credit (TDC) schemes and Stewardship Units has been limited. Without proper design and careful provincial oversight, TDC schemes and Stewardship Units could actually result in lower quality habitat being protected in favour of development.<sup>47</sup>

Finally, there are limited means provided in ALSA for review of the plans and for ensuring compliance with the plans.<sup>48</sup> While there is a formalized process to review regional plans every 10 years,<sup>49</sup> the extent and nature of the 10 year review is discretionary. A complaint process is provided by ALSA<sup>50</sup> which enables a person to make a written complaint about non-compliance with a regional plan to the Land Secretariat. It is at the discretion of the Secretariat to investigate and to decide if the matter should be referred to the appropriate provincial government department or Minister, or local government.

While the goal of ALSA is to achieve integrated land planning on a regional basis, it appears to fall short of that goal. As stated by Steven A. Kennett, a coherent legal regime for public land management should not just be a collection of discrete statutes and regulation dealing with land use, resource management and environmental protection; it should be a unified body of substantive and procedural requirements that provide the basis for integrated management of public land and resources.<sup>51</sup> Likewise, there must be legislative authority to extend those substantive and procedural requirements to private lands (since ecosystems encompass both

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<sup>46</sup> Adam Driedzic and Brenda Heelan Powell, *Volume 1: An Introduction to Market-Based Instruments & the Alberta Land Stewardship Act* (Edmonton, AB: 2016: Environmental Law Centre) at 31-32.

<sup>47</sup> Adam Driedzic and Brenda Heelan Powell, *supra*. note 46.

<sup>48</sup> Alan Harvie and Trent Mercier, "The Alberta Land Stewardship Act and its Impact on Alberta's Oil and Gas Industry" (2010) 48:2 Alberta Law Review 295.

<sup>49</sup> ALSA, s. 6.

<sup>50</sup> ALSA, s. 62.

<sup>51</sup> Steven A. Kennett, *supra*. note 10.

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public and private lands). Effective habitat conservation and management requires effective integration across jurisdictions and agencies.<sup>52</sup>

One of ALSA's goals is to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment. This legislation falls within the mandate of Alberta Environment and Parks and is binding on all decision-makers in Alberta (including regulatory bodies and municipalities). ALSA has the potential address fragmented planning and decision-making within Alberta's ecosystems. However, as previously pointed out, only 2 of 7 planning regions have completed plans in place. In order to reach its potential, ALSA must be fully implemented via its regional plans. This is a key piece that must be addressed.



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<sup>52</sup> Steven A. Kennett, *supra*. note 10.

# A Key Legislative Gap: Endangered Species Legislation

A key legislative gap in Alberta as it pertains to habitat management and protection is the lack of dedicated endangered species legislation. In Alberta, endangered species are managed under the *Wildlife Act*<sup>53</sup> which has licencing and regulation of hunting as its primary function. While the *Wildlife Act* and its regulation do provide some designation of protected areas, it is not a habitat-based piece of legislation.<sup>54</sup>

Under the *Wildlife Act*, an Endangered Species Conservation Committee (ESCC) must be established.<sup>55</sup> This Committee makes recommendations to the Minister regarding:

- organisms that should be established as endangered species;
- endangered species and biodiversity conservation;
- the preparation and adoption of recovery plans; and
- any other matters on endangered species which the Minister seeks advice.

The ESCC maintains an independent scientific sub-committee which makes recommendations on species designations to the Minister who considers the recommendations, and then effects legal listing of species via regulations. It is noteworthy that the scientific recommendations are not binding on the Minister leading to a political listing approach.

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<sup>53</sup> *Wildlife Act*, R.S.A. 2000, ch. W-10 (*Wildlife Act*).

<sup>54</sup> Sara L. Jaremko, "An Overview of Wildlife Legislation in Alberta" in *A Symposium on environmental in the Courtroom: Enforcement Issues in Canadian Wildlife Protection* (March 2 and 3, 2018), University of Calgary, Canadian Institute of Resources Law. See also Fiona Boulet, *Landholders, Habitat and Species at Risk Legislation in the Canadian Context*, Masters' Degree Project submitted to the Faculty of Environmental Design in partial fulfillment of the requirements for the degree of Master of Environmental Design (Environmental Science), (Calgary, AB: The University of Calgary, 2001).

<sup>55</sup> *Wildlife Act*, s. 6.

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The ESCC also provides advice on the preparation and adoption of recovery plans (although there is no mandate under the *Wildlife Act* that these plans be prepared). The contents of a species recovery plan are not set by the Act, although it is expressly stated that the ESCC may identify critical habitat as part of recovery plans.

The Act does not mandate protection for areas identified as critical habitat. The *Wildlife Regulation*<sup>56</sup> does provide for the designation of habitat conservation areas, wildlife sanctuaries (there are currently none), game bird sanctuaries, restricted areas, seasonal sanctuaries, and corridor wildlife sanctuaries which confer certain restrictions on camping, hunting, and disturbing nests, dens and houses of listed species. However, there are no area designations designed to specifically address critical habitat of species at risk. In addition, under the Act Ministerial Regulations may be passed to address “the protection of wildlife habitat and the restoration of habitat that has been altered, and enabling the Minister to order persons responsible for alteration to restore the habitat and to charge them with the cost of it”.<sup>57</sup>

Overall, Alberta’s management of species at risk relies heavily on policy with a minimal, highly discretionary legislative framework. The preparation of recovery plans, including the identification of critical habitat, is not mandated by legislation. Further, there are no specific prohibitions against the destruction of critical habitat. Given that the major threat to biodiversity is habitat degradation and loss, this is a gap that urgently needs to be addressed in Alberta.<sup>58</sup>

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<sup>56</sup> *Wildlife Regulation*, A.R. 143/1997 (*Wildlife Regulation*).

<sup>57</sup> *Wildlife Act*, s. 103(1)(u).

<sup>58</sup> Fiona Boulet, *supra*. note 54.



## Failure to Identify and Protect Key Habitat: Public Land Dispositions

In Alberta, interests in public land are granted via dispositions primarily governed by the PLA and its regulation *Public Lands Administration Regulation* (PLAR).<sup>59</sup> Dispositions may include rights to access public lands, timber rights, surface rights and mineral rights. In Alberta, the dispositions with significant potential to impact habitat are those associated with resource activities: oil and gas, mining and forestry. Other dispositions may allow grazing activities, recreational activities/development, or other access and use of public lands<sup>60</sup> that can impact habitat management and protection. As a general statement, dispositions of public land are meant to enable

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<sup>59</sup> *Public Lands Administration Regulation*, A.R. 187/2011 (PLAR).

<sup>60</sup> The types of dispositions issued by Alberta Environment and Parks and by the Alberta Energy Regulator can be found in the Public Lands Administration Regulation Tables available at <http://aep.alberta.ca/land/legislation-and-policy/public-lands-administration-regulation/default.aspx>.

resource extraction or access to public lands, and are not responsive to the needs for habitat management and protection.

Dispositions for oil, gas, coal, oil sands, and metallic or industrial minerals are issued under the authority of the *Mines and Minerals Act*<sup>61</sup> which is primarily administered by Alberta Energy (versus oil, gas, coal and oil sands exploration and extraction activities which are regulated by the Alberta Energy Regulator). The *Mines and Minerals Act* does not address matters of habitat management and protection.

When a request for a mineral disposition is made by industry, Alberta Energy refers the matter to the Crown Mineral Disposition Review Committee (CMDRC)<sup>62</sup> which is comprised of representatives from Alberta Environment and Parks, Alberta Culture and Tourism, Alberta Energy, Alberta Municipal Affairs, and the Special Areas Board. According to the Government of Alberta website, the role of the CMDRC is to “review proposed dispositions to identify potential impacts on the environment specifically major surface or environmental concerns that can affect surface access for exploration and development of minerals”.<sup>63</sup> To a great extent, the mandate and work of the CMDRC is a “black box” but this description of its role does not reflect a strong mandate for habitat management and protection.

Forestry dispositions are governed by the *Forests Act* which is administered by Alberta Agriculture and Forestry. The *Forests Act* is a timber disposition and management piece of legislation; it does not refer to management or protection of forests as an ecosystem. Timber may be disposed via a forest management agreement (FMA), timber quota certificates in conjunction with timber licenses, or timber permits. Given their term length and access to a large amount of public land, FMAs can have a significant impact on habitat. The *Forests Act* provides that a person holding an FMA can establish, grow and harvest “timber in a manner designed to provide a yield

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<sup>61</sup> *Mines and Minerals Act*, RSA 2000, c. M-17 (*Mines and Minerals Act*).

<sup>62</sup> The Crown Mineral Disposition Review Committee was established in 1971 and is continued via section 10(2) of the *Alberta Environmental Protection and Enhancement Act*.

<sup>63</sup> See Government of Alberta website at <http://aep.alberta.ca/land/industrial-commercial-activities/crown-mineral-disposition/default.aspx>.

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consistent with sustainable forest management principles and practices".<sup>64</sup> However, there is no explicit reference to management and protection of forests as habitat or ecosystems.

Other dispositions for public land use – such as grazing or cultivation – are initiated by a Land Review Request (LRR).<sup>65</sup> The LRR results in an evaluation process which determines whether the requested use can be integrated into other current uses on the land. These decisions are governed by the PLA and the PLAR.<sup>66</sup> These decisions may involve consultation by Alberta Environment and Parks staff with resource experts, the public and others responsible for management in the area.<sup>67</sup>

Despite the significant impact a decision to grant a disposition may have on habitat, there is little (if any) public process supporting these decisions. In the case of mineral dispositions there is no public consultation prior to disposition, no direct notice to potentially affected surface owners or occupiers, no procedure for consultation and no public representation on the CMDRC.<sup>68</sup> Similarly, there is no requirement for public involvement in the decision to enter into FMAs which grant timber rights in a significant area on a long term (public participation typically comes after disposition in the planning stages).<sup>69</sup>

Once a disposition has been granted, the disposition-holder has at least some existing interest in that land or resource which then must be balanced against habitat management and protection (the interest held by the disposition-holder is

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<sup>64</sup> Forests Act, s. 16.

<sup>65</sup> See Government of Alberta website at <http://aep.alberta.ca/land/programs-and-services/dispositions/default.aspx>.

<sup>66</sup> It should be noted that under the PLAR, there are also areas of public land which are designated as Public Land Use Zones, Recreation Areas or Recreation Trails (these are not dispositions but areas of public land which are open to use by the general public).

<sup>67</sup> See Government of Alberta website at <http://aep.alberta.ca/land/programs-and-services/dispositions/default.aspx>.

<sup>68</sup> Nickie Vlavianos, "The Potential Application of Human Rights Law to Oil and Gas Development in Alberta: A Synopsis" (Calgary: University of Calgary, Alberta Civil Liberties Research Centre and Canadian Institute of Resources Law, 2006).

<sup>69</sup> See Government of Alberta website for a summary of public participation in FMAs: <https://www.agric.gov.ab.ca/app21/forestry?page?cat1=Forest%20Management&cat2=Forest%20Tenure>.

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determined by the type of disposition granted).<sup>70</sup> This means that the amendment, suspension or cancellation of dispositions may trigger rights to compensation.

Once issued, a disposition may be cancelled, suspended or amended for reasons specified in the PLA.<sup>71</sup> This includes the disposition-holder being convicted of an offence under an ALSA regional plan or under the regulations that relates to the use of the land contained in the disposition. As well, the Director may amend a disposition at any time for reasons specified in the PLA which includes making amendments necessary to make the disposition comply with any applicable ALSA regional plan.<sup>72</sup>

In addition to amendment and cancellation authority under the PLA, authority exists under other legislation to cancel dispositions located in protected areas, to cancel mineral agreements, and to cancel forest dispositions. In the case of dispositions within a protected area, both the *Provincial Parks Act* and the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act* contain provisions allowing cancellation or termination.<sup>73</sup> These Acts are silent on the issue of compensation for such cancellations.

With respect to mineral dispositions, pursuant to the *Mines and Minerals Act*, the Minister has authority to cancel or to refuse to renew a mineral agreement if further exploration or development is not in the public interest.<sup>74</sup> The *Mines and Minerals Act* requires compensation be paid to the agreement-holder in such a case.<sup>75</sup> The requirements for compensation are set out in the *Mineral Rights Compensation Regulation*.<sup>76</sup> Essentially, the regulations require compensation for amounts spent to

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<sup>70</sup> PLAR, s. 2 states: "Subject to the Act and this Regulation, a disposition holder has only the estate, interest, rights and privileges expressly provided in the disposition."

<sup>71</sup> PLA, s. 26.

<sup>72</sup> PLA, s. 15(3).

<sup>73</sup> Provincial Parks Act, R.S.A. 2000, ch. P-35 (*Provincial Parks Act*), ss. 8 and 8.1. *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, R.S.A. 2000, ch. W-9 (*Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*), s.6.

<sup>74</sup> Mines and Minerals Act, s. 8(1)(c).

<sup>75</sup> Mines and Minerals Act, s. 8(1)(c).

<sup>76</sup> Mineral Rights Compensation Regulation, A.R. 317/2003.

acquire, develop and remediate the mineral interests (plus interest). In addition, the *Mines and Minerals Act* permits the Minister to expropriate mineral interests for which further exploration or development is not in the public interest.<sup>77</sup> In the case of expropriation, the *Expropriation Act*<sup>78</sup> applies and compensation is payable in accordance with that Act.

In the case of forest dispositions, the *Forests Act* allows for cancellation in the event of a default by the disposition-holder.<sup>79</sup> If a disposition is cancelled for reasons other than a default by the disposition-holder, then compensation in the amount the Minister considers just is payable.<sup>80</sup>

It is noteworthy that ALSA allows the amendment or cancellation of statutory consents (which includes dispositions) in order to achieve the objectives of a regional plan.<sup>81</sup> Under ALSA, compensation is payable for such impacts.<sup>82</sup>

As a matter of legislative interpretation, it is presumed that expropriation - that is, an outright taking of land for the benefit of public purposes – requires compensation.<sup>83</sup> As stated by Professor Ziff, “unless the words of a statute demand a different reading, a statute is not to be interpreted as taking away private property without compensation.”<sup>84</sup>

In some cases, a disposition may not be expressly amended or cancelled pursuant to legislation but rather subject to regulatory restrictions which restrict the use of the disposition. In these cases, then the disposition-holder may argue that a *de facto* expropriation (or regulatory taking) has occurred and that compensation is payable. In general, to find a *de facto* expropriation requiring compensation, two

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<sup>77</sup> *Mines and Minerals Act*, s. 8(1)(b).

<sup>78</sup> *Expropriation Act*, RSA 2000, ch. E-13.

<sup>79</sup> *Forests Act*, s. 25.

<sup>80</sup> *Forests Act*, s. 27.

<sup>81</sup> ALSA, ss. 11(1) and 1(aa).

<sup>82</sup> ALSA, s. 19.

<sup>83</sup> *R v Tener*, [1985] 1 SCR 533.

<sup>84</sup> Bruce Ziff, *Principles of Property Law*, 6th Ed. (Toronto: 2014, Carswell) at 88.

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requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property.<sup>85</sup>

Mere regulation or diminution of the interest is not enough to find a *de facto* expropriation requiring compensation. As stated by the Alberta Court of Appeal:<sup>86</sup>

[64] From these authorities, it is obvious that not every interference with aspects of property ownership will amount to a *de facto* expropriation. In the context of restrictions on land use, it is clear that such restrictions, even down zoning or a development freeze, do not amount to expropriation. Valid land use controls are an unavoidable aspect of modern land ownership, through which the best interests of the individual owner are subjugated to the greater public interest.

However, where regulatory restrictions are sufficiently drastic as to render the interest meaningless, then a *de facto* expropriation requiring compensation will be found. Several examples of this are found in B.C. case-law where disallowing mineral exploitation within protected areas turned pre-existing mineral rights into "meaningless pieces of paper" since the sole value of a mineral right lies solely in its exploitation.<sup>87</sup>

Arguments of *de facto* expropriation necessitating compensation have been made in response to the issuance of emergency orders protecting critical habitat under the Species at Risk Act (SARA). In *Le Groupe Maison Candiac*,<sup>88</sup> a land developer argued that restrictions imposed by an emergency order under SARA amounted to *de facto* expropriation since its right to develop the land as it desired were limited (although the land could still be developed to a lesser degree). In this case, the Court held the principle of *de facto* expropriation was not applicable because section 64 of SARA addresses the issue of compensation for impacts arising from an emergency

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<sup>85</sup> See *Hartel Holdings Co. Ltd. v City of Calgary*, [1984] 1 SCR 337 and *Canadian Pacific Railway Co. v Vancouver (City)*, [2006] 1 SCR 227.

<sup>86</sup> *A.G. Alberta v Nillson*, (2002) ABCA 283 (CanLii).

<sup>87</sup> *Casamiro Resource Corp. v. British Columbia (Attorney General)*, 1991 CanLII 211 (BC CA) at 19. See also *R v Tener*, *supra*. note 83, *Adroit Resources Inc. v. HMTQ*, 2009 BCSC 841 (CanLii), and *Rock Resources Inc. v. British Columbia*, 2003 BCCA 324 (CanLii).

<sup>88</sup> *Le Groupe Maison Candiac Inc. v. A.G. (Canada)*, 2018 FC 643 (CanLii).

order. The Court stated that the principle of *de facto* expropriation only applies to fill a legislative silence.

There is similar litigation pending in Alberta arising from a SARA emergency order issued for protection of the sage grouse.<sup>89</sup> An oil and gas company sued the federal government for *de facto* expropriation and injurious affection of their interests in the Manyberries oilfield.<sup>90</sup> The municipality of Medicine Hat also sued.<sup>91</sup> This litigation is currently proceeding and is under case management; however, other than interlocutory matters, no decisions have issued which would address the substance of the law suit.<sup>92</sup>

Generally, there appears to be a lack of process for disposition decisions. This is problematic from a habitat conservation and management perspective because a significant area of land, including related wildlife and water bodies, may be impacted by disposition decisions. Once the disposition is issued, steps to modify or terminate the disposition may trigger compensation issues. By improving public participation and transparency in disposition decisions, habitat conservation and management considerations could be incorporated into the disposition decisions (leading to decisions to not issue or to impose appropriate conditions onto dispositions).

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<sup>89</sup> [http://www.registrelep-sararegistry.gc.ca/document/default\\_e.cfm?documentID=1736](http://www.registrelep-sararegistry.gc.ca/document/default_e.cfm?documentID=1736).

<sup>90</sup> See Dan Healing, "LGX Oil sues federal government for \$60 million over sage grouse order" (CALGARY HERALD, Updated: December 4, 2015) available at <https://calgaryherald.com/business/energy/lgx-oil-sues-federal-government-for-60-million-over-sage-grouse-order>.

<sup>91</sup> See Carter Haydu, "Medicine Hat Suing Feds For \$42 Million In Ongoing Manyberries Oilfield Sage-Grouse Saga" (Calgary Herald, October 16, 2014) available at <https://calgaryherald.com/business/energy/lgx-oil-sues-federal-government-for-60-million-over-sage-grouse-order>.

<sup>92</sup> From Federal Court website, proceedings queries on Court No. T-12-14.



## Science, adaptation and habitat focused decision making

From a failure to fully implement ALSA conservation tools to the absence of endangered species legislation to a public lands disposition approach driven by resource and access demands, a timid governmental approach to habitat management and protection issues in Alberta is revealed. This timidity is also revealed by pervasive legislative shortcomings that appear in much of Alberta's resource and environmental law. These legislative shortcomings include disconnects between law and science, lack of legislative flexibility and resiliency, and excessive discretion and lack of accountability mechanisms.

### Disconnects between Law and Science

Existing legislation often reveals a disconnect between law and science. These disconnects can be seen in the selection of protected areas, the level of protection provided by protected areas and other legal tools, the listing of species at risk, and conservation and reclamation of disturbed lands.

Typical failings of protected areas legislation are identified by David Boyd:<sup>93</sup>

- failure to make ecological integrity a top priority for protected areas;
- industrial resource activities may be allowed in protected areas;
- it is easy to reduce or even eliminate protected areas (in Alberta, boundaries of protected areas are established by regulation);
- no requirements for management plans and broad discretion in management decisions; and
- no requirement for status updates.

Protected areas legislation in Alberta does not expressly mention ecological integrity as priority in the management of provincial parks. However, the various pieces of legislation do acknowledge that certain areas of Alberta should be managed and protected for the enjoyment of future generations. It is noteworthy that even in those cases where ecological integrity is identified as a legislative priority, such as in the federal *National Parks Act*, there may be a judicial tendency to give it limited meaning and scope and treat it as one of many factors to be considered.<sup>94</sup>

In Alberta, there are various categories of protected areas, some of which offer very little habitat management and protection. While the Willmore Wilderness Park<sup>95</sup> and other wilderness areas<sup>96</sup> are fairly well protected from industrial and development activities within their borders, natural areas<sup>97</sup> have few limitations on development and industrial uses. Similarly, provincial parks and recreation areas<sup>98</sup> convey a

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<sup>93</sup> David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: 2003, UBC Press).

<sup>94</sup> *Canadian Parks and Wilderness Society v. Canada* (2001) F.C.T. 1123.

<sup>95</sup> Established by the *Willmore Wilderness Park Act*, R.S.A. 2000 ch. W-11 (*Willmore Wilderness Park Act*).

<sup>96</sup> Established by the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*.

<sup>97</sup> Established by the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*.

<sup>98</sup> Established by the *Provincial Parks Act*.

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perception of habitat management and protection but in reality may allow significant industrial and development activities to occur.

The table below provides an overview of the level of industrial and development activities allowed within the various types of protected areas.

**Table 1: Permitted Activities under Alberta Legislation**

<b>Legislation</b>	<b>Types of Protected Areas</b>	<b>Permitted Activities</b>				
		<b>OG</b>	<b>M</b>	<b>F</b>	<b>G</b>	<b>R</b>
Provincial Parks Act	Provincial Parks	✓	✓	✓	✓	✓
	Wildland Provincial Parks	✓*	✓*	✓	✓	✓
	Recreation Areas	✓	✓	✓	✓	✓
Wilderness Areas, Ecological Reserves and Natural Areas Act	Wilderness Areas					✓
	Ecological Reserves	✓				✓
	Heritage Rangelands	✓	✓	✓	✓	✓
	Natural Areas	✓	✓	✓	✓	✓
Willmore Wilderness Park Act	Willmore Wilderness Park					✓
<b>Legend</b>						
<b>OG</b>	Oil and Gas Activity					
<b>M</b>	Mining Activity					
<b>F</b>	Forestry Activity					
<b>G</b>	Grazing Activity					
<b>R</b>	Recreation Activity (though the types of recreation permitted varies)					
*	Only from leases that pre-existed the creation of the Wildland Provincial Park					



The creation of parks is not necessarily guided by ecological principles. Instead park locations are often dictated by a lack of industrial interest or high tourism potential which leads to an over-representation of “rocks and ice”.<sup>99</sup> Furthermore, given park boundaries are set out in regulation, they are not as permanent or unassailable as one may hope (amendment of a regulation is a much quicker and less public process than legislative amendment).

The legislation offers little in the way of guidance for park management. Both the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act* and the *Provincial Parks Act* give broad discretion to the Minister to manage the park.<sup>100</sup> The *Willmore Wilderness Park Act* does not indicate who is responsible for management decisions. Without legislated guiding principles, objectives and timelines, management of protected areas is a highly discretionary activity which could very well lead to decisions which are not aligned with scientific principles.

Another key disconnect between science and law can be seen in the lack of connectivity between protected areas. Isolated protected areas result in “islands” which are more vulnerable to species loss and lack resiliency.<sup>101</sup> The smaller a protected area is, the more this effect is exacerbated.<sup>102</sup> Providing corridors between

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<sup>99</sup> David R. Boyd, *supra*. note 93.

<sup>100</sup> *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, s. 5; *Provincial Parks Act*, s. 4.1.

<sup>101</sup> David R. Boyd, *supra*. note 93.

<sup>102</sup> Ed Wiken at al., *Habitat Integrity in Canada: Wildlife Conservation at the Crossroads*, Background Paper for the National Conference on Guidelines and Tools for the evaluation of Nature 200 Sites in France (March 3-5, 2003).

protected areas and buffer zones around protected areas are essential to effective maintenance of biodiversity.

It has been suggested that a habitat integrity agenda should have four fundamental objectives:<sup>103</sup>

- represent the natural range of variation in habitats in a system of wildlife based protected areas;
- sustain viable populations of native flora and fauna in natural patterns of abundance and distribution;
- maintain natural habitat functions, structures and processes through ecosystem management; and
- plan and manage important habitats in the context of broader dynamics and character of the existing landscapes/seascapes.

In order to achieve effective habitat management and protection in Alberta, these objectives should be considered. Likely, legislation needs amendment to improve the level of protection offered by protected areas, to improve process for selecting protected areas, and to adopt legislated management principles and objectives.

Species at risk legislation is another area that often highlights the disconnect between science and law. As David Boyd<sup>104</sup> notes much of Canadian provincial legislation:

- lacks a scientific listing process;
- have insufficient prohibitions against harm;
- fail to protect habitat;

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<sup>103</sup> Ed Wiken et al., *supra*. note 102 at 18-19.

<sup>104</sup> David R. Boyd, *supra*. note 93.

- recovery plans may be too discretionary, lack timelines for completion or both; and
- there is a lack of incentives, penalties and enforcement (including citizen enforcement tools)

As previously discussed, in Alberta there is no dedicated species legislation. Modifications have been made to Alberta's *Wildlife Act* to address endangered species but the failings identified by David Boyd remain. The species at risk provisions of the *Wildlife Act* allow for broad discretion in the listing of species. There is no requirement to automatically list and protect those species scientifically determined to be at risk.

Under Alberta's approach to species at risk, recovery plans are used to address matters related to listed species. However, the development of recovery plans is highly discretionary both in terms of content and time to completion. A significant disconnect between science and law exists in that recovery plans may, but are not required to, identify critical habitat. There are no provisions in either the *Wildlife Act* or the *Wildlife Regulation* which require protection of identified critical habitat. Considering that the major threat to biodiversity is habitat degradation and loss,<sup>105</sup> this is a significant disconnect between science and law in Alberta.

While the federal Species at Risk Act (SARA)<sup>106</sup> provides a backstop to provincial legislation, it uses a political listing approach as opposed to a scientific approach. The listing process is also plagued by vague and unenforced deadlines which lead to delays in listing. Without listing, a species is not afforded the protections available under the federal Act (i.e. prohibitions, recovery and action planning, and so forth). The political approach to listing can lead to a disconnect between science and law wherein a species scientifically determined to be at risk is not afforded legal protection under the federal SARA.

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<sup>105</sup> Fiona Boulet, *supra*. note 54.

<sup>106</sup> Species at Risk Act, S.C. 2002, ch. C-29 (SARA).

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Under the federal Act, individuals of an extirpated, endangered or threatened listed species are protected with prohibitions against the killing, harming, harassing, capturing or taking.<sup>107</sup> Possession, collection, buying, selling or trading of an individual (or part or derivative thereof) of an extirpated, endangered or threatened species is also prohibited.<sup>108</sup>

In addition, the federal Act prohibits the destruction of the critical habitat of any species listed as endangered or threatened, and any species listed as extirpated that is being reintroduced.<sup>109</sup> It should be noted that this prohibition only applies once critical habitat has been identified by Order of the Minister.

However, these prohibitions are only extended to those within federal jurisdiction: listed migratory birds, listed aquatic species, and any listed species on federal lands. In addition, the prohibitions are extended to species listed by provincial/territorial law (but not by the federal Act) and found on federal lands within that province/territory. There is a “safety net” which enables federal protection of listed species which are not being adequately protected by provincial or territorial law. This approach can lead to uneven protections for species at risk across jurisdictions (and it is trite to say that species do not respect political boundaries).

Aside from these prohibitions, the federal SARA enables the use of recovery strategies, action plans, management plans and stewardship activities to protect species at risk and their habitats.<sup>110</sup> While the federal Act requires development of a recovery strategy for all species listed as extirpated, endangered or threatened (to be implemented via action plans) within certain timelines, these timelines have been routinely missed. The Federal Court commented on these delays as follows:<sup>111</sup>

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<sup>107</sup> SARA, s. 32.

<sup>108</sup> SARA, s. 32.

<sup>109</sup> SARA, ss. 56 to 64.

<sup>110</sup> SARA, ss. 37 to 55.

<sup>111</sup> *Western Canada Wilderness Committee v. Canada (Fisheries and Oceans)*, (2014) FC 148 at paras. 101 and 102.

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To state the obvious, the *Species at Risk Act* was enacted because some wildlife species in Canada are at risk. As the applicants note, many are in a race against the clock as increased pressure is put on their critical habitat, and their ultimate survival may be at stake.

The timelines contained in the Act reflect the clearly articulated will of Parliament that recovery strategies be developed for species at risk in a timely fashion, recognizing that there is indeed urgency in these matters. Compliance with the statutory timelines is critical to the proper implementation of the Parliamentary scheme for the protection of species at risk.

This illustrates another disconnect between science and law where scientific knowledge (i.e. critical habitat is essential to species recovery and survival) is not being effectively implemented.

Finally, the *Environmental Protection and Enhancement Act's* (EPEA)<sup>112</sup> approach to conservation and reclamation of disturbed lands highlights another disconnect between law and science. The standard for conservation and reclamation is “equivalent land capability” meaning that “the ability of the land to support various land uses after conservation and reclamation is similar to the ability that existed prior to an activity being conducted on the land, but that the individual land uses will not necessarily be identical.”<sup>113</sup> Numerous guidelines provide guidance on achieving this standard. Once this standard has been demonstrated, a reclamation certificate is issued.<sup>114</sup>

However, there is currently no timeline in place for either the commencement or conclusion of conservation and reclamation activities after the activity disturbing lands ceases.<sup>115</sup> This means that disturbed lands may remain in that state indefinitely

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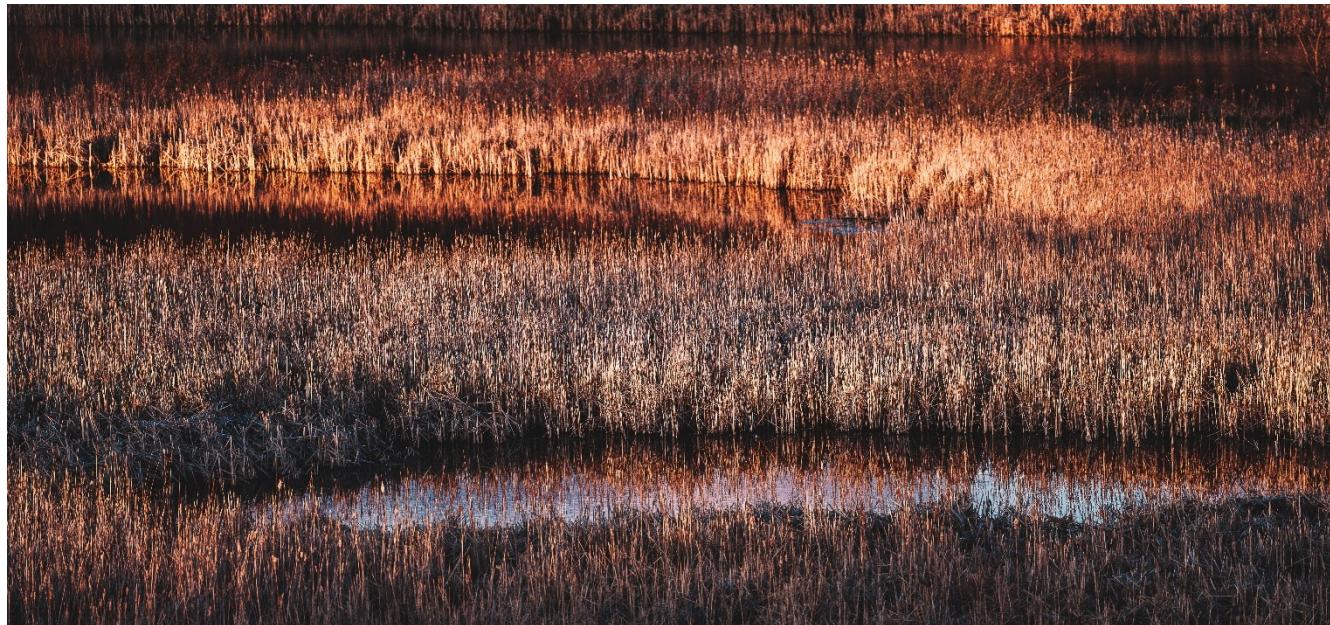
<sup>112</sup> *Environmental Protection and Enhancement Act*, R.S.A. 2000, ch. E-12, Part 6. See also *Conservation and Reclamation Regulation*, AR 115/1993 (*Conservation and Reclamation Regulation*).

<sup>113</sup> *Conservation and Reclamation Regulation*, s. 1.

<sup>114</sup> *Remediation Certificate Regulation*, AR 154/2009.

<sup>115</sup> For a discussion in the context of oil and gas wells, see Jason Unger, *Reclaiming Tomorrow Today: Regulatory Timing for abandonment and reclamation of well sites in Alberta* (2015: Edmonton, Environmental Law Centre).

exacerbating the impacts on biodiversity and ecological integrity (as well as increasing the chance for insolvency or dissolution of the responsible party). These impacts can include direct disturbance on the landscape caused by the activity itself (and from associated infrastructure such as roads), increased access to areas by roads/trails, and the risk of ongoing contamination or the spread of contamination through delay.<sup>116</sup> As a matter of science (and common sense), timelines for conservation and reclamation activities would help minimize impacts on habitat.



## Lack of Legislative Flexibility and Resiliency

Existing legislation may lack the flexibility and resiliency to respond to rapidly changing ecosystem conditions especially in light of climate change. With respect to species at risk, it has been demonstrated that climate change can exacerbate the impacts of other extinction drivers such as habitat loss, contaminants and invasive

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<sup>116</sup> Jason Unger, *supra*. note 115.

species.<sup>117</sup> In Canada, this is particularly problematic because “Canada’s steep climate gradients exert strong influences on species number geographical variability and anthropogenic climate change is occurring more rapidly in Canada as compared to countries that are more removed from polar regions”.<sup>118</sup> In other words, Canada being a northern nation will experience the impacts of climate change on habitat more rapidly and markedly.

It has been suggested that traditional conservation practices will need a “re-think” to accommodate climate change.<sup>119</sup> There may be a need to move away from the traditional approach of preserving current species and communities in particular habitats to management that embraces change and manages the dynamic responses of species and ecosystems to climate change.<sup>120</sup> Existing legislation in Alberta that impacts, either directly or indirectly, upon habitat is dated and lacks flexibility necessary to adapt to climate change pressures. Legislation needs to support conservation goals that can manage and adapt to change (as opposed to a more static approach which attempts to manage a protected area for its existing or historic state).

Aside from changes to habitat that arise from climate change impacts, scientific knowledge is constantly evolving. Effective habitat management and protection legislation requires flexibility and resiliency to adapt to changing scientific knowledge. This requires, in part, sufficient monitoring and reporting mechanisms to be in place.

The impact of insufficient monitoring and reporting is illustrated by environmental assessment processes wherein assumptions and predictions are made regarding possible environmental impacts and methods to mitigate the effects of such impacts.

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<sup>117</sup> Laura E. Coristine and Jeremy T. Kerr, “Habitat loss, climate change, and emerging conservation challenges in Canada” (2011) 89 Can. J. Zool. 435. See also Maria Dickinson, Iain Colin Prentice and Georgina M. Mace, “Climate change and challenges for conservation”, (2015) Imperial College London, Grantham Institute, Briefing Paper No. 13.

<sup>118</sup> Laura E. Coristine and Jeremy T. Kerr, *supra*. note 117.

<sup>119</sup> Maria Dickinson, Iain Colin Prentice and Georgina M. Mace, *supra*. note 117.

<sup>120</sup> Maria Dickinson, Iain Colin Prentice and Georgina M. Mace, *supra*. note 117.

However, most environmental assessment processes have generally failed to provide adequate post-decision follow-up.<sup>121</sup> This means that, without monitoring and reporting, assumptions about impacts or the effectiveness of mitigation efforts are not confirmed. Follow-up, in the form of monitoring and reporting, is similarly required in support of efforts to remediate damaged habitat or to establish areas to offset development impacts.



## Excessive Discretion and Lack of Accountability Mechanisms

Existing legislation often affords excessive discretion in decision-making that impacts upon habitat. As well, legislation often lacks sufficient mechanisms for democratic accountability providing limited avenues for individuals to challenge, question or require laws to be upheld.

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<sup>121</sup> Jos Arts et al., "Environmental Impact Assessment Follow-up: Good Practice and Future Directions – Findings from a Workshop at the IAIA 200 Conference" (2001) 19 (3) Impact Assessment and Project Appraisal 175.

This excessive discretion is illustrated by Alberta's protected areas legislation. Both the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act* and the *Provincial Parks Act* give broad discretion to the Minister to manage the protected areas.<sup>122</sup> Similarly, the *Willmore Wilderness Park Act* does not indicate who is responsible for management decisions. Without legislated guiding principles, objectives and timelines, management of protected areas is a highly discretionary activity.

None of the protected areas legislation provides clear mechanisms for democratic accountability such as public participation opportunities or public enforcement tools. For instance, the *Willmore Wilderness Park Act* and *Provincial Parks Act* make no reference to public notice, let alone public participation, of management decisions or even potential changes to park boundaries. Similarly, the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act* makes virtually no provision for public involvement except for requiring public notice for a proposed boundary change to an ecological reserve or heritage rangeland.

Further, public enforcement mechanisms such as the authority to file a complaint or seek investigation<sup>123</sup> are absent from Alberta's protected areas legislation. Provisions of this kind would be relevant for both alleged violations of the acts or regulations, and for ensuring management requirements are being complied with.

Kennett has cited the experience of the Three Sisters Wildlife Corridor as a case study which reveals deficiencies in the implementation of a Natural Resources Conservation Board (NRCB) decision.<sup>124</sup> These deficiencies include a relatively ad hoc process for involving NRCB oversight of the decision, a lack of formal monitoring and accountability mechanisms, and a lack of mechanisms to ensure that its decision in

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<sup>122</sup>Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act, s. 5; Provincial Parks Act, s. 4.1.

<sup>123</sup> There is however the "Report a Poacher" program run by the Alberta Conservation Association which enables public reporting of observed offences.

<sup>124</sup> Steven Kennett, "And Now for the Hard Part - Lessons for the NRCB from the Three Sisters Wildlife Corridor Saga" (2005) 89 Resources 1.

combination with other land-use decisions in the area result in a functional regional network of wildlife corridors.

Excessive discretion can also be seen in the administration of the PLA and the PLAR. The PLAR is “designed to provide a legislative and regulatory framework to deal with the growing demands for renewable and non-renewable resources on the public land base and to better balance resource development, recreational use and access, while still meeting environmental performance through conservation and stewardship outcomes”.<sup>125</sup>

Together, the PLA and the PLAR allow for instruments to be used for regulation of activities on public lands: orders, notifications and sell-back agreements, reservations and notations, and formal dispositions (such as leases, licences, permits). A master schedule of standards and conditions that may be applied to formal dispositions has recently been released.<sup>126</sup> These include standards and conditions which address soil, waterbodies, land reclamation, wildlife (including species at risk) and other aspects of public land. Some conditions are identified as being mandatory whereas others are discretionary. These conditions may or may not be applied consistently and past dispositions may not have any habitat related terms and conditions. An understanding of the breadth and effectiveness of conditions is nearly impossible to ascertain without looking at all relevant authorizations and whether the relevant terms and conditions have been enforced. Further legally binding direction on habitat terms and conditions is lacking in law.

As well, under the PLA and PLAR, there is a framework established to allow control and coordination of the various activities occurring on public lands (which apply to and augment the mechanisms of formal dispositions discussed earlier in this report). For instance, under the PLA, the Minister may designate portions of public land as Public Land Use Zones (PLUZs) wherein activities can be permitted, regulated,

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<sup>125</sup> Government of Alberta, *Handbook of Instruments Pursuant to Public Lands Act & Public Land Administration Regulation (PLAR)*, (February 26, 2013).

<sup>126</sup> Government of Alberta, Master Schedule of Standards and Conditions (November 2018) available at <https://open.alberta.ca/dataset/133e9297-430a-4f29-b5d9-4fea3e0a30c2/resource/e01eec23-14bd-4ade-81d4-ce958568da6b/download/masterschedstandardsconditions-nov2018.pdf>.

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controlled or prohibited.<sup>127</sup> As well, under the PLAR, the Minister has the discretion to establish disturbance standards setting the maximum acceptable footprint that a class or combination of activities, uses, dispositions, or ancillary facilities may have on public land or a class of public land.<sup>128</sup> The PLAR also allows disposition-holders on the same or adjoining lands to enter agreements respecting activities on the lands.<sup>129</sup>

Several of these tools – notations (some of which relate to conservation objectives), PLUZs and disturbance standards - could be used in support of habitat management and protection objectives.<sup>130</sup> However, these remain discretionary tools. There is no legislated requirement that these tools actually be employed. Nor is there any legislative requirement for periodic review of implemented tools or legislated restrictions on the cancellation or amendment of tools used for habitat management and protection purposes. Furthermore, there is no legislated principles guiding the appropriate use or objectives of these tools (aside from managing multiple uses on a piece of public land). Habitat management and protection criteria and objectives are absent from both the PLA and the PLAR.

A look at the current use of these tools is illustrative of governmental reluctance to exercise its discretion for habitat management and protection. Currently, there are 19 PLUZs covering approximately 11,200 square kilometres of public land in Alberta.<sup>131</sup> However, it seems few of these PLUZs are driven primarily by habitat management and protection concerns. A driving factor behind many PLUZs seems to be a desire to regulate recreational activities, especially off-highway motor vehicles.<sup>132</sup>

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<sup>127</sup> PLA, s. 71.1. The PLUZs are established by inclusion in Schedule 4 of the PLAR.

<sup>128</sup> PLAR, s. 3.

<sup>129</sup> PLAR, s. 4.

<sup>130</sup> The government may also make reservations which set aside public lands for Government of Alberta departments (usually for public works). Such reservations dictate the parameters of land use. See <https://www.alberta.ca/reservations-notations.aspx>.

<sup>131</sup> See <http://aep.alberta.ca/recreation-public-use/recreation-on-public-land/public-land-use-zones/>.

<sup>132</sup> David Poulton, *Public Lands, Private Conservation: Bridging the Gap*

*A Background Paper for the Workshop October 20, 2015, Edmonton, Alberta (October 12, 2015)* available at <http://www.aaco.ca/uploads/4/8/2/4/48245677/plpc - background paper - final.pdf>.

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Notations are used to identify a management intention with respect to public lands. There are two categories of notations: Protective Notations (PNTs) and Consultative Notations (CNTs and CNCs).<sup>133</sup> PNTs indicate management intentions for the land and may identify permitted or restricted activities. As a recent example, in Bighorn Country,<sup>134</sup> PNTs have been placed as an interim protection mechanism until the necessary legislated protected area status (i.e. as a wilderness area and a provincial park) is finalized. CNTs and CNCs flag an interest in being consulted prior to any disposition being placed on land (the first indicates a government agency interest, the second an industry interest). Neither type of notation prevents a disposition being issued or dictates the parameters of land use under a disposition. In other words, notations lack teeth.

While the PLAR grants the Minister discretion to establish disturbance standards, this seems to be under-utilized. There have been some industrial access plans developed for the Berland Smokey<sup>135</sup> and Kakwa Copton<sup>136</sup> regions. However, these plans deal with only one aspect of disturbance and are not as comprehensive as permitted by the PLAR.

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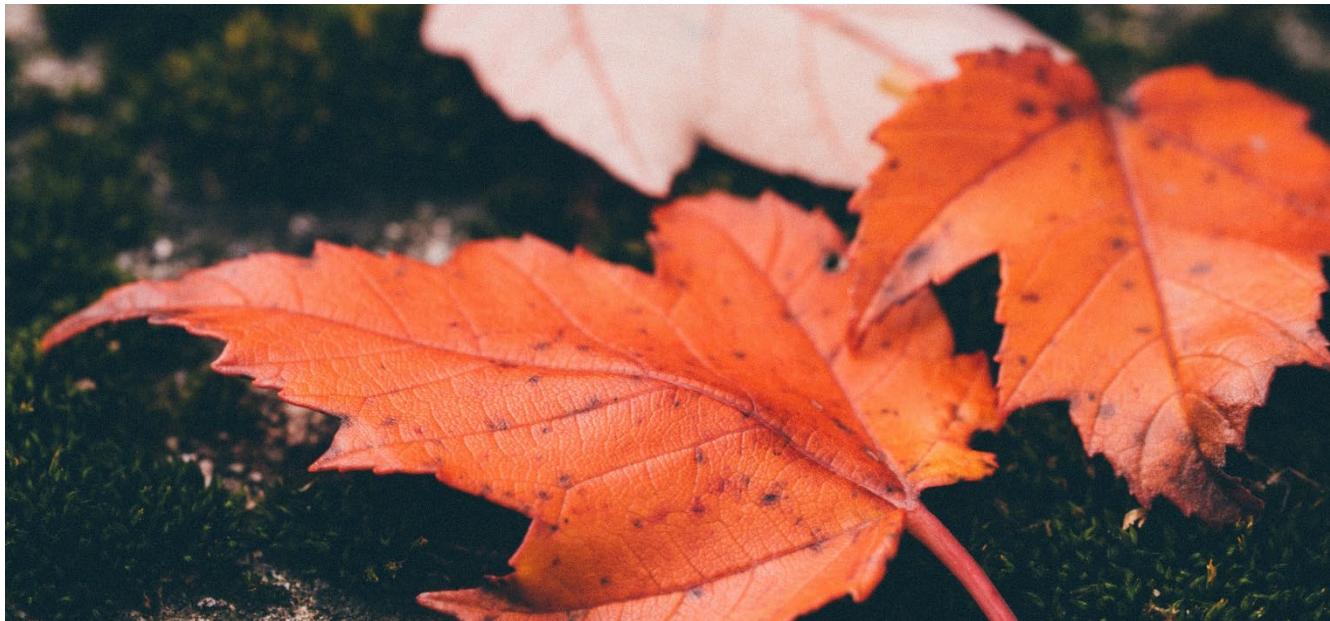
<sup>133</sup> See Alberta Sustainable Resource Development, *About Public Lands: Reservation/Notation Program* (1997) at <https://open.alberta.ca/dataset/f3c58ee8-3372-42f1-9f00-68784a2aff0a/resource/2536bf48-2a96-402c-a31c-f529802af9fd/download/2145649-1997-09-reservation-notation-program.pdf>.

<sup>134</sup> See Alberta Environment and Parks, *Interim Protection Measures –Parks and Protected Areas in Bighorn Country* (November 23, 2018) at <https://open.alberta.ca/dataset/c48f7079-aff6-495d-b4ab-2dc9be4350a5/resource/54ebb79a-500f-40fd-bdb5-a4dc7071dde/download/interim-protection-measures-bighorn-country.pdf> and <http://aep.alberta.ca/forms-maps-services/industry-online-services/public-lands-dispositions/documents/Announce-BighornCountryPNTs-Nov2018B.pdf>.

<sup>135</sup> Resource Integration Planning Branch, *Berland Smoky Integrated Planning Area: direction for access development, IL 2013-01* (2013) at <https://open.alberta.ca/dataset/3ff91f08-c47f-4b22-b6ea-d6c7b59f371e/resource/8281991f-a293-46fb-94bb-2641c77ec09d/download/lands-berlandsmyk-sep17-2015.pdf>.

<sup>136</sup> Environment and Sustainable Resource Development, *ILM success story: Kakwa Copton Industrial Access Corridor Plan* (2001) at <https://open.alberta.ca/publications/ilm-success-story-kakwa-copton-industrial-access-corridor-plan>.

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## Conclusion

As outlined in the first paper in this series, [Habitat Law in Alberta Volume 1: The State of Habitat Laws in Alberta](#), legislative impact on habitat management and protection in Alberta comes from several pieces of legislation, some of which deal directly and expressly with habitat. Other legislation deals with matters (such as resource management) that have inevitable impacts on habitat.

From this “quilt” of legislation that makes up Alberta’s habitat law, several challenges arise:

- fragmented planning and decision-making,
- a major legislative gap caused by the absence of dedicated endangered species legislation,
- a highly discretionary disposition process which does not address habitat needs proactively or effectively,
- a disconnect between law and science (for example in the selection and level of protection provided by protected areas, and listing of species at risk);

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- lack of flexibility and resiliency to respond to rapidly changing ecosystem conditions and knowledge; and
- excessive discretion in decision-making that impacts upon habitat and a lack of sufficient mechanisms for democratic accountability providing limited avenues for individuals to challenge, question or require laws to be upheld.

The challenges identified in this report focus on matters of law and policy. It is important to note that other challenges exist in the realm of habitat management and protection. A significant challenge is a lack of sufficient funding for private stewardship programs, for payment of compensation where necessary for significant impacts on property rights, for undertaking active management of habitat, and for enforcement and monitoring activities (to name a few). Another significant challenge is the need to shift from a primacy on resource and development demands to an appreciation of the value of habitat and an acknowledgement that habitat is a human requirement (not just a “nice to have”).