

PROJECT BACKGROUND



Environmental
Law Centre

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Buying a Better Environment?

Advanced Property Rights: Market-Based Instruments and Public Lands

Public lands and resources

Government ownership of public lands and resources flows from being the representative of the Crown, from the jurisdiction granted by the constitution, and from the details of legislation. In Alberta, the province owns all provincial Crown land, wildlife¹, water², and the beds and shores of permanent and naturally occurring water bodies³.

Like other provinces, the Alberta government grants lesser property rights in public land through the use of legislative tools often referred to as public land “dispositions”. These dispositions are created under numerous pieces of legislation that concern specific lands and resources. There are over 25 types of dispositions that can be made with respect to Alberta public land plus legislative provisions for further, undefined types of dispositions.

¹*Wildlife Act*, R.S.A. 6444, c. W-10, ss. 7-8.

²*Water Act*, R.S.A. 6444, c. W-3, s. 3.

³*Public Lands Act*, R.S.A. 6444, c. P-40.

Advanced Property Rights Issues

This is a companion piece to our brief on Property Law and MBIs which looked at general legal issues associated with property that may be triggered with the use of MBIs. This brief looks at specific property law that may arise in some circumstances. These are:

- Public lands and resources,
- Separation of surface and subsurface rights, and
- Indigenous rights.



Advanced Property Rights and Market-Based Instruments

Dispositions grant incomplete bundles of rights: rights to access and occupy land, and to extract and manage specific resources. They often do not create rights to exclude other users, to use the land for broader purposes, or to alienate the disposition without government consent.

Determining the exact bundle of rights created by a public land disposition involves reviewing the legislation that created the form of disposition and the specific disposition itself. Some dispositions resemble mere activity permits granted by government, while other dispositions have elements of private contracts between two parties. Some dispositions grant short-term or one-time rights for a specific purpose. For example, mineral leases are usually issued with a 5 year “use it or lose it” term. The leaseholder must take step in development of the resources within this time and has limited rights to use the land for other purposes. Other dispositions may provide broader rights and duties over longer periods. For example, Forest Management Agreements are usually granted for 20 years and, as the name suggests, delegate management functions and duties to the disposition holder.

In Alberta there is a history of policies that favor overlapping use of public lands and a practice of granting overlapping dispositions on these lands. It should be noted that public lands can be sold to private parties to become private lands. As well, they can be converted to fee simple land with the Crown as the fee simple title holder.

Implication for MBIs

Public lands create an extremely challenging context for MBIs as compared to private land. The context reveals the deterrent effect of uncertain property rights on markets, the limited utility of the “bundle of rights” theory with respect to environmental property rights, and the need for regulation to enable MBIs.

Ownership: Dispositions of public lands and resources are issued largely for resource development, production or extraction purposes. The private party holding the disposition may have management or stewardship responsibilities in relation to the land or resource, but the dispositions does not expressly grant rights in further ecosystem goods or services beyond the resource being produced. For example, Timber quotas and permits holders only have property rights to timber that has been cut. Forest Management Agreements grant the holder rights in the living trees, but still in relation to timber production.

Exchange: Public lands are a context that favors separate real and personal property interests which means a thing can be traded on the market without transferring land ownership. Dispositions might qualify as such personal property, but they cannot be transferred without government consent. This warrants government approval of trading, or the creation of tradable credits or units separate from the disposition.

Access for conservation purposes: As current disposition forms are used for resource development, there is no mechanism to grant access to public lands expressly for conservation purposes. Disposition holders may have leeway to conduct stewardship activities beyond those required by government, but this would be subject to the resource production terms of the disposition.

Securement: Dispositions provide limited rights to exclude other uses from an area, so the existence of overlapping dispositions makes likely that conservation sites will be damaged by incompatible uses. There is no securement tool resembling conservation easements available for use by private parties on private land.

Government intervention is necessary to secure conservation sites on public lands. Multiple options exist including:

- the creation of new disposition types,
- the sale of land to private parties;
- the conversion of public lands to fee simple titles held by the Crown followed by the registration of conservation easements on these lands;
- designating as a park or other protected area; and,
- protection through multiple forms of regulatory zoning.

All of these options raise legal and policy issues of their own.

Separation of surface and subsurface rights:

In Canada, title to the surface of the land and title to subsurface mineral resources are separate. As with surface ownership, we have legislated that mineral titles may be owned by private parties (known as “freehold” ownership), or they may be owned by the provincial Crown. Mineral resources owned by the Crown may be leased to individuals or corporations. The vast proportion of mineral resources in Alberta are owned by the Crown (even in situations where the surface is owned privately).

In most cases, the owner of the surface and the subsurface are different people. This may lead to conflicting uses as Crown mineral rights may be allocated without regard to compatibility with surface uses or policies on surface use. Furthermore, surface rights are usually subordinated to the right of access to mineral rights holders.

Implications for MBIs

The exploitation of mineral rights (especially oil and gas operations) is a significant economic driver and activity in Alberta compared to other Canadian jurisdictions. Demand to offset the impacts of mineral extraction or steer this activity to appropriate locations is one driver for developing MBIs in Alberta. However, the extent of mineral rights creates risks to conservation sites on public and private lands. On private lands, conservation easements and other surface rights cannot prohibit mineral extraction. On public lands, other disposition holders cannot exclude mineral rights holders from an area. This means that protecting conservation sites from minerals activity will require stronger property rights or regulatory protection. Since municipalities cannot prohibit provincially approved mineral projects, there is need for provincial regulation.

Indigenous rights

Indigenous rights are very different from standard property rights. This is a unique area of law that is rapidly evolving. Indigenous rights are based on the fiduciary relationship between the Crown and Indigenous Peoples as prior occupants of lands within Canada. Types of Indigenous rights include title to the land itself, rights to land use or activities, and treaty rights. Most land in Alberta is under treaties.

Indigenous rights are constitutionally protected and relate to both the land and the natural resources existing thereon. They can only be extinguished by the federal government with clear and plain intention to do so. However, Indigenous rights can be infringed on by the provincial or federal governments for justifiable purposes. The Crown owes a duty to consult and accommodate Indigenous peoples where a decision may infringe on Indigenous rights.

Implications for MBIs

The nature of Indigenous rights creates barriers to Indigenous participation in MBI schemes. Reserve lands are under federal jurisdiction, so provincially regulated MBI schemes may not apply to these lands. Unlike standard property rights, Indigenous rights are collectively held which means they cannot be sold or traded away.

Conservation projects that require government decisions could potentially infringe on Indigenous rights and trigger the duty to consult and accommodate. Examples include habitat alterations, species protection, access restrictions or grants of access to other parties, all of which could alter hunting, fishing or plant harvesting activities. Sales of public lands to private parties would eliminate exercise of Indigenous rights on that parcel. Overall, it is possible that MBI schemes could be viewed as eroding Indigenous rights rather than improving Indigenous rights despite the objective of the MBI is land and biodiversity conservation.

For more on property rights in public lands & resources

Environmental Law Centre, *Demystifying Forestry Law: An Alberta Analysis*, 2nd Edition, (2003).

Environmental Law Centre, *Alberta Wetlands Law and Policy Guide* (2001)

David Poulton, *Public Lands, Private Conservation: Bridging the Gap*, A Background Paper for the Alberta Association for Conservation Offsets Workshop Edmonton, Alberta October 20, 2015.

Interested in advancing the use of MBIs in Alberta?

The ELC is looking for Project Collaborators

Throughout 2016, the ELC is looking to:

- review the experiences with “pilot projects” using MBIs in Alberta,
- provide assistance to MBI projects,
- join working groups, core teams or advisory committees focused on legal issues with MBI usage, or
- share findings with municipalities, land trusts, conservation organizations, industry and government agencies.

All activities undertaken with collaborators must meet the ELC’s mandate to:

- act as an independent information service, and
- pursue environmental protection through law and policy.

As well, the collaborator’s work must involve the types of MBIs anticipated by *ALSA*.

Guiding Environmental Principles for MBI Design

Sustainable development which is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

Precautionary Principle which requires that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

Polluter Pays principle which means the costs of environmental impacts should be borne by the parties creating the impacts.

Other important principles to consider are ensuring sufficient public participation and pollution prevention.

About the Environmental Law Centre

The Environmental Law Centre (ELC) is a charity incorporated in 1982 to provide Albertans with information, education and law reform services in the area of environmental law.

Environmental Law Centre Program Team

Jason Unger, Acting Executive Director

Brenda Heelan Powell, Staff Counsel

Astrid Kalkbrenner, Staff Counsel

Kara Tersen, Marketing and Fund Development Director

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