

Letter to Stakeholders and Holders of Statutory Consents in Alberta

June 30, 2011

Is there a problem?

Some people of superstitious nature believe that nothing good can come of Friday the thirteenth. There is gentle irony then, in the fact that the amended *Alberta Land Stewardship Act (ALSA)* came into force on Friday, thirteenth of May, 2011. This letter is to raise awareness about the impacts that legislation will have on your property, your business operation, and your life. If you are an Albertan you are a stakeholder. If you hold a statutory consent you are even more a stakeholder.

Former Minister Morton has stated that one of the most significant threats facing landowners is the issue of regulatory taking. This threat extends to all of the agriculture industry but also beyond to forestry, mining, oil and gas, and in fact the entire economy. It is disconcerting to agree with Mr. Morton on the threat and then have the government pass *ALSA* with such huge potential for regulatory taking.

Section one of *ALSA* states: "In carrying out the purposes of this Act as specified in subsection (2), the Government must respect the property and other rights of individuals and must not infringe on those rights **except** with due process of law and to the extent necessary for the overall public interest." That is an incredibly important "**except**". It essentially signals the Government's intent to interfere with the property and other rights of individuals for the overall public interest. The sections of *ALSA* following that initial statement form the due process of law by which Government will interfere with rights. While the concept of eminent domain is not new and has merit in progressive societies, what is new under *ALSA* is the process by which the public interest is determined, and the limitations on mitigation for interference with individuals' property rights.

Under the Land Use Framework and *ALSA* the Government of Alberta will create regional land use plans for each of seven regions across the province, and will give those plans authority of law by making them regulations under *ALSA*. The plans will be drafted by cabinet, typically with the advice of a report drafted by a regional advisory council whose members have been appointed by the Minister of Sustainable Resource Development. In the South Saskatchewan region the council has submitted their report. In the Lower Athabaska region the council has submitted their report, the cabinet has drafted a regional plan, and that draft plan is out for public comment prior to final cabinet revisions and formalization as a regulation. Partly as a result of stakeholder criticism in late winter the Government introduced amendments to the original *ALSA* and the Premier committed to delaying the finalization of any regional plan until the amendments were complete – which happened on Friday the thirteenth of May.

What did Bill 10 change?

The amendments (Bill 10) have been touted by Government officials as the solution to all the criticism previously raised. The reality is that they did clarify certain issues, but other issues remain unresolved. For example the amendments clarify that land titles are not a statutory consent and thus they may not be rescinded (formerly extinguished). However the amendments do clearly state

that regional plans may affect, amend or rescind statutory consents. Thus the definition of statutory consent becomes critical. Interestingly, the definition in the new *ALSA* is identical to the original version **except** for certain exclusions. Those exclusions **do not** include permits, licenses, dispositions etc. issued under or authorized by the *Public Lands Act*, the *Water Act*, the *Agricultural Operations Practices Act*, or the *Municipal Government Act*. The amended *ALSA* differentiates between private titled property and statutory consents particularly when rights are affected. There is some detail on when compensation would be payable on private titled property, and how it would be determined. However, when regional plans affect statutory consents, compensation is limited to the provisions previously existing in other enactments. Unfortunately those other enactments did not contemplate a Land Use Framework when they were drafted so we are left with a process that focuses attention on land use every ten years but relies on old legislation to mitigate the effects of that process on the rights associated with property – especially statutory consents.

What are statutory consents? Why are they important?

Statutory consents are essentially rights that we obtain from government to engage in economic activity and to develop our resources and the economy. Examples include crown mineral (oil and gas) leases, provincial grazing leases and permits, forest management agreements, water licenses, and intensive livestock permits. They also include quota allocations for supply managed commodities (dairy and poultry) and permits for wind farms. In fact homesteads are statutory consents until the homesteader has proved up on the terms and been granted the title to the land. Obviously statutory consents and titled property are inextricably linked. Statutory consents, even by the government's definition, almost universally overlie property titles and it is the combination of the two that makes both the title and the consent valuable. Perhaps the classic agricultural examples are water license or intensive livestock permits on titled lands. In both cases the statutory consent leads to very significant investment that would not occur in the absence of the consent. There is an undeniable connection between the property rights of titled properties and the statutory consents that govern the use of those properties. Market value of property is always a combination of current productive (current use) value and potential future use value. Long standing policies and enactments such as one residence per quarter section and first parcel out subdivision have been factored in to the market value of real property transactions in Alberta for several generations. Even an amended *ALSA* has huge potential to significantly alter that market value. This constitutes a regulatory taking of critical rights that have been instrumental in developing and diversifying our economy.

Statutory consents are more prevalent in some industries than others. For example the oil and gas industry in Alberta is extremely dependent on mineral leases, pipeline permits etc. for their operations. The beef industry relies on statutory consents for approximately 14% of its grazing requirements, and virtually all of the finishing occurs in feedlots that require an intensive livestock permit. Similarly all slaughter plants require permits to operate. Additionally feedlot alley would not exist without the water licenses for irrigation. The potato and sugar beet growers and processors are 100% reliant on statutory consents, as are milk, poultry and hog producers (with the exception of "backyard" operations).

Is there compensation for amending statutory consents?

Minister Knight has quoted section 82 sub (5) of the *Public Lands Act* which refers to – in the case of cancellation of a portion or the entirety of a grazing lease – the applicant's obligation to

“negotiate and pay for the loss of the lessee’s interest under the lease”. It is notable that the Minister did not quote from S. 109 of the Act (no compensation payable) or even from S. 82 sub (4) regarding irrigable lands (no compensation payable). Even in reference to S. 82 sub (5) the definition of lessee’s interest under the lease is critical. The *Public Lands Act* provisions for compensation can not be described as explicit. One definition of the lessee’s interest, for example, could be the depreciated value of improvements the lessee has constructed on the leased property at his own expense. A more comprehensive definition would include those improvements as well as the cost of acquiring the grazing lease including the assignment fees paid to the crown as well as the purchase price of the disposition from either the crown or another assignor. The appropriate definition from our perspective would be the expropriation value of the lessee’s interest and would include improvements, acquisition or fair market value, as well as value of the lease interest to the overall operation.

Even though provisions for compensation for statutory consent amendments or rescissions are in some cases present in other enactments, they are in general inadequate, ambiguous, and restrictive. *ALSA* and the process of regional planning will increase the likelihood of statutory consent amendments, and it is this combination of events that threatens security of tenure and investment related to statutory consents in the province. Alberta has a history of eroding trust with its statutory consent holders by unilaterally amending or rescinding those consents. One example is the revised royalty structure for the oil and gas industry that led to the massive decline in new activity in the province. Perhaps the most recent example is the rescinding of mineral leases in the draft Lower Athabaska regional plan. There are many agricultural examples as well. The government’s own website states that the Bow Island Provincial Grazing Reserve, established in 1965, was started with land from large leaseholders in the area. Section 109 of the *Public Lands Act* rescinded the amount of grazing lease in excess of a certain carrying capacity held by an individual – no compensation payable. The property interest of grazing lease dispositions was challenged again by the Thurber Review and subsequent Bill 31 about ten years ago; with the eventual outcome being amended statutory consents with no compensation.

The purpose of this letter is not to discourage planning for future land use. In fact Part 3 of *ALSA* entertains a variety of tools to incent stewardship and conservation in an effort to achieve orderly development and still maintain ecosystem functioning. However Parts 1 and 2 of *ALSA* grant cabinet the power to impose their plans without resorting to the Part 3 tools – particularly in the case of statutory consents. Again it is an issue of trust. If the government does not intend to use the omnipotence granted to cabinet by the legislation (Parts 1 and 2) why are those elements in the legislation? As always trust is earned and recent actions speak for themselves.

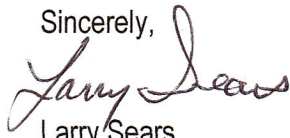
Who does stewardship?

Alberta Land Stewardship Act has such nice connotation. The problem is that land stewardship is not the result of actions of the legislature but rather the result of actions of land users. The “tragedy of the commons” was overcome by ascribing rights to land users so that they bore the consequences of their actions – positive in the case of good stewardship and negative in the case of poor stewardship. Security of tenure is critical to this process. The Land Use Framework is an opportunity for Government to reinforce the rights of statutory consent holders. So far all they have done is threaten them.

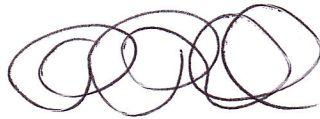
There is much more detail to be learned about the Land Use framework and ALSA than can be contained in this letter. Lawyer Keith Wilson will be touring southern Alberta with public meetings in Cochrane and Strathmore July 19th, Nanton and Lethbridge July 20th, and Brooks and Medicine Hat July 21st. As mentioned the advice to Government from the Regional Advisory Council for the South Saskatchewan Region has been submitted and is available at www.landuse.alberta.ca Also on that website is a workbook for comment on the advice to government (to be completed by December 19th) as well as about thirty maps used for planning land use. Your place is on at least one of them. Finally, there is an extensive collection of information regarding this legislation and other associated Acts at www.landownersagainstbills.com

Please consider this your invitation to attend one of the public meetings in July. You will find more detailed information regarding the meetings, as well as excerpts from the RAC Report in this package.

Sincerely,



Larry Sears
Chairman
AGLA



Phil Rowland
President
WSGA

Public Meetings with Keith Wilson – Details:

July 19, Tuesday, Cochrane, 1:00 p.m.
Cochrane RancheHouse, 101 RancheHouse Rd., Cochrane

July 19, Tuesday, Strathmore, 7:00 p.m.
Strathmore Civic Center, 120 Brent Blvd, Strathmore

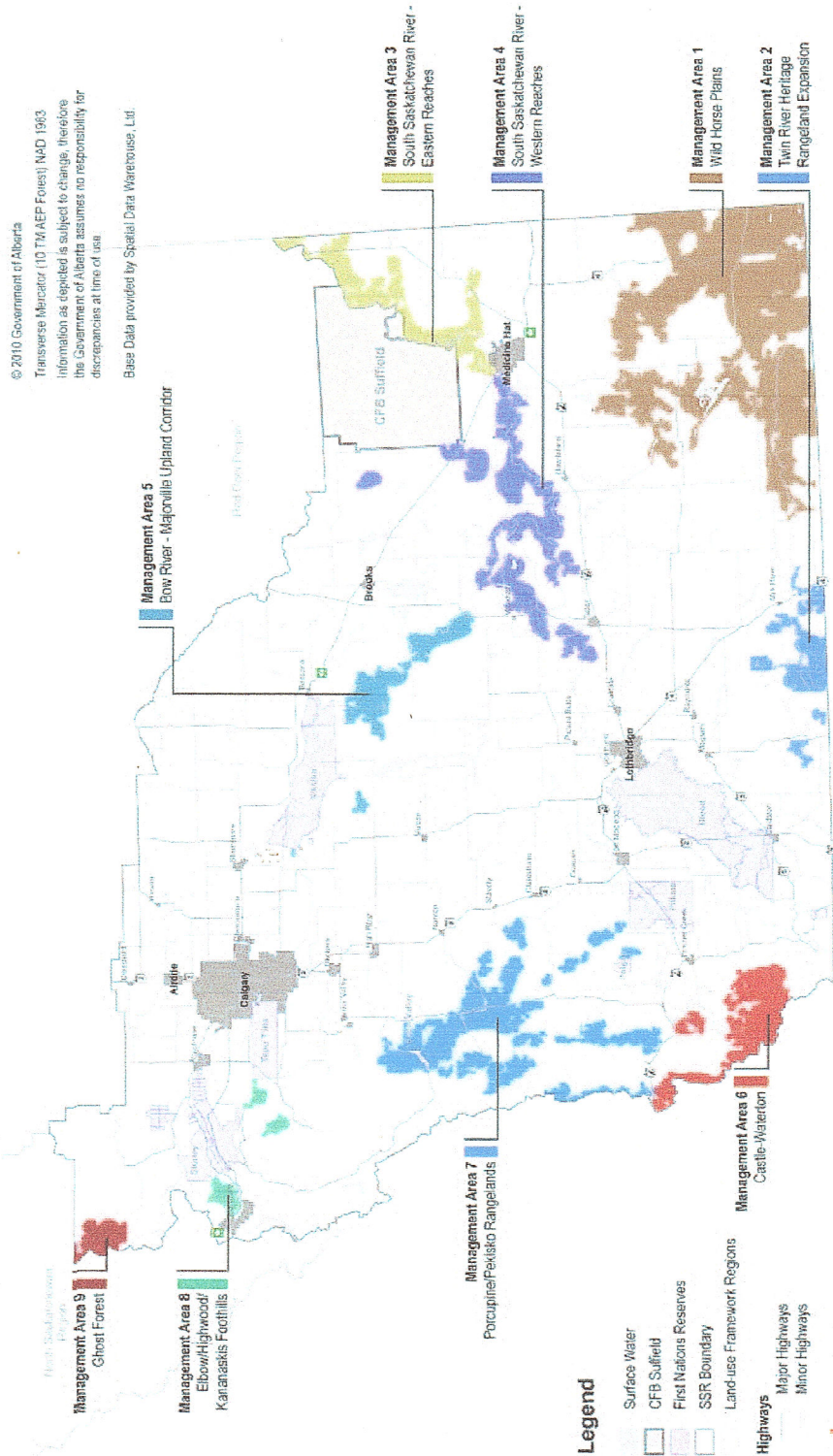
July 20, Wednesday, Nanton, 1:00 p.m.
Nanton Community Memorial Center, 2204 18 St., Nanton

July 20, Wednesday, Lethbridge, 7:00 p.m.,
Lethbridge Lodge, Aspen Room, 320 Scenic Drive South, Lethbridge

July 21, Thursday, Brooks, 1:00 p.m.
Heritage Inn, 1239 2 Street West, Brooks, Alberta

July 21, Thursday, Medicine Hat, 7:00 p.m.
Quality Inn, (formerly Callaghan Inn) 954 7th St. S.W., Medicine Hat

Candidate Conservation Management Areas on Public Lands Map



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 Transverse Mercator (10 TM AEP Forest) NAD 1983
 Information as depicted is subject to change, therefore the Government of Alberta assumes no responsibility for discrepancies at time of use.

Base Data provided by Spatial Data Warehouse, Ltd.

Legend

- Surface Water
- CFB Suffield
- First Nations Reserves
- SSR Boundary
- Land-use Framework Regions
- Highways
 - Major Highways
 - Minor Highways

Conservation Network Concept Map

