

Yard Work

Exploring Natural Capital Public Policy Issues

Should There Be Certainty? The Elimination of Ministerial Discretion to Terminate Conservation Easements

Introduction

Land in Alberta is being used by a variety of people in a variety of ways. Be it a field of wheat in southern Alberta, a suburban development east of Edmonton, or an open mining oil sands operation in the northeast, wherever we look, Alberta's land is at work. The processes and products that the land provides are integral to the current prosperity of Alberta. Future prosperity in the province will depend on mitigating the cumulative effects of development on that land. In an effort to protect this bounty, a series of policy tools have evolved that enable individuals, companies and governments to balance the environmental, social, and economic interests of Albertans.

One such tool is the **conservation easement**. Land conservation comes in two forms: public and private. Public conservation requires government commitments of both support and funding. Easements are an example of private conservation, which is achieved through the use of instruments that enable landowners to protect areas they deem important enough to limit future development of the land. For the rancher who wants to prevent subdivision on his land or the group that wishes to preserve a sensitive wetland, easements offer one of the few available means to do so. In short, conservation easements are one of the ways Albertans can protect their natural capital and preserve the heritage of their land.

This edition of *Yard Work* suggests an improvement to Alberta's easement legislation that will both advance Alberta's land use policy and better preserve the province's natural capital. The provincial government must provide those who hold conservation easements with the certainty that their decisions will be respected. In most cases, easements are granted for perpetuity. However, the legislation establishing the ability to place conservation easements on land in Alberta allows for ministerial discretion to terminate the easement if it is deemed "in the public interest" to do so.¹ It would not be reasonable to expect the private sector to invest money in oil sands development if the Minister of Energy had the discretion to unilaterally terminate access rights; there would simply be too

much uncertainty involved. *The same consideration must be granted to those who have invested or wish to invest in Alberta's land.*

How Does it Work?

Conservation easements are unique in that they are a direct agreement by a landowner to protect the land. These agreements can work in a variety of ways. First, they can be granted for a specific length of time or, as is more often the case, can be placed on the land indefinitely by registering the conservation easement on the land title. Second, the written agreement to place land under conservation easement dictates the ability of the landowner to develop that land, provided that development is consistent with protecting both biodiversity and natural or aesthetic values.² Third, an



The term "Yard Work" is a spin on a statement frequently made by Alberta Premier Ralph Klein: "It's time to get our economic house in order." As well as getting our economic house in order, we believe that it is important to work on the "yard." The Canada West Foundation's **Natural Capital Project** is based on the premise that the "yard" (i.e., our stock of environmental assets) is critical to not only western Canada's quality of life, but to its long-term economic prosperity as well. As such, the Project seeks to close the counterproductive gap that exists between environmental and business interests, and stresses that natural capital is not a luxury, but a primary economic asset. The *Yard Work* series contributes to this by identifying, exploring, and encouraging debate about natural capital issues and ideas for improving public policy in this critical area.

www.cwf.ca

1. *Environmental Protection and Enhancement Act*, S. 22(7)(b).

2. *Environmental Protection and Enhancement Act*, S. 22(2)(a-c).

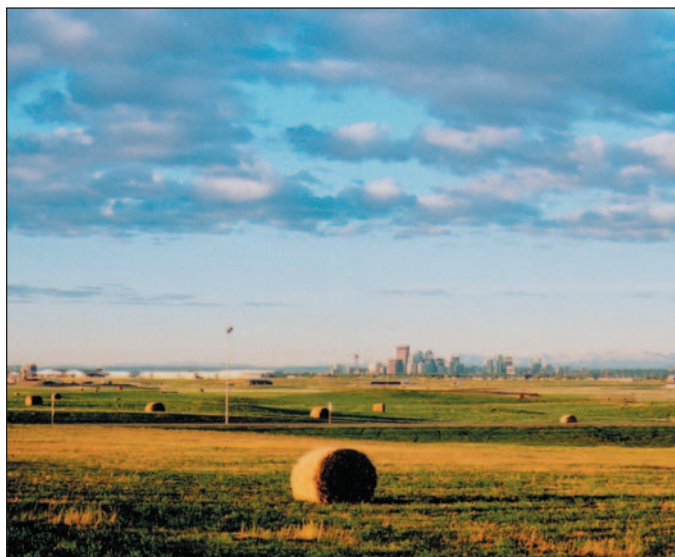


photo: Robert Roach

easement may be enforced and protected by either the grantor of the easement or by a qualified organization. In Alberta, the latter is often a nonprofit organization specializing in conservation easement management—for example, the Nature Conservancy of Canada or the Southern Alberta Land Trust Society—but can also include municipalities wishing to conserve local environmental features.

Benefits

The direct and indirect benefits that come from placing an area of land under conservation easement can be many. Financially, conservation easements enable landowners to qualify for an income tax deduction if the easement is considered a charitable donation. As well, funding for easements in Alberta is often provided by nonprofit organizations. For the rancher who is trying to resist the market pressure to subdivide his land into acreages, placing

an easement can both preserve the landscape and provide funds that would not otherwise be available. Ecologically, easements can safeguard watersheds or important riparian areas, can protect sensitive wetlands, or can maintain a valuable wildlife habitat in its natural form.

Conservation easements provide indirect benefits as well. For Alberta, where development is booming, easements provide a way of preserving the open spaces that are a part of the province's heritage, and are thus an invaluable means of preserving natural capital.

Costs

There are also costs involved in the placing of conservation easements. In terms of establishing the easement, landowners face the legal costs of setting it up. As well, an inventory of the biophysical features of the land is required before an easement is granted, though this cost is often borne by the organization that will hold the easement.

There are also concerns that must be considered in the modification of an easement. For one, natural capital is not static. Dynamic land processes may lead to a change in the necessity to use an easement to protect land. For this reason, easement legislation should allow for the altering of the easement if agreed upon by both the easement grantor and the qualifying organization, something the Act establishing easements in Alberta ensures.³



3. *Environmental Protection and Enhancement Act*, S. 22(7)(a).

This document was authored by Canada West Foundation Intern Chris Fay and Senior Fellow Barry Worbets and is part of the Canada West Foundation's *Natural Capital Project*. The *Natural Capital Project* is a multi-year research and consultation endeavour that promotes the importance of the environment to western Canada's economic prosperity and quality of life. The project promotes the need to find a public policy balance between short-term economic growth and long-term investment in natural capital. Funding for *the Natural Capital Project* was provided by Alberta-Pacific Forest Industries Inc., Ducks Unlimited Canada, EnCana Corporation, Shell Canada Limited, and Suncor Energy Inc. The Canada West Foundation expresses its sincere thanks for this generous support. The opinions expressed in this document are those of the authors and not necessarily those of the Canada West Foundation's Board of Directors, advisors, or funders. Permission to use or reproduce this report is granted for personal or classroom use without fee and without formal request provided that it is properly cited. Copies may not be made or distributed for profit or commercial advantage. This document can be downloaded at no charge from the Canada West Foundation website [www.cwf.ca].

cover photo: Robert Roach

Public Policy Implications

The key to understanding conservation easements is *certainty* around the preservation of Alberta's land. Thanks to the easement section of the *Environmental Protection and Enhancement Act*, private conservation is outpacing public conservation in Alberta. It is obvious that Albertans desire to have conservation easements as a policy tool that can be used to protect their land and heritage.

However, the provisions in the *Environmental Protection and Enhancement Act* that allow for the Minister of Environment to terminate conservation easements are exactly the type of land policy that causes an erosion of certainty around this desire. With growing pressure for multiple land uses, preservation is an increasingly difficult decision to make. The financial support provided by qualifying organizations to landowners who choose to put easements on their property is often central in making the decision an easier one.

But just as industry would not invest in a project that could be taken away without compensation, we cannot reasonably expect groups to invest millions of dollars in preserving land if these investments may be removed by one arbitrary decision of a provincial minister. **We therefore recommend removing the provision under the *Environmental Protection and Enhancement Act* that allows for ministerial discretion to terminate conservation easements.**


The public policy issues related to this decision include:

- the need to relinquish an element of “political comfort” around easements (ministerial discretion was originally put in place to prevent the blanketing of the province with easements that prevented industry development, but this has not occurred);
- concern over the potential for conservation easements to be used as a means of limiting urban development; and
- expropriation of land—which under the *Expropriations Act* allows for complete and absolute ownership of land by the province despite conservation easements—as a mechanism to override easements if it is deemed in “the public interest” to do so.⁴

4. *Expropriations Act*, S. 3.

Conclusion

The Government of Alberta is in the midst of developing a comprehensive land use framework that will guide land use decisions for the province. This is no easy task, but one strategy for how to guide this important policy file to a successful conclusion is to build momentum by enacting easy policy wins; eliminating ministerial discretion to terminate conservation easements is simply one example.

Of course, the claim will be made that ministerial discretion to terminate conservation easements has never been invoked before, and so it is unnecessary to change the legislation. This is irrelevant. The problem is that the ability to terminate easements reduces certainty around land use in Alberta. In the end, enacting this small change towards the preservation of natural capital will send a strong message that the Government of Alberta is ready to confront the province's land use issues. 

Examples of organizations qualified to hold conservation easements in western Canada:

The Land Trust Alliance of BC
(www.landtrustalliance.bc.ca)

The Land Conservancy (BC)
(www.conservancy.bc.ca/)

Western Sky Land Trust
(www.westernskylandtrust.ca/)

Southern Alberta Land Trust Society
(www.salts-landtrust.org/)

Nature Saskatchewan
(www.naturesask.ca/)

Saskatchewan Wildlife Federation
(www.swf.sk.ca/)

Manitoba Wildlife Federation
(www.mwf.mb.ca)

Nature Conservancy of Canada
(www.natureconservancy.ca)

Ducks Unlimited Canada
(www.ducks.ca)