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In Search of Public Land Law in Alberta

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Executive Summary

Public land management has been the subject of much debate in Alberta, a province richly endowed with natural resources and heavily dependent on a variety of land and resource uses for its economic well-being. Over time, with the pace of development increasing, this debate has become more acrimonious. At issue are fundamental values and interests and critical policy and institutional choices that will affect the long-term ecological, economic and social sustainability of Alberta's land and resource base.

This paper is intended to contribute to the discussion of legal and policy options for public land management in Alberta. The analysis is based on two premises: (1) there is a critical need for an integrated approach to managing the public domain; and (2) law has a fundamental role to play in structuring decision-making regarding the use of public land and resources. The objective is to assess the extent to which Alberta's land and resource legislation provides a solid legal basis for an integrated approach to public land management. To this end, a template for integrated public land law is used as the standard against which legislation is evaluated.

The template for public land law includes the following four key attributes. First, public land law should have a well defined normative basis that establishes clear principles, objectives and standards and provides meaningful direction to decision-makers. Furthermore, this normative basis should embody an ethical commitment to principles of 'ecosystem management'. Second, public land law should include a planning process designed to provide an integrated strategic framework for public land management. Both the planning process and the plans themselves should have a legal basis. Third, public land law should include mechanisms to ensure a logical progression among the various stages of decision-making, from the establishment of general policies regarding land use objectives and priorities to the particular regulatory requirements tailored to specific projects. Finally, legal mechanisms should exist to promote or require interagency and interjurisdictional coordination in areas where issues and policies exhibit spill-over effects. With all four elements of the template, the emphasis is on the legal basis for public land management.

The review of Alberta's land and resource legislation leads to the conclusion that public land law as defined above is virtually non-existent in this province. To begin with, public land management is currently without a clear normative basis in law. Alberta's statutes governing land and resource use lack an overarching framework of integrative principles, objectives and standards, the extent of substantive and procedural direction provided to decision-makers is often very limited, and adherence to principles of ecosystem management is not mandated by law. Alberta is also currently without a comprehensive planning process for public land and resources and, in any case, has never had a legal basis for such a process beyond a bare statutory authorization. This gap is not adequately filled by either the limited zoning resulting from protected areas designation or by the sectoral planning

processes that currently exist for water and forest resources. In addition, there are few legal mechanisms linking the various decision-making stages in public land management; in fact, an integrated decision path from general policy issues to project-specific regulation is currently precluded by the absence of both substantive and procedural law at the early stages and by the independent statutory mandates of decision-makers responsible for project review and regulation. It is in relation to the fourth attribute of public land law, the existence of mechanisms for interagency and interjurisdictional coordination, that Alberta legislation contains a stronger measure of statutory support. Although most of the provisions are enabling only, they have provided a legal basis for the establishment of a variety of administrative mechanisms for interagency coordination and some interjurisdictional arrangements, notably in relation to environmental assessment.

The conclusion that public land law is largely non-existent in Alberta does not imply, of course, that the use of public land and resources in this province takes place in a legal vacuum. There is a significant amount of legislation dealing with resource management on a sector-specific basis and establishing general requirements for environmental protection. The elements of this regulatory regime do not, however, add up to a coherent and integrated body of public land law.

This conclusion is remarkable for several reasons. First, the proposed template for public land law is neither radical nor particularly novel. The standard against which the current legal regime was measured cannot, therefore, be characterized as overly demanding. Second, the importance of the province's land and resource base to the well-being of Albertans and the increasing demands that are being placed upon it would lead one to expect a businesslike and well conceived approach to public land management, including an integrated legal framework for managing the public domain. Finally, the absence of public land law documented in this paper is remarkable because it shows the very limited role of law in this important area of governance. Broad grants of discretionary authority are commonplace and there is consequently little opportunity for law to fulfill its key functions as an instrument of public policy. In fact, the principle of the 'rule of law' has little substantive content in relation to most of the areas of decision-making that are critical to an integrated approach to managing the public domain.

While public land management should not be transformed into a highly legalistic process, there are considerable risks in conducting this important aspect of public governance through only the most minimal of legal frameworks. In order to ensure the long-term economic, environmental and social sustainability of Alberta's land and resource base, the existing patchwork quilt of legislation and policy governing public land management should be transformed into an integrated body of public land law.

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List of Abbreviations

AEP	Alberta Environmental Protection (Department of Environmental Protection Responsible for Forests, Parks and Wildlife)
AFRD	Department of Agriculture, Food and Rural Development (Alberta)
CEAA	*Canadian Environmental Assessment Act*
CMDRC	Crown Mineral Disposition Review Committee
EPEA	*Environmental Protection and Enhancement Act*
ERCs	Environmental Resource Committees
ERCB	Energy Resources Conservation Board (now the EUB)
EUB	Energy and Utilities Board
FMAs	Forest Management Agreements
IRP	Integrated Resource Planning
IRPs	Integrated Resource Plans
NRCB	Natural Resources Conservation Board
WCWRA	Waterton-Castle Wildland Recreation Area

Contents

1. Introduction

The management of Alberta's public lands and resources is a matter of tremendous economic, environmental and social importance. Not surprisingly, it is also the subject of considerable controversy. Provincial Crown land accounts for approximately 63 per cent of the province, with federally-controlled land making up another 9.6 per cent.[1] The surface and subsurface resources in this vast area, along with most of the subsurface resources under private land, are also owned by the Crown. These public lands and resources support a wide range of economic activities, notably hydrocarbon exploration and development, forestry, mining, grazing and tourism.[2] Public lands also provide numerous and diverse recreational amenities to Albertans. These lands include most of the foothills and Rocky Mountain regions of the province, large areas of Northern Alberta and pockets of land scattered throughout the rest of the province – a varied landscape of global ecological importance due to its biodiversity and relatively undisturbed natural ecosystems.[3] Many of Alberta's public lands also have high aesthetic value.

Controversy surrounding public land management[4] is a product of the many and often conflicting values and interests that are affected by decisions regarding land and resource uses. With growing demands on public lands and resources, public land management is becoming increasingly complex and contentious. Resource use and land use conflicts are accentuated as development on and adjacent to public lands becomes more intensive, public values regarding economic and environmental trade-offs change, and threats to the long-term sustainability of natural ecosystems become better understood. These conflicts are often played out in project-specific regulatory processes, but they are also evident in broader land use planning and policy processes, such as the province's protected areas initiative, *Special Places 2000*, the ongoing provincial review of the Kananaskis Country management plan and the recently completed federal Banff Bow Valley Study. In fact, all stages of public land management are faced with demands that a broader range of values, interests, and interrelationships be considered. The ability of current legal and institutional arrangements to provide the level of integrated decision-making required to meet the challenges of public land management is thus a matter of grave concern to those who view the sustainable use of this province's rich

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1 Alberta Environmental Protection, *Alberta's State of the Environment Comprehensive Report* (Edmonton: 1995) at 3.

2 For a discussion of the various uses of Alberta's public lands and resources, see: Alberta Forestry, Lands and Wildlife, *Alberta Public Lands* (Edmonton: 1988).

3 Banff and Jasper National Parks (along with Yoho and Kootenay National Parks in British Columbia), Waterton-Glacier International Peace Park, Wood Buffalo National Park and Dinosaur Provincial Park are UNESCO World Heritage Sites and the Waterton-Glacier region has been designated a biosphere reserve under the UNESCO Man and the Biosphere Program.

4 The term 'public land management' is used here to refer to decision-making regarding:
(1) the use of the resources that are on, under or move across public lands (e.g., forests, rangeland, minerals, water, wildlife); and
(2) the other uses of public land (e.g., recreation, tourism, ecosystem and biodiversity preservation, protection of aesthetic values and wilderness).

endowment of land and resources as a high priority.

The objective of this paper is to determine the extent to which provincial land and resource legislation provides a sound legal basis for integrated public land management in Alberta. The approach taken here reflects two key premises: (1) an integrated approach to managing public land and resources is essential given the diverse values and interests at stake and the interrelationships among various land use decisions; and (2) law has a valuable role to play in structuring decision-making regarding the use of public land and resources. The underlying question to be answered can be phrased as follows: Does the considerable body of law and regulation governing the use of Alberta's public land and resources constitute a unified legal framework for managing the public domain, or is it nothing more than a patch-work quilt of sector-specific regimes and discrete regulatory processes? To answer this question, a template for integrated public land law is used as the standard against which existing legislation is evaluated. The analysis presented below is, in effect, a search for public land law in Alberta.

The paper is organized as follows. Section 2 outlines the four-element template for public land law that will be applied in subsequent sections. A brief review of the legal and institutional structure for public land management is then provided in Section 3. The four subsequent sections consider, in turn, the extent to which legislation in Alberta conforms to the public land law template. These sections examine the normative basis for integrated public land law, the existence of comprehensive land use planning, the integration among stages of decision-making, and the provision for interjurisdictional and interagency coordination. Brief concluding comments are contained in the final section.

2. The Elements of Public Land Law

The analytical framework for this paper was developed in a companion piece entitled *New Directions for Public Land Law*.[5] The *New Directions* paper argues that public land law should be a unified body of substantive and procedural requirements that provides the basis for an *integrated* approach to the management of public land and resources. In particular, the proposed template for public land law highlights four key attributes.

First, public land law should have a well defined normative basis. The adjective 'normative' is chosen advisedly, since the word 'norm' implies both a standard of conduct and an underlying ethical value.[6] Both components are essential. Public land law should establish clear principles, objectives and standards that provide

5 Steven A. Kennett, *New Directions for Public Land Law*, CIRL Occasional Paper #4 (Calgary: Canadian Institute of Resources Law, January 1998) [hereinafter *New Directions*].

6 *Webster's Third New International Dictionary* (1986) defines 'norm' as "a standard of conduct or ethical value" and "an imperative statement asserting or denying that something ought to be done or has value"; 'normative' is defined as "creating, prescribing or imposing a norm".

meaningful direction to decision-makers. This direction, in turn, should reflect the imperatives of integrated land and resource management. For reasons discussed in the *New Directions* paper and briefly reviewed below, public land law must embody an ethical commitment to principles of 'ecosystem management' if it is to address the challenges that confront land and resource managers in Alberta and, indeed, throughout Canada.

In considering the normative basis for public land law, the *New Directions* paper examined the 'multiple use' approach that has been the dominant paradigm for public land management in both Canada and the United States. This approach, at least in its purest form, reflects the view that land and resources can simultaneously meet a variety of needs and should be managed to achieve the greatest stream of benefits or outputs. The ethical basis of multiple use is thus strongly utilitarian, and this approach provides little substantive guidance to decision-makers beyond the appeal to maximization of net benefits. While multiple use mandates can incorporate notions of sustained yield, or even more ecologically-based notions of sustainability, their practical effect is generally to confer broad discretionary power on land managers to balance competing uses as they see fit.

The multiple use approach as commonly practised thus fails to provide clear standards of conduct for public land management and it does not – at least not directly – reflect a 'land ethic'[7] based on principles of ecosystem management. In particular, the principal criticisms of multiple use management discussed in the *New Directions* paper are that:

- the virtually unconstrained administrative and political discretion that frequently accompanies multiple use regimes for public land management is inconsistent with basic tenets of democracy and the rule of law;

- the absence of an ecosystem-based ethic underlying multiple use makes it unequal to the challenges of public land management in an era where intense value- and interest-based conflicts among land and resource users are played out against a backdrop of unsustainable management practices in respect of certain lands and resources, and well documented threats to the long-term viability of natural ecosystems; and

- the practical effect of multiple use regimes is often to increase the ability of narrowly-focused, well organized interest groups to dictate how public land and resources will be used, to the detriment of broader public values and long-term societal interests.

In light of these deficiencies, public land management requires a normative basis that goes beyond the unstructured utilitarianism of multiple use. More particularly,

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7 The term "land ethic" was used by Aldo Leopold, whose work constitutes one of the key intellectual foundations of ecosystem management. See: Aldo Leopold, *A Sand County Almanac* (New York: Ballantine Books, 1970).

the *New Directions* paper argues that the multiple use approach should give way to ecosystem management as the foundation for integrated public land management.

Ecosystem management is a relatively new concept that is, nonetheless, gaining increasing currency as a basis for land and resource management. It is not a formula for resolving all conflicts over land and resource use, nor does it define precise management options. Ecosystem management does, however, provide the normative basis – in the form of operational principles, objectives and standards – upon which an integrated regime for public land management could be constructed. While grounded in the value of ecosystem integrity, ecosystem management allows ample room for a broad range of human uses of public land and resources. In practical terms, it arguably requires decision-making at two levels.[8] The first involves determining the amount of human activity within a defined management area that is consistent with ecosystem viability. Once this ceiling is established, the second level of decision-making requires a determination of the appropriate mix of uses to be allowed. For this model to operate as intended, the ecosystem viability ceiling must constitute a meaningful constraint on the 'lifestyle' choices made at the second level. While there are no *a priori* limitations on the menu of lifestyle options for land and resource use, short-term lifestyle decisions would not be permitted to cause long-term ecological damage.

The second attribute of public land law identified in the *New Directions* paper is that it should include a planning process designed to provide an integrated strategic framework for public land management. Through planning, the allowable uses of public lands and resources can be identified in a manner that reflects the spatial and temporal scales appropriate to ecological processes and the interests of both present and future generations. While planning is not a panacea, if properly designed and executed its benefits can include:

- focusing decision-makers on the long-term sustainability of land and resource uses, ecological processes and public land communities;

- avoiding some of the pitfalls of incremental decision-making and consequent problems of cumulative impacts;

- formalizing the requirement of systematic data collection and analysis as the basis for decision-making;

- increasing the legitimacy, consistency, fairness and accountability of decision-making by formalizing the 'rules of the game' for public land management;

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8 See: Scott W. Hardt, "Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship" (1994) 18 *Harv. Envtl. L. Rev.* 345 at 392-396; discussed in *New Directions*, *supra* note 5, Section 3.2.3.

- providing an opportunity for public participation at an early stage in decision-making and forcing competing interests to articulate and defend their positions in a single arena;

- increasing predictability in public land management; and

- improving the efficiency of the other stages of decision-making regarding the use of public land and resources.

To increase the likelihood that planning will deliver these benefits, both the process and the resulting plans should have a legal basis.

Third, the *New Directions* paper argues that public land law should include mechanisms to ensure integration among the stages of decision-making. Most decisions regarding public land and resources can be located at some point along the following continuum: (1) the establishment of guiding principles, broad policy directions, and more specific objectives and priorities for the use of public land and resources; (2) land use planning (i.e., a process of land zoning to determine preferred, acceptable and unacceptable uses for specified areas); (3) rights disposition (i.e., the granting of private rights in public land and resources); and (4) project-specific review (i.e., environmental assessment) and regulation (e.g., licensing, permitting, etc.). Ideally, these stages should constitute a logical decision path that progresses from the establishment of broad policy priorities to the attachment of particular terms and conditions to individual project approvals. If this integration is accomplished, the efficiency, effectiveness and predictability of public land management should be improved to the benefit of all parties. Without adequate integration, important issues may fall through the cracks and pressures on certain stages in the process may be accentuated as a result of deficiencies elsewhere.

Finally, the *New Directions* paper highlights the importance of legal mechanisms to promote or require interjurisdictional and interagency coordination in areas where issues and policies exhibit spill-over effects. This attribute reflects the undeniable fact that ecosystems do not respect administrative or jurisdictional boundaries. Since decisions in one area or by one set of managers frequently have implications for land management objectives pursued by others, overarching institutional arrangements or clear mandates requiring interagency and interjurisdictional cooperation are necessary if an integrated approach to public land management is to be achieved.

All four elements of this template could be viewed simply as attributes of integrated public land management. The *New Directions* paper takes the discussion one step further, however, arguing that all of these attributes should be embodied in public land law. The reason for this emphasis on the legal basis for public land management is that law has four critically important functions as an instrument of public policy:

- law making is a deliberative process that can provide a relatively open and transparent means of setting societal goals and priorities and addressing important issues of public policy;

- law can provide a measure of predictability for those whose rights and interests are affected by government decision-making;

- law is a means of directing and constraining the exercise of discretion, serving as a check on potential abuses of authority and a means of ensuring the accountability of those entrusted with public powers and functions; and

- law can be used to structure decision-making processes, establishing the procedure to be followed in the exercise of governmental authority and determining, where appropriate, the relationships among various policy directives and stages of decision-making.

These functions explain why democratic societies establish legal mechanisms to achieve policy objectives. Furthermore, as argued in the *New Directions* paper, the rationale for using law as an instrument of public policy applies with particular force to the policies and decision-making processes that constitute public land management. The focus of inquiry in this paper is therefore the legal underpinnings of public land management in Alberta.

It should be underlined at the outset that nothing in the way this issue has been framed, nor in the discussion to follow, suggests that every aspect of public land management should be subject to a detailed, complex and rigid legal regime. Law is only one among many instruments of public policy and excessive legalization of public land management would clearly bring with it a host of problems. Furthermore, it is evident that no legal regime could resolve all conflicts regarding land and resource use or replace the need for professional judgement, political responsiveness and sensitivity to particular circumstances in decision-making. The four functions of law noted above show, however, that the principle that government should be conducted in accordance with the ‘rule of law’ is much more than an empty slogan; it has a convincing rationale and important practical implications for structuring key aspects of governance in a democratic society. The analysis presented in this paper is directed towards evaluating whether legislation in Alberta serves these basic yet fundamentally important functions in relation to the integrated management of public land and resources. The vision of public land law that underlies this paper is thus one that accords an important role to law in establishing policy direction, predictability, accountability mechanisms and a logical decision-making structure for public land management; it is not one that implies detailed legal prescription of all aspects of land and resource use.

The template outlined above provides a relatively clear standard against which the legal regime for land and resource management in Alberta can be assessed. Following a brief overview of the legal and institutional framework, each attribute is

examined in turn with a view to determining whether the laws of Alberta require, or indeed permit, an integrated approach to public land management. The role of the law in public land management in Alberta is a recurring theme throughout and will be the subject of summary comments in the concluding section of this paper.

3. The Legal and Institutional Framework for Public Land Management

Before turning to an evaluation of the state of public land law in Alberta, a brief orientation to the laws and institutions governing land and resource use may be useful. A more complete list of the statutes and regulations that were reviewed when preparing this paper is contained in the Appendix.

3.1 Legal Instruments

The allocation, use and management of public land and resources (e.g., forests, lands for agricultural, recreational or tourism uses, minerals, water) are governed by a wide variety of statutes and regulations. The most general statute governing public land is the *Public Lands Act*, which provides in very broad terms for the classification of public land, land dispositions (e.g., sales and transfers) and grazing dispositions (leases or permits/licences). Specific natural resources such as minerals, forests and water are managed under a range of sectoral statutes and associated regulations, the most significant being:

- minerals: the *Mines and Minerals Act*; the *Energy Resources Conservation Act*; the *Coal Conservation Act*; the *Oil and Gas Conservation Act*; the *Oil Sands Conservation Act*; the *Pipeline Act*; the *Surface Rights Act*;

- forests: the *Forests Act*; the *Forest and Prairie Protection Act*; the *Forest Reserves Act*;

- water: the *Water Act*;

The large number of statutes governing mineral exploration and extraction reflects the predominance of the mineral sector in the province. By contrast, the disposition and management of the forest resource are essentially effected under a single statute, the *Forests Act*.

Alberta also has several statutes that govern the setting aside of public lands for conservation or recreation purposes. This protected areas legislation either prohibits or restricts resource development and other activities within the boundaries of designated lands. These statutes include: the *Provincial Parks Act*; the

Wilderness Areas, Ecological Reserves and Natural Areas Act; the *Wildlife Act* (and Wildlife Regulations); and the *Willmore Wilderness Park Act*.

Also relevant to this review of public land law is environmental legislation of general application, which establishes both substantive and procedural obligations that can apply to the use of public land and resources. In 1992, various provincial environmental statutes were consolidated into a comprehensive statute, the *Environmental Protection and Enhancement Act* (EPEA), which establishes an environmental assessment process and also contains a range of environmental regulatory provisions.

An array of regulations passed under the above statutes is also relevant to this analysis. Regulations provide more specific direction to government officials in the performance of their statutory obligations.

3.2 Institutions Responsible for Land and Resource Management

The principal public land manager in Alberta is the Department of Environmental Protection Responsible for Forests, Parks and Wildlife (hereinafter AEP). This department administers the *Public Lands Act*, key resource statutes such as the *Forests Act* and the *Water Act*, as well as EPEA and all protected areas statutes. With respect to lands allocated to agricultural uses, located for the most part in the agricultural area of the province known as the White Area, the Department of Agriculture, Food and Rural Development (hereinafter AFRD) shares the stewardship of public lands with AEP under a formal accord.[9] AEP retains ownership and control over the planning, allocation and sale of all public lands, while operational management responsibilities for these lands are assumed by AFRD. Finally, the Department of Energy is a key resource manager by virtue of its responsibility for issuing all mineral dispositions under the *Mines and Minerals Act* and its administration of other relevant energy statutes.

In addition to the above government departments, Alberta has two quasi-judicial tribunals that have extensive authority in relation to many developments on public lands. The Energy and Utilities Board (EUB) has broad project review and regulatory powers over energy projects, including oil and gas operations, oil sands plants, coal mining, electrical generation and the construction of related energy infrastructure, notably pipelines and transmission lines. The Natural Resources Conservation Board (NRCB) is charged with the review of specified non-energy projects such as pulp and paper mills, water management projects and major tourism facilities.

9 Minister of Environmental Protection, Minister of Agriculture, Food and Rural Development, *Formal Accord For the Shared Stewardship of Public Lands*, 24 February 1993.

4. The Normative Basis for Public Land Law

The first attribute of public land law set out above in Section 2 is the presence of a well defined normative basis. This basis, it was argued, should include principles, objectives and standards which establish an integrated framework for public land management and provide clear legislative direction to land and resource managers in the exercise of their decision-making powers. In addition, it was argued that the normative basis for public land law should reflect an underlying ethical commitment to the value and principles of ecosystem management.

The initial query in this analysis of Alberta's legal framework for public land management is therefore whether this type of normative content can be found in the legislation governing public land and resources in this province. In particular, legislation will be examined for the presence of integrative principles and objectives, the extent of statutory direction provided to decision-makers, and the incorporation of ecosystem management principles into public land management. These elements could be found in general statutes establishing an overarching framework for decision-making regarding public land and resources or in the legislation that governs specific resources or the distinct operational stages of public land management (i.e., planning, rights disposition, and project-specific review and regulation).

4.1 The General Principles and Framework for Public Land Management in Alberta

Alberta does not have a single, overarching statute that establishes a normative basis or unified framework for public land management. The *Public Lands Act*, despite the broad scope suggested by its title, deals with a set of relatively specific issues relating primarily to the disposition of certain interests in public lands. This Act has no purpose section and contains no general provisions setting out principles, objectives or standards for the management of Alberta's public lands as a whole.

It is also noteworthy that there is no single authoritative statement of government policy that could form the basis – albeit non-legal – for integrated public land management. The general approach to land and resource management in Alberta, however, has long been and continues to be based on the multiple use philosophy.[10] In particular, the integrated resource planning process that was in existence for approximately 20 years was based on the premise that, with adequate planning and management constraints, the land base can accommodate a wide variety of uses.[11] Sectoral resource policies are similarly governed by multiple use

10 See, for example: *Alberta Public Lands*, *supra* note 2 at 2.

11 Alberta Forestry, Lands and Wildlife, *Integrated Resource Planning in Alberta* (Edmonton: September 1991) at 3.

principles.[12] Finally, the province's current protected areas policy, *Special Places 2000*, applies a multiple use approach to the designation and protection of natural areas and does not even mention the term 'ecosystem management.'[13] In terms of the contrast between the multiple use approach and ecosystem management, then, Alberta's public land policy is firmly in the multiple use camp. There is, in any case, no authoritative and broadly applicable policy document, let alone direct statutory language, that mandates ecosystem management for the public lands in Alberta that come within provincial jurisdiction.

In addition to the general issues and problems associated with multiple use management that were highlighted in the *New Directions* paper, this approach poses particular challenges in Alberta given the close physical proximity of many competing land and resource uses. As noted by the Environment Council of Alberta 20 years ago: "The inordinate wealth in non-renewable mineral resources that lies below the forest land in Alberta makes multiple use difficult to implement".[14] This difficulty is compounded when the ecological and aesthetic values of Alberta's public land and the recreational and tourism opportunities that are associated with wilderness and relatively undisturbed natural landscapes are added to the multiple use equation.

The need to reexamine the current policy framework for public land management in light of the challenges facing land and resource managers in Alberta was recently underlined in *Ensuring Prosperity: Implementing Sustainable Development*, the Report of the Future Environmental Directions for Alberta Task Force (March 1995). This Task Force was created by the Government of Alberta to identify environmental priorities and chart the course for the province's environmental policy, notably with a view to achieving sustainable development. The report stated that:

> The Task Force sees the need for sustainable land and resource management policies as the most urgent issue facing Alberta. Without updating and clarifying land-use policy, including determining the relationships among the policy elements, conflict will continue – *valley by valley and hill by hill*.[15]

Acknowledging that "Our continued prosperity requires that natural resources be

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12 Forest management has long adhered to a multiple use policy. See, for example: Environment Council of Alberta, *The Environmental Effects of Forestry Operations in Alberta, Report and Recommendations* (Edmonton: February 1979) at 6 and 85-86. With respect to water, see: Alberta Environment, "Water Management Policy for the South Saskatchewan River Basin", Fact Sheet (Edmonton: May 1990): "Under government's existing policy, multiple use is the underlying principle governing the use and management of all water in Alberta. The objective is to manage the resource to meet the requirements for diverse uses such as domestic, municipal, agricultural, industrial, fisheries, wildlife and recreation."

13 Government of Alberta, *Special Places 2000: Alberta's Natural Heritage* (Edmonton: March 1995) at 3. For a commentary on this policy, see: Steven A. Kennett, "*Special Places 2000*: Protecting the Status Quo" (1995) 50 *Resources* 1.

14 Environment Council of Alberta, *supra* note 12 at 86.

15 Environment Council of Alberta, *Ensuring Prosperity — Implementing Sustainable Development*, The Report of the Future Environmental Directions for Alberta Task Force (Edmonton: March 1995) at 52 (emphasis in original) [hereinafter *Ensuring Prosperity*].

managed sustainably within an ecosystem context", the Task Force recommended as follows:

> The Alberta government should explicitly adopt sustainable renewable resource management as an overriding objective. An ecosystem-based resource management approach is also needed. Current efforts to determine what is required for effective ecosystem management should be pursued as a priority.[16]

The Task Force's report thus raises serious concerns with the current environmental policy framework and its implications for public land management. It also begs the question of the adequacy of the underlying legal regime.

Public land management in Alberta is thus firmly rooted in the multiple use tradition as a matter of policy and lacks a unifying legal framework of guiding principles, objectives or standards. The search for a normative basis for public land law must therefore turn to the legislation governing the three operational stages of public land management.

4.2 The Planning Stage

There is no statutory requirement in Alberta that obliges elected officials or managers to develop comprehensive, integrated plans for the use of public land and resources. The *Public Lands Act* simply enables the Minister of AEP to classify public land and declare the use to which different classes may be allocated (s. 10). This bare statutory authorization provided the legal foundation for integrated resource planning, discussed below in Section 5, but this process was never legislated and therefore operated without either statutory guiding principles or a legally enforceable process. At the present time, the integrated resource planning program has been discontinued and public land management in Alberta is therefore without a comprehensive planning process.[17]

Some planning does occur, however, in relation to specific aspects of public

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16 *Ibid.* at 54. One example of "current efforts" related to ecosystem management is the proposed *Alberta Forest Conservation Strategy*, which advocates managing public forests under an "ecological management" approach "that focuses on ecological processes and ecosystem structures and functions, while sustaining the types of benefits that people derive from the forest": Alberta Forest Conservation Strategy Steering Committee, *Alberta Forest Conservation Strategy: A New Perspective on Sustaining Alberta's Forests, Final Report* (Edmonton: May 1997) at 7. In this document, ecological management is distinguished from ecosystem management in that it purports to manage not the forest ecosystems, but "our own activities in the forest to ensure that they do not interfere with the ecosystem's ability to manage itself" (at 7). The strategy was submitted to the Minister of AEP for consideration in May 1997 and, to date, has not yet been adopted as government policy.

17 As discussed below in Section 7, committees established by AEP at the regional level continue to assume some planning functions, including the review and updating of selected IRPs, while the future of integrated resource management is being debated within the provincial government.

land management. To the extent that protected areas statutes authorize the allocation of certain public lands for restricted purposes, thereby creating areas with specified priority or dominant uses, they support a planning (or, at least, zoning) process. There is nothing in protected areas statutes, however, that provides a normative basis for public land management as a whole. Preambles[18] and purpose sections[19] contain some broadly worded goals, but little or nothing in the way of guiding principles, measurable objectives or clear standards to provide direction to land managers. Furthermore, both the designation[20] and management[21] of most protected areas are characterized by significant political and administrative discretion. Protected areas legislation does not specify principles of ecosystem management either for designated lands or in relation to decisions taken outside of protected areas that may have effects on the ecological resources that these areas were created to preserve. The only statutory provision demonstrating a concern to control the external threats to protected areas is the discretionary power granted to Cabinet under s. 12 of the *Wilderness Areas, Ecological Reserves and Natural Areas Act* to designate by regulation controlled buffer zones within which strip mining or quarrying is prohibited.

The *Water Act* is unique among resource management legislation in Alberta in requiring government to engage in planning.[22] The normative basis for this planning function is, however, extremely weak. Section 2 of the *Water Act* simply states the general purpose of supporting and promoting the conservation of water, including its wise allocation and use, "while recognizing" a set of equally general factors. The sections of the Act pertaining to the planning process are also carefully structured to avoid mandatory obligations or reviewable standards beyond the bare duty to

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18 The Preamble to the *Wilderness Areas, Ecological Reserves and Natural Areas Act* states:

> Whereas it is in the public interest that certain areas of Alberta be protected and managed for the purposes of preserving their natural beauty and safeguarding them from impairment and industrial development;

19 For example, s. 3 of the *Provincial Parks Act* provides:

> Parks shall be developed and maintained
> a) for the conservation and management of flora and fauna,
> b) for the preservation of specified areas and objects therein that are of geological, cultural, ecological or other scientific interests, and
> c) to facilitate their use and enjoyment for outdoor recreation.

20 Section 7(1) of the *Provincial Parks Act* authorizes Cabinet to designate by order land as a provincial park or recreation area and to increase or decrease the area of such lands. Under s. 3.1 of the *Wilderness Areas, Ecological Reserves and Natural Areas Act*, similar discretionary powers are granted to the Minister with respect to the designation and alteration of ecological reserves, although in that case public notice of ministerial decisions must be given. The boundaries of the Willmore Wilderness Park may also be modified by Cabinet (s. 2(2) of the Act).

21 The discretion to allow specific uses to be made of the land within provincial parks and to issue dispositions and permits is very broad (*Provincial Parks Act*, ss. 8, 11, 13). In the case of wilderness areas and ecological reserves, the Minister is empowered to allow existing resource dispositions to continue until their expiry, and even to be renewed in the case of ecological reserves (*Wilderness Areas, Ecological Reserves and Natural Areas Act*, s. 6(3)).

22 The Minister of AEP is required to establish "a framework for water management planning for the Province within 3 years after the coming into force of this Act" and this framework "must include a strategy for the protection of the aquatic environment" (ss. 7(1)-(2)).

establish a planning framework. There is, of course, some enabling language on matters germane to integrated public land management. The list of factors that *may* be included in the mandatory framework for water management includes "matters relating to integration of water management planning with land and other resources" (s. 7(2)(e)).[23] Furthermore, the strategy for the protection of the aquatic environment that is required as part of the framework for water management planning *may* include "matters relating to the protection of biological diversity" (s. 8(3)(c)). The term "biological diversity" is defined as: "the variability among living organisms and the ecological complexes of which they are a part, and includes diversity within and between species and ecosystems" (s. 8(1)). Addressing this matter in the context of a strategy for protecting the aquatic environment would thus seem to require explicit attention to ecosystem management. While these provisions constitute a nod in the direction of integrated planning and ecosystem management, they fail to establish the clear – and mandatory – normative basis that would ensure that water planning will conform to these principles. Furthermore, there is nothing in the Act that requires the integration of water planning with other sectoral processes or a comprehensive provincial planning program, should one be reestablished.

Sectoral planning also takes place with respect to forest resources. Planning requirements are not, however, statutorily enshrined in the *Forests Act*. Rather, limited planning obligations are imposed on timber disposition holders under s. 98 of the Timber Management Regulation, which requires that annual operating plans be submitted to the Minister for approval; all timber operations must be conducted in accordance with the approved plan.[24] More substantial planning requirements are prescribed by Forest Management Agreements (FMAs). These requirements include, in particular, the preparation by FMA holders and approval by the Minister of long-term detailed forest management plans for the entire FMA area.[25] Both the annual and the long-term plans must be prepared in accordance with a set of "ground rules" outlining objectives and standards to be met by all timber operators.[26] One of the objectives of the ground rules is to minimize the impacts of harvest operations on the "forest environment", notably water, soils, cover and riparian habitat. Integrating timber harvesting with other resources is a second objective: timber planning and operations are to be conducted in accordance with principles of integrated resource management, existing Integrated Resource Plans and the guidelines specified in the Eastern Slopes Policy (where applicable). These integrative principles and the concern for the protection of various components of the

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23 A similar provision applies to the development of water management plans, which *may* involve "an integrated approach to planning with respect to water, land and other resources" as well as inter-agency or interjurisdictional cooperation (s. 9(2)).

24 Alta. Reg. 60/73 as amended.

25 E.g., Crestbrook Forest Industries Ltd. FMA, O.C. 556/91, s. 10(2).

26 Alberta Environmental Protection, *Alberta Timber Harvest Planning and Operating Ground Rules* (Edmonton: 1994). The latest set of FMAs prescribe that forest management plans be prepared "in accordance with the forest management planning manual prepared by the Minister" (e.g., Sundance Forest Industries FMA, O.C. 630/96, s. 10(5)); a manual entitled *Interim Forest Management Planning Manual –Guidelines to Plan Development* was released in January 1998.

forest ecosystem provide a normative basis for decision-making in the forest planning process. However, this normative basis lacks a solid statutory foundation since it only exists in the form of guidelines.

The history and current state of comprehensive land and resource planning in Alberta is addressed in more detail below in Section 5. For present purposes, it is sufficient to conclude that the statutes governing both comprehensive and sectoral planning in this province contribute little to establishing the normative basis that one would expect for an integrated body of public land law.

4.3 The Rights Disposition Stage

Specific statutory authorization is, of course, usually provided for decisions to dispose of public land and resources. The question to be answered here is whether these statutory provisions embody normative elements of integrated public land law. A review of the relevant legislation reveals that the two lead provincial land and resource managers, the Ministers of AEP and Energy, enjoy broad discretionary powers in allocating rights to access and use public lands and natural resources. Statutory guidance is minimal with respect to agricultural, mineral, forest and other dispositions. In fact, there are neither purpose clauses nor specific criteria for rights allocation in the *Public Lands Act*, the *Forests Act* and the *Mines and Minerals Act*.

The *Public Lands Act* empowers Cabinet to authorize the responsible Minister to sell public land to a municipality at a price determined by the Minister, or to make any disposition or grant in any special case not provided for in the Act, without further guidance as to the objectives to be pursued by such actions and without any legislative or public discussion of these decisions (s. 7). In the exercise of his or her sweeping powers to dispose of public lands, the Minister has entire discretion to restrict the disposition, to withdraw from it any land which he or she considers warranted, or to prescribe any conditions he or she deems necessary (s. 13). Long term agricultural dispositions, such as 20 years grazing leases, are granted by the Minister when, in his or her opinion, “the best use that may be made of the land is the grazing of livestock” (s. 106).

Similar unstructured decision-making powers are found in the *Forests Act*. The Minister of AEP is enabled under ss. 14 and 15 to divide public forest land into management units, determine the annual allowable cut for each unit, and dispose of Crown timber pursuant to three types of forest tenures. The Act does not provide any direction regarding the purposes to be achieved by such disposition or the criteria that should guide the Minister in the exercise of his or her powers. The only consideration specified is in relation to the granting of one type of forest tenure, the FMA. The Act states that the purpose of FMAs must be to establish, grow and harvest timber in a manner designed to provide a perpetual sustained yield (s. 16(1)). The same wide discretion characterizes the Minister’s power to alter or

cancel any quota, licence or permit, with 30 days written notice to the tenure holder, if he or she deems this action to be “in the public interest” (s. 26).

Under the *Mines and Minerals Act*, the Minister of Energy enjoys equally sweeping powers to dispose of Crown minerals. The Act contains no substantive requirements and only a few procedural provisions regarding rights issuance. Thus, the Minister may, with Cabinet approval, enter into a contract for the recovery, processing and sale of minerals (s. 9(a)(I)), or alternatively issue an agreement which is at variance with the provisions of the Act or the regulations (s. 9(b)). Generally, the Minister may issue an agreement in respect of a mineral on application “if the Minister considers the issuance of the agreement warranted in the circumstances” (s. 16(a)) and may restrict the issuance of such an agreement or withdraw any mineral from disposition “in respect of any specified area and in any manner he considers warranted” (s. 17). Further, the Minister is granted extensive discretionary powers with respect to existing agreements, such as the right to cancel or refuse to renew an agreement, subject to compensation, if he or she is of the opinion that exploration or development of the mineral is not in the public interest (s. 8(1)(c)). As discussed below in Section 7, an interdepartmental committee (the Crown Mineral Disposition Review Committee) reviews decisions to post mineral rights for competitive bidding; this review is not, however, a legal requirement and the committee simply provides recommendations to the Minister of Energy.

Another example of highly discretionary ministerial authority is found in the Mineral Surface Lease Regulation, established under the *Public Lands Act*. Mineral surface leases enable mineral producers to obtain access to public lands in order to recover and produce minerals. Under s. 3(1) of the regulations, the Minister of AEP is entitled “to issue leases of public lands to mineral producers who require public lands for purposes in connection with or incidental to the recovery and production of mines and minerals” or, alternatively, to refuse to issue leases at his or her discretion (s. 9(a)). The only limitations on the Minister’s discretion to issue mineral surface leases relate to the obligation imposed on the applicant to obtain consent from the occupant when lands are already under disposition (s. 3(4)). For instance, in the case of public lands subject to timber dispositions, the lease can only be issued when an agreement has been reached between the parties concerning the cutting or destruction of the timber (s. 3(5)).

The highly discretionary processes under which valuable public lands and resources such as minerals and forests are allocated to the private sector are all the more remarkable in that there exist no statutory requirements for environmental assessment nor for public input at this stage in decision-making. Proponents may be “encouraged” to involve the public at an early stage in their application, but public participation is not required by law until development proposals are at a more advanced stage of planning. Unable to raise broad policy issues at the land and resource allocation stage, the public tends to express these concerns when given the opportunity to participate in project review and approval. The public hearings

held by the EUB or the NRCB may, therefore, be used as forums to debate broad policy issues of land use and allocation.[27]

Ministerial discretion at the rights disposition stage is to some extent constrained by protected areas statutes that specifically prohibit resource dispositions within the boundaries of designated areas. For instance, under ss. 7(1) and (2) of the *Wilderness Areas, Ecological Reserves and Natural Areas Act*, the Minister cannot issue new interests, leases or permits (e.g., timber or mineral dispositions), nor grant an estate or interest in land within ecological reserves and wilderness areas. As far as existing interests are concerned, the Minister is simply mandated to ensure "as far as practicable" that such interests will be terminated as soon as possible (s. 6(1)). In contrast, the *Provincial Parks Act* enables Cabinet to authorize the Minister to make dispositions within the boundaries of the parks, and the Minister may by regulation issue permits allowing special activities to be carried out.[28] In their resource allocation processes, sectoral agencies may also take into consideration the existence of protected areas. FMAs, for example, typically exclude existing provincial parks, forest recreation areas, natural areas and ecological reserves from the area allocated to forest companies.[29] Protected areas legislation operates, therefore, as an external constraint on otherwise unfettered grants of discretionary authority to dispose of public land and resources. Since protected areas statutes can preclude or constrain rights disposition decisions that would be inconsistent with the purposes of protected areas designation, they provide a measure of integration between rights disposition and certain broader policy objectives of public land management.

The recently enacted *Water Act*,[30] discussed above in the context of resource planning, addresses the disposition and transfer of water rights. The Act's general purpose section thus applies to rights disposition and, in this context, exhibits the weakness that was noted above in relation to water planning. The planning process is, in fact, linked to rights disposition since the statute authorizes the Minister to require the development of area-specific water management plans (s. 9) that are required to specify matters and factors that *must* be considered by the designated Director in issuing licences and approvals (ss. 11(3)(iv), 51(4)) as well as in approving transfers of water allocations (s. 82 (5)). Both the Minister and the Director continue to enjoy broad discretionary powers, however, since there is no obligation to develop these plans and the factors that they specify need only be considered – not treated as determinative – by subsequent decision-makers. Furthermore, the Act specifies only that, when issuing a licence or approving transfers of water allocations, the Director *may* consider such critical factors as the potential or cumulative effects of such decisions on the aquatic environment, on other users, and

27 This issue is discussed below in Sections 6.3 and 6.4.

28 As recently as 1995, oil and gas activity as well as grazing occurred in seven provincial parks, and logging had occurred in two provincial parks. See: Alberta Environmental Protection, *supra* note 1 at 73.

29 E.g., Sundance Forest Industries Ltd. FMA (O.C. 630/96), s. 4(f).

30 As of January 1998, the Act has not yet come into force.

on public safety (ss. 51(4)(b),(c), 82(5)(b)(c)). The *Water Act* thus explicitly enables decision-makers to adopt an integrated and ecosystem-based approach to rights disposition, but fails to establish a normative basis that would make this approach mandatory. The significance of the Act is further reduced by the fact that it grandfathers existing water licences; only new water dispositions or transfers of existing allocations will be affected by these statutory provisions (s. 18).

In sum, rights disposition regarding public land and resources remains unstructured by the integrative provisions and guiding principles that are the hallmarks of a normative basis for public land law. It is essentially a process of unfettered political and administrative discretion and there is no explicit or implicit requirement that rights disposition decisions take account of principles of ecosystem management, much less subordinate the granting of rights to access and exploit public lands and resources to any standard of ecosystem integrity. Rights disposition in Alberta cannot, therefore, be said to exhibit the fundamental normative characteristics of the model of public land law outlined in Section 2.

4.4 The Project Review and Regulation Stage

Project review and the regulation of various activities associated with land and resource developments are governed by environmental protection legislation and quasi-judicial regulatory processes. Of principal importance are EPEA, which legislates the environmental assessment process and a broad spectrum of environmental approvals, and the legislation governing the project review and regulatory functions of the EUB and NRCB.

EPEA has important implications for aspects of public land management but it does not contain a normative basis for integrated public land law. The Act's purpose section simply sets out a menu of factors to be "recognized" in connection with the overall purpose of "protection, enhancement and wise use" of the environment (s. 2). While it does acknowledge that "the protection of the environment is essential to the integrity of ecosystems" (s. 2(a)), the very general language of this section provides little concrete guidance to decision-makers, let alone a set of specific objectives or standards against which decisions or their results could be measured. Similarly, the purposes of the environmental assessment section are very general and set no standard regarding the types of projects to be approved or the outcomes that are acceptable (s. 38).

The Act does enumerate the information to be included, unless the designated Director provides otherwise, in the preparation of an "environmental impact assessment report", the most intensive stage of project review. Included on that list is:

> a description of potential positive and negative environmental, social, economic and cultural impacts of the proposed activity, *including cumulative, regional, temporal and spatial considerations*" (s. 47(d), emphasis added).

An analysis of the significance of these effects must also be provided (s. 47(e)). These provisions certainly permit, and may even require, an integrative and ecosystem-based approach to evaluating the effects of those projects for which an environmental impact assessment report is either mandatory or is ordered by the Director or the Minister. They thus constitute normative legal provisions that are consistent with the normative basis proposed for integrated public land law. In addition, the environmental assessment provisions in EPEA contain a number of procedural requirements, notably those that establish opportunities for public comment at various stages in the process and require the Director to "give due consideration to all statements of concern that have been submitted" prior to deciding whether to order an environmental impact assessment report (s. 44). While this latter provision provided the basis for a successful application for judicial review,[31] the extent of discretion under EPEA's environmental assessment process is considerable. Given this broad discretion and the fact that EPEA's environmental assessment provisions do not apply to the full range of decision-making regarding activities on public lands,[32] this statute does not make more than a marginal contribution to establishing a normative basis for integrated public land law.

The EUB has important project review and regulatory responsibilities for energy developments in Alberta, many of which occur on public lands and involve the use of public resources. The statutes establishing the EUB's mandate, notably the *Energy Resources Conservation Act* and sector-specific legislation such as the *Oil and Gas Conservation Act* and the *Coal Conservation Act*, contain purpose sections that specify the legislature's intent in enacting these statutes and provide some direction to responsible decision-makers. These sections generally refer to a range of economic and regulatory objectives including environmental considerations, phrased in terms of the control of pollution and environment conservation. The *Energy Resources Conservation Act* also states that the EUB's overall mandate in relation to proposed energy resource projects involves giving:

> consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment" (s. 2.1)

The EUB's legislation does, therefore, suggest some factors to be taken into account by the board, and the enabling provisions are certainly broad enough to permit an integrated approach to decision-making and the adoption of principles of ecosystem

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31 *Bow Valley Naturalists Society and Canadian Parks and Wilderness Society (Alberta)* v. *The Honourable Ty Lund, Minister of Environmental Protection, Robert Stone, Director of Environmental Assessment and BHB Canmore Ltd.* (27 October 1995) Action No. 9501 10222 (Q.B.); see also: Steven A. Kennett, "Environmental Assessment in Alberta Meets the Rule of Law" (1995) 52 *Resources* 5-8; Steven A. Kennett, "Limestone Valley Update" (1996) 53 *Resources* 7.

32 For example, oil and gas wells are specifically exempted from the environmental assessment requirements: Environmental Assessment (Mandatory and Exempted Activities) Regulation, Alta. Reg. 111/93, Schedule 2 (e).

management when determining the public interest. This approach to decision-making is not, however, required by law. The EUB's mandate to find the proper balance between social, economic and environmental effects in order to serve the 'public interest' is a daunting task. This task is facilitated to some extent by the general directions provided in statutory purpose sections; nevertheless, in the absence of more specific standards, the balancing act to be performed by the board remains difficult and, in important respects, unstructured by a substantive framework of public land law.

The NRCB is the counterpart to the EUB for the review of specified non-energy projects, although it lacks the EUB's ongoing regulatory responsibilities with respect to projects that it approves. Like the EUB, the NRCB's mandate is to apply a broad 'public interest' test to proposed projects. However, the purpose section included in the board's enabling statute, the *Natural Resources Conservation Board Act*, provides even less substantive guidance than do the EUB's statutes regarding how this test is to be developed and applied. Section 2 of the Act reads as follows:

> The purpose of this Act is to provide for an impartial process to review projects that will or may affect the natural resources of Alberta in order to determine whether, in the Board's opinion, the projects are in the public interest having regard to the social and economic effects of the projects and the effects of the projects on the environment.

As noted by two experienced regulatory lawyers in a commentary written before the *Natural Resources Conservation Board Act* was enacted, instructing an agency to conduct reviews having regard to the social, economic and environmental effects of a project is in itself not very meaningful. In the absence of a clear statutory purpose:

> [the NRCB] will be given broad approval powers, with a virtual blank cheque to develop a structure for forming value judgments on whether a project can proceed. This is a tremendous responsibility and one which will require unusually qualified appointees and staff in order to be discharged in a credible fashion.[33]

As with the EUB, the statutory language that establishes the NRCB's mandate is broad enough to allow it to take an integrated approach to decision-making with respect to projects having important implications for public land and resources. Furthermore, there is evidence that the board has in fact done so, notably in decisions regarding controversial recreation development projects in the Town of Canmore[34] and the West Castle Valley.[35] However, regardless of how the NRCB has in fact discharged its responsibilities over its relatively short history, the key point here is simply that its enabling legislation provides for broad discretion with little

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33 F. Saville & R.A. Neufeld, "Project Approvals under Proposed Alberta Environmental Legislation" (1991) 4 *Can. J. of Admin. L. & Prac.* 275 at 286.

34 NRCB, *Application to Construct a Recreational and Tourism Project in the Town of Canmore, Alberta*, Decision Report #9103, November 1992.

35 NRCB, *Application to Construct Recreational and Tourism Facilities in the West Castle Valley, near Pincher Creek, Alberta*, Decision Report #9201, December 1993. For a commentary on this decision, see: Steven A. Kennett, "The NRCB's West Castle Decision: Sustainable Development Decision-Making in Practice" (1994) 46 *Resources* 1.

substantive guidance. There is no legal requirement that the board adopt an integrated approach to public land management. Furthermore, despite the environmental sensitivity of many of the projects that come before the NRCB, the board is nowhere mandated by statute to adopt principles of ecosystem management. Consequently, the legislation that establishes the NRCB's project review process does not constitute, or contribute in a significant way to, a comprehensive normative basis for public land law in Alberta.

There is no doubt that the legislation governing project-specific review and regulation in Alberta establishes a legal basis for decision-making processes that goes far beyond that observed at the planning and rights disposition stages. Nonetheless, from the perspective of integrated public land management the normative provisions contained in that legislation are limited to general purpose sections and, in some cases, an enumeration of factors that are to be considered in reaching a decision. While these enabling provisions have the merit of allowing decision-makers to infuse normative content into their actions – as illustrated by certain important decisions of the NRCB – in legal terms they represent only a few tentative steps beyond bare statutory authorizations. Clearly defined and legally enforceable principles, objectives and standards, to say nothing of a mandate to pursue ecosystem management, are absent from the legislation governing the review and regulation of projects occurring on Alberta's public lands. This legislation thus does very little to fill the normative vacuum in public land law observed at the level of overarching legislation and policy and at the planning and rights disposition stages.

4.5 Summary

This section set out to determine whether Alberta's land and resource statutes provide the normative basis for integrated public land management. The key indicators identified for review were the existence of integrative principles, objectives and standards, the extent of direction provided to decision-makers, and the incorporation of principles of ecosystem management. In all three respects, the answer is clear: public land management in Alberta is currently without a normative basis in public land law.

5. Comprehensive Land Use Planning

The second key element of the template for public land law set out above is the establishment of a planning process to provide an integrated strategic framework for public land management. The benefits of a properly designed and executed planning process are summarized above in Section 2 and are discussed in more detail in the *New Directions* paper. It was also argued that, in order for planning to be an effective instrument of public land management, both the planning process and the resulting plans should have a basis in law and should give rise to legally enforceable

rights and obligations. The objective in this section is to assess whether the legislation governing public land and resource management in Alberta provides for an integrated planning process.

The short answer to this question is that Alberta currently lacks a comprehensive planning framework for public land and resources.[36] The Integrated Resource Planning (IRP) program that existed in Alberta for approximately two decades has been abandoned and much of the administrative structure that supported it has been dismantled. While there are ongoing discussions within government regarding the future of integrated resource management in general, and planning in particular, interviews with officials conducted for this study indicate that no clear policy direction has emerged as of early 1998. This impasse appears to be the result of a conflict between interests within government that advocate the adoption of some form of effective, legally-enforceable and comprehensive land and resource planning and those that view planning as excessively bureaucratic and an unnecessary constraint on economic development. In the absence of political will to move forward in this area, it is quite possible that Alberta will continue for some time without any formalized comprehensive planning process for public land and resources.

This state of affairs is of concern given the intensity of potentially conflicting demands on Alberta's public domain and the longer-term interests and values that may be irrevocably compromised by unplanned, incremental development. Furthermore, the absence of an integrated planning process places Alberta's quasi-judicial tribunals charged with project review in an unenviable position if they are to take seriously their responsibilities to apply a 'public interest' test to proposed developments. As the risks of incrementalism in land and resource development and the problems of cumulative impacts become increasingly recognized and well documented, the absence of a comprehensive planning framework could severely undermine Alberta's ability to manage its public land and resources in an integrated manner. Without an effective, fully integrated planning process, it is difficult to see how public land management in Alberta can be undertaken in a way that respects the full range of values that attach to the public domain and the interests of both present and future generations in the sustainable management of the province's rich endowment of natural resources.

While the current status of planning can thus be concisely summarized, there is some value in commenting on the IRP process that existed until quite recently. This process has left a significant imprint on public land management in the province and will continue to serve as a point of reference in at least two respect. First, it appears that despite the abandonment of the IRP program by the provincial government, the plans that currently exist continue to be relied upon by decision-makers responsible

36 The land use zoning resulting from protected areas designation as well as existing sectoral planning requirements for water and forest resources are discussed above in Section 4. While these processes may achieve some measure of resource use integration, they do not constitute a comprehensive planning process as it is envisioned in this paper.

for project review and regulation. The most recent illustration of this reliance is the discussion of the Coal Branch Sub-Regional Integrated Resource Plan in the report of the joint federal-provincial panel reviewing the Cheviot Coal project.[37] Second, Alberta's experience with comprehensive land use planning offers valuable lessons that should inform the debate on options for the future of public land management in this province. Consequently, the IRP process will be briefly described and its success in overcoming barriers to integration in land and resource management will be assessed from the point of view of its underlying philosophy and its basis in law and policy.

5.1 Overview of the IRP Process

Alberta first developed an integrated planning process for the Eastern Slopes region in the late 1970s.[38] This process was later extended to other parts of the province, although the vast majority of existing plans are concentrated in the mountainous and foothills regions of Alberta. In 1977, *A Policy for Resource Management of the Eastern Slopes* was adopted to ensure that public lands and resources in the Eastern Slopes were protected, managed or developed according to a philosophy of integrated resource management.[39] This policy was revised in 1984, with a changed emphasis on the development of a strong tourism industry and increased recreational opportunities.[40] The Eastern Slopes Policy instituted integrated resource planning as the principal instrument of land and resource management in Alberta.

The authority to prescribe various uses for specific zones and to develop land use plans is found in s. 10 of the *Public Lands Act*, which enables the Minister by order to classify public land and declare the use to which different classes or zones may be allocated. The Eastern Slopes Policy established three broad zones for: (1) protection, (2) resource management, and (3) development. Within these zones, land was further categorized according to a more detailed system of eight land use zones.[41] A range of permitted, compatible and non-permitted activities was identified

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37 Alberta Energy and Utilities Board-Canadian Environmental Assessment Agency, *Report of the EUB-CEAA Joint Review Panel — Cheviot Coal Project Mountain Park Area, Alberta*, June 1997, at 122-126.

38 This area of approximately 90,000 km^2, encompassing the Rocky Mountains and foothills from the United States border to the British Columbia border south of Grande Prairie, is recognized as being the critical headwaters region for the Prairie Provinces.

39 Alberta Department of Energy and Natural Resources, *A Policy for Resource Management of the Eastern Slopes* (Edmonton: 1977).

40 Alberta Department of Energy and Natural Resources, *A Policy for Resource Management of the Eastern Slopes*, Revised 1984 (Edmonton: 1984). The revised policy clarified the objectives and implementation guidelines of the former policy and reevaluated the permitted activities in the various zones. These changes resulted in expanded opportunities for recreational activities as well as mineral exploration and development.

41 The detailed zones are as follows: 1. Prime Protection; 2. Critical Wildlife (under the Protection Zone); 3. Special Use; 4. General Recreation; 5. Multiple Use; 6. Agriculture (under the Resource Management Zone); 7. Industrial; 8. Facility (under the Development Zone).

for each of the eight land use zones, with watershed protection and recreation management being identified as the highest priorities.

The planning process involved the development of a hierarchy of plans, beginning with a general provincial plan and then moving to the regional, sub-regional, and local levels. Plan development required an interdepartmental planning approach with some public involvement and the final plans were approved by a Cabinet committee.

5.2 Lessons from the IRP Process

Alberta's IRP process constituted an important innovation in public land management which, not surprisingly, exhibited a number of strengths and weaknesses. While a full review of this planning process will not be attempted here, two significant features are noteworthy because they relate directly to important issues for public land law, as it is envisioned here and in the *New Directions* paper. These features give rise to several lessons to be drawn from the IRP process.

First, the IRP process was based on the multiple use philosophy. The zoning system allowed for a wide variety of permitted or compatible uses within each zone. Commercial ski developments, for example, were allowed in the most protective designation, the prime protection zone. In the critical wildlife zone, which was intended to "protect ranges or terrestrial and aquatic habitats that are crucial to the maintenance of specific fish and wildlife protections", a wide range of resource extraction activities such as logging, oil and gas exploration and development, and coal mining could be permitted.[42] Furthermore, the majority (65%) of the Eastern Slopes region was designated as a multiple use zone, the objective of which was to "provide for the management and development of the full range of available resources, while meeting the objectives for watershed management and environmental protection in the long term".[43]

This multiple use approach was also evident in the subordination – as a matter of both law and policy – of IRPs to existing resource commitments.[44] Once the rights to extract and develop various resources have been allocated, the consideration of alternative uses of the land and the selection of "best use" zones is seriously constrained both from a legal and financial point of view. The effect of this subordination was exacerbated in practice by the length of time required for the development of IRPs.[45] By the time plans were developed, major and frequently

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42 The area to be developed for the recently approved Cheviot Coal Project is to a very large extent (83%) designated as a critical wildlife zone under the Coal Branch Sub-Regional Integrated Resource Plan: *Report of the EUB-CEAA Joint Panel*, *supra* note 37 at 123.

43 *A Policy for Resource Management of the Eastern Slopes*, Revised 1984, *supra* note 40 at 11.

44 The 1984 policy states: "Existing land use activities and industrial operations will continue, subject to the regulatory systems now in effect", *ibid.* at 13.

45 As of 1992, eight out of seventeen sub-regional plans and three local plans had been completed for the entire Eastern Slopes. Outside of the Eastern Slopes area, seven subregional and

long-term resource dispositions had often already been issued on public land. In 1990, concerns about slow progress of plan completion in the face of accelerating forestry developments in northern Alberta were voiced by a sub-committee of the Environment Council of Alberta as follows:

> The limited financial and staff resources provided for Integrated Resources Planning bring the government's commitment to this process into question. Major decisions affecting resource allocations continue to be made for areas for which Integrated Resource Plans have yet to be completed. Although such decisions cannot be delayed indefinitely while planning is completed, the value of the planning system is diminished once commitments have been made.[46]

The risk that resource decisions will foreclose future land use options is, of course, even more significant in 1998 than it was in 1990, given the increasing pace of resource developments and the absence of any process for comprehensive land and resource planning.

The shortcomings of the multiple approach to land use planning in Alberta were highlighted in the recent review by the NRCB of a proposal to develop four season recreational and tourism facilities in the West Castle Valley, just north of Waterton Lakes National Park. While the development was proposed for a parcel of land zoned for "general recreation", this parcel abutted immediately a larger "prime protection" area. The location of the project in a narrow valley that constituted a critical north-south wildlife corridor and the board's conclusion that there existed significant threats to ecosystem integrity in the region as a whole led it to comment extensively – and critically – on the IRP process.

On the question of the general approach to land and resource management underlying the IRPs, the NRCB cited the opinion of the applicant's wildlife expert that "multiple use is not as highly favoured as a workable concept today as it was two decades ago when the 1977 *Eastern Slopes Policy* was being formulated, and that the Eastern Slopes Planning Process did not address the potential impact of placing different zones in relation to others".[47] The NRCB then expressed its own views as follows:

> The Board is concerned that the concept of integrated resource management set out in the *Eastern Slopes Policy* and other public lands planning and policy documents may create unrealistic expectations by the public that we can 'have it all,' particularly where relatively small geographic areas are concerned. [. . .] the Board believes that it must be recognized that sustainable development may not be achievable unless integrated resource management is understood to mean that uses may be permitted, but in more

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eleven local plans had been completed. Planning efforts focused mostly on the southern half of the province, leaving vast areas open for development without a planning structure: Susan Bramm, *Protecting Ecosystems in Alberta* (Edmonton: Environment Council of Alberta, 1992) at 33.

46 Environmental Council of Alberta, Policy Advisory Committee, *Our Dynamic Forests: The Challenge of Management*, A Discussion Paper Prepared for the Alberta Conservation Strategy Project (Edmonton: December 1990) at 48.

47 NRCB, *supra* note 35 at 10-11.

> discrete areas than have been available in the past; i.e., that certain areas may be designated for certain land uses only and other uses may be prohibited in the same areas in order to protect the natural resource.[48]

The board specifically focused on issues of *intensity* of land use and the associated environmental impacts and cumulative effects. It concluded that the existing zoning was inadequate to "achieve a sufficient level of land use control that would appropriately mitigate the potentially significant adverse impacts of the resort on the ecologically important lands surrounding the resort"[49] and needed to be modified on a more restrictive basis in order to maintain the natural environment.

The NRCB's concerns about the need to take into account the intensity of land use and the cumulative effects of proposed developments were echoed in a recent article by two officials from Alberta Environmental Protection that assessed the potential use of IRPs to address cumulative effects in Alberta. The authors noted that certain key components of the IRP process, notably the multi-sectoral approach, landscape focus, and consideration of social and ecological values, were positive attributes. They suggested, however, that cumulative impacts can only be properly addressed by an ecosystem-based planning approach which establishes ecological thresholds for valued ecosystems components.[50] They elaborated as follows:

> Land allocation mechanisms in integrated resource planning tend to focus on identifying kinds of activities that are appropriate in a given area, whereas ecological thresholds would focus on the level of activity, and more importantly, on identifying *acceptable levels of impact to the ecosystem*.[51]

Implementation of this approach would have required a shift from establishing measurable goals focused on maintaining certain levels of resource extraction, to specifying ecological values expressed through an assessment measure. Unfortunately, this shift to an ecosystem management paradigm advocated by provincial land use planners did not occur before the land use planning program was discontinued. The experience with Alberta's IRP process thus underlines the limitations of the multiple use philosophy and supports the argument that public land management – and public land law – should be based on principles of ecosystem management.

The second notable feature of the IRP process was its emphasis on flexibility and the absence of any legal foundation beyond the broad statutory authorization contained in s. 10 of the *Public Lands Act*. The Alberta government's intention was

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48 *Ibid.*

49 *Ibid.* at 10-30.

50 This approach resembles closely Hardt's two-level process for ecosystem management that is summarized above in Section 2, *supra* note 8, and described in more detail in the *New Directions* paper.

51 Oswald Dias & Brian Chinery, "Addressing Cumulative Effects in Alberta: The Role of Integrated Resource Planning" in Alan J. Kennedy, ed., *Cumulative Effects Assessment in Canada: From Concept to Practice* (Calgary: Alberta Association of Professional Biologists, 1994) 303 at 314 (emphasis in original).

to create a process that would guide resource managers in their decisions and remain sufficiently flexible to accommodate changing needs and situations. The 1984 version of the Eastern Slopes Policy clearly stated that it was "intended to be a guide to resource managers, industry and publics having responsibilities or interests in the area rather than a regulatory mechanism", a statement which was reproduced in most plans.[52] The government wanted the policy to be "sufficiently flexible so that all future proposals for land use and development may be considered" and confirmed that "no legitimate proposals will be categorically rejected".[53] In order to retain the latitude that was considered necessary in order to adjust the plans to changing circumstances, a decision was made to not adopt a legislated approach to integrated resource planning. Even though the regional and sub-regional plans were approved by Cabinet, they were not legal documents[54] and therefore created no legal rights or obligations. Applicants for major development proposals were allowed to apply formally for rezoning of land areas, and Cabinet retained the power to approve modifications to land use zones after an interdepartmental review, a power that appears to have been rarely used in practice.

One implication of the non-legal status of the IRP process and the resulting plans was that implementation depended to a large extent on the cooperation of all departments. As stated in 1984 policy, the plans were to be implemented "within the terms of existing legislation and regulations by those government departments with appropriate administrative responsibilities".[55] Implementation relied on the interdepartmental referral system, which ensured that all agencies responsible for various types of land and resource management activities had an opportunity to review applications for development or dispositions. As noted in one commentary, the entire system relied on an "attitude of tolerance" within the agencies: "Neither the more detailed referral systems nor the planning processes could ensure implementation without the desire and positive attitude to make the system work".[56] This comment underlines the fundamental problem with such an approach to planning: should the political commitment (backed by funding allocations) to integrated resource planning wane over time, the entire system is bound to collapse.

The lack of legal status of IRPs and the reliance on the various resource managers to implement and interpret the plans' objectives resulted in final decision-making over resource developments being retained by the sectoral agencies. Admittedly, a high degree of flexibility and adaptability in planning was achieved by this approach; the down side was a corresponding degree of uncertainty over plan

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52 *Supra* note 40 at iii.

53 *Ibid.*

54 See, for instance: Alberta Energy/Forestry Lands and Wildlife, *Nordegg-Red River Sub-Regional Integrated Resource Plan* (Edmonton: 1988) at iii: "This plan has no legal status and is subject to revisions and review at the discretion of the Minister of Forestry".

55 *Supra* note 40 at 5.

56 Les Cooke, Craig Taylor & Ed Wyldman, "Eastern Slopes Policy and Integrated Resource Management in Alberta" in Reg Lang, ed., The Banff Centre School of Management, *Integrated Approaches to Resource Planning and Management* (Calgary: The University of Calgary Press, 1986) 169 at 181.

designations and permitted uses. In this context, flexibility and administrative discretion raise the possibility of incremental plan modifications and revisions of the land use zones and, over time, a progressive weakening of the protective zonation in favour of expanded resource developments. In the end, an overly flexible planning process may cease to fulfill its critical function of stemming the tendency to incrementalism and protecting long term public values, such as the protection of the natural environment, in areas subject to intense development pressure.

The absence of a detailed legal framework for the IRP process and the resulting plans thus had important implications for this component of public land management. In particular, the fact that the IRP process created no legal rights or obligations of either a procedural or a substantive nature resulted in a highly discretionary process. It appears, for example, that the effectiveness of the IRP program may have been undermined by the absence of any legal requirement that the planning process be completed in a timely manner and precede resource allocation decisions. The weak legal foundations of the IRP process were most graphically illustrated by the fact that the program was abandoned by the province, without public debate and without the need to make even the most minor amendment to statutes or regulations. The IRP experience therefore supports the argument that the planning function that is essential to effective public land management should be firmly entrenched in public land law.

Alberta's experience with IRPs is thus instructive for the future of public land law in the province. It confirmed the weaknesses of the multiple use approach and the need for a firm legal basis for planning. The discussion of these deficiencies is not intended, however, to imply that the overall experience with IRPs was a negative one. IRPs have been and continue to be relied upon by resource managers and regulatory boards as statements of government policy, a proof of their practical relevance to resource management decision-making. The above comments are simply meant to suggest areas where the IRP model could be improved and aligned more clearly with the approach to public land law that underlies the analysis in this paper.

5.3 Summary

Alberta currently lacks a comprehensive planning process for public land and resources and has never had a legal basis for such a process beyond the general statutory authorization contained in s. 10 of the *Public Lands Act*. A key component of the template for public land law set out in Section 2 of this paper is thus absent. Furthermore, this gap in the legal framework for public land management is not adequately filled by either protected areas designation or by the sectoral planning processes that currently exist for forestry and water resources. In fact, the abandonment of the IRP program without any replacement on the horizon suggests that the province may be moving away from its earlier commitment – albeit non-statutory – to integrated planning in public land management. While the IRP process

exhibited important deficiencies when measured against the ideal of a planning process embedded in public land law, it offered a base on which to build. The current vacuum in relation to comprehensive planning is thus unquestionably a retrograde step for public land management in Alberta.

6. Integration Among the Stages of Public Land Management

The third key attribute of an integrated body of public land law is the logical progression of decision-making from general policies regarding land use objectives and priorities to specific regulatory requirements tailored to individual projects. Ideally, each stage in the decision-making continuum should have a distinct purpose and should be designed to provide the information and public input that is required to address the issues raised at that stage in a thorough, open and transparent manner.

The principal stages of decision-making regarding public land and resources have been referred to earlier in this paper. The objective in this section is to determine whether legal mechanisms exist in Alberta to mould broad policy-making and priority setting, land use planning, rights disposition and project-specific review and regulation into a structured and coherent process for public land management. To begin, it is necessary to consider whether the earlier stages in this continuum inform subsequent decisions and constrain the range of issues that they are required to address.

6.1 Integrative Mechanisms at the Stages of Public Land Policy and Land Use Planning

As shown in Section 4 of this paper, Alberta's legislation governing public land and resources lacks the unifying normative foundation and substantive provisions regarding management objectives, priorities and standards that would bind it into a coherent body of public land law. There is consequently no overarching policy framework, embodied in public land law, to ensure that the various stages of public land management operate as an integrated system of decision-making.

In addition, as discussed above in Section 5, there is currently no integrated planning process for public lands and resources in Alberta and the IRP program that was in place until recently never had a legal basis beyond the mere authorization of Ministerial authority contained in s. 10 of the *Public Lands Act*. Not surprisingly, the legislation governing rights disposition and project-specific review and regulatory processes makes no reference to IRPs or comprehensive planning. Protected areas statutes, inasmuch as they constitute a very restricted form of land use planning and may affect rights disposition, do play a limited integrative role as noted below.

There is thus little substance at the 'front end' of the public land management continuum in Alberta to guide rights disposition and project-specific review and regulation. The implications of this lack of legal integration can be observed at both of these subsequent stages.

6.2 Integration at the Rights Disposition Stage

Turning to the rights disposition stage of the public land management continuum, there is very limited statutory integration with other decision-making processes. As noted above in Section 4, rights disposition in Alberta is generally a highly discretionary process, occurring largely or completely behind closed doors and governed only by minimal statutory authorizations that contain little, if any, procedural or substantive direction to decision-makers. There are, however, several mechanisms that warrant brief mention because they achieve a degree of integration between rights disposition and other stages of public land management.

The planning process has had some impact at the rights disposition stage in that IRPs have been taken into account as a matter of government policy by the Crown Mineral Disposition Review Committee (CMDRC) and in FMAs. The CMDRC, formerly established under the Land Conservation Regulation,[57] has been continued under s. 10(2) of EPEA. It reviews applications for mineral rights dispositions for their potential impacts on surface and subsurface resources and recommends to the Minister of Energy whether mineral rights should be issued unconditionally, issued with specific conditions attached (e.g., access restrictions), or not issued. Although Alberta Energy is not legally bound by the recommendations of the Committee, in practice the Minister generally follows its advice. In areas where IRPs had been completed, FMAs have also referred to these documents as one of the factors that the Minister may consider when determining if certain portions of the FMA lands should be allocated to non-forestry uses. It thus appears that the practice of reviewing IRPs when making rights disposition decisions is fairly well established, although it remains to be seen whether IRPs will continue to be of value in the absence of an integrated provincial planning program. Regardless of administrative practice, however, there is no legal obligation to factor IRPs into decisions on resource disposition, nor is there any formal requirement regarding the weight to be attached to these documents. Furthermore, IRPs have never been complete in their coverage of Alberta public lands; resource dispositions in certain regions consequently have no comprehensive planning framework from which to take direction.

A limited degree of integration between planning and rights disposition is also achieved through protected areas legislation. Certain protected areas statutes specifically restrict the issuance of new interests, leases or permits within the boundaries of the protected areas (e.g., wilderness areas or ecological reserves).

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57 Alta. Reg. 125/74 under the *Land Surface Conservation and Reclamation Act* (Act repealed by s. 247 of EPEA).

The existence of legislated protected areas is also taken into consideration by sectoral departments at the rights issuance stage; for example, provincial parks or ecological reserves are typically excluded from the area allocated to forest companies under FMAs. In addition, the above-mentioned CMDRC factors in existing or even candidate protected areas sites in its recommendations on mineral rights dispositions. Nevertheless, as noted in Section 4, ministerial discretion in the management of the majority of protected areas, notably regarding decisions to issue land and resource dispositions or permits, remains largely unfettered.

Rights disposition decisions can also have an impact on subsequent decision-making regarding land and resource uses through the attachment of terms and conditions. While these limitations can be imposed by implementing the recommendations of the CMDRC or through FMAs, there is no legal requirement to do so. Furthermore, decisions to attach terms and conditions to rights dispositions are not guided by statutory provisions, nor are they the product of a transparent process incorporating public involvement. There is thus neither legal nor practical assurance that the rights disposition stage will produce reasoned decisions or definitive statements of public policy that could be used by decision-makers responsible for project review and regulation.

6.3 Integration at the Stage of Project-Specific Review and Regulation

The relationship between the project-specific review and regulatory stage and the planning stage of the public land management continuum raises several interesting issues. There is, as noted above, no legal provision for – let alone requirement of – integration. Nonetheless, IRPs have been explicitly considered in the course of project review and regulatory processes and there is no doubt that in any public review process, whether the environmental assessment process under EPEA or the review and regulatory processes of the EUB and NRCB, participants may argue that IRPs should be considered by decision-makers. The lack of legal integration between this stage and the planning process makes it difficult, however, to determine exactly what their effect has been, or might be in the future.

The clearest examples of this use of planning documents have occurred before the EUB and NRCB. Participants in hearings conducted by both boards have treated IRPs as being germane to the determination of whether proposed projects are in the ‘public interest’. On a number of occasions, the boards have referred explicitly to these documents in their decisions. For example, in the recent decision approving the Cheviot Coal Project, a joint EUB-CEAA panel stated its view that “the consistency of a project with government policy does provide one of many tests of the public acceptability of a project" and concluded that the proposed coal mine was “conceptually consistent with the Integrated Resource Plan for the region”.[58] In the

58 *Report of the EUB-CEAA Joint Review Panel*, *supra* note 37 at 126; see also: EUB, *Applications*

earlier Whaleback decision, the EUB based its decision to deny the application for a well licence in part on the inconsistency between the applicant's proposed operations and the sub-regional IRP.[59] As discussed above in Section 5, the NRCB has also considered IRPs, notably in its West Castle decision where the board appeared unconvinced that they provided a satisfactory basis for guiding project-specific decisions.

IRPs have thus figured in project review and regulation, but the EUB and NRCB have consistently treated them as merely one among many factors to be considered in deciding whether a given project should proceed. There is a good reason for their unwillingness to go further, and it is quite independent of whether or not they view IRPs as useful planning instruments. Without a formal legal connection between planning and project review, it is very doubtful whether the boards could adopt a policy-based IRP as determinative of a project-specific application without unlawfully fettering their discretion.[60] The legal mandates of Alberta's two quasi-judicial tribunals, which require them to exercise their independent judgement when determining if a proposed project is in the 'public interest', thus preclude them from treating non-statutory planning processes as authoritative. Consequently, public land management in Alberta is legally structured so that issues relating to broad land-use priorities and the appropriateness of proposed types of land use can and arguably should be addressed at the project review stage. When the boards confront these issues, land use planning can provide no definitive guidance.

The effect of rights disposition decisions at the project review and regulatory stage also raises interesting issues. With the exception of timber dispositions by means of FMAs, there is no legal integration between the two stages. The requirement of independent judgement under EPEA and the statutory 'public interest' mandates of the EUB and NRCB mean that they could not be bound by the outcome of the rights disposition process. The boards are thus placed in a somewhat peculiar position when an applicant seeks approval to exercise its 'rights' as holder of a resource disposition. The EUB, for example, takes the view that the holder of a mineral lease has a 'right' to develop its resources, but that this 'right' does not guarantee that any specific development proposal – or indeed any development proposal at all – will receive approval. This position was articulated by the board in the Whaleback decision as follows:

> While the Board accepts Amoco's right to explore for and develop hydrocarbons in the Whaleback and therefore it need for the well, the Board does not believe that either the acquisition of mineral rights or a surface lease agreement in any way automatically

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by Shell Canada Ltd. for Permit to Construct Sour Natural Gas Pipeline in the Carbondale Area, Decision D95-6, 15 March 1995, at 126.

59 *Application for an Exploratory Well, Amoco Canada Petroleum Company Limited, Whaleback Ridge Area*, ERCB Decision D94-8, 6 September 1994, at 32-35.

60 In the Whaleback decision, *ibid.* at 32, the ERCB — now EUB — stated clearly the view that "its ultimate discretion is not fettered by the guidelines set out in the IRP." The board added, however, that "it should be cognizant of the IRP in reaching its decisions and can draw from the document valuable insights and direction into the Provincial Government's land-use goals."

> confers the right of an applicant to a well licence. The Board must balance Amoco's need for the well against the potential economic, social, and environmental costs and benefits accruing to the public from the exploration well.[61]

The granting of mineral rights in a certain area through the provincial government's rights disposition process is thus no guarantee that the project review process will find the mineral development in that area to be acceptable in principle, quite apart from whether it would be approved subject to various terms and conditions.

In the case of forest resources, integration between rights disposition and project review and regulation is achieved indirectly through provisions in FMAs linking the allocation of timber rights to the construction and operation of a mill. Failure to build the mill within the time specified in the FMA can result in the cancellation of the agreement.[62] As the NRCB has authority to review and determine the acceptability of major forest industry projects, such as pulp and paper mills, a refusal by the board to approve a proposed mill could therefore directly affect the timber disposition, since the main condition for the right allocation would not be fulfilled.

The NRCB will confront its first application for a pulp and paper mill in 1998. For the first time since its creation, the board will have to consider whether the review of a proposed mill also extends to the forest tenure allocated in connection with its construction. The NRCB will be called to exercise its independent judgement with respect to the acceptability of the proposed mill, based on an extensive list of factors including an assessment of the sources of supply, the need for the project, and its regional and cumulative impacts on resources and resource uses.[63] The mill review will occur following extensive negotiations and preliminary arrangements between the government and the forest company (Daishowa-Marubeni International Ltd.) regarding timber dispositions. The company already holds an FMA obtained in 1989 for a previous mill, and the original FMA has been amended to provide for additional timber supply, should a second mill be approved. Should the board refuse to approve the mill as proposed, the forest company would be compelled to re-apply to the board until such time as an approval was obtained, and the timber disposition would not become effective until after approval and construction of the mill.

The fact that the government has issued or agreed in principle to issue mineral or timber rights does not, therefore, preclude an independent evaluation at the project review stage of the general acceptability of resource extraction (or specific related activities) in the area covered by these rights. It is questionable, however, whether project-specific hearings constitute the best venue for debating these matters, given that they frequently have implications that extend well beyond the

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61 *Ibid.* at 12.

62 E.g., Crestbrook Forest Industries Ltd. FMA, O.C. 556/91, s. 37(1). Cancellation of the FMA is only a last recourse; FMA holders are given a six month notice to comply and Cabinet is entitled to grant extensions to forest companies to enable them to comply with their obligations to construct a mill (s. 37(2)).

63 Rules of Practice of the Natural Resources Conservation Board, Alta. Reg. 345/91, Appendix.

impact of any particular project. Equally, as noted above, opening up fundamental questions regarding the appropriateness of certain land uses after rights issuance has occurred or when it is at a stage of advanced negotiations places the decision-maker – to say nothing of the project proponent – in a somewhat uncomfortable position. To provide some practical illustrations of these difficulties and their relationship to the lack of integration among the stages of public land management, two case studies will be briefly reviewed.

6.4 Case Studies

The lack of integration between different stages in the public land management process was highlighted by the decision of the Energy Resources Conservation Board (ERCB – now the EUB) on the application by Amoco Canada Petroleum Co. Ltd. for a licence to drill an exploratory well in the Whaleback region of southern Alberta.[64] In this case, the province had sold mineral rights in an environmentally sensitive area and the company conducted initial exploration work and proceeded with an application to drill a well. Amoco's costs were $1.6 million for the mineral leases and $1.5 million for work undertaken up to and during the project review process.[65] After conducting a public hearing, the ERCB rejected the well licence application, in part because of an apparent inconsistency between Amoco's development proposal and the sub-regional IRP and in part because the Whaleback area was likely to be nominated for protection under Alberta's protected areas initiative, *Special Places 2000*.

The Whaleback case illustrates the unclear relationship that currently exists between broad land use policies and specific project review processes in Alberta.[66] Issues raised at the ERCB hearing went well beyond the proposed well and access road. Intervenors were concerned with the environmental and social implications of full-field development, the impacts of oil and gas activity on wildlife populations in the Eastern Slopes, and the ecological significance of the Whaleback area on a provincial (and national) scale. A broad range of land-use issues that had either been ignored or inadequately addressed at the earlier land use planning and rights issuance stages were thus telescoped into the ERCB's project review process. More specifically, the Whaleback case showed that there exists considerable uncertainty regarding the implications of the policy-based IRP process for the ERCB's – now EUB's – statutory mandate to apply a public interest test when deciding on project applications. These deficiencies resulted in unnecessary cost to the applicant and continuing questions regarding future land use in the Whaleback region.

The NRCB's West Castle decision also highlighted the difficulty of integrating

64 *Supra* note 59.
65 *Ensuring Prosperity*, *supra* note 15 at 52.
66 These issues are discussed in Steven A. Kennett, "The ERCB's Whaleback Decision: All Clear on the Eastern Slopes?" (1994) 48 *Resources* 1.

various stages of public land management.[67] Like the Whaleback case, this application raised a series of more general concerns regarding land use and ecosystem integrity.[68] Following an extensive hearing, the NRCB rejected the application as proposed and indicated that it would be prepared to grant an approval on the condition that the project be redesigned and the province implement a comprehensive land use policy for the surrounding lands in order to protect more adequately the sustainability of the Crown of the Continent ecosystem. Of particular significance was the NRCB's criticism of the IRP process – noted above – and its conclusion that a decision on this specific project could not be made without revisiting the framework for land use planning and the ongoing management structures for surrounding public lands.[69]

As these two case studies make clear, the lack of legal integration among stages in decision-making becomes most evident (and problematic) at the point of project review and project-specific regulation. When a controversial project reaches this point, important general policy issues may not have been addressed in a public forum and through a transparent decision-making process despite the fact that planning and resource disposition decisions may already have been made. As a result, decision-makers at the project review stage have been confronted with arguments regarding such issues as the appropriateness of broad categories of land and resource use in a given area, the cumulative impacts of the proposed use in relation to a range of existing and proposed uses, and the ecological value and condition of the region where the development is to occur. Some attention to these issues is likely inevitable in any review of a major and controversial project. The effect of throwing them into the lap of those responsible for project review is, however, to create significant substantive and procedural problems for public land management.

If decision-makers at the project review stage give full effect to their broad statutory mandates, they are obliged to revisit (or examine for the first time) fundamental issues involving a host of interests and values of profound social, economic and environmental importance in terms of an undefined 'public interest'. Resolving these issues in a satisfactory manner is a significant challenge for a quasi-judicial tribunal, operating without clear statutory guidance and convened to consider a discrete development proposal. Board members may lack access to both the information base and the input from all affected interests that are necessary to make a fully informed decision on these matters. Furthermore, transforming a project application into an inquiry into provincial land use policy may be unfair to the applicant and procedurally cumbersome. Finally, one might question the appropriateness of appointed officials making judgements of broad public policy without, as noted above, any clear statutory guidance.

Alternatively, if the EUB or NRCB treats these broader issues as having been

67 NRCB, *supra* note 35.
68 Kennett, *supra* note 35.
69 NRCB, *supra* note 35 at 10-29, 10-30.

de facto resolved by previous planning decisions (if there are any) and by the fact of rights issuance, they may be vulnerable to judicial review on the grounds of fettering their discretion. They may also effectively choke off the principal vehicle for focused public debate on these issues. In the absence of comprehensive and legally-based planning and with rights disposition decisions made without direct public input or a transparent procedure for environmental assessment, the public expects to have a voice on the full range of land use issues when projects enter the environmental assessment process and come before the review and regulatory tribunals. Since this stage is more open, transparent and legally structured than either planning or rights issuance, it naturally becomes the focal point for public involvement in decision-making regarding the management of public land and resources. This political dynamic increases the demands on the project review and regulatory stage.

6.5 Summary

In conclusion, there are few legal mechanisms linking the various stages of decision-making in public land management in Alberta. In fact, an integrated decision path from general policy issues to project-specific regulation is currently precluded by the absence of both substantive and procedural law at the early stages and by the independent statutory mandates of decision-makers responsible for project review and regulation. This discussion is not meant to imply that integration among these stages is nonexistent in practice; a certain level of integration may be achieved by mechanisms for interagency coordination, a subject addressed in the next section. However, based on the criterion of legal integration among stages of decision-making, there is little public land law to be found.

7. Integrative Mechanisms for Interagency and Interjurisdictional Coordination

The coordination of decision-making authority across agency and jurisdictional lines is the fourth key attribute of an integrated body of public land law. This attribute is important because decisions taken by sectoral land and resource managers almost inevitably affect aspects of public land management for which other agencies or jurisdictions are responsible. For instance, mineral rights dispositions and the authorization of oil and gas development or mining operations can have significant implications for forest, water and livestock management as well as for recreational uses of the land and the protection of wildlife. Interagency consultation and coordination is therefore indispensable in order to avoid or mitigate potential resource conflicts, address cumulative impacts and prevent the degradation of ecosystems. Further, since the effects of land and resource developments often cross jurisdictional boundaries and may interfere with the land management objectives pursued by other governments, interjurisdictional cooperation is needed to evaluate and prevent or lessen these effects. The purpose of this section is to

assess the extent to which the legislation governing the use of public land and resources in Alberta supports interagency and interjurisdictional coordination.

7.1 Interagency Coordination

Mechanisms for interagency coordination in Alberta have been developed at all stages of decision-making, from planning to project-specific review and regulation. For the most part, these mechanisms are administrative and policy-based, relying on the use of interdepartmental committees and referral processes. Over the past few years, however, recognition of the need for integration has resulted in the inclusion in environmental and resource management legislation of provisions explicitly enabling managers to enter into cooperative arrangements with other agencies. This legislative recognition of the need for interagency integration is most noticeable at the project review and regulation stage, where coordination in the conduct of environmental assessments and the issuance of environmental approvals is perceived to be of critical importance.

As a general matter, EPEA provides a statutory basis for the establishment of interdepartmental advisory committees that could address issues of public land management. For instance, the Sustainable Development Co-ordinating Council, previously established as the Natural Resources Co-ordinating Council under the *Department of the Environment Act*,[70] is continued under s. 5 of EPEA. The Council, comprising Deputy Ministers from various departments, the chairs of the EUB and the NRCB, and other government representatives designated by the Minister, provides recommendations and submits reports to the Minister “on interdepartmental matters related to sustainable development and the protection of the environment” (s. 6). EPEA enables the Minister or a designated Director to establish other interdepartmental committees to advise on matters related to the Act (s. 10). The specific responsibilities of these committees are not, however, defined in mandatory statutory language and there is no legal requirement that they play an integrative role in the management of Alberta’s public lands and resources.

Turning to the planning stage, the IRP program was predicated upon an integrated approach to decision-making. In the absence of a legislative basis for this process, integration was achieved through administrative mechanisms rather than statutory provisions. Interagency teams were thus relied upon to maximize communication between departments and agencies, from the Cabinet committee that gave final approval to IRPs to the lower level committees of officials that developed these plans. With the termination of the IRP program, a number of these committees no longer exist and new ones have been instituted. For example, as part of a provincial regionalization plan initiated by AEP in 1995, regional Environmental Resource Committee (ERCs) have been established to “provide an interdepartmental forum for the communication, coordination and resolution of

70 R.S.A. 1980, c. D-19, s. 11.

interdepartmental issues at the regional level with regard to environmental and natural resources management and administrative issues at the policy, program and operational levels".[71] These committees appear to have inherited certain of the regional planning functions formerly undertaken through the IRP program, since their terms of reference include identifying regional planning needs as well as initiating, reviewing and endorsing all regional planning projects. As the future of integrated resource management in Alberta is currently being debated within the provincial government, selected IRPs are in the process of being updated at the regional level.[72] This activity is occurring, however, through administrative actions for which there is no developed legal framework.

At the present time, the only legislative provision specifically enabling interagency coordination at the planning stage is found in the *Water Act*. Under s. 9(2) of that Act, the Director in his or her discretion may cooperate with other government departments or agencies in the development of area-specific water management plans. As required under the Act, a water management planning framework is currently being developed. This framework may address key issues of interagency involvement in the development of water management plans as means to achieve some degree of integration in water planning.

At the rights disposition stage, the interdepartmental CMDRC, discussed above in Section 6, plays a key advisory role in the disposition of mineral rights. The committee is chaired by an official from AEP and includes, in addition to representatives from various divisions within AEP, officials from AFRD, Alberta Community Development, Alberta Energy, the EUB and Alberta Municipal Affairs. This broad representation ensures that the committee's recommendations incorporate the concerns of key departments and agencies. The disposition of timber rights also involves an internal governmental review, although this review is not conducted by a formally established interdepartmental committee.[73]

At the project review and regulation stage, interagency integration of decision-making processes is supported by both legal and administrative mechanisms. Coordination between AEP, which conducts environmental assessments and issues environmental permits, licences and approval under a variety of statutes, and the EUB and NRCB, which have primary responsibility for the review and approval of major resource development projects, is particularly critical.

Statutory provisions promoting integration are found in both EPEA and the legislation governing the boards. Thus, while environmental assessments of

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71 Alberta Environmental Protection, "Environmental Resource Committees — Our Department in the Regions", Appendix 2, Initial Terms of Reference — Environmental Resource Committees (undated). ERCs are composed of senior regional staff from each service within AEP, and may include representatives from other provincial government agencies with interests or mandates relating to the committees' business.

72 Telephone conversations with government officials, December 1997.

73 John Lilley, *Public Involvement Requirements for Activities in the Green Area of Alberta* (Sherwood Park, Alberta: Lilley Environmental Consulting, October 1996) at 12.

proposed developments are undertaken by AEP, EPEA prescribes that the final environmental assessment reports be communicated to the EUB or the NRCB when the proposed projects require board approval (s. 51). Other EPEA provisions are designed to coordinate actions by AEP and the boards on regulatory matters; for example, s. 65 specifies that the Director, in making a decision to issue an approval or registration, is required to consider any applicable written decision of the EUB or NRCB and may consider any evidence before those boards in relation to that decision. Under a number of the sectoral statutes administered by the EUB, the board must refer the applications to the Minister of AEP for his or her approval and incorporate any conditions imposed by that Minister in the permits or licences that it issues.[74]

Under s. 5(1) of the *Natural Resources Conservation Board Act*, no reviewable project may proceed until an approval has been obtained from the NRCB, and the board is entitled under s. 5(2) to order that no other authorization be issued by a provincial department or agency until it has granted an approval. There is, however, no obligation on AEP to include the terms and conditions specified in the NRCB's decision reports in the project approvals and licences that it issues. This gap in the legislative framework may be a problem since, unlike the EUB, the NRCB does not have ongoing regulatory authority over projects that it approves. Without explicit enforcement of the NRCB's decision report through regulatory instruments administered by AEP, it is unclear how compliance with terms and conditions specified by the NRCB can be ensured.

Somewhat similar integrative provisions are also contained in the *Water Act*. Under s. 5(1), the Director is obliged to refer projects which require an approval under EPEA – along with any recommendation that he or she considers appropriate – to the relevant Director within the department. The Director is further prevented from issuing an approval, preliminary certificate or licence or approving a transfer of water rights until he or she is satisfied that environmental assessment requirements have been complied with (s. 16(1)). Upon receipt of an environmental impact assessment report from AEP, the Minister advises proponents that they may apply for approvals or licences or that their application may proceed under the *Water Act* (s. 17).

These statutory provisions achieve a measure of administrative coordination. They do not, however, impose substantive integration in the sense of systematically requiring consistency or making decisions at one stage binding on subsequent decision-makers.

Cooperation between the regulatory boards and other provincial government agencies or departments is also authorized by legislation. For example, the *Natural Resources Conservation Board Act* enables the board to participate in the proceedings of, or to conduct a review jointly or in conjunction with, another provincial board, commission or body (s. 20(1)). This provision is almost identical to

74 See, for example: ss. 21(1) and (2) of the *Coal Conservation Act*.

s. 23(3) of the *Energy Resources Conservation Act*, which likewise entitles the EUB to conduct cooperative proceedings with other boards and agencies.

In addition to the above legislative provisions, government departments and agencies have developed a range of administrative mechanisms to promote integrated decision-making. For example, during the environmental assessment process, the EUB and NRCB may provide input to AEP on the development of terms of reference for environmental impact assessment reports for projects falling within each board's respective jurisdiction.[75] AEP coordinates an interdepartmental review of this report in order to identify deficiencies in the submitted material and ensure that sufficient information is provided to proceed to a public hearing before the EUB or NRCB. In the event that a hearing is held, AEP personnel may participate in the hearing to present environmental or regulatory information. The 'one-window approach' to the review and regulatory processes administered by the EUB and AEP involves the use of Memoranda of Understanding between the two agencies (e.g., with respect to the development of oil sands mines or processing plants)[76] and the development of administrative procedures for coordination of applications and review and approval processes.[77] The objective is to ensure efficiency of process and consistency of result. Similarly, the NRCB and AEP are in the process of developing a coordinated project review and regulatory process through a draft Memorandum of Understanding setting out the statutory responsibilities of the two agencies and delineating ways in which their activities will be harmonized.[78]

Interagency coordination is thus well established among many of the provincial departments and agencies responsible for public land management in Alberta. The legal basis for this integration is largely in the form of enabling provisions, although in certain instances interagency cooperation is more specifically required. While this legal basis falls short of constituting a comprehensive framework for integrated public land management, it clearly provides the authority required to establish a variety of administrative mechanisms for interagency coordination.

7.2 Interjurisdictional Coordination

The need to address federal-provincial and transboundary aspects of land and resource management has led legislators to insert enabling provisions in some recent environmental protection and resource management statutes. For example, under s. 6 of the *Water Act* the Minister is empowered to enter into agreements with

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75 The preparation of environmental impact assessment reports is required for the most detailed level of environmental assessment under EPEA. The terms of reference and contents of these reports are provided for in ss. 46 and 47 of the Act.

76 Memorandum of Understanding between the Alberta Energy and Utilities Board and Alberta Environmental Protection with respect to Oil Sands Developments (April 1996).

77 E.g., Administrative Procedures for Coordination of AEUB Coal Licence Applications and AEP EPEA Approvals, 28 June 1995.

78 Draft Memorandum of Understanding between the Natural Resources Conservation Board (NRCB) and Alberta Environmental Protection (AEP), 30 October 1996, Discussion Draft 1.

other jurisdictions with respect to, *inter alia*, water conservation and management, water-power development, flood control and management or transboundary water. Interjurisdictional cooperation is also possible in the development of a water management plan (s. 9(2)(b)). General language addressing this issue is also found in s. 12 of EPEA, which states that the Minister "shall . . . maintain a continuing liaison" with the federal government, other provincial governments and local authorities in Alberta "in relation to matters under the administration of the Minister." In addition, EPEA contains a general provision establishing ministerial authority to enter into intergovernmental agreements (s. 20). Provisions of this type were included in previous generations of environmental protection and resource management statutes and have, on a number of occasions, provided the legal basis for formal interjurisdictional arrangements. Alberta has, for example, been a party to the Canada-Alberta-Saskatchewan-Manitoba Master Agreement on Apportionment since 1969 and has thus been involved in interjurisdictional water management through the Prairie Provinces Water Board.

With the exception of s. 9(2)(b)(iv) of the *Water Act*, which enables the Director to cooperate with other jurisdictions in the development of water management plans, there appear to be no explicit provisions in Alberta's land and resource management legislation regarding interjurisdictional cooperation at the planning and rights disposition stages. For example, there is no legal requirement that provincial land use planning and resource management adjacent to national parks be coordinated with Parks Canada's planning and management processes. As highlighted by the report of the Federal Banff Bow Valley Task Force, lack of integration in this context is a serious deficiency when public land management is viewed from an ecosystem perspective. Although the Task Force's enquiry was geographically restricted to Banff National Park, it concluded that there is "a great deal of evidence supporting the need for a more integrated approach to planning, management and decision-making in the [Bow] Valley" as a whole.[79] The Task Force noted some ongoing efforts at interjurisdictional cooperation, but concluded that "the situation in the region demands a more urgent and directed approach."[80]

Concerns with the impacts of development on a transboundary ecosystem were also expressed by the NRCB in its West Castle decision. The board recognized that the Crown of the Continent ecosystem, which encompasses areas of southwestern Alberta, southeastern British Columbia and northern Montana, was already under significant stress and that the proposed development would create a risk of further deterioration.[81] Consequently, the board proposed the creation of a special management area, the Waterton-Castle Wildland Recreation Area (WCWRA) and emphasized "the need to formalize intergovernmental relationships with our neighbors to ensure that the broader ecosystem surrounding the proposed WCWRA

79 Banff-Bow Valley Study, *Banff-Bow Valley: At The Crossroads*, Summary Report of the Banff-Bow Valley Task Force (October 1996) at 61.

80 *Ibid.*

81 NRCB, *supra* note 35 at 9-73.

is managed on an ecosystem basis."[82] The provincial government did not accept the NRCB's recommendation to create the WCWRA and formal interjurisdictional arrangements for ecosystem management in the Crown of the Continent have yet to be established. Had the WCWRA been created, an opportunity would have existed to establish either a statutory or policy-based framework for an integrated, interjurisdictional approach to managing the ecologically and economically significant public land and resources in the southwestern portion of Alberta.

Interjurisdictional cooperation has been addressed more explicitly in legislation governing the project review and regulatory stage of decision-making. Most notably, both the Alberta and federal statutes establishing environmental assessment processes specifically provide for cooperation in the conduct of assessments. The purpose section of EPEA acknowledges "the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts" (s. 2(h)) and the Act authorizes the Minister to enter into agreements with other jurisdictions with respect to environmental matters (s. 20). Interjurisdictional agreements for the conduct of environmental assessments are specifically provided for under s. 55 of EPEA. Both the EUB and the NRCB are also authorized to enter into interjurisdictional agreements with a federal or provincial department or agency and hold proceedings jointly or in conjunction with such body.[83]

The equivalent provisions in federal law are found in the *Canadian Environmental Assessment Act* (CEAA), the purpose section of which refers both to transboundary environmental effects and to the elimination of "unnecessary duplication in the environmental assessment process" (ss. 4(c), (b.1)). Where both federal and provincial processes apply to the same project, CEAA enables federal authorities to enter cooperative arrangements with the province (including the delegation of certain functions) at the screening and comprehensive study stages (ss. 12(4), 17(1)). In addition, CEAA provides for agreements or arrangements with provincial departments or agencies respecting the establishment of joint review panels (ss. 40-42).

Cooperative arrangements for environmental assessment were formalized on August 6, 1993 when the federal and the Alberta governments signed the Canada-Alberta Agreement for Environmental Assessment Cooperation. This agreement establishes a general framework for intergovernmental cooperation and its two subagreements deal with joint review panels and the establishment of designed offices and notification procedures. Several joint assessments have been conducted pursuant to this agreement, the most recent being the review of the Cheviot Coal Project by a joint review panel comprising two EUB members and a federal nominee.[84]

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82 *Ibid.* at 12-9.

83 See: s. 20(2)(3) of the *Natural Resources Conservation Board Act* and s. 23(2)(3) of the *Energy Resources Conservation Act*.

84 "Agreement between Alberta Energy and Utilities Board and The President of the Canadian

A fully integrated approach to public land management would, of course, also require interjurisdictional coordination at the project review and regulatory stage when projects may have transboundary impacts. Beyond general authorizations for intergovernmental agreements and the provisions in the *Water Act* noted above, Alberta's land and resource management legislation does not specifically oblige decision-makers to address transboundary issues. By way of contrast, both CEAA and the British Columbia *Environmental Assessment Act* provide explicitly for transboundary environmental assessment.[85]

Alberta's legislation governing the project review and regulatory stage of public land management thus contains a number of provisions that authorize interjurisdictional coordination. These provisions, along with those found in CEAA, have provided the basis for fairly elaborate administrative mechanisms for coordinating – and in some cases combining – key elements of federal and Alberta environmental assessment processes. In no case, however, is an integrated interjurisdictional or transboundary approach to public land management required by Alberta legislation and at most stages of decision-making there is no legal basis for such cooperation beyond general statutory authorization to enter into intergovernmental agreements.

7.3 Summary

In contrast to the virtual legal vacuum in relation to the attributes of public land law reviewed in previous sections, Alberta legislation does at least refer to the establishment of mechanisms for interagency and interjurisdictional integration of decision-making. While most of these provisions are enabling only, they have served as the basis for a number of important administrative developments, notably at the interagency level within Alberta and in relation to federal-provincial coordination of environmental assessment processes. A measure of statutory support for interagency and interjurisdictional integration in public land management can thus be detected in Alberta, although these provisions fall short of either a fully-developed legal framework for integration of this type or a set of statutory requirements that would oblige land and resource managers to coordinate their respective roles in relation to the management of public land and resources.

Environmental Assessment Agency on behalf of the Federal Minister of the Environment Concerning The Panel for the Cheviot Coal Project", 24 October 1996, in EUB-Canadian Environmental Assessment Agency, *Report of the EUB-CEAA Joint Review Panel*, *supra* note 37, Appendix B.

85 CEAA, ss. 46-53; *Environmental Assessment Act*, S.B.C. 1994, c. 35, ss. 2(e), 7(2)(m), (n), 9(2)(e), 11(3)(c), 17(e), 22(k), 43(e).

8. Conclusion

This paper set out to assess the extent to which Alberta has a coherent body of public land law. The analysis presented here leads inevitably to one conclusion: public land law – as defined above in Section 2 – is virtually non-existent in this province. This is a remarkable conclusion for three reasons.

First, the template for public land law described in Section 2 is neither radical nor particularly novel. The standard against which the current legal regime was measured cannot, therefore, be characterized as overly demanding. Principles of integrated resource management have been widely recognized and debated for several decades, and Alberta was in fact a leader in this area in the 1970s when the IRP process was initiated. Ecosystem management, while not widely implemented, is at least common currency in land and resource management circles in North America and has been advocated in various venues within Alberta. The lack of congruence between the administrative and jurisdictional boundaries that limit decision-making authority and the problems confronting land and resource managers is an oft-repeated theme of legal and policy analysis. As a matter of institutional and policy design, therefore, it seems hardly ground-breaking to suggest that the legal framework for public land management should: (1) have a clear normative basis reflecting ecosystem principles; (2) include a comprehensive planning process; (3) ensure integration among the various stages of decision-making; and (4) provide for interagency and interjurisdictional coordination. The analysis presented above reveals, however, that legislation in Alberta is severely deficient in most, if not all, of these areas.

Second, the absence of a coherent body of public land law in Alberta that this paper documents is remarkable given the tremendous economic, social and environmental significance of the public lands and resources of this province and its heavy economic dependence on non-renewable and renewable natural resources, including the natural landscape and opportunities for outdoor recreation that support a substantial tourism industry. Alberta is, after all, a province where government readily embraces private sector models when fulfilling its public responsibilities. The failure to develop an integrated body of public land law is anything but ‘businesslike’ when one considers the value of the province’s public resources and their potential to yield benefits to Albertans in perpetuity if they are properly managed.

The absence of a normative basis for public land law means that, in effect, the business of public land management is occurring without an explicit ‘mission statement’, let alone a set of comprehensive principles, objectives, and standards against which the performance of decision-makers could be measured.[86] Similarly,

86 It may be, of course, that the failure to provide an explicit normative basis for public land law constitutes a conscious policy choice in its own right. As such, it has significant implications for public land management in that it systematically favours certain public land values (e.g., those represented by well-organized economic interest groups), certain types of decision-making (e.g., incrementalism) and certain substantive outcomes (e.g., rapid development and problems

while provincial departments are required to develop 'business plans', the government as a whole appears willing to dispose of its most precious public assets without the benefit of a comprehensive planning process. It is also clear that the stages of public land management fall short of constituting a logical and legally integrated decision path. The organizational hierarchy for public land management is thus far from a model of efficient and coordinated decision-making. More attention has been paid to interagency and interjurisdictional coordination, but here as well significant gaps have been noted and such legal provisions as exist are merely enabling. In sum, Alberta lacks the legal framework for public land management that one would expect given the critical importance to Albertans of their province's land and resource base and the multitude of demands that are placed upon it. While short-term economic development may have been enhanced by Alberta's model of public land management, there is growing evidence that the long-term costs of this approach have not been fully understood. Indeed, as noted by the Future Environmental Directions for Alberta Task Force, our future economic prosperity may be at risk unless Albertans and their government undertake a fundamental reassessment of current land and resource uses in light of sustainability principles.[87] This is a recurring theme, emerging from all public consultation processes that the government has engaged in over the past few years.

Finally, the conclusion reached in this paper is remarkable for what it says about the place of law in one of the key areas of governance in Alberta. The argument reviewed above in Section 2 and developed in more detail in the *New Directions* paper is that law has four key functions as an instrument of public policy: (1) law making is a public and deliberative process for establishing societal goals and priorities; (2) law provides a measure of predictability when individuals' rights and interests are at stake; (3) law constrains discretionary decision-making and provides an effective mechanism for ensuring accountability; and (4) law structures decision-making processes. It is thus no accident that democratic societies adopt legal mechanisms for achieving their most important objectives and constraining the authority of those entrusted with public duties and responsibilities. The principle of 'the rule of law' is much more than rhetorical flourish; it is fundamental to responsible, democratic and accountable government.

The analysis presented above reveals, however, that the 'rule of law' is largely absent in important areas of public land management in Alberta. Broad grants of discretionary authority are commonplace. For example, the powers relating to rights disposition are generally open-ended, without either substantive or procedural guidance in law. Even at the stage of project review and regulation, where the legal framework is more developed and there is a significant body of procedural

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associated with cumulative effects and erosion of ecosystem integrity). Needless to say, if the guiding principle of public land management is simply the maximization of economic activity and revenue through resource extraction, a sophisticated legal and policy framework that reflects multiple values and the need for integrated decision-making as embodied by principles of ecosystem management may be seen by some as an unjustifiable brake on development.

87 *Ensuring Prosperity*, *supra* note 15 at 85-86.

requirements, the substantive decisions of officials, ministers and quasi-judicial tribunals are made with little or no statutory guidance. At the planning stage in the decision-making continuum, Alberta has never seen fit to establish a legal duty to engage in integrated planning or to impose an obligation on decision-makers – or, for that matter, other stakeholders – to conform to such plans as are established. The strongest statutory language in this area is found in the recently enacted *Water Act*, which specifically requires sectoral resource planning. However, the *Water Act* reflects an explicit policy choice not to make plans legally binding. The absence of mandatory legal provisions is thus a theme repeated in virtually all aspects of public land management.

The individual uses of public land and resources in Alberta are, of course, governed by a substantial body of law. There is a multitude of general and project-specific legal restrictions placed on land users by environmental protection and resource management statutes and by the terms and conditions that regulators attach to individual project approvals. The sum total of this extensive regulation does not, however, constitute a coherent body of public land law in the sense of providing for integrated public land management. In the areas of decision-making that are critical to such an integrated approach, the management of the public domain in Alberta is in large measure subject to the rule of men and women, not the rule of law.

Needless to say, this absence of law is not the end of the public land management story. Important and useful initiatives are possible, and indeed have been undertaken, at the level of policy and through administrative measures. In the hands of farsighted political leaders and skilled officials, such a non-legal regime can undoubtedly serve the public interest well. To abandon the principle of the rule of law and rely instead on the wisdom of individual decision-makers and the blunt instrument of electoral accountability is, however, to ignore some of the most fundamental lessons of democratic political theory and practical experience. While public land management should not be hamstrung by a complex, rigid, and excessively detailed legal regime, it is a considerable risk to place this key aspect of public governance at the other end of the scale, subject to only the most minimal of legal frameworks. The establishment of an integrated body of public land law is therefore an important step that should be taken to ensure the long-term economic, environmental and social sustainability of Alberta’s land and resource base and its ability to meet the diverse needs of present and future generations of Albertans.

Appendix

Selected Land and Resource Statutes and Regulations

Statutes

Alberta

Administrative Procedures Act, R.S.A. 1980, c. A-2
Coal Conservation Act, R.S.A. 1980, c. C-14
Energy Resource Conservation Act, R.S.A. 1980, c. E-11
Environmental Protection Enhancement Act, S.A. 1992, c. E-13.3
Forests Act, R.S.A. 1980, c. F-16
Forest and Prairie Protection Act, R.S.A. 1980, c. F-14
Forest Reserve Act, R.S.A. 1980, c. F-15
Historical Resources Act, R.S.A. 1980, c. F-8
Municipal Government Act, S.A. 1994, c. N-26.1
Mines and Minerals Act, R.S.A. 1980, c. M-15
Natural Resources Conservation Board Act, S.A. 1990, c. N-5.5
Oil and Gas Conservation Act, R.S.A. 1980, c. O-5
Oil Sands Conservation Act, S.A. 1993, c. O-5.5
Pipeline Act, R.S.A. 1980, c. P-8
Provincial Parks Act, R.S.A. 1980, c. P-22
Public Lands Act, R.S.A. 1980, c. P-30
Special Areas Act, R.S.A. 1980, c. S-20
Surface Rights Act, S.A. 1983, c. S-27.1
Water Act, S.A. 1996, c. W-3.5 (assented, but not enforced yet)
Wilderness Areas, Ecological Reserves and Natural Areas Act, R.S.A. 1980, c. W-8
Wildlife Act, S.A. 1984, c. W-9.1
Willmore Wilderness Park Act, R.S.A. 1980, c. W-10

Federal

Canada Wildlife Act, R.S.C., 1985, c. W-9
Canadian Environmental Assessment Act, S.C. 1992, c. 37
Migratory Bird Convention Act, S.C. 1994, c. M-7.01
National Parks Act, R.S.A. 1985, c. N-13

Regulations

Alberta

Activities Designation Regulation, Alta. Reg. 211/96 (*Environmental Protection and Enhancement Act*)

Approvals Procedures Regulation, Alta. Reg. 113/93 (EPEA)

Coal Conservation Regulation, Alta. Reg. 270/81 (*Coal Conservation Act*)

Conservation and Reclamation Regulation, Alta. Reg. 115/93, 167/96 (EPEA)

Environmental Appeal Board Regulation, Alta. Reg. 114/93 (EPEA)

Environmental Assessment (Mandatory and Exempted Activities) Regulation, Alta. Reg. 111/93 (EPEA)

Energy Resources Conservation Board Rules of Practice Regulation, Alta. Reg. 149/71 (*Energy Resources Conservation Board Act*)

Exploration Regulation, Alta. Reg. 32/90 (*Forests Act, Mines & Minerals Act*, *Public Lands Act*)

Forest Recreation Regulation, Alta. Reg. 343/79 (*Forests Act*)

General Wildlife (Ministerial) Regulation, Alta. Reg. 95/87 (*Wildlife Act*)

Grazing Permit Regulation, Alta. Reg. 64/70 (*Public Lands Act*)

Head Tax Grazing Permit Regulation, Alta. Reg. 121/63 (*Public Lands Act*)

Mineral Surface Lease Regulation, Alta. Reg. 228/58 (*Public Lands Act*)

Oil and Gas Conservation Regulation, Alta. Reg. 151/71 (*Oil and Gas Conservation Act*)

Oil Sands Conservation Regulation, Alta. Reg. 76/88 *(Oil and Gas Conservation Act*)

Petroleum and Natural Gas Agreements Regulation, Alta. Reg. 188/85 (*Mines and Minerals Act*)

Pipeline Regulation, Alta. Reg. 122/87 (*Pipeline Act*)

Public Lands Grazing Lease Regulation, Alta. Reg. 432/66 (*Public Lands Act*)

Public Lands Miscellaneous Leases Regulation, Alta. Reg. 376/61 (*Public Lands Act*)

Recreational Lease Regulation, Alta. Reg. 548/57 (*Public Lands Act*)

Rules of Practice of NRCB Regulation, Alta. Reg. 345/91 (*Natural Resources Conservation Board Act*)

South Saskatchewan River Basin Water Allocation Regulation, Alta. Reg. 307/91 (*Water Resources Act*)

Timber Management Regulation, Alta. Reg. 60/73 (*Forests Act*)

Water Act Draft Regulation *(Water Act*)

Wildlife Regulation, Alta. Reg. 95/87 (*Wildlife Act*)

Federal

Migratory Birds Sanctuaries Regulation, C.R.C., c. 1036

National Parks Lease and Licence of Occupation Regulation, SOR 92/25

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A Guide to Appearing Before the Surface Rights Board of Alberta (Second Edition), by Barry Barton and Barbara Roulston. 1986. ISBN 0-919269-19-2. 124 p. $10.00

The Canadian Regulation of Offshore Installations, by Christian G. Yoder. 1985. ISBN 0-919269-18-4. 116 p. $10.00

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