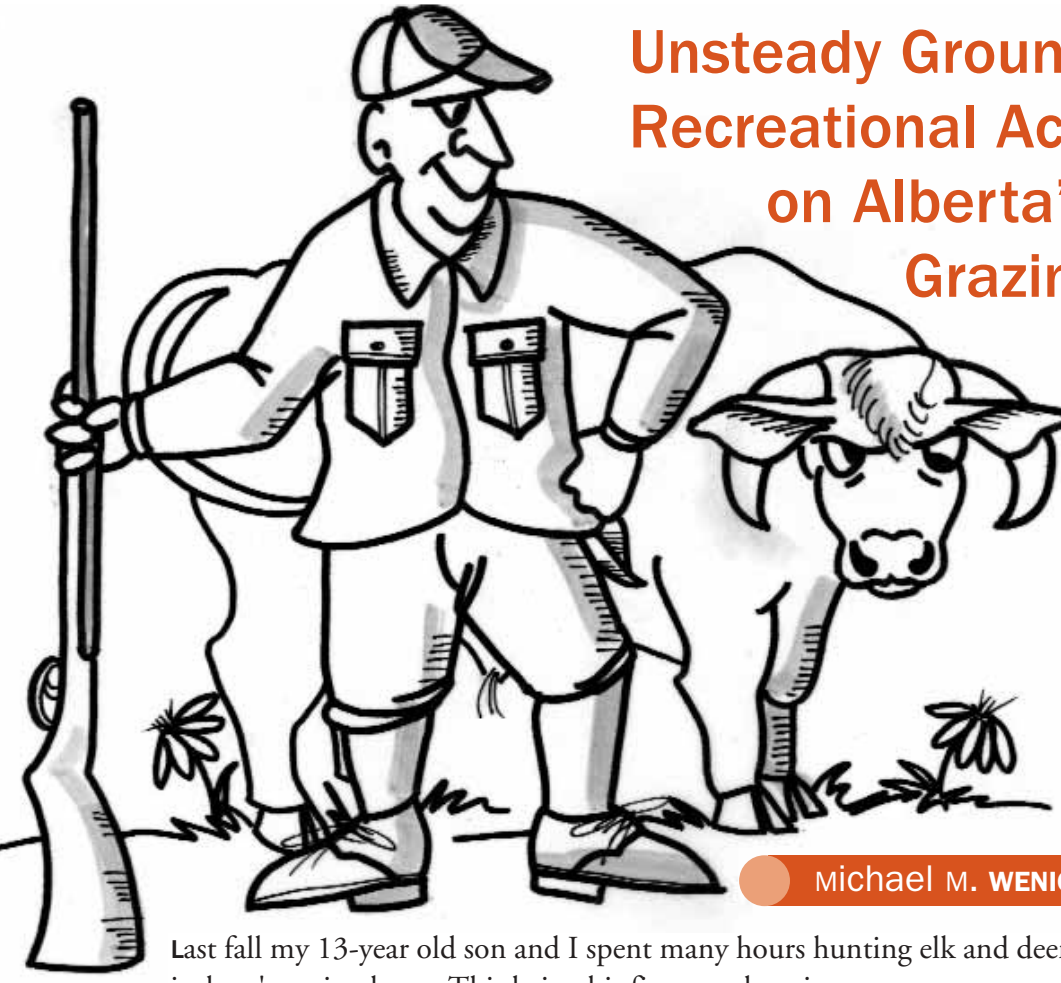
Unsteady Ground - Recreational Access on Alberta's Grazing Lease Land



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Last fall my 13-year old son and I spent many hours hunting elk and deer on my in-laws' grazing lease. This being his first year hunting, my son was surprised at how many other hunters we encountered and a little frustrated whenever we found the choice hunting spots already taken. "Why can't we kick these hunters off our land?" he asked more than once.

"Because it's the public's land, not our land," I would reply, all the while knowing that this simple response belied a much more complex reality with respect to public access to grazing leases.

Alberta's grazing lease system is older than the province itself, having been established by Ottawa in 1881 to reduce the growing conflict among ranchers competing for use of what was then free or open rangeland. And at one time or another, many Albertans will have had some connection with the grazing leases.

As of 2003, there were 5,700 grazing leases covering roughly five million acres (or 5%) of Alberta's public lands. Those leases are located primarily in the unforested, so-called "settled" portions of the province. Grazing leases are only one of several forms of agricultural dispositions of Alberta's public lands, but they account for over 60% of the land covered by those dispositions for grazing and over 75% of the actual grazing allowed on those dispositions. Grazing leases also account for nearly 10% of all agricultural land in Alberta. Individual lease sizes generally range

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from a section (640 acres) in central Alberta to almost three sections (1,920 acres) in southern Alberta grasslands.

Grazing leases are a creation of section 102 of the *Public Lands Act*, which authorizes the public lands Minister (currently the Minister of Alberta Sustainable Resource Development (SRD)) to lease public land for grazing cattle, horses, and sheep when, in the Minister's opinion, livestock grazing is the "best use that may be made of the land". Besides granting grazing rights, those leases impose various duties on leaseholders to keep the land in good condition and to pay annual rentals. Leases can be issued for up to twenty-year, renewable terms.

Grazing leases have arguably provided a mainstay for Alberta's cattle industry. Besides supporting beef production, the lease lands provide substantial value for maintaining biological diversity and other ecological services, and for Albertans' recreational enjoyment.

Much of the provincial land managers' time in managing grazing leases has focused on setting stocking rates and performing other tasks designed to balance provincial objectives of facilitating livestock grazing and preserving the ecological integrity of the provinces' rangelands. But likely a considerable portion of managers' time has been spent setting policies relating to issues that are inherent in the grazing lease system. Chief among these issues have been the appropriate level of lease rental rates; the transferability of leases; whether leaseholders and others should be able to purchase lease land for private ownership; the accessibility of public grazing land to developers of other commercial resources (e.g., oil and gas, timber, and trapping); and grazing leaseholders' entitlement to compensation for other commercial resource-related activities on their lease land (Government of Alberta, *Agricultural Lease Review Report* (Nov. 1998). Among the more controversial of these issues, and the issue which is the focus of this article, is the accessibility of public lands covered by grazing leases for public recreational purposes.

While all of these issues may seem somewhat arcane to those who haven't encountered them directly, their resolution requires considerations of the fundamental concept of "public lands" — an important concept for any Canadian — and of the government, public, and leaseholders' core legal relationships with those lands. Unfortunately, legal sources are typically ambiguous about the nature of these relationships. Thus, for example, in deciding an access dispute, the Alberta Court of Appeal referred to the province's "obligation and responsibility to protect and husband [Alberta's] public lands," but without clarifying the legal source and scope of this obligation (*OH Ranch Ltd. v. Patton*, 1996).

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The nature of Albertans' legal rights of access to public lands, including rights of recreational access to grazing leases, has been particularly ambiguous. Until recently, Alberta legislation provided no express, general right of recreational access to public lands leased for grazing. At best, that right was inferable from provisions of the *Public Lands Act* and *Petty Trespass Act*. Collectively, these statutes essentially prohibited various other kinds of access or access to other types of public lands, thus, implying a right of access for any types of access not expressly prohibited. But that implication was a weak legislative articulation of public access rights.

Courts have struggled in defining public access rights in the face of these legislative ambiguities. The issue was raised tangentially but ultimately left unresolved in *R. v. Alexson*, 1990, a government prosecution of an Albertan Aboriginal hunter under the provincial *Wildlife Act*. While of no value as precedent, the conflicting court decisions on the issue in the Provincial Court, Court of Queen's Bench, and Court of Appeal apparently fuelled a public controversy that called for either legislative or judicial attention.

The latter occurred first. In *OH Ranch Ltd. v. Patton*, 1995, the Alberta Court of Queen's Bench granted a rancher's request for an injunction barring a hunter from accessing the rancher's grazing lease without obtaining the rancher's express written consent. The Court based its legal findings on vague references to common law property doctrines and on weak, negative inferences from the province's reservation of rights to continue granting access for resource development. As to the appropriateness of the injunction requested by the rancher, the Court concluded, without explanation, that it would be "impossible" to assess monetary damages if that was the only remedy and that the injunction was necessary to enable the rancher to "point out the possible dangers and risks" and thereby limit the rancher's own liability for any injury to the hunter.

While *largely* failing to consider the hunter's access rights, the Court did not completely fail to do so. In the final paragraph of its decision, the Court cautioned that its injunction did not mean a "total prohibition" against hunting on the leased lands. According to the Court, the injunction merely reflected a land management approach that was "compatible with the expectations of a reasonable and responsible hunter and the control and management of the land and its best use for grazing purposes." The Court thus implied that the rancher could deny permission only when necessary to protect grazing. The Court's reference to the hunter's "expectations" also necessarily implied that the hunter had underlying access rights to begin with and that those rights had not been completely extin-

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guished by the province's issuance of the grazing lease. However, this implication would have benefited greatly from a more thorough judicial analysis of the source and nature of those underlying public access rights.

The Alberta Court of Appeal affirmed the lower court's decision with a similar approach to the legal rights granted under the lease. The Court also avoided considering the existence and nature of the hunter's underlying right of access except to say that, whether or not the hunter had any such right, it was trumped by the rancher's power to "bar access or use that may be injurious or incompatible" with the rancher's right to graze livestock. The appellate court then simply "accepted" without explanation that hunting on the lease land without the rancher's express consent would be an "incompatible use"(Court of Appeal, 1996).

The *OH Ranch* courts' unexplained legal and factual findings were an unsatisfactory resolution of the public access issue. To be fair, this outcome was not entirely the courts' fault. In framing their arguments, neither party seemed to recognize how its positions could be modified to avoid infringing on the other party's rights. And, more fundamentally, the courts were being asked to decide an issue with sensitive and tricky policy and factual aspects, but in the absence of leadership and clear guidance from the province. The leadership vacuum was reflected not only in the ambiguities in the legislation and the grazing lease, but also in the province's failure to establish the rules for public access and to provide any non-judicial procedure for resolving access disputes, and in the province's apparent silence in the *OH Ranch* litigation itself.

In 2003, the province took major steps to fill this leadership void, in large part, by adding a new section (s. 62.1) to the *Public Lands Act* requiring the holders of grazing leases to "allow reasonable access" to the leased land for "recreational purposes" (*Agricultural Disposition Statutes Amendment Act*, 2003). These terms provide little guidance on the scope of the leaseholder's discretion in determining what access is "reasonable". However, the new section also provides that leaseholders must exercise their discretion "in accordance" with access regulations adopted under the Act.

The new *Recreational Access Regulation*, AR 228/2003, establishes a comprehensive framework for managing public access to grazing lease land. The regulation requires a person seeking recreational access to public lands covered by a grazing lease to first contact the leaseholder (if the holder has registered with SRD staff for purposes of receiving contacts) and to provide the person's identity and the date, time, specific locations, and the types of recreational access being sought at those locations.

The regulation then prohibits the person from accessing the lease land until the leaseholder's designated contact person has responded to the contact, but allows the person seeking access to enlist SRD's help if the person is unable to make contact after "reasonable attempts" to do so.

As for the content of the leaseholder's response, the regulation requires grazing leaseholders to allow access to any person who has provided the required information, except under several access scenarios identified in the regulations. These access scenarios involve

- camping;
- recreational use of bicycles, animals, or motor vehicles;
- recreation in a fenced pasture within a grazing lease when livestock are present (under the applicable grazing lease) and hunting that is "unreasonably close" to any such pasture;
- and recreation on lease land covered by a provincially-imposed fire ban.

Under the regulation, a leaseholder can deny access under any of these circumstances, provided the holder gives oral or written reasons for the denial. Of course, the leaseholder can also grant access under any of these circumstances, and set "reasonable" and "necessary" conditions for such access.

The regulation also establishes a process for resolving access-related disputes between grazing leaseholders and persons seeking access to lease land. In brief, the process involves submitting a written statement to a designated SRD "local settlement officer" and appealing the officer's decision to a designated SRD "director". Both officials have broad powers to either prohibit or require access and to set the terms for permitted access. Those officials also have broad authority on their own initiative to prohibit access, require a leaseholder to permit access, or set access conditions. The regulation also gives the SRD Minister authority to adopt "recreational management plans" that can restrict, allow or otherwise manage recreational access to specific public lands covered by grazing leases and other agricultural dispositions.

Besides amending the *Public Lands Act* and adopting new access regulations under that Act, the province adopted legislative amendments in 2003 that essentially reaffirmed that recreational users of public lands covered by grazing leases were not trespassers under the *Petty Trespass Act* (*Agricultural Disposition Statutes Amendment Act*, 2003, and *Justice Statutes Amendment Act,* 2003). The province also amended the *Occupiers' Liability Act*, to clarify that leaseholders owed no "duty of care" to provide "reasonably safe" premises to recreational users covered by the new provisions of the *Public Lands Act* and accompanying access regulation.

How well has the new access regime worked? I was unable to obtain information from the province on the number and nature of any disputes that have arisen under the new regime and how they have been resolved. However, I am aware of at least one such dispute, in which an SRD director rejected a hunter's appeal of a leaseholder's requirement that all prospective hunters attend a meeting at the ranch at 6:00 am on a specified weekday shortly before the hunting season began,

as a condition for hunting on the leased land. The SRD director's reasoning for approving the leaseholder's meeting requirement turned in large part on the need for some kind of system for implementing a six-hunter-per-day limit for that lease land that SRD had previously established. Ironically, the dispute involved a grazing lease owned by the OH Ranch (Notice of [SRD] Director's Decision, File No. GRL 32027, Dec. 2, 2004).

The outcome of that dispute, and the new regulations themselves, suggest the new access regime may still not provide sufficient government leadership, in several respects. First, the regulations give leaseholders considerable discretion in deciding how quickly to respond to contacts from persons seeking access; the acceptable proximity of access for hunting to pastures where livestock are grazing; and whether to allow access, and the access conditions, for any of the several scenarios where access is expressly subject to the leaseholder's permission. The regulations also lack specificity as to the duration of the required notice, response, and dispute resolution process. If disputes do arise, the process may take so long as to have the practical effect of precluding recreational access, at least, unless such access is fully planned weeks or possibly months in advance. And, finally, the regulations do not require SRD officials to consult with the public before setting hunting limits or other kinds of restrictions for recreational access to lease lands.

The net burden of these features of the new access regime would seem to fall on the shoulders of the members of the public seeking access rather than on the leaseholders (although the leaseholders' administrative burden may be considerable). This burden is consistent with the requirement of section 102 of the *Public Lands Act* that the lands Minister may issue grazing leases only when the Minister believes livestock grazing is the "best use" of the public land to be leased.

But those "best use" determinations are likely influenced considerably by the long historical legacy of grazing leases and are made without public consultation and arguably absent a coherent province-wide public land management framework. From this standpoint, the new access regime falls short of identifying and clarifying the meaning of the word "public" in the concept of "public lands".

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References

- For a more detailed overview of the history of Alberta's grazing lease system, see Arlene J. Kwasniak, *Alberta Public Rangeland Law and Policy* (Environmental Law Centre, 1993).
- For general information on the issues, see Alberta Sustainable Resource Development Fact Sheets: *Range Management, Grazing on Public Land, Grazing Statistics for Public Land, and Recreational Access to Agricultural Public Land* (accessible from http://www3.gov.ab.ca/srd/land)
- For a critique of the province's overall public lands management regime, see Steven A. Kennett and Monique M. Ross, *In Search of Public Land Law in Alberta* (Occasional Paper #5) (Canadian Institute of Resources Law, 1998), and Dr Shirley Bray, *Loving, Losing and Reclaiming our Public Lands,* 12 Wildlands Advocate (Alberta Wilderness Association, August 2004).