Is There Enough "Public" in Alberta's Public Lands?

By Andrea Johancsik, *AWA Conservation Specialist*

A hunter, a mushroom picker, and a rancher go to a bar. "All we have is Alberta beef tonight," says the server.

"Well it's no surprise," the mushroom picker says. "Just yesterday I encountered a locked gate before my favourite mushroom field."

The hunter chimes in, "I wanted venison and my buddy wanted to get a fresh fish down the road, but the gates were locked too!"

"Hey, don't be upset," the rancher chimes in, "it's the law. I have a grazing lease and I'm legally allowed to deny you access to that public land if your use involves bicycles, animals for transport or motor vehicles; if your use of that public land would take you through a fenced pasture where livestock are present or on cultivated land where a crop has not been fully harvested; if there is a fire ban; if you plan to hunt or camp; or if your use is contrary to a recreation management plan. Thanks for the land and enjoy your Alberta beef!"

Think this is a joke? It isn't – you might not have access to the public land that all of us own. You could be denied access to land to do these seemingly harmless activities. It's all perfectly legal according to the Recreational Access Regulation and lease conditions. In order to enter one of the 5,899 grazing leases in Alberta, you need to

Public Lands Facts

According to the Government of Alberta, grazing leases are long-term authorizations to individuals, corporations, or associations. Allotments, on the other hand, are areas in the forested range of central and southern Rocky Mountains that use natural barriers like rivers and mountain ranges for cattle grazing. The type of disposition generally – but not always – corresponds to Alberta's White and Green area system. Alberta created this distinction in 1948. Sixty-one percent of Alberta is found in the Green Area; 31 percent is in the White Area. (See Figure 1) Leases are found generally in the White Area and allotments in the Green Area.

The White Area is mostly settled. Three-quarters of the White Area is owned privately. White Area lands may be used for a range of commercial, recreation, and conservation purposes. Municipal governments have primary authority to make decisions regarding how private lands in the White Area are used. Primary authority rests with the provincial government for how public lands in this Area are used.

The Green Area is nearly all owned by the public. Two land uses not associated with lands in the White Area, timber production and watershed protection, are listed as main land uses in the Green Area. Primary authority rests with the provincial government for how Green Area lands are managed.

Public lands in Alberta make up about 60 percent of the total provincial land base. Of that, approximately eight million acres of public land are under agricultural disposition. Of that, 5,899 grazing leases cover over five million acres.

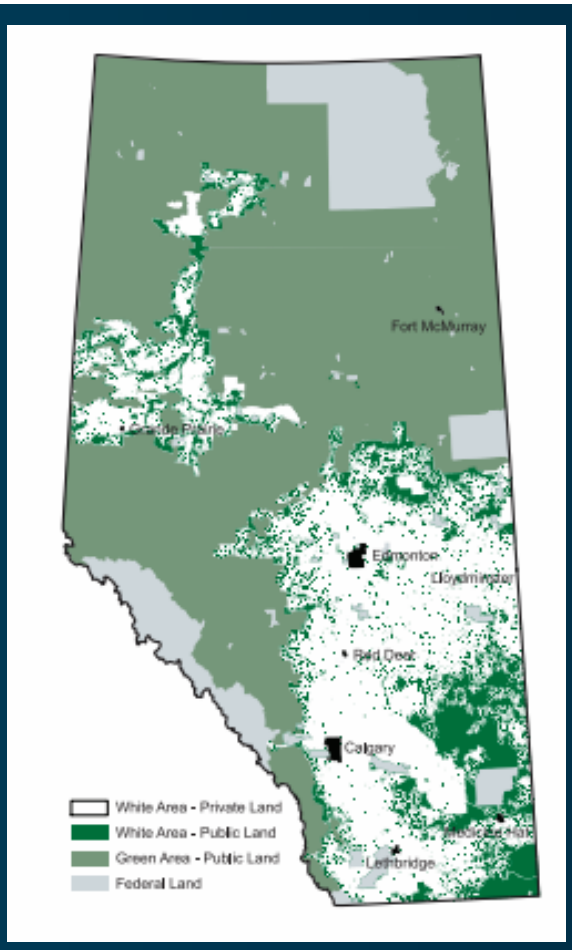


Figure 1: Alberta's White and Green Areas SOURCE: GOVERNMENT OF ALBERTA, LAND-USE FRAMEWORK

receive permission from the lessee and the lease may be subject to certain conditions like "No access if livestock in field" and "Contact 7 days before accessing lease."

Meanwhile, in grazing *allotments*, activities pertaining to oil and gas, forestry, off-highway vehicle use, cattle grazing, and other recreation compete with one another for access to the land. This approximates a "free for all" and creates the opposite problem – too much access, too easily obtained. One would think that the safety risk to livestock is no different whether they are on grassland or in the foothills. One AWA member wrote, tongue in cheek, to say:

> *"Ironically, in the Green or forested zone of the province, cattle are also grazed on public land grass, but under permit. There, the public is not considered to be at risk from vicious cattle. There, the public is free to risk recreating amongst a mix of cows, calves and bulls. Apparently Green Zone cattle are a different, more benign breed, than White Zone cattle."*

Near Caroline, you might be barred entry onto a grazing lease with a condition of "No access while livestock are on field" because a few cows are licking a salt block coincidentally (or strategically?) placed near the locked gate. In West Bragg Creek, on the other hand, anyone who has mountain biked or hiked in the area has experienced a bounty of cows so proliferate that they risk slipping on a cow patty or colliding with Bessie at the next hairpin.

This type of difference is puzzling and illogical. It suggests there's a serious need to pay more attention to public lands management issues. But understanding public lands access in Alberta is a complicated affair. Let's break it down and discuss how we got here, what Albertans think about public access, and what should happen next.

Origins of the Recreational Access Regulation

Alberta's grazing system is older than the province itself. It was established in 1881 to reduce conflict between ranchers and encourage economic growth from the grazing resource. Divvying up the land was a no-brainer; settlers altered the landscape dramatically and as their numbers increased so did conflict for resources. The grazing system was an organized method to reduce and manage resource conflict.

The Government of Alberta's "Use Respect/Ask First" campaign from the 1980s and AWA's response

The access issue flared up significantly in the 1970s and 1980s. Gordon Stromberg's private members bill in 1973, *The Private Land Protection Act*, sought to give persons holding grazing leases or permits the right to refuse access to the public. There wasn't a single definitive legal statement on public lands access; a handful of laws including the *Public Lands Act*, the *Petty Trespass Act*, the *Wildlife Act*, and the *Criminal Code* offered inconsistent and sometimes contradictory positions.

In 1981, a two-day Trespass Seminar brought stakeholders together including AWA, Western Stockgrowers Association, Alberta Fish and Game Association, government agencies and other groups. The group couldn't come to consensus on access but some needs were agreed on.

For instance, the group identified a need for a clear and simple method for identifying and locating land operators on both public and private land. A website was eventually created *(https://maps.srd.alberta.ca/RecAccess/Viewer/?Viewer=RecAccess)* where someone who wants access to leased land can view the location of the lease and the lessee's contact information in order to obtain permission. Although this aims to be simple, critics argue it restricts unreasonably those who go on spontaneous trips onto public land and that the internet is not the best way to connect rural residents.

The Government also aimed to address public awareness by their "Use Respect" program to encourage ranchers and hunters to get along. AWA adamantly opposed the project because it implied that permission was required to access public lands by foot and led an access campaign with Alberta Fish and Game Association in the mid-1980s.

Access rights to public lands were tested in the courts in the late 1980s. Treaty Indian George Alexson was charged with trespass for hunting without permission on grazing lease land west of Longview. The case of *R vs Alexson* was heard at three levels of the court system In Alberta. The provincial court ruled the general public has unrestricted access to Crown grazing leases. The Court of Queen's Bench Justice ruled that land under Crown grazing lease is off-limits to anyone without permission. Finally, in October 1990 the case was heard in the Court of Appeal and was overturned again. The Court of Appeal ruled that "hunting on land which is subject to a grazing lease is not an offence under the *Wildlife Act* or the *Public Lands Act*, nor does it constitute trespass under the *Petty Trespass Act*."

The precedent-setting case for access by the general public, however, came in 1995 after Calgary hunter Wade Patton attempted to hunt on the OH Ranch; the Ranch made an application in court to prohibit the hunter from accessing their leased lands. The application was denied initially but the Court of Queen's Bench overturned the decision. Patton couldn't enter the lease without permission. The justice ruled the OH Ranch had "exclusive right of occupation" which carried with it the right to prohibit entry onto the lands. The Court of Appeal affirmed this decision. Lawyer Mike Wenig wrote the following about this case in a 2005 essay: "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" and "the *OH Ranch* courts' unexplained legal and factual findings were an unsatisfactory resolution of the public access issue."

So how did these "vague" and "weak" elements that the courts upheld come to be included into an enforceable regulation?

In 1997 and 1998, MLA Tom Thurber chaired the Agricultural Lease Review Committee and released the "Thurber Report." It revealed that compensation payments from oil and gas were retained by the grazing lessees instead of the rightful owner, the Government of Alberta. Thurber tabled Bill 31 in 1999, the *Agricultural Dispositions Statutes Amendment Act* to address this issue. The Bill was passed but never proclaimed, a rare event in which the bill becomes law but does not come into effect. The very last paragraph in Bill 31 contained a provision amending the *Public Lands Act* to require lessees to provide "reasonable access" for recreational users.

Lease conditions like these are a telling sign of the control lease holders have on choosing which recreational activities are allowed on the lease, if they choose to exercise it.

A few years later, the *Agricultural Dispositions Statutes Amendment Act* re-emerged as a government bill, Bill 16. Mike Cardinal, the Minister of Sustainable Resource Development at the time, said the bill built "on extensive public consultation that occurred in 1997 and reflects recent discussions with the stakeholders." The new act led to the Recreational Access Regulation as we know it today, expanding that one paragraph of Bill 31 but including none of the provisions about lessee compensation which is the subject of Ian Urquhart's article in this issue. I'll give the Minister the benefit of the doubt that discussions around access hadn't changed from 1999 to 2003 – after all, AWA has been asking for public lands to be public for longer than I've been alive – but Bill 31 and Bill 16 looked about as similar to me as the Fire Code Regulation and the *Dangerous Dogs Act*.

The bill had its critics in the legislature. One predicted that issues like lack of spontaneity in recreational planning and "a cramping of style and access for [hikers]" would arise. Another accused the executive branch of the government for "[ruling] supreme in this province" and "selling out to special interests because they happen to be powerful." The ND opposition proposed an amendment to ensure hikers were allowed on agricultural dispositions, at their own risk and liability. The amendment would have taken foot access out of the regulations to allow freedom for walkers who didn't intend to hunt on the land. It was defeated and the very problems that were flagged by these critics in 2003 persist.

One aim of the Regulation was to set up a dispute resolution process in case of conflict between a user and lessee. In the last 16 years since the Recreational Access Regulation came into force, there have only been 12 formal disputes filed. Four were resolved in favour of the lessee and seven in favour of the recreational user. One was withdrawn as resolved prior to a decision by the Land Stewardship Officer, (LSO), a position in Alberta Environment and Parks. We were told by government that many other informal LSO disputes are handled at the field level with no formal application being filed or entered into a database. Although there are no records AWA was told "these occur regularly in some regions." It appears the dispute process set up by the regulation hasn't been used consistently throughout the province and, in some cases, it hasn't resolved some contentious and ongoing disputes. In a 2003 response to the new regulation, the Environmental Law Centre predicted this problem. James Mallet wrote: "practically speaking, the burden of applying for review of any access dispute will also fall upon the visitor." Not surprisingly, in general lessees are happy with the regulation while recreational users find it onerous and unfair.

What do lessees think?

A quick search through the public website previously mentioned shows that conditions on leases vary widely. The burden is on the recreational user to find out when they have to call, what they're allowed or not allowed to do, and to know where they'll go ahead of time in case they encounter different conditions on an adjacent lease. "Reasonable access" is certainly not a concept that everyone agrees on. I might argue that it's reasonable for someone to walk onto public land regardless of what time of day or year, whereas a grazing lessee might believe it's reasonable to require two weeks-notice before entry.

I spoke to three people who hold grazing leases west of Rocky Mountain House, where hunting attracts a lot of users. All three lock access to the land they lease with gates. All have experience with oil and gas operations on their lease. All three support the regulation.

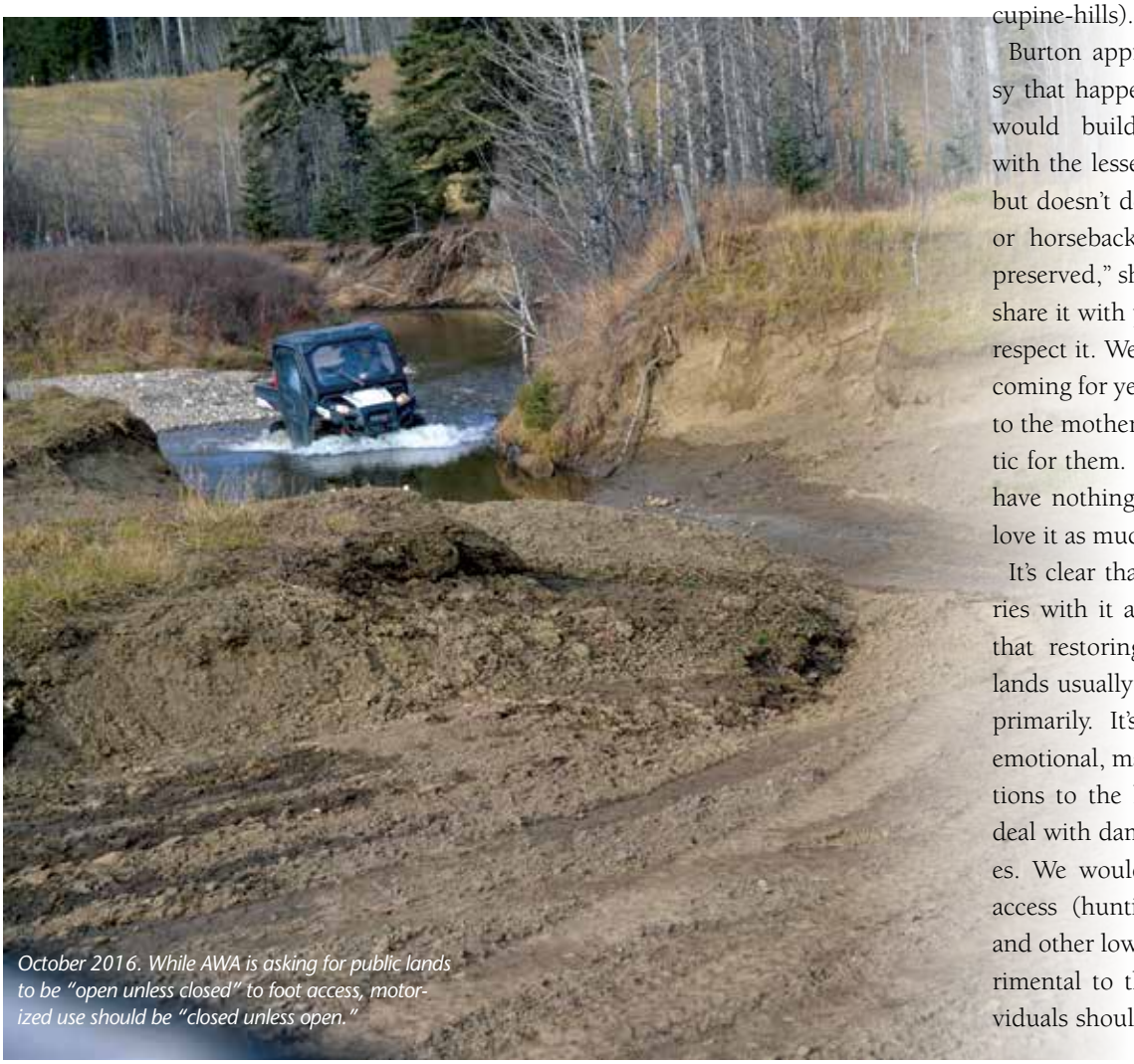
One lessee complained about invasive

and noxious plants primarily spread by off-highway vehicle users. Though the oil and gas company on the lease does some weed control, this lessee takes the brunt of stewardship responsibility for spraying and pointed to a need for more provincial management of weeds. The oil and gas company on this lease closes the gates to the access road during hunting season at the lessee's request. When I asked what problems the company had that would require closure of the gates, I was told that it was a proactive decision because there had been problems of theft of solar panels and batteries in other dispositions. This may be true, but I would also guess there are benefits to maintaining a good relationship (either "financial" or personal) with the land's other occupants.

Another lessee holds land that is apparently popular with hunters. Badly behaved, disrespectful ones have cut fences to remove their kills, wrecking the fence and letting the lessee's cattle roam outside the lease. According to the conditions on this lease (foot access only, no access when livestock in field), the hunters are probably breaking the law. This lessee was upset that the regulations weren't being enforced.

Liability is a major issue for grazing lessees. They wouldn't want to be at fault if anything happened to users by way of an accident or bear the cost for emergency response calls. The Recreational Access website says the lessee's liability is reduced if recreational users become injured, unless the courts find the lessee intentionally or negligently tried to injure them. Recreational users are responsible for their own personal safety. It would be smart for the recreational user to inform the lessee about their entry in order to be aware of and perhaps warned about hazards like aggressive bulls or other hunters on the lease. One lessee told me he likes to let users know about their safety, and to be aware of how many people are on the lease at a given time. This communication is encouraged and most sensible people will try to do this. But the lessee shouldn't be liable for the risks I might expose myself to on leased lands. If they're not liable then AWA doesn't believe prior contact must be necessary for people to access leased land on foot.

Shawna Burton, owner and manager of Burton Cattle Co., holds both a grazing lease and allotment in the M.D. of Willow Creek near the Porcupine Hills. She maintains the most damage is caused by off-highway vehicle users in the forestry allotments. On the grazing lease, the biggest problem is garbage left during hunting season as OHVs aren't allowed. A video published on AWA's website in the spring shows this stark contrast between OHV-disturbed land and intact land (albertawilderness.ca/ohv-disturbance-porcupine-hills).



October 2016. While AWA is asking for public lands to be "open unless closed" to foot access, motorized use should be "closed unless open."

Burton appreciated the kind of courtesy that happened in the past when users would build face-to-face relationships with the lessee before accessing the land, but doesn't deny access to people on foot or horseback. "This country should be preserved," she says. "It's nice to be able to share it with people that appreciate it and respect it. We have people that have been coming for years to hunt – this is their trip to the motherland. It's solitude, it's cathartic for them. We have people [come] that have nothing to do with agriculture that love it as much as anyone else."

It's clear that being a grazing lessee carries with it a number of challenges, and that restoring damage to leased public lands usually is a burden the lessee bears primarily. It's understandable that with emotional, material, and financial connections to the land, you wouldn't want to deal with damaged land and broken fences. We would argue, however, that foot access (hunting, bird watching, hiking, and other low-impact recreation) isn't detrimental to the landscape and that individuals should be able to make their own

decisions about, and be responsible for, their personal safety. The current system, under a premise of protecting the public, unfairly advantages a minority of individuals who are granted the privilege to graze the land – without necessarily giving any consideration to low impact foot access. Alberta has gone too far in the direction of making this type of public land de facto private property. Leaseholders shouldn't have the same rights as they would if they owned the land.

What does the rest of the public think?

Dwight Rodtka, hunter and retired provincial wildlife official, submitted a formal dispute in the past year to resolve the issue of being denied hunting access to a long-used grazing lease. Rodtka asked for access to a high-grade road, but the lease's conditions state the lessee can deny access to anything other than foot access, Rodtka's request for access and his subsequent appeal were both denied. Rodtka particularly took issue to the fact that the lessee told him that OHV users were allowed (allegedly the lessee was advised by Sustainable Resource Development to allow OHVs) but trucks were not. Rodtka was told by the agrologist in charge that the lessee was legally allowed to ignore his own lease's conditions, which include in this case 'no motorized access'.

"Where I live a lessee has cattle on his lease during summer and then puts four horses on the lease in the fall leaving them there until hunting seasons are closed. This eliminates public hunting but the lessee and his friends enjoyed this private hunting reserve all season," says Rodtka. He adds: "How the government can defend this hideous abuse is beyond comprehension. Albertans have been robbed of their public land by grazing lessees' and their friends who now control access to it and we don't even realize it."

Vivian Pharis, long serving AWA board member, also uses the same lease for stewardship – checking on the health of the landscape and documenting off-highway vehicle damage. She also crosses the lease to get access to vacant public land beyond the lease boundaries where there are no restrictions on public access. This year, correspondence with the government has informed Vivian a steward role falls under the Recreational Access Regulation. She is denied access as a steward, even though "steward" is not specifically defined in the Regulation.

Other stories include lessees strategically placing salt blocks near the road entry to activate the "No access if livestock present" condition in the foothills. In the southeast, recreational users were repeatedly denied access except to the hunters who paid the lessee for access. Profiting off the wildlife resource is illegal under Alberta's hunting regulations but selectively denying access is not.

What does it all mean for conservation?

One of the biggest issues with this situation is that there is inadequate protection for wildlife and habitat on grasslands, the landscape and ecosystem where most grazing leases are located. Kevin Van Tighem states that cattle grazing is the best economic use of our public rangelands. Maybe that's true in the bare dollar value, but what if we put a price on ecological goods and services like clean water and biodiversity? While it's certain that well-kept, long-held livestock operations contain some of the healthiest native ecosystems, we shouldn't be so quick to make such a definitive generalization.

Cattle have been around for 150 years but bison and indigenous peoples co-evolved with the grassland ecosystem for thousands. The recent work of the Iinnii (bison) Initiative by the Blackfoot people to reintroduce bison widely across the Eastern Slopes is a powerful example of the influence empowered peoples can have on public priorities. Grazing can contribute to a healthy ecosystem but valuing the land for other purposes like conservation and reintroducing extirpated species is also important. Access is also important for stewards who have been voluntarily performing that vital role on the land for generations. Not every rancher stewards the land perfectly and other people can bring attention to range practices that affect parts of the land, such as riparian zones.

In deciding what the best use of public land is, Alberta needs an inclusive and comprehensive public debate that considers modern issues such as climate change and indigenous rights. We shouldn't assume that grandfathered uses are the "right" uses today.

The Future of Access?

In 2014, a stakeholder engagement session was hosted by the government to explore changes in the Recreational Access Regulation, as the regulation was set to expire. AWA was excluded. We were told that the government consulted two grazing associations, three beef producers, three off-highway vehicle organizations, and four non-motorized recreation groups. Notably missing from this list are environmental groups, First Nations, and industry, all of which were specifically pointed out in last year's Auditor General's Report as key stakeholders. The audit even specified that "current and future Albertans" were a stakeholder – that's YOU.

This Regulation is set to expire in March 2017, so there is still time to give the government your thoughts on the matter.

AWA believes that in order to achieve a vision of public lands in Alberta held in perpetuity for the public and in the public trust and interest and managed for conservation, broad and meaningful public consultation should inform public lands policy. Key elements to include in this policy are: allowing unconditional foot access, managing for wildlife, watersheds, and ecosystem goods and services, and only allowing designated motorized access if the decision is based on science and public input.