Thoughts on Crown Grazing Lands and their History

These grazing leases have existed in some shape or form in Alberta since 1881, making them among the oldest administrative tools to support livestock production, rural communities and a broad suite of public values and benefits. Crown owned rangelands have traditionally been valued as an important source of forage for the livestock industry. Today there is a growing awareness of the important functions and values that rangelands provide to society. Careful stewardship is necessary to maintain rangelands and watersheds in healthy condition. Conservation of rangeland vegetation cover protects rangeland soils that have taken centuries to develop and will also maintain the potential productivity of rangelands.

Healthy range plant communities are very efficient in utilizing available energy and water resources in the production of maximum biomass and provide a reliable and high quality source of forage for livestock and wildlife. Healthy rangelands will promote the storage, retention and slow release of water, making moisture available for plant growth and other organisms. With less runoff, the potential for soil erosion is reduced. Moisture retention makes for a more stable ecosystem during drought. Healthy rangelands require relatively low inputs to sustain productivity. Range management practices encourage the conservation and recycling of nutrients making them available for plant growth. This healthy range possesses a diversity of grasses, forbs, shrubs and trees, supporting high quality forage plants for livestock and wildlife and maintaining biodiversity, - the complex web of life.

Western Canadians have placed considerable value on "Natural Capital", this includes our resources that provide raw materials, but can also include the land and water resources that anchor our quality of life and support economic activity such as agriculture, forestry, tourism and recreation. It also includes living ecosystems such as our grasslands that help cleanse fouled air and water, reinvigorate soil, and contribute to a predictable, stable climate. Like produced capital, natural capital is subject to deterioration, in this case through excessive growth and waste, natural resource extraction and modification of the landscape. The public policy challenge is to recognize the importance of these working landscapes, and to ensure that their foundations – the soil and the forest resources – are sustained for generations to come.

The concessionary Crown rental rates combined with the demand for pasture from the profitability of the beef enterprise, result in substantial capitalization into the market value of Crown grazing leases. Any change in policy that would strip the leasee of the ability to recoup these investments would be tantamount to a forced take.

These thoughts were compiled from extracts from two documents: the first written by Public Lands for preparation of Codes of Practice, the second source was from a Canada West Foundation publication called Western Canada's Natural Capital. This was a study commissioned by the province to help guide a new public policy framework.

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The Surface Rights Act (SRA) provides the framework, principles, and appeal process for any oil and gas compensation in Alberta. The SRA provides the ability for land owners and occupants of both private and public land to be compensated for explicit losses incurred by oil and gas developments. Public land grazing leaseholders are considered occupants under the SRA. When oil and gas activities take place on a grazing lease, the leaseholder receives payments based on loss of use, adverse effects, inconvenience and noise as provided for in the SRA. Compensation is intended to cover damages to the occupants' interest in an amount that covers actual economic loss.

The Surface Rights Act sets the same "heads of compensation" for any land in Alberta, but recognizes that there are components of private land compensation that are not applicable to lease land occupants (e.g. value of the land). Once criteria that would only impact the owner of the land is removed, occupants on leased land typically receive approximately half the amount of compensation that a private land owner would receive. These payments are negotiated directly between the leaseholder and the oil and gas companies within the framework provided in the SRA.

The Province receives a first year payment and yearly rental on any oil and gas installation. The average annual surface rental is $360 for the first five acres plus $21 for each additional acre. Since standard rates are set by the Province, in comparing the payments on private land versus public leased land, there is an amount of compensation that the Province does not capture as the owner and that the leaseholder is not eligible for. This amount of compensation which is not accounted for could be used by the United States to argue that the Crown as the owner is purposely not collecting their share, making the amount available for the leaseholders to negotiate into their compensation packages. This could ultimately be identified as a subsidy.

Alternatively, some would argue that the province as the landowner should capture a greater share of the compensation currently going to public land leaseholders; however the SRA contemplates compensation to the parties directly affected. It would be difficult for the Province to argue they are directly affected by noise, dust, change in farming practices, loss of use or nuisance.

RE: Oil and gas surface compensation payments to leaseholders

One question would be what, exactly, are these grazing leaseholders being compensated for? The short answer is inconvenience, loss of use and damage which is up to the leaseholders to fix.

Here is a sample of some of the things that leaseholders as the land managers deal with as a consequence of having industrial activity on their lease land. **This is by no means a complete list.**

- Skewed grazing patterns. It is almost impossible to get the same mixture as was there originally so you either get overgrazing or no grazing depending on the palatability of the species even if they try to use native species. Wheat grasses for example aren't palatable later in the season so pastures grazed then make the pipeline really visible.
- Major dust issues during drilling, completions and maintenance operations. Dust kicked up by the activities of the oil companies lead to pneumonia in calves. The dust can travel up to a mile and makes the surrounding grass unpalatable grass due to dust settling on the grass.
- Loss of rattle snake population leading to increased pressure from rodents
- Unnecessary network of trails fragmenting the landscape leading to uncontrollable access issues particularly during hunting season. (Access issues can include but are not limited to gates left open and cattle wandering, cattle getting accidentally injured by hunters, garbage left behind by hunters, damage to fences and gates)
- Not all orphaned wells are taken care of. Who assumes liability for orphaned wells when both industry and government walk away?
- Soil compaction resulting from industrial activity a major obstacle to recovering native species. There are very few cases where the production tonnage has recovered to pre-industrial activity production.
- When reseeding pipelines it is virtually impossible to find the same cultivars of existing native species.
- Sheer volume of time spent mitigating effects is difficult to quantify. During drilling, pipelines and completions probably up to 80 % of time spent managing the access and damage.
- Bio-security issues. Imminent issues with invasive grass species such as brome grass, downy brome, crested wheat, alfalfa, knapweed, leafy spurge establishing on the grassland. On a native grassland ecosystem, these are damaging to the health of the grassland. Grass seed is transmitted from operation to operation through the day-to-day operators. In addition, there is concerns regarding soil-borne disease and fungus becoming a potential problem.
- Operator due diligence. This would include such things as fire danger, open gates, speed, etc.
- Poorly maintained Texas gates. These need to be cleaned regularly to be effective and they are damaged when the companies come to plow the roads.

EXECUTIVE SUMMARY

Over 5,700 grazing leases covering 5.2 million acres have been granted on Alberta's Crown lands. Instituted in 1886 to enable the settlement and economic development of the prairies, today Crown grazing leases form an important component of Alberta's modern cattle industry, supporting value-added processing, and contributing nearly $3 million in annual grazing fees to the provincial government. Most importantly, Alberta's grazing lease system—and the security of tenure it provides to ranchers—has been a cornerstone of ranchers' stewardship and management of the province's grass resources.

The continued stewardship of the grass resource on Crown lands and the economic viability of grazing leases is important to the Alberta Grazing Leaseholders Association (AGLA) and to all Albertans. AGLA represents grazing leaseholders across the province who are significantly impacted by the provincial Agricultural Lease Review Report (ALR report) and the proposed *Agricultural Dispositions Statutes Amendment Act*. Our members are concerned that the recommendations in the ALR report, if enacted into law, will result in negative implications for all Crown lands users.

For example, the ALR's proposals, if implemented, will:

- devalue Crown grazing lands and create economic uncertainty for the thousands of ranching families who utilize these grass resources to make their operations viable;
- fundamentally erode the legal protections that leaseholders have from oil and gas activity and provoke new tensions between agriculture and the oil and gas industry; and
- increase the size of government bureaucracy and create significant additional regulatory processes and inefficiencies for the oil and gas industry.

These flaws should not be enacted in legislation and regulations. As an association, AGLA's mandate is to present these concerns to the government, and to seek solutions that meet the shared goal of resource protection while recognizing the interests of stakeholders.

The concerns regarding the specific recommendations in the ALR report and proposed *Agricultural Dispositions Statutes Amendment Act* fall into three areas:

1. **The government's proposed policies in the ALR report conflict with the primary goal of the grazing lease system—they threaten the balance between long-term stewardship and economic utilization of Crown lands.**

    - Leaseholders' security of tenure will be threatened by lease cancellation if they withhold access permission to protect the land or limit their personal liability.

- The role of the Surface Rights Board in resolving disputes will be eliminated.

- Leaseholders will lose the ability to coordinate with Alberta Energy Utilities Board (AEUB) to minimize the impacts of oil and gas activities.

- Leaseholders will lose the ability to manage the environmental and wildlife impacts of developments on the grazing lease.

- The decreased role of the leaseholder will reduce the value of the grazing lease within a rancher's operation and reduce the value of the lease land itself.

2. **Key recommendations in the report are based on public perceptions that are not supported by the facts.** The ALR report accepted common misperceptions instead of conducting the necessary research to establish the facts about Crown grazing leases. In particular, three common perceptions are erroneous:

- Myth: The money oil and gas companies pay to leaseholders is a "rental fee" or a "royalty" that should be paid to the Crown as the "landowner" and "mineral owner".
- Fact: No "rental fees", "access fees" or "royalties" have ever been paid to Crown grazing leaseholders. The government is not being deprived of *any* "rental fees", "access fees" or "royalties". The only money leaseholders receive from oil and gas companies is *compensation* as required by Alberta's *Surface Rights Act* to compensate the leaseholder for the operational impacts caused by oil and gas activities. The surface rights of leaseholders are the same on both Crown and private lands.

- Myth: The surface rights compensation paid to individual leaseholders is substantial and results in "windfall profits" when compared to the lease rental rates the leaseholders pay to the government.
- Fact: Only half of the province's grazing leases have well sites on them, and those that do average only $1,100 annually in compensation. The compensation is paid for operational impacts, not just to reimburse for the loss of use of portions of the grazing lease. Comparing compensation for operational impacts with the lease rental rates paid by the leaseholder ignores the fact that the most significant component of compensation paid to leaseholders is for operational impacts.

- Myth: Crown grazing leases are "cheap grazing".
- Fact: Provincial statistics demonstrate that the lease rental rate paid by a grazing leaseholder is only 8 to 16% of the total cost associated with running a Crown grazing lease. On average a Crown leaseholder pays 31% more in lease rental to graze on Crown land than on private land.

3. **The ALR report recommends legislation and policy that is unfair—creating different classes of leaseholders, with different rights and benefits. In many cases, the ALR's proposals are likely to have unforeseen and negative implications—for example, requiring leaseholders and oil companies to fence over 120,000 acres of oil and gas access roads and well sites.** A comparison of Crown and private leaseholders before and after the ALR report demonstrates the double-standard being created (changes in status are marked in bold):

	Current System		Proposed System	
	Crown Leaseholder	Private Leaseholder	Crown Leaseholder	Private Leaseholder
Leaseholder receives rental or royalty for Crown land from oil and gas development	NO	NO	NO	NO
Leaseholder receives compensation for operational impacts and adverse effects of oil and gas development	YES	YES	**NO**	YES
Leaseholder legally required to fence oil and gas access roads and well sites but gov't may require oil and gas companies to be responsible	NO	NO	**YES**	NO
Leaseholder liable for damage to vehicles caused by livestock on oil and gas access road	NO	NO	**YES**	NO
Leaseholder has ability to manage access on oil and gas roads	YES	YES	**NO**	YES
Fair and impartial process established for resolving operational concerns related to oil and gas development	YES	YES	**NO**	YES
Leaseholder included in AEUB process for review and approval of well sites/pipelines	YES	YES	**NO**	YES
Leaseholder entitled to apply to Surface Rights Board for specific damage claims	YES	YES	**NO**	YES
Leaseholder's consent required for geophysical exploration	YES	YES	**NO**	YES

Our members are concerned that the government has not fully considered the implications of these new policies on the established working relationship that exists between the agriculture community and the oil and gas industry.

To address these concerns AGLA has prepared a comprehensive background paper that carefully examines the implications of the government's proposed new polices. Recognizing that there needs to some means of resolving the various issues relating to Crown grazing leases, AGLA's paper also contains recommendations on how government can move forward with a number of policies as outlined in the ALR report.

SUMMARY OF SPECIFIC CONCERNS AND RECOMMENDATIONS

1. *Managing Public and Recreational Access to Crown Grazing Leases*

Alberta leaseholders are recognized as successful stewards of the grasslands—an important natural resource. It is a role they have performed for over 100 years. During that time, leaseholders have worked cooperatively with other Crown land users—both industrial and recreational—to ensure the grasslands are not damaged for future generations and that multiple use of the lands is promoted.

Most leaseholders regularly grant access to the public and industry once stewardship concerns have been addressed. However, each time leaseholders grant access, they face serious risk of liability suits: lease land is rugged and livestock unpredictable. It is easy for recreational users to become injured or to damage their vehicles or snowmobiles. The *Occupier's Liability Act* makes the leaseholder liable for these damages. The ALR report recommends that the government develop a standard liability waiver form that could used by the leaseholders for recreational users on the lease land.

The AGLA supports the waiver approach as it will allow grazing leaseholders to continue to promote reasonable access and protect leaseholders from serious liability exposure. However, the AGLA is concerned about proposed changes to the leaseholder's ability to refuse access. The leaseholder's current right to reasonably refuse access balances the requests of recreational users against the leaseholder's need to protect the livestock and grass resource as well as the leaseholder's liability exposure under the *Occupier's Liability Act*.

The ALR report proposes that the government be authorized to cancel a lease where it finds access is unreasonably refused. This proposed change will severely undermine leaseholders' security of tenure, and may encourage leaseholders to grant access—even access damaging to the land or wildlife—simply to avoid a compliant process that could result in lease cancellation.

AGLA members propose that a more proportionate solution be used—namely that the Minister use his authority under section 19 of the *Public Lands Act* to order access on a case-by-case basis in the rare, specific instances where public access problems arise.

2. *Agriculture's Relationship with the Oil and Gas Industry and Surface Rights Compensation*

In Alberta, the Legislature has granted the oil and gas industry the unrestricted power to force its way onto occupied agricultural lands. The Legislature sought to balance the oil and gas industry's right of entry powers with an obligation on the company to pay compensation to the rancher for the operational impacts related to the access. Consequently, since as early as 1905, all leaseholders—Crown and private—have been guaranteed surface rights compensation for the "loss of use, adverse effect, nuisance and inconvenience" caused by oil and gas development. The Courts, the Surface Rights Board, the AEUB, and Alberta Agriculture have all recognized that grazing leaseholders are the ones most directly affected by oil and gas activity. Therefore, they are given the right to negotiate compensation payments directly with oil and gas companies: the AEUB resolves operational issues and the Surface Rights Board deals with compensation disputes.

AGLA members are concerned about the ALR's proposal to eliminate the surface rights of Crown grazing leaseholders and redirect the leaseholder's compensation payments to the government. Under the ALR's proposal, the operational impacts and adverse effects of development would continue to be a financial burden on leaseholders but the compensation payments would go to the government. This is despite the fact the government does not experience operational impacts whatsoever and ignores the fact that the oil and gas companies are on the land at the request of the government to develop Crown minerals.

Simply put, the ALR's proposal would remove the compensation but leave the nuisance, and unjustly enrich the government at the expense of the ranching community and the oil and gas industry. Other unforeseen implications of the ALR's proposed policy include: aggravating tensions between agriculture and the oil and gas industry; erosion of compensation rights for private landowners; governmental delay for approval of oil and gas activities on Crown land; and a significant increase in the fees paid by oil and gas companies to the government.

The AGLA recommends that Alberta's current compensation regime be maintained and that changes be restricted to those cases where the concentration of oil and gas activity results in inordinate compensation levels.

3. *Removal of New Oil and Gas Sites from the Boundaries of Existing Grazing Leases*

Currently, oil and gas developments are not removed from the title of the land or the lease boundaries—to do so would involve thousands of well sites and access roads, substantially increase government's administrative costs, and fractionalize the limited agricultural land base. AGLA's members are concerned that the ALR's proposal of removing well sites, pipelines

and access roads from the legal boundaries of grazing leases will create an onerous administrative burden for leaseholders, banks, government, and the oil and gas industry. The cost of this burden would be borne by taxpayers.

Additionally, there are several significant—and unforeseen—negative implications. First, the government's proposal to withdraw the well sites and access roads from grazing leases, combined with the elimination of the leaseholder's right to receive compensation, may cause banks to review financing arrangements where the grazing lease has been used as security. In addition, Alberta Environmental Protection will have to renegotiate all Memorandums of Agreement with banks relating to mortgages on grazing lease lands. Secondly, the *Stray Animals Act* will require leaseholders to fence over 120,000 acres of oil and gas sites and access roads in the White Area—isolating pastures, potentially cutting cattle off from water supplies, compromising rotational grazing, jeopardizing the migration patterns of wildlife and habitat, and adding substantial operational costs. Thirdly, leaseholders will become liable for damage caused by cattle on access roads. More importantly, the Crown, oil companies, and leaseholders will lose the ability to manage public access over these roads. The License of Occupation Regulation mandates unrestricted public access where a road is excluded from a grazing lease. Fourthly, the Crown will have to pay compensation to leaseholders in accordance with the *Expropriation Act*. Finally, the process of removing the well site and access road from grazing leases will further delay oil and gas developments.

The government has advanced only one rationale for taking well sites and access roads out of grazing leases: to justify redirecting the leaseholder's surface rights compensation away from the leaseholder and to the Crown instead.

The AGLA recommends that the government reconsider the merits of withdrawing the well sites and access roads from the grazing leases given these significant implications.

4. *Elimination of Leaseholder's Role in Determining Well Site and Pipeline Location Issues*

The ALR report proposes to eliminate the AEUB's current regulatory role of resolving location and operational issues on Crown lands and, instead, have these important functions taken over by Public Lands staff in Edmonton who are untrained in oil and gas approvals. Grazing leaseholders are recognized as having the greatest knowledge of the landscape, wildlife and habitat sensitivities on leased land, and are currently required to consent to oil and gas activities so that these sensitivities can be taken into consideration by the AEUB. The AEUB is recognized world wide as having the expertise to understand oil and gas impacts and regulate the industry.

AGLA members are concerned about the ALR's proposal to eliminate the leaseholder from the current approval process for oil and gas developments and shift this responsibility to Public Lands staff. The proposed new arrangement will create further tensions between agriculture and oil and gas industry. It will cause undesired delay and uncertainty for oil and gas companies seeking access and approvals. It will result in government increasing the size of the Public Lands branch and impose a greater burden on the taxpayer.

The AGLA recommends that the government continue to allow the leaseholder to provide input to the AEUB as part of the AEUB's approval process and not complicate the process by shifting these responsibilities onto the Public Lands branch.

5. ***Restrictions to Direct Damage Claims related to Oil and Gas Activities***

Currently, leaseholders are entitled to specific damages caused by oil and gas activities throughout the operating life of wells and other developments. AGLA members are concerned with the ALR's proposal to restrict leaseholders to claiming for only those physical damages that are apparent at the time companies indicate their desire to enter the lease, rather than damages that will occur while the well is being constructed and in operation. Most of the damages and operational impacts are not foreseen when the company originally conceives of its proposed access.

Restricting damage claims to the period prior to access and operation of the well site or pipeline will make leaseholders vulnerable to oil and gas developments, prevent leaseholders from being paid for damage, and unnecessarily aggravate relations between agriculture and the oil and gas industry. It will put ranchers supportive of oil and gas developments into the undesirable position of having to discourage development as the only means to protect their livestock and lease land operations.

The AGLA recommends that the government support the Surface Rights Board as the vehicle to resolve and rule on damage claims related to oil and gas activity.

6. ***Access for Geophysical Exploration***

In recognition of the impact geophysical (seismic) exploration can have on grazing leases and water supplies, Crown and private leaseholders have the right to manage access or refuse it if stewardship concerns are not met. AGLA members are concerned that the ALR report eliminates this right for Crown leaseholders, and provides no effective process for resolving

disputes. The oil and gas industry has expressed concerns about the delays that can be encountered in seeking access for geophysical exploration.

AGLA members support creating a uniform regulation and process—treating geophysical exploration the same as existing well site and pipeline development processes. This would preserve the leaseholder's ability to protect the land and water, while at the same time responding to the oil and gas industry's need for timely access.

7. *Sale of Crown Grazing Lease Lands*

AGLA members are supportive of the orderly sale of Crown land. It allows the government to get out of the business of being a property manager and lets the private sector do what it does best.

However, significant negative implications in the auction process need to be resolved. First, the bidding process needs to protect agricultural uses—the original intent of grazing leases. Second, leaseholders should be able to realize the value of their improvements—in most cases a significant cost—either as a credit against their purchase of the land, or as a reimbursement from the purchase price.

The AGLA recommends that a process be established to value the leasehold improvements with the leaseholder being entitled to the appraised value of the improvements as a credit against the purchase price.

8. *Rental Rates and Payment of Municipal Taxes*

Currently, the leaseholder pays lease rentals to the province and pays municipal taxes to the municipality. AGLA members are concerned about the effect of the ALR's proposal of combining municipal tax payments with the provincial grazing lease rental payments and requiring this new payment to be made to the province instead of the municipality. The proposed new policy will deprive leaseholders of the right to appeal tax assessments and cause the Public Lands branch to be needlessly expanded to process the paperwork for municipalities. In addition, since the names of leaseholders will no longer appear on the tax assessment roll, these names will also not appear on the municipal maps. These maps are frequently used by oil and gas companies, recreationalists and government agencies to determine the occupant of these lands.

1.4.3 A three step process be initiated to resolve access complaints:

- First, the government's lease supervisor should be directed to mediate access disputes with the person seeking access and the grazing leaseholder;
- Second, if a satisfactory resolution is not achieved through mediation, the dispute could be submitted to a neutral, third party arbitrator; and
- Finally, if the arbitrator directs that access should be permitted and the grazing leaseholder refuses to cooperate, the Minister could use his power under section 19 of the *Public Lands Act* to authorize the access of the person who had been previously refused access.

2. SURFACE RIGHTS COMPENSATION FOR OIL AND GAS ACTIVITY

2.1 Current Law and Policy

In Alberta, the Legislature has granted oil and gas companies the unrestricted power to force their way onto occupied agricultural land.[16] The Legislature has balanced the oil and gas industry's right of entry powers by placing a legal obligation on oil and gas companies to pay compensation to the rancher for the operational impacts related to the access.[17]

The principle that surface owners and occupants who are affected by oil and gas development are entitled to compensation for the impact of the development has been firmly entrenched in Alberta law since 1905.[18] The *Surface Rights Act* requires oil and gas companies to compensate both Crown leaseholders and deeded leaseholders for loss of use, adverse effect, nuisance, and inconvenience related to the oil or gas activity.[19] These types

of compensation are designed to compensate the leaseholder for the increased operating costs and other impacts that the leaseholder must endure when operating an agricultural operation around an oil and gas facility. As Alberta Agriculture's publication on surface compensation states, "the government has determined that grazing lease, license and permit holders are the ones most directly affected by oil and gas activity. Therefore, they are left to negotiate compensation payments privately with the oil and gas industry."[20]

Although it is not widely understood, on surface rights issues, the law has always treated those leasing Crown land the same as those leasing private land. This current practice meets one of the primary goals set out in the ALR report—that, "legislation, regulation and policy should be uniform and clear".[21] Leaseholders on Crown and private land currently possess identical entitlements to compensation,[22] and both negotiate compensation for operational impacts. It is true that not all leaseholders of private land receive the compensation they are entitled to receive under the *Surface Rights Act*. The reason for this is simply that most private leases are for a short term, typically one year.[23] The farmer seeking to lease the land is able to discount his lease rates with the knowledge of a pre-existing well site.

Alberta Agriculture recognizes the preferred practice of allocating compensation for operational impacts to Crown and private leaseholders. In its popular publication on the legalities of leasing private agricultural land, *Leasing Cropland in Alberta*, the Department of Agriculture provides advice on all aspects of private leasing and specifically recommends contractual clauses that the department believes are fair and lawful.[24] On the issue of how the surface rights compensation should be allocated between the landowner and the leaseholder, the department states that a clause should be inserted in the lease agreement clearly stating that all compensation related to operational impacts should go to the leaseholder, not the landowner.[25]

The law also provides that leaseholders may receive specific compensation for physical damages caused by an industrial development—for example, the destruction of fencing, fire damage, or the death of cattle caused by the development.[26] These claims can be arbitrated by the Surface Rights Board, or settled in a court of competent jurisdiction.[27]

Over the years various government departments, the courts, and the Surface Rights Board itself have reviewed the rationale of leaseholders—whether on Crown land or deeded land—receiving compensation for operational impacts. [28] In every case, the conclusion has been that since leaseholders experience the operational impacts, they should be compensated. The Alberta Court of Appeal, praising the wisdom and fairness of the *Surface Rights Act*, has said that rather than creating an injustice by requiring companies to pay compensation to farmers and ranchers, the Legislature was attempting to redress the injustice that had occurred by the Crown reserving the mineral rights from land and then authorizing companies to forcibly enter those lands to develop the minerals.[29]

Three erroneous perceptions should be avoided when considering the issue of surface compensation.

First, some perceive the compensation payment mandated by the *Surface Rights Act* as a "rental fee", "access fee" or a "royalty". It is not. Payments made to leaseholders are clearly established as *compensation* for the significant operational impacts leaseholders experience as the occupant of the land. Landowners of leased land receive separate payment for an "entry fee" and land value,[30] but are intended to receive compensation for the operational impacts only when they are the ones actively farming the land.

Second, some perceive the amount of the compensation payments to be substantial, providing "windfall profits" to leaseholders. Government statistics show that the reality is that only half of all leases have any oil and gas facilities, and the majority of those with such

facilities receive only $1,100 annually in compensation[31]—about the price of a single cow from a rancher's herd. In only a few exceptional cases—where a leaseholder has a large land base and intense concentration of well sites—do leaseholders receive significant compensation payments.

Third, some consider provincial grazing lease rates result in "cheap grazing". For example, the government publication *Agri-News* (November 30, 1998) stated that there is a "perception that public land leases provide unfair 'cheap' grazing for some producers."[32] However, an analysis of Alberta Agriculture's twenty-year survey of grazing lease costs (conducted by former University of Alberta farm economy Professor Leonard Bauer) indicates that grazing land rents paid by leaseholders to the Crown comprise only 8 to 16% of total grazing lease costs to Crown leaseholders, and the average leaseholder pays 31% more to graze on Crown land than to rent private land.[33] Major Crown leaseholder expenses include the assignment fee, improvements (including clearing, pasture development, fencing, waters, loading facilities and gates) and maintenance. In addition to these costs, Crown land leaseholders have higher rates of public access and thus experience higher property damage, and spend more time managing Crown lands than their counterparts on private pasture.

Changes to government policy should not be based on these common, but inaccurate, perceptions.

2.2 Government's Proposed Policy Change

The ALR report proposes elimination of the Crown leaseholder's surface compensation by "removing" industrial development from the legal boundaries of the grazing lease. Oil and gas companies would continue to make payments for "loss of use, adverse effect, nuisance and inconvenience" but would remit these payments to the Crown, instead of the

leaseholder. The change would take place immediately for new wells, while existing developments would be grandfathered for ten years.[34]

2.3 Implications

The ALR report emphasizes the need to treat Crown and private leaseholders uniformly—ensuring that no unfair advantage or penalty is conferred on a leaseholder simply because the province is their landlord. In recommending the elimination of adverse effects compensation, however, the report creates a serious inequity—establishing two classes of leaseholders with different rights under law. These leaseholders are distinguished only by the identity of their landlord, and Crown leaseholders will be significantly penalized.

The ALR report attempts to avoid this predicament by arguing that because development land has been "removed" from the lease, the leaseholder is no longer entitled to adverse effects compensation. It is plain, however, that the land cannot be physically "removed"—both the land, and the development, remain within boundaries of the lease, and the oil and gas activity would continue to have operational impacts on the cattle operation. These operational impacts would continue to be a financial burden to the leaseholder. Simply put, the government proposes to remove the compensation, but leave the nuisance and operational impacts. The government would receive the compensation, but not have to endure the operational impacts.

While the ALR report's recommendation has obvious financial implications for grazing leaseholders, it is also likely to have unanticipated impacts on the surface rights of deeded landowners and private leaseholders. If the report's recommendation is implemented, it will also result in significant increased annual costs for oil and gas companies, and create serious tensions between the agricultural community and the oil and gas industry.

Impact on Deeded Landowners Surface Rights

The ALR report's recommendation on surface compensation will mark the first time in Alberta's history that oil and gas companies will be allowed to enter occupied land, cause operational impacts to farmers and ranchers using those lands, and not be required to provide compensation to the leaseholders for those impacts.

In order to implement its new policy, the government will have to make significant legal changes to the *Surface Rights Act*, and AGLA's members are concerned about the unforeseen impact of those changes on deeded landowners. It is apparent that the amendments will either reduce the surface rights associated with deeded lands or make the rights of deeded landowners vulnerable to legal challenge by oil and gas companies in the future. The head of the government's task force has indicated that the intention of the new policy is to make lease arrangements on Crown land and deeded land similar.[35] The only way that this could be achieved, given the government's proposals, is if the compensation rights of leaseholders on deeded lands were also eliminated.

Impact on Oil and Gas Industry

It appears that the financial impact of the government's proposed changes on the oil and gas industry could be significant. The ALR report states that:

> "The province would charge a first year and subsequent annual rental. These rentals will be based on regional comparisons of compensation paid on private land from the previous year."[36]

The ALR report suggests that the Crown would seek to collect this additional "rental" on well sites on unoccupied Crown lands outside of the grazing lease system. In addition, the ALR report proposes to adopt private land compensation rates as the standard for setting the government "rental rate". Private compensation levels tend to be double or triple that paid to Crown leaseholders. Given these factors, it is inevitable that the oil and gas industry's annual payments to the Crown will increase significantly.

AGLA's analysis concludes that oil and gas companies could be expected to pay a net annual increase of tens of millions of dollars in surface payments to the government.

In summary, the surface compensation recommendations proposed by the ALR report have a series of significant negative consequences. In particular, if the new policy is implemented, it will:

- cause Crown leaseholders to endure the operational impacts of oil and gas developments, without the right to be compensated for the impacts;
- create a double standard for deeded and Special Areas lands by continuing compensation for deeded landowners—a double-standard that cannot withstand critical or legal scrutiny, which potentially jeopardizes all farmers' and ranchers' surface rights including those in the Special Areas;
- mean that the government will award itself compensation that no other landlord is entitled to—compensation legally intended for the leaseholder who experiences the impacts;
- result in new revenues to the Crown at the expense of rural family businesses and communities;

- provide an undesirable incentive for farmers and ranchers to discourage oil and gas developments wherever possible as this will be their only means of avoiding the operational impacts of oil and gas activities;
- aggravate existing tensions between the agricultural community and the oil and gas industry;
- result in policies being based on erroneous perceptions of the existing compensation system, the amount of compensation paid to leaseholders, and comparative grazing rates.

AGLA recognizes that it may be considered desirable to address the small minority of leases where significant development provides substantial payments to leaseholders. While AGLA's members are of the view that the compensation paid to leaseholders due to these intensive and disruptive oil and gas developments is justifiable, and that the existing compensation policy should be continued, AGLA proposes that the Crown establish a compensation formula for the most extreme cases. Under the formula, the leaseholder's compensation would be reduced for additional well sites after the number of wells within a grazing lease exceed a certain level. This formula approach would recognize that the adverse effect to the leaseholder increases as the number of wells increases. It would also recognize, however, that the nuisance and inconvenience to the leaseholder decreases as the leaseholder develops the skills and processes to deal with the oil and companies and their operations.

2.4 Recommendations

2.4.1 The government's rationale for eliminating Crown leaseholder's compensation should be revisited, while being mindful of the impacts on the surface rights regime for all types of land.

2.4.2 The Crown consider negotiating increased royalties or other fees normally paid to the Crown by oil and gas companies, rather than disentitling Crown leaseholders from fair compensation which is rightfully theirs.

2.4.3 A formula be developed reducing the level of compensation paid by oil and gas companies to Crown leaseholders for nuisance and inconvenience when the concentration of oil and gas sites reaches a certain density.

3. REMOVAL OF NEW OIL AND GAS SITES FROM THE BOUNDARIES OF EXISTING GRAZING LEASES

3.1 Current Law and Policy

Currently, when an oil and gas company seeks access to land for oil and gas activities, the land it requires is not subdivided or removed from either the title of the land or the lease boundaries. This is the case for both deeded land and Crown land. The current law and policy recognize the temporary nature of oil and gas development. Revising land titles and leases to exclude the acres involved in the thousands of well sites and access roads would create enormous and unnecessary legal paperwork and administration. The current law and policy are designed to avoid the significant fractionalization of the agricultural land base that would be caused by a proliferation of land subdivisions for well sites and access roads.[37]