Western Stock Growers' Association
Stockman's Centre, # 232, 2116 - 27 Avenue NE
Calgary, Alberta, Canada T2E 7A6
Phone 403-250-9121 Fax 403-250-9122
Email: wsga@shaw.ca • Web: www.wsga.ca

March 1, 2011

MLA Morton,
Ted.morton@assembly.ab.ca

MLA Groeneveld,
George.groeneveld@assembly.ab.ca

MLA Berger,
Evan.berger@assembly.ab.ca

Dear Ted, George and Evan:

Thank you for attending the land use session at the Alberta Beef Industry Conference last Friday. It was helpful to learn your perspective on *ALSA* and to hear about potential amendments. The introduction of Bill 10 in the legislature this afternoon adds another dimension to the discussion.

First off, let us assure you all that we agree fully with Ted when he states one of the most significant threats facing landowners is the issue of regulatory taking. This threat extends to all of the agriculture industry but also beyond to forestry, mining, oil and gas, and in fact the entire economy. It is very significant that in spite of this agreement in principle, the original *ALSA* was viewed by WSGA and many others as a massive regulatory taking whereas you and your government saw it as a protection against regulatory taking. Clearly we are lacking common language, definitions, and understanding to arrive at such different conclusions. This letter will attempt to make clear our understanding of regulatory takings and property rights.

Much has been made of section 11 of *ALSA* and its purported power to cancel land titles. The amendments your government have introduced attempt to distinguish between certificates of title such as deeded lands and freehold minerals; and statutory consents. We propose that the argument over whether or not a land title is a statutory consent is in large part moot. Statutory consents even by the government's definition almost universally overlie property titles and it is the combination of the two that makes both the title and the consent valuable. Most land titles permit the construction of a residence, for example, only after acquiring the statutory consent known as a building permit. Further examples include subdivision (both first parcel out and more extensive) that are subject to municipal approval as well as approval by Alberta Environment for water and sewer. There is an undeniable connection between the property rights of titled properties such as private lands and freehold minerals; and the statutory consents that govern the use of those properties. Section 8 (c) of Bill 10 clarifies section 11 of *ALSA* by adding

subsection (3) in this respect. This subsection makes clear the fact that a regional plan may affect, amend, or rescind development permits unless improvements under such development permit and on the relevant land have been installed at the time the regional plan comes into force. In other words, a regional plan may preclude the issuance of development permits which otherwise would have been forthcoming or cancel those already issued if construction has not commenced. Market value of property is always a combination of current productive (current use) value and potential future use value. Long standing policies and enactments such as one residence per quarter section and first parcel out subdivision have been factored in to the market value of real property transactions in Alberta for several generations. Even an amended *ALSA* has huge potential to significantly alter that market value. This is one reason WSGA and others view *ALSA* as a regulatory taking.

The new wording of Section 19 of *ALSA* indicates a right to compensation. Section 19.1 deals with compensable takings on private lands and freehold minerals and offers tight definitions. These definitions align with the presentation from the three of you and imply that property interest is confined to Land Title and Freehold Mineral Rights. Even under those tight definitions the final remedy outlined in Bill 10 is essentially a conservation directive under *ALSA* Part 3, Division 3. This section also (under 19.1 (6)) provides for registered owners of titled properties to apply to the Court of Queen's Bench to determine matters in dispute.

Bill Newton argued in his comments (during the Q and A at your presentation) that property interest extends to statutory consents, using the example of mineral leases. Clearly a mineral lease is a statutory consent by and upon which an entire sector of our economy is reliant. The Crown typically sells the right to that statutory consent. This in itself denotes property rights directly associated with the statutory consent. Private entities invest enormous financial resources to extract products, and value, under that statutory consent. Those products are exchanged for good and valuable consideration as property in a marketplace with typically multiple changes of ownership before final consumption. The rights to compensation for amendments or cancellations of statutory consents under an amended *ALSA* are restricted to the rights existing under other enactments or as provided for under Part 3, Section 3 of *ALSA* (conservation directives, conservation easements and transferable development credits). Because Section 19.1 deals only with titled properties the provision for application to the courts to determine matters in dispute does not apply to statutory consents. The potential for regulatory taking on statutory consents is equally threatening for agriculture and other major industries as regulatory taking of titled properties. This is another reason why WSGA and others view *ALSA* as a regulatory taking.

The fact that the Crown in most cases sold statutory consents that are renewable and assignable is an extremely important aspect of the property rights associated with statutory consents. In the case of grazing lease dispositions and forestry grazing permits the Crown charges an assignment fee far in excess of the cost of transferring the contract to a new disposition holder. Objectionable as they may be, these fees infer value in the statutory consent property and they definitely indicate that the crown is cognizant of that

value. In other cases the Crown issued statutory consents in full knowledge that the issuance would trigger investment in infrastructure and businesses – usually on titled lands - to utilize that statutory consent. Two agricultural examples would be the issuance of a water license for irrigation under the *Water Act* and the issuance of a permit for a confined feeding operation under the *Agricultural Operations Practices Act.* Will the provisions for compensation in those Acts cover the loss of the investment in infrastructure and business development upon cancellation of such statutory consents? More appropriately, will the compensation provisions cover the expropriation value of those statutory consents?

Minister Knight has been quoting the section of the *Public Lands Act* which refers to – in the case of cancellation of a portion or the entirety of a grazing lease – the applicant's obligation to "negotiate and pay for the loss of the lessee's interest under the lease". It is notable that the Minister did not quote from S. 109 of the Act (no compensation payable) or even from S. 82 sub (4) regarding irrigable lands (no compensation payable). Even in reference to S. 82 sub (5) the definition of lessee's interest under the lease is critical. Law professor Arlene Kwasniak has recently reported that it is very difficult to establish regulatory taking in Canada. She refers to the requirement to meet *Tener* rules which include:

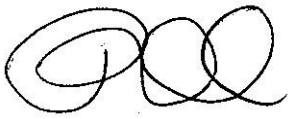
- property interest is extracted by government,
- deprivation of the property interest by government,
- acquisition of the property interest by government, and
- legislation explicitly providing for compensation.

The *Public Lands Act* provisions for compensation can not be described as explicit. One definition of the lessee's interest, for example, could be the depreciated value of improvements the lessee has constructed on the leased property at his own expense. A more comprehensive definition would include those improvements as well as the cost of acquiring the grazing lease including the assignment fees paid to the crown as well as the purchase price of the disposition from either the crown or another assignor. The appropriate definition from WSGA perspective would be the expropriation value of the lessee's interest and would include improvements, acquisition or fair market value, as well as value of the lease interest to the overall operation. There is some precedent in Alberta for compensating for regulatory taking of statutory consents. It involved natural gas and bitumen and the shutting in of one to preserve the extraction opportunity of the other. From memory, the province did compensate the mineral lessee. However that compensation appears to have been limited to the improvements the lessee had made at his own expense – eighty-five million dollars for shutting in 146 gas wells or an average of $582,000 per well. This would more closely represent the cost of drilling the wells than the value of the one trillion cubic feet of gas shut in by the decision. In fact even at a 20% recovery rate and a low gas price of four dollars per Mcf the gas was worth 800 million dollars. Even though provisions for compensation for statutory consent amendments or rescissions are present in other enactments, they are in general inadequate, ambiguous, and restrictive. *ALSA* and the process of regional planning will increase the likelihood of statutory consent amendments, and this combination of events threatens security of tenure and investment related to statutory consents.

In summary, the amendments introduced by way of Bill 10 do improve some of the sections of *ALSA*. However, the differentiation between the property rights of titled properties and those of statutory consents remains alarming. Most of the other concerns WSGA has expressed to you and your government remain unresolved. Tabling regional plans in the legislature prior to approval by cabinet is only a slight improvement in transparency. Now we will know what is going to hit us before it hits us. Section 20 regarding local government bodies remains unchanged. Ministerial appointment of Regional Advisory Council members and the gag order RACs operate under while drafting regional plans do not constitute public consultation or local decision making. Finally, Bill 24 passed in the legislature in December 2010 may represent the most egregious theft of property since Section 109 of the *Public Lands Act* was enacted. Not surprisingly they both preclude compensation. They also both ignore the lawmaking principle of non-retroactivity.

We again attach our white paper on Land Use Framework. This was sent to all MLAs and presented to Morris Seiferling and Colin Jeffares a year ago. You will notice that our message is consistent. Your attendance at the Alberta Beef Industry Conference was truly appreciated. However your government and several recent enactments have seriously eroded trust with rural Albertans. That trust will only be restored by clear communication and precisely worded legislation that assures the principal drivers of the economy their investments in Alberta are safe from regulatory taking. WSGA hopes that this letter clarifies our perspective and we await your response as to how closely our understanding of regulatory takings and property rights align with yours.

Sincerely,



Phil Rowland
President

c.c. Minister Knight
Premier Stelmach
All MLAs