

At Long Last - Legal Protection for the Castle Wilderness

By: Shaun Fluker

Matter Commented On: Alberta Environment and Parks, News Release ["Province to fully protect Castle area"](#) (September 4, 2015)

On September 4 the Alberta government [announced](#) its intention to legally protect the area in southwestern Alberta known as the Castle wilderness with a new wildland provincial park and a new provincial park. What this legal protection exactly amounts to remains to be seen, but the September 4 announcement states there will be no further approvals granted for resource development in the Castle and existing approvals, other than for oil & gas, will be cancelled. Readers who follow land use decision-making in Alberta will know this announcement follows on the heels of the [South Saskatchewan Regional Plan](#) which was enacted just one year ago in September 2014 with its own direction for protecting the Castle. And those familiar with the Castle wilderness specifically will know this announcement is a monumental shift in policy direction. What follows is some context for this announcement, and some consideration of the applicable law in relation to implementing this new policy direction. The analysis concludes by suggesting the Alberta government consider enacting dedicated legislation to protect the Castle wilderness.

The Castle region was once included within the boundaries of Waterton Lakes National Park. When Alberta obtained administration and control over public lands in the Castle in 1930, the province managed the area following the wise-use principles of the time including timber harvesting, game management and water conservation. Demands on the landscape began to escalate in the 1960s with the increase in local populations, road building, recreation, and resource development, while at the same time environmental values entered the policy discourse and advocates lobbied public officials to protect these vast forested areas as undisturbed wilderness. I think Steven Kennett said it best in 2003 when he wrote the land use challenges in the Castle stem from an abundance of riches (Steven A Kennett, [Spinning Wheels in the Castle: A Lost Decade for Sustainability in Southwestern Alberta](#) (Canadian Institute of Resources Law, 2003) at 1). The region is environmentally and culturally significant in many ways, a storehouse of economically valuable resources, home to endangered flora and fauna, amenable to a host of recreational activities, and very aesthetic. If Alberta was going to face a land use crisis, it most certainly would surface in the Castle region. And indeed it has.

Competing visions of land use in the Castle have faced each other in many forums over the years. The earliest such battle may be the proposal by Shell Canada in the mid-1980s to drill for natural gas in the South Castle river valley. The construction of the Waterton gas plant in the 1960s ensured the region would be exploited for natural gas (for an excellent novel on this topic I highly recommend local author Fred Stenson's latest book [Who By Fire](#)), but for years gas exploration focussed on the front range canyons and valleys. This Shell proposal was notable for its location deep in the heart of what was otherwise considered at the time to be untouched wilderness. The Alberta Energy Resources Conservation Board (predecessor to the Alberta Energy Regulator) conducted a public hearing to consider the proposal, and received

submissions from local and international groups who argued the South Castle valley should be protected from industrial development. The Energy Resources Conservation Board approved this application in Decision D86-2 and went on to approve numerous additional wells and pipelines in the Castle following surface and mineral rights dispositions granted by the Alberta government, even while acknowledging at times that biological thresholds in the Castle had already been seriously degraded by resource development (See for example [Decision 2000-17](#) at p 10).

In 1993 the Alberta Natural Resources Conservation Board issued what might still be its most notable and significant [decision](#) in conditionally approving the expansion of the Westcastle Ski Resort located in the West Castle river valley. The Board's process included a detailed assessment of the social, economic and environmental effects that the expansion would produce in the Castle. Steven Kennett provides a thorough review of the Board's decision in [Spinning Wheels in the Castle](#) at pages 6 to 18 and summarizes the Board's decision as “a groundbreaking, controversial and ultimately unsuccessful attempt to incorporate sustainable development principles into land and resource management in the Castle” and “the most thorough discussion to date of broader land-use issues in the Castle, including the adequacy of the overall regime for environmental and resource management in the region” (at 3). The Board concluded the expansion should proceed but only if a new protected area - the Waterton Castle Wildland Recreation Area – was designated by the Alberta government to offset the environmental impacts the new project would have in the region. In an odd turn of events the Alberta government initially accepted the Board's decision and struck a committee of local stakeholders to plan for its implementation, but then later rescinded the Board's decision. Kennett describes how disagreement between local stakeholders over land-use in the Castle led to the demise of the Board's work (at 15-16).

The Castle was also nominated for protection under Alberta's Special Places 2000 program in the mid-1990s. Special Places 2000 was a policy guiding the Alberta government to protect biodiversity in each of the province's eco-regions by the end of the 1990s (Steven Kennett describes Special Places 2000 in more detail [here](#)). Once again the Alberta government struck a local committee of stakeholders to consider the nomination and land use priorities for the Castle region. The competing visions for land use in the Castle inevitably led to factions within the local committee. Ultimately the committee recommended the Castle Special Management Area be designated as a multiple-use area to accommodate the existing commercial and recreational interests in the region. The Alberta government designated the Castle Special Management Area, but to this day has continued to manage the area as a multiple-use region of public lands with no real legal protection and managed by a large swath of non-transparent discretionary power exercised by public officials.

Alberta environmental groups and others who have advocated for real legal protection in the Castle obviously left the 1990s with bitter feelings, but the campaign to protect the Castle did not subside. In 2008 these groups and individuals formed a working group – the Castle Special Place Citizens Initiative - to develop a [conceptual proposal](#) for legal protection in the Castle. Their work concluded that the Castle Special Management Area be designated as a wildland provincial park. At about the same time, the provincial recovery team for the Alberta grizzly bear population released a [recovery strategy](#) that identifies the Castle region as core habitat for the bear and identifies many of the existing resource development and recreational activities in the Castle as a threat to maintaining a viable population of grizzly bears in the area. In the face of growing opposition to resource development in the Castle and the mounting scientific

evidence that significant environmental thresholds had been passed in the region, the Alberta government nonetheless continued to approve new resource development activity in the Castle. Land use in the Castle was once again on the planning agenda with the development of the [South Saskatchewan Regional Plan](#) under the *Alberta Land Stewardship Act*, [SA 2009, c A-26.8](#). The committee responsible for advising the Alberta government on the content of the Plan recommended a new wildland provincial park in the Castle, but restricted its boundaries to essentially the sub-alpine and alpine regions of the area and notably excluded much of the South Castle valley and all of the forested region surrounding the Carbondale river. The South Saskatchewan Regional Plan was enacted into force on September 1, 2014 and Appendix F (at pages 140 to 142) sets out new conservation areas called for by the Plan, including a proposed wildland provincial park (map on page 142). Environmental groups have criticized the existing proposal as inadequate to protect the biodiversity and environmental values in the Castle. Noting for example the current Plan does not call for an end to logging or gas exploration in the Castle and surprisingly makes no reference to the region as core habitat for the endangered grizzly bear in Alberta.

The NDP included legal protection for the Castle wilderness in their 2015 campaign platform, and last week's announcement demonstrates the Alberta government will now follow thru with that promise. The government proposes to designate two new protected areas in the Castle – an expanded version of the wildland provincial park proposed in the current South Saskatchewan Regional Plan and a provincial park to thereby cover the entire Castle Special Management Area. Most notably, the new proposal also calls for logging and mining to cease in the Castle. Existing oil and gas dispositions will be honoured but no new surface access will be granted for oil and gas activities in the Castle. The wildland park will be managed primarily for low-impact, non-motorized recreational activities, while the provincial park will accommodate a wider range of recreation and facilities. The proposal will shift the land use priority in the Castle from resource development to environmental protection. In light of the history briefly surveyed above, this is a monumental shift in public policy.

The implementation of this new direction will require an amendment to the South Saskatchewan Regional Plan. Section 4 of the *Alberta Land Stewardship Act* provides the Lieutenant Governor in Council with power to amend the description of the Castle conservation areas in the Plan, subject to the requirement in section 5 for public consultation on the proposed amendment – that [consultation](#) is currently underway until October 5 – and placing the amendment before the Legislative Assembly which will presumably happen this Fall.

The actual designation of the new provincial parks by the Lieutenant Governor in Council will occur under section 6 of the *Provincial Parks Act*, [RSA 2000, c P-35](#). Section 8 of this Act is also important here as it provides the Minister of Environment and Parks with the power to grant new dispositions and/or cancel existing dispositions in the provincial parks. And moreover section 12.3 provides that the Minister's discretion under section 8 must be exercised in accordance with any applicable regional plan enacted under the *Alberta Land Stewardship Act*. This constraint on discretion is important here because otherwise there is no legal constraint on dispositions in provincial parks designated under the *Provincial Parks Act*. In other words, the legislation does not otherwise preclude the exploration for and development of subsurface mines and minerals or logging in provincial parks. On the other hand, the *Provincial Parks (Dispositions) Regulation*, [Alta Reg 241/1977](#) does generally preclude new dispositions for the

exploration and development of subsurface mines and minerals in *wildland* provincial parks. The *Regulation* does not, however, preclude forestry dispositions in wildland provincial parks. And so any amendment to the South Saskatchewan Regional Plan will have to include a statement to the effect that logging is prohibited in both the new wildland park and the new provincial park. Whether or not compensation is payable to holders of existing dispositions in the Castle which will be cancelled is not an issue I am addressing here, but my colleague Nigel Banks has previously addressed the topic in the context of the regional plans [here](#).

It is an understatement to declare this as a significant victory for the many who have advocated relentlessly for legal protection in the Castle region despite the many legal and policy setbacks and frustrations over the years – only a few of which I have mentioned above. These folks are no doubt celebrating this moment, as they should. My suggestion going forward is that instead of designating the protected areas under the *Provincial Parks Act* the Alberta government should enact dedicated legislation to protect the Castle – along the lines of the *Willmore Wilderness Park Act*, [RSA 2000, c W-11](#) which appears to contain the same sort of land use rules consistent with real environmental protection intended for the Castle with this new announcement. The enactment of dedicated legislation in the Legislative Assembly – say the *Castle Wilderness Act* - would not only provide a symbolic and formal moment for achieving real legal protection in the Castle wilderness, but it would also make it much harder for future governments to reverse this achievement.

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>
Follow us on Twitter [@ABlawg](#)

