

February 8, 2021

Coal Law and Policy in Alberta, Part One: the Coal Policy and Its Legal Status

By: Nigel Bankes

Issue Commented On: Revocation of the [Coal Development Policy for Alberta \(1976\)](#); Department of Energy, Information Letter 2020-23 “[Rescission of A Coal Development Policy for Alberta and new leasing rules for Crown coal leases](#)” (15 May 2020)

I don’t need to tell anybody living in Alberta that there has been a lot of talk recently about coal. Most of that talk has been directed at the Government of Alberta’s decision, to revoke a policy adopted in 1976 known as the *Coal Development Policy for Alberta* (CDP or Policy).

Once it became widely known, the decision to revoke the policy attracted the attention of civil society and of the media. Interest in the decision is growing and many local governments including Lethbridge, High River, Nanton, Longview, Canmore, Edson, Okotoks, Airdrie and Turner Valley have weighed in on the issue. So too have the Kainai-Blood Tribe and the Siksika First Nation. A significant number of these governments have adopted resolutions either questioning the decision to revoke the coal policy or simply demanding that the Government of Alberta reinstate the policy. Much of the commentary focuses on the environmental and health costs associated with coal mining as well as the conflict between coal mining and other visions for the future of the eastern slopes of the Rockies (e.g. Sharon J Riley, “[An Alberta County drafted big tourism plans. Then came the coal leases](#)”, *The Narwhal* (6 February 2021))

There are many sources of information on the revocation decision including:

- Alberta Wilderness Association (AWA), “[Coal production has adverse impacts on both land and water ecosystems](#)”
- Canadian Parks and Wilderness Association (CPAWS), [Southern Alberta Chapter](#)
- Robson Fletcher, “[Answers to questions about Alberta’s coal policy that, at this point, you’re too afraid to ask](#)”, *CBC* (21 January 2021)
- Richard Quinlan, “[The Risks of Surface Mining](#)”, Opinion, *Lethbridge Herald* (22 July 2020)
- Southern Alberta Group for the Environment (SAGE), [The Rockies and Coal Mining](#)
- And for a column strongly supporting a limited number of new coal projects see Lisa Sygutek, councillor for the Municipality of Crowsnest Pass, “[Albertans need education, not rhetoric, on coal mining](#)”, Opinion, *Edmonton Journal* (26 January 2021)
- And for a site that contains useful links to comments opposing new mines see Dave Cournoyer “[Who opposes Kenney’s decision to allow open-pit coal mining in Alberta’s Rockies? Basically everybody.](#)” (5 February 2021)

The purpose of this post, and what I hope will be a series of follow-up posts, is to clarify the legal issues involved. To this point, ABlawg has not commented significantly on the decision although we have addressed one specific issue associated with the water requirements of proposed coal projects in Alberta: see “[Water for Coal Developments: Where Will It Come From?](#)”

More generally we can say that there is very little legal literature on coal developments in Alberta beyond an excellent, but now dated, contribution from Doug Rae in the Alberta Law Review nearly forty years ago: “The Legal Framework for Coal Development in Alberta” ([1982](#)) [20 Alta L Rev 117](#).

This post begins the series by addressing a set of questions related to the adoption of the CDP and the legal effect of that policy.

I will refer to the 1976 CDP in the past tense while recognizing that there are ongoing judicial review proceedings aimed at overturning the revocation decision (for one such application see: [Blades et al v Alberta](#)).

What Did the *Coal Development Policy of 1976* Provide For?

As the name suggests, the CDP was a policy of the then government of the day, the Lougheed government. It was not a “no-coal” policy, but neither was it an “anything-goes” policy. The Policy makes for interesting reading 45 years after its adoption. The Policy contains no reference to greenhouse gas emissions or climate change and indeed, it praises the environmental virtues of Alberta’s coals on the basis of their “uniformly low sulphur content” making those coals “a clean, low-polluting source of thermal energy” (at 1).

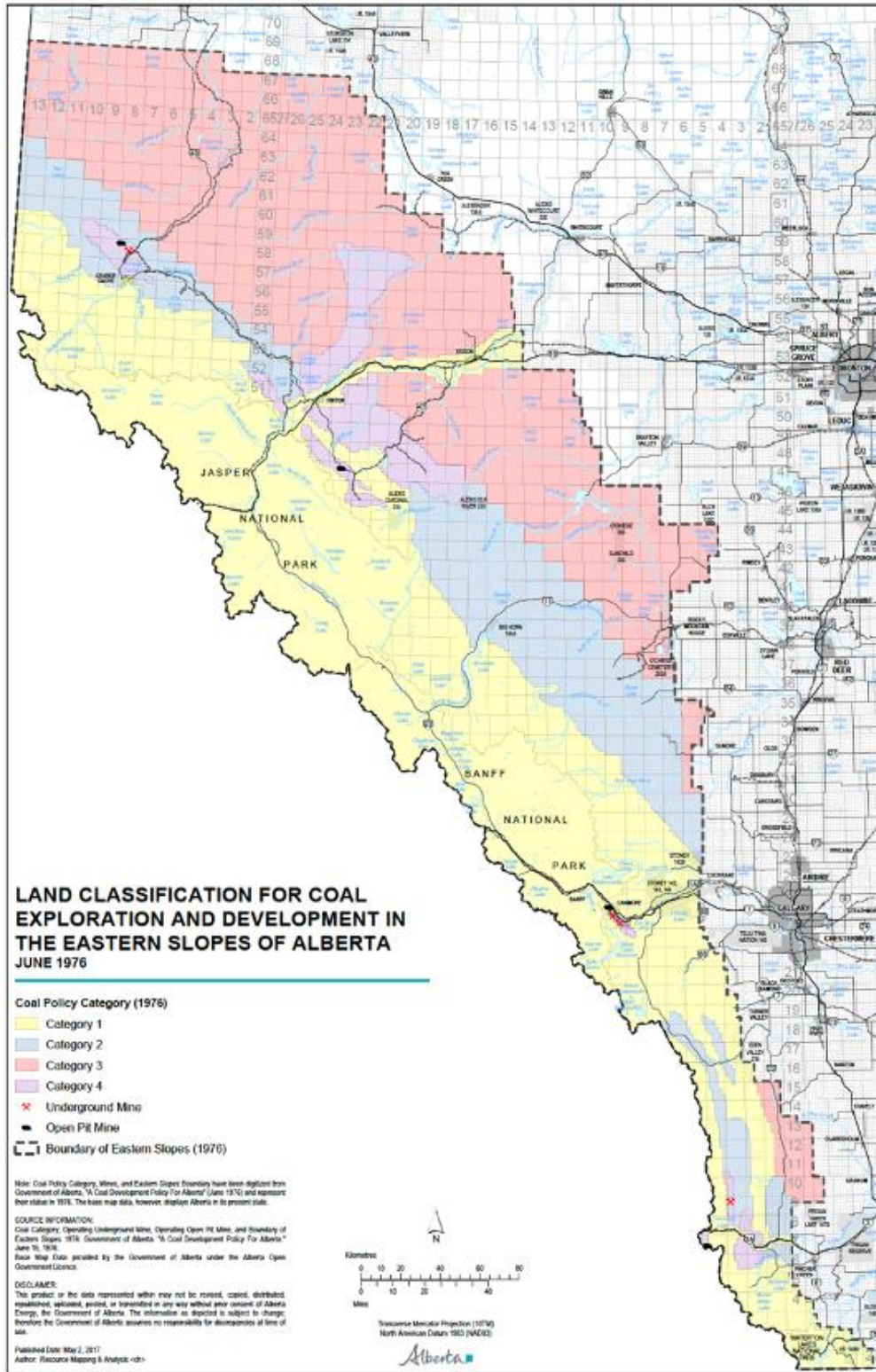
But as well as being an industrial development policy for Alberta, the Policy was also (and this remains significant for the purposes of the current policy debate) an early and relatively crude form of landscape-level planning with respect to a single resource: coal. The Policy recognized, given the value of the eastern slopes as the source of clean water and recreational values, that some activities should simply be excluded from further consideration, notwithstanding any potential economic benefits. Hence, the Policy established a four-fold classification of lands for coal exploration and development. Category 1 lands were lands in which no exploration or commercial development would be permitted. This category includes National Parks, present or proposed Provincial Parks, Wilderness Areas and some other lands of special significance (at 14). Category 2 lands were said to be lands

in which limited exploration is desirable and may be permitted under strict control but in which *commercial development by surface mining will not normally be considered at the present time*. ... Underground mining or in-situ operations may be permitted in areas within this category where the surface effects of the operation are deemed to be environmentally acceptable.” (at 15, emphasis added)

Categories 3 and 4 both contemplated access exploration and potential development, not only by underground mining or in-situ operations, but also by strip mining where appropriate. But as a

matter of actual practice, the only lands for which coal leases continued to be issued in the ordinary course were for Category 4 lands.

Here is a visual representation of the four categories.



Because the government recognized that the adoption of the CDP affected existing coal lease holders, the government afforded lessees the opportunity to surrender their interests in return for compensation on the basis of exploration costs incurred. In the cases of lessees of Category 2 and 3 lands, the CDP also allowed lessees to “continue to hold them on payment of normal rentals, recognizing the restrictions on development” (at 19).

On a go-forward basis, the CDP contemplated that “new coal leases will be granted only in areas where a reasonable likelihood exists that commercial mining operations will be permitted in the foreseeable future” (at 20). This carried the implication that unless a coal prospect in Category 2 lands could be exploited by underground mining, the Department would not consider granting a lease within the Category 2 areas. The Department gave effect to this leasing policy through a series of Information Letters. For example, IL 2014-07: “[Public Offering of Crown Coal Rights in Alberta](#)” re-stated the Department’s practice with respect to issuing new coal leases. It advised that: “Alberta Energy will continue to issue coal leases through the public offering process for lands classified as Category 4 in *A Coal Development Policy for Alberta* (1976). ... *All applications for Crown coal rights in Category 2 and 3 will continue to be held as applications.*” (at 1, emphasis added). This leasing rule remained in effect until the adoption of IL 2020-23, “[Rescission of A Coal Development Policy for Alberta and new leasing rules for Crown coal leases](#)” on May 15, 2020.

What Is the Legal Effect of a Policy Such as the *Coal Development Policy of 1976*?

The *Coal Development Policy* was, as its name implies, just a policy, albeit an exceptionally important policy. It was neither a statute nor a regulation. But while this means that the CDP was not itself law, it does not follow from that conclusion that the CDP had no legal or other normative effect. In particular, and as the quotation from IL 2014-07 above demonstrates, the CDP clearly had *internal* legal effect within the Department of Energy and the effect of the CDP was also clearly communicated to and understood by potential developers.

The CDP also acquired enhanced legal status in the southern part of Alberta as part of the development of the [South Saskatchewan Regional Plan](#) (SSRP), which covers that part of the province south of the Red Deer River. The SSRP (adopted in 2014) was developed as part of implementing Alberta’s [Land-Use Framework](#) (2008) and the *Alberta Land Stewardship Act SA 2009, c A-26.8 (ALSA)*. The Land-Use Framework was adopted to address concerns that “rapid growth in population and economic activity is placing unprecedented pressure on Alberta’s landscapes” and that this required “developing and implementing a land-use system that will effectively balance competing economic, environmental and social demands” (at 6). A particularly important part of the Framework was its emphasis on the cumulative effects of environmental disturbance on the landscape and the limitations associated with project-based assessments. This was recognized by the adoption of a strategy on cumulative effects which proposed that: “[c]umulative effects management will be used at the regional level to manage the impacts of development on land, water and air” (at 19).

Those involved in developing the SSRP recognized that some land use plans and policies including the CDP already existed within the region. Accordingly, the SSRP contemplated that these policies and plans, including the zonal categories established by the CDP, would have to be

reviewed “to confirm whether these land classifications specific to coal exploration and development should remain in place or be adjusted” (at 61). The SSRP went on to indicate that it was the government’s

intent for the SSRP and implementation strategies of the regional plan or future associated subregional or issue-specific plans within the region to supersede the coal categories for the purposes of land use decisions about where coal exploration and development can and cannot occur in the planning region.” (at 61)

It does not seem unreasonable to read this as confirmation that the CDP would remain in place unless and until more finely grained direction could be developed as part of these subsequent implementation activities. In sum, the CDP was effectively incorporated by reference into the SSRP, except to the extent that subsequent implementation activities would supersede that. This makes sense. The Framework and *ALSA* represent a “whole of government” approach to landscape level planning that was intended to replace sector-specific approaches under the control of particular line departments like the Department of Energy.

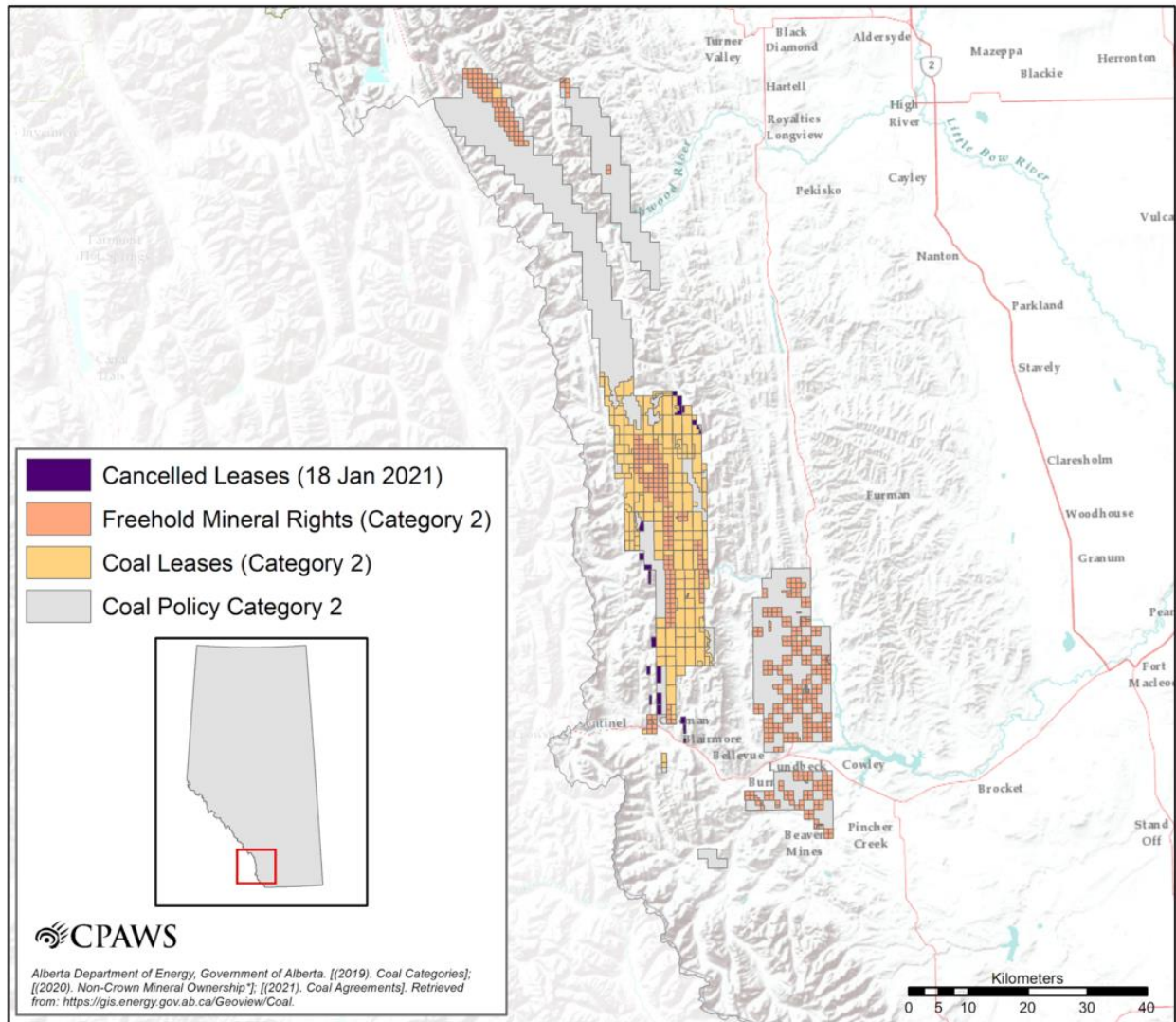
This reading is confirmed by the terms of the [Livingstone-Porcupine Hills Land Footprint Management Plan](#) (LFMP). Adopted in 2018, this is a sub-regional plan within the SSRP. The LFMP reiterates the need for updating the coal categories but emphasized that any such update should take “an integrated approach and specify where surface exploration and development can or cannot occur based upon the best and most recent biodiversity sensitivity data available” (at 23).

Revocation of the *Coal Development Policy*

On May 15, 2020 the Department of Energy issued [IL 2020-23](#), informing those on the relevant mailing list that the CDP would be rescinded effective June 1. The letter advised that “[t]he coal categories are no longer required for Alberta to effectively manage Crown coal leases, or the location of exploration and development activities, because of decades of improved policy, planning, and regulatory processes” (at 1). The letter, and the accompanying [Coal Information Bulletin 2020-02](#), also contained information on the resumption of leasing activities for lands within Categories 2 and 3. These two documents contemplated that any party that had applied for a coal lease for any of these lands since CDP was put in place would have a right of first refusal to acquire those lands. Following that, the Department anticipated opening all lands (except Category 1 lands) to rounds of public offering - in much the same way as the Department regularly offers oil and gas rights. [IL 2020-23](#) continues the prohibition on coal exploration and development activities in Category 1 lands in order to “maintain watershed, biodiversity, recreation and tourism values along the Eastern Slopes.”

In accordance with the decision to reinstitute public lease sales ([Coal and Mineral Development Information Bulletin 2020-03](#) and [IL 2020-43](#)), the Department completed one sale on [December 15, 2020](#) but subsequently ([January 18, 2021](#)) cancelled leases of Category 2 lands within that offering. It also suspended plans for additional lease sales within Category 2 lands ([IL 2021-03](#)). However, as CPAWS (“[Too Little Too Late](#)”) and other organizations were quick to point out,

the cancellation decision affected only a small portion of Category 2 lands (0.2%) that had already been leased:



Map credit CPAWS/Department of Energy

It follows from this that the leases that we see now on Category 2 lands are leases that were either never surrendered following adoption of the CDP, *or they were leases that were granted post June 1, 2020 to applicants who had filed for leases prior to the announcement of the revocation of the CDP.* These applications might have been filed at any time between 1976 and May 15, 2020. The [Moroskat Affidavit](#) filed by the province in the Blades judicial review matter indicates that the province was holding “506 coal lease applications (652,000 hectares) province-wide” some months before rescission was finalized.

It would be useful to have a breakdown of just when these applications were filed, especially in light of revelations (Andrew Nikiforuk, “[Months Before Albertans Were Told, Australian Miners Knew Plans to Axe Coal Policy](#)”, *The Tyee* (29 January 2021)) that the Government of Alberta had discussed revocation of the CDP with the coal industry sometime before May 15, 2020 –

even though there had been no consultations with civil society or other levels of government on this decision.

This is where matters stand as of February 6, 2021. The Minister of Energy has indicated that a new coal policy may be forthcoming shortly (Janet French & Audrey Neveu, "[New Alberta coal policy coming next week, energy minister says](#)" *CBC News* (5 February 2021)).

My colleagues and I are working on further posts in which we hope to address additional legal questions such as: (1) the rules for acquiring coal rights and the royalty regime for coal, (2) the regulation of coal projects by the AER, (3) the claim that we don't need the CDP because of intervening regulatory developments, (4) the federal role in regulating coal projects, (5) the application of the *Species at Risk Act*, [SC 2002, c 29](#) to lands covered by the CDP, (6) the status of the [Grassy Mountain Coal Project](#) (a proposed mine on Category 4 lands, with a decision pending on an environmental assessment by a joint (federal/provincial) review panel operating under the *Canadian Environmental Assessment Act, 2012*, [SC 2012, c 19, s 52](#)), and (7) the status of the Coalspur expansion projects.

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