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Alberta Heads the Wrong Direction with Bill 79 – the Proposed *Trails Act*

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On November 2, 2021, the Minister of Environment and Parks (Jason Nixon) introduced Bill 79 – the proposed *Trails Act* – into the legislative assembly for first reading. Initial public reactions varied significantly from the positive endorsements given by recreational trail user groups (such as those quoted in the government’s [media statement](#)) to the critical assessments on social media (see [here](#)) and environmental groups (such as the [Alberta Wilderness Association](#)). One thing Bill 79 does not implement is the [trail permit fee](#) on off-highway vehicle (OHV) users which the Minister previously indicated was forthcoming. This omission not only further highlights the glaring absence of the McLean Creek area from the access fee imposed by the [Kananaskis Conservation Pass](#), it also reinforces the view that OHV users have the Minister’s ear on policy development. In this post, we critically examine the actual content in Bill 79 and explain why the proposed *Trails Act* will result in further damage and destruction to public lands in Alberta.

In his address to the legislative assembly on first reading for Bill 79, the Minister stated as follows:

Mr. Jason Nixon: Thank you, Mr. Speaker. I lost my glasses; let’s start with that. I’m pleased to rise today to move first reading of Bill 79, the Trails Act.

Mr. Speaker, if this bill is passed, the act would modernize how Alberta’s trails are managed while conserving the environment and improving recreational experiences for all Albertans. The Trails Act will help to care for trails and make them safer by ensuring that they’re managed properly, designated for specific uses like hiking or riding off-highway vehicles. The act will also give us better enforcement tools to promote conservation and environmental stewardship across our public lands.

I hope all members of the House will support this legislation, and, Mr. Speaker, with that, I ask that we move first reading of Bill 79. (*Alberta Hansard*, 30-2, (2 November 2021) at [5919](#))

Well, it would be easy to support Bill 79 if the proposed *Trails Act* had any content which suggested it would achieve these objectives. Unfortunately, in its current form the legislation will almost certainly fail on every one of these counts, other than facilitating more access to recreational trails by OHV users.

Bill 79 is another example of ‘framework legislation’: A statute that consists almost entirely of permissive statements which authorize a minister or other member of the executive branch to enact all the substantive legal rules sometime later outside of the legislative process. This sort of lawmaking by the Legislature is far too common in Alberta (and elsewhere in Canada) these days. The executive branch appears to be hopelessly addicted to governing in this manner of delegated lawmaking, and that spells trouble for democratic or political accountability where, as is the case in our system of government, the executive branch largely controls the legislative agenda in the elected assembly.

In the case of Bill 79, the proposed legislation authorizes the Minister to: (1) designate what trails are subject to the Act (section 4); (2) establish management plans for designated trails (section 5); (3) appoint a manager for designated trails (section 6); (4) delegate management of designated trails by agreement (section 7); and (5) enact regulations to implement and administer the foregoing powers (section 11). As for transparency and other processes in relation to these extensive powers over land use on public lands, all the statute offers is that the Minister posts this stuff on his website (section 4). So while section 2 states that the purpose of the *Trails Act* is to designate recreational trails on public lands and provide for the management and planning of trail use, the actual purpose of the statute is merely to authorize the Minister to do these things.

One of the more questionable provisions is section 10 which is given the heading “Deficiency regulations”, and in particular section 10(1)(b) which reads:

10(1) The Lieutenant Governor in Council may make regulations

...

(b) remedying any confusion in the application of or any difficulty or impossibility in applying any provisions of this Act.

Say what? Regulations that remedy confusion or an impossibility in applying the Act? Are these not the sort of deficiencies that the Legislature itself should fix, or alternatively address in the legislative process before the Bill becomes a statute? This provision is a blatant abuse of delegated lawmaking.

Our curiosity with section 10 led us to undertake a quick survey of legislation across Canada to see how often regulation-making power is granted to remedy confusion or an impossibility. A search of the term ‘impossibility’ within 10 words of ‘regulations’ produced only 61 hits in legislation on the national [CanLII](#) database. Interestingly, most of the legislation containing this sort of provision has been enacted by only two provinces: Alberta and Manitoba. Perhaps most noteworthy is the scope of this type of regulation-making power is almost always limited to address one of two instances: (1) a difficulty or impossibility that arises in relation to a transition from repealed legislation to new legislation; or (2) a difficulty or impossibility that arises from the dissolution of a statutory entity. A search of the term ‘confusion’ within 10 words of ‘regulations’ produced only 17 hits in legislation on the national [CanLII](#) database, and Alberta was the only jurisdiction on our search results with legislation that delegates regulation-making power to the executive branch to remedy confusion!

Bill 79 also includes some consequential amendments to the *Public Lands Act*, [RSA 2000, c P-40](#) to further clarify that the Minister has the unilateral power to designate public lands as a trail under the *Trails Act* and manage the use of those lands. These amendments really beg the question: Why is the *Trails Act* needed at all? The *Public Lands Act* already gives the Minister power to designate and classify public lands (section 11) and authorizes the Lieutenant Governor in Council to designate recreational trails on public lands (section 71.1). Schedule 6 of the *Public Lands Administration Regulation*, [Alta Reg 187/2011](#), sets out the recreational trails which have been designated under the *Public Lands Act*. All of these enactments do essentially the same thing: Empower the executive branch and its delegates with unilateral discretion to plan, dispose of, and otherwise manage land-use on public lands in Alberta in a non-transparent manner with little political or legal accountability.

While the proposed *Trails Act* literally doubles down on provisions already available to the Minister in the *Public Lands Act*, it also perpetuates the greatest actual problem with public lands management in Alberta. That is the dominant land management ideology that we can do everything at the same time in the same place without meaningful limit, and still expect to have intact forests, abundant wildlife and fish, a continuing supply of clean water, and other amenities of public lands. We have dealt at length with that problem [elsewhere](#) in a case study of how a once abundant and widespread westslope cutthroat trout species along the eastern slopes of the Rocky Mountains has been driven to near-extinction. In that case, continuing attempts to manage the region for multiple uses initially helped to drive the native cutthroat trout species into steep decline. While the cutthroat trout has been designated and listed as a threatened species under the *Species at Risk Act*, [SC 2002, c 29](#) (SARA) since 2013, the multiple-use ideology adhered to by public officials in the exercise of their discretionary powers is circumventing the critical habitat protections in SARA by continuing to authorize industrial and motorized recreational uses that negatively impact recovery of the species.

In short, it is pure fantasy to believe that we can optimize multiple competing uses at once. The reality on the ground is that in the multiple-use ideology every use but one is going to get the short straw, and in nearly every case it will be, and has been in Alberta for decades, industrial and motorized recreational use favoured over an intact, functional environment. The result is the ecological decline of public environmental resources which are destroyed by increments, the cumulative effect being complete loss and extinction.

In this case of Bill 79, [Minister Nixon envisions extending](#) the existing system of (reportedly) 13,000 km of designated OHV trails, even though the total extent of motorized linear disturbance on Alberta's Eastern Slopes has been among the [highest in western North America](#) (at pages 61-63) for a quarter-century or more (see also [here](#)). Nor does the Minister intend to close existing trails (see [“What this act will not do is close trails”](#)), despite several studies from scientists in his own department indicating that the extent of linear disturbance is already threatening to Alberta wildlife and fish (see e.g., [here](#), [here](#), [here](#), and [here](#)), clearly implying that we need to reduce trail networks, certainly not increase them.

It is not just designated OHV trails that are a problem from recreational OHV use. Keep in mind that designated trails constitute only a fraction of all trails used by motorized recreationists, and that those users also routinely use many seismic lines, cutlines, and pipeline rights-of-way, even though they may be officially off-limits to OHV and other motorized users. Increasing access to

OHVs is likely to increase the incidence of unlawful use of these other linear disturbances, and the formation of new ones.

Linear disturbances, as a whole, transform watersheds and their streams by extending the channel network, increasing drainage efficiency, thereby tending to increase peak flows. Trails, roads, and other linear disturbances used as roads are also a major source of surface erosion, sediment from which is delivered to and pollutes streams, damaging aquatic habitats, and thereby increasing water treatment costs. In [one Alberta Eastern Slopes study](#) (at 23-29), linear disturbance, including a dense recreational designated and undesignated trail network, was the major factor causing nearly a third of the 90 small watersheds studied to be ranked as at high risk, and nearly all the remaining catchments as at moderate risk of channel damage from the combined effects of surface erosion and peak flow increases. In most cases, those risks had persisted for many decades. Using the data upon which that paper was based, a very rough estimate of the total motorized linear disturbance network on Alberta's Eastern Slopes outside national parks (~108,000 km²) is something in the order of 177,000 km, at a mean linear disturbance density of 1.64 km/km². For reference, the probability of finding threatened bull trout in watersheds having that mean linear disturbance density is [effectively zero](#) (at figure 2).

In one key watershed in the McLean Creek OHV area, losses of eggs and larvae of SARA-designated threatened westslope cutthroat trout have been minimally [estimated at 40% to 60% annually](#) from total suspended sediment primarily eroded from OHV trails. [A similar result](#) was obtained for the watershed of McLean Creek itself, which holds a recorded population of SARA-listed threatened bull trout. Of course, destruction of any individuals of a listed species, or any part of their designated critical habitat, is unlawful under SARA with very limited exceptions. However, enforcement of this prohibition is almost non-existent.

Aquatic habitats and fish are not the only public resource at risk from linear disturbances used by motorized vehicles. Grizzly bears are known to [benefit from motorized access closures](#) (see also [here](#)), with disturbance density below 0.6 km/km² suggested as an upper limit for road density, and no roads allowed in areas holding high-quality habitat. Similarly, caribou refugia from predators are [reduced by linear features](#). This and much other available science shows that a program of mass removal of linear features, not a proliferation of them as envisioned in this proposed Act, is necessary to have any hope of recovering and maintaining Alberta's forested ecosystems with their native species intact.

In conclusion, the proposed *Trails Act* will likely produce exactly the opposite result from that espoused by the Minister with his scripted buzzwords at first reading (conserving the environment, better enforcement, etc). Back in reality, the proposed *Trails Act* in its current form is unnecessary, an excessive use of delegated lawmaking power, and will lead to even more linear disturbances on public lands in Alberta. Any credible attempt to promote conservation and environmental stewardship on Alberta's public lands would start by addressing a problem which the *Trails Act* will exacerbate: Too much unconstrained discretionary power held by the Minister and other bureaucrats within Alberta Environment and Parks who fail to adhere to the findings of their own scientists when it comes to formulating environmental policy.

This post may be cited as: Shaun Fluker and David Mayhood, “Alberta Heads the Wrong Direction with Bill 79 – the Proposed *Trails Act*” (November 8, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/11/Blog_SCF_DWM_Bill79_Nov_2021.pdf

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