

Private Conservancy -- The Path Forward

- Where we have been
- Where we need to go
 - Greater range of purposes & more flexibility
 - Transfer of Development Credit Programs
 - Water Trusts

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- **Where we have been**
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Just over a decade ago if a landowner wished to protect natural values of land she or he was stuck with common law tools



**How can I
protect this land
from
development
using common
law tools?**



Most likely common law tools ...

- Restrictive covenant
- Easement

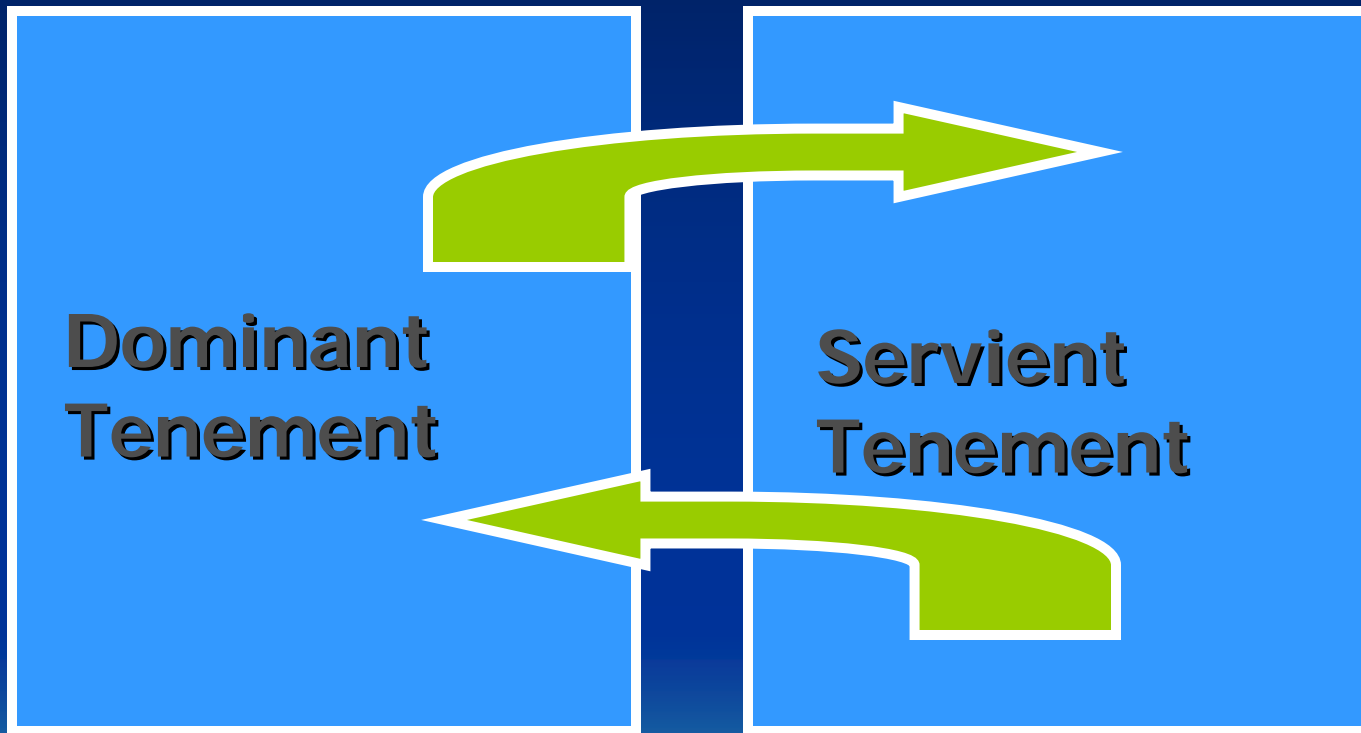


*For a valid common law RC or
Easement need:*

**Dominant
Tenement**

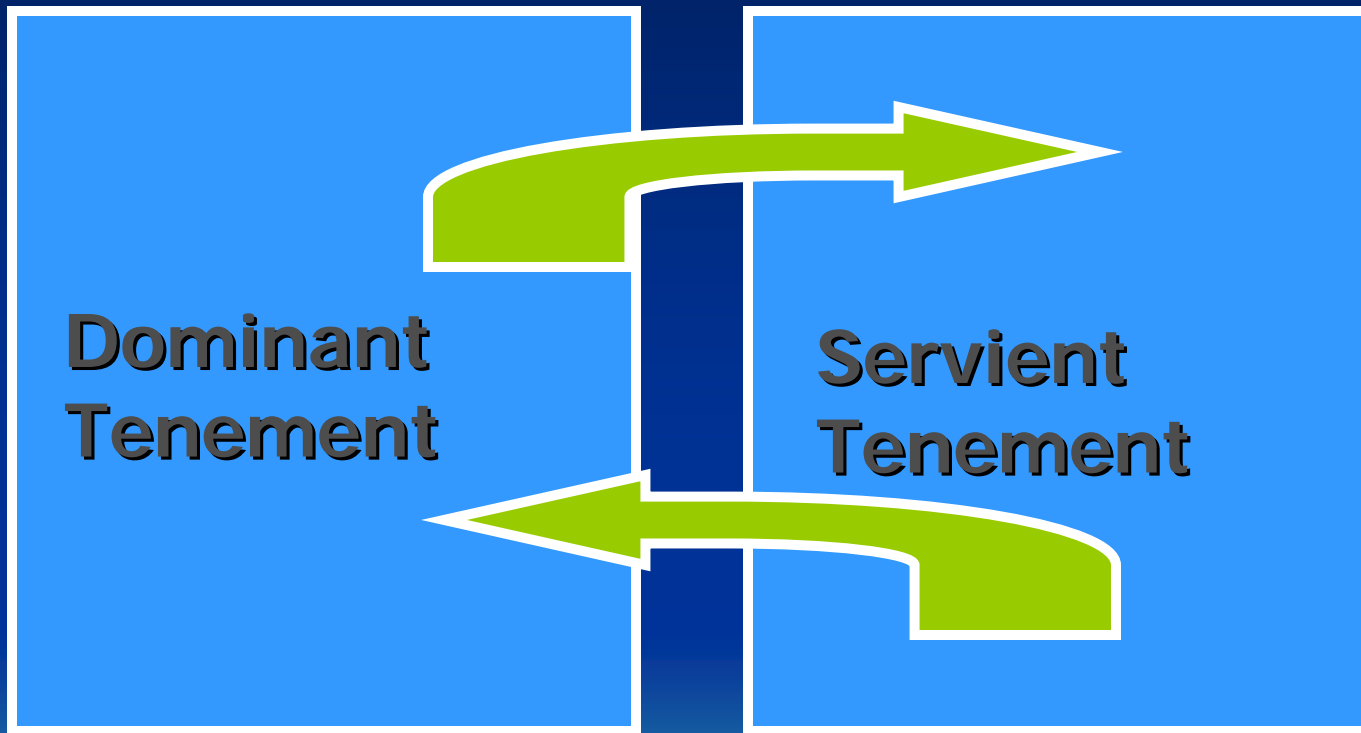
**Servient
Tenement**

- *Generally must be framed in the negative*
- *Can be challenged if no longer a benefit*
- *Not clear whether “ecological protection” is a valid purpose for restrictions*



RESTRICTIVE COVENANT

- *Generally must be framed in the positive*
- *Can be challenged if no longer a benefit*
- *Positive easement rights limited for “ecological protection”*



EASEMENTS

- **Canadian conservation organizations, other NGOs, municipalities, and interested landowners called upon provincial governments to pass legislation that would allow landowners to protect the natural values of their land without having to transfer entire parcels, and without having to meet the stringent, cumbersome common law conditions**
- **U.S. CE precedent**
- **In 1990's provinces began developing legislation**
- **Within 10 years nearly all Canadian provinces had some form of CE legislation**



ALBERTA – MANY PLAYERS
CONTRIBUTED TO THE ENACTMENT
OF 1996 CE PROVISIONS IN THE
*ENVIRONMENTAL PROTECTION AND
ENHANCEMENT ACT*



ABOUT CONSERVATION EASEMENTS (CEs)



A registered legal interest in land created by statute where a landowner enters into a voluntary legal agreement with a qualifying organization for conservation purposes to limit and prescribe the uses that may be made on all or a portion of land for a term of time or in perpetuity.

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Registered Legal Interest

Certificate of Title

Legal Description

Encumbrances:

Conservation Easement

Mortgage

Utility Right of Way

....

Created by Statute



Property interest
that does not
exist at
common law

Created in 1996 by amendments to the *Alberta Environmental Protection and Enhancement Act*
(' EPEA ')

A registered legal interest in land created by statute where a landowner enters into a voluntary legal agreement with a qualifying organization for conservation purposes to limit and prescribe the uses that may be made on all or a portion of land for a term of time or in perpetuity.

Cannot force a landowner to enter into a conservation easement agreement



*A registered legal interest in land created by statute where a landowner enters into a voluntary legal agreement **with a qualifying organization** for conservation purposes to limit and prescribe the uses that may be made on all or a portion of land for a term of time or in perpetuity.*

With a Qualified Organization ('QO')

Under EPEA a QO means:

- **Minister of Environment, Provincial Gov't or Agency (*note not Federal*)**
- **A local authority (municipality)**
- **A non-profit charity organized to hold CE's that meet EPEA requirements**

Nature Conservancy of Canada

Alberta Fish
and Game
Association

Ducks Unlimited Canada

*Southern Alberta Land
Trust Society*

**A number of
others**

LAND
STEWARDSHIP
CENTRE OF
CANADA

**TROUT
UNLIMITED
OF CANADA**

**Crooked
Creek
Conservancy**

*Alberta
Conservation
Association*

A registered legal interest in land created by statute where a landowner enters into a voluntary legal agreement with a qualifying organization for conservation purposes to limit and prescribe the uses that may be made on all or a portion of land for a term of time or in perpetuity.

Authorized purposes -- to limit and prescribe uses

A CE may be granted only for purposes set out in EPEA

Limitations and conditions of use of land are those that are required to meet the purpose for which the CE is granted – *there must a connection*



EPEA s. 22(2)

- (a) the protection, conservation and enhancement of the environment including, without limitation, the protection, conservation and enhancement of biological diversity;**
- (b) the protection, conservation and enhancement of natural scenic or aesthetic values;**
- (c) providing for any or all of the following uses of the land that are consistent with purposes set out in clause (a) or (b):**
 - (i) recreational use;**
 - (ii) open space use;**
 - (iii) environmental education use;**
 - (iv) use for research and scientific studies of natural ecosystems.**

*A CE runs with title and binds
future owners*

*No need for a separate
dominant tenement*

*Other common law stumbling
blocks removed*



That was easier!

Conservation
Easement Land



What next?

Conservation
Easement Land



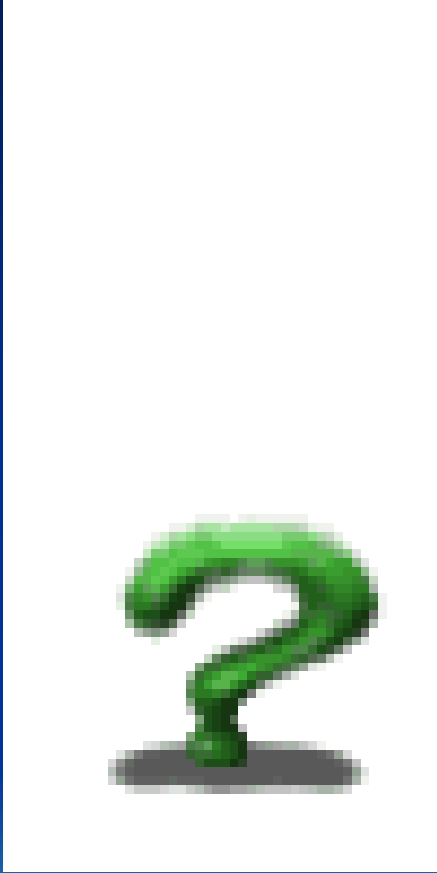
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natural scenic, natural aesthetic values



biodiversity





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Farm land?



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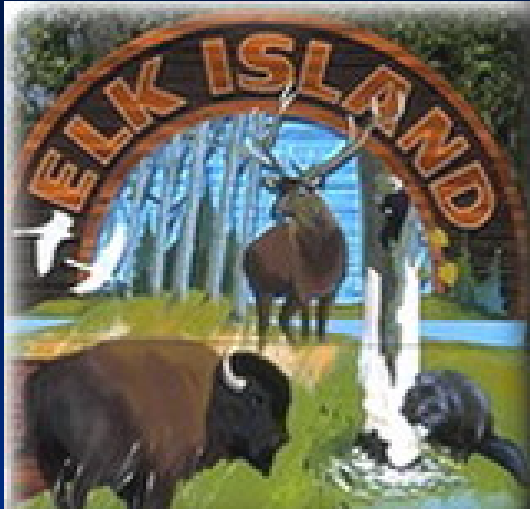
Farm land?



Agricultural Easements?



Non-natural values within an CE area?



National Parks



Suffield National Wildlife Area

Enlarging the class of QO's to include the Federal Government



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What means "Transfer of Development Credits"?

A typical TDC program involves transferring “development potential” from one parcel of land (“sending parcel”) to another parcel of land (“receiving parcel”) by way of using “development credits” pursuant to land use plans and bylaws.



Long History in U.S.

- **First introduced in U.S. in 1961, by 1997 more than 107 programs in 25 states**
- **In 2000, nine states had specific state enabling legislation, balance only have local programs set out in zoning laws and other land use regulations**



**"Development
potential" =**

**The difference between
existing land use and
potential land use as
allowed by and set out
in applicable local land
use bylaws ("LUB")
and municipal plans
("MP")**

Parcel A	B
C	D

**LUB = 1 residence
per parcel, if no
residences, then each
parcel has develop
potential of 1
residence**

**"Development
potential" =**

The difference between existing land use and potential land use as allowed by and set out in applicable local land use bylaws ("LUB") and municipal plans ("MP")

**"Development
credits" =**

The LUB/MPs will set out how many credits are allotted for unused development potential in a TDC program

Parcel A	B
C	D

**E.g., TDC
Program = 1
credit in respect
of each parcel**

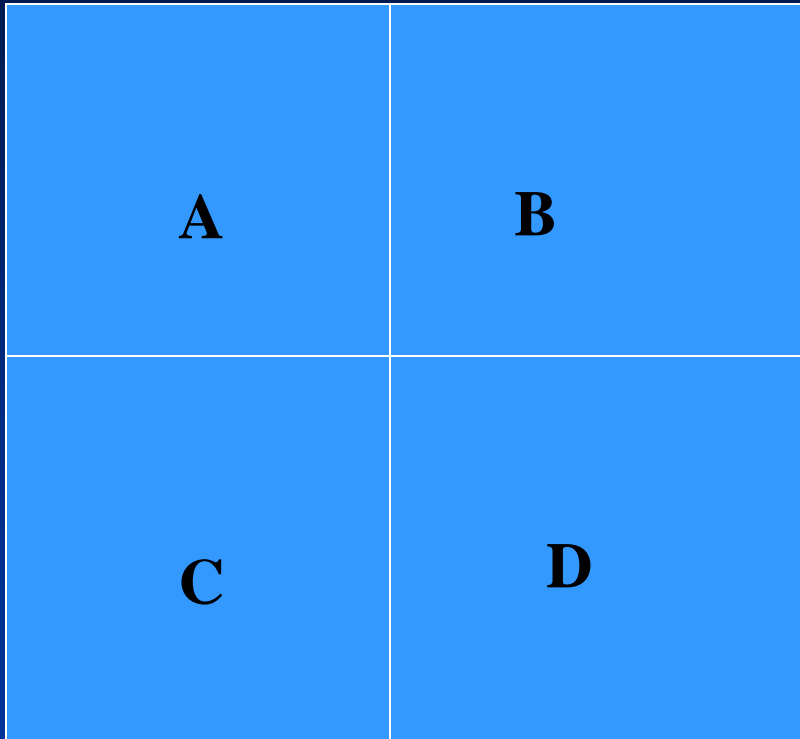
**If an owner has
four undeveloped
parcels = 4
development credits**

**"Sending
parcel" =**

**The parcel from which
development credits (DCs)
are transferred (to remove
development potential)**

**"Receiving
parcel" =**

**The parcel to which
DCs are applied to
allow more residences
(to add development
potential)**



Receiving parcel



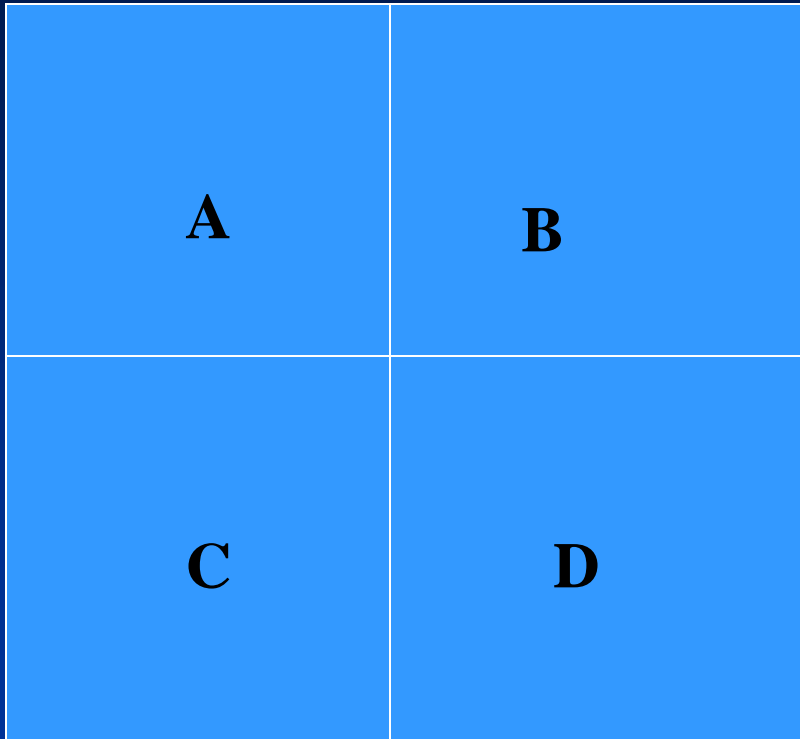
Apply the credits to get greater density/ as set out in MPs and LUBs

Sending parcels



**DEVELOPMENT
RESTRICTIONS ON
SENDING PARCELS
ARE SECURED BY
APPROPRIATE
INSTRUMENTS SUCH
AS CONSERVATION
EASEMENTS**





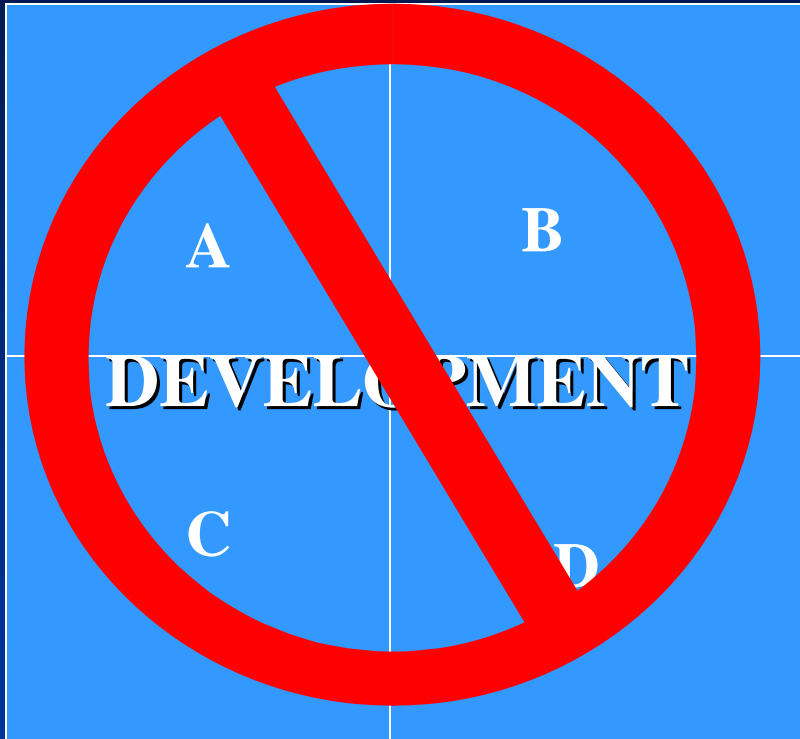
Receiving parcel



Sending parcels



*Apply the
credits to get
greater
density/ as
set out in
MPs and
LUBs*



Sending parcels ↑

Receiving parcel ↓

Apply the credits to get greater density/ as set out in MPs and LUBs

Rationale for TDC Programs in the U.S.

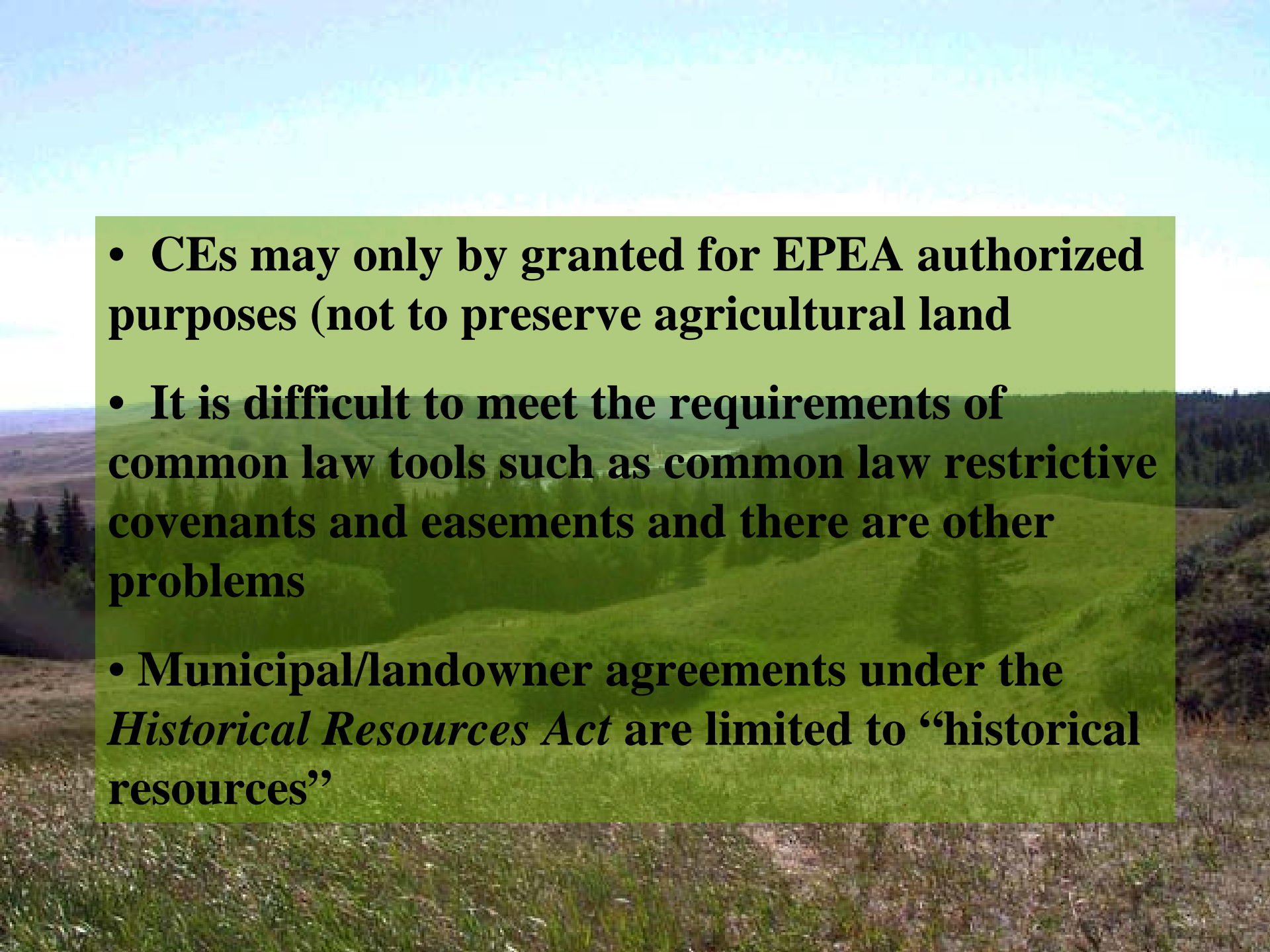
- **Preserves desirable landscapes (agricultural, heritage, environmentally important, habitat, etc.)**
- **Does this by shifting permissible densities from areas where development is less desirable to areas where it is more desirable**
- **Enhances equity to landowners restricted by zoning or other land related regulations (not just development freezes)**

Problem in Alberta: securing restrictions on sending parcels



Very limited tools ...



- 
- **CEs may only be granted for EPEA authorized purposes (not to preserve agricultural land)**
 - **It is difficult to meet the requirements of common law tools such as common law restrictive covenants and easements and there are other problems**
 - **Municipal/landowner agreements under the *Historical Resources Act* are limited to “historical resources”**

- "historic resource" means a work of nature or of humans that is "primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or esthetic interest including but not limited to, a palaeontological, archaeological, prehistoric, historic or natural site, structure or object."



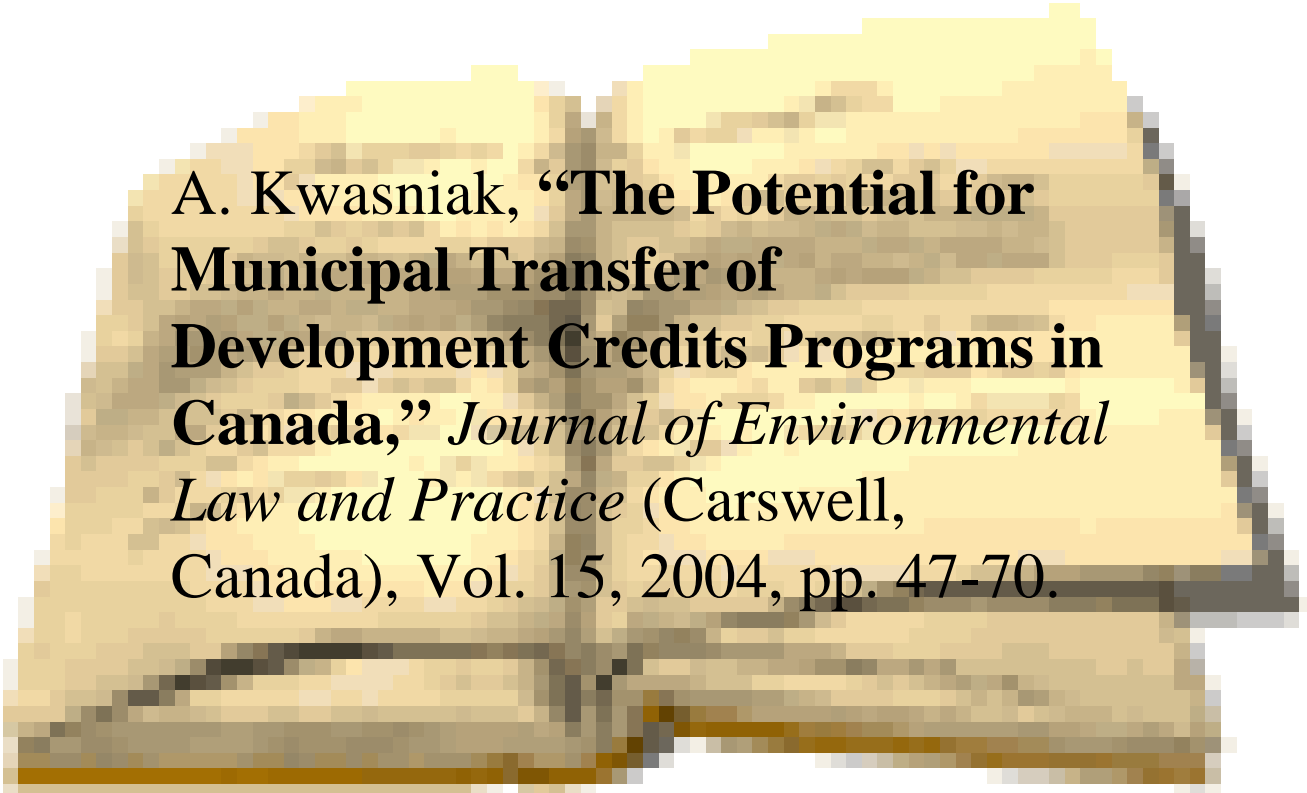




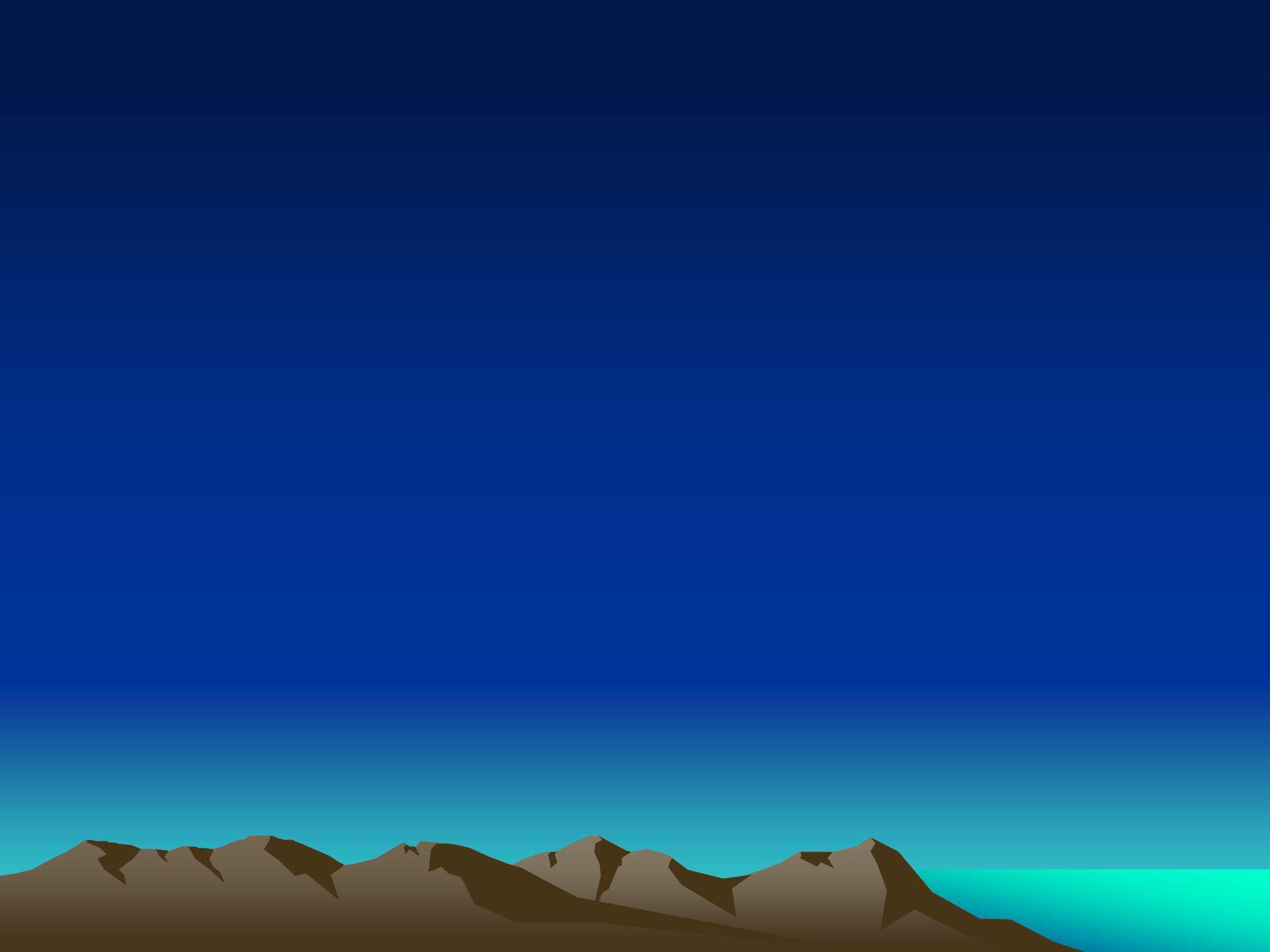
Agricultural Easements?



TDC Easements? (Mistakis Institute)



A. Kwasniak, **“The Potential for
Municipal Transfer of
Development Credits Programs in
Canada,”** *Journal of Environmental
Law and Practice* (Carswell,
Canada), Vol. 15, 2004, pp. 47-70.



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What are water trusts?

- **Private non-profit organizations that acquire water rights in order to enhance instream flow for conservation purposes**
- **Exist in western states -- none in Canada**
- **Oregon Water Trust is the oldest -- 1993**
- **Made possible in U.S. through recognition that instream uses are beneficial uses**
- **Used for both temporary and permanent (perpetual) transfers**
- **For the most part, only government agencies in U.S. may hold instream licenses (Idaho, Montana, Oregon (others?)) -- exception is Washington (others?)**

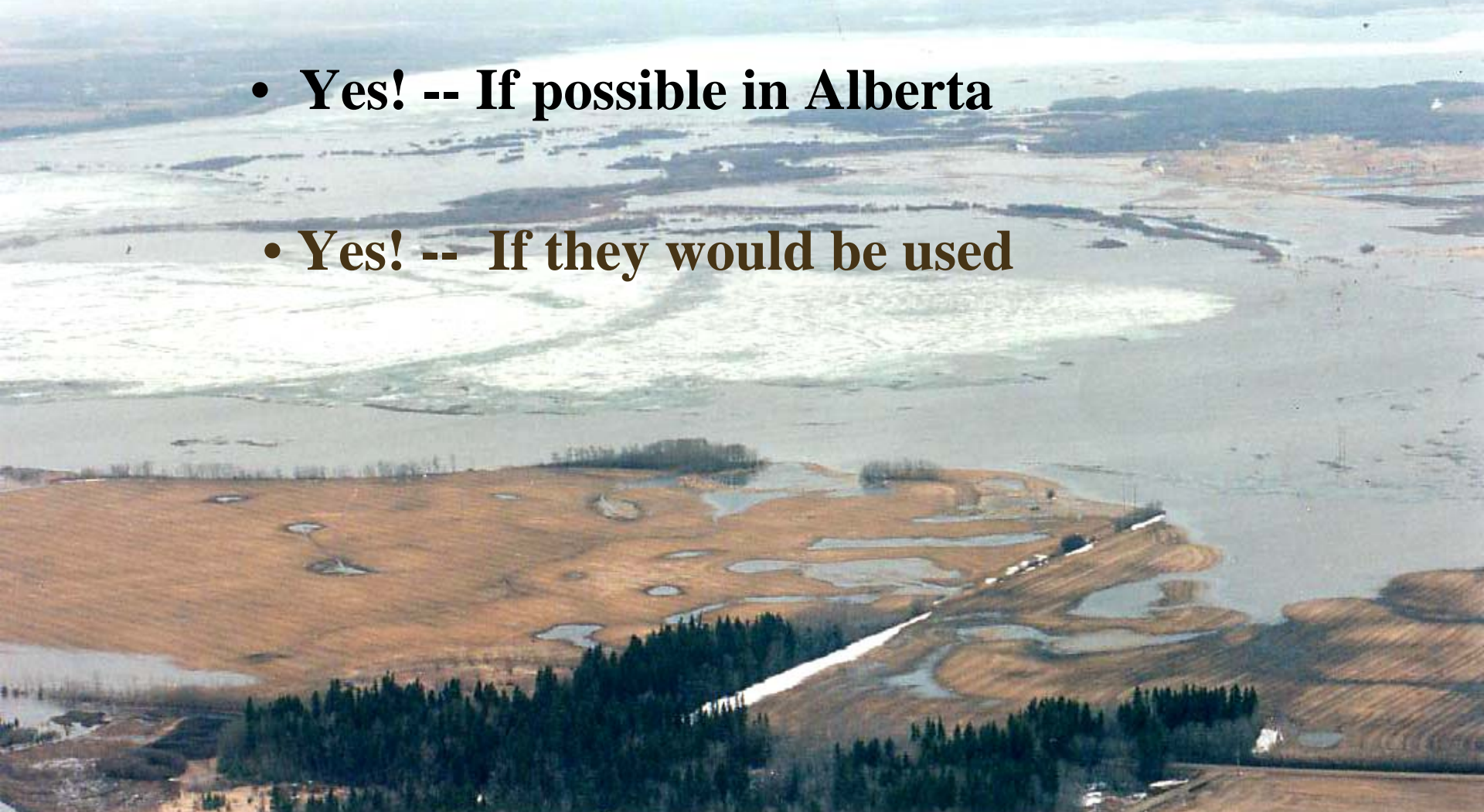
- **Water trusts are like *land trusts* except that they acquire water rights to enhance aquatic instream values instead of (or possibly in addition to) interests in land**

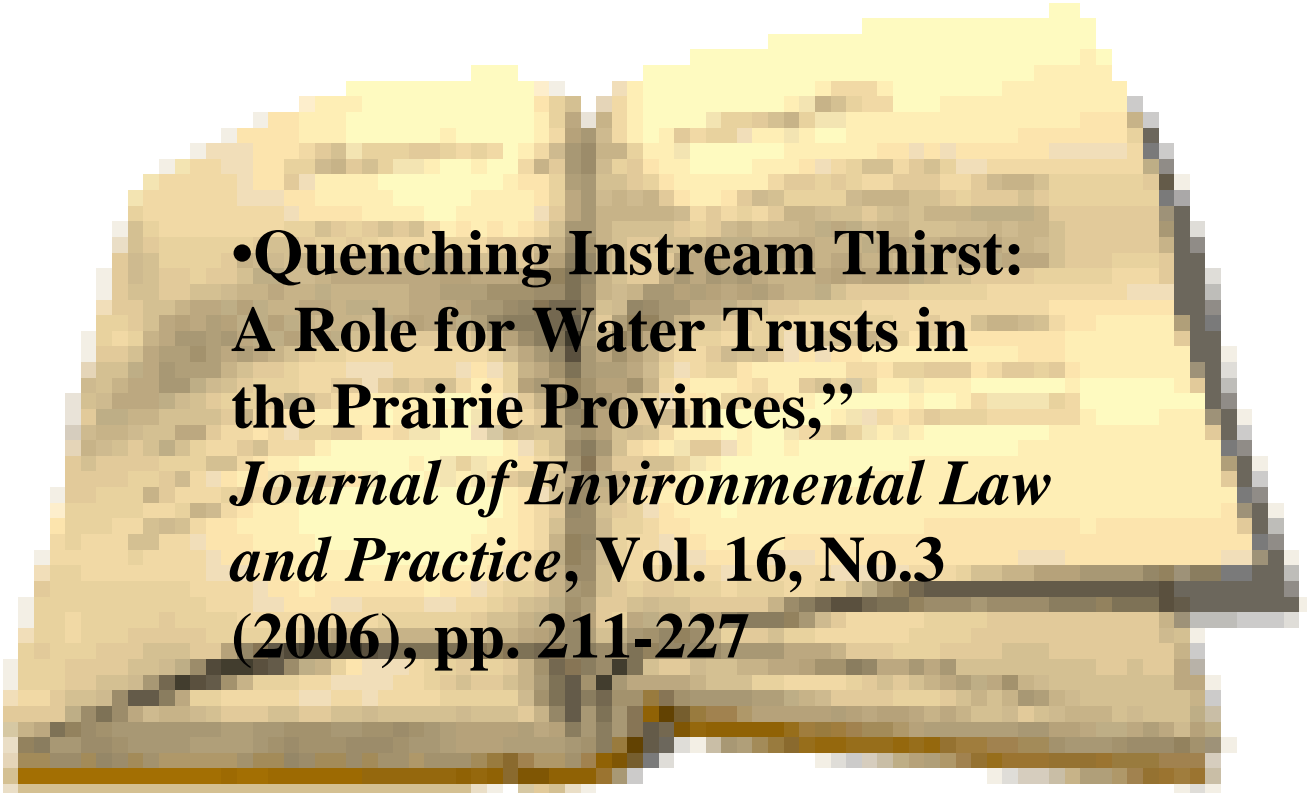
Water trusts a solution to water scarcity in Alberta, in particular in respect of the South Saskatchewan River Basin?



Water trusts a solution?

- **Yes! -- If possible in Alberta**
- **Yes! -- If they would be used**





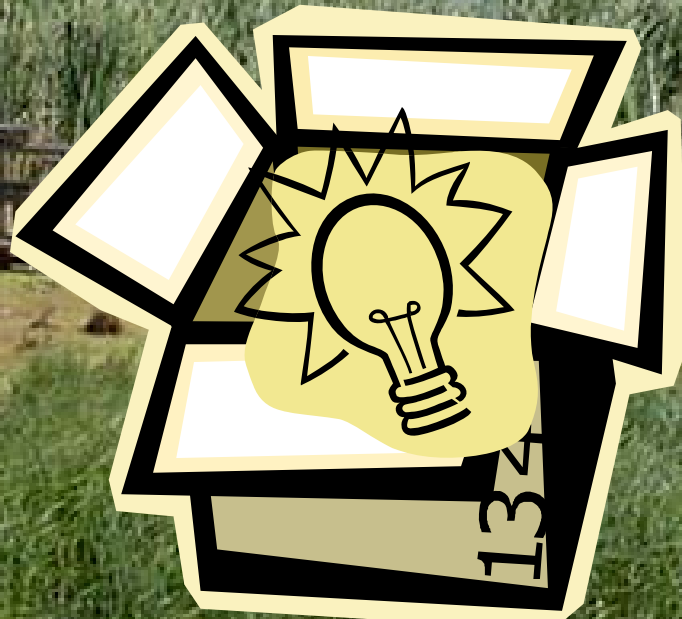
•**Quenching Instream Thirst:
A Role for Water Trusts in
the Prairie Provinces,”**
*Journal of Environmental Law
and Practice*, Vol. 16, No.3
(2006), pp. 211-227

Water trusts and Land Trusts?

- **Conservation land may need water rights**
- **Amend constating documents to enable acquiring of water rights**
- **Recommendations to government to facilitate private water trusts**
- **Recognition of water rights for instream use as Ecological Gifts, for federal Income Tax Purposes**



**We have come a long way but we need to
move forward**



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"Never, ever, think outside the box."

THANK YOU!



*Arlene Kwasniak
Faculty of Law
University of Calgary*