



CLOSING LETTER

FPB/IRC/46

Dear Participants:

Re: Board's Report for File 950083 / Slocan Valley Watershed Assessments

This letter constitutes the Board's report of conclusions and reasons after an investigation into a complaint submitted by Slocan Valley Watershed Alliance on August 21, 1996. The complainant said that the Arrow Forest District had accepted and approved cutting permits and road building permits in at least ten consumptive use watersheds in the Slocan Valley. The complainant considered that to be inappropriate because water users had not been involved in planning and decision making through advisory committees in watershed assessments.

Background

Some 60 to 70 percent of harvestable area in the Slocan Valley is in watersheds that supply water for domestic purposes. As a result, the complainant and domestic water users want to have input into planning of forest practices. The complainant asserted that the district manager should not have approved operational plans in 1995 and 1996 for at least 10 watersheds that supply domestic water because there had been no participation by water licensees in watershed assessments.

The Board started to investigate in late 1996 but staffing limitations and other matters seriously delayed the Board's completion of the complaint investigation so that it has taken the Board more than five years to deal with the matter. This delay, due solely to the Board rather than any participant, limited the practical options for the Board in disposing of the matter.

Relevant Legislation

- Section 17(2)(b) of the Act requires forest agreement holders (forest licensees) to "assess watersheds that meet the prescribed requirements to determine the impact of proposed timber harvesting and related forest practices."
- Section 32 of the Operational Planning Regulation, at the time of the complaint, required watershed assessments to be conducted in:
 - a) a community watershed;
 - b) a watershed that has significant downstream . domestic water values and significant watershed sensitivity as determined by the district manager and a designated environment official; and
 - c) a watershed for which the district manager determines an assessment is necessary.

Discussion

In 1996, there were 48 designated community watersheds in the Arrow Forest District, of which 11 were in the Slocan Valley. However, there were another 1300 watersheds in the district that had licensees under the Water Act but were not community watersheds. Such “domestic watersheds” are not specifically mentioned in the Code. Instead, section 41(10) of the Code was intended to add domestic watersheds that contained a large number of individual domestic licences to those designated as community watersheds. As watershed assessments are required in community watersheds, such designation would ensure that watershed assessments were done on most domestic watersheds. However, no new community watersheds were designated in the Slocan Valley since the time of this complaint. The Code mechanism to deal with most domestic watersheds apparently has not been effective in the Slocan Valley. (The Board will consider the Code’s role in the protection of drinking water in a separate special report. A draft of that report is enclosed for your information and comment.)

The complainant had three reasons why water-users should be involved in watershed assessments. First, the complainant said that the Code, including Code guidebooks, required such involvement. Second, the complainant said that land use planning promised such involvement. Third, the complainant said that local practices created an expectation of water-user involvement in assessments.

The Board found that the Code does not require that water-users be consulted or be allowed to participate in watershed assessments. The Code at the time of the complaint simply required that an assessment be carried out “to the satisfaction of the district manager.” There was no legal obligation on the district manager to require water-user participation. The district manager had the discretion to require such participation, and decided not to do so. Therefore, the district manager complied with the Code.

Nevertheless, even with Code compliance, the Board can go on to examine whether discretion was reasonably exercised. The Board limits its scrutiny, however, because the decision on whether to require water-user representatives to be involved in a watershed assessment is the district manager’s, not the Board’s. Therefore, the Board will not assess whether a decision was the best one, or whether it was what the Board would have decided.

In the circumstances of this complaint, the Board has decided not to examine the reasonableness of the district manager’s decision. The complaint arose in 1996 when all participants were still unclear of their respective roles, in part because the Code was new and both the Code itself and watershed assessment procedures were still evolving. A long time has passed since the decisions were made. Overall, the Board considered that there was no practical value in now re-examining the reasonableness of the discretionary decisions to not require water-user participation in 1995 and 1996 watershed assessments.

The complainant’s second basis for expecting water-users to be involved in watershed assessments was that land use planning created such an expectation. The Board examined both the draft Kootenay-Boundary Land Use Plan and the KBLUP implementation strategy. The Board found that the KBLUP and strategy did not create a clear expectation of water-user participation in assessments. Instead, the KBLUP draft implementation strategy endorsed water-user participation in watershed

assessments only in community watersheds. For domestic watersheds, the draft implementation strategy proposed water-users reviewing and commenting on forest development plans. Water-users were not to have representatives involved in round table consultation in domestic watershed assessments under the land use implementation strategy.

The complainant's third basis for an expectation of participation was local practices. The complainant said that water-users had been offered participation in some watershed assessments in the past, and that that created an expectation among water-users for participation in all watershed assessments. The Board examined water licensee participation in Slocan Valley watershed assessments that were completed in 1995-1997, in both community and domestic watersheds. Watershed assessments were routinely done in community watersheds after the Code came into effect (although not in several that were done just before the Code). In each case, water licensees were involved in advisory round tables as part of the assessment.

In domestic watersheds, the forest licensee carried out watershed assessments on eleven domestic watersheds even though that was not legally required. The number of water-users registered in each watershed ranged from two to over one hundred. Water licensees were offered the opportunity to participate in eight of those eleven assessments between 1995 and 1997. However, in every case they declined to do so. As early as October of 1996, the complainant had decided not to participate in discussion of watershed-specific hydrological studies. Instead, the complainant had proposed to several cabinet ministers that there should be a negotiated settlement for the entire Slocan Valley. Until the ministers responded, the complainant was opposed to further approval of road building and logging in the valley and did not want to continue to participate in watershed-by-watershed assessments and planning. Nevertheless, the Board considers that the water licensees were usually offered the opportunity to participate in domestic watershed assessments. However, the Board does not consider that such offers of participation created a requirement to involve water-users in all watershed assessments.

In summary, the complainant asserted that water licensees in 1996 had a reasonable expectation that they would participate in watershed assessments, regardless of whether the watersheds were community watersheds or not. At the time of this complaint, watershed assessments did not have to be done unless the district manager specifically required that. If an assessment was required, there was no legal requirement for water-user representation. Although the IWAP guidebook, Kootenay-Boundary Land Use Plan and local practices created some public expectations for water-user participation in watershed assessments, there is no practical value in the Board assessing whether the district manager should or should not have required such participation in 1996.

Although this deals with the complaint itself, the complaint raised the still-important issue of what the Code can and should do about protection of water quality. The Board has decided to produce a special report on that issue. The Board invites your comments and suggestions on the enclosed draft report. If you are willing to respond, please do so by the end of Friday, June 29, 2001.

Yours sincerely,

John Cuthbert
Vice Chair