



**Forest
Practices
Board**

Davidson Creek Access Management

Complaint Investigation #100971

FPB/IRC/183

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Executive Summary

In September 2010, Batnuni Lake Guides and Outfitters (the complainant) submitted a complaint to the Forest Practices Board that L&M Lumber Co. Ltd. (the licensee) was not seasonally-blocking motorized access to the road system in their Davidson Creek operating area (the Davidson). This caused the complainant to lose a key business opportunity guiding hunters by horse in a non-motorized area.

Since 1994, when not being used for industrial purposes, the Davidson road system has been closed every winter to motorized use by putting concrete barriers in front of the bridge at the start of the road. In 1997, the Vanderhoof Land and Resource Management Plan (LRMP) formalized this practice by designating access into the Davidson as 'semi-primitive, non-motorized' (SPNM), and specifying that recreationalists, including hunters, could not use vehicles in the area between April 1 and November 30 each year.

In 2008, government replaced the LRMP's access management provisions with those of the Vanderhoof Access Management Plan for Forest Recreation (AMP). Under the AMP, the SPNM decreased from 18 to 8 percent of the Vanderhoof District. The Davidson remained SPNM. Under the AMP, other commercial interests were allowed to use motorized vehicles for their business, but outdoor recreationalists—such as guide outfitters—were not. As well, when government approved the plan it made compliance voluntary, with the condition that government agencies could take regulatory measures if their monitoring efforts showed non-compliance.

The complainant bought its guide outfitting licence, which included the Davidson, in 2005 in order to provide a SPNM hunting experience to clients. However, in 2008 the licensee responsible for the road refused the complainant's request to close the road before hunting season began, so the complainant did not use the area that year.

In 2009, again the licensee did not shut the road to motorized traffic until after the hunting season. This time, the complainant used the area but, while guiding a client on an SPNM hunt, met a logging contractor hunting in a vehicle, which destroyed the client's SPNM experience. So, the complainant felt compelled to refund the client's fee. Since then, the complainant has not used the area. Since the complainant feels unable to charge clients for an SPNM experience when other hunters are using vehicles, this guiding territory is now effectively lost as a revenue generator.

The licensee, on the other hand, maintains that it has ongoing obligations for road maintenance and silviculture and that it and other industrial users need to be able to easily access the operating area in order to be cost-effective.

Given the different points of view, the two parties reached an impasse. In this case, left with few options about how to address what they believed was a significant devaluation of their investment, the complainant suggested litigation to the licensee, effectively stopping communication between them.

But despite this, in the summer of 2011, with the help of staff of the Ministry of Forests, Lands and Natural Resource Operations (MFLNRO) from the Vanderhoof District, a resolution was reached. Actions agreed to in order to address the complainant's concerns were:

- The licensee agreed to install a non-locking gate in July 2011.
- The Vanderhoof District agreed to install a sign explaining the SPNM designation of the area, as well as a camera to monitor activities.
- MFLNRO Fish and Wildlife staff said that, if this approach was unsuccessful, they would consider including a proposal to close the Davidson to vehicular access for hunting when developing *Hunting Regulation* proposals.

The gate, sign and camera have been installed as promised. However, though they reluctantly agreed to this arrangement, the complainant still thinks a physical barrier is the best option.

As the *Forest and Range Practices Act* does not provide guidance about situations where tenured land users come into conflict with forestry operations, disputes like this are becoming more common. Since that resolution was made, a large open pit goldmine has been publicized in the Davidson. The guide outfitter has not contacted, or been contacted by, the mine proponent. As of this time, the potential implications to the AMP and the SPNM designation are not known.

Board Commentary

As with many of our complaint investigations this report illustrates the conflicts that can arise between individuals or companies who are granted tenures to conduct their business using public resources on the same public lands. As government issues more tenures to public resources over the same land base, conflicts are expected to increase. This issue is particularly acute in cases where land use plans are unclear or out of date. In this complaint, an access management plan provides guidance, but compliance with that guidance is voluntary and government is so far unwilling to legalize the plan. This is consistent with a general government reluctance to restrict access to resource roads on public land.

Government has previously rejected a Board recommendation that it should provide a process of mediation when tenure holders interests conflict. BC's current management system leaves it to the tenured users to work out a solution, or the forest tenure holder decides what action it will take. Either way, the Board is concerned that, in some instances, private interests are determining the priorities on public land. In this case, district staff worked to try and mediate the conflict, and did broker a compromise, although it is not entirely satisfactory to the complainant. The Board acknowledges their efforts.

The Investigation

The Complaint

In September 2010, Batnuni Lake Guides and Outfitters (the complainant) submitted a complaint that L&M Lumber Co. Ltd. (the licensee) was not seasonally blocking motorized access on the road system in Davidson Creek operating area (the Davidson). This caused the complainant to lose a key business opportunity guiding hunters by horse for a semi primitive non-motorized hunting experience (SPNM). The complainant had to abandon the Davidson for two years.

Definition of Semi-Primitive Non Motorized (SPNM) from the Vanderhoof Access Management Plan for Forest Recreation (AMP)

“Recreation setting provides a more remote wilderness experience in a high quality natural environment. Opportunities exist to experience solitude and closeness to nature. Expectations are for low opportunities to interact with other people in very small parties.

These areas are identified for a low impact recreational experience (ie hiking/hike-in), with no 2WD, 4x4, or ATV/ORC use for recreational purposes from April 1 – November 30. Roads are managed to maintain or reduce overall road density.”

Background

Access Management Planning

Following extensive public consultation, the land ministries endorsed the consensus-based Vanderhoof Land and Resource Management Plan (LRMP) in 1997. The LRMP access objectives established 18 percent of the landbase as SPNM. The Vanderhoof District implemented the LRMP access management objectives until 2008. Then, due to the mountain pine beetle epidemic the access management objectives were revised. The access management provisions of the LRMP were replaced by the Vanderhoof Access Management Plan for Forest Recreation (AMP) and it reduced the amount of SPNM down to eight percent of the landbase. The Davidson remains SPNM.

History of Road Closure

Since the Davidson was opened up to logging in the early 1990s, the practice has been to physically close the Davidson road system when it is not active. The Ministry of Forests, (now the Ministry of Forests, Lands and Natural Resource Operations or MFLNRO) originally granted access to the area for the licensee to harvest four cutblocks based on the licensee agreeing to pull out a bridge it built immediately following harvest. The bridge is at the junction of the road into the Davidson and the adjacent mainline road.

Harvest was completed in March 1994 and, once debris piles had been disposed of, the bridge was pulled in the fall of that year. However, the bridge was re-installed in 1995/96 when harvesting resumed and this time it was left in place to allow access for tree planting and site preparation, but the licensee restricted vehicle access by placing concrete blocks on the approach to the bridge during inactive periods. From then on, MFLNRO allowed industrial users who were going to use the area to remove the blocks, but required them to replace them when their work was done.

In 2005, the complainant bought the guide outfitting licence that included the Davidson. Concerned that the blocks were not in place, the complainant contacted the forest licensee who held the road use permit on the adjacent mainline road. The complainant thought this licensee was also responsible for the Davidson road. Without explaining that it did not hold the road permit for the Davidson, this other licensee agreed to replace the blocks as a public service, and for the next few years that relationship continued; the guide-outfitter and the licensee together maintaining a schedule for closing the road.

However, in 2008, the complainant called the second licensee to find out if the blocks were in place and if not, to arrange for the blocks to be placed at the bridge. Since it was no longer using the mainline road in the area, the second licensee directed the complainant to the licensee who had the road permit. The licensee explained that it had not been in the area for a while; and, it didn't know the status of the blocks. It also explained that, in its view, the blocks did not prevent ATVs from driving through the stream to get access, and so did not work; nor did the licensee think it was its responsibility to replace the blocks. Further, the licensee told the complainant that it had silviculture work to do in the area, but it did agree to put the blocks in place after it had completed the silviculture. However, the blocks were not in place at the start of the hunting season, so the complainant did not use the area in 2008.

In 2009, wanting to use the area for hunting season, the complainant called the licensee and this time the licensee said up-front that it was not going to replace the blocks, causing an argument that effectively halted communication between the two parties. Following the argument, the complainant called MFLNRO who stepped in to facilitate some discussion. The result of this discussion was that the licensee agreed to put the blocks back for that year only.

Satisfied, the complainant spent a week preparing its camp, and, even though the blocks were not yet in place, it respected the SPNM designation and used only horses to pack in supplies and hay. However, as the licensee still had some silviculture work to do, it did not replace the blocks until *after* the hunting season. The complainant had a hunt scheduled and used the area that year. While guiding by horseback, the hunting party met a logging contractor who was hunting from a vehicle. Subsequently, because it could not deliver the promised experience of non-motorized hunting, the complainant refunded its client for the hunting experience.

The complainant then called MFLNRO staff once more, and again they offered to try to work out a solution, but by August 2010 the blocks still had not been replaced, and so the complainant filed the complaint with the Board.

Participants' Interests in the area

The complainant is a partnership that holds two guide outfitting territories at the south end of the Vanderhoof District. One partner lives and works in Kamloops and the other lives and works in Invermere. In size, the Davidson makes up about one-third of the complainant's combined territory. A guide outfitter's licence only gives the guide outfitter the right to guide¹ hunters in that territory.

¹ The guide outfitters licence gives an exclusive right to guide in a specified area and with a specified allocation of wildlife species (i.e., 4 moose, 3 bears etc.) – there are no other rights implied by the licence.

For the complainant, not only does it take a significant amount of time to get to the Vanderhoof area, but it also takes over four hours to drive from the main camp via Vanderhoof into the Davidson area. As well, it costs time and money to develop clientele, develop a camp, and provision it before a hunt.

The AMP makes the area a SPNM recreation experience between the months of April and November inclusive. The complainant respects the SPNM designation in the AMP so will not use motorized vehicles to guide hunters in the area. They market and try to deliver an SPNM hunting experience for which they can charge a premium.

For the licensee, however, there are ongoing obligations for road maintenance (wilderness roads - a road where timber is not being hauled), silviculture, and there is also the possibility of developing more cutting permits in the future. For this, it needs cost effective access to the operating area.

Government, licensees, non-government agencies and the public have spent time and energy developing both the Vanderhoof LRMP and AMP, and government would like to see successful implementation of the AMP. Specifically, stated in the executive summary² of the Background Document and Reference Information for the AMP, the government asserts three specific goals for the AMP:

- align the existing patterns of recreational use with the current situation regarding roads and access;
- manage for the continued integrity of the recreational experiences and opportunities provided; and
- ensure there is no impact to timber flow and supply.

Although the complaint is that the licensee should be required to keep the concrete blocks in place, the issues this complaint raises are broader in scope, and so the investigation examined the following questions:

1. Why is the Davidson categorized as SPNM and what are the benefits of that designation?
2. What does it mean for the AMP to be voluntary?
3. What are the impacts of this physical barrier on other industrial users such as the range licensee and the various mineral exploration companies who currently have rights in the Davidson?
4. Should there be a physical barrier?
5. Who is responsible for deciding the method and cost of maintenance of access control?
6. How does legislation deal with potentially competing business values?
7. Is communication between the licensee and the complainant effective?

² Background Document and Reference Information page 2

http://www.ilmb.gov.bc.ca/sites/default/files/resources/public/PDF/LRMP/Vanderhoof_percent20AMP_percent20Backgroundunder_percent20March08_Final.pdf

Discussion

Why is the Davidson categorized as SPNM and what are the benefits of that designation?

The Vanderhoof LRMP attempted to promote a variety of recreational opportunities across the landscape, basically trying to provide something for everyone. As stated, the LRMP went through extensive public review, resulting in SPNM access decreasing from 18 percent to 8 percent of the land area. The AMP tried to identify existing uses, and with the physical barrier, the Davidson met the criteria for SPNM access.

Is this a Private Hunting Ground?

The Background Document and Reference Information for the AMP states,

“The plan is not promoting or providing areas of exclusive use for commercial recreation purposes. All guide outfitters and commercial lodge operations must conduct their business in compliance with the Access Management Designations and are subject to the same ‘rules’ of the plan as the public.”

The guide outfitter has a large stake in maintaining the existing designation. Still, the only exclusive use the complainant has is guided hunting. Any other hunter may use the area, but the use should be SPNM. As well as hunting, this area is available to anyone seeking a “remote wilderness experience in a high quality natural environment.”³ Since the amount of SPNM has decreased from 18 percent to 8 percent, the benefit of maintaining the Davidson as SPNM is largely that of preserving a variety of recreational settings in the Vanderhoof District.

What does it mean for the AMP to be voluntary?

Government could have regulated recreational use under a number of statutes including, the *Land Act* s. 66, the *Forest and Range Practices Act* s. 58, the *Wildlife Act* s. 109, or the *Motor Vehicle (All Terrain) Act* s. 7. Government staff in the agency responsible for Crown land was responsible for the AMP. Staff developed the AMP in a way that would allow the minister to implement the recreational objectives as land use objectives under the *Land Use Objectives Regulation*. However, government decided not to do that, but approved the plan as policy instead. The AMP states that its success depends on:

- voluntary compliance by the public
- open-mindedness and consideration from communities
- education and extension to build understanding
- commitment from government agencies
- professional reliance from industry⁴

So, when government chose not to implement the AMP as regulation, it left the public, communities, government agencies, professionals and industry free to respect or not respect the SPNM designation. The AMP states, “successful implementation will be a collective and

³ Definition of SPNM in AMP as described above.

⁴ Page 27 *Background Document and Reference Information* for AMP

combined effort from all.” Although the AMP specifically singles out the road proponents⁵ as those responsible for implementing the plan, commitment from government agencies is also required for its success. Government agencies are monitoring voluntary compliance with the AMP, but if these principles prove unsuccessful in delivering expectations, government reserves the right to impose regulatory measures.⁶

What are the impacts of this physical barrier on other industrial users such as the range licensee and the various mineral exploration companies who currently have rights in the Davidson?

In order to respect the AMP, guide outfitters and nature-based tourism operators must not use vehicles to do their business in SPNM areas. In the complainant’s view, guide outfitters cannot expect their clients to ride horses when other hunters are using a vehicle. So, in their view, if others are road hunting in the area, it makes the area unusable for guided hunting.

The AMP recognizes a difference between recreational vehicular access and access for businesses such as timber licensees, mining tenures, alternative energy companies, ranchers and trappers. All these businesses may have vehicular access, as long as it is for business purposes only. The impact of a physical barrier on these other industrial users is that it will cost more to remove and replace the barrier but they can still use the area.

In the guide-outfitter’s view, it cannot sell a guided hunt where others are hunting with vehicles if it cannot use vehicles so it has effectively lost the area. In the licensee’s view, the guide-outfitter could still hunt the area but would have to change the product it is selling.

So, there is a direct economic impact to other businesses if they have to deal with a physical barrier but it is the Board’s view that the impact to the guide outfitter is greater, as they face the complete loss of the area for business.

Should there be a physical barrier?

The AMP gives examples of 26 field practices⁷ that can be used to control access. One of those practices includes physical barriers - road impediments and blockages including concrete barriers. The barrier does not have to be a physical barrier. Half the practices given as examples in the AMP, such as the use of education and signage, do not involve a physical closure. Two other non-physical barriers that can be used that are particularly important to this investigation are scheduling activities and regulation.

Scheduling activity

The AMP discusses scheduling of activities as a strategy to avoid establishing public expectations for motorized access. For SPNM, the AMP is in effect from April 1 to November 30. The AMP suggests that the road proponent should schedule activities in a way that will “minimize the potential of establishing incompatible patterns of public recreation use in non

⁵ Page 28 *Background Document and Reference Information* for AMP

⁶ AMP page 34 *Background Document and Reference Information* for AMP

⁷ AMP page 31 *Background Document and Reference Information* for AMP

motorized recreation management areas.” In this case, all parties recognize that the major recreational use of the area is for hunting. Therefore, if licensees and other businesses are following the policy government endorsed in the plan, they should try to schedule the activities in a way that discourages vehicular use during hunting season.

Regulation

When government approved the AMP, the various functions of government that dealt with natural resources were housed in different ministries. At that time, the Ministry of Environment (MOE) was separate from the agency responsible for the *Land Act*. Even so, MFLNRO staff developed the AMP in conjunction with MOE ecosystem staff. However, when it was approved as a policy plan, the AMP was not referred to the MOE staff responsible for administering the *Hunting Regulation*.

The licensee is of the opinion that if government wants the area designated SPNM, then it should regulate it under the *Hunting Regulation*.

During the investigation the complainant pointed out an inconsistency between the AMP and the *Hunting Regulation*. In the wildlife management area of the complainant’s base camp the AMP allows motorized access, but the *Hunting Regulation* includes a restriction on ATV use in the morning. In the Davidson, the AMP designated it as SPNM but the *Hunting Regulation* has no restriction.

The Board contacted MOE’s Fish and Wildlife Branch (F&W) to discuss this inconsistency, and to explore ways to resolve the complaint. The Board found that F&W staff responsible for the Davidson area was not aware of the AMP requirements, nor of any proposal to implement motorized vehicle restrictions in this area. F&W said that normally they do not put motorized vehicle restrictions in an area unless there is a biological or environmental reason to do so. Still, they explained that every year they undergo a review process with constituent public groups representing the hunting community, to get input toward proposed *Hunting Regulation* changes.

So, in conclusion, a physical barrier is not essential but it is one of the legitimate options to ensuring compliance with the AMP. It is the Board’s view that, since government expects the AMP to succeed, if other non-physical barriers, such as timing of operations or regulation do not work, then there should be a physical barrier.

Who is responsible for deciding the method and cost of maintenance of access control?

Where roads were closed to maintain SPNM access, the LRMP prescribed a physical barrier and posted signs. Previously, MFLNRO maintained tight controls and a prescriptive approach to access management, ensuring physical barriers and posted signs were in place.

In 2008, with the approval of the AMP, government took more of a results-based approach. The AMP described the desired condition of the area and left it up to the road permit holder to find a way to achieve that result. Current legislation requires the road proponent to maintain the road to a wilderness standard, at its cost, until it is deactivated and returned to the Crown. On a wilderness road, a road proponent must ensure that the road prism and clearing width are

protected and that drainage structures are maintained so that failures to these features do not cause a material adverse effect on a forest resource. Hence, government does expect licensees to either deactivate a road or maintain it to the prescribed standard.

Implementing interim access control measures is not part of the wilderness standard and there is no other legislation that specifically prescribes the responsibility for the cost of access control. In the past, the blocks were left in place and MFLNRO required people who were using the area to replace the concrete blocks when their activity was complete. If the blocks were removed by some unknown person, then another timber licensee or the MFLNRO absorbed the cost. Recently, both MFLNRO and the complainant have offered to share in the cost of replacing the blocks. Even so, the licensee still does not want to have a physical barrier.

However, even though there is no legislated requirement to maintain access control, it is clear from the AMP that government expects the road proponent to maintain the area as SPNM. The AMP states that, “the forest road proponent has the flexibility and ability to utilize a range of strategies and options (including use of access control devices) to adequately manage identified recreation values.”

So, it is up to the licensee to decide the method and maintain the area as SPNM. No one is responsible for the cost of access control. Still, the cost has been born both by the licensee and another licensee who is responsible for the adjacent main-line road. MFLNRO has offered to share the cost in the past and the complainant is also willing to share the cost.

How does legislation deal with potentially competing business interests?

There are a number of laws that enable the BC government to grant tenures on Crown land. These tenures are granted by several different government ministries. As a result, there can be multiple over-lapping tenures within an area. Sometimes, the activities of one or more tenures can conflict with others. For example, a tenure granted under the *Range Act* for grazing cattle may conflict with a *Forest Act* tenure allowing the harvesting of timber.

The complainant’s authority to conduct guide-outfitting activities is granted under the *Wildlife Act* and *Land Act*. The forest licensee’s tenure is granted under the *Forest Act* but the manner in which it conducts its activities is governed under FRPA. None of the legislation has provisions to directly address issues when conflicts arise. However, when a forest licensee prepares an FSP as required under FRPA, they must describe actions (called results and strategies) to conduct their activities consistent with government objectives. When the plan is being advertised, there is an opportunity for stakeholders to provide comments and the licensee is required to consider those comments. If a business could show how its interest was linked to a government objective, then, government may decide not to approve the FSP if the activities proposed by the licensee are not consistent with the objective.

Under FRPA, government sets objectives for values like water, timber and biodiversity. It can also set other objectives through regulations such as the *Government Actions Regulation* and *Land Use Planning Regulation*. However, although the AMP was developed to be implemented under the *Land Use Planning Regulation*, government decided not to do that, so no objective for forest recreation has been set in the Vanderhoof Forest District.

The licensee submitted its FSP in 2005. The complainant bought the territory in 2005 and did not comment on the FSP. In 2010 the FSP was extended to 2015. The FSP is not required to, and does not address, access management in the Davidson Creek area.

In summary, legislation does not deal with competing interests between timber and guide-outfitting in the Vanderhoof District.

Is consultation between the licensee and the complainant effective?

Outside of FRPA, another method of dealing with competing business values is through litigation. The complainant had an ongoing relationship with another forest tenure holder who had been replacing the concrete blocks as a service to help implement the AMP. When asked in 2008, the licensee said that it was not going to maintain the concrete blocks as an access control measure. The complainant saw this refusal as harmful to his guide outfitting business so he suggested litigation to the licensee. At that point, effective communication stopped and until recently there has been little consultation between these two parties.

Government expects the licensee and guide outfitter to implement the AMP. In order for the AMP to be successful, government suggests that the road proponent and others need to communicate effectively.⁸ Until very recently, the only communication between the licensee and the complainant has been through this investigation and through a MFLNRO representative who was trying to implement the AMP. So, in summary, it is the Board's view that consultation between the licensee and the complainant has not been effective.

Resolution

During the investigation, resolution options were explored with all parties.

Early in the investigation, the licensee offered to install a gate that could be locked. However, neither the complainant nor the MFLNRO thought that would be an acceptable option. Public sentiment generally runs against locked gates on public land. Locked gates give key holders a special right to access the area. Even if the guide outfitter did not have a key, a locked gate would promote the misunderstanding that the SPNM designation gives the guide-outfitter a private hunting ground.

In 2010, Vanderhoof District staff explored another option in a different area. It placed a wooden construction barricade across a road with a sign explaining the area was SPNM access, then it monitored compliance with a hidden camera. About 10 percent of the time, the hunter drove into the area but for the most part, hunters respected the barrier.

In the summer of 2011, MFLNRO met with the parties by telephone to try to come up with a resolution. The licensee maintained that it did not want concrete barriers but said it would install a non-locking gate when it replaced the bridge in July. Although the complainant still thought that a physical barrier was the best option, the complainant reluctantly agreed.

⁸ Page 34 AMP

The licensee installed the non-locking gate. The Vanderhoof District installed a sign explaining the SPNM designation of the area and a camera to monitor activities in the area.

The gate can be opened by anyone that needs to use the road as provided for in the AMP. For example, a forest licensee, a range tenure holder or mining exploration company may drive in the Davidson when doing business in the area. As described in the AMP, if at all possible, industrial activities should not occur during the months of September and October, when the guide-outfitter uses the area.

The gate signifies the formal SPNM designation approved in the AMP for this area. Since the guide outfitter must respect the non-motorized designation, the expectation is that other hunters and recreationalists will do so as well.

If the non-locking gate and signage prove not to be successful, as part of the resolution to the complaint, F&W staff said they will consider taking a proposal from the guide to the Skeena Hunters Advisory Committee as part of the consultative process they follow when developing *Hunting Regulation* proposals. F&W staff proposes amendments to the *Hunting Regulation* every two years. The next proposals need to be submitted by November 1, 2013 for the 2014/2016 period.

Since that resolution was reached, a large open pit goldmine has been proposed in the Davidson. The guide outfitter has not contacted or been contacted by the mine proponent as of this time and the potential implications to the AMP and the SPNM designation are unknown.



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