

# **Unauthorized Construction of a Cabin and Trail on Sinclair Mountain**

**Complaint Investigation 040587**



**FPB/IRC/111**

**July 2005**

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## Executive Summary

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On September 7, 2004, a resident of Smithers (the complainant) asked the Board to investigate the unauthorized construction of a cabin and an all-terrain vehicle (ATV) trail on Sinclair Mountain, near Smithers. The complainant asserts that the construction of the trail and cabin contravened the *Forest and Range Practices Act* (FRPA). The complainant also asserts that, despite the contraventions, the Ministry of Forests<sup>1</sup> (MOF) did not take appropriate enforcement action.

The Board investigated whether the construction and use of the cabin and trail complied with FRPA and whether MOF adequately enforced current and previous forest practices legislation.

The Board determined that the unauthorized harvesting of timber, the construction of the cabin, and the construction of the trail, did not comply with the Forest Practices Code. The current use of the cabin does not comply with FRPA.

The Board also found that enforcement was inappropriate because MOF did not undertake measures to restrict the use of the trail and cabin, nor did it reduce the risk of any further infractions.

## Commentary

Prior to approving recreation trails and facilities, government considers the social, environmental and economic impacts of development. Allowing unauthorized trails and buildings to remain on Crown land circumvents this process and is contrary to the public interest. Sound forest management would legitimize positive impacts and prevent negative ones. In this case, the cabin is not impacting the environment and has safety and comfort benefits for legitimate winter motorized users of the area. The trail, in contrast, is impacting the environment and allowing illegitimate summer motorized vehicle use. Government should make two decisions. First, either tenure the cabin or remove it. Second, deactivate the trail as it was built contrary to the publicly endorsed RAMP and is causing damage.

There are no specific FRPA restrictions to summer motorized use of the alpine, unless restrictions are enacted by the minister. Under section 58 of FRPA, the minister may prohibit a specific recreational use anywhere on Crown land, where it is needed to protect recreation resources. Prohibiting the summer use of motorized vehicles in the Sinclair Mountain area may be appropriate, to give weight to the community preferences expressed in the RAMP and LRMP.

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<sup>1</sup> In June 2005, the name of the ministry was changed to Ministry of Forests and Range.

The Board is currently preparing a special report that addresses issues involving recreation access. That report will further discuss the issue of impacts caused by off-road vehicles including ATVs.

This investigation also concurred that environmental damage caused by ATV use in the alpine does not contravene the *Forest and Range Practices Act*. Section 46 of Act prohibits damage to the environment, and section 3 of the *Forest Planning and Practices Regulation* limits what constitutes 'damage' to include only harvesting activities. This narrow definition of what constitutes damage to the environment is a concern the Board will examine further and may raise with government.

Since initiation of this investigation, the issue of ATV use in the alpine throughout the district has grown. MOFR is compiling an inventory map of the known trails, cabins and damaged alpine areas that will include the recreation access management plan (RAMP) designations. MOFR intends to assess current signage associated with the RAMP direction. The former Ministries of Sustainable Resource Management and Water, Land and Air Protection, and MOF, established a working group to undertake a problem analysis and develop follow-up actions to take place in 2005. Following the agency review, the findings and suggested follow-up actions will be sent to the Community Resources Board and stakeholders for feedback.

Nevertheless, MOFR has the mandate to regulate public recreation on Crown land (other than commercial recreation). The mandate comes in part through the *Ministry of Forests Act* and in FPRA and the *Forest Recreation Regulation*. Consequently, MOFR has some responsibility for dealing with recreational use and damage to recreation resources (including the alpine environment).

## **Recommendations**

In accordance with section 131 of the *Forest and Range Practices Act*, the Board recommends:

1. The Skeena Stikine Forest District and the Ministry of Agriculture and Lands decide the use of the Sinclair Mountain cabin by October 1, 2005, and either issue a tenure or remove the cabin, consistent with the guidance provided by the Bulkley Valley Land and Resource Management Plan and the Recreational Access Management Plan;
2. The Skeena Stikine Forest District address the unauthorized trail to the cabin by October 1, 2005, by:
  - following the recommendations and analysis of the interagency working group reviewing alpine use;

- prohibiting ATV use in areas designated as summer non-motorized use in the Bulkley Valley Recreational Access Management Plan through use of section 58 of the *Forest and Range Practices Act*;
  - undertaking a field review of the environmental impact and condition of the trail leading to the cabin;
  - if the existing cabin is to remain, attaching conditions to its use that would require the permit holder to improve or stabilize the existing trail; or
  - deactivate the existing trail; and if a trail is required, relocate it to a suitable location; and
3. The Skeena Stikine Forest District erect a sign at both the trail head and at the cabin stating that summer motorized vehicle use is restricted in accordance with the Recreational Access Management Plan. The sign should be erected by August 15, 2005.

# The Investigation

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On September 7, 2004, a resident of Smithers (the complainant) asked the Board to investigate the unauthorized construction of a cabin and an all-terrain vehicle (ATV) trail on Sinclair Mountain, near Smithers. The complainant asserts that the construction of the trail and cabin contravened the *Forest and Range Practices Act* (FRPA). The complainant also asserts that, despite the contraventions, the Ministry of Forests (MOF) did not take appropriate enforcement action. The complainant maintains the cabin should be removed or destroyed; the road access to the trail deactivated; and a sign erected stating that trail construction and trespass into the alpine is prohibited.

The Board investigated whether the construction and use of the cabin and trail complied with the *Forest Practices Code of British Columbia Act* (the Code) and FRPA; and whether both Acts were adequately enforced by MOF.

## Background

Sinclair Mountain is located southwest of the town of Smithers, and can be reached from the 2800 Road and the Telkwa Forest Service Road.

In 1996 and early 1997, the provincial government coordinated a public process in which local recreational users worked together to develop a recreational access management plan (RAMP). The RAMP was part of a land and resource management plan (LRMP) prepared by the Bulkley Valley Community Resources Board (CRB). Both the LRMP and RAMP provide policy guidance for the management of forest resources. Because it is a policy document which government did not establish as a legal objective, the RAMP is not enforceable under the Code or its replacement, FRPA.

The RAMP identified 20 specific recreational areas and mapped existing trails throughout the district. ATV use is permitted only on hard-packed established trails. The RAMP designated the Sinclair Range for motorized use during the winter but only for non-motorized use in summer. Therefore, ATVs should not have access to the Sinclair Range area in summer.

Some time before July 1999, a trail was cleared up Sinclair Mountain. In 2000, a cabin was built in the sub-alpine near the trail. The cabin is small, approximately 12 feet by 10 feet, with no amenities, offering shelter for day use only. The ATV trail to the cabin is approximately 1.5 kilometres long, through sub-alpine forest. Since its construction, the cabin and trail have been used in both summer and winter. Repeated summer use of the trail has caused rutting. In addition, ATVs have been using the trail to reach the alpine. As a result, the sensitive alpine vegetation is now marred by ruts and tracks. A similar problem has occurred in several other areas in the district.

In September 2001, a snowmobile club told MOF that a cabin had been built in the Sinclair Mountain area. In December 2001, MOF staff began an investigation, but was unable to determine who had built the cabin. The limitation period for administrative penalties expired in November 2004, so there was no authority to impose fines, even if the builder was identified after that date. The enforcement file was permanently closed at that time.

## Discussion

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The Board investigated:

1. whether the construction and use of the cabin and trail complied with the *Forest Practices Code of British Columbia Act* and the *Forest and Range Practices Act*; and
2. whether both Acts were adequately enforced by the Ministry of Forests.

### 1. Did construction of the cabin and trail comply with the Acts?

In January 2004, the *Forest and Range Practices Act* (FRPA) replaced the Forest Practices Code as British Columbia's forest practices legislation. FRPA will be phased in over a transition period ending on December 31, 2006 (with government authorized to extend the period until December 31, 2007). The Board examined whether the construction of the cabin and trail complied with the Code and whether the current use of the trail and cabin comply with FRPA.

In 2001, section 102 of the Code required the district manager's authorization to construct or maintain a trail on Crown land. Section 99 required such authorization to construct or occupy a building on Crown land. Section 96 did the same for timber harvesting.

On September 28, 2001, the snowmobile club informed MOF that a cabin had been built near Sinclair Creek and, in December, took MOF staff to the site. MOF had not authorized cutting down trees, or constructing the trail or cabin.

The cabin and trail have been used since construction. Both snowmobile and ATV enthusiasts use the area in the winter and summer respectively. Use of a cabin on Crown land is "occupation," for which section 54 of FRPA requires government authorization.

As well, section 57 of FRPA requires authorization to maintain a trail on Crown land. There is no evidence that the trail has been 'maintained' since construction. Any future maintenance of the trail would require MOFR approval.

In conclusion, the unauthorized harvesting of timber, the construction of the cabin, and the construction of the trail did not comply with section 96, 99, and 102 of the Code as it applied in 2001. The current use of the cabin does not comply with section 54 of FRPA.

## **2. Were the requirements of the Code and FRPA adequately enforced?**

The complainant asserted that MOF failed to enforce the requirements of the Code and FRPA, and that the lack of timely enforcement encourages ATV users to construct illegal cabins and trails at will. The complainant maintains that the incident at Sinclair Mountain is a small part of a larger problem of ATV damage to alpine areas.

The Board examined whether requirements of the Code and FRPA were adequately enforced. This includes past MOF investigations into the construction of the trail and cabin, MOF decisions on tenure and continued use of the cabin, and the enforcement considerations MOF was facing under the circumstances.

### **Investigation**

Enforcement promotes compliance with forest practices legislation and prevents damage to resources. Enforcement activities generally begin with monitoring and inspections. If problems are discovered, there are a number of tools available to the ministries to promote compliance. These tools escalate in severity through written compliance notices, stop-work orders, administrative penalties (fines), and prosecution. However, if no responsible party is identified, direct enforcement is impossible.

During the summer of 1999, MOF discovered the trail. It went 1.5 kilometres through sub-alpine forest, from a cutblock to the Sinclair Mountain alpine. Regional MOF enforcement staff investigated, but no further enforcement actions were taken.

In September 2001, MOF was told by the snowmobile club that a cabin had been built in the Sinclair Mountain area. In December, MOF confirmed the cabin's location and began a second investigation. ATV users had accessed the cabin using the trail. MOF staff went on site, determined the amount of timber illegally harvested, measured the ATV trail, and took photographs. MOF staff tried to identify the responsible parties, including placing an advertisement in a local newspaper in the summer of 2002 seeking information. Ultimately, MOF staff identified individuals who knew, but would not name, those who built the cabin.

FRPA sets a three-year time limit for imposing penalties. That limitation period ran out in November 2004, so MOF decided there was no point in continuing the investigation. Having failed to prove who had built the trail and cabin within the time limit, MOF permanently closed the file.

### **Tenure and continued use of the cabin**

Even if no enforcement action could be taken against those who built the trail and cabin, MOF could undertake measures to prevent use of the cabin without government authorization. During the three years of MOF investigation, the continued use of the cabin



and trail became a management issue. Some members of the public expected the cabin to be removed, while the snowmobile club wanted to obtain authorization to use and maintain the cabin.

On May 8, 2002, MOF compliance and enforcement staff wrote the snowmobile club noting that, as the cabin was built without authorization, MOF recommended that Land and Water BC (the agency with the authority to remove trespassing structures on Crown land) destroy the cabin. Within a month, the snowmobile club wrote to MOF requesting permission for, and tenure over, the Sinclair Mountain cabin, stating:

The persons responsible told our association what was done and that is when we came to you to first discuss this issue. The persons responsible also donated their efforts to our club and asked us to 'clean up their mess.'

The snowmobile club noted that, although built without proper authorization, the cabin was important to its members for the safe enjoyment of the alpine area in winter. In the event that MOF refused to give the club tenure, the club asked permission to dismantle the cabin and rebuild it in a more suitable area. The snowmobile club said that it had asked the responsible party to come forward on their own accord, but the club would not identify the party, unless MOF agreed to not impose fines or penalties. MOF would not make such an agreement.

On October 2, 2002, the district manager wrote that he would not grant tenure of the cabin to the snowmobile club. The district manager incorrectly stated that the cabin was in an area where no consensus about motorized or non motorized recreation had been reached under the 1997 RAMP. He went on to recommend that the snowmobile club contact the Community Resource Board and the Ministry of Sustainable Resource Management to resolve the land use issue. The district manager promised to revisit his decision if the land use issue was resolved. In the meantime, the cabin would not be removed and the district manager said he would review the situation in August 2003.

Under the RAMP, the Sinclair Range area is designated for winter motorized use, and the summer use is restricted to non-motorized. ATVs are not permitted in the Sinclair Range area. Meanwhile the cabin and trail were used in both summer and winter. MOF did not take any actions to limit the use of the cabin or trail.

During the Board's investigation, MOF acknowledged that the October 2, 2002, letter was incorrect in stating that there was no consensus on recreation use in the Sinclair Mountain area. The RAMP allows winter motorized use and summer non-motorized use. The cabin is in the RAMP's winter motorized use zone for Sinclair Mountain. There was no direct environmental damage from the cabin itself, and its use as a warm up hut and emergency shelter for winter recreation users is consistent with the RAMP. The Ministry of Forests' decision to leave the cabin until the investigation was complete was reasonable.

However, the RAMP had designated both summer and winter use for Sinclair Mountain area, so there were no outstanding issues in the this area that MSRM needed to resolve.

### **Enforcement Considerations**

When faced with the issue of recreation use in the Sinclair Mountain area, MOF had to consider what enforcement options it had.

The construction and use of the trail is contrary to the RAMP. Construction of the cabin was contrary to the Code, and continued use of the cabin without a permit is contrary to section 54 of FRPA. In response, MOF did not take any actions to limit summer use of the cabin and trail. It is probable that those who built the cabin also use it. By not taking any action, parties that contravened the Code have benefited from that contravention by having use of the cabin and access for ATVs provided by the trail. The trail's use has resulted in soil erosion and rutting, providing ATV access to the alpine areas that have been harmed by summer ATV use.

During the Board's investigation, the MOF district pointed out that the RAMP was not enforceable as it is only policy, and that damage to the alpine by all-terrain vehicles is not prohibited by the *Forest and Range Practices Act*.

There are no specific FRPA restrictions to summer motorized use of alpine areas. However, under section 58 of FRPA, the minister may prohibit a specific recreational use anywhere on Crown land, where it is needed to protect recreation resources. This has not been done. Consequently, unless the minister intervenes, the MOF district is quite correct that enforcement of the RAMP is not currently supported by FRPA.

MOF also argued that the definition of environmental damage is limited to section 46 of FRPA, and section 3 of the *Forest Planning and Practices Regulation (FPPR)*. Motorized use that damages sensitive alpine environment is not a defined damage, and use of the trail is not prohibited by FRPA. As such, the district maintains that enforcement was appropriate, as site degradation to the alpine by recreation use is not specifically prohibited.

The Board agrees that section 46 of FRPA prohibits damage to the environment, and that the definition of damage is narrowly restricted by regulation. Section 3 of the FPPR limits what constitutes damage, and it does not include damage to alpine by recreation use. The regulation prohibits soil disturbance that 'fundamentally and adversely alters an ecosystem.' Section 1 of FPPR restricts soil disturbance to damage caused by harvesting. The MOF district is correct in pointing out that protection of the environment under FRPA has a narrow application to harvesting activities.

The Board also recognizes that during the period of this complaint, MOF announced that it was dismantling its recreation program and divesting itself of its network of recreation sites and trails. In 2002, the BC government implemented the core review process for all

ministries. The government determined that managing recreation sites and trails was no longer a MOF core priority. All MOF recreation sites and trails were to be transferred to other agencies and organizations or cancelled. The process to transfer or cancel the sites and trails was scheduled to be completed by March 31, 2004.

Along with this change, all MOF district offices eliminated the staff specialist position known as the “recreation officer.”<sup>2</sup> These factors contributed to MOF not deactivating the illegal trail; not erecting signs at the cabin and on the trail notifying the public that that summer motorized use of the alpine and the trail was contrary to the RAMP; and not informing the public that unauthorized use of the cabin was prohibited under FRPA. MOF did investigate to identify the responsible parties, but did not take additional measures to reduce the risks of further infractions and degradation of the alpine. The risk to the sensitive alpine could have been mitigated while the investigation (enforcement) was ongoing.

## Summary

The Board finds that government enforcement has been inappropriate. Construction of the Sinclair Mountain cabin and trail did not comply with the Code, and the current use of the trespass cabin does not comply with FRPA. MOF did not undertake measures to restrict use of the trail and cabin.

The Board also finds FRPA does not prohibit damage to the alpine and MOF did not impose FRPA restrictions on recreation use. First, damage to the alpine by all-terrain vehicles is not specifically prohibited by the *Forest Planning and Practices Regulation*. Second, the minister has not put any restrictions on summer motorized recreation to prevent damage to the Sinclair Mountain alpine as provided by section 58 of FRPA.

## Conclusions

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1. **Did the construction and use of the cabin and trail comply with the *Forest Practices Code of British Columbia Act* and the *Forest and Range Practices Act*?**

Construction of the cabin and trail did not comply with the Code. Use (occupation) of the cabin does not comply with FRPA.

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<sup>2</sup> In the end, MOF maintained its role as the umbrella managing agency for the sites and trails and, in 2004, much of the funding to this program was restored.

## 2. Were both Acts adequately enforced by the Ministry of Forests?

Enforcement was inappropriate because MOF did not undertake measures to restrict the use of the trail and cabin, or to reduce the risk of further infractions. The party(ies) responsible for the illegal cabin construction have been allowed to benefit from the contraventions, while MOF investigated and waited for further planning decisions.

With respect to ATV damage to the alpine, there are no enforcement options available to the district manager under FRPA. Section 46 of FRPA prohibits damage to the environment, but the *Forest Planning and Practices Regulation* limits damage to that caused by timber harvesting. Recreation use that damages sensitive alpine environments is not specifically prohibited by the regulation.

## Recommendations

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The communities of Houston, Smithers and Hazelton have benefited from public participation in resource management planning processes. Consequently, policy guidance for the management of public recreation is provided by the 1997 recreational access management plan and the 1998 Bulkley Valley Land and Resource Management Plan. Both plans form policy, but are not directly enforceable under the *Forest Practices Code of British Columbia Act* or the *Forest and Range Practices Act*. However, government agencies still have the ability to manage recreation consistent with the RAMP and LRMP, through the *Forest and Range Practices Act* and other provincial legislation.

In accordance with section 131 of the *Forest and Range Practices Act*, the Board recommends:

1. The Skeena Stikine Forest District and Ministry of Agriculture and Lands decide the use of the Sinclair Mountain cabin by October 1, 2005, and either issue a tenure or remove the cabin consistent with the guidance provided by the Bulkley Valley Land and Resource Management Plan and the recreational access management plan;
2. The unauthorized trail to the cabin is addressed by Skeena Stikine Forest District by:
  - following the recommendations and analysis of the inter-agency working group reviewing alpine use;
  - prohibiting ATV use in areas designated as summer non-motorized use in the Bulkley Valley Recreational Access Management Plan through use of section 58 of the *Forest and Range Practices Act*;
  - undertaking a field review of the environmental impact and condition of the trail leading to the cabin;

- if the existing cabin is to remain, attaching conditions to its use that would require the permit holder to improve or stabilize the existing trail; or
  - deactivate the existing trail; and if a trail is required, relocate it to a suitable location.
3. The Skeena Stikine Forest District erect a sign at both the trail head and at the cabin stating that summer motorized vehicle use is restricted in accordance with the recreational access management plan. The sign should be erected by August 15, 2005.