



**Forest  
Practices  
Board**

## **Construction of the McCorkall and Woodpecker Forestry Roads**

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**FPB/IRC/151**

March 2009

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## Executive Summary

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On October 30, 2006 the Forest Practices Board received a complaint regarding the construction of two forestry connector roads and the impact that increased access to Crown land was having on farming and commercial recreation businesses. The area in question is located south of Prince George, BC.

The complainants assert that the actions of British Columbia Timber Sales (BCTS) violated previous commitments made by the Ministry of Forests and Range (MFR) when the complainants entered a statutory right-of-way agreement with MFR. The complainants believed they gave MFR an easement across their private property in exchange for a promise not to build alternate access into a core area that the complainants were using for commercial interests and as range land for grazing.

The complainants felt that this would protect their wildlife viewing and guide outfitting area from any negative effects of easy hunting access since they would control access with a gate when there were no logging operations. However, MFR correctly points out that they did not make a commitment to limit hunting pressure.

This investigation focused on three issues:

1. how the roads affected the complainants' range;
2. whether statutory public review and comment requirements were met by BCTS; and
3. whether government's commitments were met.

The complainants were concerned that, without appropriate fences and cattle guards in place, the new roads would let cattle bypass natural range barriers. *The investigation found* that BCTS completed some measures to mitigate the effects of the roads on range barriers, even though it was not legally obligated to do so.

The complainants were also concerned about the shortened public review and comment period that was approved by MFR for the development of the roads; they felt it had been shortened to the benefit of BCTS. *The investigation found* that the complainants had been given an adequate opportunity for review, as the amendment only added two short connecting roads, and the shortened review period complied with legislation and gave enough time for them to respond.

Finally, the complainants assert that BCTS did not live up to its commitments not to construct alternate access into the area. Part of the agreement the complainants had with BCTS required the complainants to maintain access across their private road for BCTS timber sale licence holders.

To resolve a dispute over maintenance cost charges with a BCTS timbers sale licensee, the complainants briefly blocked the road on their private property. The blockade precipitated BCTS building the connector roads that the complainants assert have damaged their livelihood. However, the MFR did not tell the complainants that it would not construct alternate access; it told the complainants that if alternate access was needed, it would minimize any impact this might have on their commercial recreation business, where they could reasonably do so.

*The investigation found* that the reasons that BCTS built the roads were reasonable, but concluded that BCTS did not honour MFR's commitment to minimize the impact the roads would have on the complainants' commercial recreation business.

In light of this, the Board recommends that MFR should take steps to mitigate damage to the complainants' businesses that have resulted from opening up unlimited vehicular access to the area where the complainants conduct these businesses.

It is reasonable for the complainants to expect BCTS and MFR to live up to their end of the bargain. While the actions of BCTS and MFR complied with the legal requirements of FRPA and the Forest Practices Code, it would be appropriate, in the Board's view, for BCTS and MFR to take steps to mitigate any damage, consistent with the original commitment made to the complainant to "minimize any adverse impact on your commercial recreation business, where we can reasonably do so."

In recent communications with the Board, BCTS has said it will continue to communicate with the complainants to mitigate the impact of its operations on their range and guiding tenures. BCTS has told the Board that it intends to apply to MFR for approval to deactivate the McCorkall connector road once harvest and hauling of mountain pine beetle killed timber is complete, likely in summer 2010.

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

BCTS Prince George and the Ministry of Forests should take steps to mitigate any damage to the complainants' businesses resulting from the opening up of access via the McCorkall and Woodpecker connectors.

The Board requests BCTS to advise it on the implementation of mitigation measures for impacts to the complainants range tenures by September 30, 2009, and on mitigation of road access impacts by September 30, 2010.

# The Complaint

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On October 30, 2006, a complaint was submitted to the Forest Practices Board regarding the construction of two forestry connector roads, and an associated amendment to a forest development plan (FDP), affecting an area south of Prince George.

The complainants are concerned that the connector roads—the McCorkall and the Woodpecker—which were built by the BC Timber Sales Program (BCTS) for forestry purposes, are allowing resident hunters to reach areas by vehicle that were previously difficult to access. The complainants assert that increased levels of hunting are having a harmful effect on their guiding business, which relies heavily on wildlife viewing. They also assert that the actions of BCTS violate previous commitments made by the Ministry of Forests and Range (formerly the Ministry of Forests) that, in the complainants' view, assured that roads accessing specific areas of Crown land used by the complainants for their livelihood would not be constructed.

As well, the complainants hold a range use permit for forested Crown land and are also concerned about how the roads and logging are affecting their range use. Because construction of the roads and cutblocks has damaged natural range barriers, the complainants assert that BCTS should be responsible for range improvements that mitigate the impact the roads and cutblocks have had on the complainants' cattle grazing areas.

## Background

The complainants own Almas Farms near the Fraser River, south of Prince George. They have several business interests associated with the farm and nearby Crown land, including ranching and Crown range use, a guide-outfitting licence and area, a woodlot licence, a registered trapping area, a small scale hydro-electric generation operation, and cabin rentals.

Most of the complainants' guiding clientele prefer to view and photograph wildlife (as opposed to hunting), so the complainants use part of their guiding territory on Crown land exclusively for wildlife viewing. The complainants have found that wildlife is easier to view if it is not hunted, so they prefer to restrict public vehicular access for hunting.

The complainants report that unrestricted vehicular access for hunters and other recreational users is currently affecting their farm, as well as their hunting and trapping business.

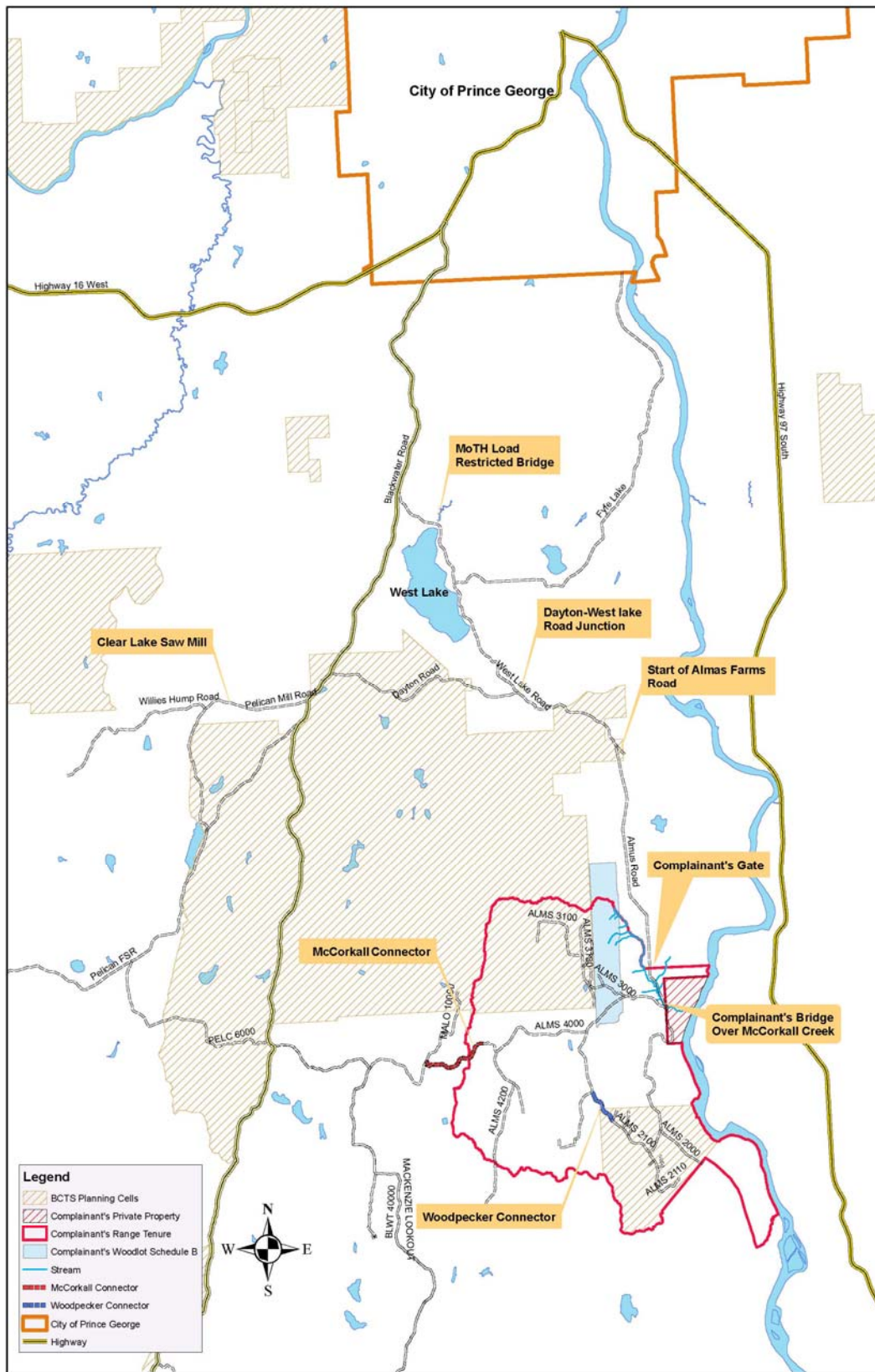


Figure 1. Area of Complaint (This is a figure only and the roads are not drawn to scale).

Before the events that led to this complaint, the only road access to the wildlife viewing area was the Almas Farms Road, which passes through the complainants' property to access the McCorkall and Woodpecker forestry operating areas (see Figure 1). Any forest licensees operating in the area had to haul timber along the Almas Farms Road. Previously, the district manager had authorized the complainants to put a gate on the Almas Farms Road. This made it easier for the complainants to restrict public access across their private land, thereby limiting hunting access.

Having the access to the Woodpecker and McCorkall operating areas exclusively via the Almas Farms Road had two main advantages for the complainants. First, it kept hunting pressure in the wildlife viewing area down, and second, it helped control the complainants' cattle. The complainants anticipated that new roads could allow cattle to drift, as the roads would bypass natural range barriers.

In 2005, BCTS constructed two short connector roads, the McCorkall (2.3 kilometres long) and the Woodpecker (0.4 kilometres long). The roads opened up motor vehicle access via an alternate route to the east of the complainants' property. The history and circumstances surrounding BCTS's decision to build the connectors, and the associated amendment to the BCTS forest development plan (FDP), are important to understanding this complaint, so they are described below in some detail.

## **1992 to 2004**

In 1992, the complainants built the first 10 kilometres of the Almas Farms Road to connect their farm with the West Lake Road to the north. In 1993, the complainants obtained a woodlot licence and in 1995 they obtained a road permit from the Ministry of Forests and Range (MFR) authorizing them to use the road for industrial forestry purposes, and obligating them to maintain the road.

During the late 1990s, the major licensee in the area used this road to access the McCorkall and Woodpecker operating areas, making an arrangement with the complainants concerning road maintenance.

When the major licensee started to haul through West Lake Community in 2000, the MFR approved an amendment to its FDP, allowing it to construct the Dayton Connector to bypass the community of West Lake, through which the licensee had been hauling. This connector provided more direct access to the licensee's mill and improved safety in the West Lake community.

In June 2001, responsibility for the McCorkall and Woodpecker operating areas was transferred from the major licensee to the Small Business Forest Enterprise Program (SBFEP), an agency of the MFR. At that time, the MFR district manager was responsible for the SBFEP.

In 2002, the SBFEP assessed the economics of constructing an alternate route to the McCorkall and Woodpecker operating areas and decided to continue using the existing access via the Almas Farms Road.

Because a portion of the Almas Farms Road passed through the complainants' private property, the SBFEP decided to secure access across the property by negotiating with the complainants to register a statutory right-of-way (SRW) across it. As part of the negotiations, there was also some discussion about whether the Almas Farms Road would remain the sole access to the operating areas, or whether alternate access would be built. In an April 14, 2003 letter to the complainants, MFR said:

... the ministry cannot give an unconditional guarantee that sometime in the future a road will not be required in the location of your concern. Notwithstanding the foregoing, the ministry, in its future access planning, will make every attempt to minimize any adverse impact on your commercial recreation business, where we can reasonably do so.

The MFR and the complainants signed the right-of-way agreement on April 16, 2003. The complainants provided the SRW free of charge.

Also in April 2003, the SBFEP received a new mandate and became the BC Timber Sales Program (BCTS), managed now by a timber sales manager rather than MFR's district manager. On August 6, 2003, the district manager approved an amendment to BCTS' 2000-2005 FDP. That amendment maintained the existing access arrangement via Almas Farms Road.

In July 2004, the district manager approved another amendment to the BCTS FDP, one that included cutblocks proposed in the McCorkall and Woodpecker planning areas. The amendment stated:

As per previous FDP commitments made to [the complainant] ... all wood from the Woodpecker and McCorkall operating areas will be hauled east and north on the road that runs through [the complainant's] property.

## **2005**

In February, 2005, the designation of the McCorkall operating area under the *Bark Beetle Management Regulation* was changed from 'containment' to 'salvage.' This resulted in a significant increase in the number of truckloads of logs that would be harvested and hauled from the area in the next couple of years.



Table 1 shows the number of loads scaled that actually came from the area between 2004 and 2007.

Year	Loads
2004	92
2005	158
2006	4759
2007	1051

Table 1. Loads per year

North of the Almas Farms Road, there are two ways for logging trucks to get to the Blackwater Road. One is a northerly route along the West Lake Road, through the community of West Lake; the other is west via the Dayton Road. The West Lake Road is a public road, which can be used by logging trucks free of charge. On the other hand, logging trucks using the Dayton Road were required, at the time, to pay a maintenance fee to the major licensee that held the road permit.

On June 7, 2005, the BCTS operations manager had a telephone discussion with a representative of the Ministry of Transportation (MOT) concerning logging trucks using the West Lake Road to haul through the community of West Lake. There were two concerns: one was public safety in West Lake; the other was increased road maintenance costs for MOT.

At this time, BCTS's operations manager was not aware of possible alternate routes (other than the Dayton Road). However, BCTS added a clause to the information package it provided when it advertised timber sales. The clause said:

It is the expectation that the Licensee haul logs via the Dayton Road to the Blackwater Road as the main hauling route. Local residents and the Ministry of Transportation have concerns with the prospect of hauling logs via the West Lake Road and strongly recommend using the Dayton Road route to the Blackwater Road. The Ministry of Transportation may use load weight restrictions on the West Lake Road to protect their investment in sealcoating, which is a long term project between the local residents of West Lake and the Ministry of Transportation.

Two timber sale licences (TSLs) were sold in late June 2005, and a third was sold on July 28. The information packages stated that the licensee would need to enter into a maintenance agreement with the complainants to use their road permit road (Almas Farms Road). That is because, under the *Forest and Range Practices Act* (FRPA), a TSL holder is required to pay the road permit holder "a reasonable contribution to the expense of maintaining the road."

BCTS also sent a letter to two of the three successful bidders, directing them to contact the complainants regarding a road maintenance agreement.

Sometime in July 2005, the complainants spoke with the contractor for one of the TSL holders and told him the TSL holder would need to contribute road maintenance costs. According to the complainants, the contractor said that he was not aware of this requirement. When the TSL holder was reluctant to agree to an appropriate amount for road maintenance, the complainants sought assistance from MFR and BCTS. Section 22.3 (3) of FRPA states that, if the licensee and the holder of the road permit can't agree on the amount of payment, the matter must be submitted to arbitration. It was BCTS's view that it had no legislated authority to intervene in dispute resolution between such parties and it would not get involved in arrangements between its TSL holders and road permit holders. Accordingly, BCTS did not assist the complainant, although a BCTS staff member did suggest a method to calculate suitable road maintenance fees.

The complainants hired a registered professional forester to advise them. The forester used the allowance used to calculate stumpage in MFR's Interior Appraisal Manual and recommended a road maintenance fee of about 11 cents per cubic metre per kilometre. The complainants also checked with the Nechako-West Lake Road Users Inc. and were informed that the rate estimated in June 2003 for using a nearby forest service road in summer was 11 cents per cubic metre per kilometre. On that road, maintenance rates are estimated in advance, and reconciled at the end of the year once all volume travelled over the road and actual maintenance costs incurred are known. At year end, refunds are provided, or users are asked to provide additional funds, as required, to balance the books.

According to the complainants, the two TSL holders agreed to the rate of 11 cents, and they asked the complainants to prepare a written agreement, which the complainants did. However, on July 15, 2005, those TSL holders decided not to sign the agreement, saying that BCTS had advised them that the rate was too high.

Meanwhile, the two TSL holders continued to use the Almas Farms Road for hauling timber, but did so without contributing to the expense of maintaining the road. The complainants were very frustrated by these developments. On August 8, 2005, near completion of the term of one of the TSLs, the complainants positioned a bulldozer near the bridge over McCorkall Creek, on their private property. Small vehicles could pass, but logging and equipment transport trucks could not. The TSL holder's contractor immediately contacted the complainants and orally agreed to pay road maintenance fees, whereupon the complainants removed the bulldozer. The TSL holder informed BCTS about the roadblock.

The TSL holder's contractor subsequently signed an agreement with the complainants, and made an initial payment. However, a dispute ensued concerning payment of the remainder, a dispute that was being litigated as of the publication of this report.

The next day, August 9, BCTS representatives investigated possible alternative routes for the McCorkall and Woodpecker connector roads, by helicopter and on the ground.

On August 10, in response to the TSL holder's contractor's inquiry, a BCTS representative told the contractor that BCTS had located a second option for access and would pursue alternate access. However, it would likely be September before work could start because the FDP would have to be amended. By August 10, the district manager had given oral approval for a shortened public review period for the amendment.

By August 11, BCTS had completed the field layout of the road.<sup>1</sup> On August 12, BCTS told the complainants that it was going to build the new roads. The complainants protested the BCTS decision and promised not to block access again. On August 15, a BCTS staff member advised the BCTS operations manager as follows:

I've finished the cost estimates (attached) for the alternative access into the McCorkall and Woodpecker planning cells to avoid [the complainants'] private land.

A consulting firm had been contacted to do the survey and design.

In an internal August 16 e-mail, the BCTS operations manager explained why BCTS was proceeding with the construction of the connector roads:

1. there was potential for difficult negotiations with the complainants, which put the TSLs under a "cloud of risk" that would likely result in lower bids;
2. an alternate route would allow truckers to avoid two steep grades on the existing route;
3. the original access decision was based on minimizing investment due to low volumes, but advanced beetle activity and greater volume would now put more traffic on the road, creating more impetus to invest in a remedy to the steep grade issues;
4. an alternate route would provide an "off highway" option that could lead to higher bids for timber sales;
5. an alternate route would make sense as an investment when applied against the increased volume, which would bring the cost down to about \$4.00 per cubic metre over two years; and
6. the Almas Farms route would still be available as an alternative.

A BCTS staff member added two other points:

7. the alternate route would reduce traffic on the public West Lake Fraser River Road, which was "taking a beating" from log hauling; and
8. the alternate route would keep logging trucks out of West Lake community, reducing safety concerns.

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<sup>1</sup> During the investigation BCTS advised the Board that when roads are needed for winter hauling, it is not abnormal that the layout work moves this quickly.

## **FDP amendment for new connector roads**

Forest service roads, such as the McCorkall and Woodpecker connectors, are constructed under the authority of section 121 of the *Forest Act*. In the case of BCTS, forest service roads are funded from revenue derived from timber sales.

Under the *Forest Practices Code of British Columbia Act*—the applicable legislation in 2005—a road could only be constructed if the road was identified in an FDP approved by a district manager. BCTS therefore needed to amend its FDP to get approval to construct the two new connector roads. As of August 10, 2005, BCTS had received district manager approval orally for an expedited (10 days rather than 60 days) public review and comment period. On August 22, BCTS formally requested the shortened review and comment period. BCTS explained that:

... the only road accessing this area presently crosses a short section of private land and BCTS registrants have been having difficulty coming to an agreement with the landowner regarding fees for maintenance of the private road sections...

On August 23, an MFR Tenures Officer stated that:

From what I understand, this involves the use of [the complainants'] gated road – the plan is to now avoid this road and build a new one bypassing his private land.

The FDP amendment was advertised on August 25, 2005, and the review and comment period ended on September 6, 2005.

On September 6, BCTS received a letter from the complainants reiterating the agreement that they had with BCTS and that there was no need for new roads:

... we absolutely [do] not deserve to be backstabbed with two new access roads... We assure you that we will always do our outmost to positively consider your concerns but we expect the same from BCTS.

The complainants hired a lawyer who continued the communication with BCTS. On September 8, 2005, the lawyer wrote to MFR and asked for reasons for the amendment, explaining:

Public access will have a devastating financial affect on our client's recreational (photo guiding) tenure business and on his grazing licence. It is our position that there is no compelling need which should cause our clients to suffer this substantial loss...our clients have been cooperating with the placement of roads within their recreational and grazing tenures, all on the understanding that public access to this area would be

avoided... it appears that your application is directed at harming [the complainants] ... we ask that you withdraw your application.

BCTS responded the same day (September 8):

Clearly establishing open access for our TSL holders to exercise their timber harvesting rights is an important factor ...

MOT is concerned about the public highway impact of significant increases in logging related traffic due to the increased harvest levels as a result of the mountain pine beetle (MPB) epidemic. BCTS discussions with MOT ... have identified specific concerns about increased traffic through the Westlake community on the Westlake public road. In particular, concern for resident safety and increased costs of public road maintenance. We were initially unable to offer MOT a remediation plan. However, at the time of these discussions, we were not fully aware of the potential for alternative route access to alleviate this significant issue.

The alternate route eliminates the need to utilize at least three steep grade portions of the existing route systems that have been a safety concern to log haulers... Given the general dependence on winter harvesting in these planning cells these sections are noted as a safety concern. . . .

The original decision to use the RRWA access was based on consideration for a much smaller annual removal from the Woodpecker and McCorkall planning cells.

BCTS reiterated that:

It is BCTS' consideration that negotiations of road use charges are entirely up to the parties involved to resolve. As such BCTS will not become a party to negotiations between TSL Holders and [complainants] and will not interfere with negotiations as these are the sole responsibility of the parties involved in accordance with Section 56(3)(4) of the *Forest Practices Code of British Columbia Act*.

The complainants' lawyer sent two more letters to BCTS. The last letter, sent October 7, 2005, argued against BCTS' rationale and stated:

You are proposing a road that will have a permanent detrimental affect on our clients' business and on wildlife. You have given no proposal and certainly no commitment as to how you would prevent these permanent problems<sup>2</sup>.

BCTS did not respond to the last letter. BCTS had promised to discuss remediation options to minimize potential impacts on the complainants' interest.

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<sup>2</sup> October 7, 2005 letter from the complainants' lawyer to BCTS.

BCTS submitted the amendment for approval on October 7. The amendment stated that:

The original decision to utilize the existing road systems rather than the currently proposed alternatives was based on a total chance scenario with a small amount of volume being removed in any given year. To manage the current epidemic, BCTS will be removing approximately 370,000 cubic metres over the next two years. Timber Sale Licence holders using the existing road as well as the West Lake community would be significantly impacted by the increase in volume. The alternative routes proposed provide for increased safety for the public as well as industrial users.

The amendment document also referred to two other potential benefits. One was avoidance of two steep grades in the existing road system (including the Almas Farms Road). The other was to provide an off-highway opportunity to a local sawmill. The amendment did not mention any concerns about reliability of access via the Almas Farms Road, or potentially difficult negotiations over road maintenance fees.

The MFR district manager approved the amendment on October 13 and the construction contract was awarded at the end of October. The connectors were completed in December 2005, at a total cost of just over \$200,000.

Sometime in the fall, BCTS, MFR and the major licensee agreed to share maintenance costs on the Dayton Road; the effect was that logging trucks could use it free of charge.

In January 2006, BCTS committed:

... to deactivation of (the McCorkall Connector Road), provided there are no other industrial users that require the use of the road, once the BCTS harvesting and primary silviculture obligations are complete... The deactivation level will be permanent and will close the road to vehicular traffic with removal of the bridges.

That same letter stated that BCTS would contact the complainants in 2006 to confirm placement of a cattle guard and wing fencing.

## **Discussion**

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The complaints' range tenure is in the McCorkall and Woodpecker planning areas (see Figure 1), so the complainants were concerned that the new roads, without cattle guards, would allow cattle to bypass range barriers. The Board examined the legislated requirements and the non-legislated commitments that BCTS made to the complainants.

The complainants also allege that BCTS failed to allow for proper public review and comment on the FDP amendment and failed to respond in accordance with sections 21 and 22 of the *Forest Planning and Practices Regulation*. The Board examined whether statutory review and comment requirements were met.

Finally, the complainants assert that, in building the McCorkall connector, BCTS did not live up to its commitments not to construct alternate access into the McCorkall and Woodpecker areas. The Board examined this allegation.

## **Were statutory range requirements met and are range issues resolved?**

Legislation requires that BCTS perform measures specified in operational plans, or determined by the minister, to mitigate the effects of the removal of natural range barriers. However, no measures to this effect were ever specified in BCTS's operational plans, or by the minister.

Nevertheless, in 2006, BCTS agreed to install some fencing and some cattle guards, but had not completed those measures by the time the complainants turned out their cattle in 2007. As a result, the complainants say they put considerable effort into chasing stray cattle in 2007. BCTS completed installing the agreed-to fencing and cattle guards in October 2007.

Further to the agreed-upon fencing, BCTS also promised to put in some other fencing, at its discretion, but that fencing has not yet been installed. In the complainants' view, though the fencing and cattle guards that BCTS put in partially mitigate the effect of removing the natural range barriers, more fencing needs to be built.

Given that no measures for installing fencing or cattle guards were specified in operational plans, BCTS had no legal requirement to mitigate the effects of removing range barriers. However, BCTS has completed some measures to mitigate the loss of range barriers and has resolved some of the complainants' range issues.

BCTS has told the Board that it continues to communicate with the complainants about the impact of its operations on their range tenure, and in a recent communication said "we have agreed to fence roughly 7.5 km of [the complainant's] range tenure to mitigate the impact of our planned operations... [the complainant] is aware of our intent to install the fencing this summer."

## **Were statutory review and comment requirements met?**

The complainants say that the district manager approved a 10-day review period without the justification required under section 20(2)(c) of the *Forest Planning and Practices Regulation*. However, that section did not apply to this amendment; instead the *Operational and Site Planning Regulation*, section 27(5)(b), applied. This regulation allows the district manager to

shorten the review period if doing so will still provide adequate opportunity for persons potentially affected by proposed operations approved under the amendment to review it.

The amendment was simple; it merely added two short connecting roads. The complainants were well aware of the impact the roads would have on their business. They responded within the shortened review period. They also continued the dialogue, through their legal counsel, until the FDP was approved. The objective of the review period is to allow affected parties to express their concerns to the district manager and allow the FDP amendment proponent to modify its plans.

BCTS and district manager were aware of the effect the roads would have on the complainants, and BCTS had an opportunity to modify the plans. Therefore, the statutory review and comment requirements were met. The complainants had an adequate opportunity for review.

### **Commitments concerning alternate access**

The complainants believe that MFR (including the SBFEP and BCTS) had promised that it would not build alternate access into the McCorkall and Woodpecker operating areas. It is clear from the complainants' correspondence with MFR that this 'promise' was secured primarily so that the complainants could continue to limit hunting access by closing the gate on the Almas Farms Road when it was not needed for logging. The complainants felt that this would protect their wildlife viewing and guide outfitting area from the negative effects of easy hunting access (discussed in more detail below). However, MFR correctly points out that it did not make a commitment to limit hunting pressure.

The complainants believe that the commitment by MFR was a long-term commitment. In their view, the commitment was made in April 2003, when they agreed to the SRW across their land. The FDP amendment in July 2004 appeared to the complainants to reiterate and confirm this commitment on the part of BCTS.

In April 2003, when the SRW was registered, MFR wrote to the complainants saying that:

... the ministry cannot give an unconditional guarantee that sometime in the future a road will not be required in the location of your concern. Notwithstanding the foregoing, the ministry, in its future access planning, will make every attempt to minimize any adverse impact on your commercial recreation business, where we can reasonably do so.

At that time, MFR's ability to limit future access depended in part on the operating areas continuing to be SBFEP/BCTS operating areas, and therefore controlled by MFR. If, hypothetically, a major licensee had taken over the operating area, the district manager would have had limited authority to refuse an application by that licensee to build connector roads.



The April 2003 letter was clear that MFR's ability to make a commitment concerning future access was limited.

In fact, with the transition from SBFEP to BCTS in early 2003, the district manager ceased to have direct authority over the program.

The Board finds, therefore, that MFR, being aware of the complainants' business interests in the area, made a commitment in 2003 to endeavour not to build or allow alternate access, at least in the near future. MFR also made it clear that it could not provide any guarantees. Importantly, though, the letter promised to make every attempt to minimize any adverse impact on the complainants' commercial recreation business in its future access planning.

BCTS's FDP reflected this commitment. In the amendment, BCTS stated that:

As per previous FDP commitments made to [the complainants] . . . all wood from the Woodpecker and McCorkall operating areas will be hauled east and north on the road that runs through [the complainants'] property.

From BCTS's perspective, FDP commitments relate to circumstances as they exist at the time, and are subject to change. In this case, they say, circumstances changed as safety issues emerged in the community of West Lake and at several other locations, including a winding stretch of the West Lake Road from kilometre 9 to kilometre 14.

Another force of change during the period of 2003-2005 was the need to deal with a mountain pine beetle infestation of growing magnitude. In March 2004, the official designation of the McCorkall operating area was 'containment'— an effort to control beetle spread. That designation changed to 'salvage' less than a year later. BCTS says that safety concerns became more pronounced in anticipation of increased harvesting as a result of the spreading mountain pine beetle.

The statistics show that there was a significant jump in truck traffic between 2005 and 2006, which was to be expected, because the volume harvested increases after an area is approved for development. Beyond that, there is no evidence that BCTS changed the planned date the timber was to be sold, and no new blocks, or changes to proposed blocks, were submitted to the district manager for approval after the July 2004 amendment.

In any event, increased volumes were anticipated to be removed from the areas, which caused MOT to raise concerns in June 2005, based on a fairly limited amount of truck traffic up to that point. In hindsight, this suggests that the safety considerations related to the West Lake community may not have been adequately taken into account in 2004, when BCTS made its FDP commitment to haul all the wood via the Almas Farms Road.

Desire to bypass the complainants was also part of the equation. This is confirmed by statements made at the time, including the following (emphasis added):

- the August 15 e-mail referring to “alternative access ... to avoid [the complainants’] private property;
- the August 16 e-mail documenting, among other factors, concern that the potential for difficult negotiations with the complainants put the TSL’s under a ‘cloud of risk’ that would likely result in lower bids;
- the August 22 e-mail in which BCTS advised the DM that: “the only road accessing this area presently crosses a short section of private land and BCTS registrants have been having difficulty coming to an agreement with the landowner;” and,
- the August 23 MFR e-mail: “From what I understand, this involves the use of [the complainants’] gated road - the plan is to now avoid this road and build a new one bypassing his private land.”

The timing of the decision to construct the connectors could also have taken place because, in 2005, the BCTS operations manager was apparently unaware that an alternate route was possible. The possibility of an alternate route was known within the BCTS organization for some time (it had considered the construction of alternate access as early as 2002) but in 2005 the operations manager told MOT that TSL holders had no choice in having to haul on the West Lake Road. Had the operations manager known of the alternate route in June 2005, BCTS believes this would have been explored as a solution to MOT concerns at that time, not in August when the complainants partially blocked the Almas Farms Road.

It is also clear that the business case for constructing the connectors shifted over time. In 2002 to 2004, there appeared to be no cost benefit to doing so, safety was not given the prominence it later achieved, and there was a desire to cooperate with the complainant. By August 2005, that situation had changed. Under BCTS’s new mandate, BCTS was to focus more on revenue generation, the safety issue had emerged as significant, and the desire to cooperate with the complainants had shifted to a desire to avoid them. These were all sound business considerations from BCTS’s point of view.

BCTS also says it wanted to remain impartial; that to provide special treatment to any one individual is not fair, nor is it appropriate conduct for any branch of government. However, in the Board’s view, mitigating the effects of putting in the two roads would not be special treatment; it would honour the commitment government made two years earlier.

The complainants described to the Board the impact that construction of the connectors has had on their wildlife viewing business. They say that with unrestricted access through the McCorkall connector, their tree stands (for wildlife viewing) are occupied long before they

arrive with their clients; wildlife has been spooked out of the area; and the tree stands and surrounding areas are littered with beer cans, whiskey bottles, human excrement, gut piles and the smell of rotten flesh.

The complainants also say that their guide outfitting business has been negatively affected. Before the McCorkall connector opened, they claim they were booked three years in advance and the quota assigned by government for hunting bull moose was fully used every year. However, in 2007-2008, they said that only 2 bulls of their quota of 11 were harvested by clients, they were not able to book any bear hunters in the spring of 2008, and only two hunters booked their services for the fall hunt. The effect on their business is not just reduced client satisfaction and declining revenue, but non-use of their quota is likely to result in a quota reduction. The complainants have no bookings yet for 2009.

BCTS maintains that the downturn in the complainants' wildlife viewing business is attributable not to the connector roads, but to the fact that there has been extensive logging. They point out that they made no commitment not to log in the area, and that the complainant does not have exclusive use. In response, the complainants insist that the bulk of the impact is due to easy access to pickup trucks with hunters, and to some extent to ATV access. They say that the clearcuts themselves are not the problem, as they will become moose and bear habitat, and that the real problem is increased wildlife vulnerability to hunters. The Board did not investigate those collateral matters.

There is one additional complication. The MFR and the Ministry of Tourism, Culture and the Arts have an issue with the complainants' authorization to use Crown land for commercial wildlife viewing. Before 2000, about 1,000 people in British Columbia were doing what is now termed 'commercial adventure tourism guiding.' Photo guiding is a subset of that category. In 2000, government introduced the guided adventure tourism policy which requires an adventure tourism guiding licence.

While the complainants have a guide outfitters licence to guide hunters, they do not have an adventure tourism guiding licence for wildlife viewing. Given that the complainants have no such commercial recreation tenure, MFR maintains that the complainants have no right to mitigation for impacts caused by what the ministry sees as improved public access to wildlife viewing and photography opportunities. In response, the complainants, supported by the Guide Outfitters Association of British Columbia, believe that their right to guide people to take photographs is covered under the complainants' guide outfitters licence, which pre-dates the adventure tourism guiding licence. The Board does not take a position on this issue.

BCTS has told the Board that it intends to apply to MFR for approval to deactivate the McCorkall connector road once harvest and hauling of mountain pine beetle killed timber is complete, likely in summer 2010.

## Conclusion

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Over the years, the complainants have made a living from several Crown land tenures. In the years leading up to 2005, they asserted their interest in being able to limit access to certain areas. A major licensee, two district managers and the SBFEP were willing to accommodate this interest until 2005.

Both BCTS and the complainants now assert that the other did not abide by the terms of the statutory right-of-way agreement on the complainants' private road. The agreement requires MFR to maintain the private road, and MFR has not done so. BCTS asserts that the complainants never notified it that the road needed any maintenance. On the other hand, it is clear that the complainants did not live up to their requirement to maintain unimpeded access when they blocked the road on August 8, 2005. That blockade appears to have precipitated BCTS' rapidly-implemented decision to build the connector roads. However, the Board concludes that the consequences to the complainants have been out of proportion to the inconvenience caused by that brief obstruction.

The role of government in arbitrating road maintenance disputes also changed when, in late 2002, the district manager could no longer determine what constituted a reasonable contribution to road maintenance charges. Any disagreement henceforth had to be referred to commercial arbitration. This was not a convenient mechanism for individuals, such as the complainants, who have the maintenance responsibility for only small stretches of road. If BCTS or MFR had taken the lead in bringing the dispute to resolution, it is possible the events would not have unfolded as they did.

The period 2003 to 2005 was also a time of change for BCTS: the organization was created with a new mandate, the district manager no longer had authority in the BCTS program, there were personnel changes, the mountain pine beetle infestation was spreading, and the response strategy toward beetle kill in the area was changing.

Nevertheless, BCTS is a very large enterprise, while the complainants are individuals. It is reasonable for the complainants to expect BCTS and MFR to live up to their end of the bargain. While the actions of BCTS and MFR complied with the legal requirements of FRPA and the Forest Practices Code, it would be appropriate, in the Board's view, for BCTS and MFR to take steps to mitigate any damage, consistent with the original commitment made to the complainant to "minimize any adverse impact on your commercial recreation business, where we can reasonably do so." In recent communications with the Board, BCTS has said it will continue to communicate with the complainants to mitigate the impact of its operations on their range and guiding tenures.

## Recommendations

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

BCTS Prince George and the Ministry of Forests should take steps to mitigate any damage to the complainants' businesses resulting from the opening up of access via the McCorkall and Woodpecker connectors.

The Board requests BCTS to advise it on the implementation of mitigation measures for impacts to the complainants range tenures by September 30, 2009, and on mitigation of road access impacts by September 30, 2010.



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