



**Forest  
Practices  
Board**

## **Motorized and Industrial Use of the Columbia and Western Rail Trail**

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*Complaint Investigation #19077*

**FPB/IRC/238**

June 2021

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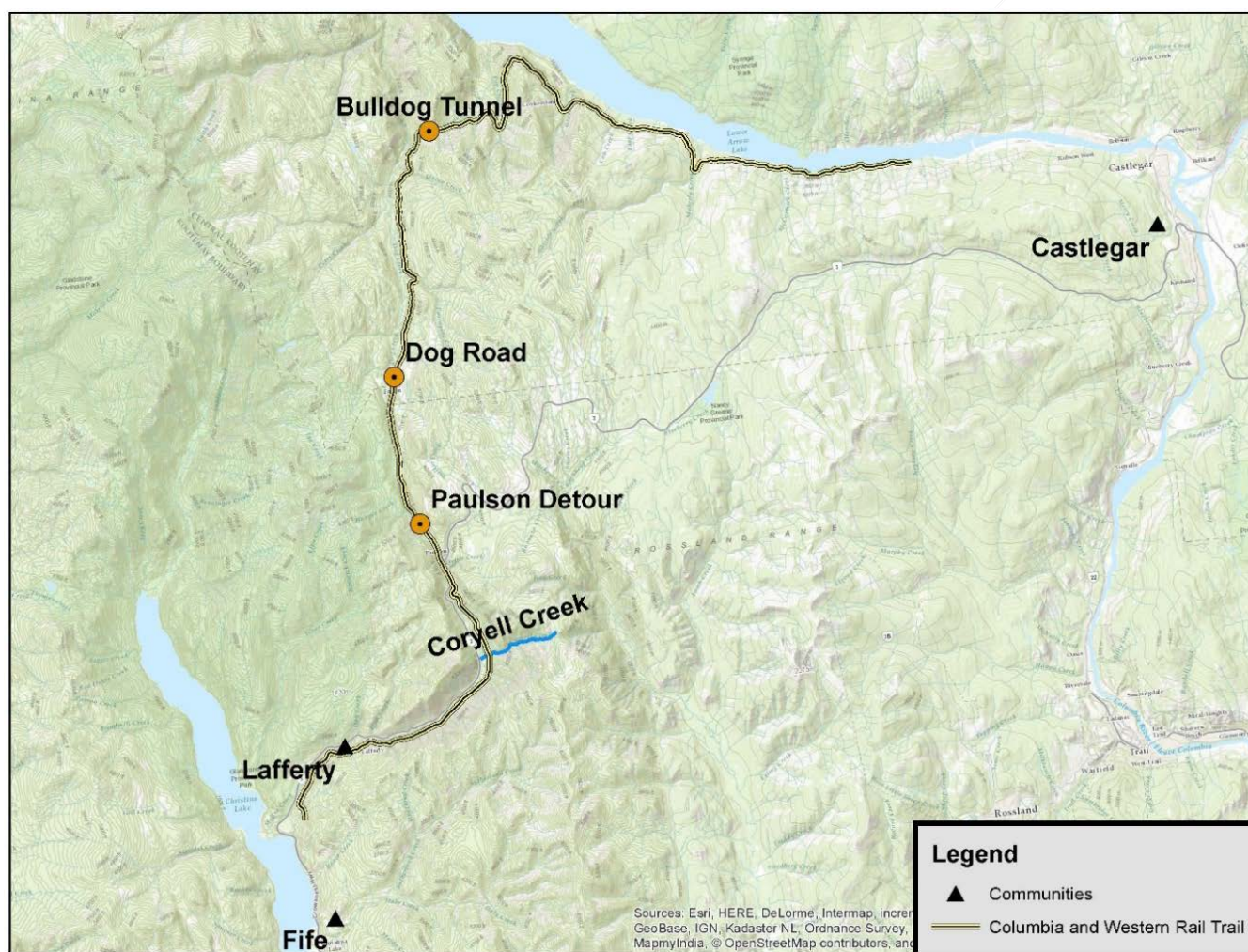
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# Introduction

## The Complaint

On December 2, 2019, the Forest Practices Board received a complaint from a resident of Grand Forks (the complainant) about the use and maintenance of the Columbia and Western Rail Trail (CWRT).

The first aspect of the complaint is that Recreation Sites and Trails British Columbia (RSTBC) has allowed portions of the CWRT from Fife to Castlegar to be used as an industrial road by Interfor, timber sale licence (TSL) holders and BC Timber Sales (BCTS). Private vehicles are also using the CWRT to access private property. The complainant is concerned that this use is changing the character of the trail, as it prevents tourists and the public from enjoying a safe recreational experience.



**Figure 1.** Map of the CWRT

Secondly, the complainant asserts that maintenance and re-construction of the trail is contaminating streams used for drinking water and spawning beds. The complainant identified a specific example where he is concerned about harmful materials, such as creosote from the rail bed, entering an unnamed stream near Coryell Creek where Interfor replaced a culvert.

## Background

The Columbia and Western Railway was built in the late 1800s, and ran from Midway to Castlegar. This complaint is about a 67-kilometre stretch of the railway corridor between Fife and Castlegar (see Figure 1), which is referred to as the CWRT. The CWRT crosses rugged terrain, and features close to 200 structures including tunnels, bridges, culverts and retaining walls. The CWRT is within the traditional territories of the Osoyoos, Neskonlith, Adams Lake, Shuswap, and Okanagan Indian Bands, the Splat's'in First Nation, and the Lake Tribe. The Forest Practices Board recognizes the importance of their historical relationship with the land that continues to this day.

In 1990, the Canadian Pacific Railroad (CP Rail) removed the ties and rails from the CWRT, and motorized and recreational use began. Motorized vs. non-motorized use has been a point of debate ever since. Non-motorized recreational users believe that motorized use negatively impacts the quality of the recreational experience and the trail itself. Motorized users believe that access to Crown land and private property is their right, and that ensuring motorized access to the rugged and remote areas of the trail is important for maintaining the safety of all users of the CWRT. Motorized access also provides for public access and continued maintenance of historic sites along the CWRT.

At no point in time were any covenants or restrictions registered for the rail trail lands, nor did any conveyance documents restrict the use of the rail bed.

The first two kilometres of the trail, at the Castlegar end, is on private land owned by CP Rail. The ownership of the remainder of the CWRT has changed multiple times. In 1998, CP Rail transferred ownership of the rail grade to the Trans Canada Trail Foundation (TCT). TCT's vision was for it to be a non-motorized recreation trail.

In 2004, TCT transferred ownership of the trail to Tourism BC with the understanding that it would be a non-motorized recreation trail. That same year, Tourism BC publicly announced the "Spirit of 2010 Trail" network, anticipating a world-class tourism attraction. The CWRT was a part of the network. The news release stated the trails would be accessible for activities such as cycling, hiking, horseback riding, and Nordic skiing. The news release did not explicitly state non-motorized access, but Tourism BC posted signs on the CWRT signaling non-motorized use only.

In 2010, government dissolved Tourism BC and the trail became an asset of the provincial government. In 2011, government established the CWRT as a recreation trail under section 56(1) of the *Forest and Range Practices Act* (FRPA). This designation is discussed later in this report.

In 2014, RSTBC entered into a partnership agreement<sup>1</sup> with the Columbia and Western Trail Society (the Society), that authorized the Society to maintain the trail. The Society held the partnership agreement until 2019. The Society also has an agreement with CP Rail to control highway vehicle access at the Castlegar end of the trail, with a gate on the CP Rail property. Unrestricted highway vehicle access to the CWRT also exists via the Paulson detour road, the Bulldog Forest Service Road (FSR) and the Shields Creek FSR.

The Society's 2017-2018 Trail Maintenance and Upgrade Program document stated that the CWRT had become unsafe and posed an environmental liability due to lack of maintenance of the infrastructure. The Society conducted maintenance on the trail to improve safety, reduce

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<sup>1</sup> A partnership agreement holder is authorized to provide management and maintenance services within the agreement area, without financial remuneration from the Province.

environmental liabilities, and to ensure access for the construction of enhancement projects at historic sites. This work generally included brushing, ditching, culvert maintenance and replacement, and grading, but also included trail re-alignment, rockslide removal, and repairs needed due to washouts of dangerous sections.

Interfor and BCTS have timber harvesting rights that can be accessed from the CWRT, and both are interested in doing so.

RSTBC was aware of the significant liability posed by the aging infrastructure and recognized that it did not have funding, staff or asset management systems in place to repair it. In a July 2019 letter to stakeholders, RSTBC asked for input on a proposal to cancel the recreation trail designation on the CWRT. This proposal garnered significant public response and media attention in the West Kootenay and Boundary area.

On July 6, 2020, government cancelled the recreation trail designation on the CWRT. The CWRT is now a non-status road, except for sections that are under some type of authorization such as a road permit.

## Legislation

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Section 56 of FRPA enables the establishment, variance, and disestablishment of a recreation trail. It also creates the opportunity for establishment of objectives for the recreation trail. Objectives are not directly enforceable but if a FRPA objective is established, major forest licensees must provide a result or strategy consistent with that objective in their forest stewardship plan (FSP), and that result or strategy is then enforceable.

Once a recreation trail is established, section 16 of the *Forest Recreation Regulation* (FRR) requires authorization from a recreation officer to use it for an industrial activity. Although not a defined term in FRPA, in the forestry context, industrial use commonly includes timber harvesting, road maintenance, and access for tree planting. A section 16 authorization may include conditions, which are enforceable. Section 20(3) of the FRR enables a recreation officer to establish rules for the use of a recreation trail by posting a sign containing the rules to be followed at the site or trail.

FRPA offers protection to the environment from any activity carried out on provincial Crown land. There are specific sections of FRPA relevant to the investigation that relate to protection of the environment. Section 46 of FRPA prohibits carrying out a forest practice or other activity that results in damage to the environment. Section 3 of the *Forest Planning and Practices Regulation* (FPPR) defines what damage to the environment means. Damage to the environment includes depositing a petroleum product or similar harmful substance into a stream. If the stream is licensed for human consumption of drinking water, section 59 of the FPPR prohibits material that is harmful to human health from being deposited in, or transported to that licensed intake. Section 57 of the FPPR requires primary forest activities<sup>2</sup> to be carried out at a time and in a manner that is unlikely to harm fish or damage fish habitat.

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<sup>2</sup> Primary forest activity means timber harvesting, silviculture treatments, wildlife habitat enhancement, or road construction, maintenance and deactivation.

# Investigation Results

To address the complainant's concerns about motorized use, industrial use, and maintenance activities, the investigation considered the following questions:

1. Was motorized use of the CWRT allowed?
2. Was industrial use of the CWRT authorized?
3. Was the recreation officers' approval of industrial use of the CWRT reasonable?
4. Did maintenance activity on the CWRT near Coryell Creek meet legal requirements?

## Was motorized use of the CWRT allowed?

While the vision of the TCT and statements made by Tourism BC may have created a public expectation that motorized use of the CWRT was prohibited, that was not the case. Motorized use of the CWRT has never been prohibited.

The Kootenay Boundary Land Use Plan (KBLUP) is the higher level plan for this area. It suggests that most operable Crown land outside protected areas will be managed to allow for motorized use. The KBLUP identified opportunity for further planning processes to develop recreation objectives on the operable Crown land base at a landscape unit level. The KBLUP legal order did not set legal objectives for recreation, and government did not establish recreation objectives for the landscape unit.

## Finding

Motorized use of the CWRT is permitted, and is consistent with the higher level plan for this area.

## Was industrial use of the CWRT authorized?

In 2011, government established the CWRT as a recreation trail under section 56 of FRPA. Section 16 of the FRR prohibits use of a trail for an industrial purpose unless authorized by a recreation officer.

The recreation officer issued five section 16 authorizations to use the CWRT for industrial use, two to Interfor, two to BCTS, and one to a BCTS TSL holder (see Table 1).

**Table 1.** Section 16 of the FRR - Authorizations on the CWRT

AUTHORIZATION	DATE	INDUSTRIAL USER	LOCATION	PURPOSE
1	April 25, 2017	BCTS	Castlegar to west side of Bulldog tunnel	Tree planting access
2	Oct 31, 2018 (FSP 658)	Interfor	Dog Road to Paulson Detour	Transporting timber, basic maintenance
3	Oct 31, 2018	BCTS	Castlegar to Bulldog tunnel	Highway vehicle access for layout works
4	June 28, 2019 (FSP 658)	Interfor	Fife to Coryell Creek	Transporting timber, road construction
5	Oct 8, 2019 (FSP 601)	Mercer Celgar Limited Partnership	Dog Road to Paulson Detour	Transporting timber, basic maintenance



The investigation revealed one instance where individuals working for Interfor chose not to follow Interfor's direction, and used a lowbed truck on the CWRT instead of on McRae Creek Road. Interfor did not have section 16 authorization for this industrial activity, as it did not plan to use the CWRT. The Society brought the unauthorized industrial activity to Interfor's attention, and in response, Interfor agreed to contribute to the trail maintenance work for that section of the trail. That maintenance work was carried out by the Society.

Since July 2020 the CWRT is no longer an established recreation trail, and industrial use must be authorized by a road permit.<sup>3</sup>

## **Finding**

Industrial use of the CWRT was authorized under section 16 of the FRR.

## **Was the recreation officers' approval of industrial use of the CWRT reasonable?**

As described above, the recreation officer issued five authorizations for industrial use of the CWRT. An authorization is a discretionary decision made by a government statutory decision maker (SDM). Discretionary decisions must reflect the principles of administrative fairness. The standard the Board uses in evaluating discretionary decisions is:

1. The decision is based on an adequate assessment of available information,
2. The decision is consistent with sound forest planning and practices, and
3. The decision achieves the intent of the legislation.

This section of the report will examine whether the recreation officer issued the authorizations in accordance with these standards.

## **Adequate Assessment of Available Information**

RSTBC's guidelines, *Administrative Law Decision Making*, provide RSTBC SDMs a basic understanding of administrative law decision making and a practical guide to make statutory decisions. A principle of natural justice outlined in the guidelines is the duty to let parties know about and respond to the information the decision is based on. That way, people can bring information to the attention of the decision maker.

The recreation officer knew that some of the public wanted the CWRT used exclusively for non-motorized activity, but motorized use was permitted. The recreation officer typically required the industrial use applicant to carry out referrals with user groups, primarily when the use involved timber hauling, as it had the potential to negatively impact the running surface of the trail and the safety of the recreational users. The recreation officer considered the referral information and its knowledge of the public expectations when issuing an authorization. The recreation officer did make exceptions when the industrial use was minor in nature,<sup>4</sup> but did so with the knowledge of what the public expectations were surrounding use of the CWRT, and its experience working with BCTS and Interfor. The recreation officer managed the potential negative impacts to the

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<sup>3</sup> There are other mechanisms available to authorize industrial use of a road, depending on the status of the road and the type of use being authorized. In this case, the industrial use would be authorized by a road permit as the road does not have FSR status.

<sup>4</sup> An example of industrial use minor in nature is highway vehicle access for layout crews.

CWRT by including conditions in the authorizations to manage trail maintenance standards and public safety.

The recreation officer had an adequate understanding of the available information when making the decisions to authorize industrial use.

### **Sound Forest Planning and Practices**

To be consistent with sound forest planning and practices, the decision has to be consistent with government objectives and any legal requirements. Sound planning and practices also include safety for people and the environment, effective public consultation, meeting technical requirements, and using the best available scientific information.

The CWRT had no objectives that could guide the recreation officer in making its decision to authorize industrial use. In BC, an area is available for motorized use unless is prohibited, and there were no legal requirements in place prohibiting motorized use. The recreation officer applied conditions in the authorizations to conserve the character of the trail, to limit the industrial use to periods of low public use, and to ensure the safety of the public and environment.

The decisions made by the recreation officer were consistent with sound forest planning and practices.

### **Achieving the Intent of the Legislation**

The *Recreation Manual, Appendix 7 – Guidelines for Authorizing Uses at Recreation Sites and Trails* (the manual) helps with determining legislative intent. The manual describes that the purpose of section 16 of the FRR is to manage certain uses on recreation trails to ensure they are compatible with the trails' resources, structures, services, and other visitor use, and with the recreation program mission of providing recreational experiences. The manual says activities that will be prohibited or restricted (i.e., approval with conditions) include activities that: require exclusion of the general public, could detract from safe recreation opportunities, or could be offensive to a segment of the population.<sup>5</sup> Authorizing industrial use of a recreation trail is a discretionary decision and so there is a balancing implied in each decision. For example, although a portion of the public may be offended by industrial use of the trail, that use does not exclude the general public's use of the trail. The decision maker is expected to consider the issues and could place appropriate conditions on the use to make an appropriate balanced decision.

The authorizations issued by the recreation officer incorporated conditions, where necessary, to ensure that safe public use of the CWRT was not impeded by the industrial use. These conditions prohibited industrial use in the summer when recreation use on the rail grade is higher, required general maintenance, required returning the trail to pre-industrial use surface condition and contained obligations intended to ensure public safety.

The decisions made by the recreation officer to authorize industrial use on the CWRT achieved the intent of the legislation.

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<sup>5</sup> These are the three principles that would apply to timber harvesting activities.



## **Finding**

The recreation officer's authorization of industrial use was reasonable. The decisions included an adequate assessment of the available information, were consistent with sound forest practices, and achieved the intent of the legislation. Motorized and industrial use of the CWRT is allowed, and there were no established objectives to inform the authorization decision. The recreation officer was aware of the local public expectations regarding motorized use of the trail, and applied conditions in the authorizations to minimize the potential negative impact on the recreational experience and the character of the trail.

## **Did the maintenance activity on the CWRT near Coryell Creek meet legal requirements?**

The complainant was concerned that maintenance done on the CWRT by Interfor caused environmental damage. Specifically, he claimed the culvert replacement on an unnamed creek just south of Coryell Creek caused harmful materials, such as creosote from the rail bed, to enter the stream, causing contamination to drinking water, and siltation of spawning beds.

The investigation considered whether maintenance activities complied with:

- the conditions set out in the FRR section 16 authorization; and
- the FRPA requirements related to protection of the environment.

## **Compliance with the Conditions**

The authorization issued to Interfor under section 16 of the FRR, between Coryell Creek and Fife, was for five years of use, limited to the months of September to the end of May. The conditions placed on the authorization required Interfor to maintain public safety and inform recreational users of the industrial activity, to minimize disturbance to the trail, and to restore the trail to pre-use conditions at the end of each season. It also required Interfor to obtain a road permit and indicated that the road permit was the primary document if there were inconsistencies between the two authorizations. The road permit authorized Interfor's construction and maintenance of the road but did not contain conditions or specifications for the maintenance.

To demonstrate compliance with the conditions of the section 16 authorization, Interfor provided the professional engineer's design and implementation instructions with photos to demonstrate compliance with those, and photos of the access controls in place during the maintenance activity, and the condition of the trail after the maintenance occurred. The evidence provided by Interfor satisfied the Board that the conditions of the authorization were achieved. RSTBC did not inspect the site to assess compliance.

The section 16 authorization ceased to apply to any activity carried out after the CWRT recreation trail designation was cancelled on July 6, 2020.

## **Compliance with FRPA Requirements**

Section 46 of FRPA prohibits carrying out a forest practice or other activity that results in damage to the environment. Section 3 of the FPPR, in part, defines "damage" as the deposit of a petroleum product or other similar harmful substance into a stream. Section 59 of the FPPR prohibits a person

from causing material that is harmful to human health to be deposited in water that is diverted for human consumption by a licensed waterworks.

In November 2019, Interfor carried out maintenance and reconstruction work on a short section of the CWRT, replacing a crumbling concrete culvert that dated back to the original railroad construction in the late 1800s. The culvert was on a small non-fish bearing (S6) tributary stream to McRae Creek, just south of Coryell Creek. To maintain the rail grade across the gulley, the old culvert was buried under nine metres of fill.

Interfor hired a professional engineer to design and make recommendations for the culvert replacement.



**Figure 3.** The old culvert replaced by Interfor on the small unnamed tributary stream.

The excavation instructions required stripping and stockpiling existing surfacing material separate from other common materials that would later be used to cover the culvert. The surfacing material is where creosote or other similar substances might be present. The new culvert was installed parallel to the old culvert and then water was diverted to the new culvert. The professional engineer monitored the installation and certified that it followed the prescription and recommendations.

The complainant suggested that the maintenance activity caused contamination to drinking water. Section 59 of the FPPR prohibits material that is harmful to human health from being deposited in, or transported to a licensed intake. However, there is no licensed domestic water intake on the unnamed stream.

The complainant also suggested that siltation from the culvert replacement negatively impacted spawning beds. However, the unnamed tributary stream is not a fish-bearing stream.

A natural resource officer (NRO) inspected the site in the spring of 2020. The inspection showed that Interfor followed the engineer's erosion and sediment prevention measures. The NRO concluded there was no movement of freshly exposed soil to the stream. This is consistent with the evidence supplied by Interfor and the professional engineers' instructions.



**Figure 4.** The culvert replacement site - during excavation, culvert placement, and final grade.

## Finding

Interfor met the legal requirements when carrying out the maintenance activity on the CWRT. Interfor followed the design and instructions of the professional engineer when replacing the culvert, taking measures to prevent the introduction of potentially contaminated surface materials from the surface of the rail bed, and sediment, from entering the stream.

## Conclusions

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The complainant is concerned that motorized use is changing the character of the CWRT, and preventing the public from enjoying a safe recreational experience. The Board found that, although certain public user groups believe the CWRT was intended to be a non-motorized recreation trail, government did not take any steps to restrict motorized access.

The Board found motorized use of the CWRT is permitted. RSTBC authorized the industrial use of the CWRT and it took steps to mitigate the potential negative impacts on the recreational users. The authorizations restricted industrial activity to the non-peak recreation season, included conditions to address safety of all users, and required the industrial users to return the surface conditions of the trail to a state better than before the use occurred.

With respect to the replacement of a culvert on an unnamed stream near Coryell Creek, the investigation found that Interfor complied with all the legal requirements. It used a professional engineer to design and implement the project, taking the appropriate steps to prevent the introduction of potentially contaminated spoil materials from the surface of the rail bed, and sediment, from entering the stream. There was no evidence of damage to the stream resulting from the culvert replacement.



**Forest  
Practices  
Board**

PO Box 9905 Stn Prov Govt

Victoria, BC V8X 9R1 Canada

Tel. 250.213.4700 | Fax 250.213.4725 | Toll Free 1.800.994.5899

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