THE BIG EDDY

Water District	Watershed Number*	Source	User	Reserve Area Requested**
Revelstoke	1a	Clachnacudainn Creek		15.3
"	1b	Greely Creek		20.3
"	1c	Hamilton Creek	City of Revelstoke	5.6
"	1d	Bridge Creek		1.7
"	1e	Napoleon Creek		1.2
"	2	Dolan Creek	Big Eddy W.W.D.***	1.7

A History of the Big Eddy Waterworks District and its Long-Standing Battles to Protect the Dolan Creek Watershed Reserve

By Will Koop, September 30, 2013
B.C. Tap Water Alliance (*http://www.bctwa.org*)

9. THE LOOMING ISSUE OF LIABILITY AND ITS DISSIPATION – A DISCUSSION AND REVIEW OF INTERNAL RECORDS

> ***T****he ministry, having no mechanism in place to deal with the costs associated with damage to water quality or works, has a very difficult task in public sessions when attempting to convince water users that damage can be avoided or repaired. In fact, the absence of any sort of mechanism to cover such unforeseen costs, has led to prolonged, heated public debate and is at the centre of the problems being encountered in the Slocan Valley, Creston and Nelson watersheds, for example… At present, it would be safe to assume that many watershed areas presently in the AAC* [Allowable Annual Cut] *will not be harvested unless the government develops a serious, justifiable position on the liability issue.* [277]

> ***T****he final component* [of the Community Watershed Planning Policy] *is the <u>Operations in Community Watersheds: Responsibilities and Liability Policy</u>. This policy specifically addresses responsibilities and liability in community domestic and irrigation watersheds. It is an entirely new policy which we formerly presented as an "annex" to the government "Community Watershed Planning" policy.* [278]

As was the case with the Big Eddy Waterworks District Trustees, for the most part the thorny theme and issue of liability raised by provincial water purveyors with the government regarding the damage to water quality primarily from logging has a long and interesting history, a history that became particularly pronounced in the 1980s when the Ministry of Forests (MoF) launched a full assault on many previously restricted and protected drinking watersheds.

The subject of liability was poignantly summarized in 1981 by Bruce Fraser, the MoF's newly hired Consultant on Public Involvement. [279] Fraser had been busily preparing an internal report for the Ministry on a new public policy framework about logging in these politically sensitive community watersheds, the majority of which had been protected with Watershed Reserve tenures, a legal conflicting status that went oddly unidentified in Fraser's reports:

> *The major problem that comes up in discussions with the public are the questions of "Who is accountable and who will be liable for changes in water quality and quantity if there is damage from development?" Our draft addresses this* ***but you can see it is an area of quicksand!*** [bold emphasis] [280]

---

[277] R.R. Tozer, Regional Manager, Ministry of Forests memorandum to W.C. Cheston, Assistant Deputy Minister, Operations, August 2, 1985.
[278] C.M. Johnson, Acting Director, Integrated Resources Branch, Ministry of Forests, to W.C. Cheston, Assistant Deputy Minister, Forests and Lands Operations, Ministry of Forests, July 13, 1988.
[279] See Chapter 8.2 for background information.
[280] Bruce Fraser, Consultant on Public Involvement, Planning Branch, Ministry of Forests, to J. Soles, Administrative Assistant, Environmental Management Division, Ministry of Environment, November 23, 1981. Refer to Chapter 7 for more on Bruce Fraser.

As later identified on page 15 in a January 17, 1986 MoF paper, *Liability for Damage to Domestic Water Supplies from Forest Harvesting Activities – A Discussion Paper*, was the following:

> *determining liability is the crux of the discussion and apparently the real stumbling block in reaching agreements with water users and the forest industry.*

Narrated earlier in Chapters 5 and 6, in many ways the Big Eddy Trustees were largely responsible for establishing renewed concerns, discussion, and precedent on liability in the early 1980s, through both the legal agreement with BC Hydro resulting from the Water Comptroller's Public Hearings on the Revelstoke Dam, and through the finding of the Environmental Appeal Board in 1983. These precedents, combined with the unwavering determination of the Big Eddy Trustees against the intrusion of forest management in its small Watershed Reserve, was why certain top administrators in the MoF developed such strong and lasting criticisms against them, even implementing an agenda to subdue them. The Big Eddy Trustees, as with a number of other outspoken water purveyors and users in the Nelson Regional boundaries, were a real threat to these government administrators who were scheming against the public by including community watersheds into the "working forest", lands devoted to the Provincial Harvesting Land Base. These precedents, as revealed here, were also under careful and confidential review by government legal counsel assigned to the MoF by the Attorney General's staff, internal documents which are conveniently restricted from public disclosure through Freedom of Information policies.

9.1. Early Legislative Precedent

Earlier on in the 1900s, both federal and BC provincial legislation and legal agreements regarding fresh water protection for both fish [281] and humans had specified that "pollution" of fresh water sources by mankind was intolerable and was subject to financial penalties, and even imprisonment.

For instance, the December 1924 provincial legislation which established the incorporation of the Greater Vancouver Water District and its administration over Crown and private forest lands in the Seymour and Capilano watersheds:

> *88. Penalties for polluting water*
>
> *If any person shall bathe the person, or wash or cleanse any cloth, wool, leather, skin of animals, or place any nuisance or offensive thing within or near the source of supply of such waterworks in any lake, river, pond, source, or fountain, or reservoir from which the water of said waterworks is obtained, or shall convey or cast, cause or throw, or put filth, dirt, dead carcasses, or other offensive or objectionable, injurious, or deleterious thing or things therein, or within the distance therefrom as above set out, or cause, permit, or suffer the water of any sink, sewer or drain to run or be conveyed into the same or into any part of the system, or cause any other thing to be done whereby the water therein may in anywise be tainted or fouled or become contaminated, he shall be liable, on summary conviction, to a fine not exceeding fifty dollars, or to imprisonment for a period not exceeding thirty days, with or without hard labour, or to both fine and imprisonment.* [282]

[281] The Federal Fisheries Act.
[282] Chapter 22, *An Act to incorporate the Greater Vancouver Water District*, Assented to, December 19, 1924.

Fourteen years earlier, the federal government passed an Order-in-Council in 1910 that protected the drinking watershed boundary of Coquitlam Lake, the source of drinking water for New Westminster City and its neighbouring municipalities. Signs posted at its boundary by the federal government stated:

> *Public Notice is hereby given that the Government of Canada has reserved, for special purposes, the lands surrounding the neighbourhood of Coquitlam Lake … Any UNAUTHORIZED person in any manner occupying or taking possession of any portion of these lands, or cutting down or injuring any trees, saplings, shrubs, or any underwood, or otherwise trespassing thereon, will be prosecuted with the utmost vigour of the law. By Order, Robert Rogers, Minister of the Interior of Canada.*

Ironically, the Greater Vancouver Water District later undertook to ignore and break its own early provisional laws when it became a logging company under secret negotiations from 1963 to 1966 with the Social Credit government's Minister of Lands, Forests and Water Resources, Ray Williston, leading to the passage of the *Amending Indenture* for the Greater Vancouver Water District in March 1967.

The concerns by government about public liability related to its permit licensing of Crown land use activities in public drinking watershed sources was almost a non-entity until the 1960s. That's when the Forest Service began to controversially authorize commercial logging in former and legislatively protected watersheds in the face of an astonished and opposed public. Even in 1960, the Chief Forester's office recognized, through its own slanted interpretation, the decades-old inter-agency legacy of drinking watershed protection:

> *Although the water licence holder does not appear to have any specific legal rights respecting use of timber … it is necessary to ensure that any such sale is subject to no interference with his water rights and improvements if the sale covers the same area. We also have a moral obligation to attempt to prevent pollution or other adverse effect on his water supply*. [283]

Similar sorts of restrictive clauses and understanding were also implemented in drinking watersheds in the United States, most notably Portland City's federally protected Bull Run Watershed Reserve which prohibited human and domestic animal access, that is, until 1958 when the federal Forest Service illegally authorized commercial logging.

By 1976, the newly elected Social Credit administration effectively began to stymie the role of provincial Health Officers as protectors or guardians over the public's drinking watersheds, later ensuring that top administrators in that department would tow a new line. The newly formed and now autonomous MoF then quickly sought to take charge to oversee community watersheds amidst the justifiable protestations and objections by both Ministry of Crown Lands and Ministry of Environment administrators.

[283] Memorandum, December 20, 1960.

9.2. At the Center: Liability

Immediately following the dissolution of the provincial Task Force on community watersheds at the end of 1980 [284] is when the MoF began to actively frame and implement its own policy about logging in community watersheds. In 1981, the MoF's new Consultant on Public Involvement, Bruce Fraser, authored a November 12, 1981 draft document, *A Policy for Integration of Forest Planning and Operations in Community Watersheds Lying on Crown Land Within Provincial Forests*. It stated the following under a section entitled *Liability for Alternate Water Supply*:

> *During the life of a forest tenure, the licensee is responsible for making alternate water supply available to licenced water users should changes in water quality and quantity occur which are attributable to logging, road construction, road maintenance or forestry practices which depart from constraints or prescriptions imposed in the final approved Integrated Forest Management Plan. When a forest tenure lapses, the Forest Service is responsible for maintenance of the developed area to keep conditions within the limits imposed by the IFMP and assumes liability for water supply disturbances in place of the licensee. Liability for provision of alternate water supply shall be incorporated into Ministry of Forests contracts with licensees. Contracted liability for provision of alternate water supply shall be invoked by the Forest Service on the licensee, or accepted by the Forest Service itself, only where the Planning Team has inspected the area in question, and has determined that the disruption to water supply is related to licensee operations or Forest Service maintenance activity which departed from the approved Plan. In general, this liability provision shall expect licensees or the Forest Service, to take corrective action to restore natural water supply prior to undertaking alternatives.*

According to a series of documents in the MoF's thick, voluminous central file on community watersheds, the theme of liability was discussed and reported on internally by the provincial government throughout the 1980s. This issue and these documents have rarely seen the light of day in a publicized report. The documents, summarized below, suggest that at the height of public concern by numerous provincial water users/purveyors in the 1980s about the consequential disturbance effects of logging in community watersheds, the government eventually decided to ignore and disappear the issue, because the cumulative financial and mitigation consequences to the provincial government had simply become too enormous, overwhelming, unwieldy, and highly embarrassing.

As a result of the growing number of intrusions to public water supply sources, and the public's related concerns and repeated calls for no logging, especially by knowledgeable members of the public in the Kootenays in southeast BC, serious internal discussion about this public movement in the Kootenays arose in June 1985 at the MoF Deputy Minister level.

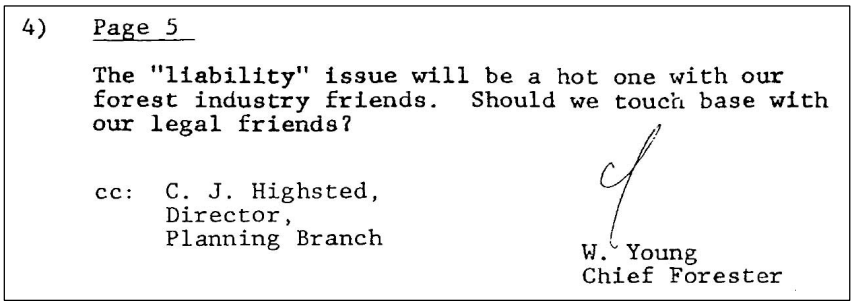
> *As you are aware, this is a very high profile topic in this and other Forest Regions.*
>
> *While this is a discussion between third parties with most tenures, the Ministry of Forests retains development and management responsibilities under the SBEP* [Small Business Enterprise Program]. *In doing so, we therefore must deal with liability in the event that unforeseen damage results from SBEP harvesting activities.*

[284] See Chapter 4 for the narrative about the Task Force.

This commitment must be looked at as a cost of doing business in domestic-use watersheds if these areas are expected to continue to contribute to the AAC.

Related to this matter, this region is currently developing a discussion paper dealing with liability for damage in domestic watersheds under all tenures. Mr. Cuthbert initiated the project prior to leaving this region and we hope to be able to forward a draft for your consideration in the near future. [285]

The ministry having no mechanism in place to deal with the costs associated with damage to water quality or works, has a very difficult task in public sessions when attempting to convince water users that damage can be avoided or repaired. In fact, the absence of any sort of mechanism to cover such unforeseen costs, has led to prolonged, heated public debate and is at the centre of the problems being encountered in the Slocan Valley, Creston and Nelson watersheds, for example. [286]



4) Page 5

The "liability" issue will be a hot one with our forest industry friends. Should we touch base with our legal friends?

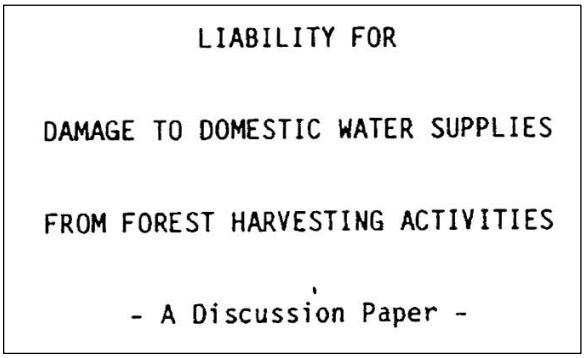
cc: C. J. Highsted,
Director,
Planning Branch

W. Young
Chief Forester

By January 1986, a MoF Nelson Forest District Regional Task Force completed a 22-page discussion paper, *Liability for Damage to Domestic Water Supplies from Forest Harvesting Activities*. The discussion paper was then circulated to all MoF Regional and District managers for comment. In 1986, MoF staff then began questioning the *"legal rights"* of water users, with the suggestion that the Ministry adopt other tactics to deflect such discussion, i.e.:

The discussion paper is an (admirable) attempt to find a way around the central problem which we believe could be stated as follows: "In the absence of any legal guarantee of water quality, quantity or flow regime provided by a water licence, the question remains open as to the legal liability of the Ministry of Forests and of licensees to provide compensation for damage or loss to, or replacement or repair of, water supply." The way around the problem is based on recognition of the purposes and functions of the Ministry in Section 4 of the Ministry of Forests Act. We don't have any problem with the concept that we must coordinate and integrate the use of the forest resources so that the water resource value can be realized. We do have a problem accepting the view of some water users that their water supply must not be impaired in any way. Impairment in some degree is almost inevitable but as identified under "central problem" above, there is no legal recourse to ensure absolute absence of impairment. It would almost appear, therefore, that a common sense, rational approach to integrated use as advocated by the discussion paper is a better means for us to fulfill our mandate than an attempt to resolve the central problem by defining a legal right of a water user. [287]

[285] D.L. Oswald, Acting Regional Manager, to W.C. Cheston, Assistant Deputy Minister of Operations, Ministry of Forests, June 13, 1985. "Mr. Cuthbert" became the Chief Forester.
[286] R.R. Tozer, Ministry of Forests Nelson Regional Manager, to W.C. Cheston, Assistant Deputy Minister of Operations, Ministry of Forests, June 13, 1985.
[287] J.J. Juhasz, Director, Timber Management Branch, to J. Bullen, Manager, Resource Planning, Ministry of Forests, March 11, 1986.


LIABILITY FOR

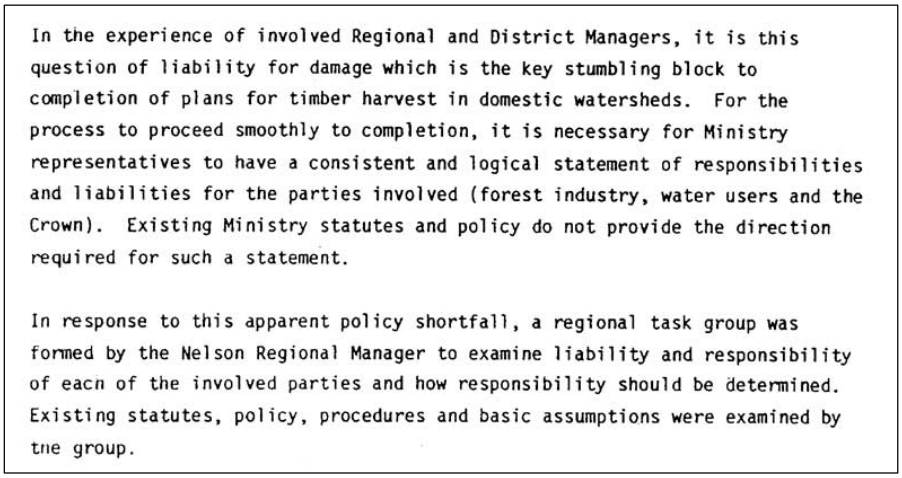
DAMAGE TO DOMESTIC WATER SUPPLIES

FROM FOREST HARVESTING ACTIVITIES

- A Discussion Paper -

What was omitted or ignored from this discussion was that water user's / purveyor's *"legal rights"* were inherent in provincially established *Land Act* Watershed Reserves, as these Reserves prevented all crown land "dispositions," which included Timber Sales, to specifically protect the water supply interests of provincial water purveyors and users. Nothing whatsoever is noted about the Watershed Reserves legislation and policy in the discussion paper on liability.

Timber Management Director Julius Juhasz's comments to Resource Manager J. Bullen in the above quotation eventually led Bullen to contact the Legal Services Branch of the Ministry of Attorney General on June 4, 1986 for a legal rendering of the liability concerns. On June 18, 1986, barrister and solicitor Dennis Doyle responded with a two-page letter of response. On July 3rd, a meeting was held with Doyle to *"discuss liability in community watersheds."* [288]


In the experience of involved Regional and District Managers, it is this question of liability for damage which is the key stumbling block to completion of plans for timber harvest in domestic watersheds. For the process to proceed smoothly to completion, it is necessary for Ministry representatives to have a consistent and logical statement of responsibilities and liabilities for the parties involved (forest industry, water users and the Crown). Existing Ministry statutes and policy do not provide the direction required for such a statement.

In response to this apparent policy shortfall, a regional task group was formed by the Nelson Regional Manager to examine liability and responsibility of each of the involved parties and how responsibility should be determined. Existing statutes, policy, procedures and basic assumptions were examined by the group.

A June 10, 1987 confidential MoF and Ministry of Lands Briefing Note, signed by Assistant Deputy Forests Minister Wes Cheston and Deputy Forests Minister Ben Marr, stated that *"Government position to date is that it cannot accept liability for damage caused during any resource development, and that it cannot delegate resource management decisions to a third party."*

The Briefing Note attached three options, of which option number 1 was recommended:

> *1. To issue cutting permits when the District Manager is satisfied that adequate safeguards are in place.*
> *2. To issue cutting permits only when government has accepted liability and agreed to third party arbitration.*
> ***3. To exclude timber in domestic watersheds from the allowable annual cut.*** [Bold emphasis]

Under the heading *Potential Questions and Responses*:

> *How can government justify not accepting liability for damage caused by logging or other resource activity in watersheds? <u>Response</u>: We will hold the resource developer liable for damage caused by his actions. For damage resulting from events outside of his control, we reserve the right to decide what should be done.*

[288] These letters and memos were "whited-out" under Section 14 of the *Freedom of Information Act*.

9.3. The South East Kelowna Improvement District Demands Accountability

A protracted, heated debate about liability occurred in the Okanagan Valley with the Trustees of the South East Kelowna Improvement District (SEKID) from 1987 to 1989. These water purveyors had a water license over Hydraulic Creek, a Category 2 Watershed Reserve (a re-defined area category of Watershed Reserve made by the 1972-1980 community watersheds Task Force) of some 14,000 hectares in area. The water license dates back to 1908. [289] Logging already began in 1981 under strong opposition by the SEKID regarding the MoF's plans to "combat" the mountain pine beetle, with both Weyerhaeuser Timber Co. and Gorman Bros. Logging Company getting the majority of the Crown land logging permit contracts.

More salvage logging was proposed. This resulted in the MoF hiring University of BC Associate Forest Hydrology professor Doug Golding to write a report which was released in 1986, *Hydrological Implications of Salvage Harvesting Lodgepole Pine in Hydraulic Creek Watershed*. Golding recommended that an additional 25 percent of the watershed could be logged.

At the time, Golding was conducting a twin-basin forest hydrology/logging experiment in Greater (now, Metro) Vancouver's Seymour drinking watershed. About 15 percent of the old growth forest cover had been removed in the 'treatment' Jamieson Creek sub-drainage basin from 1977 to 1984 through road construction and clearcut logging. No final report was ever published about this expensive experiment supplemented from federal, provincial and regional government tax dollars. In fact, after the author of this report had investigated the history and records of the Jamieson experiment held by the Greater Vancouver Water District in 1997 following, Golding had evidently misconstrued total logging percentage data upwards by five percent in his conference presentation reports to make it appear that logging twenty percent (rather than fifteen percent) of a relatively small drainage produced no or little alteration damage to stream characteristics and with little alteration of sediment rates. In November 1990, a large landslide that initiated at the top of one the four clearcuts in the experimental drainage caused extensive damage to the Seymour watershed and shut down the Seymour Reservoir water supply for three weeks!

In 1987, Golding's Hydraulic Creek report was assessed in a five-page report critique by D.A. Dobson, the Engineering Section Head with the Ministry of Environment's Water Management Program, *Concerns of Logging Impacts on Hydraulic Creek as a Domestic & Irrigation Water Supply for the South East Kelowna Irrigation District*. Dobson's review originated by concerns forwarded to him by the SEKID regarding a major amendment to the timber cutting plans in Hydraulic Creek.

In his first paragraph, Dobson summarized that the *"results of this review are alarming"*. Dobson provided annual figures on the amounts of logging in Hydraulic Creek since 1962, the year prior to the Okanagan Basin becoming Public Sustained Yield Unit number 25. Over a 25-year period, with the majority logged between 1968 and 1987, a total of 3,503 hectares were clear-cut, out of an overall total of the 12,851 hectares of forest cover. Golding overlooked describing this basic summary information in his 1986 report.

---

[289] According to the Water Rights Branch 1926 report, *South East Kelowna Irrigation District*, the *"development of fruit lands in this district practically commenced with the activities of the Canyon Creek Irrigation Company Limited, 1910-1911 and the South Kelowna Land Company Limited in 1912."* The Improvement District was formed on November 2, 1920. For more interesting details on this history, see *Paying for Rain: A History of the South East Kelowna Irrigation District*, by Jay Ruzesky and Tom Carter.

The report by Dr. Golding indicated that clearcut logging should not adversely impact the water supply. These conclusions were questioned by both the Water Management Program and SEKID since they did not appear to be in agreement with research work carried out by Dr. Cheng in other watersheds in the Okanagan, namely Camp Creek. In this case the research using actual field measurements, not modelling results, show that when 30% of the forested area of a watershed is in clearcut, that the water quantity is increased by 21% on average.

The water quality study indicated that there were observable changes to water quality due to logging. It appeared that the net effect, for 1986, was an increase in the chlorine consumption by the SEKID. The long term impacts are not known so the study has been extended through 1987.

When an area is clearcut it produces more water than when it was forested. In the area below McCulloch Reservoir ["it is this area that provides the District with their early spring water supply"] there will be a number of sub-drainages that will have 50% + of the area in clearcut. An increase in water yield will mean that streams will carry greater flows than their channels capacity. To accommodate these higher flows the channels will erode their beds and thus degrade the water quality. A second threat and possibly more serious is the risk of slope failure in the lower portions of these sub-drainages into the mainstem of Hydraulic Creek. The watershed has had Erosion Potential mapping completed. The high erosion potential areas are those steep slopes adjacent to Hydraulic Creek below Hydraulic Lake. With large areas upslope in this area in clearcut means that both surface water and ground water yields will increase. If these lower slopes should become saturated and fail or if the streams should cause significant erosion in this area, there could be a blockage of Hydraulic Creek above the SEKID intake. A slide has already occurred in this area from some previous logging. Fortunately, it did not reach Hydraulic Creek. This concern is again supported by the research carried out by Cheng. If a slide should block Hydraulic Creek above the SEKID intake, the District will lose the use of the creek as a water supply for an indeterminate period of time.

If the water supply is degraded due to channel erosion and/or sediment laden water from the logged area, the water supply could be deemed unpotable by the Ministry of Health.

The loss of Hydraulic Creek to SEKID for even a short period of time would mean that 3,500 people would be without water. The District has no operational backup supply to meet even the domestic requirements at this time. If Hydraulic Creek were lost to the District for an extended period of time, the impact on the agricultural industry would be in the millions of dollars.

In summary, extensive logging of the Hydraulic Creek watershed particularly the area below McCulloch Reservoir (both current and proposed) is exposing the water supply of the South East Kelowna Irrigation District to severe risk. Since it appears unlikely that this situation will improve and that this risk is being imposed on the District as a result of timber harvesting, that steps be taken to develop a contingency plan for an alternate, domestic only, water supply to be operational for the spring of 1988.

As a result of Dobson's report, from late 1987 into the following year the SEKID and the government exchanged letters of correspondence, with the major concern by the SEKID about liability and demands for an alternate and government-financed back-up water supply. The SEKID held a meeting with the MoF on October 23, 1987 to discuss the option of an alternate source of

water supply, where it was agreed by both parties that the SEKID *"develop a plan which could provide an alternate source of domestic water supply"*.

The SEKID pointed out in its letter of November 5, 1987, that silt in its distribution system *"would have extremely serious ramifications"*, because to shut down the system would necessitate automating the intake's shut off valves, with a cost valued at $25,000. Furthermore, on the event of a system shut down, the SEKID would have to pump water from two groundwater wells which had a combined capacity of 1,700 U.S. gallons per minute, a quantity that *"would just be adequate for normal residential use"*. To do so, the District would have to install three booster pump stations, at a cost of $188,000, and that private lands would have to be purchased to house the new pump stations. The total costs were estimated at $213,000.

The SEKID stated that, *"the possibility of a problem developing is much more likely with the very large clearcut blocks that are being proposed"*:

> *The increase in peak flows combined with ground disturbances caused by logging operations greatly increases the likelihood of a landslide or slope failure into Hydraulic Creek which would require a temporary shut down of the water system. It should be noted that one major slide resulting from logging activities has already occurred in Hydraulic Creek. The Trustees believe that the large increases in clearcut areas will result in an unacceptable level of risk to the water supply system and an emergency supply must be developed. Since this increased risk results from logging activities which are beyond the control of the District, the Ministry of Forests and/or the forest companies must provide a large share of the cost of implementing an emergency scheme. It should be noted that to successfully implement the alternate supply system as outlined above by April 1, 1988, materials and equipment must be ordered by no later than January 1, 1988, with construction to commence by February 15, 1988.*

On December 10, 1987, Penticton MoF District Manager J.H. Wenger wrote a memo to Kamloops MoF Regional Manager Peter Levy entitled, *Ministry Financial Responsibilities for Remedial Actions - Hydraulic Creek Watershed*:

> *Hydrologically, effects on water quantity and likely quality can be anticipated in a watershed as forest cover denudation occurs at a rate greater than thirty percent. Under normal forest management as many as four planned passes may occur in a watershed during rotation in order to maintain a rate of denudation less than thirty percent at any one time. With the beetle epidemic, normal forest management strategies have been set aside and, as a result, we are now facing a denudation of about forty percent in a very critical portion of the watershed; the area between the storage dam and the intake to SEKID's distribution system. In addition, much of this harvesting is being done over soil types designated as being environmentally sensitive.*

Wenger then went on to discuss *"The Problem"* under two subsections of his memo, *"Who Accepts the Risk"* and *"Precedent"*:

> *Does SEKID, the Ministry of Environment and Parks or the Ministry of Forests and Lands in whole or in part or on a shared basis accept the risk of disruption of water supply caused by logging? Acceptance of risk can be equated to acceptance of responsibility. In this case it is our Ministry that is directing the increased rate of harvest in this area and as such, I*

> *believe, must thereby assume the risk of its actions. An extension of this responsibility would be to develop a contingency plan (including capital works) to provide for alternate water supplies. Should the Ministry accept the risk and responsibility, especially making funding available to provide remedial measures, is there a concern on setting a precedent for other situations in the Province?*

Wenger then provided an estimate of timber stumpage payments accruing from the pine-beetle logging over the 1987-1989 period at $1,767,500: *"in addition there are another 3,830 hectares containing susceptible pine in the watershed having an estimated stumpage value of $7,400,000."* Wenger then recommended that *"this year's"* stumpage be used to write off the $213,000 costs for the SEKID as *"the option of stopping further harvesting was not considered viable in view of the Crown revenue that would be foregone."*

By early January 1988, the concerns had worked their way up the chain of command to the Chief Forester and Deputy Minister levels. Wes Cheston, the Assistant Deputy Minister of Forests and Lands Operations wrote on January 5th, after a meeting with Deputy Forests Minister Ben Marr (the former first chairman of the 1972-1980 Community Watersheds Task Force), that:

> *If it is positively indicated that harvesting has resulted in an adverse impact then we will entertain consideration of making funding available to provide remedial measures. It would not be appropriate to fund an alternate water supply at this time based on speculation.*

An eighty-one page legal assessment was provided for the MoF by the Attorney General's department at that time, a document withheld from public knowledge under Section 14 of the *Freedom of Information Act* in documents supplied to the author of this report by the MoF in late 1998.

On January 8, 1988, S.B. Mould, Manager of the SEKID, wrote to Deputy Forests Minister Ben Marr. Since District Manager Wenger advised the SEKID that a decision about the *"emergency plan"* could not be made for another sixty days, *"the Trustees request that logging operations in the watershed below McCulloch Reservoir be immediately stopped in order to minimize the risk to the water system."*

Given the explosive politics of the day, Ben Marr replied on March 7, 1988 that *"the District Manager in Penticton has temporarily suspended logging in the Hydraulic Creek Watershed"*, and that in future *"harvesting activities have a minimum impact on water quality and quantity through sound planning and appropriate operational techniques."* Marr ended the letter by stating that, *"I must confirm that our Ministry is not prepared to fund the back up water system that SEKID has proposed."*

Given Marr's background as previous Deputy Minister of Environment (1975-1986), and as former Chair of the Community Watersheds Task Force (1972-1975), he failed to mention to the SEKID in his letter that before any more logging be authorized in Hydraulic Creek the government needed to undertake an Integrated Watershed Management Plan (IWMP), as mandated for Watershed Reserves under Appendix H of the 1980 Community Watershed Guidelines document. Moreover, Marr's position on *"watershed liability"* was influenced by almost two years of internal government review on this issue, of which he was familiar with.

On March 18, 1988, the SEKID sent a four-page letter of reply to Ben Marr:

> *The Trustees were shocked and dismayed by the position taken regarding the integrity of the District's water supply. We can only assume you must not have been aware of all the facts relating to this particular problem. In this regard we would like to take the opportunity to detail some of the background and reasons for our concern. In 1985, the District began experiencing a measurable deterioration in water quality. Since timber harvesting was the only major activity in the watershed, it was obvious to us that logging was the likely cause. Ministry of Forests officials were, however, not convinced and two detailed studies were undertaken over a two-year period to substantiate and quantify the impacts on water quality or water quantity. The District again co-operated by participating and providing funds for these studies. Not surprisingly, the studies confirmed that the District's water supply is being adversely affected by timber harvesting even though the amount of clear cut area is still less than 30% of the watershed. Now that funding for the contingency plan has been turned down, we understand that Mr. Wenger* [was] *directed to review alternatives and to continue harvesting. The District must strongly oppose further harvesting until we are satisfied that no additional risk will be placed on our water supply. As best we can ascertain, there are no documented examples of a community water supply watershed being logged to the degree that ours is, either in Canada or U.S.A. We are in an area of very limited technological experience and cannot afford to be used as an experimental guinea pig.*

Contrary to the concerns of Forest District Manager Wenger about the government setting a precedent to compensate the SEKID with a temporary alternate water source, as revealed in Chapter 6 the "precedent" had already been established by the Big Eddy Water District with B.C. Hydro. In fact, an October 26, 1987 MoF memo regarding *"Watershed Liability"* made reference to the B.C. Hydro and Big Eddy compensation issue. In it, D.A. Currie, the Planning Forester and coordinator in the government's discussions about liability in drinking watersheds, provided a general discussion on obtaining *"background information from which an estimate of liability might be extracted"* for *"most watershed problems"*:

> *Due to a wide range in the types and severity of events there is also a wide range in associated cost estimates. Costs can reasonably be expected to range from several hundred dollars to in excess of one quarter of a million dollars.*

9.4. Union of B.C. Municipalities' Resolutions Concerning Liability

In 1988, the City of Nelson, which remained undaunted by the Provincial Government's lack of response to its entreaties about drinking watershed protection, presented the following resolution on the issue of compensation from damages to drinking water supplies:

> ***LR5. COMPENSATION FOR DAMAGES TO WATERSHED AREAS***
>
> ***WHEREAS*** *there is a growing concern throughout the Province of British Columbia regarding resource extraction in watershed areas because of the possible negative impact of such resource extraction on the quality of potable water and because of the difficulties, extreme costs and virtual impossibility of litigation in the event of damages;*

AND WHEREAS *the preservation of watershed areas and the potable water resources they contain is vital to the health of a community, repairs must be instituted immediately in the event of damage:*

THEREFORE BE IT RESOLVED *that: (a) The Provincial Government establish a no fault insurance pool to pay for costs for immediate repairs to such assets and water supply areas and water supplies damaged through resource extraction; (b) The funding for such an insurance pool come from resource extraction companies through posted bonds or similar funding and through royalties and stumpage fees paid to the Province; (c) Liability for the damage to be proportioned through an arbitration board decision and the fund reimbursed accordingly. Such arbitration board to be established prior to resource extraction being instituted. The composition of the arbitration board to include municipal (regional) representation for the area affected, technical expert acting for the municipality (region) affected, appropriate ministry representative, the industry involved plus a fifth party to be chosen by the other four members as an impartial voting member.*

B36. WATER LICENSEE INDEMNIFICATION

WHEREAS *the Provincial Government is responsible for issuing licences for the extraction or use of provincial resources which at time lead to conflicts between the uses licenced;*

AND WHEREAS *municipalities, regional districts, water improvement districts and others holding a priority use licence for domestic water supply have found that subsequently issued licences for uses such as logging have resulted in financial hardship to the prior use licensee and have caused deterioration of the prior use of resources:*

THEREFORE BE IT RESOLVED *that the Provincial Government be requested to reimburse a prior use licensee where the issuance of a subsequent licence results in financial or resource loss to the priority user and the Provincial Government seek its own reimbursement of costs from the licensee causing damage.*

The UBCM Resolutions Committee later commented:

The Resolutions Committee notes that this resolution (B36-1986; A38-1982) was previously considered and endorsed. The Provincial Government indicated in response that it should not be held liable or have to pay damages resulting from the use or extraction of resources under licence. The Provincial Government is reviewing the issue and is attempting to propose a policy which would solve the problem.

The following year, the City of Nelson passed another resolution pertaining once again to the subject of compensation of injury to water users from those responsible for issuing and performing resource activities in community watersheds:

B46. COMPENSATION FOR DAMAGES TO WATERSHED AREAS

WHEREAS *there is a growing concern throughout the Province about resource extraction in watershed areas, and the negative impact of such resource extraction on the quality of*

*potable water; **AND WHEREAS** it is difficult, if not impossible, to prove fault in the case of damage to watershed areas:*

***THEREFORE BE IT RESOLVED** that the Provincial Government be urged to provide no fault compensation for areas damaged by resource extraction.* (Endorsed by the Association of Kootenay and Boundary Municipalities)

9.5. Provincial Legal Counsel Quietly Cans Liability

By the end of 1989, after numerous years of internal reviews and reports, public complaints and demands for compensation costs for watershed damages to water supply sources and requests for liability contract clauses, the MoF produced three interrelated draft watershed policies:

- *Community Watershed Management;*
- *Community Watershed Planning; and*
- *Reparation of Damages to Water Supplies and Delivery Systems*. [290]

Prior to the final tweaking of these policies, government staff at a joint Environment and Forests meeting in Nelson on January 23, 1989 made a significant revision to *"reflect a general re-thinking of the intent of the proposed policy which formerly dealt with liability for damage"*, namely, the ***"deletion of all references to liability as a result of advice from legal counsel."*** [Bold emphasis]

The Update also commented on the *"acceptance of the University of Calgary Environmental Law report contention that "water quality" is implicitly guaranteed through English Common Law."*

The *Watershed Policies Update* memo conveniently and shamelessly passed on the buck to the water purveyors at the end of the document, adding that:

> *However, you must realize that the water licensee also must share in overall responsibility. He or she must be aware that the water delivery systems they install must be capable of dealing with natural sediment load. The licensee must also be willing to accept a reasonable level of risk. I like to view the situation as a cooperative effort. Government, forest and range licensees and water licensees are in this together and must share the attendant responsibilities.* [291]

[290] Previously called *Responsibility for Liability in Community Consumptive Use Watersheds* in the July 11, 1988 draft version. *"Purpose: The purpose of this policy is to clarify liability for reparation of damage to consumptive use water supplies or delivery systems necessitated as a result of timber harvesting (including silvicultural treatments and protection activities) or grazing activities."*

[291] D.A. Currie, Planning Forester, Integrated Resources Branch, to J.R. Cuthbert, Chief Forester, regarding *Proposed Watershed Policies*, March 2, 1989.

10. THE HOT POTATOE - PRIVATE LAND OWNERSHIP CONFLICTS IN COMMUNITY WATERSHEDS

***P**rivate land logging legislation proposal will go to Cabinet in two weeks.* [292]

In addition to bitter, persistent complaints from BC's water purveyors in the 1960s about the provincial government's meddling and mismanagement of Public land drinking watershed and irrigation sources, forest land use management practices on private lands also became a constant irritation and threat. The statistical information on these complaints were initially compiled from about 325 BC water purveyor response forms returned to the 1972–1980 community watersheds Task Force in 1973, after questionnaires were bulk-forwarded to them in late 1972. [293] The main conflict identified on BC private lands was logging, practices often conducted indiscriminately. The other registered conflict on private lands was agricultural practices, primarily by way of domestic livestock and various concerns about infecting and polluting water sources.

3. If development of use potential considered to be undesirable, discussion is required on: (a) how can this be restricted on Crown lands? (b) how can this be restricted on private lands?	Controls to restrict undesirable use development

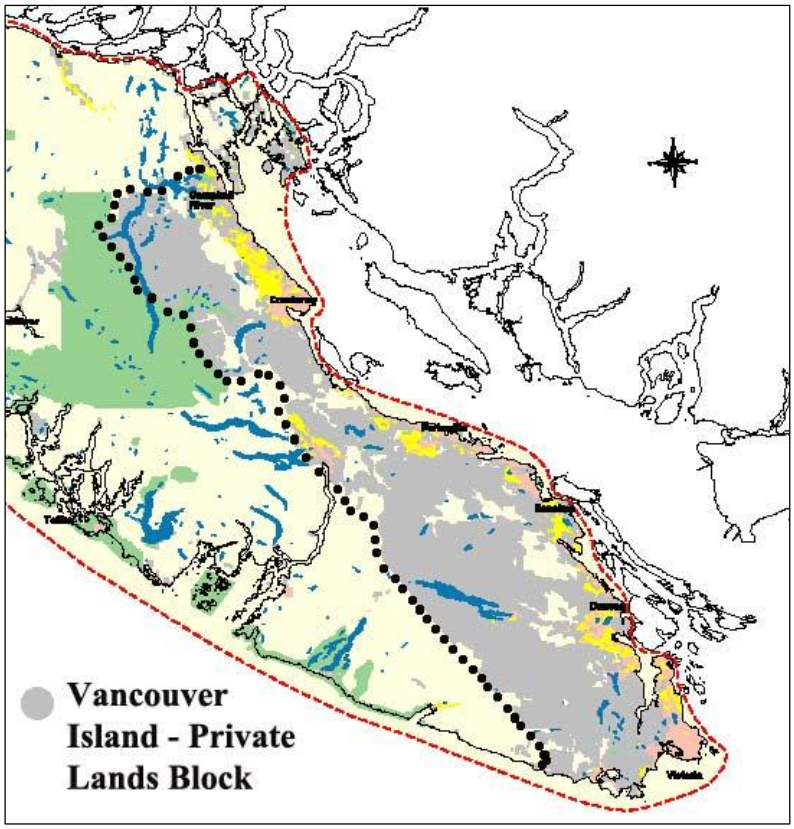
A number of BC's community watersheds constituted a mix of both private and public lands, and others were constituted as either fully public or private lands. Provincial legislation and regulations apparently never provided any control measures over the management of private lands located in the hydrographic boundaries of community drinking watersheds, or, for that matter, on influential impacts to groundwater sources. This left the Task Force with the responsibility of registering the first formal recommendations to do so. However, the Task Force's recommendations over private lands were ignored by the incoming Social Credit Party administration (1976–1991), despite repeated recommendations by senior government ministerial managers and administrators. The reason for the repeated failures by BC governments to pass legislation to limit or prohibit private land activities in drinking sources was because it was a hot political potatoe, as the Big Eddy Trustees were to discover in the 1980s and 1990s.

> As indicated in the attached letter, map reserves have been placed on the watersheds serving communities throughout the Province. The establishment of these map reserves by the Lands Service will enable decisions regarding Crown land use to take cognizance of the water supply function of these lands. A similar control of proposed land use activities on privately-owned community watershed lands by Provincial authorities is not possible under existing legislation.
>
> The regional districts and municipalities could control changes in the use of privately-owned community watershed lands by designating these lands as watershed areas on official-regional plans and regulating the land use activities by means of zoning bylaws.

[292] Minutes, Inter-Agency Watershed Management Meeting, February 1, 1990.

[293] The Task Force later provided simple data on the land ownership status of each of the provincial community Watershed Reserves in a document called *Appendix G*, included in the Ministry of Environment's 1980 community watershed Guidelines document. This Watershed Reserve catalogue identified the name of each registered watershed, its jurisdictional location, area, names of water purveyors, and the percentage of ownership in terms of private or public lands.

Private land logging was wreaking havoc on water supplies, particularly evidenced on southeast Vancouver Island. These domestic watershed sources are located within a large rectangular block of private lands comprising some two million acres, usually called the E&N Railway lands. The federal and provincial governments conditionally transferred the Crown title of these vast lands into private hands in the late 1800s in exchange for establishing and financing a railway transportation system. Similar and controversial land title transfers to railway barons had also occurred in the United States, some of which were later contested in lengthy court cases. [294]



Logging in many of the drinking watershed sources in Vancouver Island's railway lands either began or escalated in the 1950s when the forest industry's agenda to erode the provincial government's single-use / water-only policy began in earnest. A prime complaint example was the logging that began in the City of Nanaimo's Jump Creek watershed in the mid-1950s. Aerial and topographic photographs confirm the watershed's undeveloped pristine nature at the time. Jump Creek was then owned by forestry tycoon H.R. MacMillan, BC's former and first Chief Forester, who acquired the private lands in the late 1940s from the Victoria Lumber Company. It is not known if MacMillan had made any conciliatory offers to the City of Nanaimo to purchase his Jump Creek lands before MacMillan chose to log the watershed in order for the City to protect its long-term interests.

H. R. MacMILLAN
VANCOUVER
CANADA

March 30, 1951.

Dear Dr. Cleveland:

I enclose an article in which I think you will be interested, it deals with forest management of one of the watersheds that supply the City of Seattle.

This property has been under some form of forest management for something over 30 years, I think.

Since 1924, the management has been under the supervision of trained men. The situation is the same in many respects as the forest lands under the care of the Vancouver and District Water Board.

I believe that some day you will employ foresters and bring your lands under their management for the production of a forest crop and the best conservation of the water.

With kind personal regards,

Yours sincerely,

H. R. MacMillan

[294] I.e., a BC Supreme Court suit was recently launched against the BC government by Canadian Pacific Railways on May 30, 2013 concerning land resource rights ownership conflicts in the Okanagan and Kootenay areas over areas totalling some 324,000 hectares.

Records held at the Vancouver Archives indicate that MacMillan was in favour of logging in community watersheds by way of a letter he personally sent to Greater Vancouver Water District Commissioner E.A. Cleveland in 1951, where he encouraged the central guardian over the public's protected watersheds to begin logging them. Like other BC timber barons and forest companies in that period, efforts were being made to persuade federal, provincial and third order government administrators to abandon their principles and policies in order for the private sector to reap short-term profits from the protected timberlands.

In 1950, H.R. MacMillan's forest land and industrial empire merged with another to become MacMillan Bloedel, later acquired in 2000 by corporate forestry giant Weyerhaeuser that bought out the empire for some $3 billion under harsh criticism from BC residents. Weyerhaeuser is the American family-owned and integrated company that had been logging in Seattle City's Cedar River watershed private lands from the 1930s onwards. When public resistance mounted in 1943 against future logging in Seattle's water supply by many organizations and elected officials, Weyerhaeuser helped invigorate and spearhead an international agenda to log in protected American and Canadian drinking watershed sources, through the advocacy of "dual-use" by Seattle City's watershed forester Allen E. Thompson (see Chapter 8.4). Weyerhaeuser would also later reap its rewards with timber harvesting licenses in BC's Interior, in the Okanagan drinking and irrigation watersheds.

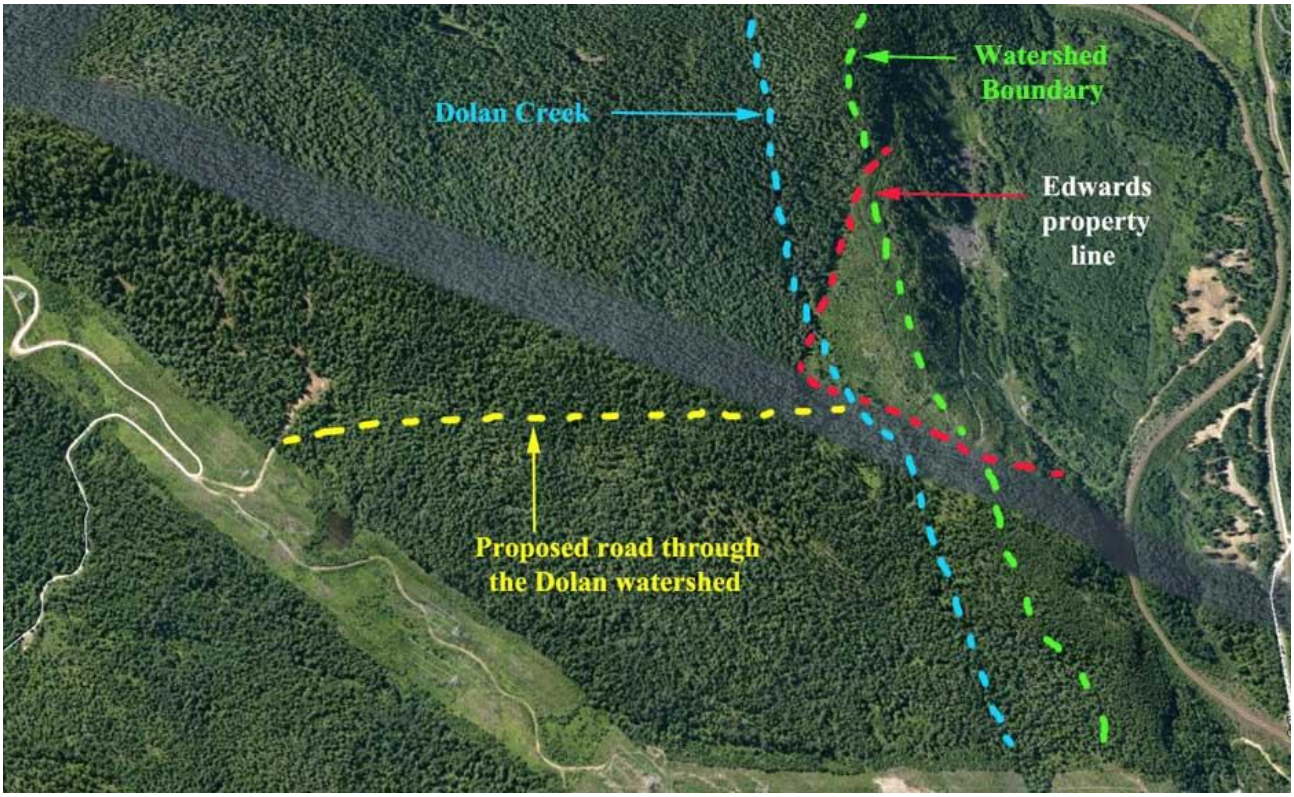
By 1994, BC's forest licensees banded together to form the Private Forest Landowners Association (PFLA) prior to the New Democratic Party government's intentions to legislate controls over their privately owned forestlands. The PFLA was successful in limiting the legislation, and by May 2002 the BC Liberal Party with its majority control in the Legislature (77 out of 79 seats), and with its strong financial and ideological ties to the forest industry, removed the private land legislation introduced by the NDP in 1994. Of greater concern, the BC Liberals were also intent on developing privatization initiatives and legislation of Public forestlands.

10.1. The Request for Access through Crown Lands on the Dolan

As narrated in Chapter 7.2, before the Big Eddy Trustees were advised of Kozek Sawmills' Crown land application to log Dolan Creek in early February 1984, they were contesting an application with the Ministry of Forests (MoF) regarding a Crown land road access to be constructed directly across the lower Dolan Watershed Reserve. The proposed road was to run from south to north (parallel to the Columbia River Valley) to connect with the upper portion plateau area of Gordon and Lillian Edwards' private lot, which lay along and beside the Dolan Creek stream channel, and not far distant and upslope from B.C. Hydro's lower transmission line right-of-way.

According to Ministry of Forests' records, the Edwards' property was alienated *"long before"* the incorporation of the Big Eddy Waterworks District in March 1950, only 10 hectares of private land which was in the hydrographic boundaries of the Dolan Watershed Reserve. The remaining 52 hectares of the Edwards' private lands lay on both very steep northward facing terrain a good vertical distance below the Dolan watershed and on the valley bottom of Tonkawatla Creek, just next to the Canadian National Railway line. To access the 10 hectares in the Dolan watershed from the Edwards' lands below would necessitate building an expensive switchback road across very difficult and very steep terrain – the Edwards wanted a cheaper alternative route through the Dolan Reserve to access and log off their property.

Since the 1983 road access proposal by the Edwards, it took almost ten years of negotiations with government and related delays before logging of the 10 hectares occurred in 1993. Due to the numerous delays and impasses following 1983, the Edwards sold their property to logger Barry Rothenberger in 1992. After failing to negotiate a land swap with the government, Rothenberger built a steep switchback road up his new property from Tonkawatla Creek to clearcut the 10-hectare corner lot section in the Dolan watershed. The clear cutting resulted in more damage to the Dolan watershed due to strong winds that later blew over both the narrow row of trees left standing as a protective stream buffer and the standing forest on Crown lands marking the rectangular edges of the clearcut. The fallen trees with their uprooted mats and soils caused the stream to be diverted thereby created turbidity problems and controversy about costly remediation and rehabilitation measures in the mid-1990s.

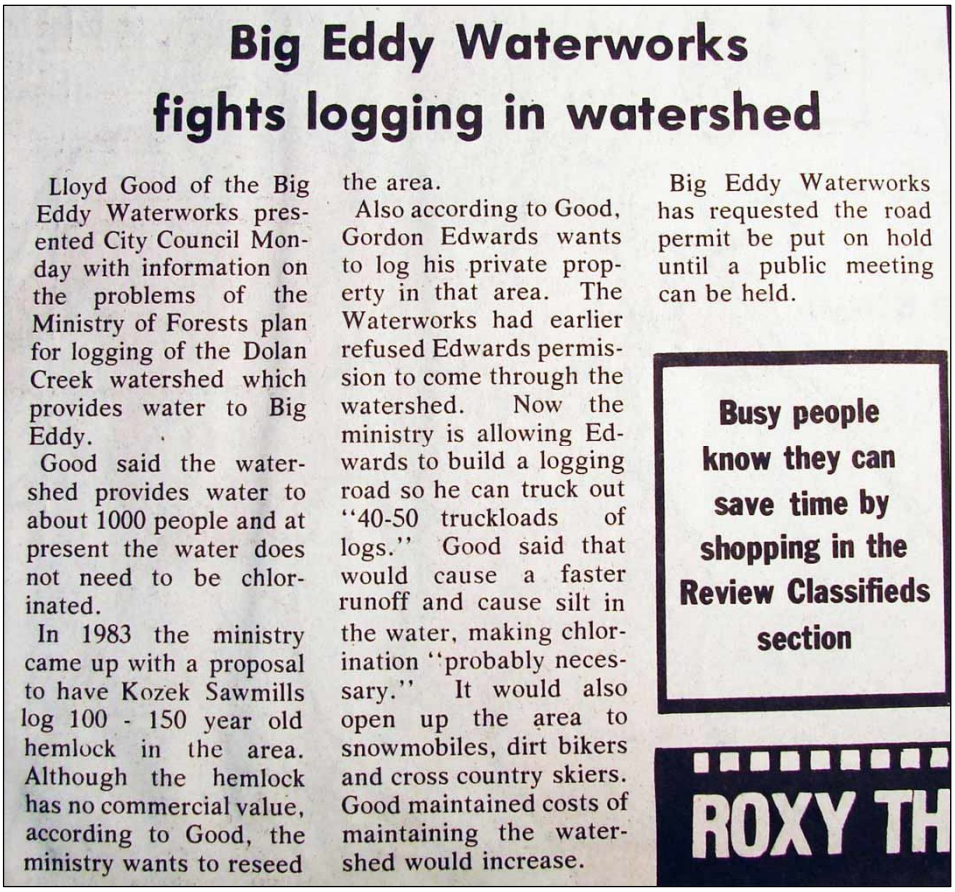


Recent image from Google Earth showing the lower portion of the Dolan Reserve, the rough location of Edwards' proposed logging access road (in yellow), the Edwards' property boundary (in red), the northern boundary of the Dolan watershed (in green), and the course of Dolan Creek (in blue). The image shows the later logging that occurred in 1993 by later property owner Barry Rothenberger. The steep switchback access road is just visible built from Rothenberger's lower property to the area Rothenberger clearcut in the Dolan Reserve.

The Edwards stated in their November 17, 1983 letter to the MoF that the only feasible access to their timber on the 10-hectare portion beside Dolan Creek would be to build:

> *One thousand meters of skidder skid trail from our property to a log landing that already has logging truck access. The skidder skid trail would be built on the snow pack and used only during the snow months of February and March. There will be no disturbance to the ground and all signs of its use will be obliterated on the melting of the snow pack.*

Other promises were made in the Edwards' letter to *"prevent stream damage"* to Dolan Creek. The Edwards based their proposed logging prescriptions on the 1980 Water Comptroller's Environmental Guidelines for B.C. Hydro's transmission line crossing which they received a copy of from the Ministry of Forests. The Edwards also received a copy of the 1980 Ministry of Environment's Community Watershed Guidelines document about the Watershed Reserves.



Big Eddy Waterworks fights logging in watershed

Lloyd Good of the Big Eddy Waterworks presented City Council Monday with information on the problems of the Ministry of Forests plan for logging of the Dolan Creek watershed which provides water to Big Eddy.

Good said the watershed provides water to about 1000 people and at present the water does not need to be chlorinated.

In 1983 the ministry came up with a proposal to have Kozek Sawmills log 100 - 150 year old hemlock in the area. Although the hemlock has no commercial value, according to Good, the ministry wants to reseed the area.

Also according to Good, Gordon Edwards wants to log his private property in that area. The Waterworks had earlier refused Edwards permission to come through the watershed. Now the ministry is allowing Edwards to build a logging road so he can truck out "40-50 truckloads of logs." Good said that would cause a faster runoff and cause silt in the water, making chlorination "probably necessary." It would also open up the area to snowmobiles, dirt bikers and cross country skiers. Good maintained costs of maintaining the watershed would increase.

Big Eddy Waterworks has requested the road permit be put on hold until a public meeting can be held.

The *Forest Act* contained a provision for conditional access to private forestlands through Public lands, if no other means were available to access it. Permission to do so could be obtained upon the discretion of a senior Forests manager:

> *Where a person who has a right to harvest timber does not have access to the timber over an existing road on Crown or private land, and the most efficient means of providing access to the timber is by building or modification of a road on Crown land or by the use of a forest service road, the regional manager or district manager shall, subject to this Part, grant a road permit to the person to provide access to the timber. [Under Section 92 (1) (b) (i), the district manager] "shall determine .... (i) a right of way that, in his opinion, will provide access to the timber without causing unnecessary disturbance to the natural environment."* [295]

In accordance with the provisions in the *Forest Act*, the Ministry of Forests advised the Big Eddy Trustees that it:

> *took great care in reviewing Mr. Edwards' application before we were satisfied that a skid trail could be built and used without causing any environmental damage. We have advised Mr. Edwards that we are prepared to issue him a road permit only when conditions are suitable to avoid environmental damage. Suitable conditions would include the ground being frozen and an adequate snowpack of at least 0.8 meters in depth. Once a road permit has been issued it is*

[295] *Forest Act*, RSBC, c.140, Section 91.

our intent to closely supervise the construction and use of this skid trail to ensure that no environmental damage is done. [296]

Big Eddy residents confront Forestry representatives

Guarantees were what the Big Eddy residents asked for from the Ministry of Forests Monday evening, but they didn't get any. That was the end result of a meeting between the residents and representatives from the Ministry of Forests.

Spectators at the meeting included some members of City Council, Mayor Tony Coueffin and MLA Cliff Michael.

There is still a great deal of concern by residents in the Big Eddy that their water will no longer be pure with the intrusion of logging in the Dolan Creek Watershed. It covers an area of about 1.7 miles, which includes an area of about 20 acres of private land.

Forestry recently allotted the owner of the land, Gordon Edwards, a permit to put in an access road to his property. The road would cut across the watershed, although Edwards has decided not to use it. Another fear is that Forestry themselves have plans to log the watershed and the local residents feel they will get the end results of polluted water, damage to the watershed area and in the end, higher costs to cover chlorination. The residents say it has happened before with B.C. Hydro except that Hydro paid for the chlorination and a new water supply. Forestry is not promising the same.

Presiding over the meeting on the watershed issue was Lloyd Good who told forestry he believed the people had a right to be able to drink uncontaminated water and that could happen only if there was no or limited activity in the watershed. He reviewed the problems that arose when B.C. Hydro put power lines in the area and residents ended with alternate chlorinated water and only recently in 1984 had returned to the Dolan Creek supply. He said they expect to have to use the alternate source during spring run-off which they had never had to do in years prior to Hydro clearing for their power lines. He asked Forestry if they would consider waiting 5 - 8 years before logging until the full impact of the Hydro clearing was established. Good added that he would rather not have the area logged at all.

Paul Kuster, operations superintendent for the Ministry of Forests said their main concern was to maintain both the quality and quantity of water. But there are two things the department has to contend with. One is the fact of private property in the watershed. Kuster said by law they cannot deny access of an owner to his property unless it could be proven to cause environmental damage. After a careful review the forestry department decided to issue a road permit to Edwards to be used only when the disturbance is minimal and conditions are suitable. Kuster said this year those conditions were prevalent. He said there were clauses to protect the watershed and the operations would be closely monitored. If the water were affected in an adverse way, Kuster said they would shut down the operations.

The second item was the fact that the department's job was to manage all areas of the forests. Recognizing water as the number one resource in Dolan Creek watershed, Kuster said it was not the only resource adding that forestry and wildlife were important too as well as the electricity in the power lines.

In trying to manage the forests a five year plan is being put together and should be complete by early March. Kuster invited interested people to review the plans at an Open House and to comment or put in suggestions. He said no decision would be made until that time.

But those who live in the Big Eddy area were not buying the bill of goods being offered. They said Hydro had said the same thing and still their water became polluted. Good spoke for the majority when he said, "If Paul (Kuster) has a plan that works then I'm from Missouri." Good is a long time resident of Revelstoke, Big Eddy area.

One of Good's questions was on responsibility should damage occur. Mayor Tony Coueffin the crown of any liability should damage occur. Coueffin stated his concern was also for Greely Creek which is the watershed for Revelstoke and which Kuster said they are also looking to log in the future. The mayor said should damage run into thousands of dollars, the small logging owner could not cover the costs.

"I don't feel good about it," said Coueffin.

According to Kuster, only if the license breaks the conditions of the permit is he responsible, leaving no one accountable if the contractor stays within the conditions and damage still occurs.

It was noted by Good that Hydro had paid a considerable sum to erect an eight foot fence while Forestry sees fit to go ¼ mile further and open up the entire area. In putting in an access road and/or logging it would lead to an influx of wildlife and perhaps man, which Good said, would add to the damage.

A great deal of timberland has been already lost to the Ministry of Forests through the Revelstoke and McNaughton reservoirs, double tracking with CP Rail, Mount Mackenzie Ski Hill and National Parks. If they start making allowances for areas that cause a stir in communities such as the Dolan Creek watershed, according to the ministry of forests representatives, they would soon run out of timber to log.

Kuster reiterated that although they believed a considerable part of the Dolan Creek area could be logged with out damage, they could give no guarantees as to "acts of nature."

The residents left the meeting still not satisfied with what they feel is another injustice and forestry members left feeling they were heard but not understood.

Another meeting is scheduled in March once forestry's management plans have been reviewed. MLA Cliff Michael will be looking into the mandate of the forestry department while Kuster and Good will be searching and viewing other watersheds comparable to Dolan that have already been successfully logged.

[296] L.P. Kuster, Ministry of Forests Revelstoke District office, to Lloyd Good, Chairman, Big Eddy Waterworks District, January 23, 1984.

The Ministry of Forests, which had planned to log between 220-300 hectares of the 469 hectare Dolan watershed, ironically and contradictorily notified the Edwards in late January 1984 that Dolan Creek was a *"Category 1 Community Watershed and is subject to maximum protection measures"*, and that *"the maintenance of water quality and quantity is our primary concern"*. Due to the winter conditions that year, the Ministry of Forests recommended to the Edwards that:

> *… with a lack of snowfall during January it appears unlikely that we'll get suitable conditions this winter. If you look at this year and last year as examples it may be some time before conditions are ideal. In the meantime you may wish to consider alternate ways of removing the timber from your land. One such method could be the use of a helicopter.* [297]

Conditions remained unsuitable for the proposed skidder trail entry in early 1984. One year later in January 1985, with the onset of snowfall and the freezing of the forest soils, the Edwards again notified the Big Eddy Trustees of their intent to access their timber through the Dolan Watershed Reserve. The Big Eddy Trustees then complained to Operations Superintendent Paul Kuster at the Ministry of Forests Revelstoke District office that five days notice was insufficient time:

> *Due to the extra increase costs and deterioration of water quality a road of this nature will create, it is our feeling that a Public Enquiry should be held, so that each and every member of this community who is a water consumer can be fully informed and have an opportunity to address this situation. We therefore request that road permit R01267 to Gordon and Lillian Edwards dated January 16th, 1985, be put on hold and not issued until a public meeting is held to inform the residence and water consumers of Big Eddy Water District*. [298]

After their public meeting, the Big Eddy Trustees wrote two letters, one to the Revelstoke District Ministry of Forests office manager Harvie and another to the Forests Minister Tom Waterland, that they:

> *Strongly protest the granting of road permit #1267 to Gordon Edwards through Dolan Creek water supply. This protest was brought to the attention of the Forest Service in Revelstoke to no avail. Due to B.C. Hydro's activities in our water shed and deterioration of our water supply, we request that no more activities occur in our watershed for at least 5 years or until the previous damage can be properly assessed.* [299]

And:

> *If you persist with the Road permit, the Big Eddy Water District will expect the same mitigation from B.C. Forest and Mr. Edwards, as B.C. Hydro were subject to during their operation in Dolan Creek Watershed. When the power line was installed by B.C. Hydro, the Forestry Department were to supervise all phases of clearing operation and construction. The Forestry were very lax in their supervision, which resulted in extreme environmental damage to our watershed; and extremely costly to our Water District. We cannot afford a repeat of such operations. We're barely rehabilitated from the last intrusion to where we*

[297] L.P. Kuster, Ministry of Forests Revelstoke District office, to Mr. and Mrs. Edwards, January 23, 1984.
[298] Lloyd Good, Chairman, Big Eddy Waterworks District, to L.P. Kuster, Revelstoke Ministry of Forests, January 14, 1985.
[299] L.H. Good, Chairman of Trustees, to Tom Waterland, Minister of Forests, January 24, 1985.

can use Dolan Creek water supply, that we're faced again with further unnecessary disturbance. [300]

On January 23, 1985, the Edwards notified the Ministry of Forests that due to the poor log market situation they would not be going forward with their logging plans that year.

In an earlier letter dated November 25, 1983, the Ministry of Forests asked the Big Eddy Trustees if they had considered purchasing the private land in the Dolan watershed, as the agency would *"find it difficult to deny access to Mr. Edwards' private land unless we have an excellent reason."* The Big Eddy Trustees were not willing to do so at the time, and by late February 1985 the Edwards notified the Trustees that *"we do not want to conduct operations in the Dolan Creek Watershed"*, and that they had written the Minister of Lands, Parks and Housing to arrange a *"swap of land*".

3. A second major deficiency of both policies as they now stand is neither of them requires the integration of land use planning on private lands within watersheds. In many cases, the uncontrolled use of private lands in a watershed can totally destroy the benefits derived from integrated planning on the surrounding Crown lands. Perhaps the Water Act should be amended and the Environment Management Act used to legally require private land owners to work through the planning arms of Regional Districts to insure the uses made of their lands is compatible with the land and water use objectives established for Crown lands in watersheds. It should be remembered the Water Act does not currently distinguish between Crown and privately owned lands so it is likely the best vehicle to accomplish this.

In support of the land swap, the Edwards then wrote a letter of defence for Big Eddy's concerns:

We must say that the Government of B.C. must regard the Dolan Watershed as a most sensitive area. If not, why all the restrictions, conditions, guidelines and monitoring documents required by B.C. Hydro, B.C. Forest Service and the Ministry of Environment. Any activity in the watershed will have a detrimental effect. Why should the Water District play Russian Roulette, when there are alternatives? The swap, which is most reasonable, should be negotiated and approved. We are pursuing our priority to obtain a swap, with all our vigor and integrity. MAY JUSTICE PREVAIL. Your cause is right and just. The Crown should relinquish all right in the Dolan Creek Watershed and transfer the management of the watershed to the vitally concerned people. [301]

The issue simmered unresolved for almost six years until the winter of 1990 when the Edwards notified the two parties once again about their renewed intentions to log in the Dolan Reserve. This time, after a meeting with the stakeholders on December 12, 1990, the Ministry of Forests blamed the Big Eddy Trustees for providing unconstructive reasons against the proposed logging and for

[300] L.H. Good, Chairman of Trustees, to T. Harvie, District Manager, Revelstoke Forest Service, January 24, 1985.
[301] Mr. & Mrs. Edwards, to Big Eddy Waterworks District, February 28, 1985.

being critical about the final Integrated Watershed Management Plan of 1987. The Ministry of Forests then issued the road permit for the Edwards, which the Big Eddy Trustees immediately rejected.

> *During a meeting on December 12th, 1990, we pointed out the many violations to the Integrated Watershed Management Plan, but nobody wanted to listen. We were accused by Mr. Raven in his letter of January 14th, 1991, that we contributed no constructive thoughts, reasons or alternatives, and that the Big Eddy Waterworks was trying to delay or preclude any activity in the Dolan Creek Watershed. Consequently, the Ministry of Forests was issuing a road permit to Gordon Edwards, subject to conditions stated in IWMP. Our complaints at this meeting, to Mr. Huettmeyer, was that we were never informed of the many trips into the watershed during the summer of 1990, and our position was that any inspection for road location be made during the spring run off or wet season, as per Dolan Creek IWMP. The reason BEWD* [Big Eddy Water District] *wanted all field reconnaissance made during spring run off, is to establish a before and after effect. There was never any provisions in the IWMP to have a skid trail of 1.8 km. It states skid trails should be kept as short as possible to eliminate environmental damage. I could find no provisions for skidding with a tractor except on steep grades when the snow is 1.7 meters deep; and certainly not skidding with the horsepower Mr. Sihlis is planning to use. IWMP recommends rubber tire skidders with wide flotation tubes.... At 3 P.M. February 4th, inspection of John Sihlis' cat revealed his machine to be 126 H.P John Deere, and has 2 inch high ice lugs welded on tracks."* [302]

The Revelstoke Forest District office notified the Edwards on February 5, 1991 that their road permit was suspended *"due to heavy rain and mild temperatures, conditions that are not acceptable to continue with accessing your private lot and adhere to the Dolan/MacPherson Integrated Watershed Guidelines."*

The nature of the private land logging dispute and its outcomes was not isolated to the Big Eddy Waterworks District, but involved numerous other and similar conflict accounts that have been ongoing in BC for over 40 years. For instance, the following lengthy quotation from a legal opinion to the Western Canada Wilderness Committee in 1990 which included an evaluation of Regional District of Central Kootenay's actions against a logging company operating on private lands near Nelson City:

> *Logging on watersheds has been a matter of concern to citizens in B.C. for some time now. On June 4, 1990, the Supreme Court of British Columbia granted an ex parte injunction to the Regional District of Central Kootenay, enjoining L. & W. Sawmills Limited from logging or clearing of timber and brush on lands that fell within the South Slocan Watershed. The lands described in the order are a checkerboard of privately-held, Crown, and watershed-owned lands. No reasons were given for the order; however, we undertook to speak to counsel for the Regional District of Central Kootenay, to the Chairman of the South Slocan Water District, and the District Administrator for Central Kootenay. The facts of this case are as follows: the lands in question had been privately held for some generations until April 20, 1990, when L. & W. Sawmills acquired the land. The new owners were "notorious" sawmill operators, who planned to log 80% of the parcel. The Central*

[302] L.H. Good, Chairman of Trustees, to D. McDonald, Regional Director, Ministry of Environment, and to R. Tozer, Regional Manager, Ministry of Forests, Nelson, February 4, 1991.

Kootenay District had adopted guidelines stating that a watershed could not be logged more than 30% overall. If L. & W. Sawmills went ahead and logged 80% of their land, no other land owner in the watershed would be able to log, because the quota would be exhausted. The District sought the order to enjoin the logging company from proceeding until a management plan that met everyone's approval could be worked out with L. & W. Sawmills Limited.

The guidelines they referred to were set out in Guidelines for Watershed Management of Crown Lands used as Community Water Supplies, October 1980, published by the Ministries of Environment, Health, Agriculture, Energy, Forests, Municipal Affairs, Lands, Parks and Housing. These guidelines are not law, but only policy. The Regional District of Central Kootenay has sought for many years to have these guidelines made law, without success. The District would like to see the provincial government assume direct responsibility for the regulation of logging on private lands, and to maintain control of all community watersheds, including those located in tree farm licences, in order to offer better protection for the environment in general, and community watersheds in particular.

The Water Act, R.S.B.C. 1979, c.429, as it now exists does not provide for any protection or regulation of watersheds to ensure the proper maintenance of quantity as well as protection of quality of water so that it will continue to meet Ministry of Health requirements for drinking water quality. Given this gap in the law, counsel for the Regional District of Central Kootenay has framed his action on nuisance grounds, relying on Steadman v. Erickson Gold Mining Corporation (1989), 35 B.C.L.R. (2d) 130. There a single plaintiff alleged that the defendant had contaminated his water, which emanated from a small spring-fed dugout located on his land. When the defendant built a road uphill from the plaintiff's land, he caused silt to contaminate the plaintiff's water system. The plaintiff sued in nuisance.

The court found that he had a right to maintain the action because his use of the water was lawful, even though he did not hold a water licence. The defendant appealed that order. In the Court of Appeal, the plaintiff was held to have a fragile right to use the water as long as there was no one else licenced to use it. Further, he had a right to demand that the defendant not make the water unusable until such time as a water licence was issued to someone else. The court found that even though you cannot own water, interference with one's lawful use of water is a nuisance, and that no one has a right to contaminate the source of that water so as to prevent his neighbour from having the full value of his right of appropriation. The case of Schillinger v. H. Williamson Blacktop & Landscaping Limited (1977), 4 B.C.L.R. 394, another case of water contamination, was distinguished because in that case the plaintiff had unlawfully diverted a flow of water for industrial purposes. It might be argued by analogy that the citizens of Vancouver have a right to uncontaminated water, and that interference with that right would support an Action in nuisance.

The common law standard for water quality is found in Munshaw Colour Service Ltd. v. city of Vancouver (1960), 22 D.L.R. (2d) 197, rev'd on other grounds 29 D.L.R. (2d) 240. There the city, in "flushing out" its sewers [sic, 'water mains'], placed silt and sediment in the water, which damaged the plaintiff's films. The city was found to be under an obligation to supply water that was wholesome or ordinarily pure and fit for domestic purposes or human consumption. The standards of the U.S. Public Health Service were adopted as a useful

guide. Now there are Guidelines for Canada Drinking Water Quality (1978), antedating Munshaw, which may be referred to as a standard for water quality.

The burden of proving that the water is contaminated in such an action would be on the plaintiff. It is a far more onerous burden of proof that that required for a strict liability offence. This case may be difficult to make out. In Canada, there is no authority for the nominate tort of statutory breach, rather breach of a statute goes to proving negligence. (R. v. Sask. Wheat Pool, [1983] 3 W.W.R. 97, applied Palmer et al. v. Stora Kopparbergs Bergslags Aktiebolag e.o.b. Nova Scotia Forest Industries (1983), 26 C.C.L.T. 22.) Each element of the offense must be proved, i.e. causation and damages. Indeed, in the South Slocan Watershed case, counsel for the Regional District of Central Kootenay is concerned about the lack of jurisprudence and legal framework for an action regarding logging on a watershed. He expects that a negotiation between the logging company and the Regional District will take place, whereby the District will acquire the property concerned, and together with the logging company will work out a logging management plan. If they are successful in this negotiation, the case will go no farther. [303]

10.2. To Swap, or Not to Swap, 10 Hectares

During the renewed malaise with the Edwards over the Dolan Watershed Reserve, the Big Eddy Water Works District held a special landowners meeting on February 8, 1991. Two motions were unanimously passed to *"convince someone in government to trade land with Mr. Edwards and get this problem of logging activities in our watershed cleared up once and for all"*, and to *"see if a cash settlement could be made to Gordon Edwards for the land."*

Prior to the meeting, the Big Eddy Trustees had written the City of Revelstoke's Mayor and Council to entreat their support *"to help bring about this exchange of properties through the Ministry; as a portion of SW 1/4, Sec.29, unlogged, is in the Dolan Creek watershed"*, and as *"logging in this area would have great detrimental effects on our water system."* [304]

In the Spring of 1991, the Edwards subsequently sold their land to Barry Rothenberger, a private contract logger. After contacting the new landowner, the Big Eddy Trustees notified the Ministry of Crown Lands Regional office in Kamloops that Rothenberger was willing to swap the land *"for equivalent land around Cherryville, B.C."*, that *"this would be an excellent way of returning this portion of the Dolan watershed to Crown land."* [305]

The Kamloops Ministry of Lands regional office rejected the proposal, stating that it had *"no interest"* in acquiring the land, and that the land *"would not provide a specific benefit to the*

---

[303] Part of a 14-page legal opinion by McCarthy Tetrault, Barristers & Solicitors, June 28, 1990, regarding a proposed court action against the Greater Vancouver Water District for logging in the three Greater Vancouver (now, Metro Vancouver) drinking watersheds. Oddly, contrary to its long-held concerns, the Regional District of Central Kootenay's vigilant role as public arbitrator on the protection of drinking watersheds is now effectively and politically silenced, and has since the late 1990s became a logging partner with the Creston Valley Forest Corporation, which holds a community forest logging license to operate in four drinking watershed sources near Creston, B.C., most of which are Watershed Reserves.

[304] L.H. Good, Chairman of Trustees to the City of Revelstoke, January 27, 1992.

[305] L.H. Good, Chairman of Trustees, to Kamloops Regional Manager of Crown Lands, June 20, 1991.

Ministry." [306] Okanagan North MLA and Transportation and Highways Minister Lyall Hansen wrote to Rothenberger on September 4, 1991 formally stating that it had agreed with the Kamloops Lands office rejection.

According to a letter from Rothenberger in early 1992, he had purchased the Edwards' property based on an unwritten statement from the Department of Highways that a swap of land would be in order because if the property were logged it would create an unsightly blight regarding tourism, being situated next to the Trans Canada Highway directly west of Revelstoke. [307]

The Big Eddy Trustees went to the top and wrote to Dan Miller and John Cashore, the recently appointed Ministers of Forests and of Environment, Lands and Parks, requesting their assistance and support in the matter:

> *Our purpose in writing to you is to support the application of Mr. Barry Rothenberger as contained in his letter of February 3rd, 1992 for a land trade. The interest which we hold in this matter relates to our desire to prevent the potential despoilation of our watershed resulting from a plan to clear cut the private land now held by Mr. Rothenberger. If it is logged as private land, there is a limited power of the Crown to set and control standards. Conversely if the Ministry acquires this land in Right of the Crown, then standards which properly reflect the interest and protection of our Water District measures can be set.* [308]

In turn, the Executive Director of the Ministry of Lands Operations Division, J.T. Hall, replied to Rothenberger on March 27, 1992 on behalf of Lands Minister Cashore:

> *This Ministry's position is to consider exchanging land only where the province requires the parcel for a specific program and the parcel cannot be purchased directly.... I encourage you to continue to work with the Big Eddy Water District to coordinate any timber harvesting on the site with the protection of the water resource that they rely on for their community.*

On May 28, 1992, the Ministry of Lands provided a two page Backgrounder and Discussion Analysis of the *Revelstoke Land Exchange request by Barry Rothenberger*. The Backgrounder identified that both the Big Eddy Water Works District and the City of Revelstoke supported the 10-hectare exchange, and that Rothenberger wished to acquire:

> *… below market price for Crown agriculture land at Cherryville as he is not farming. However, he is not eligible to acquire Crown agricultural land as he is not farming. His present property is committed to his woodlot licence.* [309]

---

[306] Reg Bose, Manager, Land Administration, Kamloops, to Barry Rothenberger, July 23, 1991.
[307] Barry Rothenberger to Minister of Forests, Dan Miller, and Minister of Environment, John Cashore, February 3, 1992.
[308] L.H. Good, Chairman of Trustees, February 10, 1992.
[309] An enormous controversy erupted in the late 1980s when logging company operators began to acquire private farming lands to log off the forest assets during the time when former forestry consultant Dave Parker was Social Credit's Minister of Forests. The numerous instances, which received wide investigative attention in the press, created enormous conflicts with neighbouring landowners, but reaped large profits for the loggers, who then sold the cleared land. Taxpayers were left wondering why Forests Minister Parker suddenly became Minister of Lands, in charge of Crown land management decisions, a position he held until late 1991. The new NDP government was taking a dim view of the previous government's decisions about these controversial land use decisions.

The Ministry of Lands had already rejected four proposals for land exchanges in the Kootenay Regional boundaries over the previous 12 months, two of which were related to drinking water sources identified in the Backgrounder:

> *Request by the City of Cranbrook to exchange 120 hectares of private land proposed for logging adjacent to the main City Water Reservoir. Request by the City of Rossland to exchange 300 ha. of private property in its watershed, that has already been logged and used for recreation.*

According to the Briefing Note:

> *Supporting this exchange would be a significant precedent: Watershed and visual landscape impacts from timber harvesting on private land are an issue for many communities around this region and supporting this exchange request could suggest to other groups that they should receive similar consideration.*

The Ministry of Lands' document therefore recommended that the Big Eddy Water Works District revert to its *"alternate well water supply"* to address *"unacceptable water quality"* that would result from the logging operations.

At the beginning of August 1992, two weeks prior to Rothenberger's intentions to begin logging in the Dolan Reserve, Trustee Chairman Lloyd Good sent a letter of desperation to NDP Premier Mike Harcourt. In the letter, Good related Big Eddy's recent tribulations with B.C. Hydro, the damage incurred to the water quality, and how expensive it was for two motors to pump water from the wells. He related to the Premier that his MLA Jim Doyle *"assured me he would do everything he could to see this logging did not occur"*, and reminded Harcourt of how he personally assured the Big Eddy Water Works District in October 1991 *"that watersheds would receive top priority if your Government were elected,"* because *"during the election campaign of 1991, it was stated by your Party that community watersheds would be protected."* [310]

Hundreds of communities had enormous difficulties with the previous Social Credit Party administration (1976–1991) and were extremely vexed about the issue of logging, mining and cattle grazing in community and domestic watersheds. The NDP opposition Party, acutely aware of this, promised to protect these sources during the provincial campaign in the late spring and summer of 1991. For instance, the Creston Valley Advance newspaper ran a series of stories starting on June 1, 1991 where NDP Opposition Leader Mike Harcourt and ex-logger and candidate hopeful Corky Evans promised local citizens that they would protect the community's interests regarding the Arrow Creek Watershed Reserve, which the residents had been fighting to protect for about twenty years:

> *Alderman Vaughan Mosher was applauded for relating the Town of Creston's opposition to conventional logging in the Arrow Creek watershed, as did Area B director Elvin Masuch for his remarks on the Erickson Improvement District's opposition as well. He received added applause when he said the improvement district would use every means possible - including going to court - to prevent logging by conventional methods.*

[310] L.H. Good, Chairman of Trustees, to Premier Harcourt, July 14, 1992.

Corky Evans, a logger from Winlaw who is seeking the local New Democratic Party constituency nomination, said ownership of critical watersheds should be transferred to the municipalities that use their water. This would ensure there would be no damage to water supplies, he maintained.

Corky Evans' statement aroused great political sympathy with the communities of greater Creston. In fact, an article in the Advance four days previous, on June 1, Evans declares opposition to logging, Evans openly declared his opposition to the logging plans in the Arrow and Duck watershed Reserves in an interview during a 3-day NDP conference in Creston. As part of the front-page coverage of June 1st, the Advance featured comments from Mike Harcourt, the NDP opposition leader, who promised his party would advocate an initiative to "stop logging on lands, especially in watersheds, used by communities."

Unfortunately, as time has revealed, Harcourt and Evans never lived up to their promises to the community [and to BC communities], but rather, capitalized on the public's emotions. As a result, logging and opposition to logging by communities throughout British Columbia continued throughout the 1990s during the NDP government's stay in government, and "government policies concerning resource use activities and the access for community control over their watersheds were further weakened and defied by government agencies." [311]

In addition, Lloyd Good was also critical of the Kamloops Regional Lands Manager's comments and assurances about logging in the Dolan watershed:

Mr. T.J. Hall ... seems to believe there will be no problem in logging in this watershed as long as Mr. Rothenberger works closely with the Water District to minimize impacts from logging. Apparently Mr. Hall is not aware that there are no rules, regulations or guidelines and laws that apply to private lands in community watersheds. This seems to be the only Province in Canada that does not supply this kind of protection.

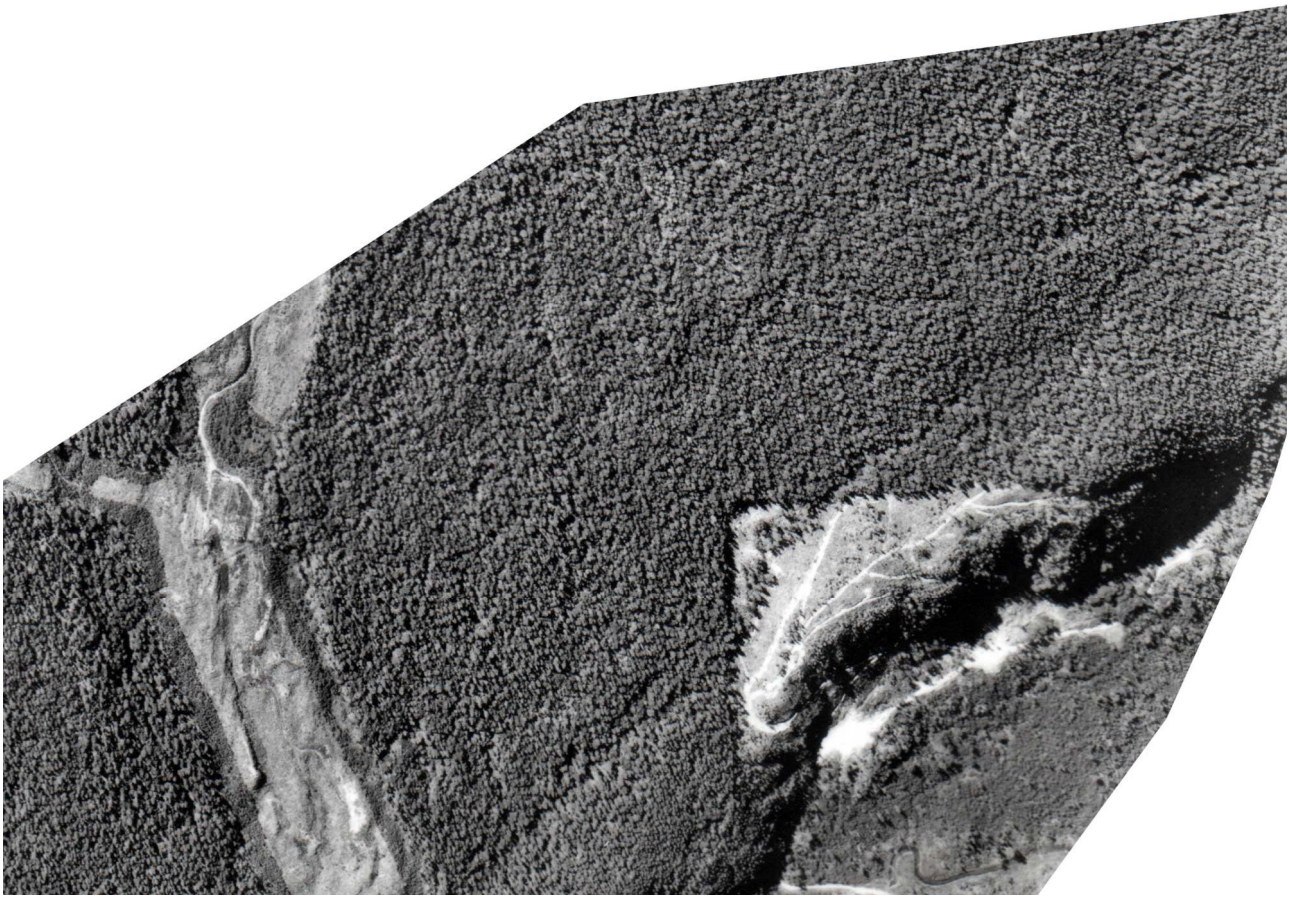
Rothenberger's logging operations were postponed until the Spring of 1993, before which time the Big Eddy Trustees notified Rothenberger of their "*objections*":

We regret that we have been unable to date to reach a mutually satisfactory resolution to our conflict within the Dolan. You have an interest in the value of timber on your land and we wish to protect an economic and health source of pure water for our community.

Unfortunately the unilateral solution which you have undertaken will we believe lead to both short term and long term negative consequences for our water supply. Your current actions serve only your own interests and will result in significant additional operating and maintenance costs for residents of the Big Eddy. Your use of cat-skidder logging methods with the Dolan during the period of spring break-up is extremely distressing. At the best of times

[311] Quote from Chapter 14 of Will Koop's January 2002 case history study on the Arrow Creek watershed reserve, *The Arrow Creek Community Watershed - Community Resistance to Logging and Mining in a Community Watershed*, http://www.bctwa.org/ArrowCreekHistory-Jan21-2002.pdf . The first two paragraphs are quotes from the June 5th edition of the Creston Valley Advance. After Premier Harcourt resigned from office, Premier Glen Clark later contrarily and defiantly announced in Nelson in 1997 that his administration "logged" in community watersheds.

such methods cause extensive ground disturbance. During wet spring conditions we feel that such activity in our very small Category one watershed (1.7 square mile total area) will have disastrous results. We close by respectfully asking you to reconsider your decision to log within the Dolan Creek. We will work very hard with you to ensure that you are fairly compensated. Should you decide to continue logging in the Dolan Creek, and should your actions impact the residents of the Big Eddy we will expect to be fully compensated by you for any and all costs the Big Eddy Waterworks District incurs. [312]



Aerial photo showing the recent logging by Rothenberger of his private lands in the Dolan Creek Reserve, the second intrusion within the Reserve. The thin standing forest buffer around Dolan Creek, and the clearcut-forest edge on many sectors, were later blown down from strong winds, uprooting soils, the cause of turbidity. The steep switchback access road from the property lands below are faintly noticeable. BC Hydro's wide transmission right-of-way is to the left.

During the logging, the Big Eddy Trustees carefully monitored the operation and even provided Rothenberger with a summary letter of their concerns on May 20, 1993, noting that his skidder was leaking engine coolant and hydraulic oil. They also recommended that his fuel containers be stored outside of the watershed, that fuelling and servicing activities be done outside of the watershed, that logging slash and *"prescribed burning"* were a serious concern related to starting a fire in the Dolan watershed, and that the skidder cease *"skidding logs ... within the watershed"*.

[312] L.H. Good, to Barry Rothenberger, April 19, 1993. Copies were sent to MLA Jim Doyle, Ministries of Health, Environment and Forests, and to the City of Revelstoke.

Big Eddy Trustees' photos of the blowdown damage to Dolan Creek from Rotherberger's logging. Above: Clay Stacey.

The blowdown trees caused the diversion of the creek's streamflow, the erosion of soils, and fouling of water.

Below, Lloyd Good examines the aftermath in late Spring. Culverts can plug up, the cause of great damage. The Big Eddy Trustees were passionate about protecting their drinking water, and were infuriated over Rothenberger's logging.

Due to their ongoing tribulations with the private land in the Dolan Reserve, the Big Eddy Trustees had some strong-minded words about the matter in a written submission to the NDP's Technical Advisory Committee on Community Watersheds that was holding public meeting forums in BC in early 1993:

> *If you are really sincere in protecting the quantity and quality of water in community watersheds, there are two things in your discussion paper that have to be changed; one is the word guideline and two is the regulations of private land in community watersheds. It is our contention that if good quality drinking water is going to be protected, all private land in watersheds that provide Community drinking water, should be exchanged for Crown land elsewhere where the private land owners are willing and where cost to taxpayers are kept to a minimum. When private land owners do not wish to make an exchange, rules and regulations should be applied to protect water quantity and quality.* [313]

From photos taken by the Trustees in following years, and from a 1996 government aerial photograph, Rothenberger had left a very narrow buffer zone of trees on either side of Dolan Creek, and that he had crossed the creek to remove all the trees to the southern edge of his property about 100 meters distant from the Creek. A series of skid trails and a main haul road were also built and scattered through the small seven-hectare clear-cut.

From 1993–1994, high winds knocked over many of the trees in the buffer zone and along the south and southeast perimeter of the clear-cut. The uprooted trees directly beside Dolan Creek were responsible for muddying the water and caused the creek to be blocked, diverting the creek onto the forest floor and eroding the soils. This resulted in some heavy deposits of debris and material farther down the creek to become deposited, piled, and lodged behind fallen logs. Lloyd Good explained how members of the Big Eddy Water Works District had to hike in to the site and cut a number of the fallen trees at their bases and then had to put their backs into it by pushing the vertical root masses back into place in their uprooted craters to try and alleviate some of the damage. All the Big Eddy Trustees' warnings and concerns to government and to Rothenberger had once again been realized.

The Big Eddy Trustees notified the Nelson Ministry of Environment Regional Manager, John Dyck, the following year on October 18, 1994, that *"due to logging done on private property, the watershed in Dolan Creek has been badly damaged"*, and that they *"expect compensation for all pumping costs and any other expenses that occur due to this damage."* In response, Dyck immediately notified Barry Rothenberger on October 21st that the Ministry was issuing an "Order" under the *Water Act* to immediately *"waterbar/cross-ditch the skid trail at naturally occurring low spots and at intervals not exceeding 20 meters."* On October 27, Rothenberger notified the Big Eddy Water Works District that he signed a $1,000 cheque to help offset the pumping expenses for the two well water pumps, due to the turbidity entering Dolan Creek from his skidding trails and from the damaged buffer zone.

Responding to Lloyd Good's November 21, 1994 letter of concern, Environment, Lands and Parks Minister Moe Sihota wrote to console the Big Eddy residents, as so many other Ministers been accustomed to before him:

---

[313] L.H. Good, Chairman of Trustees, Big Eddy Waterworks District, submission to the Technical Advisory Committee on Community Watersheds, Ministry of Environment, March 11, 1993.

While reviewing the background information on your letter, it became apparent that there has been a long standing and contentious relationship between the Big Eddy Waterworks District and staff from both the Ministry of Environment, Lands and Parks and the Ministry of Forests, which is unfortunate. I can assure you that BC Environment and Ministry of Forests staff are concerned and will work toward the best interests of all of the people of British Columbia, and I would encourage you to work cooperatively with these agencies.

At the end of February 1995, Lloyd Good sent a two-page letter of concern to the Nelson Environment Ministry Regional Director, Dennis McDonald, complaining of *"four rotten, mouldy contaminated hay bales"* that Rothenberger had placed in Dolan Creek:

> *I immediately left the Rothenberger property and turned off the creek. The Ministry of Health had nothing to do with this action. However, I phoned him the next day (Dennis Clarkson, Chief Health Inspector for Okanagan), to inform him that we had shut the creek down and were now operating on the wells because of the contamination in the creek put there by the landowner on the instructions from the personnel of Water Management, Nelson."* [314]

[314] L.H. Good, Chairman of Trustees, February 21, 1995.

10.3. Thirty Years of Repeated Concerns and Recommendations

> ***I*** *have followed up further on the proposal to introduce legislation to control logging on private land, which was initiated by Dennis MacDonald, of the Ministry of Environment, Kootenay Region. I have since spoken to Erik Karlsen of Municipal Affairs and Sandra Smith of Water Management Branch.... Amendment to the Water Act to provide powers to prepare Integrated Watershed Management Plans; A proposal to prepare a Forest Practices Act; Amendments to the Municipal Act, to broaden the existing powers regarding tree cutting permits.* [315]

> ***3. A*** *second major deficiency of both policies* [the Ministry of Forests' and Ministry of Environment's] *as they now stand is neither of them requires the integration of land use planning on private lands within watersheds. In many cases, the uncontrolled use of private lands in a watershed can totally destroy the benefits derived from integrated planning on the surrounding Crown lands. Perhaps the Water Act should be amended and the Environment Management Act used to legally require private land owners to work through the planning arms of Regional Districts to insure the uses made of their lands is compatible with the land and water use objectives established for Crown lands in watersheds. It should be remembered the Water Act does not currently distinguish between Crown and privately owned lands so it is likely the best vehicle to accomplish this.* [316]

Conflicts concerning private land ownership in BC's community drinking watershed sources have been ongoing for over one hundred years. Many of these concerns originated in early provincial legislation that permitted indiscriminate alienation of large tracts of Crown lands, most of which ended after legislation was passed to end the sale of Crown lands in December 1907. [317]

When prime, low elevation Crown forest lands of old growth Red Cedar, Douglas Fir, and Hemlock and scattered Spruce were alienated in the Capilano and Seymour watersheds to timber speculators from Seattle City in 1905, Vancouver City Council and neighbouring municipalities vigorously protested the matter which resulted in the provincial government placing two Order-in-Council *Land Act* reserves over the remaining Crown lands in the Capilano in 1905 [318] and in the Seymour in 1906, [319] the water supply sources for Vancouver and its neighbour municipalities. However, motions and warnings by Vancouver City Council to buy out the Capilano Timber Company's and the Robinson Estate's private land holdings in the Capilano and Seymour watersheds from 1905 to 1917 were left unresolved, which led to the severe clear cutting and railway grade and bridge-tressle building demise of the Capilano watershed between 1918 and 1931.

---

[315] Denis K O'Gorman, Manager, Resource Planning, Integrated Resources Branch, to John Cuthbert, Chief Forester, and J. Biickert, Director, Integrated Resources Branch, Ministry of Forests, July 6, 1989.
[316] Dennis McDonald, Nelson Ministry of Environment Regional Manager, to P. Brady, Director, Water Management Branch, Victoria, June 12, 1984.
[317] *"That from and after the date hereof all lands in the Province of British Columbia not lawfully held by preemption, purchase, lease or Crown Grant be reserved from alienation under the Land Act by way of timber licence."* (OIC #901, approved on December 23, 1907) *"That whenever any timber licences or lease, or portion thereof, in the Province of British Columbia, shall be surrendered, cancelled, or in any other way terminated, such timber licence or lease, or portion thereof, shall forthwith be reserved from pre-emption, sale, or other alienation under the Land Act."* (OIC #902, approved on December 24, 1907)
[318] Order-in-Council No. 184, March 30, 1905.
[319] Order-in-Council No.505, August 23, 1906.

D. Precedent Re: Private Lands Purchase

As far as I know, there is no precedent regarding the purchase of private lands on community watersheds by the Government with a view to protecting the watershed from water quality deterioration. However, the Greater Vancouver Water District and the District of North Vancouver have leased their watersheds from the Crown for 999 years with the timber vested with the Lessee, but the net proceeds of the sale of timber payable to the Lessor. The Cities of Fernie and Enderby have 99-year leases for watershed protection only, and the City of Vernon has a 21-year lease for watershed purposes only. In the case of the Greater Victoria Water District, the watershed is owned by the District.

Outright ownership of the watershed lands or a lease gives substantially complete control to the local water authority except in regard to mineral exploration activity.

Fortunately, the Greater Vancouver Water District, which began its operations in February 1926, immediately commenced negotiations to purchase all the private timberlands in the Seymour watershed, including those that were still un-logged and in a pristine state above the Seymour water intake (then located some five kilometres distant and below the present intake at the Seymour Reservoir). Over the next twenty years, the Water District wisely purchased all remaining private lands, long-term investment measures that brought complete control of forestlands within the watersheds to the Greater Vancouver Water District. Given the large population's tax base and top credit ratings, the Water District was able to do what many other communities could not as readily afford. Related, the City of Victoria's water supply lands were also under private ownership, and the majority of those lands were also purchased by the City in 1925 to provide it with complete control over land use activities.

C) Administration of Private Lands in Community Watersheds

The attached letter dated October 7, 1974 outlines a suggested approach regarding the control of land use activities on private lands located in community watershed areas. No action appears to have resulted from this request for co-operation from Mr. B. E. Marr to the Department of Municipal Affairs.

With the onset of the Community Watersheds Task Force in 1972, an initial review of land use conflicts was undertaken by the Water Investigations Branch based upon findings from a questionnaire sent back from most provincial water users. Results from the Task Force's questionnaire mailed out to 325 provincial water users in early 1973 determined that:

> *Forestry use conflicts, indicated as the main problem for community water supply users, appear to be concentrated in the Vancouver Island, New Westminster, Vernon and Nelson Water Districts,* [320] and, *only 4% of the land area on Vancouver Island is in community*

[320] Ben Marr, Chairman, Community Watersheds Task Force, to J.S. Stokes, Chairman, Environment and Land Use Technical Committee, April 18, 1973.

watersheds; the main conflict in the Vancouver Island watersheds is waterworks vs. logging.[321]

2. Matters Arising From Previous Minutes

2a) Minute No. 1 a)

Mr. Larter stated that the October 7, 1974 letter from Mr. B. E. Marr to Mr. R. W. Prittie, concerning a request to regional districts to indicate community watersheds on their official regional plans, would be acted upon. Mr. Larter noted that Municipal Affairs would only be advising the regional districts in this matter. It would be up to the districts to institute land use controls on private lands in community watersheds as they deem necessary.

Action - W. J. Larter

Many of these concerns stemmed from cities and communities along the eastern lower half of Vancouver Island, lands that had been alienated through an old Railway agreement, forests of which were being denuded at a rapid and uncontrolled rate. As a result, the Task Force determined that the issue of private land holdings in drinking watersheds was a critical issue that needed to be resolved.

Mr. Harkness noted that the proposed pilot scheme would not include activities on private lands. After some discussion, it was concluded that zoning information on private lands could be provided by the Department of Municipal Affairs to the M.H.O. when the scheme gets underway.

For instance, the Task Force's *Progress Report* for September 1974 identified the concerns about private land logging in the Nanaimo Regional District's boundaries and from Invermere City's watershed. A year and half earlier, Nanaimo Regional District's Planning Director, W.S MacKay, wrote V. Raudsepp, the Deputy Minister of Water Resources on March 20, 1973, requesting that he help *"ensure that sufficient protection is given to the principle watersheds"*, requesting if it was *"possible for your branch to establish reserves on watershed areas."*

B. Administration of Land Use Activities in Community Watersheds on Private and Crown Lands

Ownership of "typical" community watershed lands by the Crown would simplify the administration of land use activities, with a view to reducing water quality degradation, in these areas. The existing legislation or procedures provides less control of land use activities on private lands than on Crown lands.

On Crown lands, even in cases where specific legislation or requirements regarding water quality degradation do not exist, the placing of map reserves on community watershed areas has permitted the water supply function to be considered in the adjudication process. However, due to a lack of specific guidelines or controls land use activities on Crown lands are subject to adhoc solutions to specific problems (i.e. the grazing conflicts in the Naramata community watershed)

Crown lands in a "typical" community watershed area is used for timber harvesting and grazing whereas, on private lands, problems often arise from additional sources such as homesites (septic tanks) and farming.

On private lands, there is no existing control of pollution sources by Government Agencies from timber harvesting activities, private road construction, discharges from animal and plant wastes from traditional farming operations or the maintenance of homesite (septic tank) installations. Consequently, water quality degradation from these activities on private lands can occur, to the detriment of the water user licensee. Although there are expropriation rights available (Water Act) concerning land control by the licensee which would prevent pollution of the water authorized to be diverted this option may be too expensive for a small water authority to undertake.

C. Need for Private Land Acquisition - Goldie Creek Watershed

[321] Summary of meeting notes by the Community Watersheds Task Force on January 21, 1974.

The Acting Director for the Water Resources Services, P.M. Brady, replied to the Regional District of Nanaimo's letter of March 20, 1973 one and a half years later on September 19, 1974, providing the following comments regarding problems related to private lands:

> *Practically all the lands are privately owned. This latter characteristic poses severe limitations on the control of land use activities under existing legislation…. Essentially, control of land use on private lands is presently vested in the Regional Districts via Official Plans and Zoning Bylaws. We would suggest that you and your Regional Board give some consideration to establishing these controls with a view to providing a high priority to the water supply function of these watershed lands.*

On June 13, 1973, the Vancouver Island Regional District of Comox-Strathcona wrote I.T. Cameron, the provincial Chief Forester, about the District's *"responsibilities"* of *"bulk water supply to the communities of Courtenay and Comox"*, as *"the larger part of the watersheds which generate our supply are made up of privately held lands primarily in the ownership of Crown Zellerbach and which are in the course of being actively logged."*

Regional District of Comox-Strathcona

No. 4, 463 Fifth Street, Courtenay, B.C.
Telephone 334-4452

June 13, 1973

Mr. I. T. Cameron,
Chief Forester,
Department of Lands, Forests,
and Water Resources,
(Forest Service),
Parliament Buildings,
Victoria, B.C.

DEPT. OF LANDS FORESTS
AND WATER RESOURCES
FOREST SERVICE

JUN 15 1973

MAIL ROOM
VICTORIA, B. C.

Dear Mr. Cameron:

Re: Watershed Protection

One of the responsibilities of the Regional District is that of bulk water supply to the communities of Courtenay and Comox. The larger part of the watersheds which generate our supply are made up of privately held lands primarily in the ownership of Crown Zellerbach and which are in course of being actively logged.

Since gaining the responsibility for bulk water supply the Board has made continuing attempts to ensure that activities in the watershed areas be regulated so as not to endanger the capacity or quality of the supply. So far we have had little success but do understand that a Provincial interdepartmental task force has been asked to investigate and report on the subject. We further understand that the task force is being guided by your Branch and we would be greatly obliged for any information that you can give as to the present status of the investigation.

Yours very truly,

J. E. Hiebert,
Secretary-Treasurer

Later that year, the Regional District tabled resolution No. 52 at the annual Union of B.C. Municipalities (UBCM) conference, to ensure that the privately held lands along the eastern length of their region comply with health standards and proper protection:

> *WHEREAS it is desirable that watersheds forming water sources for community water supplies should be protected and regulated by competent authority to ensure that quality and quantity of water supply be continuously maintained;*
> *AND WHEREAS major areas of watersheds are often in private ownership;*
> *AND WHEREAS it has been ruled by the Department of Health the "Sanitary Regulations Governing Watersheds" issued pursuant to the Health Act are not applicable to privately held lands within such watersheds;*
> *THEREFORE BE IT RESOLVED that the Provincial Government be requested to establish standards for all community watershed areas; these standards to give the Health authorities a guideline which will enable them to determine any deterioration in water quality whatever the cause; and further that the Health authorities be authorized to enforce the required remedial action.*

Mr. J.E. Hiebert
Secretary-Treasurer
Regional District of Comox-Strathcona
4795 Headquarters Road
Courtenay, B.C.

Dear Mr. Hiebert:

I refer to your letter dated December 19, 1975 regarding a map reserve for the Oyster River. The Planning and Surveys Division of the Water Investigations Branch requested, on behalf of the Task Force on Multiple Use of Watersheds of Community Water Supplies, that map reserves be placed on all existing community watersheds in the Province. The placing of map reserves on watershed lands enables decisions regarding applications for Crown land use to take cognizance of the water supply function of these lands. It should be noted that proposed land use activities on private lands are not covered by this map reserve referral system.

I would suggest that you inform Mr. J.D. Watts, Chief, Planning and Surveys Division, of the proposed location of your future intake works on the Oyster River. This Division will ensure that a map reserve is placed on the drainage area of the Oyster River which is located upstream of the proposed intake works.

Yours very truly

B.E. Marr
Deputy Minister

RWN/am

Stemming from complaints by the Winfield & Okanagan Centre Irrigation District in February 1972 about private land logging in the Irrigation District's watershed by Premier W.A.C. Bennett's sons, R.J. Bennett and W. Bennett, the Kamloops Forest Service noted in an internal March 24, 1972 memo that:

> *It is noted from the first paragraph on the second page of Mr. Brodie's letter, of January 12th, to the Honourable Mrs. Pat J. Jordan that the Irrigation District has a remedy to protect the water supply under the Provisions of the Water Act. It is considered unlikely that further legislation would be approved for submission to the Legislature, when the Irrigation District can protect the water supply under existing legislation.*

Dear Mr. Marr:

I refer to your letter dated June 8, 1976, which requested that the Task Force on Multiple Use of Watersheds of Community Water Supplies investigate and comment on Resolution No. 15 of the Associated Boards of Health of British Columbia.

The Task Force met on August 16th and 31st to discuss this resolution. A consensus was reached by the Task Force that it could not support the resolution as passed, in that it would provide the Medical Health Officer with a veto power regarding all activities in a community watershed applying to both Crown and private lands. While the drafters of the resolution probably envisaged a small watershed comprised predominantly of Crown land, there are also many large watersheds in the Province containing large areas of private land as well as Crown land and where the impact of a veto power by the Medical Health Officer could be severe, and at variance with Provincial and Local Authority objectives. The administration of such a veto power also could be costly and time-consuming.

Concerns arising from private land conflicts by the Village of Invermere in southeast BC were detailed in an August 27, 1974 four-page memo. It described Goldie Creek as a 12.5 square mile watershed, 9.8 square miles of which was Crown lands and 2.7 square miles as private lands, a dual status relationship described as *"a typical example"* of land status relationships for BC's drinking watersheds.

The memo also identified that the private land use conflicts were related to *"cattle grazing, homesites, and recreational uses,"* and that the main tributary Sunlight Creek *"flows through a corral"*. Due to the placement of a watershed Map Reserve on Goldie Creek, it prevented any further land alienation.

Senior Hydraulic Engineer R.W. Nichols provided a general explanation of the differences in management policies between the two types of ownerships, with the application of the recently adopted policy of "multiple use" the government was in hot water over with water users:

> *Crown lands in a "typical" community watershed area are used for timber harvesting and grazing whereas, on private lands, problems arise from additional sources such as homesites (septic tanks) and farming. On private lands, there is no existing control of pollution sources*

by Government Agencies from timber harvesting activities, private road construction, discharges from animal and plant wastes from traditional farming operations or the maintenance of homesite septic tank installations. Consequently, water quality degradation from these activities on private lands can occur, to the detriment of the water user licencee. Although there are expropriation rights available (Water Act) concerning land control by the licencee which would prevent pollution of the water authorized to be diverted this option may be too expensive for a small water authority to undertake. [322]

Nichols went on to describe the difficulties involved in attempting to expropriate the lands, and that many related problems would persist. He suggested that it *"would be unwise for the Province to turn over the purchased land to the small authority to administer"* because of its lack of *"administrative, financial and technical capability."* From his understanding, Nichols knew of *"no precedent regarding the purchase of private lands on community watersheds by the Government with a view to protecting the watershed from water quality deterioration."* In contrast, Nichols then went on to describe how Crown land leases were provided to the Greater Vancouver Water District (999 years), the City of Fernie (99 years), the City of Enderby (99 years), and the City of Vernon (21 years), and that these leases provide *"substantially complete control to the local water authority"*. He also stated that the City of Victoria has complete control because it owns the watershed lands. With the possibility of there being no other way to overcome conflicts, Nichols recommended that provincial legislation be pursued to do so whereby *"it may be necessary to apply sections of the Water Act (Section 41 and Section 24 attached) to specific pollution source areas."*

(6) So far the problems have been related to Crown lands only but if any of the benefits recited are to be fully realized, it would seem similar restrictions should be imposed on privately owned lands as well.

(7) If we expand the problem to include privately owned lands, do we merely consider privately owned lands with agricultural potential or all privately owned lands?

I am pleased that you have raised this problem and would be interested in how the solution suggested in the Okanagan Basin study dealt with points recited above.

The Lands Service is postulating for a stronger role in management of the Crown lands of the Province and the problem you have raised, if it can be satisfactorily resolved, is one which would strengthen this role.

Due to the concerns about private land conflicts in community watersheds, Ben Marr, as Chairman of the community watersheds Task Force and as the Associate Deputy Minister of Water Resources Service, instructed the Associate Deputy of Municipal Affairs, R.W. Prittie, in October 1974 to contact and arrange meetings with Regional Districts with the aim of providing strategic planning remedies and measures to address these concerns:

[322] R.W. Nichols, Senior Hydraulic Engineer, Water Resources Service, to J.D. Watts, Chief, Basin Planning and Power Division, Water Investigations Branch, August 27, 1974.

> *The establishment of these map reserves by the Lands Service will enable decisions regarding Crown land use to take cognizance of the water supply function of these lands. A similar control of proposed land use activities on privately-owned community watershed lands by Provincial authorities is not possible under existing legislation. The regional districts and municipalities could control changes in the use of privately-owned community watershed areas on official-regional plans and regulating the land use activities by means of zoning bylaws. In discussions between officials of our departments, it has been agreed that a request should be made to the regional districts to show the community watersheds on their official regional plans.... It was also agreed that the request to the regional districts should emanate from your office. I would therefore request that this action be taken."* [323]

According to the Agenda package prepared for the Community Watersheds Task Force meeting of August 16, 1976, it was stated that after almost two years *"no action appears to have resulted from this* [October 7, 1974] *request for co-operation from Mr. B.E. Marr to the Department of Municipal Affairs."* [324] As a result of this review information, Municipal Affairs representative W.J. Larter promised that he *"would look into the matter from the point of view of the Department of Municipal Affairs and report his findings to the Task Force at the next meeting:"*

> *Mr. Larter stated that the October 7, 1974 letter from Mr. B.E. Marr to Mr. R.W. Prittie, concerning a request to regional districts to indicate community watersheds on their official regional plans, would be acted upon. Mr. Larter noted that Municipal Affairs would only be advising the regional districts in this matter. It would be up to the districts to institute land use controls on private lands in community watersheds as they deem necessary. Mr. Harkness* [Municipal Affairs] *noted that Municipal Affairs is in the process of defining the content of settlement plans. He stated that this may be enshrined in legislation by next year and that a priority concern would be that of community watersheds. Mr. Harkness indicated that he was hopeful that the importance of community watersheds will be recognized by the regional districts. If this proves to be true, then the matter could be handled internally rather than by legislative means. He noted that the proposed action by Municipal Affairs in advising the regional districts appeared eminently reasonable.* [325]

Both the affected Vancouver Island Regional Districts and the community watersheds Task Force were very concerned about the extensive private land holdings over Vancouver Island's drinking watershed sources. Both the draft June 1977 and the final October 1980 Community Watersheds Guideline documents reflected these concerns and provided a recommendation for Regional Districts to resolve the conflicts through existing legislative means:

> *Due to the alienation in 1884 of a large track of land (1.9 million) acres on the South East coast of Vancouver Island, that is, the E&N Grant, there are 46 watersheds totally or partially within this area over which the Province has little land ownership control.... Where large areas of community watersheds are in private ownership, such as Vancouver Island, Regional Districts may be able to offset the lack of Crown control by adopting zone by-laws to restrict future activities within watersheds which are likely to impair water quality. Where this*

[323] Ben Marr, Associate Deputy Minister of Water Resources Service, to R.W. Prittie, Associate Deputy Minister of Municipal Affairs, October 7, 1974.
[324] Appendix A, Background Information and Progress Report.
[325] Minutes of the August 31, 1976 meeting of the Community Watersheds Task Force.

is done, Crown Lands within the by-law area can be managed to be compatible with overall land use goals. [326]

Mr. J.E. Hiebert
Secretary-Treasurer
Regional District of Comox-Strathcona
4795 Headquarters Road
Courtenay, B.C.

Dear Mr. Hiebert:

I refer to your letter dated December 19, 1975 regarding a map reserve for the Oyster River. The Planning and Surveys Division of the Water Investigations Branch requested, on behalf of the Task Force on Multiple Use of Watersheds of Community Water Supplies, that map reserves be placed on all existing community watersheds in the Province. The placing of map reserves on watershed lands enables decisions regarding applications for Crown land use to take cognizance of the water supply function of these lands. It should be noted that proposed land use activities on private lands are not covered by this map reserve referral system.

I would suggest that you inform Mr. J.D. Watts, Chief, Planning and Surveys Division, of the proposed location of your future intake works on the Oyster River. This Division will ensure that a map reserve is placed on the drainage area of the Oyster River which is located upstream of the proposed intake works.

Yours very truly

B.E. Marr
Deputy Minister

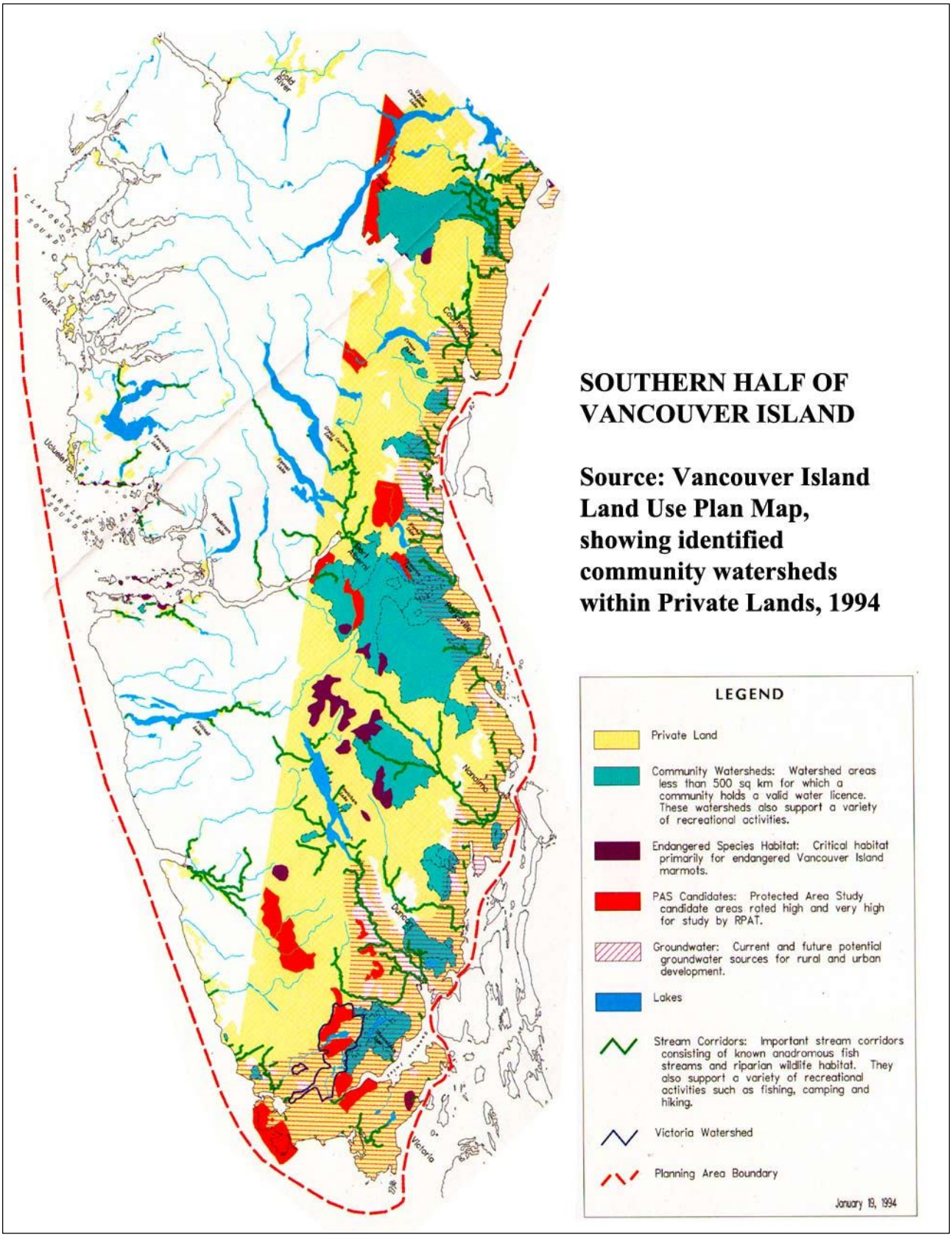
RWN/am

At a February 15, 2001 public forum in Nanaimo City's Beban Community Center, concerned citizens revealed that Nanaimo City's Jump Creek drinking watershed had been un-logged prior to the mid-1950s. The information was based on aerial photography information from 1955 to the present. Since 1955, roughly 85%, or more, of the drainage had been clear-cut and roaded, also impacting the habitat headwaters of the highly endangered Vancouver Island Marmot. Recent investigations also determined that the timber company Weyerhaeuser, which had taken over the assets and holdings of former timber giant MacMillan Bloedel, was, according to newspaper articles and radio interviews, responsible for planting seedlings laced with toxic fertilizers, and with clearcutting a 400 hectare stand of remaining old forest that was home to a herd of white-tailed deer a contracted wildlife biologist was in the midst of monitoring.

During the comment and review process of the draft Community Watersheds Guidelines document in 1979, it was suggested by an Environment Ministry biologist that the government consider re-purchasing private lands within Category One watershed reserves, given their extreme sensitivity

[326] Pages 16-17.

1980 map showing the Watershed Reserves in southwestern BC – 54 are shown here on southern Vancouver Island. Many of these Reserves in the private lands sector were later cancelled by government.


Gold River
CLAYOQUOT SOUND
Tofino
Ucluelet
BARKLEY SOUND
Courtenay
Nanaimo
Duncan
Victoria
SOUTHERN HALF OF VANCOUVER ISLAND
Source: Vancouver Island Land Use Plan Map, showing identified community watersheds within Private Lands, 1994
LEGEND
Private Land
Community Watersheds: Watershed areas less than 500 sq km for which a community holds a valid water licence. These watersheds also support a variety of recreational activities.
Endangered Species Habitat: Critical habitat primarily for endangered Vancouver Island marmots.
PAS Candidates: Protected Area Study candidate areas rated high and very high for study by RPAT.
Groundwater: Current and future potential groundwater sources for rural and urban development.
Lakes
Stream Corridors: Important stream corridors consisting of known anadromous fish streams and riparian wildlife habitat. They also support a variety of recreational activities such as fishing, camping and hiking.
Victoria Watershed
Planning Area Boundary
January 19, 1994

status by the Task Force. [327] Later that year, the City of Cranbrook tabled a resolution adopted by the Union of B.C. Municipalities on the protection of provincial drinking watersheds. Resolution No. 100 stated:

> *BE IT RESOLVED that the Provincial Government be asked to place a freeze on sales and/or leases of any Crown land in any municipal watersheds to private individuals or companies;*
>
> *AND BE IT FURTHER RESOLVED that the Provincial Government aid in reclaiming privately owned land in municipal watersheds in which domestic animals or other conditions could affect the purity of the water*.

Resolutions passed at the annual Municipalities conferences are forwarded to provincial Ministers and their related ministry administrators. Municipal Affairs Minister R.W. Long sent a copy of *Resolution No. 100* to Environment Deputy Minister Ben Marr on January 28, 1980, detailing the following:

> *Enclosed please find the resolutions endorsed by the Union of British Columbia Municipalities at their 1979 convention. They have been sent to inform you of the position of the U.B.C.M. as it relates to your Ministry, and to obtain your response to the subject matter of the resolutions. In some cases the subject matter of resolutions is familiar, but we are nevertheless interested in your current position. Would you please respond to the resolutions by stating your position on the matter, commenting on the validity of the argument presented in the resolution, specifying any points with which you take issue, and suggesting, where applicable, an appropriate position for Mr. Vander Zalm to take in discussing the issue with U.B.C.M. representatives."*

Nearing the closure of input for ministerial comments on the final version of the Ministry of Environment's Community Watersheds Guidelines document, the chairman of the community watersheds Task Force, J.D. Watts, sent a related memo on February 15, 1980 to P.M. Brady, the Director of the Water Investigations Branch, asking that he respond to Deputy Minister Ben Marr's request for action on UBCM *Resolution No. 100*:

> *(1) The Ministry of Environment is actively investigating the practicality of placing a freeze on sales and leases of crown land in some 150 watersheds which are currently held under map reserves for administrative purposes. These 150 watersheds are those which are less than six square miles in area and substantially free from present public uses. There are an additional 126 map reserves on watersheds ranging in size from six square miles to 200 square miles* [Categories] *(2) and (3). As a result of investigations by a Task Force set up to consider multiple use problems of watersheds used as community water supplies, it does not appear practical to place a freeze on, or to overly restrict agricultural and public activities in watersheds much in excess of six square miles in area in which there are extensive existing public and/or resource activities. It is noted that Joseph Creek, the watershed of the City of Cranbrook, the municipality sponsoring this resolution, falls into this category as it is 32.7 square miles in area and contains much agricultural land. In a few of the smaller watersheds, individual municipalities may find it advantageous to buy critical areas of privately owned*

[327] W. Hubbard, biologist, Prince George, to W.R. Redel, Assistant Deputy Minister, Lands Branch, March 21, 1979.

land within watersheds for protection purposes. However, the Provincial Government should not be expected to participate in this, as it is already making substantial contribution in holding the majority of the land in these areas under map reserve for water supply purposes. (4) The Minister, Mr. Vander Zalm, should advise that specific watershed management problems should be referred to the Water Investigations Branch of the Ministry of Environment.

Despite the ongoing recommendations by senior government administrators and by the Community Watersheds Task Force little transpired, until the issue resurfaced again and again throughout the 1980s. During internal senior administrative level discussions on the implementation of Integrated Watershed Management Plans (IWMPs), [328] recognition was once again made in 1984 about the critical concerns related to private land logging:

3. A second major deficiency of both policies [the Ministry of Forests' and Ministry of Environment's] *as they now stand is neither of them requires the integration of land use planning on private lands within watersheds. In many cases, the uncontrolled use of private lands in a watershed can totally destroy the benefits derived from integrated planning on the surrounding Crown lands. Perhaps the Water Act should be amended and the Environment Management Act used to legally require private land owners to work through the planning arms of Regional Districts to insure the uses made of their lands is compatible with the land and water use objectives established for Crown lands in watersheds. It should be remembered the Water Act does not currently distinguish between Crown and privately owned lands so it is likely the best vehicle to accomplish this.* [329]

During the U.B.C.M. annual meeting in 1982, Nelson City, another member of the Kootenay Regional District, presented a resolution on community water supply watersheds, which was passed as resolution A38:

CONTROL AND MAINTENANCE OF WATERSHEDS. WHEREAS the maintenance of the high quality and adequate quantities of supplies of water is of prime concern to all purveyors of water in the Province of British Columbia;
AND WHEREAS there is widespread pressure by the Ministry of Forests and the logging industry to open watersheds on Crown lands to logging operations and other developments;
AND WHEREAS in the past, some logging operations, associated road building and other development have been carried out in such a manner as to damage community water supplies; AND WHEREAS at present, authority over watersheds on Crown lands is vested in the Ministry of Forests:
THEREFORE BE IT RESOLVED THAT U.B.C.M. request the Provincial Government to alter any purveyor of water the right and power to participate with the Ministry of Forests, any other Ministries involved and any involved industry in the planning and execution of any operations within the watersheds of that purveyor and that decisions to proceed with such operations must be made by consensus of the parties involved.

[328] See Chapter 7 for the narrative on IWMPs, and in Will Koop's book, *From Wisdom to Tyranny*.
[329] Dennis McDonald, Nelson Ministry of Environment Regional Manager, to P. Brady, Director, Water Management Branch, Victoria, June 12, 1984, regarding *Policy for Integration of Forest and Water Management Planning on Crown land within Community Watersheds and related Ministry Policy concerning "Management of Community Watersheds on Crown Land.*

Again, the recommendations about private land logging in community watersheds went into abeyance, until the matter erupted two years later, and at consecutive annual conferences of the UBCM. The Central Kootenay Regional District presented resolution B-31 in 1986 regarding logging on private lands and its consequences for water supplies:

> *B31. LOGGING GUIDELINES.*
> *WHEREAS there is a growing concern amongst residents that the Province of British Columbia does not have regulations regarding commercial logging on private property;*
> *AND WHEREAS the Province of British Columbia does have regulations regarding commercial logging on Crown Land and the said regulations encourage responsible logging practices to the extent of providing protection of community water systems, protection from soil erosion and protection from excessive fire hazards:*
> *THEREFORE BE IT RESOLVED that the Union of British Columbia Municipalities petition the Provincial Government to develop suitable guidelines that could be referred to by commercial loggers when logging on private property.*
> *ENDORSED BY THE ASSOCIATION OF KOOTENAY & BOUNDARY MUNICIPALITIES.*

Other resolutions adopted at the UBCM annual conferences from 1987-1989 targeted matters of provincial policies that allowed for logging in drinking watersheds and on related liability issues. In advance of the 1989 conference, the ministries of Forests and Environment were preparing themselves in anticipation of the issue of private land logging that was being persistently raised by the Regional District of Central Kootenay:

> *I have followed up further on the proposal to introduce legislation to control logging on private land, which was initiated by Dennis MacDonald, of the Ministry of Environment, Kootenay Region.*
>
> *I have since spoken to Erik Karlsen of Municipal Affairs and Sandra Smith of Water Management Branch.... Amendment to the Water Act to provide powers to prepare Integrated Watershed Management Plans; A proposal to prepare a Forest Practices Act; Amendments to the Municipal Act, to broaden the existing powers regarding tree cutting permits.*
>
> *Sandra indicated that this reply also responds to Dennis McDonald's proposal to his ADM [Assistant Deputy Minister] in which he advances the case for the use of the Environment Management Act. He is being heavily pressured by the Central Kootenay Regional District for action.*
>
> *We should note that this same Regional District has brought issues forward at the UBCM, and that the UBCM has recently written a letter to our Minister conveying various resolutions advocating legislation to control logging on private land.* [330]

The 1989 conference, held in the Okanagan Basin City of Penticton, was particularly focussed on the logging issue. A representative from the Regional District of Central Kootenay stood and read at length five pages from a prepared paper, *Logging in Watersheds*, into the floor conference

[330] Denis K O'Gorman, Manager, Resource Planning, Integrated Resources Branch, to John Cuthbert, Chief Forester, and J. Biickert, Director, Integrated Resources Branch, Ministry of Forests, July 6, 1989.

microphone before a captive audience, where a number of representatives from the provincial government sat and listened to the entreaties:

> *Water, as much as the air we breathe, is so essential to our everyday life that we react - - sometimes violently and with anger, and understandably so - - when it is threatened. Increasingly water is being diminished in quantity and quality by resource extraction for the benefit of others.... We are, generally, very pleased with our mountain water both in purity and quantity. Suddenly we find someone wants to log our watershed. Visions of muddy debris-filled creeks from hastily-built roads; all sorts of activity above us from machinery and humans. We will have to boil our water, install filters to protect our hot water tanks and washing machines; next comes chlorination or other treatment demanded by the health authorities because our watersheds are invalid and violated.*
>
> *When Forestry issues the guidelines and signs the contracts and is in control of the terms of the contracts, it would appear that they should then assume the responsibility for the consequences. This Ministry should recover the costs whatever they may be for repairing damage done through performance bonds required at the time of the contract signing. The repairs should be made immediately, the logging stopped and then the investigations and questions asked.... As the Agricultural Land Reserve protects our farm lands - - or was supposed to - - a similar piece of legislation - - without the loopholes - - should protect our watersheds and landscapes.*
>
> *The Minister of Forests (Dave Parker) - - who is viewed increasingly by many as the Minister FOR Forestry - - has shown no great concern for us. The Council of Forest Industries - - the greatest pressure lobby and special interest group in the Province - - is concerned because we want to prevent the destruction of our watersheds.*
>
> *We urgently need legislation to control many of the issues that the forest service has made no mandate to supervise. We require legislation to place the protection of our watersheds where they rightfully should be under the Water Rights Branch of the Ministry of Environment and under the Ministry of Health. Even with the imminent change in Ministers, without changing the responsibility of preserving our community watersheds, we face a continuing losing, confrontational battle.*

Immediately following the public uproar at the 1989 UBCM conference, once again a series of memos were dispatched and meetings set up within government to address the concerns. In particular, senior provincial administrators had prepared a document for Cabinet on February 1, 1990 on introducing legislation regarding the thorny issue of private lands in drinking watershed sources: *"Private land logging legislation proposal will go to Cabinet in two weeks."* [331]

However, once again little came of the matter. The Social Credit Party government lost the election in September 1991, and its successor, the New Democratic Party administration, was left in charge of reviewing the matter of private land logging in drinking watersheds.

[331] Minutes, Inter-Agency Watershed Management Meeting, February 1, 1990.

In 1994-1995, B.C.'s largest private timber landowners, TimberWest (Fletcher Challenge Corporation) and MacMillan Bloedel, [332] were primarily responsible for the creation of a lobby organization, called the Private Forest Landowners Association (PFLA). This occurred prior to the introduction of the new *Forest Practices Code Act* in the late Spring of 1995, and a year after the creation of the *Forest Land Reserve Act* on July 8, 1994 with the establishment of a provincial Forest Land Reserve Commission:

> *This Act designated all private land classed as managed forest land under the Assessment Act and all private land subject to a tree farm license under the Forest Act as a special land use zone called the Forest Land Reserve (FLR).*
>
> *Initially the FLR included only private managed forest land encompassing 920,000 hectares. In 1995, after land use plans were completed for Vancouver Island, the Cariboo and Kootenay regions, the Provincial government added 15 million hectares of Crown Provincial Forest land to the FLR.*
>
> *The Forest Land Reserve (FLR) is a provincial zone established in 1994 to retain forest lands for timber production and harvesting and to minimize the impact of urban development and rural settlement on these lands.*
>
> *The Commission is responsible for private lands in the FLR with respect to inclusion and exclusion. In addition, is responsible for administration of the Private Land Forest Practices Regulation administration of the Managed Forest property tax assessment program, and ensuring FLR owners have the ability to pursue forest management activities relating to timber production and harvesting (i.e. right to harvest).*
>
> *Land use, subdivision and forest management practices on Crown and Crown license lands in the FLR are governed by the Forest Act and the Forest Practices Code.*
>
> *Local and regional governments through zoning and community plan bylaws, are responsible for subdivision and land use control of private land FLR areas within their jurisdiction.*
>
> *The Forest Land Reserve Act sets the legislative framework for the establishment and administration of the forest land reserve program and the forest management requirements on private forest lands.* [333]

The PFLA was deeply concerned about the government's intentions to regulate private forestlands under the new *Forest Practices Code Act*, and successfully lobbied to prevent it from occurring.

---

[332] Timber West, formerly Fletcher Challenge, formerly B.C. Forest Products; in 2000, Weyerhaeuser became the new owner of timber giant MacMillan Bloedel and later sold many of its new assets to Brookfield Asset Management.

[333] Information provided on the government website with the Provincial Agricultural Land Commission, February 2003.

Moreover, the Forest Land Reserve legislation was a preventative measure for private forest landowners from divesting their forest lands for subdivision and commercial development purposes, highlighted in newspapers and on television broadcasts in the early 1990s. For instance, the actions of citizens on Galiano Island to prevent MacMillan Bloedel's large scale developments on lands being stripped by clear-cut logging.

Almost four years after the establishment of the *Forest Practices Code Act*, the provincial government issued a press release on January 6, 1999, declaring that it was undertaking a new regulatory model for forest practices with the Private Forest Landowners Association *"to protect key public environmental values"*, particularly related to drinking watersheds:

> *Landowners will conduct their harvesting, silviculture and road building so as not to harm water quality and fish habitat.... Landowners will work with water purveyors to ensure drinking water is not adversely affected. The Ministry of Environment may require landowners to take action to address water quality concerns. Pesticide and fertilizer use around streams is restricted.*

The following year in April 2000, the provincial government merged the administration over both private forestlands and the Agricultural Land Reserves under one body, called the Land Reserve Commission.

The change in provincial government administration in May 2001 to the majority elect B.C. Liberal Party, with 77 out of 79 seats, brought about the swift and ongoing introduction of significant changes to key provincial legislations on land use during the first three sittings of Parliament. The Gordon Campbell government, with its party slogan of *"B.C. Open For Business"*, steadily relaxed regulations and altered and dismantled long-held legislations to accommodate its business party member politics. Of significance was the removal of the word "Environment" (which it later re-instated) from the former Ministry of Environment, Lands and Parks, under the new and ambiguous auspices of "Sustainable" Resource Management. The government also passed legislation on May 14, 2002, Bill 21, the *Agricultural Land Commission Act*, without public consultation. [334] Its deceptive title did not accurately convey the substance of the *Act* that also regulates the administration of all provincial private forestlands. As a result, the passage of the *Act*, and its implications, was provided with very little coverage in the media, and went by almost unnoticed to British Columbians.

During the Second Reading of *Bill 21* on April 30, 2002, the Minister of Sustainable Resource Management, Stan Hagan, declared the following:

> ***Hon. S. Hagen****: This bill is an important step in facilitating improved management of both our agricultural and private forest lands. This bill gives statutory meaning to our core review direction and the new-era commitment to make the Land Reserve Commission more regionally responsive to community needs.*

[334] Refer to Appendix D, a partial copy of West Coast Environmental Law's May 1, 2002 submission to the late Stan Hagen, former Minister of Sustainable Resource Management. It relates the concerns and implications of the *Act*, and states the absence of public consultation prior to its passage. As a result, Hagen promised that *"consultation with stakeholders"* would occur after the passage of the legislation over the following 3 months. Stan Hagen's riding of Comox Valley was on the east coast of Vancouver Island, in the area of the former large private forest landowners, TimberWest and Weyerhaeuser.

The Land Reserve Commission has undergone a comprehensive core services review to examine how it can become more efficient, effective and accountable while better reflecting the needs of each region of the province. New legislation is required to implement this direction. With passage of this bill, three pieces of legislation currently under the Land Reserve Commission's jurisdiction will be repealed: the Land Reserve Commission Act, Agricultural Land Reserve Act and Soil Conservation Act.

Land use provisions of the Forest Land Reserve Act and related land use regulations will be repealed. Provisions of the act which establish the reserve and provide for the regulation of forest practices on private FLR and managed forest ALR by the commission will be retained. ALR regulations will be repealed and replaced with a single regulation for use, subdivision and application procedures in the ALR under the new legislation. Consequential amendments of a minor nature will need to be made to the Local Government Act and the Land Title Act, as well as other minor amendments to statutes which make reference to the Agricultural Land Reserve Act.

This bill will establish the provincial Agricultural Land Commission, outline its purpose or mandate and operations; establish authority for managing the ALR and regulating land use in the ALR; establish procedures for applications and the authority for cabinet to pass regulations; and provide new enforcement and compliance powers for the commission." [335]

In the debates of the House during the Third Reading of *Bill 21*, opposition leader Joy MacPhail provided the following criticism of Hagen's Bill:

The effect of these changes to sections 64 through 80, which essentially gut the Forest Land Reserve Act, repeals the fundamental purpose of why the forest land reserve was created. I'm going to put that on the record. The intent of the reserve was to provide a more open and accountable process for the conversion of managed forest land to urban and rural development. That was a trade-off that was actually agreed upon as a counterbalance to the generous property tax treatment that such land receives under the Assessment Act.

Privately held forest land got very, very beneficial tax assessments, so to counterbalance that, there was an act created, and it was agreed upon, frankly. It was agreed upon - there's no question - by community, forest companies and local governments that the trade-off for that favourable tax treatment was that the forest companies who were going to convert it from managed forest land to urban or even, in some cases, rural development would have to live with the tenets of the Forest Land Reserve Act.
It was a major issue. I'm surprised that the member who represents the Gulf Islands, for instance, is not up speaking to this, because this was a key issue in the Gulf Islands and also on eastern Vancouver Island where forest companies were getting into the real estate development business. They were selling off large private forest land holdings. They didn't conduct very much in the way of public process, and then, with the sale of that private forest land, they increasingly turned to the use of publicly owned Crown forest land for timber harvesting. There was a shift in pressure from the private lands to the publicly owned forest

[335] Second Reading of Bill 21, Official Report of Debates of the Legislative Assembly, Tuesday April 30, 2002, page 3074.

lands with no accountability by the forest companies for that shift. All the while, the forest companies also benefited from very favourable tax treatment under the Assessment Act.

This agreement, this covenant, this legislation that had been agreed upon by all to hold that shift somehow in check or to provide balance is gone now with the repeal of the Forest Land Reserve Act. It was a bit surprising that neither the explanatory notes in this legislation nor the minister's comments at either first or second reading in any way hinted that that balance now was gone completely with the repeal. In fact, the minister said the repeal of these sections of the Forest Land Reserve Act was an important step in facilitating improved management of both our agricultural and private forest lands. [336]

Bill 21 was not assented until November 1, 2002, which officially repealed the 1994 *Forest Land Reserve Act*. The significance of this *Act*, and related revisions, releases the controls by the provincial government on these issues to its former condition prior to 1994, and will help to liberate the constraints placed upon the private lands from tax assessment legislation.

The land use and subdivision provisions in the Forest Land Reserve Act will be repealed. The Commission will no longer be responsible for adjudicating applications for non-forestry uses or subdivisions of FLR land and will no longer receive or process these applications.

The sections dealing with recapture tax for land excluded from the FLR will be repealed. The section that allowed Cabinet to designate Crown land as FLR will be repealed.

Sometime during 2003 the FLR will be phased out in its entirety and local governments will need to review, and possibly amend existing official community plans and zoning bylaws to reflect this change. If a local government wishes to adopt a bylaw after November 1, 2002 that would have the effect of restricting forest management activities relating to timber production and harvesting it should be aware that the government has committed to maintain the right to harvest on private lands with Managed Forest classification.

During the first phase the Commission will also continue to oversee forest practices on private forest land and ALR land with Managed Forest classification through administration of the Private Land Forest Practices Regulation.

The remaining provisions of the Forest Land Reserve Act will be repealed in conjunction with the devolution of the private land forest practices regulations to a new agency sometime in 2003. A target date of April 1, 2003 has been set but additional time may be needed to complete the transition. [337]

[336] Official Report of the Debates of the Legislative Assembly, May 14, 2002, afternoon session, pages 3451-3452.

[337] Information provided on the government website with the Provincial Agricultural Land Commission, February 2003: Information Bulletin #8 - *Changes to the Forest Land Reserve system as a result of repeals to the Forest Land Reserve Act with the bringing into force of the Agricultural Land Commission Act.* The government's intention was to set up a Public Private Partnership oversight to replace the Commission, and to establish self-regulation of private lands.