

Blueberry River First Nations files claim against B.C. for the Gundy Plan

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On July 8, 2024, Blueberry River First Nations (BRFN) filed a Notice of Civil Claim^[1] (the Claim) against the province of British Columbia (B.C.) with respect to the Gundy Plan, which is the first implementation plan under the precedent-setting [Blueberry River First Nations Implementation Agreement \[PDF\]](#) (the BRFN Agreement).

The Claim alleges that the Gundy Plan was made contrary to the parties' understandings, commitments, and obligations in the BRFN Agreement, and further that BRFN's Chief had agreed to the Gundy Plan in private meetings with B.C. without the participation or knowledge of BRFN's elected Council or BRFN's legal counsel. Accordingly, BRFN now seeks injunctive and declaratory relief against B.C. to prevent the implementation of the Gundy Plan based on the province's breach of its fiduciary duties to BRFN, and its contractual obligations under the BRFN Agreement.^[2]

The Claim raises important questions about BRFN governance and the implementation challenges inherent in the BRFN Agreement, which continue to cast uncertainty on resource development in northeast B.C.

Background

The BRFN Agreement was the result of extensive negotiations between BRFN and B.C. following the British Columbia Supreme Court's seminal decision in *Yahey v. British Columbia*. We previously discussed the [Yahey decision](#).

In short, the British Columbia Supreme Court found that the cumulative effects of industrial development in BRFN's traditional territory have resulted in significant adverse impacts on the lands, waters, fish and wildlife, and to the exercise of BRFN's Treaty 8 rights. Notably, Justice Burke found that BRFN's treaty rights to meaningfully hunt, fish, and trap within BRFN's traditional territory had been significantly and meaningfully diminished, such that BRFN's Treaty 8 rights have been infringed.^[3]

B.C. did not appeal the *Yahey* decision. Rather, B.C. sought to negotiate with BRFN to mitigate the cumulative effects of industrial development. As a result of these negotiations, the BRFN Agreement was executed between B.C. and BRFN on January 18, 2023. This Agreement

sought to manage the cumulative effects of industrial development in BRFN's territory and to protect BRFN's treaty rights and way of life. In particular, B.C. and BRFN agreed to collaborate on land use planning to identify where and how development would occur.

The BRFN Agreement established different zones based upon the degree of importance those zones hold for BRFN. Zones that are called "High Value 1" or "HV1" are areas of particular importance to BRFN as they represent key places for BRFN's practice of their treaty rights.^[4] New disturbances in HV1 areas are limited. No new disturbances are allowed in HV1A areas, unless BRFN agrees otherwise. However, HV1B and HV1C areas are less restrictive. A total of 80% of HV1B areas will be restricted from new disturbances, while 60% of HV1C areas will be restricted.^[5]

In addition, BRFN's territory will be split into areas where new disturbances will be capped. For example, new disturbances in Area 1 will be capped at 200 hectares per year, while new disturbances in Area A will be set to 240 hectares per year for the first calendar year, and then 200 hectares per year thereafter (New Disturbance Caps).^[6]

According to the Claim, on June 9, 2023, BRFN's elected Council adopted a policy to evaluate exemptions and amendments sought under the BRFN Agreement, including from New Disturbance Caps in HV1 areas. B.C. began engaging with certain Council members, who had been designated by the Council as BRFN's spokespersons, on matters related to the BRFN Agreement.^[7]

On September 1, 2023, B.C. informed the BRFN Council that it would continue engaging with BRFN through a seniors' officials table (SOT), which would be comprised of all members of the Council, key representatives from B.C., and advisors and staff, as appropriate.^[8] However, around this time a rift appears to have developed between certain BRFN councillors and the elected BRFN Chief. During a SOT meeting on September 29, 2023, designated Council representatives informed B.C. that the BRFN Chief did not lawfully represent BRFN or the Council with respect to the BRFN Agreement. This position was reiterated by the BRFN councillors by way of a letter to B.C. dated October 3, 2023, in which the councillors requested that B.C. only meet with the designated Council representatives with respect to the BRFN Agreement.^[9]

The Gundy Plan

As of writing this Update, the Gundy Plan is not yet publicly available. However, according to the Claim, the Gundy Plan, which covers an area of approximately 53,000 hectares of BRFN's traditional territory, would seek to facilitate new oil and gas activities in certain areas within BRFN's traditional territory. These areas would include HV1C zones, as well as portions of Area 1 and Area A.^[10]

The primary point of contention between the parties relates to the New Disturbance Caps in Area 1 and Area A of the Gundy area. B.C. has sought to increase the New Disturbance Caps in these areas to 680 hectares over five years to facilitate new development activities. This is significantly higher than the New Disturbance Caps originally agreed upon in the implementation agreement. The Claim alleges that such an increase to the New Disturbance Caps would require an amendment to the BRFN Agreement, which has not occurred.^[11]

On May 22, 2024, B.C. informed the BRFN Council that BRFN's Chief and the Minister of Energy, Mines and Low Carbon Innovation (Minister) had met on May 15, 2024, and approved

the Gundy Plan, which included the removal of New Disturbance Caps in Area 1 and Area A of the Gundy area.^[12]

On May 30, 2024, B.C. announced in a news release that the province and BRFN would move forward with implementing the Gundy Plan, consistent with the BRFN Agreement.

Relief sought by BRFN

BRFN seeks:

- declarations that, by approving the Gundy Plan, B.C. breached (i) its fiduciary and constitutional obligations to BRFN (ii) the honour of the Crown and (iii) procedural rights and substantive terms of the BRFN Agreement;^[13]
- a declaration that the New Disturbance Caps cannot be removed prior to, and as a condition for, the approval of the first HV1C Plan without amending the BRFN Agreement;^[14]
- interim or permanent injunctions against B.C. and any government agency, including the British Columbia Energy Regulator from (i) taking any step or action to give force to or reliance on the Gundy Plan and (ii) issuing any regulation, order in council, license, permit, approval, or other authorization with respect to the area at issue in the Gundy Plan, in reliance on the Gundy Plan;^[15] and
- an order of specific performance requiring B.C. to fulfill its obligations under the BRFN Agreement with respect to approving a HV1C Plan in the Gundy Area.^[16]

Implications of BRFN's claim

Unlike other co-management regimes that have previously been established between governments and treaty First Nations, the BRFN Agreement allows BRFN significant decision-making powers that, in effect, gives BRFN significant control over natural resource development in northeastern B.C. On their face, the powers that have been bestowed on BRFN in the BRFN Agreement and the associated restrictions on resource development in BRFN's traditional territory (which includes important resource areas, including the B.C. Montney natural gas play) have resulted in regulatory uncertainty for resource developers in this area. Over the past several months, this regulatory uncertainty has only increased.

The uneven decision-making powers that are held by BRFN through the BRFN Agreement relative to other Treaty 8 First Nations (several of whom have traditional territories that overlap with BRFN's) have now given rise to litigation between B.C. and other Treaty 8 First Nations in northeast B.C.^[17] This litigation threatens to re-open the BRFN Agreement or supplement that agreement with similar agreements with other Treaty 8 First Nations, potentially creating a mosaic of overlapping rules and restrictions.

Further, implementation of the BRFN Agreement contemplates that B.C. and BRFN will cooperatively develop a variety of land use and watershed basin management plans. For a community with a population of roughly 550 people as of June 2024,^[18] the expectations placed on BRFN under the BRFN Agreement seriously risk exceeding the community's resources and capacity. But the Claim also highlights that the BRFN community is internally complex and divided. Without alignment among BRFN's Chief and Council, it is highly unlikely

that BRFN and B.C. will be able to achieve the implementation work that the BRFN Agreement contemplates. Such an outcome, in our view, would exacerbate the regulatory uncertainty that has already been created by the existence of the Agreement, and would likely lead to even more disputes before the courts.

[1] *Blueberry River First Nations v. His Majesty the King in Right of the Province of British Columbia* (9 July 2024), Vancouver 244500 (BCSC) [BRFN Claim].

[2] BRFN Claim at paras 7 and 9.

[3] *Yahey v. British Columbia*, 2021 BCSC 1287 at paras 1116 and 1132.

[4] Blueberry River First Nations Implementation Agreement, clauses 5.2, 7.2-7.5 [BRFN Agreement].

[5] BRFN Agreement, clauses 7.3-7.5.

[6] BRFN Agreement, clause 14.1.

[7] BRFN Claim at para 42.

[8] BRFN Claim at para 48.

[9] BRFN Claim at para 54-5.

[10] BRFN Claim at para 6, 37-8.

[11] BRFN Claim at paras 62-4.

[12] BRFN Claim at paras 72-8.

[13] BRFN Claim at Part 2: Relief Sought, paras 1-3. BRFN claims that B.C. breached sections 7.11, 7.1, 14.1, 7.16, 7.6, 3.1, 23.8, and 23.11 of the Implementation Agreement.

[14] BRFN Claim at Part 2: Relief Sought, para 4.

[15] BRFN Claim at Part 2: Relief Sought, paras 5-6.

[16] BRFN Claim at Part 2: Relief Sought, para 7.

[17] *Halfway River First Nation v. Attorney General of British Columbia* (22 September 2023), Victoria 233163(BCSC) [HRFN Claim]. *Doig River First Nation v. Attorney General of British Columbia* (5 October 2023), Vancouver 236814 (BCSC) [DRFN Claim].

[18] Government of Canada.