



Environmental Appeal Board

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DECISION NOS. 2005-WIL-020(b) and 2005-WIL-026(b)

In the matter of an appeal under section 101.1 of the *Wildlife Act*, R.S.B.C. 1996, c. 488.

BETWEEN:	David Wiens	APPELLANT
AND:	Regional Manager, Fish And Wildlife	RESPONDENT
AND:	Clifford Andrews Jeff Browne	THIRD PARTIES
AND:	British Columbia Wildlife Federation	PARTICIPANT
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	December 13, 2005	
PLACE:	Fort St. John, BC	
APPEARING:	For the Appellant: Dale Drown For the Respondent: Joseph G. McBride, Counsel For the Third Parties: H. Bruce Kaun, Counsel For the Participant: Rich Petersen	

APPEALS

David Wiens appealed the issuance of two separate transporter licences to Clifford Andrews and Jeff Browne (the "Licences") on August 12, 2005, and August 16, 2005, respectively. The Licences were issued by Andy Ackerman, Regional Manager of Fish and Wildlife (the "Regional Manager") Peace Region, Ministry of Environment (the "Ministry"). The Licences allow Mr. Andrews and Mr. Browne to transport resident hunters to, from or between locations for the purpose of conducting hunting activities, until March 31, 2006. A schedule attached to each of the Licences sets out the respective areas in which Mr. Andrews and Mr. Browne may operate. Those areas overlap with Mr. Wiens' guide outfitting territory.

The Environmental Appeal Board has authority to hear this appeal under Part 8 of the *Environmental Management Act*, S.B.C. 2003, c. 15, and section 101.1 of the *Wildlife Act*, R.S.B.C. 1996, c. 488.

Section 101.1(5) of the *Wildlife Act* provides:

- (5) On an appeal, the appeal board may
 - (a) send the matter back to the regional manager or director, with directions,
 - (b) confirm, reverse or vary the decision being appealed, or
 - (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

Mr. Wiens requests that the Board vary the Licences by amending them so that the transporter territories of Mr. Browne and Mr. Andrews be reduced to their areas of traditional use as reflected by their respective range use permits.

BACKGROUND

Non-resident hunters may not hunt for game in BC unless they are accompanied by a licensed guide outfitter, an assistant guide outfitter, or other person licensed to guide for game. Resident hunters may hunt for game in BC without a guide, as long as they hold the required licences or authorizations, and comply with all other requirements of the *Wildlife Act*. Guide outfitters hold licences and certificates, issued under the *Wildlife Act*, which give them the exclusive right to guide non-resident hunters within their designated guiding territory. Guide outfitters may, in addition to guiding hunters, engage in activities conducted by transporters; namely, the transport of hunters. Transporting hunters involves taking resident hunters and their gear to areas where they may hunt. Transporters, also known as packers, are not permitted to guide hunters.

Mr. Wiens holds a guide outfitter certificate and licence, and operates Stone Mountain Safaris Ltd. His guide territory is located to the south of the Toad River, which is on the east side of the Rocky Mountains and is west of Fort Nelson, BC. The Alaska Highway runs through his guide territory. He has been guiding and transporting hunters in that territory for many years.

Mr. Browne and Mr. Andrews are transporters. Mr. Browne operates Steamboat Mountain Outfitters, and Mr. Andrews operates Tetsa River Outfitters. They have been transporting resident hunters in or around the Toad River area for many years. The question of exactly where Mr. Browne and Mr. Andrews have historically conducted their transporting activities, and the extent to which those activities may affect Mr. Wiens' guiding and transporting business, are issues in these appeals.

There has been a long history of conflicts between transporters and guide outfitters throughout British Columbia. As a result of these conflicts, the government concluded that legislation should be introduced to regulate the activities of transporters. Guide outfitters have been regulated under the *Wildlife Act* for many years.

Before 2005, the *Wildlife Act* and its regulations did not regulate the transporting of hunters. In early 2005, Division 5 of the *Wildlife Act Commercial Activities Regulation*, B.C. Reg. 338/82, came into force. That regulation, together with section 15 of the *Wildlife Act*, provide for the issuance of licences to transport hunters. Individuals such as Mr. Andrews and Mr. Browne, who operated as transporters before the licensing scheme came into effect, were eligible to apply for transporter licences through a "grandfathering" process, which included providing proof of past operation as a transporter, writing an exam, and developing a Transporter Management Plan. Thus, the Licences that are the subject of these appeals are the first that have been issued to Mr. Andrews and Mr. Browne.

Before the Regional Manager issued the Licences, he created a committee called the Regional Transporter Implementation Team (the "Committee") to assist him in assessing applications for transporter licences in the Peace Region. The Committee consisted of the Regional Manager, two representatives from the Guide Outfitters Association of British Columbia, two representatives of the B.C. Wildlife Federation (the "BCWF"), and one representative of transporters from the region.

The Committee considered Mr. Andrews' and Mr. Browne's licence applications, along with submissions provided by Mr. Wiens. The Committee recommended that Mr. Andrews and Mr. Browne be issued licences with defined transporter territories.

On June 22, 2005, the Regional Manager sent a letter via email to Mr. Wiens' representative, Dale Drown of the Guide Outfitters Association of British Columbia, notifying him of the Committee's recommendations.

In a letter dated June 24, 2005, the Regional Manager also notified Mr. Wiens of the proposed territories for the Licences.

The Regional Manager issued the Licences in August 2005. The areas in which Mr. Andrews and Mr. Browne may operate are set out in Schedule "A" to their respective Licences. Schedule "A" to each Licence refers to a map that has been "signed off" and is located in Ministry offices. Copies of those maps were provided to the Panel during the appeal proceedings.

Mr. Browne's territory consists of two separate areas. One is located on the north side of the Alaska Highway, to the north of Stone Mountain Park; the other is located on the south side of the Alaska Highway, to the east of Stone Mountain Park.

Mr. Andrews' territory is located south of the Alaska Highway, adjacent to the east boundary of Stone Mountain Park. It is also located between Mr. Browne's two areas, and shares its north and east boundaries with his two areas.

Mr. Wiens' guide territory overlaps with all of Mr. Andrews' territory and most of Mr. Browne's territory, although large portions of his guide territory do not overlap with any transporter territories.

Schedule "A" to each Licence also contains other conditions. For example, when Mr. Andrews' Licence was first issued, Schedule "A" restricted him to a maximum of 15 hunters. However, in September 2005, the Regional Manager amended Mr. Andrews' Licence to increase the hunter limit to 20 for the 2005/2006 Licence year only. Mr. Andrews requested the increase because he had accepted deposits from 20 hunters before the Licence was issued.

Similarly, Schedule "A" of Mr. Browne's Licence restricts him to a maximum of 20 hunters. It also states that no more than 5 of those hunters may be taken to the portion of Mr. Browne's territory that is north of the Alaska Highway. In addition, Schedule "A" states that a camp on the border with John Robidou's guide area must "be abandoned and moved to a location further into the area assigned" to Mr. Browne, and a distance of 2 km must exist between Mr. Browne's camps and those used by Mr. Wiens.

On September 12, 2005, Mr. Wiens filed a Notice of Appeal with the Board regarding Mr. Andrews' Licence.

On September 16, 2005, Mr. Wiens filed a Notice of Appeal with the Board regarding Mr. Browne's Licence.

The grounds for appeal provided in the two Notices of Appeal are very similar. Mr. Wiens' grounds for the appeals may be summarized as follows:

1. The Regional Manager failed to provide Mr. Wiens with written reasons for his decisions, as required by section 101 of the *Wildlife Act*.
2. In issuing the Licences, the Regional Manager failed to properly consider Mr. Wiens' rights as a guide outfitter, including his right to service the transportation needs of resident hunters.
3. Mr. Andrews and Mr. Browne have been licensed to operate in areas where they have not historically operated.
4. Mr. Andrews and Mr. Browne have been licensed to operate in areas that overlap with Mr. Wiens' guiding territory. As such, the Licences seriously affect Mr. Wiens' rights to exclusively transport and guide hunters in the parts of his guiding territory that overlap with the Licence areas.
5. Additionally, in issuing the Licences, the Regional Manager failed to follow procedures 10.2 and 10.3 in the Management Plan Form in Appendix 1 of the *Wildlife Act Commercial Activities Regulation*, which aggravated the situation and prevented mitigation of the impacts on Mr. Wiens' guiding operation.
6. The Regional Manager failed to give sufficient consideration to information that Mr. Wiens provided to the Committee regarding where Mr. Andrews and Mr. Browne have historically operated.

7. The Regional Manager issued a park use permit authorizing Mr. Andrews to set up a camp at a location that Mr. Wiens has used for more than 10 years under a park use permit.

Mr. Wiens also submitted, in his Statement of Points, that the Regional Manager set the boundaries in the Licences without following the procedure set out in section 3.1 of the Ministry's *Procedure Manual* dated July 7, 2005. This section, titled "Transporter Licence Authorization," requires the Regional Manager to give preference to the "senior licence holder(s)" if the applicant cannot reach an agreement regarding overlaps with the territories of existing licencees including guide outfitters.

On October 18, 2005, the BCWF applied to participate in the appeal. The BCWF sought to participate in order to represent the interests of resident hunters and transporters in areas that are licensed to guide outfitters.

On November 18, 2005, the Board granted the BCWF's application for participant status: *David Wiens v. Regional Fish and Wildlife Manager*, Appeal Nos. 2005-WIL-020(a) and 2005-WIL-026(a), November 18, 2005 (unreported).

The Regional Manager opposes the appeals and requests that the Board confirm the Licences.

Mr. Browne and Mr. Andrews oppose the appeals and request that the Board confirm their respective Licences. They also requested that the Board order Mr. Wiens to pay their costs associated with the appeal proceedings.

The BCWF submits that the Licences should be confirmed.

ISSUES

The Panel has framed the issues before it as follows:

1. Whether Mr. Andrews and Mr. Browne have been licensed to operate in areas where they did not historically operate.
2. Whether the Regional Manager erred by failing to give Mr. Wiens an opportunity to be heard, failing to require Mr. Andrews and Mr. Browne to consult with Mr. Wiens, and failing to properly consider Mr. Wiens' rights as a guide outfitter before issuing the Licences.
3. Whether the Regional Manager failed to provide Mr. Wiens with written reasons for his decisions, as required by section 101 of the *Wildlife Act*.

The Panel has also considered, under a separate heading, whether to order Mr. Wiens to pay Mr. Browne's and Mr. Andrews' costs associated with the appeal proceedings.

Regarding Mr. Wiens' concerns about the Regional Manager's issuance of a park use permit to Mr. Andrews, the Panel notes that its jurisdiction in these appeals is

limited to considering the issuance of the Licences. While the activity permitted under the park use permit may be relevant information in the appeal of Mr. Andrews' Licence, the Panel has no jurisdiction to consider the merits of the decision to issue the park use permit under the *Park Act*.

RELEVANT LEGISLATION

The following sections of the *Wildlife Act* are relevant to this appeal:

Definitions and interpretation

1 (1) In this Act:

"accompany" means to remain in the company of the other person, able to see the other person without the aid of any device other than ordinary corrective lenses and able to communicate by unamplified voice with that person;

"guide" means a person who, for compensation or reward received or promised, accompanies and assists another person to hunt wildlife, but does not include a guide for fish;

Issue of licences

15 (1) The director, or a person authorized by the director, may issue and authorize the issue of licences in the form, with the content and valid for the term the director, or a person authorized by the director, specifies.

(2) Applications for licences must be made in the manner and form required by the director, or a person authorized by the director.

Reasons for and notice of decisions

101 (1) The regional manager or the director, as applicable, must give written reasons for a decision that affects

(a) a licence, permit, registration of a trapline or guide outfitter's certificate held by a person, or

(b) an application by a person for anything referred to in paragraph (a).

(2) Notice of a decision referred to in subsection (1) must be given to the affected person.

(3) Notice required by subsection (2) may be by registered mail sent to the last known address of the person...

The following sections of the *Wildlife Act Commercial Activities Regulation* are relevant to this appeal:

Division 5 - Transporters

Definitions

5.01 In this Division:

...

“transporter” means a person who, for money or other compensation, transports a hunter to, from or between locations so that the hunter can hunt but does not include a person who operates a scheduled commercial flight or a chartered aircraft unless the person also provides ground transportation, accommodation or other ground services to the hunter.

Transporter licence

5.02 (1) A person must not act as a transporter unless the person holds a transporter licence issued under section 15 of the *Wildlife Act*.

...

(3) Subsection (1) does not apply to a person who is licensed as a guide outfitter.

Eligibility for transporter licence

5.03 (1) A person is eligible for a transporter licence only if

(a) the person

...

(iv) submits to the director a transporter licence application and management plan, in the form and with the information required by the instructions set out in Appendix 1, along with the application fee under Schedule 5.05 (2), and

(b) based on the applicant's application and management plan, the director is satisfied that the person's transporter activities are unlikely to have a significant negative impact on wildlife.

DISCUSSION AND ANALYSIS

1. Whether Mr. Andrews and Mr. Browne have been licensed to operate in areas where they did not historically operate.

Mr. Wiens does not seek cancellation of the Licences. Rather, he maintains that the boundaries of the Licences should be varied to reflect Mr. Andrews' and Mr. Browne's historical use of the areas. In particular, Mr. Wiens takes issue with the

inclusion of the Henry Creek, upper Tetsa, North Tetsa, and Twin Lakes areas in Mr. Andrews' Licence, and the inclusion of the area north of the Alaska Highway (Dunedin, Snake and Ram Creek areas), and the upper Chischa area south of the Alaska Highway, in Mr. Browne's Licence. Based on all of the evidence, Mr. Wiens submits that the territories set out in the Licences should be reduced by removing the portions that overlap with Mr. Wiens' guide territory and that are outside of the historical range tenures held by Mr. Andrews and Mr. Browne.

Mr. Wiens submits that the Regional Manager set the Licence boundaries without properly considering information regarding Mr. Andrews' and Mr. Browne's areas of historical use, including their historical grazing tenures.

In addition, Mr. Wiens maintains that, prior to 2002, neither he nor any of his employees ever encountered Mr. Andrews, or anyone connected with his transporter operation, in the areas of Mr. Andrews' territory that overlap with Mr. Wiens' guide territory and that are outside of Mr. Andrews historical range tenure areas. Similarly, Mr. Wiens maintains that neither he nor any of his employees ever encountered Mr. Browne, or anyone connected with his transporter operation, in the areas of Mr. Browne's territory that overlap with Mr. Wiens' guide territory and that are outside of Mr. Browne's historical range tenure area.

In support of those submissions, three assistant guide outfitters, Dan Leonard, Kenneth Clarke and Larry Warren, gave evidence.

Mr. Leonard testified that he has been employed by Mr. Wiens every year since 1986, with the exception of 2000 and 2001. Mr. Leonard advised that he has guided hunters into Mr. Wiens' guide area north of the Alaska Highway for many years. During those many trips into that area, he has never encountered any transporters with assisted resident hunters. He explained that there are only 4 trails into the area, and all hunters use those trails and go in by horseback, whether they are guided, assisted or unassisted. He surmised that, with the limited access to the area and with common use of the same trails, he would have either seen or seen evidence of assisted hunters in the area if they had been there. The only evidence he has seen of anybody, other than himself or Mr. Wiens' other employees, being in those areas was on two occasions when he found woodpiles that had been disturbed in Mr. Wiens' camp area. Mr. Leonard also advised that he has guided in the Twin Lakes, Henry Creek and Chiska areas, and has similarly never encountered a transporter in any of those areas.

Mr. Clarke testified that he has been employed as an assistant guide outfitter by Mr. Wiens from 1991 to 1995 and from 2004 to 2005. Mr. Clarke advised that, during those years, he has guided hunters into Mr. Wiens' guide area north of the Alaska Highway and into the disputed areas south of the highway. He advised that he has never encountered either Mr. Browne or Mr. Andrews. He further stated that he has never encountered any other hunters or seen evidence of horse traffic north of the highway.

Mr. Warren testified that he was employed by Mr. Wiens as an assistant guide outfitter in 1987, 1988, 1995 and 1998. Mr. Warren is currently a guide outfitter

and owns the guide territory adjacent to and directly to the south of Mr. Wiens' guide area. Mr. Warren advised that he did not see any assisted or unassisted resident hunters when he worked north of the Alaska Highway in 1987. He did see both assisted and unassisted resident hunters in the areas south of the highway. In particular, he saw Mr. Browne with assisted hunters in the Maternity Mountain area.

In support of his submissions, Mr. Wiens also provided a copy of a map showing the geographic boundaries of the transporter territories and the grazing tenures held by Mr. Browne and Mr. Andrews. According to that map, the grazing tenures cover approximately half of the transporter territories.

Mr. Wiens also provided copies of two draft range use plans dated January 1, 1998, for Mr. Browne's tenures in the Dunedin Range Unit and the Tetsa Range Unit. A cover letter accompanying the draft plans indicates that the then Ministry of Forests sent the draft plans to Mr. Wiens for review and comment, because his grazing tenures overlap with Mr. Browne's. The draft plan for Mr. Browne's tenure in the Dunedin Range Unit states that his tenure covers a 16.5-hectare area north of the Alaska Highway, and that his tenure commenced in 1982. The draft plan for Mr. Browne's tenure in the Tetsa Range Unit states that his tenure "includes the entire drainage of the Chlotapecta Creek, the Chischa River drainage from the confluence of the Chischa River and Henry Creek to the mouth of the Chischa River, and the entire drainage of Doan Creek." It also states that the area was used by Mr. Andrews from 1978 to 1986, and has been used by Mr. Browne since 1988. The draft plans indicate that Mr. Browne uses the tenure areas to provide forage for his horses.

The Regional Manager submits that he received information from Mr. Andrews as well as two BC Parks employees, Peter Goetz and Rod Honeyman, that Mr. Andrews had previously used the disputed area that is covered by his Licence. Similarly, the Regional Manager submits that he received information from both Mr. Browne and a Committee member, Rich Petersen, that Mr. Browne had used the disputed area that is covered by his Licence.

The Regional Manager submits that he did not improperly extend the boundaries of the territories. Rather, he limited those boundaries. Specifically, he did not grant Mr. Andrews' request to include an area north of the Alaska Highway in his territory. He also adjusted the boundary between the areas claimed by Mr. Andrews and Mr. Browne south of the Alaska Highway, in order to avoid overlaps in their territories.

The Regional Manager maintains that he did not consider the grazing tenure areas because they are of marginal, if any, relevance, in that they do not assist in determining the extent of the areas in which Mr. Browne or Mr. Andrews had transported clients. The Regional Manager also submits that the draft range use plans were not provided to him prior to these appeal proceedings.

The Regional Manager submits that he decided on the boundaries after receiving considerable input from Mr. Wiens, and after considering the Committee's recommendations.

In support of those submissions, the Regional Manager provided copies of numerous documents, including maps and other documents that Mr. Andrews and Mr. Browne submitted to the Regional Manager and the Committee in support of their applications for the Licences. He also provided copies of correspondence between himself and other Ministry staff regarding the Licence applications, including an email from BC Parks staff confirming that Mr. Andrews has held a park use permit in the Wokkash and MacDonald River areas since 1977.

Mr. Browne and Mr. Andrews submit that they have operated as transporters for approximately 18 and 30 years, respectively, in the areas covered by their Licences. They submit that the Licences did not expand their territories, but rather, limited them. They also note that Mr. Wiens relies on a negative assertion; namely, that he has never or rarely seen either of them in the portions of their Licence territories that overlap with his guide territory. They submit that they provided the Regional Manager and the Committee with adequate proof of their historical use of the disputed areas, and that Mr. Wines' assertion actually establishes that they are able to operate in those areas without crowding one another or affecting either their clients', or Mr. Wiens' clients', wilderness experiences.

In support of those submissions, both Mr. Browne and Mr. Andrews provided letters from numerous clients stating that Mr. Browne and Mr. Andrews had helped them carry in gear or bring out game during hunting trips into various parts of the transporter territories. The letters pertaining to Mr. Andrews' operation refer to hunting trips conducted in the Twin Lakes, Tetsa River, Chischa River, and Henry Creek areas from the 1970's to 2005. The letters pertaining to Mr. Browne's operation refer to hunting trips conducted in the Tetsa River, Doam Creek, Chlotapecta, Tuchodi River, Chischa River, Dunedin River, Snake Creek, and Ram Creek areas from the late 1980's to 2005.

In addition, Mr. Andrews testified that he has operated as a transporter primarily in the area of the Tetsa River and its tributaries. Specifically, he has operated in the following areas: Henry Creek, upper Tetsa River, North Tetsa River, Twin Lakes, Tuchodi Creek, Chlotapecta Creek, Chischa Creek, Dunedin Creek, Gataga, MacDonald River, and Doan Creek. He testified that packing resident hunters is his operation's primary source of revenue, although he also takes clients on photographing and fishing trips. He provided a map showing the locations of the camps he sets up for clients. The map shows 3 "satellite camps" (Moose Camp, Dunedin Camp and Twin Lakes Camp), which include caches of supplies (when in use), temporary outhouses and showers, and sites for tent frames with plywood floors and half walls. From the satellite camps, clients may access several "fly camps" shown on the map. The fly camps are smaller, more remote, and have fewer facilities. All of the camps are usually accessed by horse in the summer and fall, and snow mobile in the winter.

Mr. Andrews also provided copies of his range use plan for the Tetsa and Dunedin Range Units, although he indicated that horses are given supplementary feed when they are in areas without sufficient natural forage.

Mr. Andrews stated that he has held park use permits for approximately 30 years for some of the camps that are within provincial park boundaries. He provided copies of correspondence with Ministry staff regarding his park use permits and his use of various areas for transporting clients. He also stated that he has held an angling guide licence for the Tetsa River, Tetsa Lake, MacDonald River, Dunedin River, and the Wokkpash watershed.

Similarly, Mr. Browne testified that he has operated as a transporter in the following areas: north of the Alaska Highway including Ram Creek, Snake Creek, Dunedin Creek, and Chischa River; and south of the Alaska Highway including Racing River, Tentsi River, MacDonald River, Wokkpash River, Tetsa Creek, Henry Creek, Chlotapecta Creek, Chischa Creek, Tuchodi Creek, Doan Creek, and Falls Creek. Mr. Browne submits that, historically, his territory was actually larger than the area covered by his Licence, because his historic use areas overlapped with some of Mr. Andrews' areas, and Mr. Browne agreed to give up those overlap areas during the licensing process.

Mr. Browne also stated that the boundaries of his grazing tenures in the Tetsa and Dunedin Range Units are not indicative of the extent of his transporter activities, as his horses are given supplementary feed when they are in areas with insufficient natural forage.

The BCWF submits that Mr. Browne and Mr. Andrews received approval of their Transporter Management Plans, which included clear boundaries, from the Committee, in which representatives from the Guide Outfitters Association of British Columbia participated. Additionally, the BCWF submits that Mr. Browne and Mr. Andrews have been operating for sufficient time to qualify for licensing under the "grandfathering" criteria that were developed and approved by the Committee.

The Panel finds that the evidence establishes, on a balance of probabilities, that Mr. Browne and Mr. Andrews have operated as transporters for approximately 18 and 30 years, respectively, in the areas covered by their Licences. In their testimony, Mr. Andrews and Mr. Browne showed a great deal of knowledge about the areas in question, including the nature of the terrain and the locations of trails and camps that they have used for many years. Such knowledge is indicative of a familiarity with those areas that could only be gained by many years of experience transporting clients in and out of the areas.

The Panel also finds that the range use plans for Mr. Browne's and Mr. Andrews' grazing tenures in the Dunedin Range Unit and the Tetsa Range Unit are of limited assistance in determining the extent of their historic use of the areas for transporting clients. The plans indicate where Mr. Browne and Mr. Andrews are permitted to graze their horses, but the extent of their grazing rights is not necessarily indicative of the extent of their transporter activities, given the evidence that horses are given supplementary feed when they are in areas without sufficient natural forage.

Further, the Panel notes that prior to 2005, transporters could pack clients into any area of the province, as it was an unregulated activity. Accordingly, prior to 2005

there were no restrictions on where Mr. Andrews or Mr. Browne could take their clients. As a result, the Panel agrees with the submissions of the Regional Manager, and the two transporters, that the Licences restricted rather than increased their areas of activity.

Further, the Panel accepts the numerous letters that were filed on behalf of Mr. Andrews and Mr. Browne that were testimonials from their clients who were transported into the disputed areas over the past several decades. The Panel accepts these letters as being honest and credible representations of Mr. Andrews' and Mr. Browne's activities. Both Mr. Andrews and Mr. Browne were cross-examined in respect of the letters, and the Panel is satisfied with respect to the authenticity of the letters.

For all of these reasons, the Panel finds that Mr. Browne and Mr. Andrews have been licensed to operate in areas where they historically operated.

2. Whether the Regional Manager erred by failing to give Mr. Wiens an opportunity to be heard, failing to require Mr. Andrews and Mr. Browne to consult with Mr. Wiens, and failing to properly consider Mr. Wiens' rights as a guide outfitter before issuing the Licences.

Mr. Wiens submits that the Regional Manager issued the Licences without properly considering his rights as a guide outfitter, including his right to provide transport for resident hunters in the portions of his guide territory that overlap with the Licence areas. Mr. Wiens maintains that his right to transport resident hunters was confirmed under section 5.02(3) of the *Wildlife Act Commercial Activities Regulation*. Mr. Wiens submits that allowing Mr. Andrews and Mr. Browne to conduct their transporting activities within a portion of his guide territory will adversely affect his rights as a guide outfitter. He argues that he will be unable to utilize the portions of his guide territory that overlap with the "non-historic use" areas under the Licences to the full extent provided by the terms of his guide outfitter licence.

In addition, Mr. Wiens submits that the Regional Manager set the boundaries in the Licences without following the procedure set out in section 3.1 of the Ministry's *Procedure Manual* dated July 7, 2005, titled "Transporter Licence Authorization". That section addresses situations where an applicant's proposed transporter territory overlaps with the territory of an existing licensee, such as another transporter or a guide outfitter. Section 3.1 provides that "the new transporter applicant needs to contact the existing licence holders and negotiate coverage of the area of overlap." Section 3.1 further states that, "if no agreement is reached, the Regional Manager will give preference to the senior licence holder(s)." Mr. Wiens argues that the Regional Manager erred by failing to require Mr. Andrews and Mr. Browne to consult with Mr. Wiens so that they could negotiate boundaries that were mutually acceptable. Mr. Wiens argues that, if the Regional Manager had followed the procedure in the Ministry's *Procedure Manual*, the boundaries of the Licences would have reflected the fact that Mr. Wiens is the senior licence holder, and would have resulted in less overlap with his territory.

Moreover, Mr. Wiens notes that procedures 10.2 and 10.3 in the "Management Plan Form" in Appendix 1 of the *Wildlife Act Commercial Activities Regulation*, which sets out the application form for a transporter licence, require applicants for transporter licences to contact existing guide outfitters if their territory overlaps with the transporter's operation, and to work out agreements with the identified guide(s).

Finally, Mr. Wiens submits that the Regional Manager failed to consider the effects of the Licences on unassisted resident hunters, as well as wildlife populations, in the areas in question. Specifically, he expressed concern about the impact of additional resident hunter activity on the stone sheep population in the Twin Lakes areas and along the North Tetsa tributary.

Larry Warren, a guide outfitter, who holds the guide area adjacent to and directly south of Mr. Wiens' guide area, also gave evidence respecting the consultation process. He testified that he had not been consulted with respect to Mr. Browne's transporter licence in spite of the fact that Mr. Browne's territory overlapped Mr. Warren's area. Mr. Warren did advise that he bought the guide area in 2005 and that the previous owner of the area may have been consulted in respect of the overlap.

The Regional Manager submits that Mr. Wiens had ample notice of the applications for the Licences, and had several opportunities to be heard before the Licences were issued. Moreover, the Regional Manager argues that he requested and considered information from Mr. Wiens. In particular, the Regional Manager submits that, in an email sent on February 2, 2005, he asked Mr. Wiens to describe his resident transporter activities. The Regional Manager maintains that he fully considered Mr. Wiens oral responses to that email, and his responses in a letter dated March 15, 2005. The Regional Manager argues that Mr. Wiens did not assert or provide any specifics about transporting resident hunters, so there was little information in that regard for the Regional Manager to consider.

Regarding the areas of overlap, the Regional Manager maintains Mr. Browne's and Mr. Andrews' operations have overlapped with those of Mr. Wiens for many years, and while minimizing overlap and potential conflict is a goal of the licensing process, zero interaction is not a requirement.

With regard to the requirement in the transporter licence application form for transporter licence applicants to consult with, and reach agreements with, a guide outfitter whose territory overlaps with their operations, the Regional Manager submits that section 28(1) of the *Interpretation Act* states that forms do not have to be followed "slavishly." That section states as follows:

- 28** (1) If a form is prescribed by or under an enactment, deviations from it not affecting the substance or calculated to mislead, do not invalidate the form used.

The Regional Manager submits that the substance of the *Wildlife Act Commercial Activities Regulation* does not impose requirements on applicants for transporter licences to meet with neighbouring guide outfitters. Additionally, the Regional

Manager submits that he did give preference to Mr. Wiens' interests, as required by the Ministry's policy in section 3.1 of the *Procedure Manual*, by including in Schedules "A" of the Licences numerous conditions that are designed to accommodate Mr. Wiens' interests and concerns.

Regarding potential impacts on wildlife, the Regional Manager submits that he requested and considered harvest information from Mr. Wiens as well as Mr. Browne and Mr. Andrews, and he considered the potential effects of the Licences on wildlife populations.

Finally, regarding resident hunters' interests, the Regional Manager submits that the Committee included two representatives of the BCWF, and the Committee process involved much discussion and consideration of the potential impacts of the Licences on unassisted resident hunters.

In support of those submissions, the Regional Manager provided copies of various emails and other correspondence with Mr. Wiens prior to the issuance of the Licences.

Mr. Andrews and Mr. Browne submit that Mr. Wiens was properly consulted during the process of considering the Licence applications. They submit that he or his representative from the Guide Outfitters Association of British Columbia had ample opportunity to provide input to the Committee and the Regional Manager. They submit that there is no evidence that the Regional Manager was anything but thorough, fair and judicious in deciding to issue the Licences. They also submit that Mr. Wiens provided virtually no evidence to the Regional Manager or the Board regarding his alleged transporting (as opposed to guiding) of resident hunters, despite the fact that he has always had the right to transport resident hunters. They also submit that he provided no evidence to support his allegations that Mr. Browne's and Mr. Andrews' transporter operations have negative impacts on his operations and on wildlife populations in the disputed areas.

Mr. Andrews and Mr. Browne acknowledge that they did not consult with Mr. Wiens regarding their applications for the Licences, but they maintain that this was because of the "acerbic" relationship between them and Mr. Wiens.

The BCWF submits that Mr. Wiens was adequately represented in the decision making process that resulted in the issuance of the Licences. The BCWF notes that Mr. Wiens, or his representative from the Guide Outfitters Association of British Columbia, participated in the Committee process that recommended the boundaries set out in the Licences, and recommended approval of the Transporter Management Plans that were submitted by Mr. Andrews and Mr. Browne as part of the application process.

The BCWF further submits that there is no evidence that Mr. Andrews' and Mr. Browne's transporting operations have negatively affected Mr. Wiens' guiding and transporting business. In addition, the BCWF maintains that the need for licensed transporters exists because resident hunters' demand for transporting services was not adequately served by guide outfitters. In this regard, the BCWF argues that the

transporting services provided by guide outfitters are generally much more expensive than the services provided by transporters, and guides tend to serve wealthy American or European clients, while transporters tend to serve resident hunters who want more basic and less expensive services.

The Panel finds that the Regional Manager gave Mr. Wiens several opportunities to make submissions before the Licences were issued. In addition, the Panel finds that the Regional Manager properly considered Mr. Wiens' submissions and his rights as a guide outfitter before he decided to issue the Licences.

Specifically, the evidence establishes that Mr. Wiens had notice of the applications for the Licences, and had several opportunities to provide submissions to the Regional Manager before the Licences were issued. Additionally, the Panel finds that Mr. Wiens' interests were heard and considered in the Committee's process of making recommendations on the Licence applications, either through his personal involvement or the involvement of representatives of the Guide Outfitters Association of British Columbia.

Moreover, the Panel finds that, although Mr. Wiens has provided little information regarding the extent or amount of his transporting activities (as opposed to guiding activities), or how his business would be harmed by the issuance of the Licences, the Regional Manager considered and took steps to address Mr. Wiens' rights and interests as a guide outfitter. The Panel finds that the conditions he included in Schedules "A" of the respective Licences show that he considered Mr. Wiens' rights and concerns, and attempted to address them. In particular, the Panel finds that the Regional Manager addressed Mr. Wiens' concerns by:

- denying Mr. Andrews' request to transport in the area north of the Alaska Highway;
- requiring Mr. Andrews to dismantle his permanent camp at Twin Lakes;
- limiting the number of hunters that Mr. Andrews could transport;
- requiring Mr. Browne to move an existing camp;
- requiring Mr. Browne to not locate camps within 2 kms of Mr. Wiens' camps; and
- limiting the number of hunters that Mr. Browne could transport, especially in the area north of the Alaska Highway.

Consequently, the Panel finds that, although the Regional Manager did not give Mr. Wiens everything that he had requested when the Regional Manager set the boundaries for the Licences, he gave Mr. Wiens' interests primary consideration while attempting to balance the valid interests of Mr. Browne and Mr. Andrews as transporters who have operated in their Licence areas for decades, as recommended by section 3.1 of the Ministry's *Procedure Manual*. The Panel finds that the boundaries of the Licences and the conditions in Schedules "A" reflect the

fact that Mr. Wiens is a senior licence holder. Mr. Andrews and Mr. Browne received smaller territories than either of them had requested, and must operate within certain restrictions in terms of the numbers of hunters they can transport and where they can establish camps.

In addition, the Panel is satisfied that the Regional Manager considered the potential effects of the Licences on wildlife populations, as well as the potential impacts on unassisted resident hunters. The Panel notes that Mr. Andrews and Mr. Browne have operated in these areas for many years, and there is no evidence that their operations have had an adverse effect on wildlife. In addition, the evidence before the Panel is that wildlife populations in the area are healthy, with the possible exception of mountain sheep, which are being monitored by the Ministry, due to concerns about declining numbers.

Finally, regarding the argument that the Regional Manager erred by not requiring Mr. Browne and Mr. Andrews to contact and negotiate agreements with Mr. Wiens regarding the areas of overlap, the Panel notes that the Ministry's *Procedure Manual* contains policies and recommended procedures, not legally binding requirements. In addition, the Panel notes that the rules of statutory interpretation indicate that materials set out in appendices or schedules that are part of a statute may or may not be part of the text of the law, depending on the terms of the statute. As stated at pages 279-281 of *Driedger on the Construction of Statutes* (3rd edition, 1994, R. Sullivan ed.):

The legal status of scheduled materials and their relation to the statute must be determined in light of any provisions in the statute relating expressly or by implication to the statute. Two questions must be answered. First, are the scheduled materials incorporated into the text of the Act? Second, if the materials are not incorporated into the Act, are they nonetheless given the force of law?

...

Legal documents or instruments set out in a schedule may be relied on in interpreting the Act, even though they are not incorporated into the text of the Act. However, in the event of a conflict between the Act and the materials in an unincorporated schedule, the Act prevails.

In this regard, the Panel notes that section 5.03(1)(a)(iv) of the *Wildlife Act Commercial Activities Regulation* requires an applicant for a transporter licence to submit "a transporter licence application and management plan, in the form and with the information required by the instructions set out in Appendix 1...". This suggests that the form in Appendix 1 is incorporated into that regulation. However, section 15 of the *Wildlife Act* states as follows:

Issue of licences

- 15 (1) The director, or a person authorized by the director, may issue and authorize the issue of licences in the form, with the content and valid for the term the director, or a person authorized by the director, specifies.
- (2) Applications for licences must be made in the manner and form required by the director, or a person authorized by the director.

[underlining added]

Thus, section 5.03(1)(a)(iv) of the *Wildlife Act Commercial Activities Regulation* conflicts with section 15 of the *Wildlife Act* regarding the form and manner of transporter licence applications. The former requires applications to be in the form and with the information required in Appendix 1 of that regulation, whereas the latter expressly states that applications “must” be made in the manner and form required by the Director or his/her delegate. In addition, there is no indication that the form in Appendix 1 of the *Wildlife Act Commercial Activities Regulation* is incorporated into the *Wildlife Act*. Specifically, section 15 of the *Wildlife Act* does not require applications for licences to be made in the “prescribed” manner and form.

As stated above in *Driedger on the Construction of Statutes*, in the event of a conflict between the Act and the materials in an unincorporated schedule, the Act prevails. Therefore, the Panel finds that the requirements in section 15 of the *Wildlife Act* prevail over the requirements in Appendix 1 of the *Wildlife Act Commercial Activities Regulation*. The Panel finds, therefore, that it was ultimately the Regional Manager, as the Director’s delegate, that determined the proper manner and form of the transporter licence applications submitted by Mr. Andrews and Mr. Browne. The application form set out in Appendix 1 of the *Wildlife Act Commercial Activities Regulation* is not binding, and therefore, the requirement in that form for Mr. Andrews and Mr. Browne to consult with Mr. Wiens is not binding.

Moreover, the Panel notes that neither section 3.1 of the Ministry’s *Procedure Manual* nor the licence application form in Appendix 1 of the *Wildlife Act Commercial Activities Regulation* require the Regional Manager to ensure that applicants consult and negotiate with guide outfitters. The requirement is for applicants to contact and attempt to reach agreements with guide outfitters, and not for the Regional Manager to take steps to make sure that consultation occurs and agreements are reached. In addition, the Panel notes that the licence application form expressly states that, “A final decision will be made by the Director as to boundaries for transporter areas.” This indicates that a final decision regarding the applicant’s transporter territory boundaries will be made by the Director or, as in this case, his delegate, regardless of whether the applicant has reached an agreement with the guide. Thus, while such agreements may have been helpful to the Regional Manager, the Regional Manager did not err at law by failing to require Mr. Browne and Mr. Andrews to consult with Mr. Wiens.

Finally, the Panel is satisfied that the Regional Manager was aware of the poor relationship that existed and continues to exist between Mr. Wiens and both Mr. Browne and Mr. Andrews. These are relationships that have suffered from many years of ill feeling. Under such circumstances, no amount of consultation between these parties could reasonably be expected to result in an amicable sharing of the guiding and transporting areas under consideration. Accordingly, the Regional Manager took on the role of a mediary to ensure that all parties were adequately consulted as part of the licensing process. The Panel finds that the Regional Manager met the pith and substance requirement of the *Regulation* and the *Procedure Manual* when carrying out the consultation process on behalf of Mr. Andrews and Mr. Browne. The Panel finds that the resulting compromise in boundary allocation would not have been improved, nor would it have been replaced, by an agreement between these parties. Such an agreement quite simply was not reasonably available.

Accordingly, the Panel finds that the Regional Manager gave Mr. Wiens an adequate opportunity to be heard, and properly considered Mr. Wiens' rights as a guide outfitter, before issuing the Licences. In addition, the Panel finds that the Regional Manager was not legally obligated to require Mr. Andrews and Mr. Browne to consult with, or reach agreements with, Mr. Wiens.

3. Whether the Regional Manager failed to provide Mr. Wiens with written reasons for his decisions, as required by section 101 of the *Wildlife Act*.

Mr. Wiens submits that the Regional Manager failed to provide him with written reasons for his decisions to issue the Licences, contrary to section 101 of the *Wildlife Act*. In particular, Mr. Wiens submits that the Regional Manager failed to explain why he allegedly ignored Mr. Wiens' submissions regarding historical use of the disputed areas, and instead chose to largely accept the information submitted by Mr. Andrews and Mr. Browne.

The Regional Manager submits that he notified Mr. Wiens of the Licence area boundaries by a letter dated June 24, 2005. He further submits that, in a letter sent via email on June 22, 2005, he notified Dale Drown, Mr. Wiens' representative, of the Committee's recommendations regarding the boundaries and the issuance of the Licences. The Regional Manager argues that, to the degree that communications with Mr. Wiens fell short of the statutory requirement for written reasons, there was no unfairness and the appeal proceedings can cure any defect.

Mr. Andrews and Mr. Browne submit that the legislative directions have been followed overall, and there has been no breach of the rules of natural justice.

The BCWF did not address this issue.

The Panel notes that sections 101(1) and (2) of the *Wildlife Act* states that the Regional Manager "must" give written reasons for a decision that affects "a licence, permit... or guide outfitter's certificate", and that notice of the decision must be given to affected persons. The Panel finds that Mr. Wiens is a person affected by

the decisions to issue the Licences, and was given written notice of the Committee's recommendations to issue the Licences and the boundaries of the transporter territories. The Panel is satisfied that the Regional Manager's notice provided Mr. Wiens with his written reasons for his decisions as required by section 101 of the *Wildlife Act*.

However, in the event that such notice is not sufficient, the Panel also notes that section 101.1 of the *Wildlife Act* states that the Board may conduct an appeal "by way of a new hearing." The present appeals have been conducted as new hearings of the matters, in which the parties were given the full opportunity to present new evidence, make submissions, call witnesses, cross-examine witnesses, and respond to the other parties' submissions. Consequently, these appeal proceedings before the Board have cured any procedural defect that may have occurred in the proceedings before the Regional Manager.

APPLICATIONS FOR COSTS

Mr. Browne and Mr. Andrews submit that Mr. Wiens' appeals are frivolous and vexatious, and are meant to inflict great stress and financial burdens upon them. Mr. Browne and Mr. Andrews submit that Mr. Wiens' goal is to restrict them and resident hunters in their legitimate commercial activities, particularly in sheep hunting areas. They submit that the appeal proceedings have cost them a considerable amount of money in legal fees, lost time, and duplicated efforts to defend their Licences.

Mr. Wiens made no submissions on the costs applications.

The Regional Manager supported the applications for costs.

The BCWF did not address the applications for costs.

The Board is authorized under section 95(2)(a) of the *Environmental Management Act* to order a party to pay "all or part of the costs of another party in connection with the appeal, as determined by the appeal board". The Board's policy, as stated at page 40 of its *Procedure Manual*, is to award costs only in special circumstances, such as where the conduct of a party has been vexatious, frivolous or abusive.

The Panel finds that there are no such special circumstances in this case. While the appeal proceedings may have resulted in costs and stress for Mr. Andrews and Mr. Browne, the Panel finds that there is insufficient evidence to establish that Mr. Wiens' appeals were vexatious. In addition, the Panel finds that Mr. Wiens' appeals were not frivolous. The appeals raised questions of fact and law that required serious consideration by the Panel.

For these reasons, the Panel denies the applications for costs.

DECISION

In making the decision, the Panel has considered all of the evidence before it, whether or not specifically reiterated here.

For the reasons stated above, the Panel confirms the Regional Manager's decisions to issue the Licences. The appeals are dismissed.

Mr. Andrews' and Mr. Browne's applications for costs are denied.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

March 9, 2006