



Province of  
British Columbia

# Environmental Appeal Board

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## DECISION NO. 2006-WIL-001(a)

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

<b>BETWEEN:</b>	Anna Fontana	<b>APPELLANT</b>
<b>AND:</b>	Regional Manager	<b>RESPONDENT</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Cindy Derkaz, Panel Chair	
<b>DATE:</b>	March 10, 2006	
<b>PLACE:</b>	Cranbrook, BC	
<b>APPEARING:</b>	For the Appellant: Anna Fontana For the Respondent: Wayne Stetski	

## APPEAL

Anna Fontana appeals the January 20, 2006 decision of Wayne L. Stetski, Regional Manager, Environmental Stewardship (the "Regional Manager"), Kootenay Region, Ministry of Environment (the "Ministry"). The decision under appeal set Ms. Fontana's guide outfitter quota for grizzly bear at one bear for the April 1 to June 5, 2006 hunting season.

The Environmental Appeal Board has the authority to hear this appeal pursuant to section 93 of the *Environmental Management Act* and section 101.1 of the *Wildlife Act*. Section 101.1(5) of the *Wildlife Act* provides that the 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.

Ms. Fontana requests that her 2006 quota for grizzly bear be increased to two bears.

## BACKGROUND

Ms. Fontana is a licensed guide outfitter operating in the Elk Valley in the East Kootenay Region of southeast British Columbia. Her guide outfitter territory is in the vicinity of the headwaters of the Elk River and has an area of 705 km<sup>2</sup>. It is bounded on the east by Alberta's Peter Lougheed Provincial Park and is not

adjacent to any other guide outfitter territories in British Columbia. Ms. Fontana estimates that the next closest guide outfitter territory is on the Bull River, approximately "20 linear miles away."

Ms. Fontana guides non-resident hunters on expeditions to hunt big game, including grizzly bear.

Non-residents may not hunt in British Columbia unless accompanied by a licensed guide outfitter. Guide outfitters have the exclusive right to guide non-resident hunters in their territories. Resident hunters holding Limited Entry Hunting authorizations may hunt, without a guide, within a guide outfitter's territory.

To facilitate wildlife management and provide greater certainty to guide outfitters, the Ministry uses three-year allocation periods. A guide outfitter's allocation is his or her share of the total allowable harvest of a game species (in this case, grizzly bear) in the region for the three-year period. The Ministry determines the allowable harvest at the beginning of each three-year allocation period.

Guide outfitters must obtain annual licences under the *Wildlife Act*. Regional managers have the discretion to attach a quota as a condition of a guide outfitter licence and may vary the quota for a subsequent licence year. A quota is the total number of the game species that a guide outfitter's clients may kill in the guide's territory during the licence year or part of it.

Where a guide outfitter's allocation would provide him or her with "minimal opportunity" (i.e. a quota so small that there is no reasonable expectation that it will be fulfilled), a regional manager may use an administrative guideline. An administrative guideline recognizes that some guide outfitters will be inactive or unsuccessful in achieving their quota during the allocation period and provides the Ministry with more flexibility to allow guide outfitters to meet their allocation as a group. An administrative guideline sets the maximum number of a big game species that a guide outfitter's clients may kill over the three-year allocation period. It is based on the non-resident share of the allowable harvest and the past non-resident success rate in the region. As will be discussed below, the administrative guideline that the Regional Manager used as part of his decision-making process to issue Ms. Fontana's annual quota, was 4.4 (hard rounded to four) grizzly bears.

The Ministry's Procedure Manual, Volume 4, section 7.04.04, sets out the Grizzly Bear Harvest Management Procedure (the "Procedure") for British Columbia, effective February 4, 2004. Its stated purpose is to "identify the procedures and standards to be followed when managing grizzly bear harvest." Regional managers are guided by the Procedure when exercising their discretion to issue three-year allocations and one-year quotas to guide outfitters.

For the purposes of management and conservation of grizzly bears, the Ministry has identified areas that define individual grizzly bear populations. Ms. Fontana's guide outfitter territory lies within the South Rockies Grizzly Bear Population Unit ("South Rockies GBPU"). The South Rockies GBPU is comprised of four management units,

one of which is divided into two subunits. Ms. Fontana's guide outfitter territory lies within subunit 4-23B.

On May 5, 2004, the Regional Manager wrote to Robert Fontana<sup>1</sup> stating that his three-year allocation for grizzly bear for 2004-2006 (inclusive) is 1.9 bears, with a quota for 2004 of two bears. During the 2004 hunting season, non-resident clients killed one male grizzly bear.

On February 22, 2005, the Regional Manager wrote to Ms. Fontana stating that her three-year allocation for grizzly bear for 2004-2006 is 1.8 bears with a quota for 2005 of two bears. There was no explanation for the change in the three-year allocation from 1.9 to 1.8 bears. Again, non-resident clients killed one male grizzly bear.

The Regional Manager's decisions with respect to the 2004-2006 allocation and the 2004 and 2005 quota were not appealed.

On January 20, 2006, the Regional Manager wrote to Ms. Fontana assigning her a quota of one grizzly bear for 2006. Ms. Fontana appeals the Regional Manager's decision on the following grounds:

- the Ministry has underestimated the grizzly bear population in her guide outfitter territory;
- her 2004-2006 allocation for grizzly bear was not fair; and
- the Ministry constantly alters the annual allowable harvest<sup>2</sup> for grizzly bear without consistent or supportable reasons.

Ms. Fontana asks that her grizzly bear quota for the 2006 season be increased from one bear to two bears.

## **ISSUE**

The issue before the Panel is whether Ms. Fontana's grizzly bear quota for 2006 should be increased to two bears.

## **RELEVANT LEGISLATION**

The Regional Manager's authority to issue a guide outfitter licence and attach a quota as a condition of that licence is found in the *Wildlife Act*, as follows:

### **Definitions and interpretation**

**1** (1) In this Act: ...

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<sup>1</sup> Robert Fontana, Ms. Fontana's late husband, was the licensed guide outfitter at the time. Ms. Fontana is now the owner-operator of the guiding business and is a licensed guide outfitter.

<sup>2</sup> The Procedure defines "harvest" as "grizzly bears taken under Limited Entry Hunting, Guide Outfitter quotas, and entitlements or allocations to First Nations."

**"quota"** means

- (a) the total number of a game species, or
- (b) the total number of a type of game species

specified by the regional manager that the clients or a class of client of a guide outfitter may kill in the guide outfitter's guiding area, or part of it, during a licence year, or part of it, but does not include an angler day quota;

### **Issue of guide outfitter licence**

**51** (1) A regional manager may issue a guide outfitter licence to a person who

- (a) is a citizen of Canada or a permanent resident of Canada,
- (b) has held assistant guide licences for 24 months and actively guided during that time, and
- (c) has public liability insurance and other qualifications prescribed by regulation.

(2) A guide outfitter licence authorizes the holder to guide persons to hunt only for those species of game and in the area described in the licence.

### **Quotas**

**60** (1) If a regional manager issues a guide outfitter licence, the regional manager may attach a quota as a condition of the licence and may vary the quota for a subsequent licence year.

(2) If a guide outfitter has a quota assigned as a condition of his or her guide outfitter licence and allows his or her clients to kill game to the extent that the number killed exceeds the quota assigned to the guide outfitter, the regional manager may reduce or take away his or her quota for a period and may take action under section 61.

## **DISCUSSION AND ANALYSIS**

**Whether Ms. Fontana's grizzly bear quota for 2006 should be increased to two bears.**

### Grizzly Bear Population Estimates

In 2004, the Ministry estimated that there were 304 grizzly bears in the South Rockies GBPU, 47 of which were estimated to be within Ms. Fontana's guide outfitter territory.

Ms. Fontana submits that the Ministry's estimate of the grizzly bear population in her guide outfitter territory is low. She testified about the numerous and consistent grizzly bear sightings in her territory, which she acknowledges are not scientific evidence.

From 1985 to 2005, Robert Fontana, and now Ms. Fontana, and their assistant guides, have been recording field observations of grizzly bears in their territory during the spring hunt.<sup>3</sup> Their observations have been compiled in a spreadsheet that tabulates total grizzly bear sightings, the number of individual bears sighted (some bears may have been observed on multiple occasions), the sex of the bears, the number of females with cubs, the age of the cubs (newborn, yearlings, two years) and an average number of new bears observed per day. Ms. Fontana testified that she spends over six months a year in her guide outfitter territory and has a good opportunity to identify individual bears by colour and by the cubs accompanying the females.

According to the spreadsheet, since 1989 individual bear sightings range from a low of 30 bears in 1995 (12 field days) to a high of 100 bears in 1992 (27 field days). Ms. Fontana stated that the field observations are from only part of her territory, being the area between the road at the entrance to her territory and the headwaters of the Elk River.

It is Ms. Fontana's opinion that the grizzly bear population in her territory has increased since the 1980's and has stabilized in recent years. She stated that her territory provides excellent grizzly bear habitat and noted that grizzly bears from Alberta (identifiable because they have been "collared") are being observed in her territory.

Ms. Fontana stated that, to the best of her knowledge, the Ministry has never made any "on the ground" observations in her part of the Elk Valley.

The Regional Manager submits that the estimate of 47 grizzly bears in Ms. Fontana's guide outfitter territory is reasonable.

The Procedure provides:

3. Grizzly Bear Population Units and Population Estimates

3.4 Population estimates will be based on either a multiple regression or related approach of estimating grizzly bear density based on known densities from other areas where possible. Where such an approach is considered inappropriate either a habitat-based method using habitat capability and a series of step-downs based on human impacts or direct inventory results may be applied.

According to the multiple regression model used by the Ministry since 2004 to estimate grizzly bear populations in most regions of the province, there is an estimated population of 199 bears in the South Rockies GBPU with 65 bears in subunit 4-23B. Based on this model there are an estimated 21 bears in Ms. Fontana's territory. However, the Ministry considers this estimate to be too low.

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<sup>3</sup> In the Kootenay Region there is only a spring hunt for grizzly bear, commencing April 1 and ending June 5. Ms. Fontana stated that her guiding season usually starts on May 15<sup>th</sup> or 16<sup>th</sup>.

Since 2001, the Ministry has used the habitat-based Fuhr-Demarchi<sup>4</sup> method, one of the alternate approaches referred to in Procedure 3.4, for estimating grizzly bear populations in the South Rockies GBPU. According to this method, there are an estimated 304 grizzly bears in the South Rockies GBPU with 60 bears in subunit 4-23B. The density of the grizzly bear population in subunit 4-23B is estimated to be 66 bears per 1000 km<sup>2</sup>. Ms. Fontana's guide outfitter territory is 705 km<sup>2</sup> and therefore has an estimated grizzly bear population of 47 bears.

In 1996 and 1997, two studies were conducted using DNA samples to estimate grizzly bear populations in the Elk Valley. The DNA based estimates range from 39 to 80 bears per 1000 km<sup>2</sup> resulting in a population estimate of between 26 and 56 bears in Ms. Fontana's territory.

At all times relevant to this appeal, Guy Woods was the Ministry's Senior Wildlife Biologist responsible for managing the grizzly bear harvest in the Kootenay Region. Mr. Woods testified that the estimate of 47 grizzly bears in Ms. Fontana's territory is at the high end of the range of population estimates.

Mr. Woods stated that a male grizzly bear's home range could be between 500 and 800 km<sup>2</sup>. Grizzly bear populations are not static within a GBPU. Given that grizzly bears have very large ranges, the same bear could be observed and counted as part of a population in a number of areas.

The Panel accepts Ms. Fontana's evidence that her guide territory is excellent grizzly bear habitat and that the Ministry's estimate of the grizzly bear population may be low for her territory. However, the Panel finds that no scientific evidence was presented at the hearing to substantiate a higher population estimate.

The Panel has considered that in determining the population estimate, the Regional Manager chose the most liberal method available under the Procedure. An estimate by definition is an "approximate judgment" of a number. The Panel finds that the Regional Manager used an appropriate method to determine an approximate judgment of the grizzly bear population in Ms. Fontana's guide territory. The Panel finds that the Regional Manager's estimate of 47 grizzly bears in Ms. Fontana's territory is reasonable in the circumstances.

#### Administrative Guideline, Allocation and Quota

Ms. Fontana submits that her 2004 to 2006 "allocation of four (4) [grizzly bears] has not been fairly issued" [emphasis added], and that unless her 2006 quota is increased to two bears, she will not have the opportunity to harvest her three-year allocation.

Underlying Ms. Fontana's submission is the assumption that the administrative guideline used in determining her quota for 2004 and 2005, is her *allocation* of the total allowable harvest for the three-year allocation period. Ms. Fontana submits

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<sup>4</sup> The Fuhr-Demarchi method provides population estimates based on the quality of the grizzly bear habitat with some "step-downs" for roads, corridors, hunting pressures and human impacts that derogate from habitat capability.

that once a three-year allocation is set for a guide-outfitter, the Regional Manager "must adhere to the original decision unless an extreme conservation issue can be identified and verified."

Ms. Fontana also submits that the annual allowable harvest for grizzly bears is constantly altered for no consistent reason. She referred the Panel to a number of studies that she argues support an increase in the annual mortality rate for male and female grizzly bears without affecting the sustainability of the population. Ms. Fontana submits that the Ministry's management of the grizzly bear harvest is subjective and too conservative.

Ms. Fontana submits that an increase in her 2006 quota to two bears will not negatively affect the grizzly bear population. She stated that she would not have initiated an appeal to increase her quota, if she believed that there was any conservation issue with respect to grizzly bears in her territory.

Mr. Woods testified about the Ministry's process to determine guide outfitter grizzly bear allocations, administrative guidelines and quotas in the Kootenay Region.

In his statement of points, the Regional Manager states that the Ministry identified a three-year allocation of 2.17 grizzly bears for Ms. Fontana's territory. This figure is rounded to 2.2 grizzly bears in the spreadsheet prepared by Mr. Woods to recommend the 2006 quotas for guide outfitters in the Kootenay Region. The Panel notes that in his letter of May 5, 2004, the Regional Manager set the three-year allocation for 2004-2006 at 1.9 grizzly bears. There was no explanation of this apparent discrepancy, however the Panel finds that it does not affect the outcome of this appeal.

As stated above, where a regional manager believes that the calculated allocation for a guide outfitter would provide the guide outfitter with an annual quota so small that there is no reasonable expectation that it will be fulfilled, the regional manager may apply the administrative guideline issued by Ray Halladay, Acting Director, of the Wildlife Branch, on March 31, 1992.

The administrative guideline takes into account the historical success rate of non-resident hunters in the region. In the Kootenay Region, the historical success rate of non-resident hunters for grizzly bears is 50%. In other words, non-resident hunters are, on average, successful in killing a grizzly bear one time in every two opportunities. The administrative guideline provides a regional manager with the discretion to offer guide outfitters more hunting opportunities for non-resident clients over a multi-year allocation period with the goal that, as a group, guide outfitters will fulfill their three-year allocations.

In the present case, Ms. Fontana's three-year allocation is, at most, 2.2 bears or .73 of a bear each year. Clearly, her allocation provides minimal opportunity. Given the 50% success rate of non-resident hunters in the region, the Regional Manager calculated Ms. Fontana's three-year administrative guideline to be four grizzly bears (i.e. allocation of  $2.2 \times 2$  hunting opportunities for each bear = 4.4 bears, rounded to 4 bears.)

In exercising his discretion under section 60(1) of the *Wildlife Act* to set a guide outfitter's annual quota, the Regional Manager considers a guide outfitter's three-year allocation and his or her administrative guideline, together with the total known human caused mortality of grizzly bears to that point in the allocation period.

The Regional Manager set Ms. Fontana's quota at two grizzly bears for each of 2004 and 2005. The Panel notes that Ms. Fontana's clients had a success rate of 50% each year: one male grizzly bear was killed each year.

David Beranek, Past President of the Southern Guides and Outfitters Association and Chair of the Kootenay Grizzly Bear Committee, appeared as a witness for Ms. Fontana. Mr. Beranek provided a detailed, cogent explanation of the complex and cumbersome methodology used to distribute a small number of grizzly bears available to be killed by hunters over a large geographical area. There are a number of competing interests to be balanced: economic interests of the guiding industry, opportunities for resident hunters and conservation of a healthy and sustainable grizzly bear population.

According to Mr. Beranek's calculations the three-year administrative guideline for Ms. Fontana's territory should have been 4.8 grizzly bears (rounded to 5 bears).

Mr. Woods testified that regional annual allowable harvest rate is 3.6% of the grizzly bear population. However, the Ministry decided to maintain a 4% annual allowable harvest rate in the South Rockies GBPU. The Ministry believes that this rate is sustainable based upon the historical numbers of human caused mortality of grizzly bears in the area.

Mr. Woods stated that the three-year harvest goal for the South Rockies GBPU, using the 4% annual allowable harvest rate, is 37 bears. The total harvest to the end of 2005 has been 36 bears, 14 of which were females. The Ministry's three-year female harvest goal is 30% of the total harvest or  $37 \text{ bears} \times 30\% = 11$  female bears.

There are ten guide outfitters in the South Rockies GBPU with a collective three-year harvest goal of nine bears. In 2004 and 2005, six of the ten guides harvested a total of eight bears (four males and four females). Ms. Fontana's clients killed two of the eight bears. Mr. Woods stated that the Ministry has issued quotas of one bear to each of five guide outfitters in the South Rockies GBPU for 2006, and expects that two or more bears will be harvested in 2006.

Mr. Woods testified that the non-hunting known female grizzly bear kill was high in 2004 and 2005 and he expects that there will be more non-hunting human caused mortalities in 2006.

Based on the female harvest in the South Rockies GBPU, previous Ministry policy would dictate that the area be closed to hunting. However, in 2005 a new more flexible system of setting harvest goals was developed through a series of six meetings with the Southern Guides and Outfitters Association and the Kootenay Grizzly Bear Committee. The new system, which has not yet received final



approval at senior levels of the Ministry, uses yellow and red flags to set three-year harvest goals.

Mr. Woods testified that he integrated the new more liberal "flag" system with the existing process to recommend the guide outfitter quotas for 2006.

Both Ms. Fontana and Mr. Beranek noted that one guide outfitter in the South Rockies GBPU has been given a quota of one bear for 2006 even though he had a three-year allocation of only one bear and harvested one male grizzly in 2005. Mr. Woods stated that this appears to have been a mistake.

The Regional Manager submits that the three-year allocation of grizzly bears to Ms. Fontana was calculated correctly and that the administrative guideline has been properly applied. He submits that his decision to set Ms. Fontana's grizzly bear quota for 2006 at one bear was reasonable and fair.

In *Robert Fontana et al. v. Regional Wildlife Manager* (Appeal No. 98-WIL-09 and 98-WIL-13 through 98-WIL-17, October 26, 1998) (unreported), the Board considered the proper procedures for calculating administrative guidelines and annual quotas. It stated:

While the Administrative Guideline is defined as the maximum number of a certain big game species the guide outfitter can expect to harvest over the three-year period, it should not be considered a guaranteed three-year quota. If in the second or third year of an allocation period the non-resident allocation could be exceeded if all guides are allowed their full Administrative Guidelines, then quotas would be reduced using the process agreed upon by the guides in the MOU of April 18, 1995. (p. 14) [emphasis added]

The Panel agrees that an administrative guideline should not be considered a guaranteed three-year "quota". The Panel finds that Ms. Fontana is incorrect in her assumption that the administrative guideline of four grizzly bears over three years is her three-year allocation of the allowable harvest.

Section 60(1) of the *Wildlife Act* provides that "a regional manager may attach a quota as a condition of the licence and may vary the quota for a subsequent licence year." [emphasis added] In determining the annual quota, a regional manager considers the three-year allocation, the administrative guideline and the total known human caused mortality of grizzly bears to that point in the allocation period. The Panel finds that it is a guide outfitter's annual licence and quota, not his or her three-year allocation or administrative guideline, which provide the legal authority for non-resident clients to harvest a game species.

The Panel finds that Ms. Fontana's three-year allocation of the allowable harvest is 2.2 bears (according to the Regional Manager's statement of points and Mr. Wood's testimony), or 1.9 bears (as set out in the May 5, 2004 allocation letter), not four bears. The administrative guideline was only one consideration used to set Ms. Fontana's annual quota for 2004 and 2005 at two bears for each year. If Ms. Fontana's clients had harvested two grizzly bears in each of the two years, she

would not have exceeded her quota or her administrative guideline, however she would have exceeded her three-year allocation.

Ms. Fontana's clients harvested a total of two grizzly bears in 2004 and 2005, leaving, at most, .2 of a bear under her three-year allocation. She received a quota of one bear for 2006 and, if her clients are successful this year, Ms. Fontana will have exceeded her three-year allocation by .8 of a bear. She will not have exceeded her quota.

The Panel notes, without deciding, that even if Mr. Beranek's calculations of Ms. Fontana's administrative guideline were correct, it would not change her three-year allocation and would not change the Panel's decision in this appeal.

The Panel finds that there is a well-founded concern about the higher than expected human caused grizzly bear mortality, particularly of female bears, in the South Rockies GBPU during first two years of the current allocation period. It is appropriate to adjust guide outfitter quotas for 2006 as part of the strategy to meet the three-year harvest goals.

The Panel finds that the Regional Manager properly exercised his discretion under section 60(1) of the *Wildlife Act* when setting Ms. Fontana's quota for 2006. The Panel finds that the Regional Manager's decision to set her quota at one grizzly bear for 2006 is reasonable and fair in the circumstances.

The Panel has also considered Ms. Fontana's submissions with respect to changes in the annual allowable harvest rate. The Panel finds that it is reasonable and appropriate that annual allowable harvest rates vary over time as new population data, scientific studies and management methodologies become available.

## **DECISION**

In making this decision, the Panel has considered all the evidence and arguments provided, whether or not they have been specifically reiterated in the decision.

For the reasons set out above, the Panel confirms the Regional Manager's decision to set Ms. Fontana's guide outfitter quota at one grizzly bear for 2006.

The appeal is dismissed.

"Cindy Derkaz"

Cindy Derkaz, Member  
Environmental Appeal Board

March 24, 2006