



Province of
British Columbia

Environmental Appeal Board

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DECISION NOS. 2006-WIL-006(a); 007(a); 009(a); 010(a)

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

BETWEEN:	Brian Larsen	APPELLANT																				
AND:	Jason Smith	APPELLANT																				
AND:	John Wallace	APPELLANT																				
AND:	Stephen Kim Sedrovic	APPELLANT																				
AND:	Regional Manager	RESPONDENT																				
AND:	Gary Gow Ned Cooper Luigi Musso ¹ Kelly Laatsch ² Paul Samycia Barry Rogers	THIRD PARTIES																				
BEFORE:	A Panel of the Environmental Appeal Board Cindy Derkaz, Panel Chair																					
DATE:	June 19 and 20, 2006																					
PLACE:	Cranbrook, BC																					
APPEARING:	<table border="0"> <tr> <td>For the Appellants</td> <td></td> </tr> <tr> <td>Brian Larsen:</td> <td>Brian Larsen</td> </tr> <tr> <td>Jason Smith:</td> <td>Jason Smith</td> </tr> <tr> <td>John Wallace:</td> <td>John Wallace and Jeff Chlopan</td> </tr> <tr> <td>Stephen Kim Sedrovic:</td> <td>Stephen Kim Sedrovic</td> </tr> <tr> <td>For the Respondent:</td> <td>Joseph G. McBride, Counsel</td> </tr> <tr> <td>For the Third Parties</td> <td></td> </tr> <tr> <td>Gary Gow</td> <td>Gary Gow</td> </tr> <tr> <td>Ned Cooper:</td> <td>Ned Cooper</td> </tr> <tr> <td>Luigi Musso:</td> <td>Luigi Musso</td> </tr> </table>		For the Appellants		Brian Larsen:	Brian Larsen	Jason Smith:	Jason Smith	John Wallace:	John Wallace and Jeff Chlopan	Stephen Kim Sedrovic:	Stephen Kim Sedrovic	For the Respondent:	Joseph G. McBride, Counsel	For the Third Parties		Gary Gow	Gary Gow	Ned Cooper:	Ned Cooper	Luigi Musso:	Luigi Musso
For the Appellants																						
Brian Larsen:	Brian Larsen																					
Jason Smith:	Jason Smith																					
John Wallace:	John Wallace and Jeff Chlopan																					
Stephen Kim Sedrovic:	Stephen Kim Sedrovic																					
For the Respondent:	Joseph G. McBride, Counsel																					
For the Third Parties																						
Gary Gow	Gary Gow																					
Ned Cooper:	Ned Cooper																					
Luigi Musso:	Luigi Musso																					

¹ Mr. Musso left the hearing at noon on the first day and did not present any evidence or make any submissions.

² Mr. Laatsch participated as a Third Party in the appeal filed by John Wallace.

Kelly Laatsch:	Kelly Laatsch
Paul Samycia:	Paul Samycia
Barry Rogers:	Barry Rogers

APPEALS

Brian Larsen appeals the April 7, 2006 decision of Wayne Stetski, Regional Manager Environmental Stewardship (the "Regional Manager"), Ministry of Environment (the "Ministry"), Kootenay Region, to offer him a ten year allocation of guided angler days³ on classified waters in the Kootenay Region as follows:

- on the Bull River, 28 guided angler days.

Jason Smith appeals the April 7, 2006 decision of the Regional Manager to offer him a ten year allocation of guided angler days on classified waters in the Kootenay Region as follows:

- on the Bull River, 10 guided angler days;
- on Skookumchuck Creek, 4 guided angler days;
- on the St. Mary River, 10 guided angler days.

John Wallace appeals the April 7, 2006 decision of the Regional Manager to offer him a ten year allocation of guided angler days on classified waters in the Kootenay Region as follows:

- on the Bull River, 24 guided angler days;
- on Skookumchuck Creek, 10 guided angler days;
- on the St. Mary River, 20 guided angler days.

Stephen Kim Sedrovic appeals the April 7, 2006 decision of the Regional Manager to offer him a ten year allocation of guided angler days on classified waters in the Kootenay Region as follows:

- on the Bull River, 55 guided angler days;
- on the Elk River, 317 guided angler days;
- on Skookumchuck Creek, 4 guided angler days;
- on the St. Mary River, 14 guided angler days;
- on the Wigwam River, 13 guided angler days.

The Board invited the Appellants and the Regional Manager to participate in a pre-hearing teleconference on June 2, 2006. Mr. Smith, Mr. Sedrovic and the Regional Manager attended the teleconference.

³ Section 1 of the *Wildlife Act* defines "angler day" as follows:

"angler day" is a unit representing one person angling during any part of a day and is used to determine the extent to which a stream, lake or area specified under section 53 may be used for angling, for example, "a limit of 1 000 angler days" means that the total obtained by adding together the number of anglers using the stream, lake or area on each day of a specified period must not exceed 1 000.

Following the teleconference, the Board determined that:

- 1) the four appeals would be heard jointly; and
- 2) the interests of the other licensed angling guides in Kootenay Region, to whom the Regional Manager had offered an allocation of guided angler days in 2006, might be affected by the Board's decision in the appeals and, therefore, they should be offered the opportunity to participate in the hearing.

As a result, the Board invited the other licensed angling guides to participate in the appeals as Third Parties. Gary Gow, Ned Cooper, Luigi Musso, Kelly Laatsch, Paul Samycia and Barry Rogers accepted the Board's invitation and participated in the appeals by either attending the hearing or by providing a written submission, or both.

The Environmental Appeal Board has the authority to hear these appeals under 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 on an appeal, 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.

Each of the Appellants seeks an increase in his allocation of guided angler days on one or more of the classified waters in Kootenay Region.

BACKGROUND

The Bull River, Elk River, St. Mary River, Skookumchuck Creek and Wigwam River are located in the East Kootenay region of southeastern British Columbia. The area is renowned, both nationally and internationally, as a world-class sport fishing destination.

The predominant fish species caught by anglers in the region are Bull Trout, Westslope Cutthroat Trout and, to a lesser extent, Mountain Whitefish.

Over the past two decades there has been a dramatic increase in the number of anglers, both guided and unguided, seeking a quality fishing experience in the region. Anglers, angling guides and residents expressed concerns about overcrowding and the attendant degradation of the fishing experience due to increased pressure on the area's popular rivers. The Ministry also had a concern about the effect of intensive sport fishing on fish stocks.

In spring 2000, the Ministry commenced a review of the freshwater angling guide industry in the province with a view to improving its management of angling guide licences and angling opportunities. In this context, the then Minister of Water, Land and Air Protection (now the Ministry) issued Ministerial Order 190 (the "Ministerial Order") on March 14, 2003, pursuant to section 52(3) of the *Wildlife Act*. The Ministerial Order imposed a moratorium on the issuance of new angling

guide licences for various waters in the Kootenay Region, including the waters at issue in these appeals. The moratorium expired in September 2004.

An information bulletin released by the Ministry concurrently with the Ministerial Order stated that a plan to manage the high angler demand in the Kootenay River watershed would be developed by Ministry staff in consultation with members of the public and interest groups, including resident anglers and angling guides.

The Regional Manager established the East Kootenay Angling Management Plan Ad Hoc Committee in the spring of 2003. In December 2003, the committee released a report titled "Status Report East Kootenay Angling Management Plan". The report recommended that the *Angling and Scientific Collection Regulation*, B.C. Reg. 125/90 (the "*Regulation*"), enacted pursuant to section 53 of the *Wildlife Act*, be amended to designate the waters listed in the Ministerial Order as "classified waters" with a limit on the number of guided angler days available annually for each water.

On February 11, 2005, Schedule A of the *Regulation* was amended to designate the waters listed in the Ministerial Order as "classified waters" and to set the maximum number of guided angler days available annually for each of the classified waters.

In 2005 the Regional Manager issued permits to assign licensed angling guides in the Kootenay Region a one year quota of guided angling days for the licence year ending March 31, 2006.

The Board's decisions in *Randall Smith v. Regional Manager* (Environmental Appeal Board, Appeal No. 2005-WIL-019(a), January 5, 2006)(unreported) and *Gordon Silverthorne v. Regional Manager* (Environmental Appeal Board, Appeal No. 2005-WIL-027(a), January 24, 2006)(unreported) contain detailed discussions of the development of the East Kootenay Angling Management Plan, the Ministry's allocation policy for guided angler days and a regional manager's authority to allocate guided angling days by permit.

On February 24, 2006, the Director, Fish and Wildlife Branch of the Ministry, approved the East Kootenay Angling Management Plan.

By registered letters dated February 15, 2006, the Regional Manager invited all potentially eligible licensed angling guides and assistant angling guides to apply for an allocation of guided angler days on classified waters in the Kootenay Region. The letter advised that the allocation of guided angler days would be valid for a maximum term of 10 years, commencing with the 2006-07 licence year. The applicants were also advised that the Ministry would be using "exactly the same process as last year to allocate days".

The Ministry sent letters to 83 potential applicants and received 39 completed applications, including one from each of the Appellants.

The Regional Manager struck a three-person committee (the "Review Panel") to review the applications and to recommend an allocation of guided angler days for each of the applicants. The members of the Review Panel were Mark Messmer, Senior Economist, Fish and Wildlife Branch (chair), Dick McMaster (representing angling guides), and Tom Protheroe (representing resident anglers). Each of the Review Panel members was selected from outside the Kootenay Region in order to avoid potential conflicts of interest.

The Review Panel reviewed the information provided by the applicants and recommended an allocation for each applicant. In making its recommendations, the Review Panel was guided by the Ministry's "Provincial Guided Angler Day Allocation and Pricing Policy Working Document" (the "Allocation Policy"), dated January 28, 2005.

The Regional Manager, by letter dated April 7, 2006, offered to allocate guided angler days to the applicants, including the Appellants, in accordance with the Review Panel's recommendations.

A brief background to each of the four appeals follows:

Brian Larsen

Mr. Larsen, an oil and gas geologist by profession, began guiding anglers on the Bow River in Alberta in the mid-1990's. In 1999 he purchased a residence in Fernie, BC, and became a permanent resident of British Columbia in 2003 in order to pursue his interest in the guiding business.

Operating under the firm name "Bow River Guiding Company", Mr. Larsen attracts clients from all over North America for guided angling trips on the Elk River and its tributaries in BC, and on waters in southwestern Alberta.

Mr. Larsen was a licensed assistant angling guide in BC from 2002 until March 31, 2006. He worked with a number of licensed angling guides operating on the Elk River and its tributaries in order to provide Bow River Guiding Company clients with an opportunity to fish on both the Elk River and the Wigwam River.

In addition to his angling guide business, Mr. Larsen is the CEO of "Fly Fishing The West", a magazine that promotes tourism through fly fishing in western Canada.

Mr. Larsen's application for guided angler days, dated February 21, 2006, requests "an appropriate allocation" on the Elk, Wigwam and Bull rivers. The Regional Manager offered Mr. Larsen an allocation of 28 guided angler days (0 base days plus 28 growth days)⁴ on the Bull River. The Regional Manager did not offer Mr. Larsen any guided angler days on either the Elk River or the Wigwam River.

Mr. Larsen appeals the Regional Manager's allocation decision on various grounds, including: the East Kootenay Angling Management Plan is not based on sound or appropriate scientific analysis; angling guides did not have an opportunity to participate in the development and implementation of the East Kootenay Angling Management Plan; and Mr. Larsen's history of guiding clients on the Elk Rivers and Wigwam River should have been given consideration in the allocation process.

Mr. Larsen seeks an allocation of 40 guided angler days on the Elk River and 10 days on the Wigwam River.

Jason Smith

⁴ Part 8 of the Allocation Policy establishes the criteria for allocating "base" days according to an angling guide's verified historical use of a classified water and "growth" days, being a portion of the available days that are surplus to the total base days allocated for that water. Part 8 of the Allocation Policy is explained in more detail in the "Discussion and Analysis" section of this decision.

Mr. Smith and his business partner, Bruce Devlin, are co-owners of Kootenay Troutfitters, an angling guide business based in Panorama, BC. They are both licensed angling guides and have been in business since 2003.

Kootenay Troutfitters attracts clients from the nearby resort areas of Fairmount Hot Springs, Panorama Mountain Village, and Radium Hot Springs. It offers guided angling trips on Skookumchuck Creek and on various unclassified waters in the area.

In 2005 the Regional Manager issued a permit to Mr. Smith authorizing the use of 13 guided angler days on Skookumchuck Creek and 3 days on the St. Mary River. Kootenay Troutfitters does not offer guided angling trips on the St. Mary River and does not own drift boats or equipment suitable for such trips. The only classified water that Kootenay Troutfitters uses is Skookumchuck Creek.

In 2006 the Regional Manager offered Mr. Smith the following allocation:

- 0 base days and 10 growth days for a total of 10 guided angler days on the Bull River;
- 0 base days and 4 growth days for a total of 4 guided angler days on Skookumchuck Creek;
- 0 base days and 10 growth days for a total of 10 guided angler days on the St. Mary River.

Mr. Smith appeals the Regional Manager's allocation decision on the grounds that the reduction in his allocation of guided angler days on Skookumchuck Creek from 13 days in 2005 to 4 days in 2006 was unfair and unreasonable. Mr. Smith seeks an allocation of base days on Skookumchuck Creek.

John Wallace

Mr. Wallace and Jeff Chlopan are both licensed angling guides and are partners in Bootleg Mtn. River Adventures based in Kimberley, BC. They offer drift boat angling expeditions down the St. Mary River. Although Bootleg Mtn. River Adventures is a new business, having been established in 2005, the partners have a significant investment in a building, boats, equipment and vehicles.

Mr. Wallace has 8 years of prior experience in the angling guide business as a co-owner of East Kootenay Sporting Adventures with Mike Labach. Mr. Wallace left that guiding business in 1999 to spend more time raising a young family. However, he retained boats and equipment from East Kootenay Sporting Adventures in anticipation of eventually establishing an angling guide business in Kimberley.

In 2005, after making additional submissions to Ministry officials in Victoria, Mr. Wallace received a permit from the Regional Manager for 13 guided angler days on the St. Mary River and 4 guided angler days on Skookumchuck Creek.

In 2006 the Regional Manager offered Mr. Wallace the following allocation:

- 0 base days and 24 growth days for a total of 24 guided angler days on the Bull River;
- 0 base days and 10 growth days for a total of 10 guided angler days on Skookumchuck Creek;

- 0 base days and 20 growth days for a total of 20 guided angler days on the St. Mary River.

Mr. Wallace appeals the Regional Manager's allocation decision on a number of grounds, including: the Regional Manager should have considered his previous experience as a licensed assistant angling guide when allocating base days on the St. Mary River; the allocation process was unfair; and his business' proximity to the St. Mary River should have been taken into account in the allocation.

Mr. Wallace seeks an allocation of 50 guided angler days on the St. Mary River.

Stephen Kim Sedrovic

Mr. Sedrovic has been in the angling guide business in Fernie for 20 years and is the president and owner of Fernie Wilderness Adventures Inc. The company offers guided fishing expeditions in the Kootenay Region during the fishing season and snow cat skiing adventures in the winter. It is a well-established business with 4 year-round employees and 6 seasonal employees. The company's lodge, located on the banks of the Wigwam River, has an estimated market value of over \$1 million.

Mr. Sedrovic was one of four angling guides on the East Kootenay Angling Management Plan Ad Hoc Committee and is affiliated with the BC Guide Outfitters Association, Kootenay Angling Guide Association, and Fernie Rod and Gun Club.

In 2006 the Regional Manager offered Mr. Sedrovic the following allocation:

- 49 base days and 6 growth days for a total of 55 guided angler days on the Bull River;
- 317 base days and 0 growth days for a total of 317 guided angler days on the Elk River;
- 0 base days and 4 growth days for a total of 4 guided angler days on Skookumchuck Creek;
- 0 base days and 14 growth days for a total of 14 guided angler days on the St. Mary River;
- 13 base days and 0 growth days for a total of 13 guided angler days on the Wigwam River.

Mr. Sedrovic appeals the Regional Manager's decision in respect to the number of guided angler days allocated to him on the Wigwam River on the grounds of economic hardship. Historically, he has used 39 or 40 guided angler days each year on the Wigwam River and markets multi-day trips by including the opportunity to fish the Wigwam River for one day. Mr. Sedrovic seeks an increase in his allocation on the Wigwam River from 13 guided angler days to 39 guided angler days.

The Third Parties are all angling guides in the Kootenay Region who were offered an allocation of guided angler days in 2006. Gary Gow, Ned Cooper and Kelly Laatsch attended the full hearing, questioned witnesses and made closing submissions. Mr. Cooper also gave evidence as a witness for Mr. Sedrovic. Luigi Musso attended the first morning of the hearing but did not give evidence or make any submissions. Both Barry Rogers and Paul Samycia provided written submissions to the Panel.

The Third Parties' submissions relate to the process involved in the development and implementation of the East Kootenay Angling Management Plan and the remedies sought by the four Appellants. Their submissions are outlined in greater detail in the Discussion and Analysis section of this decision.

The Regional Manager requests that the four appeals be dismissed.

ISSUE

The issue in each of the four appeals is whether the Regional Manager's April 7, 2006 offer of an allocation of guided angler days to each Appellant was fair and reasonable in the circumstances.

RELEVANT LEGISLATION

Section 53 of the *Wildlife Act* provides for regulations to be enacted to restrict guiding for fish and angling:

Restrictions on guiding for fish and angling

53 (1) The Lieutenant Governor in Council, by regulation, may do one or more of the following:

...

- g) provide for the allocation of angler day quotas to and among angler guides and for the disposal of angler day quotas by auction or tender or any other means;

...

(3) A regulation made under this section may

- (a) provide for the attachment of an angler day quota to, or for the reduction or cancellation of an angler day quota attached to, an angling guide licence issued before or after this section or the regulation comes into force, and
- (b) impose limitations, restrictions and requirements relating to guiding for fish on an angling guide, even though the angling guide's licence was issued before this section or the regulation comes into force.

The relevant provisions of the *Regulation* are as follows:

Interpretation

1 In this regulation:

"**Act**" means the *Wildlife Act*;

"**annual angling licence**" means an angling licence issued for a term of not more than 12 months ending March 31;

...

“**classified water**” means a water or group of waters set out in Column 1 of Schedule A;

...

“**licence year**” means a period of 12 months beginning on April 1 in each year and ending on March 31 in the following year;

“**management plan**” means a plan for managing guiding for fish and angling referred to in section 52(3) of the Act;

Allocation of angler day quotas

11 (1) Subsections (1.1) to (2) apply with respect to angler day quota for classified waters.

(1.1) Subject to subsection (1.2), a regional manager may allocate angler day quota to an angling guide by issuing a certificate to the angling guide only if

(a) a management plan applies to the classified water for which angler day quota is to be issued,

(b) the allocation is in accordance with

(i) the management plan, and

(ii) the requirements of this section, and

(c) the period for which the angler day quota allocated is 20 years or less.

(1.2) A regional manager must use one of the following processes for allocating angler day quota for classified waters:

(a) a process that requires an angling guide to bid for angler day quota for one or more classified waters by sealed tender or auction;

(b) a process that requires an angling guide to submit a written proposal for the use of angler day quota;

(c) a process that requires an angling guide to submit a sealed tender referred to in paragraph (a), together with a written proposal, as referred to in paragraph (b).

...

(3) For each water specified in Schedule A for which a regional manager is responsible, the regional manager must not allocate

...

(b) guided angler days in the period set out in column 4 of Schedule A in excess of the number set out in column 3 of Schedule A next to that water.

...

The relevant portion of Schedule A is as follows:

Schedule A
[en. B.C. Reg. 263/2005, s. 3.]
Classified Waters

Column 1	Column 2	Column 3	Column 4		Column 5 STEELHEAD LICENCE MANDATORY	
			FROM	TO	FROM	TO
STREAM (includes unspecified tributaries unless indicated by an * before the name)	NO. OF GUIDES	GUIDED ANGLER DAYS				
Class II Inland Waters (non-anadromous)						
REGION 4						
Bull River	No limit	500	April 1	March 31	Exempt	
Elk River (excluding the following tributaries: Wigwam River; Coal Creek downstream of the old M.F. & M. Railway bridge located about 7 km upstream of the Elk River) (Elk)	No limit	2 950	April 1	March 31	Exempt	
Kootenay River (upstream of White River)	0	0	April 1	March 31	Exempt	
Skookumchuck Creek	No limit	150	April 1	March 31	Exempt	
St. Mary River (downstream of St. Mary Lake) ¹	No limit	1 250	April 1	March 31	Exempt	
St. Mary River (upstream of St. Mary Lake) ¹	0	0	April 1	March 31	Exempt	
White River	0	0	April 1	March 31	Exempt	
Wigwam River	No limit	150	April 1	March 31	Exempt	

¹ The two Class II portions of St. Mary River are considered a single classified water for the purposes of a classified waters angling licence.

DISCUSSION AND ANALYSIS

Whether the Regional Manager's April 7, 2006 offer of an allocation of guided angler days to each Appellant was fair and reasonable in the circumstances.

Each of the Appellants appeal on one or both of the following grounds: 1) the process for the development and/or implementation of the East Kootenay Angling Management Plan was inappropriate and/or unfair; and 2) the Regional Manager failed to properly consider the Appellant's circumstances when allocating guided angler days in 2006.

The Appellants' submissions on each of these grounds are discussed below. However, in order to follow the submissions, it is necessary to summarize the relevant provisions of Schedule A of the *Regulation*, the East Kootenay Angling Management Plan, the Allocation Policy, and the process used by the Regional Manager to allocate guided angler days in 2006.

The waters that are the subject of the four appeals are classified waters under Schedule A of the *Regulation*. An angling guide may only guide anglers on classified waters if he or she has been allocated a guided angler day quota by the Regional Manager, pursuant to section 11 of the *Regulation*. Section 11(3) prohibits the Regional Manager from allocating guided angler day quota in excess of the maximum number of days set out in column 3 of Schedule A.

The East Kootenay Angling Management Plan applies to the classified waters in Kootenay Region. The plan states the total number of angler days (guided and unguided) available annually for each classified water and sets the number of days available for allocation to licensed angling guides. The plan does not address the issue of how guided angler days will be allocated among licensed angling guides.

The Ministry developed the Allocation Policy to provide a framework for the allocation of guided angler days. The Allocation Policy attempts to balance the competing interests of existing angling guides and new entrants to the guiding business.

According to Part 5 of the Allocation Policy, once a regional manager has allocated guided angler days to a licensed angling guide, those days may be bought, sold or traded amongst eligible angling guides, subject to the regional manager's approval and payment of a transfer fee. In effect, guided angler days become "currency" in the hands of licensed angling guides.

The Allocation Policy sets out eligibility requirements for two categories of angling guides, specifically existing angling guides and new angling guides. An existing angling guide must have been operating as a licensed angling guide for at least the last year of the "reference period", as defined in Part 4 of the Allocation Policy. Licensed assistant angling guides operating during the reference period are not included in the existing angling guide category. In the Kootenay Region the reference period is the 5 years from the 1999-00 licence year up to and including the 2003-04 licence year.

Pursuant to Part 8 of the Allocation Policy, an existing angling guide is eligible for an allocation of guided angler days based upon his or her historical use of a

classified water (referred to as “base days”). An angling guide’s best angler day year during the reference period determines his or her allocation of base days⁵.

If the total number base days applied for by all existing angling guides exceeds the available guided angler days for a classified water (as set out in Schedule A of the *Regulation*), base days are allocated pro-rata. In the Kootenay Region, existing angling guides applied for more base days than the number of days available for each of the Elk River and the Wigwam River. The Regional Manager refers to these waters as being “over-subscribed”.

If the total number of base days applied for by existing angling guides is less than the available guided angler days for a classified water, the surplus days may be allocated to existing angling guides and new angling guides as “growth days”. Part 8 of the Allocation Policy provides for allocation of any surplus days as follows:

- 50% of the surplus to existing angling guides;
- 30% of the surplus to new angling guides; and
- 20% of the surplus to all eligible angling guides on an annual basis by auction or a bid process conducted by the regional manager.

In 2006 there were surplus days available for allocation as growth days on each of the Bull River, Skookumchuck Creek and the St. Mary River. Given the relatively few surplus days that would likely end up in the annual auction pool and the time and resources required to conduct an annual auction, the Regional Manager decided to allocate 50% of the surplus days to existing angling guides and 50% to new angling guides.

Parts 8 and 10 of the Allocation Policy set out the criteria for the allocation of surplus guided angler days as growth days for existing and new angling guides. Briefly, angling guides are assigned points for their angling guide experience (both as licensed angling guides and as licensed assistant angling guides) and for their level of investment in the angling guide business. The sum of an angling guide’s points is divided by the total points scored by all the angling guides in his or her category (either existing or new angling guides) who applied for growth days on the classified water. The resulting percentage score is applied to the number of surplus days available to be allocated to existing or new angling guides (whichever category applies) on that water. The product is the number of days (rounded to a whole number) to be allocated to the angling guide as growth days.

Mr. Messmer gave evidence respecting the process followed by the Review Panel to recommend an allocation of guided angler days for each applicant. He stated that he personally entered the information provided by the applicants into a database and produced a spreadsheet. He attempted to verify any discrepancies between the information provided by the applicants and the Ministry’s records. He stated that there were no such discrepancies in the information provided by the four Appellants.

⁵ For example: Mr. Sedrovic’s highest use of the Bull River was 49 guided angler days in the 2001-02 licence year. Accordingly, he was allocated 49 base days on the Bull River.

Mr. Messmer testified about the calculation of base and/or growth days for each of the Appellants in accordance with the provisions of the Allocation Policy, as varied by the Regional Manager. He stated that it was not always possible to achieve precise numbers in applying the allocation formula and percentages for growth days for each applicant. However, he is confident that any variation in the calculation would not be more than +/- 10%.

As of June 7, 2006, the Regional Manager has offered to allocate all available guided angler days on the Elk River, Wigwam River, Bull River and Skookumchuck Creek. There are 47 guided angler days available for allocation on the St. Mary River.

- 1) *the process for the development and/or implementation of the East Kootenay Angling Management Plan was inappropriate and/or unfair*

Mr. Larsen takes issue with the East Kootenay Angling Management Plan and the limit on guided angler days imposed by Schedule A to the *Regulation*.

In particular, Mr. Larsen submits that the numbers stated to be "present (2002) angler use and angler day allocation" in the Elk River Angling Management Plan Summary Form (which forms part of the East Kootenay Angling Management Plan) are inaccurate. He argues that the "recommended angler use and angler day allocation" in the summary form are not based on sound (or any) science.

Mr. Larsen characterizes the benchmark angler density for the Elk River, applied in the East Kootenay Angling Management Plan, of 1.03 anglers per km as "a fantasy". He testified that he has been guiding anglers on sections of the Elk River when there have been more than 10 anglers per km and at other times when there has been only one angler. He states that it is hard to put a number on an industry that is based upon experience and knowledge, not numbers.

Mr. Larsen argues that the Ministry did not have sufficient background to accurately establish the carrying capacity of the classified waters in the East Kootenay Angling Management Plan. He points out that the benchmark density in the plan was derived from one study conducted during the 2002 angling season that estimated angler use of the Elk River from Elko to Sparwood⁶.

Mr. Larsen testified that although he is a resident of Fernie and reads the papers he was not aware of the East Kootenay Angling Management Plan process and was not aware of the proposed changes that would limit his ability to guide anglers on the Elk River.

It is Mr. Larsen's position that the East Kootenay Angling Management Plan and Schedule A to the *Regulation* were not "the right process" to deal with the issue of over-crowding on the classified waters and that they have had the effect of increasing hostility on the waters and "pitting guide against guide". He would like to have the process re-opened and to have angling guides, as a body, make recommendations for positive changes. He seeks to be part of that new process.

⁶ Heidt, K.D. 2002. Elk River creel survey 2002: Quality Waters Strategy (River Guardian Program). B.C. Ministry of Water, Land and Air Protection, Cranbrook, BC.

Mr. Sedrovic participated in the process as a member of the East Kootenay Angling Management Plan Ad Hoc Committee. He submits that it would be wrong to re-open the East Kootenay Angling Management Plan process after the "good work" that has been done. He rejects Mr. Larsen's submission that the angling guide industry did not receive sufficient notice of the process and specifically notes the newspaper ad that appeared in the Kootenay Advertiser on July 11, 2003.

Mr. Cooper was involved in the process as an "alternate" on the ad hoc committee representing angling guides. Mr. Cooper supports the East Kootenay Angling Management Plan. He stated that angling guides "had a say" in how guided angler days are allocated.

Similarly Mr. Rogers supports the East Kootenay Angling Management and Allocation Policy. In his written submission, he states that "[t]he allocation policy is not perfect, but it is fair and objective." He notes that there have been "numerous public meetings, guide meetings, newspaper articles, research and planning projects as well as a major sustainable angling symposium dealing with the growing issues and problems with the fisheries and fishing experience."

In his written submission, Mr. Samycia states that he has followed the process and has "come to accept the process for rod day allocation."

Mr. Laatsch stated he feels the process was "as fair as it could be."

Mr. Gow stated that he hoped that there would have been an opportunity for further input after the Regional Manager used one year permits to allocate guided angler days in 2005 and before approval of the East Kootenay Angling Management Plan by the Director in 2006. However he noted that stakeholders have been exposed to the process for a long time. He feels that everyone involved including the Regional Manager and Mr. Messmer have done all that they can to make the process work.

The Regional Manager submits that the guided angler day allocation process was fair and represents sound policy. He stated that the East Kootenay Angling Management Plan provides for social decisions to be made with "conservation underpinnings". In response to Mr. Larsen's submissions about the scientific basis of the angler carrying capacity used in the East Kootenay Angling Management Plan, the Regional Manager stated that he is satisfied that the target density of 1.03 anglers per km is realistic.

The Panel notes that the East Kootenay Angling Management Plan contains particulars of public and stakeholder input, including: a meeting between government officials (including MLA Bill Bennett) and anglers and angling guides in Fernie on June 2, 2003; a survey soliciting input on each moratorium water conducted during July 2003, which produced 25 responses; and the July 11, 2003 advertisement in the Kootenay Advertiser.

The Panel finds that Mr. Larsen has not demonstrated, on the evidence, that there was a lack of notice to the angling guide community in respect to the development of the East Kootenay Angling Management Plan.

The Panel further finds that there is no evidence before it that would support the conclusion that the process for the development of the East Kootenay Angling Management Plan was inappropriate or unfair.

Many of the Appellants and the Third Parties raised concerns about the Ministry's implementation of the East Kootenay Angling Management Plan and the Allocation Policy.

The Panel heard a number of allegations of deceit by some unnamed angling guides with respect to their guiding history and business investment. The Appellants and Third Parties submit that the Ministry failed to appropriately scrutinize the information contained in the applications for guided angler days.

Mr. Cooper articulated many of the concerns expressed by the Appellants and Third Parties. Specifically, Mr. Cooper stated that some angling guides did not file annual angling guide reports or proof of insurance required by the *Regulation*. He believes that the Review Panel was too lenient in accepting other evidence of guiding history.

Mr. Cooper also noted that some angling guides did not meet the deadlines for filing their applications for guided angler days. He submits that the Ministry should strictly enforce all requirements, including deadlines.

The Regional Manager submits that taking a "generous" or lenient approach to assessing the information provided by the applicants was fair and reasonable. A number of guides did not have accurate records. His goal was to determine the facts in each case in order to make a fair allocation of guided angler days. He stated that his intent was to be "as inclusive as possible".

The Panel is concerned by the allegations of impropriety on the part of some of the applicants. While a "generous" approach in the acceptance of supporting documentation may make the process more inclusive, it may also work against those applicants who have followed all the rules. However the Panel finds that the Appellants and the Third Parties have not supported their allegations with any evidence.

The Panel finds that neither the Appellants nor the Third Parties have established that the implementation of the East Kootenay Angling Management Plan was inappropriate or unfair.

(2) *the Regional Manager failed to properly consider the Appellant's circumstances when allocating guided angler days in 2006*

Mr. Larsen

Mr. Larsen seeks an allocation of 40 guided angler days on the Elk River and 10 guided angler days on the Wigwam River based upon his previous angling guiding activities on these rivers.

Mr. Larsen testified that during the moratorium he operated as a licensed assistant angling guide working for various licensed angling guides, in order to provide his clients with an opportunity to fish on the Elk River and Wigwam River. After the moratorium expired, he wrote and passed the BC angling guide licence exam. He has applied for an angling guide licence.

Mr. Larsen submits that without an allocation of guided angler days on the Elk River, he is being denied the economic opportunity to make a living and to continue operating his business as he has done in the past.

However Mr. Larsen stated that he is not seeking an allocation of guided angler days if it would result in a reduction of the allocation offered to other licensed angling guides.

Mr. Messmer testified that the Review Panel did not recommend an allocation of base days for Mr. Larsen on either the Elk River or the Wigwam River because he had not operated as a licensed angling guide on either river during the reference period (i.e. he is not an existing angling guide as defined in the Allocation Policy).

Under the Allocation Policy, Mr. Larsen would be eligible for an allocation of growth days as a new angling guide. However, there are no growth days available for allocation on either the Elk River or the Wigwam River because the historical use of these rivers by existing angling guides exceeds the number of guided angler days available pursuant to Schedule A of the *Regulation*.

Mr. Messmer testified that the Review Panel felt that it was "within the spirit of the [Allocation] Policy" to apply Mr. Larsen's request for guided angler days to the surplus available on the Bull River. It would provide Mr. Larsen with an opportunity to maintain his existing business and possibly acquire guided angler days on either the Elk River or the Wigwam River by trading with other licensed angling guides.

The Panel finds that the Regional Manager's decision to not offer Mr. Larsen an allocation of base or growth days on either the Elk River or Wigwam River was made correctly, in accordance with the Allocation Policy. While the Panel is sympathetic to Mr. Larsen's need for guided angler days on the Elk River and the Wigwam River, neither the Regional Manager, nor the Panel, has the authority to allocate guided angler days in excess of the maximum set out in Schedule A of the *Regulation*.

Mr. Smith

Mr. Smith submits that the Regional Manager should have included him as an existing angling guide for the purpose of allocating base days on Skookumchuck Creek.

Mr. Smith testified that both he and his business partner, Bruce Devlin, were licensed angling guides operating during the 2003-04 licence year (the last year in the reference period) and were authorized to guide anglers on Skookumchuck Creek in accordance with their Angling Guide Operating Plan. However they did not guide any clients on Skookumchuck Creek that year. Mr. Smith stated that the 2004-05 licence year was their "best angler day year" on Skookumchuck Creek when they used 29 guided angler days.

In 2005 the Regional Manager issued a permit to Mr. Smith for 13 guided angler days on Skookumchuck Creek and 3 guided angler days on the St. Mary River.

In 2006 Mr. Smith applied for an allocation of 29 days on Skookumchuck Creek, which is the only classified water in his Angling Guide Operating Plan. He did not apply for an allocation of guided angler days on any other classified water. The Regional Manager offered him an allocation of 4 growth days on Skookumchuck Creek, 10 growth days on the Bull River, and 10 growth days on the St. Mary River.

Mr. Smith testified that Kootenay Troutfitters does not own drift boats for angling expeditions on the St. Mary River and that the Bull River is too far away from Panorama for guided angling trips to be logistically feasible.

Mr. Smith stated that if he had been allocated 13 guided angler days on Skookumchuck Creek in 2006, he would not have appealed. Instead the Regional Manager reduced his allocation to 4 guided angler days on Skookumchuck Creek for the next ten years. Mr. Smith submits that the reduction was unfair and unwarranted.

Mr. Smith requests a larger allocation of guided angler days on Skookumchuck Creek but does not seek a larger overall allocation of guided angler days. He also stated that he does not seek an increase in his allocation of guided angler days on Skookumchuck Creek if it has the effect of reducing the allocation offered to other licensed angling guides.

According to Schedule A of the *Regulation* there are 150 guided angler days available for allocation on Skookumchuck Creek. Mr. Messmer stated that existing angling guides demonstrated historical use for 84 base days, leaving 66 growth days. The Regional Manager decided to issue all the available growth days with 33 days (50%) for existing angling guides and 33 days (50%) among new angling guides.

Mr. Messmer explained that Mr. Smith did not receive an allocation of base days on Skookumchuck Creek because he had not operated as a licensed angling guide on Skookumchuck Creek during the reference period. Mr. Smith's application was scored for the purpose of considering an allocation of growth days to him as a new angling guide. He received 4 points for his 2 years as a licensed angling guide plus 6 points for his demonstrated investment. His score represents 12% of the total points scored by the 5 new angling guides seeking growth days on Skookumchuck Creek. His allocation of 4 growth days is 12% of the 33 growth days available for allocation among the new applicants.

The Panel finds that Mr. Smith is not an existing angling guide within the definition in the Allocation Policy because he did not use guided angler days on Skookumchuck Creek during the reference period. The Panel finds that it would be unfair to the other licensed angling guides who received an allocation in 2006, if the reference period were varied in Mr. Smith's case to take into consideration his use of Skookumchuck Creek in the 2004-05 licence year. Therefore, the Panel finds that Mr. Smith is not eligible for an allocation of base days on Skookumchuck Creek.

Further, the Panel has reviewed the allocation of growth days to Mr. Smith on Skookumchuck Creek in 2006. Part 3 of the Allocation Policy states:

3.0 Goals of the Guided Angler Day Allocation and Pricing Policy

1. To allocate fairly, objectively and transparently, guided angler day carrying capacity as define (sic) through an Angling Management Plan

...

4. To ensure long-term business certainty with secure guided angler day allocations

[bold in the original]

The Panel notes Mr. Smith's concern that the reduction in his allocation from 2005 to 2006 by 9 guided angler days (or by 69%) does not ensure business certainty.

Mr. Messmer stated that the number of guided angler days allocated by permit in 2005 was "not a good reference point" to determine an angling guide's allocation in 2006. Angling guides were invited to make a written proposal and/or file new information to be considered by the Regional Manager for the 2006 ten year allocations. There were more existing angling guides who applied for base days on Skookumchuck Creek in 2006 and therefore fewer growth days available for allocation.

Mr. Messmer noted that Mr. Smith actually fared better in the allocation of growth days on Skookumchuck Creek in the new angling guide category because there were more existing angling guides competing for 50% of the growth days.

Mr. Smith did not provide any evidence that the Allocation Policy was not followed appropriately or correctly for the allocation of growth days on Skookumchuck Creek in 2006.

The Panel notes that Mr. Smith's total allocation of guided angler days in 2006 increased from 16 to 24. Mr. Smith is free to sell or trade his guided angler days on the St. Mary River and the Bull River in order to obtain more guided angler days on Skookumchuck Creek. The Panel also notes that the Regional Manager allocated guided angler days in 2006 for a ten year period, which will provide longer-term business certainty.

The Panel finds that the allocation of guided angler days by permit for the 2005-06 licence year was "a work in progress". While the 2006 allocation for Mr. Smith varied dramatically from 2005, the Panel does not find any reason, on the evidence before it and taking into consideration the interests of the other licensed angling guides who were allocated guided angler days in 2006, to vary the Regional Manager's allocation to Mr. Smith.

Mr. Wallace

Mr. Wallace submits that the Regional Manager failed to properly consider his experience as a licensed assistant angling guide when allocating guided angler days in 2006.

Mr. Wallace testified that from 1993 until 1999 he was a licensed assistant angling guide and co-owner of East Kootenay Sporting Adventures. He re-entered the angling guide business in 2005 with Jeff Chlopan under the business name "Bootleg Mtn River Adventures". He testified that when he left East Kootenay Sporting Adventures to raise his young family, he retained drift boats and other equipment because he intended to return to the angling guide business.

In 2005, Mr. Wallace requested an allocation of 40 guided angler days on the St. Mary River. Initially the Ministry advised him that he would receive 4 guided angler days on the St. Mary River but, after discussions with Ministry officials, this was increased to 13 guided angler days on the St. Mary River and 4 guided angler days on Skookumchuck Creek for 2005.

In 2006, Mr. Wallace applied for a total of 497 guided angler days as follows: 4 base days and 50 growth days on Skookumchuck Creek; 13 base days and 280 growth days on St. Mary River; and 50 growth days on each of the Bull River, the Elk River and the Wigwam River.

At the hearing, both Mr. Wallace and Mr. Chlopan testified that they need at least 50 guided angler days on the St. Mary River in order for their business to be economically viable. They submit that it is unfair that 4 angling guides using the St. Mary River received 71% of the allocation of guided angler days.

Mr. Messmer stated that the Regional Manager did not allocate any base days to Mr. Wallace because he is not an existing angling guide as defined by the Allocation Policy.

Mr. Wallace's application was scored for the purpose of considering an allocation of growth days to him as a new angling guide on the Bull River, Skookumchuck Creek and the St. Mary River. He received 8 points for his 4 years as a licensed assistant angling guide plus 18 points for his demonstrated investment, for a total of 26 points.

Mr. Wallace's score represents 19% of the total points scored by the 6 new angling guides seeking the 102 growth days available in that category on the Bull River. Mr. Messmer testified that the Regional Manager meant to offer Mr. Wallace an allocation of 20 growth days on the Bull River (19% of 102 days) but due to a data entry error he was offered 4 extra days.

For Skookumchuck Creek, Mr. Wallace's score represents 31% of the total points scored by the 5 new applicants seeking the 33 available growth days and Mr. Wallace was offered 10 growth days.

For the St. Mary River, Mr. Wallace's score represents 17% of the total points scored by the 7 new applicants. Mr. Messmer stated the Review Panel's calculation of growth days offered to new applicants is based on 110 growth days being available for that category. For Mr. Wallace, 17% of 110 days calculates to 19 growth days. Mr. Messmer explained that the Review Panel decided to round up to 20 growth days for Mr. Wallace because there are usually two anglers booked per trip.

Mr. Messmer stated that, during the allocation process, the estimates of base days and growth days are "a moving target" as new information becomes available and angling guides decline guided angler days offered to them. As at June 7, 2006 there were 47 guided angler days available for allocation on the St. Mary River. The Regional Manager stated that he would consider allocating those days following the Board's decision in these appeals.

The Panel finds that Mr. Wallace is not an existing angling guide within the definition in the Allocation Policy because he was not a licensed angling guide at any time prior to 2005. Therefore, Mr. Wallace is not eligible for an allocation of base days.

The Panel further finds that the Regional Manager gave Mr. Wallace credit for 4 years as a licensed assistant angling guide. Mr. Wallace did not provide any evidence to the Panel to demonstrate that he had more than 4 years experience as a licensed assistant angling guide.

The Panel finds, on the evidence, that the Regional Manager properly considered Mr. Wallace's prior experience as a licensed assistant guide when allocating growth days to him on the Bull River, Skookumchuck Creek and the St. Mary River in 2006.

Mr. Wallace submits that the Regional Manager should have considered their business' proximity to the St. Mary River when allocating guided angler days.

Specifically, Mr. Wallace advises that Bootleg Mtn. River Adventures' sales office is located on the banks of the St. Mary River, which flows through Kimberley. Both Mr. Wallace and Mr. Chlopan gave evidence respecting the economic hard times recently experienced in Kimberley with the closure of the Sullivan mine, the hospital, and 4 elementary schools as well a receivership at the local ski resort. It is Mr. Wallace's position that the St. Mary River should be a resource for angling guides based in Kimberley. Similarly the Elk River should be a resource for angling guides based in Fernie, because the Elk River flows through Fernie.

Mr. Wallace testified that the trip from Bootleg Mtn River Adventures' sales office to the launch point on the Bull River is approximately 120 km, 40 km of which is a rough road, and takes about 1.5 hours. He submits that to make trips to the Bull River economically viable, they need to be included as part of a multi-day package. He stated that without an allocation of more guided angler days on the St. Mary River, it is not possible to offer multi-day expeditions.

The Regional Manager testified that he did not consider an angling guide's proximity to a classified water in making his decision to allocate guided angler days. It is not part of the "scoring system" set out in the Allocation Policy. He stated that he does not believe that proximity would be a fair consideration. It could be difficult to ascertain an angling guide's primary location. Angling guides may have postal addresses in one location but offer guided angling trips on a number of classified waters.

The Panel finds that the Allocation Policy does not include proximity as a criterion for allocating guided angler days. While it may be possible to develop an allocation policy that includes proximity as a criterion, the Panel is not satisfied that this would be desirable.

Both Mr. Wallace and Mr. Chlopan testified that it is their understanding that an inflated request for growth days will result in a larger allocation. The Panel finds that Mr. Wallace and Mr. Chlopan are wrong on this point. According to the evidence before the Panel, in 2006 the number of growth days requested by an applicant was not determinative of the number allocated to an applicant, unless the applicant's score would provide him or her with more growth days than requested, in which case his or her allocation was limited accordingly.

Mr. Wallace and Mr. Chlopan made submissions in respect to perceived injustices in the process used by the Regional Manager to allocate guided angler days by permit in 2005 and errors in the information they filed in that year. The Panel notes that they filed additional documentation in 2006 and that the Review Panel took the new information into consideration. The Panel finds that their submissions in respect to the 2005 allocation of guided angler days are not relevant to Mr. Wallace's current appeal.

The Panel finds that the Regional Manager's allocation of guided angler days to Mr. Wallace was reasonable under the circumstances. The Panel notes that Mr. Wallace may sell or trade his guided angler days on other classified waters to meet his business' needs on the St. Mary River.

Mr. Sedrovic

Mr. Sedrovic seeks an allocation of 39 guided angler days on the Wigwam River based upon his historical use of the river.

In 2005 the Regional Manager issued a permit to Mr. Sedrovic for 18 guided angler days on the Wigwam River. In 2006 Mr. Sedrovic was offered a ten year allocation of 13 guided angler days per year, as base days, on the Wigwam River.

Mr. Sedrovic submits that an angling guide's experience and investment should be considered in the allocation of base days. He argues that he should have received a larger allocation of base days for the Wigwam River because of his seniority as an angling guide on that river for 20 years and his substantial investment in the angling guiding business, including a lodge on the banks of the river. He testified that he has "traditionally" (historically) guided anglers on the Wigwam River for 39 to 40 days each year.

Mr. Sedrovic testified that he markets multi-day trips by offering one day on the Wigwam River in addition to days on the Elk River. He stated that because he is now severely limited in the number of days he can offer on the Wigwam River, he has lost clients who choose to fish the river without a guide. He notes that non-guided anglers, including non-resident anglers, are continuing to use the Wigwam River.

According to Schedule A of the *Regulation* there are 150 guided angler days available for allocation on the Wigwam River. Mr. Messmer stated that the total of "best year historical use" of the Wigwam River during the reference period for all existing angling guides, including Mr. Sedrovic, is 444 guided angler days. Existing angling guides were offered 34% of their historical use of the Wigwam River ($150/444 = 34\%$).

Mr. Sedrovic's "best year" guiding anglers on the Wigwam River during the reference period was the 2003-04 licence year when he used 38 guided angler days. Mr. Messmer stated that Mr. Sedrovic was offered 34% of 38 days, which rounds to 13 guided angler days.

The Allocation Policy recognizes that licensed angling guides who have been operating on a classified water, have a "historic entitlement" to continue guiding on that water. However an existing angling guide's investment and experience, other than having used guided angling days on the classified water during the reference period, are not part of the criteria set out in the Allocation Policy for the allocation of base days.

The Panel finds that the Regional Manager correctly followed the Allocation Policy when he offered to allocate 13 base days on the Wigwam River to Mr. Sedrovic in 2006.

The Panel notes that the Regional Manager issued permits for 302 guided angler days on the Wigwam River for the 2005-06 licence year. In 2006 the Regional Manager allocated 150 guided angler days on the Wigwam River, being the maximum set by Schedule A of the *Regulation*. As a result, Mr. Sedrovic received fewer guided angler days in 2006.

Mr. Sedrovic's submission that the allocation of base days should take into account an existing angling guide's experience and investment represents a significant

departure from the criteria established in the Allocation Policy. The Panel finds that Mr. Sedrovic has not presented sufficiently convincing evidence or argument that would lead the Panel to conclude that such a modification to the Allocation Policy is warranted.

Finally, Mr. Sedrovic and some of the Third Parties suggested that the *Regulation* should be amended to close the Wigwam River to non-guided anglers. Mr. Sedrovic acknowledged that this proposal would need to be negotiated with the other stakeholders, including resident anglers. The Panel notes that, while this proposal may have merit, it would require an amendment to the East Kootenay Angling Management Plan and is beyond the scope of these appeals.

DECISION

In making this decision, the Panel has carefully considered all relevant submissions, documents, and evidence before it, whether or not specifically reiterated here.

For the reasons stated above, the Panel finds that the Regional Manager's April 7, 2006 offer of an allocation of guided angler days to each Appellant was fair and reasonable in the circumstances.

The appeals are dismissed.

"Cindy Derkaz"

Cindy Derkaz, Panel Chair
Environmental Appeal Board

July 27, 2006