



Environmental Appeal Board

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DECISION NO. 2015-WIL-005(a)

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

BETWEEN:	James Darin Wiens	APPELLANT
AND:	Regional Manager	RESPONDENT
AND:	Aaron Stelkia	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board Norman E. Yates, Panel Chair	
DATE:	Conducted by way of written submissions concluding on November 13, 2015.	
APPEARING:	For the Appellant: James Darren Wiens For the Respondent: Michael Burwash For the Third Party: Aaron Stelkia	

APPEAL

[1] James Darren Wiens (the "Appellant") has appealed a decision by Michael Burwash, the Regional Manager, Recreational Fisheries & Wildlife Programs, Thompson/Okanagan Region (the "Respondent"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), to issue a guide outfitter's licence to Aaron Stelkia a portion of land that falls within the Appellant's geographically-defined guiding territory.

[2] Both the Appellant and Mr. Stelkia are licensed guide outfitters. The Appellant operates as a guide outfitter over a broad area that the Appellant says includes part of the Inkameep Indian Reserve, also known as the Osoyoos Indian Reserve (the "Reserve"). Mr. Stelkia operates as a guide outfitter within the Reserve.

[3] The Appellant asserts that he has exclusive rights to operate as a guide outfitter in his guiding territory and Mr. Stelkia should not have been licensed to operate as a guide outfitter in that part of the Reserve without the Appellant's consent, relying on section 51(3) of the *Wildlife Act*. Section 51(3) states, in part:

If an area is part of a guiding territory assigned in a guiding territory certificate, the regional manager may not issue a guide outfitter licence... authorizing a person to guide in the area unless the person provides proof...

that the person has the consent of the holder of the guiding territory certificate.

[4] The Board has jurisdiction to hear this appeal under Part 8 of the *Environmental Management Act* and section 101.1 of the *Wildlife Act*. More particularly, 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.

[5] For the reasons that follow, the Panel has dismissed the appeal, and has confirmed the Respondent's decision to issue Mr. Stelkia's licence.

BACKGROUND

[6] The Appellant holds guide outfitter's licence GOPE15-168622 (the "Appellant's Licence"). It is a renewable, annual licence. The Appellant's Licence was issued by the Respondent on March 19, 2015. It is valid from April 1, 2015 to March 31, 2016. The Appellant's Licence states that he is authorized to guide persons to hunt game in the areas "As set out in Guiding Territory Certificate 800297...".

[7] The Appellant also holds guide outfitter's certificate 800297, also referred to as guiding territory certificate number 800297 (the "Appellant's Certificate"). The Appellant's Certificate has a 10-year renewable term beginning April 1, 2009. Reflecting the terms of section 59(3) of the *Wildlife Act*, the Appellant's Certificate gives him "the exclusive privilege of guiding... in the area described in Schedule A" and attaches a document which is referenced as "Schedule A". Schedule A describes the metes and bounds of – and exceptions to – a geographical area that is the Appellant's guiding territory (the "Schedule A Lands"). Of note, Schedule A sets out the following exception:

... except, and unless permission is granted, private land, Provincial and Federal parks and Indian Reserves.

[8] In the present appeal, the Appellant's Certificate and the Schedule A Lands are the "certificate" and "territory" to which sections 59(3) and 51(3) of the *Wildlife Act* refer. The Panel accepts that the Appellant, or his father before him, has held a guide outfitter's licence covering the Schedule A Lands for at least three decades. A portion of the geographical area comprising the Reserve falls within the Schedule A Lands (the "Overlapping Territory").

[9] Mr. Stelkia holds guide outfitter's licence GOPE15-168622 ("Mr. Stelkia's Licence"). Mr. Stelkia's Licence was issued by the Respondent on August 17, 2015. It is valid for a five-year period from April 1, 2015 through to March 31, 2020. Mr.

Stelkia's Licence defines the area where he is authorized to guide as "Inkameep Indian Reserve of Management Unit 8-01". Appendix A of Mr. Stelkia's Licence authorizes an annual quota of bighorn ram in "Inkameep Indian Reserve of Management Unit 8-01". Of some note, Mr. Stelkia has held a guide outfitter's licence covering the Reserve since the late 1980s.

[10] According to documents provided by the Respondent, the original decision to allow guided hunting on the Reserve through a guide outfitter licence was made in or about 1987 by agreement between representatives of the Osoyoos Indian Band and the Ministry. In August 1987, the Osoyoos Indian Band Council enacted by-law 87.08 ("By-law 87.08") which contemplates the issuance by the Band Council of a sheep hunting permit within the Reserve.

[11] On August 28, 2015, the Appellant appealed the issuance of Mr. Stelkia's Licence. The Appellant's Notice of Appeal states, in part:

Section 59(3) of the *Wildlife Act* states a guiding territory certificate grants the holder exclusive control over guiding privileges (The Osoyoos Indian band private property is within my certificate in which I am able to guide with the Chief's permission as my father did).

[12] And further:

... Aaron Stelkia did not have consent from me to give to the Regional Manager, nor did the Regional Manager contact me.

[13] The Appellant requests that anyone seeking a guide outfitter licence in the Appellant's guiding territory must obtain his consent before the Respondent issues a licence. By reference to section 51(3) of the *Wildlife Act*, the Appellant submits that the Respondent had no authority to issue Mr. Stelkia's Licence without the Appellant's consent.

[14] By a letter dated September 14, 2015, the Board offered the parties an opportunity to make written submissions, and specified deadlines for the parties to provide written submissions. The Appellant provided initial written submissions. In response to the Appellant's submissions, the Respondent provided written submissions. The Appellant was given until November 13, 2015 to provide rebuttal submissions, but none were provided. The Panel's decision is based on the parties' written submissions and the Appellant's Notice of Appeal.

[15] Included in the Respondent's submissions was an August 5, 2015 letter from the Guide Outfitter's Association of British Columbia ("GOABC") to the Ministry's Deputy Minister regarding the circumstances in this appeal. GOABC neither sought nor was granted participant status by the Board. However, the Panel considered the letter as part of this appeal.

ISSUE

[16] The issue to be decided is:

1. Whether any part of the Reserve is within the Appellant's guiding territory, such that the Appellant's consent is required before the Respondent may issue

a guide outfitter's licence authorizing Mr. Stelkia to guide within the Reserve, pursuant to section 51(3) of the *Wildlife Act*.

RELEVANT LEGISLATION

[17] Sections 51(3) and 59(3) of the *Wildlife Act* are relevant to this appeal. Those sections state as follows:

51 (3) If an area is part of a guiding territory assigned in a guiding territory certificate, the regional manager may not issue a guide outfitter licence... authorizing a person to guide in the area unless the person provides proof, satisfactory to the regional manager, that the person has the consent of the holder of the guiding territory certificate.

...

59 (3) ... a guiding territory certificate grants to the holder the exclusive control over guiding privileges in the area described in the certificate for the period stated in the certificate, which may not exceed 25 years.

DISCUSSION AND ANALYSIS

[18] Guide outfitter's certificate 800297 is obviously an integral part of the Appellant's Licence. The Appellant points to the provisions of the *Wildlife Act*, and specifically sections 51(3) and 59(3), to support his contention that his consent is required before anyone else can be issued a guide outfitter's licence within the Schedule A Lands and specifically on the Overlapping Territory.

[19] The Appellant also submits that his father operated on the Reserve in the past. In support of that submission, the Appellant provided a letter from an international hunting consultant, which states that he has referred sheep hunting clients to the Wiens family since the late 1970s and that sheep hunting was conducted within and outside of the Reserve in the late 1970s and early 1980s.

[20] The Respondent submits that the Schedule A Lands in the Appellant's Certificate excludes "unless permission is granted... Indian Reserves." The Respondent also says that the Appellant has not demonstrated that the Osoyoos Indian Band has granted him permission to guide within the Reserve and, therefore, no part of the Reserve is within the Appellant's guiding territory. The Respondent argues that the Appellant's permission is not required as a precondition to the Respondent issuing a guide outfitter licence to Mr. Stelkia. The Respondent further points out that Mr. Stelkia has permission from the Osoyoos Indian Band to operate within the Reserve.

[21] In support of those submissions, the Respondent provided several supporting documents, including:

- Bylaw 87.08;
- minutes of a meeting held on August 31, 1987 between representatives of the Osoyoos Indian Band and the Ministry;

- an internal Ministry letter dated September 1, 1988, stating that the Chief of the Osoyoos Indian Band had provided verbal confirmation that Mr. Stelkia was the designated sheep guide for the 1988 season;
- a copy of Mr. Stelkia's guide outfitter licence, issued in 1988, authorizing him to guide on the Reserve, and
- an October 29, 2015 letter from Ministry staff stating that, during a telephone conversation with the Chief of the Osoyoos Indian Band on August 15, 2015, the Chief had confirmed with that Mr. Stelkia was to be issued the Osoyoos Indian Band's guide permit for the 2015 season, and the Chief understood that Mr. Stelkia had applied for a five-year licence but the duration of the licence could be amended by the Respondent upon request from the Chief and Band Council.

[22] The Panel finds as a fact that both the Appellant and Mr. Stelkia have held their respective guide outfitter's licences – and both have been guiding in what they each consider to be the areas specified by those licences – for at least 27 years. The Appellant's assertion that his consent is required before the Respondent can authorize another person, in this case Mr. Stelkia, to guide within the Overlapping Territory, has apparently never previously been raised.

[23] A term of the Appellant's Certificate is that, the Appellant requires "permission" in order to have exclusive guiding privileges on any part of the Schedule A Lands that are part of an "Indian Reserve". More particularly, the Schedule A Lands include "... all intervening territory [within the geographical area described] *except, and unless permission is granted*, private land, Provincial and Federal parks and *Indian Reserves*" [italics added]. For the purposes of this appeal, the Panel finds that the Reserve is an "Indian Reserve" and has determined the appeal by reference to that exception.

[24] The Panel notes that the Appellant's Certificate does not specify whom the requisite permission regarding lands within an Indian Reserve (in this case, the Overlapping Territory) needs to come from but, for the purposes of this appeal, the Panel is satisfied that permission would have to be obtained from the Osoyoos Indian Band Council. To that end, the Panel notes that By-Law 87.08 contains a preamble that states, "the Osoyoos Indian Band has inherited authority to govern and regulate the resources and lands within the Osoyoos Indian Reserve". By-Law 87.08 also states that the Band Council has a responsibility "to protect and manage wildlife" on the Reserve; that anyone who wishes to hunt sheep on the Reserve needs to make written application to the Band Council for a permit; and that anyone who acts as a sheep hunting guide on the Reserve must also be a member of the Osoyoos Indian Band.

[25] The Panel finds as a fact that the Appellant's Certificate does not include (and in fact was intended to exclude) any territory within the Schedule A Lands that falls within the Reserve, unless the Appellant has obtained prior permission from the Osoyoos Indian Band Council to guide there. Put differently, for the Overlapping Territory to be included as part of the Appellant's exclusive guiding territory – within the geographic area described as the Schedule A Lands – the Appellant must first comply with By-Law 87.08. Amongst other things, that would entail a written

application to the Osoyoos Indian Band Council, and the issuance of a permit by the Band Council.

[26] The Appellant has not challenged the validity of By-Law 87.08, nor has he argued that By-Law 87.08 does not apply to the present circumstances. There is no evidence before the Panel that the Appellant has permission to be a hunting guide on the Reserve. Permission would be a straight-forward thing for the Appellant to prove. If the Appellant possesses a permit issued by the Band Council, he could have provided a copy of it to the Board. In an email dated September 21, 2015, the Appellant asserted that he can guide on the Overlapping Lands with permission "as we have done in the past" and that "a discussion with the chief and council could allow me to guide." The Panel finds, however, that this statement is insufficient to establish that the Appellant has obtained the requisite permission. It is also contrary to the Panel's interpretation – and plain reading – of By-Law 87.08.

[27] Finally, the Panel notes that the GOABC's letter acknowledges that a guiding territory certificate does not provide authorization to operate as a guide on private lands or Indian Reserves. GOABC has suggested, however, that this does not exclude such lands from the area covered by the Appellant's Certificate, that the exception in Schedule A of the Appellant's Certificate simply prohibits the Appellant from guiding in the excepted area unless the consent conditions are met, and that to find otherwise would frustrate the intention of the *Wildlife Act* to provide exclusive tenure rights to a defined guiding territory. GOABC also offered the view that, as a matter of constitutional law, there is no limitation on the application of the *Wildlife Act's* guide outfitter provisions to Indian Reserves. In response, the Panel finds that its interpretation of the language in the Appellant's Certificate neither frustrates the legislative intent of the *Wildlife Act*, nor is it impractical. To the contrary, the Panel finds that there is no evidence, no precedent brought to the Panel's attention, and no persuasive argument that would justify GOABC's proposition. Further, the Panel has made its determination without consideration of whether the provincial government has authority to dictate how land under the jurisdiction of the federal government (such as Indian Reserves and Federal parks) is managed. That said, the Panel finds that GOABC may be 'out on a limb' by suggesting that there is nothing from a constitutional law perspective that would prevent the *Wildlife Act* from applying to Indian Reserves.

[28] In summary, the Panel concludes that no part of the Reserve is currently within the Appellant's guiding territory and, therefore, the Respondent was not required by section 51(3) of the *Wildlife Act* to obtain the Appellant's consent before issuing a guide outfitter licence authorizing Mr. Stelkia to operate as a guide within the Reserve.

DECISION

[29] In making this decision, the Panel has considered all of the submissions and arguments before it, whether or not specifically referred to herein.

[30] For the reasons provided above, the Panel finds that the Overlapping Territory is not part of the Appellant's guiding territory, let alone his exclusive guiding territory, unless he has obtained permission from the Osoyoos Indian Band

to guide there. That being a condition precedent, and because the Appellant does not have permission, the Overlapping Territory is excluded from the geographical area over which the Appellant has "the exclusive privilege of guiding" contemplated by his guiding territory certificate. Based on section 51(3) of the *Wildlife Act*, it follows that the Appellant's consent was not a prerequisite to the Respondent authorizing Mr. Stelkia to guide on that portion of the Reserve that lies within the metes and bounds of the Schedule A Lands.

[31] The appeal is dismissed.

"Norman E. Yates"

Norman E. Yates, Panel Chair
Environmental Appeal Board

March 2, 2016