

WEK'ÈEZHÌ RENEWABLE RESOURCES BOARD

IN THE MATTER OF: A Wildlife Management Proposal Submitted by The Government of the Northwest Territories Department of Environment and Natural Resources and the Tłıchǫ Government to Address the Management and Protection of Bathurst Caribou;

AND IN THE MATTER OF: Legal Questions Raised by Parties to this Proceeding and requesting Rulings from the Board:

REASONS FOR DECISION

1. INTRODUCTION AND BACKGROUND:

The Wek'èezhì Renewable Resources Board (WRRB) is conducting a legal proceeding, including a hearing, which will result in recommendations to the Minister of Environment and Natural Resources (ENR) and the Tłı̨chǫ Government about a wildlife management proposal which addresses the need to protect the Bathurst Caribou Herd. This proceeding was initiated by the filing of a Wildlife Management Proposal (the Proposal) on November 5, 2009. Over the course of this proceeding, several parties have raised legal issues or questions for the Board's attention. The Board has treated these issues as Requests for a Ruling in accordance with its draft Rules of Procedure.

The Board set December 11, 2009 as the deadline for the identification of such issues and then compiled the list of concerns raised by those parties to the proceeding which indicated that they had concerns. Four parties (Mr. Boyd Warner; Mr. John Andre; North Slave Métis Alliance and Ms. Karen McMaster) identified issues.

The list of issues was circulated to all parties to the proceeding on February 1, 2010. The parties were offered the opportunity to respond or comment on any of these legal issues. Only one party (ENR) responded to any of the issues.

The Board has considered the matters raised by the parties, the response and the information available on the record for the proceeding in making its ruling on the issues.

Below, each of the issues is listed and explained. The Board's analysis for each issue is then set out. The Board's decision with respect to the disposition of the issue is then rendered.

2. THE ISSUES AND THE BOARD'S DECISION:

Issue # 1 Raised by Mr. Boyd Warner (17/12/09)

The Bathurst Caribou Management Plan is not endorsed by any of the representative organizations and therefore is invalid.

ENR Response:

The Bathurst Caribou Bathurst Caribou Management Plan was released in December 2004. It was prepared by a committee consisting of representatives from federal, territorial and Aboriginal Governments, First Nations, Inuit organizations, institutions of public government and communities on or adjacent to the herd's range. The committee was established in 2000 and operated by consensus. Extensive consultations were held in 2004. Although not formally endorsed by others, ENR considers the plan to be a valid guidance document when considering monitoring and management actions.

Analysis:

The status of the Bathurst Caribou Management Plan is not in issue in relation to the Proposal before the Board. The Tłı̨chǫ Agreement requires a Board response and recommendations related to the Proposal. This issue is not relevant to the Proposal.

Decision:

This issue is dismissed. It is not relevant to the Proposal or the proceeding.

Issue # 2 Raised by Mr. Boyd Warner (17/12/09)

No valid information available on which herd the bulls harvested by outfitters come from.

ENR Response:

The joint proposal submitted by the Tłı̨chǫ Government and ENR proposes actions for all three caribou herds located in the North Slave region. Bulls have been collared in the Bluenose-East herd but not the Bathurst and Ahiak herds. The bulls are considered to be Bluenose-East as they are consistently associated with Bluenose-East cows. There is no evidence to suggest that bulls in other caribou herds act differently. Thus, it is reasonable to assume that the location of the cows can be used to identify the herds that outfitters are harvesting.

Analysis:

Mr. Warner's issue is one of fact or evidence and not law. It is a matter which can be explored in questioning at the hearing. The Board is not in a position to address this question until it considers all the evidence and not all information is available yet. A ruling would be premature at this time.

Decision:

Defer issue for consideration at the hearing. Mr. Warner would be advised to address it at the hearing when he questions ENR.

Issue # 3 Raised by Mr. Boyd Warner (17/12/09)

No formal consultations were held with outfitters prior to the reduction or elimination of tags.

ENR Response:

A Meeting was held with outfitters and Deputy Minister in July 23, 2009 to discuss the decline of the Bathurst Caribou herd and possible management actions including the elimination of tags. Outfitters participated in the Bathurst Decline Workshop in October 23, 2009 to discuss recovery options. A letter was sent by the Deputy Minister to all outfitters in October indicating the potential elimination of all outfitting tags for barren ground caribou, including a caution about accepting reservations for outfitted hunts for 2010 season.

Analysis:

Consultation with affected parties is a matter of good wildlife management but in the case of outfitters' businesses it is not required by law in the same way as consultation with the holders of aboriginal rights. The evidence filed by ENR conflicts with Mr. Warner's assertion. In any event, the Board is not responsible for nor could it enforce a requirement for ENR to consult outfitters before this proceeding was initiated.

Decision:

This issue is dismissed.

Issue # 4 Raised by Mr. Boyd Warner (17/12/09)

If the WRRB makes a ruling, is it then that body that would be held accountable in the future for losses/claims by groups or individuals if any of those groups were successful in proving that the caribou are not in the crisis we are told they are in?

Analysis:

This is not a request for a ruling. It is a question about the potential for WRRB liability for its decisions.

In most cases the Board merely makes recommendations and the final decisions are made by government. Any party aggrieved by the Board's decision or proceeding has recourse to the Courts. The Board is not in a position nor should it speak to liability issues in an ongoing proceeding.

Decision:

This matter is dismissed. It is not a relevant issue in relation to the Proposal.

Issue # 5 Raised by Mr. Boyd Warner (17/12/09)

ENR is not following the recommendations of the ARC report re: transparency and treating caribou as a meta-population.

ENR Response:

ENR interprets the reference to “transparency” as sharing information in an open manner. ENR has provided presentations on all survey results and analyses and held workshops where information was openly shared. ENR has limited sharing of draft reports as there is a duty to provide the best information to the public.

With respect to meta-populations, the ARC report validates the approach of managing by herds (as defined by calving grounds) as standard practice across North America. ARC suggested that ENR should increase collar numbers to confirm the degree of closure (i.e. rate of exchange) of herds. The ARC report states, *“In contrast, no data support the competing hypotheses that all caribou should be treated as one herd, nor that mass movements between herds have demonstrably occurred.”* However, for management purposes, the ARC report suggests the analysis of data for each herd should be integrated within a larger population framework.

Analysis:

This is not a legal issue. It questions the ENR management approach and science and is a matter best left for cross examination at the hearing. The Board is not in a position to rule on this issue at this time. It is premature.

Decision:

Defer issue. Mr. Warner would be advised to address it at the hearing when he questions ENR.

Issue # 6 Raised by Mr. Boyd Warner (17/12/09)

ENR has not adequately informed stakeholders of which caribou live and use the North Slave (Management Unit R) and has failed to propose a management plan.

ENR Response:

In the last 3 years, ENR has done annual presentations to boards, user groups (e.g. outfitters) and communities on an animation of caribou movements and which caribou herds are seasonally found in Management Unit R.

With respect to a management plan, ENR has undertaken the following actions:

- In 2004, ENR released a draft Bathurst Caribou Management Plan which ENR uses as a guidance document. The plan was developed collaboratively with all management authorities and communities that share the herd.

- In late 2006, ENR submitted a proposal to the Wek'èezhì Renewable Resources Board on management actions for barren-ground caribou in the North Slave region.
- ENR has been working with the Tłıchǫ Government and the Wek'eezhii Renewable Resources Board to develop a management process for the Bathurst herd as directed by the *Tłıchǫ Agreement*.
- A management plan exists for the Bluenose-East herd which is now being revised by an inter-jurisdictional committee lead by the wildlife co-management boards in the NWT and Nunavut.
- Maps of radio-collar locations from the Ahiak, Bluenose East and Bathurst herds during fall and winter were presented at workshops in October 2009 and are contained in ENR's Bathurst workshop report and the longer Bathurst technical report. Other ENR reports have used maps based on radio-collar data for all herds monitored by ENR.

Analysis:

This is not a legal issue. It questions the ENR management approach and information sharing and is a matter best left for cross examination at the hearing. The Board is not in a position to rule on this issue at this time. It is premature.

Decision:

Defer issue. Mr. Warner would be advised to address it at the hearing when he questions ENR.

Issue # 7 Raised by Mr. John Andre (21/12/09)

Assuming there is no new data to support the use of the emergency clause, will the WRRB go to court to maintain its right to manage wildlife in Wek'èezhì, or does it intend to permanently cede that right to the GNWT?

Analysis:

This appears to be a rhetorical question. The matter raised is not in issue in the current proceeding. Further it is based on an assumption for which there is no evidence on the record that being that the WRRB has "ceded jurisdiction" to the Minister of ENR. The ENR exercise of emergency power is authorized by Tłıchǫ Agreement. Procedures for emergency actions are set out in the Tłıchǫ Agreement, Section 12.5.14. Emergency Interim Measures are not a matter before the Board at the upcoming hearing.

Decision:

This issue is dismissed.

Issue # 8 Raised by Mr. John Andre (21/12/09)

Will the WRRB go to court to explain to ENR exactly where the Bathurst wintering ground is, so that the entire wintering area is protected? (It appears that the area closed deliberately avoids the Akaitcho region, currently involved in land claims negotiations. Certainly, ENR and the WRRB do not intend to manage migratory species based on land claim settlements).

Analysis:

This appears to be a rhetorical question. The matter raised is not in issue in the current proceeding. There is no basis for seeking to involve the Courts in the kind of factual issue set out by Mr. Andre. The current proceeding is not the place to be debating the scope of the closure imposed by ENR. Emergency Interim Measures are not a matter before the Board at the upcoming hearing.

Decision:

This issue is dismissed.

Issue # 9 Raised by Mr. John Andre (21/12/09)

Apparently, some area of the NWT is being opened up to unlimited Woods Bison hunting. If this area is in Wek'èezhìi, will the WRRB go to court to prevent this hunt?

ENR Response:

As part of the interim emergency measures to offset reduced access to caribou, ENR has established two new wood bison management areas in Unit R. R/WB/01 is located west of Behchoko and has a quota of 45 tags. These are to be allocated by Tłıchǫ Government, Yellowknives Dene First Nation and Metis groups. The second zone R/WB/02 is located east of Behchoko to Yellowknife and is open to all General Hunting Licence holders.

Analysis:

The answer to Mr. Andre's question in respect of legal action by the WRRB to challenge the ENR creation of new Wood Bison hunting areas and the allocation of 45 tags should be the same as for previous questions. The Board is not in a position to challenge this decision in the Courts.

Decision:

This issue is dismissed.

Issue # 10 Raised by North Slave Metis Alliance (NSMA) (18/12/09)

Has a proper, legal declaration been made about barren-ground caribou to be game in danger of becoming extinct? Has the Crown acted illegally in announcing restriction on Aboriginal harvesting?

ENR Response:**For NSMA Questions 10, 11, 12 and 13**

Barren-ground caribou have been listed as being in danger of becoming extinct since 1960, when the Government of Canada implemented Regulation 1236 under the *Northwest Territories Act*, a piece of federal legislation.

The *Northwest Territories Act* (and its attendant *Regulations*) is the law that grants the Government of the Northwest Territories its legal authorities and powers, including the authority to regulate game. These laws apply to everyone, including Aboriginal persons.

Aboriginal rights are extremely important, but they are not absolute. Canadian courts have consistently allowed governments to infringe Aboriginal rights where it was necessary and justified, provided that the government has taken steps to minimize the infringement.

Any infringement of an Aboriginal right must be justified, and the government must be able to satisfy a court of law that it has met a three-part legal test:

1. That there is a valid legislative objective
2. That there has been as little infringement as possible to achieve the desired result, and
3. That there has been consultation regarding the measures being implemented.

In the case of the joint proposal currently before the WRRB, the Government of the Northwest Territories and the Tli Cho Government have worked together to develop this joint proposal in order to ensure the long-term recovery of the Bathurst caribou herd, a herd on the verge of extinction.

In drafting the joint proposal survey results were shared with affected groups beginning in July, 2009. A number of affected groups participated in the Bathurst Caribou Decline workshops held in October to discuss recovery options. Letters sent in October 2009 to potentially affected Aboriginal governments and organizations to discuss recovery options. Consultation meetings on the joint proposal we held in November and December 2009. GNWT will be submitting results of the consultations to the WRRB.

Once recommendations are received from the WRRB, the GNWT and Tłıchǫ government will consult with each other, and GNWT will undertake further consultation if required.

At current harvest levels the long-term survival of the Bathurst herd is in serious doubt, given model projections of extinction in 3-5 years. In our view, the joint proposal is aimed at the best interests of Aboriginal people, as the recovery of the herd will ensure future generations of Aboriginal hunters will have Bathurst caribou to hunt in order to feed their families and protect their culture.

Analysis:

There is a regulation declaring barren ground caribou to be game in danger of becoming extinct. In any event, this question has now been moved to the Courts by the GNWT. The Board does not have to make such a ruling on questions about the GNWT's authority to regulate aboriginal harvesting in this proceeding. The upcoming hearing is to address the Bathurst Caribou Joint Management Proposal, not the Emergency Interim Measures. The WRRB has no authority to question legality of Emergency Interim Measures.

Decision:

This issue is dismissed.

Issue # 11 Raised by the NSMA (18/12/09)

Constitutional rights cannot be infringed without justification. Justification, in the case of Aboriginal Peoples involves adequate Crown Consultation and Accommodation. Has the Crown justified infringement to harvest wildlife for traditional purposes? Is there a valid conservation concern? Had the existing policy of priority allocation been taken seriously? Have all other conservation options been considered? Has there been adequate Crown Consultation? Is this proposal the least infringement possible to affect the desired result? Is fair and adequate compensation made available?

ENR Response: (see above)

Analysis:

There are a series of questions for ENR imbedded in this NSMA "issue". Most of them could or should be pursued in questions of ENR in the hearing. These questions are not for the Board to answer. The Board is only reviewing a specific wildlife management Proposal. The question of consultation and the adequacy of consultation must be explored between NSMA and the GNWT and it is not relevant to the questions posed by the Proposal. WRRB has no authority to make a ruling on questions like this.

Decision:

This issue is dismissed.

Issue # 12 Raised by the NSMA (18/12/09)

Has the Crown provided adequate information? Has the Crown provided adequate time and opportunity to formulate views? Has the Crown made an honorable effort to accommodate rights?

ENR Response: (see above)

Analysis:

This issue or question is subject to the same analysis as question 11 above. The first two questions can be pursued in the hearing. The last question is outside the scope of the Board's authority.

Decision:

Dismissed.

Issue # 13 Raised by NSMA (18/12/09)

Has the Crown fulfilled its fiduciary duty to manage caribou in the best interests of the Aboriginal people? Has the Crown breached the terms of Treaty 11 with regard to the protection of the right of the Aboriginal people to live their traditional lifestyle without interference or completion from "white people"?

ENR Response: (see above)

Analysis:

The matters raised in these questions are not within the jurisdiction of the Board. They involve complex issues which should be addressed by the NSMA directly with the GNWT.

Decision:

Dismissed.

Issue # 14 Raised by the NSMA (18/12/09)

Have the Tłıchǫ Government, Crown and WRRB taken steps to acquire and use Métis TK?

Analysis:

These questions should be addressed to those parties in the hearing. This information is not in the Board's hands.

Decision:

Dismissed. This question can be raised at the hearing by the NSMA.

Issue # 15 Raised by the NSMA (18/12/09)

Why has the WRRB left the Métis organizations out of their definition of First Nation and how does this affect the rights of the Métis to just and equitable treatment by the WRRB?

Analysis:

This issue relates to the definition of First Nation used in the Board's draft Rules of Procedure. Exclusion of the Metis from this definition is not intended to prevent members of that organization from fully participating in the Board's proceeding. NSMA members like any participant will be treated fairly and equitably throughout the process.

Decision:

The draft Rules of Procedure will be reviewed after the hearing in this proceeding. The NSMA has the same right to a fair process as all other parties. This right is not affected by the wording of the draft Rules.

Issue # 16 Raised by the NSMA (18/12/09)

Section 12.7.1 of Tłıchǫ Agreement "must allocate a sufficient portion of a total allowable harvest level for any other Aboriginal people to exercise its rights to harvest wildlife in Wek'èezhìı ... how does the WRRB or the Crown intend to do this with (sic) consulting the Métis?"

Analysis:

The question presupposes that the WRRB will make a Total Allowable Harvest (TAH) decision. If the Board does that it must also allocate the TAH as set out in s.12.7.1 of the Tłıchǫ

Agreement. It is premature to attempt to answer this question. The Board will seek input from affected parties if it decides to impose a TAH.

Decision:

The question is premature and is deferred. If it must be addressed, it will, depending on the Board's decision on the proposal.

Issue # 17 Raised by Ms. Karen McMaster (23/11/09)

Do the Environment Minister of the GNWT and Tłıchǫ believe that Canada has a constitutional duty to ensure the caribou are around for aboriginals? I believe the Minister of the Environment said the reason for the actions is we need to ensure a supply to the aboriginal community. This goes directly against the Tłıchǫ land claim agreement which specifically does not guarantee the supply of wildlife. What is the basis of this? Please refer to court decisions.

ENR Response:

The mandate of the Minister and the Department of Environment and Natural Resources is to promote and support the sustainable use and development of natural resources and to protect, conserve and enhance the Northwest Territories environment for the social and economic benefit of all Northwest Territories residents.

Analysis:

The Board cannot answer this question. It would require speculation. The question includes argument as well. There is no legal issue in the question which the Board has authority in this proceeding to address.

Decision:

This issue is dismissed.

Issue # 18 Raised by Ms. Karen McMaster (23/11/09)

Why has the government (GNWT/Federal) not appointed another representative to balance the board for such an important issue?

ENR Response:

The GNWT may nominate 2 members and both are on the Board.

Analysis:

The Board is not in a position to answer this question. In any event this is not a legal issue over which the Board has any authority in the context of this proceeding.

Decision:

This issue is dismissed.

Issue # 19 Raised by Ms. Karen McMaster (23/11/09)

Have you obtained a legal opinion that the proposed action plans do not infringe re the Charter of Rights?

Analysis:

The WRRB has not sought such a legal opinion.

Issue # 20 Raised by Ms. Karen McMaster (23/11/09)

Is there a Supreme Court of Canada decision which indicates TŁİCHQ have the right to harvest at any cost, without regard to conservation, the cost to NWT citizens and infringement of human rights?

Analysis:

The Board is not in the business of conducting legal research to advise participants in our proceedings of the law and of their rights. The process works the other way. If a party wants to raise a legal issue they must identify it, support their position and convince the Board to do something about the issue.

Decision:

This question is dismissed.

Issue # 21 Raised by Ms Karen McMaster (23/11/09)

Other legal issues that will be raised during the hearing, including but not limited to, jurisdictional issues, interpretation of land claims, constitutional issues and human rights issues, conflict of interest, due process/natural justice, and consultation.

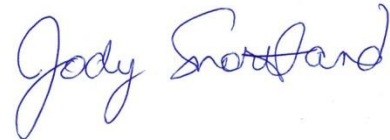
Analysis:

The Board requested that the parties identify any legal issues so that they could be addressed in advance of a hearing in order to make the process efficient. The parties should be aware that waiting to the last minute to raise an issue is not helpful to the Board or this process overall. If it is clear that an issue could have been raised earlier the Board will deal with the matter accordingly.

**Signed this 26th day of February, 2010 on for the
Wek'èezhì Renewable Resources Board:**



Grant Pryznyk, Interim Chair



Witness