

**A GUIDE TO CLAIMING
COMPENSATION UNDER
THE *YUKON WATERS ACT***

Yukon Territory Water Board

September 2001

YTWB filename: ywacclaim4.wpd

INTRODUCTION

This Guide was prepared to assist the water licence Applicants, Yukon First Nations, Yukon Indian People, other water users or interest holders and the public to understand the compensation provisions of the *Yukon Waters Act*. It is not a substitute for a careful reading of the Act and regulations. Persons intending to make compensation claims should consider securing legal assistance.

The *Yukon Waters Act* establishes a statutory compensation system which, consistent with the principle of prior allocation, protects existing water users who may suffer adverse effects, loss or damage when a new use of water is licensed under the Act. The most important compensation provisions in the Act are found in subsection 14(4). The Act creates two broad classes of claimants for compensation with different rights and obligations. Paragraph 14(4)(a) applies to compensation claims by existing licensees and applicants who have filed earlier applications for licences. Paragraph 14(4)(b) applies to a list of possible water users including licensees and applicants with precedence to whom paragraph 14(4)(a) does not apply, domestic, instream and authorized users, owners and occupiers of property and the holders of outfitting concessions, registered trapline holders and holders of similar rights.

The Guide is intended to provide an overview of some of the important issues and questions which should be considered during the preparation of a claim for compensation. It provides an outline of the approach which will be applied by the Water Board to such claims. The statutory compensation system is illustrated schematically on a flow chart and the overview is provided by way of a series of questions and answers with attached explanations. This Guide is not intended to be a complete “How To” manual for the preparation of a compensation claim.

Figure 1

Compensation Under paragraph 14(4)(a) of the Yukon Waters Act

A. Existing Licensees and Prior Applicants

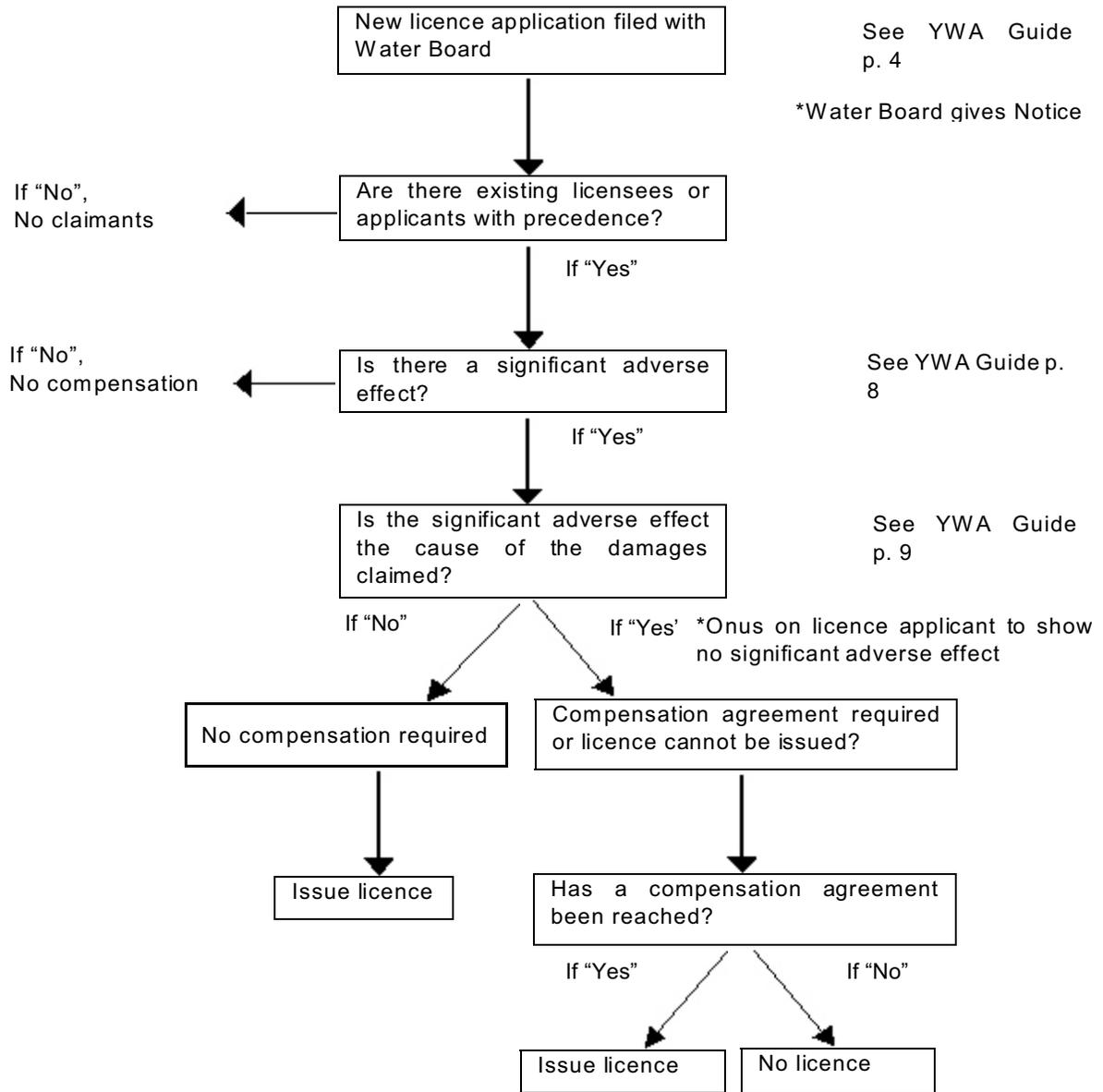
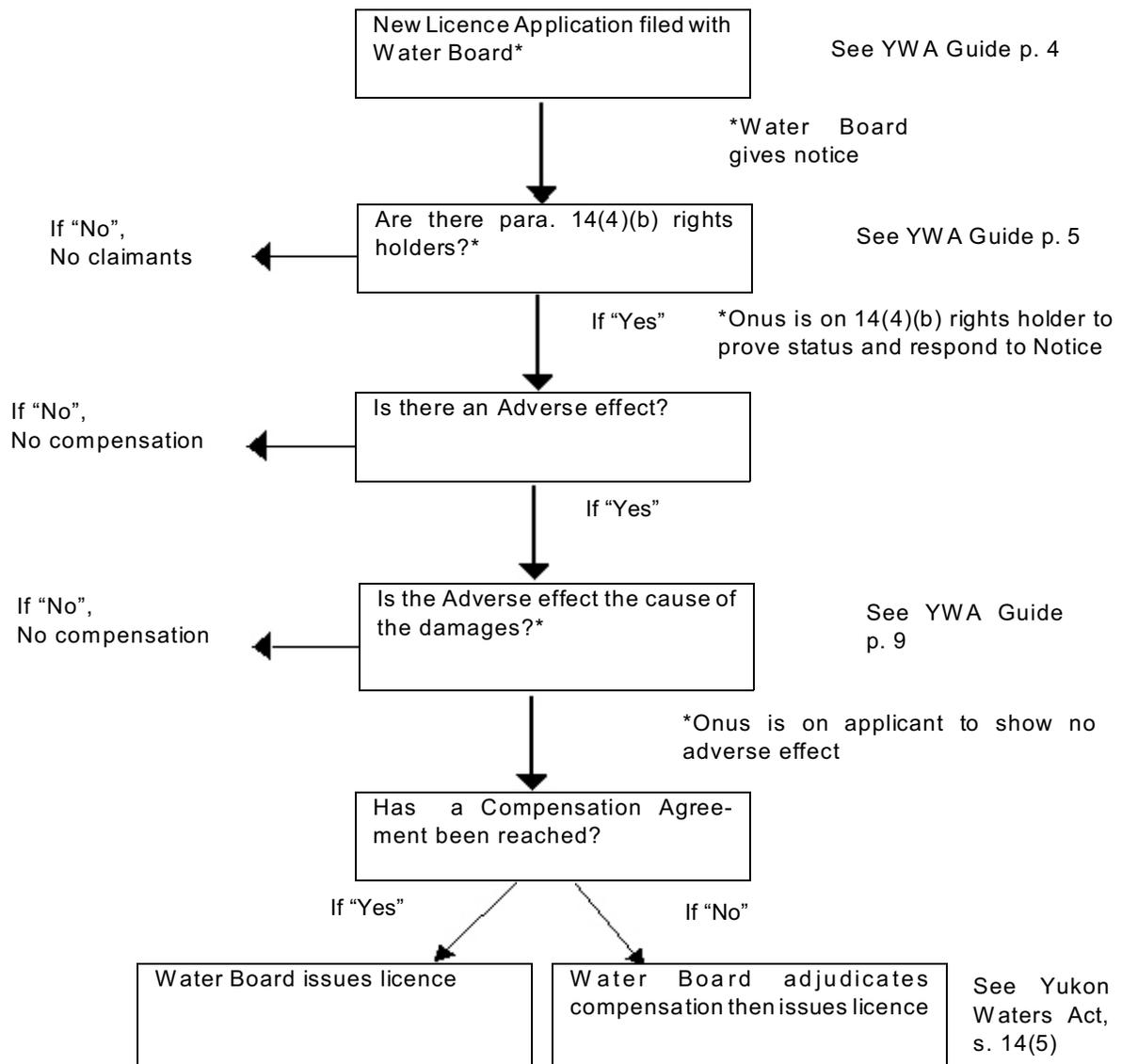


Figure 2

Compensation Under paragraph 14(4)(b) of the Yukon Waters Act

B. Domestic Users, Instream Users, Authorized Users, Owners and Occupiers of Property, Outfitters, Holders of Traplines and similar rights; and licensees and applicants not covered by para. 14(4)(a) [the “14(4)(b) rights holders”]



A Guide to Compensation Claims under the Yukon Water Licensing Process

Compensation Claims under the Yukon Waters Act Regime

1. Who can claim compensation under the *Waters Act*?

Subsection 14(4)(a)

- Only
- ▶ an existing licensee; or
 - ▶ an applicant for a licence with precedence under section 29.

Subsection 14(4)(b)

- Only
- ▶ applicants and licensees not covered by paragraph 14(4)(a).
 - ▶ domestic users.
 - ▶ instream users.
 - ▶ authorized users.
 - ▶ owners of property.
 - ▶ occupiers of property.
 - ▶ outfitting concession holders, holders of registered traplines and other holders of similar rights.

Comment: This group is called the “subsection 14(4)(b) rights holders” below.

Comment: The *Waters Act* sets up two broad classes of potential claimants who might be affected by a new licence application. Under paragraph 14(4)(a) these include those who already have licences or who have applied for one. The other class includes other water users or interested parties listed in subparagraphs 14(4)(b)(i) to (viii).

Compensation Claims under the Yukon Waters Act Regime

2. Must a claimant prove their status to claim compensation?

Subsection 14(4)(a)

- ▶ Claimant must show they are:
- an existing licensee; or
 - an applicant with precedence under section 29.

Comment: The status of claimants under subsection 14(4)(a) will be easily proven from the YTWB's records.

Subsection 14(4)(b)

- ▶ Claimant must show they are:
- an applicant or licensee not covered by paragraph 14(4)(a).
 - a domestic user.
 - an instream user.
 - an authorized user.
 - an owner of property.
 - an occupier of property.
 - a holder of an outfitting concession; a registered trapline or other similar rights.

Comment:

- The status of licensees and applicants not covered by paragraph 14(4)(a) can be proven from the YTWB's records.
- "domestic" and "instream" use is defined in the *Waters Act*.

Comment: The onus should be on a claimant to prove their status. Much of the information needed to do so is within the claimant's control.

Compensation Claims under the Yukon Waters Act Regime

3. Are there any other requirements to make a compensation claim?

Subsection 14(4)(a)

- ▶ none

Subsection 14(4)(b)

Claimant:

- ▶ must have been a subsection 14(4)(b) rights holder at time of the application for the licence.
- ▶ must have notified YTWB of claim within time specified in published notice (the “Intent date”).

Comment:

- Onus should be on subsection 14(4)(b) claimant to prove these requirements as well.
- An issue has arisen in Water Board decisions about how strictly to apply the notice requirement. Indian Bands, trappers and claimants without counsel have sometimes been caught by surprise by this requirement.

Compensation Claims under the Yukon Waters Act Regime

4. How is eligibility for compensation determined?

Subsection 14(4)(a)

- ▶ Licence Applicant's use of water must have significant adverse effect on claimant.

Subsection 14(4)(b)

- ▶ Licence Applicant's use of water must have adverse effect on claimant.

Comment: The determination of "adverse" and "significant" is an issue for the Board.

Compensation Claims under the Yukon Waters Act Regime

5. How is liability for compensation established?

Subsection 14(4)(a)

- ▶ Licence Applicant fails to satisfy YTWB that no significant adverse effects will occur on licensees or applicants with precedence.
- ▶ New water use must cause the damages claimed.

Subsection 14(4)(b)

- ▶ Licence Applicant fails to satisfy YTWB that a subsection 14(4)(b) claimant would not be adversely affected by proposed water use.
- ▶ New water use must cause the damages claimed.

Comment 1: The *Waters Act* does not require that either fault or negligence be proven on behalf of a Licence Applicant in order to claim compensation. The statutory scheme protects preexisting users consistent with the prior allocation model. The basis for liability is therefore simply causing the significant adverse effect or the adverse effect.

Comment 2: Even though fault or negligence is not required for liability, the proposed use must still “cause” the damages. The YTWB will have to set some reasonable limits on legal liability using the common law tests related to causation.

Compensation Claims under the Yukon Waters Act Regime

6. Who bears the onus to prove liability and damages?

Subsection 14(4)(a)

- ▶ the onus is clearly on the Licence Applicant to satisfy the YTWB that no significant adverse effect will occur

or

that compensation agreements have been negotiated

or else

no licence can be issued.

Subsection 14(4)(b)

- ▶ the onus is on the Licence Applicant to satisfy the YTWB that compensation that the Board considers appropriate has been or will be paid to eligible subsection 14(4)(b) rights holders

or

that the proposed licensed use will not adversely affect the claimant(s)

or else

no licence can be issued.

Comment:

- The term “has been or will be paid” may leave room for negotiated agreements with subsection 14(4)(b) rights holders although the *Waters Act* does not refer specifically to them.
- the claimant should bear the burden of providing the evidence specific to their circumstances necessary to assist the YTWB to decide what compensation is appropriate (this would be an evidentiary burden).