



**File Code:** 1570-1  
#05-04-00-0026  
(H-T #04-0417-10)  
**Date:** May 26, 2005

CERTIFIED MAIL – RETURN  
RECEIPT REQUESTED

Kenneth Buckingham  
P.O. Box 10  
Paradise Valley, NV 89426

Dear Mr. Buckingham:

This is my second-level review decision of the appeal you filed. You requested a review of the appeal decision by Humboldt-Toiyabe National Forest Supervisor Robert Vaught. Supervisor Vaught affirmed the June 18, 2004, decision by Santa Rosa District Ranger Jose Noriega canceling twenty-five percent of the Buttermilk Cattle and Horse Allotment.

**APPEAL DECISION**

I affirm the decision by Supervisor Vaught. I have reviewed the appeal record and the issues in your second-level appeal. I also reviewed the appeal decision by the Forest Supervisor. I find that both the first-level appeal decision and the initial decision by the District Ranger were appropriate and complied with applicable laws, regulations and agency policy. Enclosed is a more detailed response to the issues raised in your second-level appeal.

This decision constitutes the final administrative determination of the United States Department of Agriculture (36 CFR 251.87(e)(3)).

Sincerely,

*/s/ Joseph W. Kennedy*  
JOSEPH W. KENNEDY  
Appeal Reviewing Officer

cc:  
Forest Supervisor, Humboldt-Toiyabe (Robert Vaught)  
District Ranger, Santa Rosa RD (Jose Noriega)

John E. Marvel  
Marvel & Kump, Ltd.  
P.O. Box 2645  
Elko, NV 89803



**Buttermilk Cattle & Horse Allotment**  
**Kenneth Buckingham**  
**Appeal #05-04-00-0026**

**APPEAL ISSUE 1:** All of the alleged historical violations by appellant of unauthorized livestock use were caused and/or contributed to by third parties and/or the Forest Service.

**RESPONSE:** The record indicates that the District Ranger met with the appellant and the other permittee on June 4, 2004, to resolve fence maintenance disputes and that he directed the other permittee (Thomas) to bring his fence maintenance up to standard (District Ranger Responsive Statement, Response to Appeal Point 5).

The accusation that the other permittee (Thomas) purposely drove appellant's cattle into the Buttermilk Pasture prior to June 15, 2004, is not firmly supported by the record. The District Ranger's interview with Francisco Jimenez through an interpreter indicates that the appellant employed him at the time the affidavit was signed and that he could remember no dates (Statement of Francisco Jimenez, November 2, 2004). That Mr. Jeminez did not provide the dates in the affidavit leaves serious doubt about when the actions in the affidavit actually occurred.

The discussion in the record about the construction of the drift fence agreed to in the previous year's settlement agreement does not indicate that the delay in construction was solely the fault of the Forest Service (District Ranger Responsive Statement, Response to Appeal Point 6). The appellant's delay in signing the settlement agreement clearly played a large role in the delay in getting the necessary clearances for the construction.

The fact that recreation users and others leave gates open and occasionally cut fences is not unique to this allotment. It happens throughout the country and for this reason permittees need to be diligent in keeping track of the location of their livestock.

The appellant was responsible for maintaining his livestock in the proper unit. He was under a 25% suspension for a violation of the same term and condition of his term grazing permit (District Ranger, Decision Letter, August 29, 2002) and has a documented history of similar occurrences in the past (District Ranger Responsive Statement, Response to Appeal Point 4).

**APPEAL ISSUE 2:** Appellant has repeatedly requested that he be allowed to exchange fence maintenance obligations with the other allotment permittee to insure that necessary maintenance was timely and properly performed. This offer alone demonstrates appellant's efforts to fully cooperate and work in good faith with the District Ranger.

**RESPONSE:** Fence and other range improvement maintenance responsibilities have been divided between the appellant and the other permittee on this allotment (Term Grazing Permit, Part 3, p. 8). Both are held responsible for their maintenance responsibilities (Term Grazing Permit, Part 3, p. 8). The other permittee (Thomas) was

issued a notice of non-compliance for inadequate fence maintenance in 2004 (Notice of Non-Compliance letter (NONC), July 6, 2004). The record indicates the appellant has also failed to timely complete maintenance responsibilities and was notified of such failure through a notice of non-compliance (NONC, June 18, 2004). If the two permittees mutually agree to a division of the range improvement maintenance responsibilities that is different from the current division of responsibility contained in their term grazing permits, I am confident the District Ranger would be agreeable to making the adjustment. The key is that the two permittees mutually agree to the change.

**APPEAL ISSUE 3:** The Forest Supervisor relied exclusively on the arguments presented by the District Ranger and gave absolutely no weight or credibility to appellant's arguments and evidence presented. The bias and prejudice of the District Ranger, and now the Forest Supervisor, against the appellant are clearly demonstrated by numerous facts in addition to those set forth above and/or incorporated herein.

**RESPONSE:** My review of the record and particularly of the Forest Supervisor's review of appellant's first level appeal indicates to me that the Forest Supervisor did a thorough job of reviewing the appeal and did not disregard appellant's arguments and evidence.

As discussed above under point 1, there were several issues raised with the affidavit by Francisco Jimenez. When Mr. Jimenez was questioned with the aid of an interpreter it was discovered that Mr. Jimenez did not remember the dates he moved the cattle, did not provide the dates in the affidavit, and did not agree to give an affidavit prior to being brought to the attorney's office.

There is nothing in the record that indicates that the District Ranger failed to notify the appellant when he observed cattle in unauthorized areas. To the contrary, the record contains a history of records where the District Ranger and previous District Rangers notified the appellant of permit non-compliance problems District Ranger Responsive Statement, Response to Appeal Point 4).

On June 4, 2004, during a meeting with appellant about fence maintenance needs, livestock were discovered in the Buttermilk Pasture. The appellant moved them back to the correct pasture (Appellant's first level notice of appeal, p. 4, Item J). Again on June 15, 2005, the District Ranger discovered livestock in the Buttermilk Pasture. The presence of appellant's livestock in the pasture is clearly documented by photographs (Appeal Record, Photo Documentation). Because appellant's permit was already under suspension for violation of the same terms and conditions of the permit, the District Ranger cancelled 25% of the term grazing permit in accordance with FSH 2209.14, Section 16.4 (District Ranger, decision letter, June 18, 2004).

The record does not corroborate the statement that it was obvious to all parties that an early move was the practical and optimum management decision. The record does show that that was not the decision at the June 4 meeting (District Ranger Responsive Statement, Response to Appeal Point 8; and District Ranger memo to Marnie Josephsen,

July 9, 2004). It is also clear that if that had been decided on June 4, the decision would have been to cleanly move all the cattle to the next pasture, not to just move a few (District Ranger Responsive Statement, Response to Appeal Point 8).

The early placement of salt in the Buttermilk Pasture is not necessarily a clear statement of intent to move livestock in violation of the terms and conditions of the term grazing permit but it does not negate the fact that livestock were found there by the District Ranger on June 15, which was prior to the time livestock were authorized to be there.

The Forest Supervisor in his review of the first-level appeal considered the issue of water rights (First level appeal response, p. 7, item C, April 4, 2005). The fact that the purported water rights are not recorded with the state may or may not be pertinent to state law. The issue here is that a term grazing permit can be suspended or cancelled, in whole or in part, for failure to comply with the terms and conditions of the permit (Term Grazing Permit, p. 1, Item 3).

**APPEAL ISSUE 4:** Appellant has vehemently argued that the economic impact to his ranching operation as a consequence of the decisions is potentially devastating. Not only will appellant suffer the adverse effects set forth in his Notice of Appeal at paragraph 5, but also as discussed at the Oral Presentation, the decisions effectively reduce the value of appellant's ranching operation by approximately \$822,000 (loss of 274 head at an animal value of \$3000 per cow unit).

**RESPONSE:** The Forest Service does not recognize a value to the term grazing permit but does recognize that a reduction in the permit will affect the economics of the ranch operation. However, the Forest Service's responsibility is to the land resources and the proper management of those resources. Term grazing permits are issued with terms and conditions that afford control over livestock use of the resources. Failure to adhere to the terms and conditions is grounds for suspension or cancellation of the permit in whole or in part (Term Grazing Permit, Page 1, Item 3). Appellant has a history of non-compliance problems and was under suspension of 25% of his term permit when the most recent instance of non-compliance occurred (District Ranger, decision letter August 29, 2002). Given that situation, the next step is to cancel the portion under suspension, which is what the District Ranger did.