



United States  
Department of  
Agriculture

Forest  
Service

Humboldt-Toiyabe  
National Forest

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**File Code:** 1500-1  
Appeal # 04-0417-0010

**Date:** April 4, 2005

Mr. John E. Marvel, Esq. Attorney at Law  
Marvel & Krump, LTD  
217 Idaho Street  
P.O. Box 2645  
Elko, NV 89803

Dear Mr. Marvel:

This is my decision on your appeal.

On June 18, 2004, District Ranger Jose Noriega issued a decision letter to cancel 25% of Mr. Buckingham's term grazing permit on the Buttermilk C&H Allotment. Ranger Noriega's decision was based on the presence of Mr. Buckingham's cattle in the Buttermilk Pasture prior to the authorized on-date.

My review was conducted under the provisions of 36 CFR 251 Subpart C.

## **APPEAL DECISION**

First, I want you to know that I take my decision on this appeal very seriously. I have carefully reviewed the entire record on several occasions. Grazing on the National Forest is a very important activity that provides rural jobs and community stability. Grazing is one of the reasons that National Forests in Nevada were created, and grazing is encouraged by the Forest Service as a part of law, regulation, policy and practice. I fully recognize the potential economic impact to Mr. Buckingham personally of a decision to cancel 25% of his Term Grazing Permit.

Because of the significance of such an action, I would only do so if I was fully convinced by the record, not only that Mr. Buckingham was out of compliance with his Annual Operating Instructions and the terms and conditions of his Term Grazing Permit, but that also that such non-compliance was willful, repeated and that there was little or no probability that permit compliance could be obtained in the future.

I am very sorry to report that this is the conclusion that I have reached. Therefore I must affirm the decision by District Ranger Noriega. I find that his decision fully complies with applicable laws, regulations, and agency policy.

My rationale to affirm is described in detail in the enclosure. The enclosure includes a process information summary; a re-statement of Mr. Buckingham's appeal points as I understand them; an itemization of facts



from the appeal record for each appeal point; and my conclusions for each appeal point, based upon the facts and the record.

I would like to re-emphasize these points:

#### Control of Cattle:

Control of cattle is the most important responsibility of any permittee. All grazing systems and resource management plans and requirements are based on the assumption that a certain permitted number of cattle are located in a certain grazing unit for a particular period of time. This is particularly true in rest units. The resource benefits of a seasons rest are essentially eliminated by unauthorized grazing. Mr. Buckingham had several reasons why his cattle were in the wrong units; including gates left open, a neighboring permittee moved his cattle, that he was unaware his cattle were in the wrong area and that he assumed Forest Service permission. I did not find these reasons credible. Even in cases that he knew his cattle were in the wrong unit he did not take action to resolve the issue. In reviewing the record I also found similar issues had occurred repeatedly over nearly 30 years, involving several district rangers. In fact I found the record to be remarkable in the number of letters about this issue since 1986. There have been several previous permit suspensions concerning this issue and two settlement agreements intended to resolve the problems.

#### SECOND LEVEL DISCRETIONARY APPEAL

The provisions of 36 CFR 251 Subpart C also establish Mr. Buckingham's right to file an appeal for a second level review with the Regional Forester. The second level appeal must be filed within 15 days of this first level appeal decision. If filed, the Regional Forester has discretion to accept or deny the review. The Regional Forester's review would be conducted on the existing record; no additional information may be added to the file. Mr. Buckingham may file for a second level review at:

USDA Forest Service  
Intermountain Region  
Regional Forester Jack Troyer  
324 25<sup>th</sup> Street  
Ogden, UT 84401

Sincerely,

/s/ Robert L. Vaught  
ROBERT L. VAUGHT  
Forest Supervisor

cc: Mr. Kenneth Buckingham, Jose Noriega

**First Level of Review  
Appeal Issues and Responses  
Kenneth Buckingham, Buttermilk Allotment  
#04-0417-10**

**Process Information**

On August 12, 2004 I received a Notice of Appeal and Request for Mediation (appeal) on the decision dated June 18, 2004 by District Ranger Jose Noriega on the Santa Rosa Ranger District. Ranger Noriega decided to cancel 25% of Kenneth Buckingham's (Appellant) term grazing permit No. 5-155 based on the presence of Mr. Buckingham's cattle in the Buttermilk Pasture of the Buttermilk Allotment prior to the authorized on-date.

The appeal was filed in accordance with 36 CFR 251 subpart C and included a request for mediation as provided in 36 CFR 251.103, a request for an oral presentation as provided in 36 CFR 251.90(c) and 251.97, as well as a request for stay pending the decision on the appeal as provided in 36 CFR 251.91. The Appellant designated John E. Marvel as his representative in all aspects of this appeal. The appeal was designated 04-0417-10.

In my Letter of Acknowledgement of the appeal, dated August 12, 2004, I granted the request for mediation and a stay on the decision. An oral presentation was also granted if mediation was unsuccessful. Although the mediation process was implemented, the parties were unable to reach resolution of the issues. Therefore the appeal process and timelines were reinstated on November 8, 2004.

The Deciding Officer prepared a Responsive Statement and submitted a copy to the Appellant and myself on December 1, 2004. A written reply to the Responsive Statement was received on January 3, 2005. An Oral Presentation was made before me on February 16, 2005, at which time Appellants asked to provide a few more documents. On February 22, 2005 these documents were received from the Appellant and in a letter dated March 2, 2005 I informed all parties that the appeal record was officially closed.

I reviewed the Appeal, Responsive Statement of the Deciding Officer, Appellant's Reply Statement and the Oral Presentation information. I considered the entire record in formulating my decision.

**Appeal Issues and Responses**

**Issue 1. Lack of fence maintenance by other permittee (Thomas) allowed livestock into the Buttermilk Pasture prior to the scheduled date in the Annual Operating Instructions.** The Forest Service knew of this fence maintenance issue; the Ranger's failure to take corrective action contributed to livestock entering the Buttermilk Pasture prior to the scheduled entry date.

**Response:**

Forest Service personnel met with both Buttermilk Allotment permittees (Buckingham and Thomas) on the allotment on June 4, 2004. During the field review, inadequate fence maintenance along a stretch of fence was identified (Responsive Statement (RS) and Appeal 4a). Because the Thomas's were responsible for maintenance of that section of fence, Ranger Noriega directed Thomas to complete the maintenance (RS Appeal Point 5 and 9 – FS response). The Thomas's later fixed the fence, but the record is unclear as to when it was completed.

During the June 4<sup>th</sup> meeting, the Appellant's cattle were found in the Buttermilk Pasture. It is assumed cattle had accessed the Buttermilk Pasture through the broken section of fence. The Appellant moved his cattle back to the Spring City Pasture (Appeal 4j). Appellant states that after the meeting, he distributed salt in the Buttermilk Pasture (Appeal 4j).

The Appellant signed his Term Grazing Permit #5-155 on July 29, 1999 accepting all of its' terms and conditions. This permit includes the following General Terms and Conditions: 8 (b): "The permittee will allow only the numbers, kind, and class of livestock on the allotment during the period specified...if livestock owned by the permittee are found to be grazing on the allotment in greater numbers, or at times or places other than permitted...the permittee shall be billed for excess use at the unauthorized use rate and may face suspension or cancellation of this permit." (RS - Permit). Nowhere in the record is there evidence that Appellant tried to comply with this portion of his term grazing permit by returning to the Buttermilk Allotment between June 4<sup>th</sup> and June 21<sup>st</sup> to ensure his livestock had not re-entered the Buttermilk Pasture.

I agree that the lack of fence maintenance by Thomas, the other Buttermilk Allotment permittee, may have contributed to livestock being able to access the Buttermilk Pasture. However, I conclude that the Appellant failed to take the necessary steps to comply with the terms and conditions of his term grazing permit, by taking reasonable actions to ensure his cattle did not enter the Buttermilk Pasture early or to remove them once they had entered. Appellant had several reasons to believe his livestock might access the Buttermilk Pasture prior to his authorized on-date of June 23<sup>rd</sup>. The Appellant: 1) was aware of fence problems, 2) had found his cattle in the Buttermilk Pasture three weeks prior to the on-date, and 3) took action (placement of salt) likely to actually attract his cattle prematurely into the Pasture. Despite all these indications that his livestock might enter the Buttermilk Pasture, the Appellant made no attempt to monitor the location of his livestock during the period from June 4<sup>th</sup> to June 21<sup>st</sup>.

**Issue 2. Lack of a unit boundary fence between the Spring City Unit and the Blackridge Unit was not completed as agreed to in the 2003 Settlement Agreement.**

The District Ranger's failure to construct a fence in 2003, as agreed to in the Settlement Agreement, contributed to early cattle use in the Buttermilk Pasture.

**Response:**

Appellant was issued a decision to suspend 25% of his term grazing permit on August 29, 2002 (RS Appendix 2). Appellant appealed this decision (RS Appendix 3) and requested mediation. Mediation for the appeal occurred on March 27, 2003 (RS Appendix 5) at which time a tentative Settlement Agreement was drawn up. Appellants did not sign the Settlement Agreement at that time. The Appellant did not return a signed copy of the Settlement Agreement to the Forest Service until July 23, 2003, after Ranger Noriega sent a letter stating that the Agreement either needed to be signed or the appeal process would be reinstated (RS Appendix 4).

The FS could not begin implementation of the Settlement Agreement until it was understood that everyone agreed to and was committed to its terms. Due to the Appellant's delayed signing of the Settlement Agreement, Forest Service survey personnel were no longer available to conduct mandatory surveys during the summer of 2003. The surveys were scheduled for fall; however, an early snow storm made access to the Allotment impossible (RS, Appeal Point 6 FS Response)..

Snow continued to prevent access to the fenceline through May 2004. As soon as access was available (June 4, 2004), the District met with the Appellant on-site to flag the exact route (RS: Appeal Point 7 Forest Service Response). Surveys were completed and the Ranger authorized the Appellant to begin construction on June 14, 2004, using Forest Service provided materials. Appellant did not construct the fence until October 2004, after being confronted about his obligation to do so per the Settlement Agreement (RS, Appeal Point 9 FS Response).

I conclude that the failure to complete construction of the fence could have contributed to the ability of livestock to access the Buttermilk Pasture. However, it is apparent that the Appellant's four-month delay in signing the Settlement Agreement in 2003 was a significant contributor to authorization delays. It is unclear whether the District Ranger had the ability to expedite surveys and authorization after such late notice. Regardless, the Appellant was not absolved of his responsibility to comply with the authorized on-date and the terms and conditions of the term grazing permit as described in Issue 1.

**Issue 3. Appellant's cattle were actually moved into the Buttermilk Pasture by employees of the other permittee on the allotment on June 6<sup>th</sup> and the gates left open.** After this office received the appeal, the Appellant submitted an affidavit of a man that had worked for the Thomas's, the other permittees on the allotment. This affidavit states that he and his brother were told by the Thomas's on June 6<sup>th</sup> to move cattle through the gate into the Buttermilk Pasture and then leave the gate open.

**Response:**

Appellants have provided an affidavit from a Francisco Jimenez, who was working for the Thomas's during June 2004. In the affidavit, Mr. Jimenez states that on or about June 6<sup>th</sup>, he and his brother were instructed by the Thomas's to move cattle into the Buttermilk Pasture. He indicated the gate was partially open at that time and that after moving the cattle into the Buttermilk Pasture, they left it open (RS Appendix 11).

After receiving the affidavit, Ranger Noriega called Mr. Jimenez to discuss the points of the affidavit. The Ranger identified inconsistencies between Mr. Jimenez's affidavit and Mr. Jimenez's statement during their conversation. To assure that language barriers were not contributing to the perception of inconsistencies, Ranger Noriega arranged for a Spanish interpreter to assist Mr. Jimenez with a new affidavit. The second affidavit puts in to question the timing of the movement of the cattle and how far into the allotment they were moved (RS Appendix 12).

I conclude that the discrepancies between the two affidavits provide conflicting evidence regarding the timing and extent of cattle movement by Mr. Jimenez. If the Appellant had inspected his allotment between the June 4<sup>th</sup> meeting and June 21<sup>st</sup> he would have noticed whether this gate was open or if his livestock were actually pushed into the Buttermilk Pasture. Appellant was not absolved of his responsibility to comply with the authorized on-date.

**Issue 4. At no time during the present grazing season was Appellant aware of, or in any way responsible for, any of his livestock being in an unauthorized use area.**

**Response:**

Appellant had several reasons to believe his livestock might try to access the Buttermilk Pasture. At the June 4<sup>th</sup> meeting, in addition to the fence maintenance problems discussed in Issue 1, Appellant commented that he thought the Spring City Pasture was running low on feed, and that his livestock would "desire to move to the higher elevations of the Buttermilk Allotment" (Appeal 4d). Appellant also placed salt in the Buttermilk Pasture on June 4<sup>th</sup>, which could attract and hold livestock in Pasture (Appeal 4k).

Appellant has a history of his livestock being in areas at times and places not authorized in the Annual Operating Instructions or his term grazing permit, often in the same locations that are at issue in this current decision (RS Appeal Point 4 FS Response and Supporting Documentation Letters). In fact, he was under a 25% suspension during the 2004 grazing season for non-compliance with the same terms and conditions of his term grazing permit in 2002 (RS Appendix 2). He has received Notices of Non-Compliance and Letters of Suspension over the last three years as a direct consequence of non-compliance with similar permit terms and conditions (RS Appendix 6, and 2, and Supporting Documentation - Letter July 26, 2002, August 19, 2002).

Ranger Noriega notified the Appellant that at least 67 of his livestock were in the Buttermilk Pasture on June 15<sup>th</sup> (RS Appendix 7). The Ranger again notified the Appellant that his livestock were in the Buttermilk Pasture on June 19<sup>th</sup> (when the Ranger delivered the Notice of Decision to Cancel) (RS Appendix 8). The Appellant did not initiate removal until June 21, and did not complete his removal until June 23 (Appeal 4h).

I conclude that the Appellant had clear reason to anticipate his livestock's early use of Buttermilk Pasture and should have taken appropriate steps to know whether or not this was occurring for the following reasons:

- 1) He stated his cattle were running low on feed in the Spring City Pasture and would want to access the higher elevations of the Buttermilk Pasture,
- 2) He knew there were problems with fence maintenance,
- 3) He knew that his livestock had been in the Buttermilk Pasture on two different occasions prior to the June 23 on-date,
- 4) He had taken specific action (salting) three weeks prior to the on-date that was likely to draw his livestock into the pasture, and
- 5) He was aware of a history of his livestock being in the Buttermilk Pasture outside the dates authorized in the term grazing permit or Annual Operating Instructions.

I also conclude that Appellant is responsible for his livestock are located while on National Forest System lands. As stated in Response: Issue 1, permittees must comply with Term Grazing Permit terms and conditions, and Annual Operating Instructions. Compliance requires active permittee management of livestock. Specifically, the Appellant should have visited the allotment as often as necessary to ensure that his livestock were grazing in appropriate pastures, and taken reasonable actions to correct non-compliance. Appellants lack of knowledge does not make him not responsible.

**Issue 5. Due to an observation during a June 4<sup>th</sup> meeting that there wasn't adequate feed, and the fact that the Forest Service allows flexibility in adjusting unit entry dates due to feed or water conditions, means that those cattle that were in Buttermilk Pasture prior to the scheduled entry date were not in not-compliance.**

Cattle that were in the Buttermilk Pasture prior to the scheduled entry date were not in non-compliance because the Appellant told the Forest Service that there wasn't adequate feed, and the Forest Service allows for flexibility in entry dates.

**Response:** Appellant did not attend the spring Annual Operating Meeting and did not respond to numerous phone calls from the District following the meeting. Given the Appellant's failure to respond, the District Ranger mailed the 2004 Annual Operating Instructions to the Appellant. Authorized dates for the Buttermilk Pasture were identified as June 23 to August 28. The Annual Operating Instructions state: "Please contact the District office in Winnemucca if you have any problems or questions about these Annual Operating Instructions or conditions on the Allotment during the grazing season." (RS – AOI).

At the June 4<sup>th</sup> field meeting, the Appellant commented to the District Rangeland Management Specialist that feed in his Spring City Pasture was lacking (Appeal). He did not request an early exit date from the Spring City Pasture into Buttermilk Pasture or pursue his forage concerns in any other way at the meeting or at any other time (RS – Appendix 9, letter dated July 9, 2004). The Appellant states that he was unaware at the time that he was able to request a change from the Annual Operating Instructions (on/off date).

During the time livestock were observed in the Buttermilk Pasture, there were also livestock owned by the Appellant in the Spring City Pasture (RS: Appeal Point 12 FS

Response). The Annual Operating Instructions do not provide for livestock to be in two units at any one time (RS: AOI).

I conclude that the Appellant was in non-compliance with the terms and conditions in his Term Grazing Permit and Annual Operating Instructions. The Appellant briefly mentioned his forage concern, but had no further communication with the District regarding his concern. The Forest Service does allow flexibility in adjusting on/off dates due to feed or water conditions; however, the District Ranger must approve these changes. The Appellant did not request, nor was he given approval, to allow his livestock to utilize the Buttermilk Pasture at a time other than that authorized in the Annual Operating Instructions. Had this been requested and approved, the District Ranger would have required that all livestock be moved into the Buttermilk Pasture. Appellant was certainly not authorized to have his livestock in two units at the same time. (RS Appeal Point 12, FS Response)

**Issue 6. The District Ranger violated numerous applicable laws, regulations, practices and the Humboldt National Forest Land and Resource Management Plan (Humboldt Forest Plan), in numerous ways, including the following:**

**A. 36 CFR 251.93 requires the District Ranger to consult with Appellant prior to issuing written decision.**

**Response:**

At the time of the Ranger's June 18, 2004 decision, the Appellant was under a mediated two year-25% suspension for a similar permit violation that occurred during the 2002 season. The Ranger had issued a Notice of Non-Compliance to the Appellant on July 26, 2002; the Appellant failed to take corrective action. The Ranger subsequently sent a letter on August 29, 2002 informing the Appellant of his decision to suspend. The Appellant appealed that decision. On March 27, 2003, the Ranger participated in mediation with the Appellant and his legal counsel; a consensus was reached on conditions for an agreement. The Appellant refused to sign the mediated agreement until July 2003, after receiving a letter from the Ranger indicating that the full suspension would be reinstated (RS: Appeal Point 20 Forest Service Response).

During the 2003 grazing season, Forest Service personnel met with the Appellant and the other permittee on the Buttermilk Allotment to review the Buttermilk Exclosure and identify actions to pursue.

On September 8, 2003, the Ranger issued a second Notice of Non-Compliance for unauthorized use similar to both the 2002 and 2004 non-compliance (RS: Forest Service Supporting Documents [Notice of Non-Compliance, September 8, 2003]).

The 2004 Annual Buttermilk Allotment Operating Meeting was scheduled with the Appellant and other permittee on April 4, 2004. The Appellant failed to show, and did not return numerous phone calls from the District following the meeting. Given

the Appellant's failure to respond, the Ranger mailed the 2004 Annual Operating Instructions on May 5, 2004 (RS: Appeal Point 20 FS Response).

I conclude that Ranger Noriega communicated repeatedly and consistently, and was not in violation of 36 CFR 251.93. In addition, the Appellant's failure to attend the Annual Operating Meeting created a missed opportunity for him to clarify conditions and terms and identify needs or actions specific to the upcoming grazing season.

**B. Humboldt Forest Plan recognizes the need to maintain viable ranching operations; the cancellation will significantly impair operations. Enforcement of fence maintenance obligations and compliance with the Settlement Agreement would attain Forest Plan multiple use goals.**

**Response:**

Appellant's 2004 Annual Operating Instructions identifies 6/23 as the authorized permit on-date. Term Grazing Permit Part 2, General Terms and Conditions, 8(d) states: "If livestock owned by the permittee are found to be grazing on the allotment in greater numbers, or at times or places other than permitted ... the permittee shall be billed for excess use at the unauthorized use rate and may face suspension of cancellation of this permit.

See "Response: Issue 2" for documentation of Settlement Agreement fence construction commitments.

I conclude that the decision made by the District Ranger does support the Forest Plan.

- Forest Service recognition of the importance of viable ranching operations does not absolve the Forest from taking appropriate actions to assure terms and conditions of the Appellant's Term Grazing Permit are met. The repeated nature of the non-compliance warrants the severity of the 25% cancellation. The Appellant would have avoided permit action had he complied with permit terms and conditions.
- The Ranger has taken permit action against the other permittee to enforce fence maintenance requirements. However, Regardless of the adequacy of the other permittee's maintenance during the 2004 grazing season, the Appellant was clearly obligated to assure that his cows graze the appropriate Pastures at the appropriate time (as specified in the Term Grazing Permit, Annual Operating Instructions, and previous letters of Non-Compliance).
- Finally, as discussed in "Response: Issue 2" the Appellant was the primary contributor to the delay in authorization of fence construction prescribed in the 2003 Settlement Agreement.

**C. State of Nevada water laws obligate the Forest Service to allow the Appellant use of his property rights to water sources on the allotment**

State of Nevada-Engineer's Office documents indicate that the Appellant does not possess any stockwater rights on the Buttermilk Allotment (RS: Appendix 13). No evidence to the contrary was presented at the Oral Presentation.

In addition, a decision to cancel 25% of the Appellant's term grazing permit would not prevent the Appellant from using stockwater on the allotment. Although stock numbers would be reduced, authorized livestock would continue to water on the allotment (RS: Appeal Point 19 Forest Service Response).

I conclude that the decision made by the District Ranger does not violate State of Nevada water rights or deprive the Appellant of property rights.

**D. The Appellant has been arbitrarily and punitively singled out for punishment; the Ranger's decision is discriminatory, biased and prejudiced.**

**Response:**

Since 1989, the Appellant has been issued three decisions for either suspension or cancellation. Two of these decisions were rescinded. In both cases, within that same season, and after the decision was rescinded, appellants again had cattle in excess use. Appellants received two Notices of Non-Compliance early in 2002 for failure to maintain fences and for livestock in pastures that were scheduled for rest. Appellant did fix his fence, but failed to keep livestock out of rested areas. As a consequence, the District Ranger issued a decision to suspend 25 % of the permit for 3 seasons. The Appellant appealed. A Settlement Agreement was reached to maintain the 25% suspension, but reduced it from three years to two years.

While under suspension, the Appellant again violated the terms and conditions of his term grazing permit in both 2003 and 2004. The 2003, Notice of Non-compliance was issued for livestock in a rested pasture.

The District Ranger also took permit action in 2004 against the Buttermilk Allotment other permittee for failure to maintain fences.

I conclude that Appellant has not been arbitrarily and punitively singled out for punishment. The Appellant's livestock were clearly grazing in the Buttermilk Pasture prior to their authorized 2004 on-date. The District Ranger's 2004 decision was based, in part, on the Appellant's extensive history of failing to manage his livestock and comply with the terms and conditions of the term grazing permit. The Ranger also took action against the other Buttermilk permittee. Finally, the Appellant has provided no evidence suggesting bias or prejudice.

**E. Application of 36 CFR Part 251 Subpart C appeal regulations violates Procedural Due Process**

The Forest Service appeal process at 36 CFR Part 251 Subpart C is an administrative review of actions taken by a Deciding Official. The review is conducted by the Forest Service line officer at the next higher level. As stated in 36 CFR 251.80(b), "The rules in this subpart seek to offer appellants a fair and deliberate process for appealing and obtaining administrative review of decisions regarding written

instruments that authorize the occupancy and use of National Forest System lands.” These instruments include term grazing permits [(36 CFR 251.82(c)], such as that issued to the Appellant. The Forest Service process provides for an administrative review based on the record.

36 CFR 251.97 provides for permittees to request an opportunity for an oral presentation to the Appeal Reviewing Officer. The Appellant availed himself of this opportunity on February 16, 2005.

36 CFR 251.99(f) provides that “Unless the next higher officer exercises the discretion to review an appeal decision as provided...the appeal decision is the final administrative decision of the Department of Agriculture and is not subject to further review...”

I conclude that use of the 36 CFR Part 251 Subpart C appeal regulations follows established Forest Service process and case law. If the Appellant is not satisfied with the final administrative decision of the Forest Service, he may litigate through the Federal court system.

**F. Application of 36 CFR Part 251 Subpart C appeal regulations denies reasonable fairness in the development of the appeal record; the record is created in disregard of Appellant’s right to Procedural Due Process.**

As described above (Issue 5F), 36 CFR Part 251 Subpart C is the legal Forest Service appeal process offering “appellants a fair and deliberate process for appealing and obtaining administrative review of decisions” specific to the Appellant’s term grazing permit.

I conclude that use of the 36 CFR Part 251 Subpart C appeal regulations follows established Forest Service process and case law.