Province of British Columbia

Forest Appeals Commission

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## DECISION NO. 2005-FOR-016(a)

In the matter of an appeal under section 82 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69.

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| **BETWEEN:** | Franklin Dean Miller and Miller Ranches Ltd. | **APPELLANTS** |
| **AND:** | Government of British Columbia | **RESPONDENT** |
| **BEFORE:** | A Panel of the Forest Appeals Commission<br>David H. Searle, C.M., Q.C., Panel Chair | |
| **DATE:** | November 14 to 16, 2007 | |
| **PLACE:** | Kamloops, BC | |
| **APPEARING:** | For the Appellant: John M. Hogg, Q.C., Counsel<br>For the Respondent: E.W. (Heidi) Hughes, Counsel | |

### APPEAL

This is an appeal by Dean Miller and Miller Ranches Ltd. under section 82(1)(a) of the *Forest and Range Practices Act* (the "*Act*"), against a determination (the "Determination") made on November 28, 2005, by Ken Waite, District Manager, 100 Mile House Forest District, Ministry of Forests and Range (the "Ministry"), pursuant to section 71(2)(a) of the *Act*. Mr. Waite found that the Appellants contravened section 50(1) of the *Act* by permitting their cattle to graze on Crown range without authorization on three separate days in 2004. Mr. Waite levied an administrative penalty of $1,000.00 pursuant to section 12(c) of the *Administrative Orders and Remedies Regulation.*

The Commission has authority to hear this appeal under section 84 of the *Act*, which provides that on an appeal, the Commission may:

> (c) consider the findings of the person who made the determination or decision, and
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> (d) either
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> (i) confirm, vary or rescind the determination or decision, or
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> (ii) with or without directions, refer the matter back to the person who made the determination, for reconsideration.

The Appellants ask the Commission to rescind the Determination, including the administrative penalty.

## BACKGROUND

The historic Chilco Ranch (also referred to as the Miller Ranch in this decision), located in the Chilcotin District of the Cariboo forest region, an area of approximately 20,000 acres of deeded land, was acquired by the Appellants in 1992. In 2004, the Appellants were running approximately 1100 cow/calf units or 2200 animals on their range.

On behalf of the Appellants, Dean Miller, fearing drought, chartered an aircraft to over fly his ranch with his senior cowboy, David Maurice, on July 1, 2004. Their fears were confirmed when they located only 2 water locations on Deer Ridge, apart from water in Fletcher, Abrams and Rushes Lake.

Reading the signs of drought, the Appellants earlier in May and June, had moved approximately 400 cattle from their ranch to Horsefly, returning them home in September, for a total cost of $41,700, which included $35,700 for pasture rental and $6,000 for transportation.

Throughout the summer and fall of 2004, the Appellants rotated their stock clockwise throughout the various ranges on their ranch, but, due to lack of water, the cattle arrived on Deer Ridge earlier than they normally would have done, proceeding west to water at Rushes Lake, Abrams Lake and Fletcher Lake. Due to inadequate fencing both around and north of the Stone Indian Reserve ("IR") #4, as well as mud-filled cattle guards over 700 Road, the Appellants' cattle gained access to both IR and Crown lands before being driven back east of 700 Road by cowboys employed by the Appellants.

On November 28, 2005, the District Manager issued the Determination. He found, in part, as follows:

> Miller's cattle were grazing on Crown range not under an agreement under the *Range Act* on three separate inspection days as summarized: 66 cattle August 11, 2004, 17 cattle September 14, 2004 and 4 cattle on September 16, 2004.

In the Determination, the District Manager considered whether any of the statutory defences provided in section 72 of the *Act* applied, including the defence of due diligence. He concluded that those defences did not apply.

There is no dispute that cattle owned by the Appellants were located on Crown land on the dates and in the numbers indicated in the Determination.

On December 15, 2005, the Appellants filed an appeal of the Determination. The Appellants submit that the evidence establishes, on a balance of probabilities, that the Appellants exercised due diligence to prevent the contravention. In particular, the Appellants submit that they had cowboys riding and salting to keep the cattle on the Chilco Ranch property.

The Respondent submits that riding and salting was insufficient, because it was foreseeable that the cattle would wander from the property without a fence.

At the conclusion of the oral hearing of the appeal, the Commission issued an oral decision allowing the appeal on the basis that the Appellants had established the

defence of due diligence. The Commission advised the parties that written reasons for its decision would follow. This decision sets out those reasons.

## ISSUE

The three trespasses having been admitted, the only issue in this appeal is whether the Appellants, on a balance of probabilities, have established due diligence.

The Commission notes that, in their Notice of Appeal, the Appellants also raised the defence of officially induced error, and requested costs. However, the Appellants did not pursue those matters at the oral hearing. Accordingly, the Commission did not consider those matters.

## RELEVANT LEGISLATION

The relevant sections of the *Act* that apply in this appeal are the following:

**Unauthorized range activities**

**50** (1) A person must not cause or permit livestock to be driven on or to graze on Crown range unless

(a) authorized to do so under an agreement under the *Range Act* or under the regulations under this Act, and

**Administrative penalties**

**71** (1) The minister, after giving a person who is alleged to have contravened a provision of the Acts an opportunity to be heard, may determine whether the person has contravened the provision.

(2) After giving a person an opportunity to be heard under subsection (1), or after one month has elapsed after the date on which the person was given the opportunity, the minister,

(a) if he or she determines that the person has contravened the provision,

(i) may levy an administrative penalty against the person in an amount that does not exceed a prescribed amount, or

...

(5) Before the minister levies an administrative penalty under subsection (2), he or she must consider the following:

(a) previous contraventions of a similar nature by the person;

(b) the gravity and magnitude of the contravention;

(c) whether the contravention was repeated or continuous;

(d) whether the contravention was deliberate;

(e) any economic benefit derived by the person from the contravention;

(f) the person's cooperativeness and efforts to correct the contravention;

(g) any other considerations that the Lieutenant Governor in Council may prescribe.

**Defences in relation to administrative proceedings**

**72** For the purposes of a determination of the minister under section 71 or 74, no person may be found to have contravened a provision of the Acts if the person establishes that the

(a) person exercised due diligence to prevent the contravention,

The amount of the administrative penalty that may be levied for contraventions of the *Act* is prescribed in section 12(c) of the *Administrative Orders and Remedies Regulation* which reads as follows:

**Penalties — *Forest and Range Practices Act***

**12** The maximum amount that the minister may levy against a person under section 71 (2) of the *Forest and Range Practices Act* is

...

(c) $50 000 for a contravention of any of the following sections of that Act: 3 (1); 12 (1); 21 (1); 22 (2); 31; 38 (1); 45 (1) (a) or (b); 50 (1); 51 (7); 54 (2) (a) or (b); 57 (4); 77 (1) or (2) (a) or (b); 77.1 (1) or (2),

**EVIDENCE AND ARGUMENT**

The Appellants called three witnesses. The first was Benjamin Parker, a part-time cowboy out of Prince George who takes time off from his regular employment three to four days at a time, up to four times a year, to work for the Appellants. He has done this for over 10 years. In 2004, Mr. Parker was so employed on May 22 to 24 for branding; then from August 11 to 13 chasing cows and, finally, from October 4 to 6. It is the August 11 to 13 period that is particularly relevant.

Referring to his diary entries, which were made upon his return to Prince George, Mr. Parker testified that on August 11 he, with his dog, rode with David Maurice, who had three dogs, through the Fletcher Lake area and Hutch Meadow looking for cows. He found a few and with the help of the dogs drove the cattle east back to Deer Ridge on to Miller Ranch land. On August 12, 2005, Mr. Parker returned to Hutch Meadow and made a sweep to see if any cattle had been left behind. He found none. And, again on August 13, with David Maurice, he returned to Hutch and Kincaid Meadows looking for stray cattle but found none. Upon being asked about his instructions, he indicated that he was not directed to drive cattle onto Crown land, but rather to return any he found west of 700 Road to Miller's ranch lands, which are located east of 700 Road.

The Appellants' second witness, David Maurice, is a full-time cowboy employed at Miller Ranch. At 59 years of age, Mr. Maurice testified to being a life-time cowboy who has three working dogs, all trained to work cattle. Using his dogs, he can do the work of three to four men, easily moving 150 head of cattle by himself. On occasion, he has moved as many as 250 to 300 head by himself with his dogs. Mr. Maurice began employment for the Appellants on March 10, 2004, so was relatively new to the ranch when the trespasses occurred.

On July 1, 2004, he flew for one hour over the ranch for the dual purposes of familiarizing himself with the Chilco Ranch's range and to determine the availability of water. He located only two water locations on Deer Ridge which is a part of the ranch. He also noted water at the three lakes just west of 700 Road, which he referred to in his diary entry as Fletcher, Duck and Rushes Lakes. His job was to move cattle throughout the range in a clockwise direction, and see that they got water and did not over graze any area. Also, once the cattle moved to Deer Ridge, his job was to keep them on the Appellants' ranch land east of 700 Road.

The cattle guards on 700 Road were plugged with mud and, therefore, ineffective. Therefore, they did not prevent the cattle from travelling either north or south on 700 Road, from which they were able to enter Crown and First Nations lands (IR #4). Nor were the First Nations or other private lands fenced, and what fences there were had gates that were often left open by other users. So, to keep Miller cattle on Miller land, Mr. Maurice would lay out salt blocks on Deer Ridge in order to keep them there, then ride west of 700 Road through Hutch and Kincaid Meadows rounding up cattle, then returning them east of 700 Road. He would also place blocks of salt in Kincaid and Hutch Meadows in order to hold cattle there while he collected up others. The meadows, though west of 700 Road, were deeded lands owned by the Appellants, but were unfenced, so keeping the cattle exclusively on them was difficult. Because of that, the strategy employed by the Appellants was not to graze cattle on Hutch or Kincaid Meadows, but rather to hold them there temporarily if they were found west of 700 Road.

On cross-examination, Mr. Maurice explained that in August 2004, his principal job was to keep the Appellants' cattle east of 700 Road. He said that he spent eight days in total west of 700 Road looking for cattle and returning them to the Miller Ranch. He testified that most of the cattle that crossed west of 700 Road did so either via the mud plugged cattle guards or through the unfenced areas abutting private lands (some 400 metres) and the unfenced First Nations land referred to on maps as IR #4.

Mr. Miller, director and shareholder of the corporate Appellant, Miller Ranches Ltd., was the last witness. In 2004, the drought conditions were the worst he had seen. This prompted him to move 400 cattle to Horsefly for the summer. Having done that, he felt that he could manage his remaining cattle on the 20,000 acres of land he had, without over-grazing. He explained how his property is grazed clockwise one year, then counterclockwise the next. He testified how he alerted Ministry authorities of his plan to move cattle to Deer Ridge early, that he would "salt and cowboy" to keep the cattle there. And though he knew that cattle would drift back and forth across 700 Road for water, he would do his best to constrain them. He felt that the government authorities concurred with him doing his best, using the methods that he said he would employ.

Mr. Miller denied instructing his cowboys to push cattle west of 700 Road; to the contrary, he testified that he told his cowboys to keep his cattle east of 700 Road and to return them there if they are found west of 700 Road.

On the critical dates of August 11 and 12, 2004, Mr. Miller had two crews riding Hutch Meadows and Minton Creek looking for cattle and, upon finding them, chasing them back onto ranch land.

Mr. Miller also testified how he had tried to meet with the Stone Band and government officials on July 15, 2004, but how government officials, in the preparation of the agenda, had forgotten to include his item.

Mr. Miller described how he placed calls and wrote letters to highways officials, asking that the cattle guards across 700 Road be cleaned, all to no avail.

On cross-examination, Mr. Miller was asked why he did not fence the areas where the cattle were escaping from his land. His response was that he will not fence lands privately owned by others.

The Respondent called one witness, Michael Pedersen, the District Manager, Chilcotin Forest District. Mr. Pedersen, who assumed his position on July 4, 2004, would normally have made the Determination under appeal but, because of his involvement in the file, stepped aside and asked Mr. Waite, District Manager, 100 Mile House Forest District, an adjacent district, to be the decision maker.

Mr. Pedersen admits to attending the July 15, 2004 meeting with the Stone Band where the matters of concern to the Miller Ranch did not get on the agenda. Mr. Pedersen further admitted to the government's failure to notify the Band of the Miller Ranch agenda item, and he said that the Band did not want to add it at the last minute.

Mr. Pedersen also described his discussion with Mr. Miller on August 16, 2004, when the need for water, the use of Hutch and Hance Meadows, and the proposal to "salt and ride" were all outlined. In the end, it was mutually agreed that, in the circumstances, Mr. Miller should "do his best" to keep his cattle on his land.

Mr. Pedersen expressed his view that fences provide the first line of defence to establish due diligence. On the issue of fencing, he said that he would like to see Miller Ranches Ltd. "tie into" IR #2 (the Stone Band) and then work with the Band so that they then do their fencing. How all this was to be accomplished in 2004 was not explained.

On the issue of whether any "harm" was caused to Crown land, Mr. Pedersen admits that there was none.

The argument put forward by the Appellants is that, notwithstanding the admitted trespasses on Crown land on August 11, 2004, September 14, 2004 and September 16, 2004, the Appellants exercised due diligence in attempting to prevent the trespasses.

The argument of the Respondent is that, in the absence of fences, it is foreseeable that cattle will escape onto Crown land. It is admitted by the Respondent that maintenance of effective cattle guards is the responsibility of the government.

## DISCUSSION AND ANALYSIS

### Whether the Appellants have established, on a balance of probabilities, that the statutory defence of due diligence applies in this case.

Given that the three trespasses are admitted by the Appellants, the only issue is whether, on a balance of probabilities, the Appellants have discharged the onus of showing that they exercised due diligence in the prevention of the trespasses. The Respondent says that, in the absence of fences, due diligence is not established. Is it reasonable, in the circumstances, to have expected the Appellants to have unilaterally undertaken a significant fencing program in the spring or summer of 2004? That is the crux of the issue.

Looking at what would have been involved to build the fences that would have been needed to prevent the trespasses, the evidence shows that surveys would be first undertaken to determine property lines. Some surveying, in fact, was done. Fences are usually built by fencing contractors. Presumably, several bids would be sought. Negotiations with neighbours would have to be undertaken so that costs are shared and the location of fence lines, gates, etc., are agreed. Financing by the parties or funding by agencies would have to be arranged. Would the accomplishment of the foregoing be possible, given the time available and the other priorities in the spring and summer of 2004? Mr. Pedersen, when asked this question, agreed that it would have been unreasonable. More to the point, would it be reasonable to expect the Appellants to have spent their resources on fence building when they were facing severe drought?

The words “due diligence”, while used in section 72(a) of the *Act*, are not defined. They have, however, been given thorough consideration in the common law. Judicial comment in respect of the defence of “all due diligence” begins with *R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 at pp. 373-374:

> Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts, which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. [emphasis added]

The Respondent referred to the test for due diligence that was set out by the Commission in *Weyerhaeuser Co. Ltd. v. Government of British Columbia* (Appeal No. 2004-FOR-005(5), January 17, 2006), at pages 24-26. In that case, the Commission reviewed *R. v. Sault Ste. Marie* and subsequent judicial decisions on the due diligence defence. According to *Weyerhaeuser*, the first step in deciding whether a person has established the defence of due diligence is to consider whether the events that led to the contravention were reasonably foreseeable. If the events were foreseeable, then the next step is to consider whether the person took all reasonable steps to prevent the events that led to the contravention, based on what a reasonable person would have done in the context of the particular facts.

At the hearing, it was common ground that the burden of proving due diligence, while on the Appellants, is discharged if proven on a balance of probabilities.

The Commission finds that the events that led to the contravention in this case were reasonably foreseeable, given the circumstances in the summer and fall of 2004. Therefore, the next step is to consider whether the Appellants took all reasonable steps to prevent the events that led to the contravention. In reviewing the steps taken by the Appellants, the Commission must decide what a reasonable "man" or person would have done in the circumstances. Or put another way, did the Appellants take all reasonable steps to avoid the particular events, i.e. the trespass of their cattle upon adjacent Crown land.

The Crown's position on fencing is reviewed above. The Commission finds that, in the circumstances prevailing in the spring and summer of 2004, it would have been unreasonable to expect the Appellants to focus their resources on fencing, particularly adjacent to other privately owned lands, including First Nations lands. Having neither the luxury of sufficient time nor the financial resources to build, by themselves, the fencing along adjacent private lands that the Respondent submits would have been reasonable, the Appellants did what a reasonable person would be expected to do, namely:

- the Appellants approached the Respondent asking for a renewal of their Temporary Grazing Permit that had been granted for 2002, so that they would have more range available for their cattle;
- the Appellants asked the Respondent to assist in arranging a meeting with First Nations so that an accommodation, with their approval, might be arranged;
- in the absence of success with either of the foregoing, the Appellants conducted an air borne survey of their range to determine available feed and water;
- concluding that both food and water were insufficient for their herd, the Appellants shipped 400 head of cattle to Horsefly at the cost of approximately $40,000;
- in order to manage their range, the Appellants rotated their cattle clockwise throughout their land, arriving at Deer Ridge early due to the drought conditions experienced, specifically the lack of water;
- the Appellants called the Ministry of Highways on many occasions to request that the cattle guards be cleaned;
- knowing that the cattle guards over 700 Road were ineffective because they were plugged with mud, thereby allowing migration of cattle off the Appellants' land, the Appellants undertook to do their best to keep their cattle off Crown land, specifically, to "salt and ride"; and,
- from the diary entries of both Ben Parker and David Maurice, as well as their *viva voce* evidence, it is clear that they were doing exactly what the Appellants had undertaken with the Respondent to do, namely: placing salt on Miller Ranch to keep the cattle there, riding to locate cattle that had wandered west of 700 Road, driving them back

east of 700 Road, and then conducting sweeps to determine whether any were missed.

Taking all of the foregoing into consideration, and having determined that it is unreasonable to have expected the Appellants, within the time and resources available to them, to have engaged in a comprehensive fencing program in 2004, the Commission finds that the Appellants did what a reasonable person would have done in the circumstances. The Commission finds that the Appellants took all reasonable steps to avoid the trespasses. The Appellants, on a balance of probabilities, have established due diligence.

## DECISION

In making this decision, the Commission has considered all of the relevant documents and oral evidence, including the arguments of counsel, whether or not specifically reiterated herein.

For the reasons set out herein, the Commission rescinds the Determination and administrative penalty made on November 28, 2005, and allows the appeal.

The appeal is allowed.

"David H. Searle"

David H. Searle, C.M., Q.C
Panel Chair
Forest Appeals Commission

December 14, 2007