



Province of
British Columbia

Forest Appeals Commission

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

APPEAL NO. 2003-FOR-004(a)

In the matter of an appeal under section 131 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159.

BETWEEN:	Estate of Benjamin Bolen	APPELLANT
AND:	Government of British Columbia	RESPONDENT
AND:	Forest Practices Board	THIRD PARTY
BEFORE:	A Panel of the Forest Appeal Commission Lorraine Shore, Panel Chair	
DATE:	Conducted by way of written submissions concluding on January 20, 2004	
APPEARING:	For the Appellant: Russel Bolen For the Respondent: Guy Brownlee, Counsel For the Third Party: Ben van Drimmelen, Counsel	

APPEAL

This is an appeal by the Estate of Benjamin Bolen (the "Estate") as represented by Russel Bolen from a September 21, 2003 administrative review decision, confirming a January 23, 2003 determination by Tony Wideski, District Manager, Cranbrook Forest District (the "District Manager"). In his determination, the District Manager found that the Estate had contravened section 74 of the *Forest Practices Code of British Columbia Act* (the "Code") by conducting grazing operations in the Pickering Hills range unit contrary to the approved range use plan. He imposed a penalty of \$500.

The appeal was filed with the Forest Appeal Commission (the "Commission") pursuant to section 131 of the *Code*. The Commission's powers on this appeal are set out in section 138 of the *Code*, which states:

138 (1) On an appeal of a determination or of the confirmation, variance or rescission of a determination, the commission may consider the findings of

- (a) the person who made the determination that is being appealed, or
- (b) the reviewer.

(2) On the appeal, the commission may

- (a) confirm, vary or rescind the determination appealed from, or
- (b) refer the matter with or without directions back to the person
 - (i) who made the initial determination, or
 - (ii) in the case of a determination made under section 129(5)(c), the reviewer who made the determination.

Mr. Bolen seeks an order reversing the District Manager's determination and the review decision, and overturning the \$500 penalty.

This appeal was conducted by way of written submissions.

BACKGROUND

The Pickering Hills range unit is on Crown land located in the Cranbrook Forest District. The Estate is one of five ranching operators that use this range for grazing livestock under an agreement with the Province. The four other ranching operators are: Ben and Laird Hawke, James Durham, C&C Ranch operated by Colin Morrison, and Suzanne Carter.

The events leading up to the determination under appeal took place primarily during the summer of 2002.

In the summer of 2002, the Estate held an agreement with the Province. The agreement, RAN075127, was dated January 1, 2002 with an expiry date of December 31, 2011. It permitted the Estate to graze its livestock on the Pickering Hills range unit, and included 7 pastures known as: Bronze or Bronze Lake, Jurik, Tie Lake, Eimers, Tie Lake Seeding, Relief Camp and Bolen.

The agreement allows the Estate to consume 189 animal unit months ("AUMs") on the range unit.

During the relevant period in 2002, Mr. Bolen was the operator of the Estate's ranching operation. The agreement was formally transferred from the Estate to Mr. Bolen on April 9, 2003

One of the requirements under the agreement was for the agreement holder to prepare and hold a range use plan. Mr. Bolen obtained approval for his range use plan on May 22, 2002 (the "Range Use Plan"). It has an expiry date of December

31, 2006. The plan allows Mr. Bolen to graze 48 cow/calf pairs plus 2 bulls over the entire range between approximately May 15 (turnout) and September 5 (fall roundup) of each year, although the dates may vary depending on weather conditions and range readiness.

The Range Use Plan (2002)

Among other things, the Range Use Plan sets out the agreement holder's obligations in relation to:

- maintaining proper conditions in riparian areas;
- adding new developments (mainly fences);
- maintaining developments;
- rotating cattle through the pastures; and
- achieving a "safe degree of use".

The relevant provisions are as follows:

4.6 Strategies to achieve or maintain properly functioning condition in riparian areas

Riparian areas must be maintained in properly functioning condition, as defined in the *Forest Practices Code of BC Act* and its regulations and guidebooks. Range management techniques such as salting, riding and/or rotational grazing will be utilized to keep cattle distributed away from the riparian areas. Stubble heights must be closely monitored in preferred areas of the riparian areas. When the average stubble height reaches 8 cm., livestock must be removed from the riparian portion of the unit.

6.0 PROPOSED DEVELOPMENTS

6.1

- New fence (at least one mile) from the north-west corner of Tie Lake to the beaver pond and install a swing gate at the beaver pond.
- Spring development in Tie Lake Seeding.
- Scoop out at Dry Lake.
- Short fence to keep cattle from drifting into Long Lake (Sand Lake) and a cattleguard at the south east end of Long Lake.
- Swing fence off the small Hydro line road to restrict access off the big Hydro line.
- Construct a fence behind the dump (south of the south end of Eimers pasture) for a holding pen area. Would only require a fence along the road as the dump is already fully fenced.

- Construct a fence along the bluff at Pickering pasture and Narrow Gauge and use water from Connors slough. This will include a water development at Connors slough.
- Fence from Long Lake to Tie Lake is only a 42" high fence allowing cattle to jump over. Propose to discuss with MWLAP to increase height and add a top rail to address concern for wildlife visibility. Total length is ~ 100 m.

7.0 Maintenance of Range Developments

The agreement holder will maintain any range developments (livestock trails, water developments, fences, non-status cattlegaurds) in an effective operating condition. They must be brought to an effective operating condition prior to livestock being turned into a pasture and maintained in such condition while livestock are grazing within the pasture.

Maintenance schedule agreed to as follows:

Sunday	Bolens
Monday	Durhams
Wednesday	Carters
Friday	Morrisons
Saturday	Hawkes
Tuesday & Thursday	Checks as needed (ie: Tie Lake Pasture)

10.2 Rotation Schedule

Notwithstanding the following rotation schedule the agreement holder will modify use of each pasture to ensure that his/her livestock do not graze the pastures below the "safe degree of use" as defined in Sections 10.4 and 10.5. The agreement holder will submit for approval, from a designated forest official, any anticipated or expected deviation from the outlined order of use or indicated time frames outlined in the rotation schedule. It is understood these changes will require an amendment to this Range Use Plan.

YEAR 2002 & 2006

Pasture	Estimated # of Days	Livestock No's	Estimated # of AUMs
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Bronze	11	48 C/C & 2 Bulls	24
Jurik	18	48 C/C & 2 Bulls	20
Pickering	19	48 C/C & 2 Bulls	21
Tie Lake	30	48 C/C & 2 Bulls	50
Eimers	30	48 C/C & 2 Bulls	50
Tie Lake Seeding	11	48 C/C & 2 Bulls	24
Relief Camp			
Bolen (rest)			
TOTALS	114	48 C/C & 2 Bulls	189

10.4 Safe Degree of Use

The number of days of grazing for each pasture has been set, based on historical use and/or range inventory data, to achieve Safe Degree of Use. Safe Degree of Use can be judged by stubble heights of key forage species listed in the following chart. The best rule of thumb is to take 50% of annual growth and leave 50%. Leaving 50% of annual growth is critical for the maintenance of the forage species located on the Range Agreement area. Range practices, such as herding, salting, fencing and controlled access to water, will be used to achieve even livestock distribution so that Safe Degree of Use is uniformly achieved over grazable areas within a pasture or range unit.

The "Safe Degree of Use" provision was followed by section 10.5 "Forage Growth Table", which sets out stubble heights for 7 different kinds of forage.

The 2002 Grazing Season

During the 2002 grazing season, Mr. Bolen "turned out" his cattle on May 25 or 26 into the Eimers pasture (sometimes referred to as the Eimer pasture). The other range holders did not turn out their cattle until June 1 and, when they did, it was into the Bronze pasture.

Mr. Bolen reported his actual use of the range unit as follows:

Pasture	In	Out	# of days
Eimers	May 25	June 29	34
Bronze	June 29	June 30	1
Jurik	June 30	July 15	16
Relief Camp	July 15	August 9	24
Pickering	August 9	August 29	20

Mr. Bolen took his cattle home on August 29, and reported this to the Ministry of Forests on September 2, 2002.

Inspections and Enforcement Actions

During the season in 2002, Barb Banting, Compliance and Enforcement Technician with the Ministry of Forests, made 11 Range Inspection Reports and issued five Non-Compliance Summaries.

On June 13, 2002, Ms. Banting drove throughout the Bronze and Eimers pastures and did not locate any Bolen cattle. In the Bronze pasture, she made no observations about the vegetation in her Range Inspection Report; however, under "comments", she states that a preferred area was heavily grazed. In Eimers pasture, she noted it was green and wet and that the area along Sand Creek was heavily grazed.

According to the materials she provided to the District Manager, on June 27, Ms. Banting received a complaint that Bolen cattle were still in Eimers pasture. In a telephone conversation with Mr. Bolen, Ms. Banting confirmed that he had not moved his cattle from Eimers pasture into Bronze pasture as required by the rotation schedule. She issued a Non-Compliance Summary noting that she gave verbal instruction to Mr. Bolen to follow his grazing schedule and move his cattle, as instructed, into the Bronze pasture.

The following day, June 28, Ms. Banting drove throughout the Bronze, Eimers and Tie Lake Seeding pastures and noted the openings were heavily grazed and that the cattle needed to be moved as soon as possible into Jurik. She noted that Mr. Bolen had called and confirmed that he had moved his cattle into the Bronze pasture. On her Range Inspection Report, she noted alleged non-compliance regarding stubble height. Also on June 28, she issued a Non-Compliance Summary to Mr. Bolen and three other range users. The summary does not state what the non-compliance was, but said: "Called and left messages with all users that cattle need to me [sic] moved this week-end into Juriks."

On July 18, 2002, Ms. Banting drove through the Relief Camp, Tie Lake, Bronze and Jurik pastures. She noted that Colin Morrison and Mr. Bolen had moved all of their cattle from Jurik and Bronze pastures into Relief Camp pasture, and that seven cattle were also moved out of Tie Lake pasture. In regard to the condition of the site, she states that it was "still green but very dry." In the Incident Description provided to the District Manager, Ms. Banting said the 7 head located in the Tie Lake pasture had yellow ear tags and the "LHC" brand belonging to Mr. Bolen. She also said that some range developments needed to be maintained.

Ms. Banting again inspected the Relief Camp pasture on July 31, 2002. She noted that all of the cattle were in this pasture and that some range developments needed to be done. She said the average stubble height was in compliance with the standards.

On August 13, 2002, Ms. Banting inspected the Relief Camp and Pickering pastures. She observed that all cattle had been moved into the Pickering pasture. She could not locate any salt, but noted that the water troughs were full at both watering sites. She commented that she would continue to monitor the safe degree of use on the range unit, and noted that more than 50% of the forage was used in the Relief Camp pasture. Ms. Banting noted that this continued to be a concern, and that all ranchers must continue to herd and salt cattle away from the preferred areas and to improve cattle distribution.

On August 15, 2002, Ms. Banting observed cattle in the Relief Camp pasture. She found two groups of cattle; a total of 22 head of cattle had yellow and orange ear tags. She noted "C&C Ranch", "Hawke and Feeder Assoc." brands on the cattle. However, her Non-Compliance Summary noted yellow and orange tag cattle with "Hawke", "C&C Ranch" and "Bolen" brands. She notes that safe degree of use was not being adhered to, more than 50% of the forage had been consumed and the riparian areas were heavily used. Ms. Banting left messages for Mr. Bolen, Colin Morrison and Ben Hawke that they still had cattle in the Relief Camp pasture, which they must move to Pickering pasture immediately.

In a Range Inspection Report dated September 6, 2002, Ms. Banting states that she received a report that cattle were in the Bronze, Tie Lake, Tie Lake Seeding and Eimers pastures, and that the ranchers had been gathering the cattle to return them to the Pickering pasture. She notes that Mr. Bolen brought his cattle home on September 2 and still had three "stragglers" to bring home. In regard to the Pickering pasture, she states that favoured areas had been overgrazed and the average stubble height was not in compliance with standards. Ms. Banting notes that the ranchers reported that the public had left the gates open.

A Non-Compliance Summary was sent on October 10, 2002 to the Pickering Hills range unit licensees, including Mr. Bolen, in regard to cattle which had been observed in five different pastures on October 2, 2002. The trespass was attributed to five of the ranchers, but not Mr. Bolen.

2002 "Utilization Checks"

Lee Hart prepared a Utilization Check survey on September 30, 2002, on the Pickering Hills range unit. In the Utilization Check, the degree of livestock use is categorized as: "severe" (76% or more of the forage used); "heavy" (51-75% of the forage used); "safe" (31-50% of the forage used), "light" (16-30% of the forage used), and "none" (0-15% of the forage used).

In regard to the Eimers pasture, Mr. Hart said that the first block of logged and seeded range was in the heavy use category, with more than 50% of the domestic grasses used. This amounted to 30% of the pasture. All the other areas in the pasture were in the light use category. Mr. Hart said that he observed some relatively fresh manure and from this concluded that cattle were either still in the pasture or had recently left.

Mr. Hart found light use of the Bolen pasture and safe or light use of the Tie Lake pasture. He said the Tie Lake Seeding pasture indicated a lot of activity from different sources, with vehicle tracks and motocross race courses apparent. Livestock use of the pasture was rated as heavy, with at least 60% of the domestic grasses having been removed and no appreciable re-growth.

The Relief Camp pasture showed some patches of heavy use with a couple of patches of severe use. Overall, the pasture was in the safe use category. At the time of Mr. Hart's visit, there were still some cattle in the pasture.

In the Jurik pasture, Mr. Hart found heavy and severe use areas radiating out from Bronze Lake in both the open range and logged and seeded range. There was some recovery and re-growth in the logged and seeded area, but less recovery in the open range.

Mr. Hart rated 68% of the Bronze Lake pasture in the heavy or severe use categories. In some areas, 60% of the forage had been removed. There appeared to be little re-growth on the pasture. Mr. Hart noted an open gate between the Bronze and Pickering pastures, and cows in the Pickering pasture at the time of his visit.

The Pickering Hills pasture showed 45% of the pasture in the heavy use category, with 50% or more of the forage removed. Use in other areas varied from light to safe use. Mr. Hart observed cattle in several locations in the pasture at the time of his visit.

The reports from Ms. Banting and Mr. Hart were provided to the Commission and were accompanied by photographs.

The Determination and Review

On December 3, 2002, Mr. Bolen, along with the four other licensees, was sent a letter from the District Manager stating that his staff had reported that Mr. Bolen was in non-compliance with his Range Use Plan on a number of requirements:

1. Location and type of livestock;
2. Range developments;
3. Average Stubble Height.

They were all advised that, on January 23, 2003, Ministry of Forests' staff would present their evidence regarding the non-compliance. Afterwards, each individual would have an opportunity to be heard in private to discuss his or her own individual circumstances.

On March 17, 2004, the District Manager issued a determination that Mr. Bolen had contravened section 74 of the *Code*. The District Manager wrote:

I have determined that grazing operations were conducted contrary to the approved Range Use Plan. Specifically, safe degree of use was exceeded on several pastures along with damages to riparian areas of the Pickering Hills Range Unit. This occurred on 5 of 7 pastures within this Range Unit. In my review of the evidence, I noted instances of heavy to severe overutilization in pastures and wetland riparian areas. Also, the failure to follow the rotation schedule (i.e. location and duration of livestock) completely and failure to complete and maintain key range developments, as required in the Range Use Plan, are also contraventions of Section 74(1) of the *Act*. These were contributing factors to the overutilization of forage and damage to wetland riparian areas.

In determining the penalty, the District Manager did not include a compensatory component for the loss of forest or range resources. He states:

While the evidence presented indicates areas of heavy to severe utilization and damage to riparian areas, there was no evidence presented that would indicate that the Crown would need to be made whole through compensation. However, there is little doubt that a number of pastures will require resting and the length of that rest will be determined by the district range staff at some future point.

The District Manager also considered whether Mr. Bolen had established any of the defences under section 119.1 of the *Code*, i.e., due diligence, mistake of fact or officially induced error. He concluded that Mr. Bolen had not made out any of the defences. Accordingly, the District Manager considered the factors set out in section 117 of the *Code*. His findings are summarized as follows:

- Mr. Bolen has no previous contraventions of a similar nature.
- The magnitude and gravity of the incidents were significant given the heavy to severe overutilization in some pastures. In addition, riparian area management objectives had not been achieved and damage had occurred.
- The contravention of section 74 was continuous to some degree, given the number of occasions cattle were noted out of rotation or in areas where inspections had already noted safe degree of use was exceeded.
- Mr. Bolen did not set out on a course of action that was deliberate in intent.
- Economic gain was not a motivation associated with the infraction.
- Cooperativeness and efforts to correct the contravention were seriously lacking on the range unit. A number of actions, if taken, would have either prevented or mitigated the impacts of the contravention. However, these actions did not occur.

The District Manager then notes,

In my review of this incident, I have noted that the contravention of section 74(1) of the *Forest Practices Code of British Columbia Act* was preventable. Inspections conducted in 2002 certainly indicated issues that could have been corrected provided appropriate actions been taken at the time (i.e. following rotation schedules and maintaining/completing range developments). In addition, the Range Use Plan gave very clear expectations and standards that would need to be met (i.e. safe degree of use and riparian area management). However, in this case, either insufficient or no preventative actions were taken and the contravention occurred.

He concluded that a penalty of \$500 for that contravention was appropriate given these factors and section 117 of the *Code*.

The District Manager also found that the four other range tenure holders had contravened section 74(1) of the *Code* by not following their range use plans. Two were given penalties of \$600, and two were given penalties of \$500.

Mr. Bolen and one other tenure holder requested a review of the District Manager's determination by an administrative review panel. The review was conducted by way of written submissions.

In a decision dated September 5, 2003, the review panel upheld the District Manager's decision and penalty.

The Appeal

In a Notice of Appeal dated September 29, 2003, Mr. Bolen appealed the decision of the District Manager and review panel to the Commission. Mr. Bolen states that he

- did his best not to overgraze;
- did not follow the rotation because the grass in Bronze pasture was not ready, yet he was told by the Ministry of Forests to move his cattle there; and
- had the fewest number of cattle of the five users of the range unit and, therefore, had to do what the majority wanted.

Mr. Bolen further states that “big name ranchers” are far exceeding the stubble height requirements and they do not get any fines. Therefore, the administrative penalty of \$500 is unwarranted in the circumstances.

The Commission notes that Mr. Bolen states that he and the other agreement holders only received the file materials from the Ministry of Forests at their “opportunity to be heard” on January 23, 2003. The materials consist of detailed information, including Ms. Banting’s reports, the Utilization Checks done by Mr. Hart, photographs and other documents. To comply with the rules of procedural fairness, these materials should have been provided to the agreement holders prior to the meeting, so that they had sufficient time to review the materials and prepare a response. However, for the purposes of this appeal, this defect in the process has been remedied since Mr. Bolen has now reviewed the materials and has been able to respond to them in his submissions to the Commission.

ISSUES

1. Whether Mr. Bolen contravened section 74 of the *Code*.
2. Whether Mr. Bolen was duly diligent in his attempts to prevent the contravention such that the defence of due diligence applies.
3. Whether the penalty is reasonable in the circumstances.

RELEVANT LEGISLATION

Relevant sections of the *Code* are as follows:

Range developments and brands

74 (1) A person who grazes livestock, cuts hay or constructs, carries out or maintains a range development on range land or unfenced grazing land must do so in accordance with

(a) this Act, the regulations and the standards, and

(b) any range use plan.

Penalties

117 (1) If a senior official determines that a person has contravened this Act, the regulations, the standards or an operational plan, the senior official may levy a penalty against the person up to the amount and in the manner prescribed.

...

(4) Before the senior official levies a penalty under subsection (1) or section 119, he or she

(a) must consider any policy established by the minister under section 122, and

(b) subject to any policy established by the minister under section 122, may consider the following:

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

(ii) the gravity and magnitude of the contravention;

(iii) whether the violation was repeated or continuous;

(iv) whether the contravention was deliberate;

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

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

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

Defences in relation to administrative proceedings

119.1 (1) For the purposes of a determination of a senior official under section 117, 118 or 119, no person may be found to have contravened a provision of this Act, the regulations, the standards or an operational plan if the person establishes that

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

- (b) the person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision, or
 - (c) the person's actions relevant to the provision were the result of an officially induced error.
- (2) Subsection (1) does not apply in respect of a determination made under section 117, 118 or 119 before the coming into force of this subsection (December 17, 2002).

DISCUSSION AND ANALYSIS

1. Whether Mr. Bolen contravened section 74 of the *Code*.

According to section 74(1) of the Code, a person who grazes livestock on range land must do so in accordance with a range use plan. In this case, the District Manager determined that Mr. Bolen failed to comply with his Range Use Plan in that he exceeded the safe degree of use, failed to follow the rotation schedule and failed to complete and maintain range developments. The Commission has considered each of these alleged violations of the Range Use Plan under separate headings.

a) Exceeding safe degree of use

The Determination states that Mr. Bolen exceeded the "safe degree of use" standards on several pastures, and damaged riparian areas on 5 of the 7 pastures in the range unit. Specifically, it states that there had been heavy to severe overutilization in pastures and wetland riparian areas.

The Respondent notes that section 10.2 of the Range Use Plan requires the agreement holder to modify use of each pasture to ensure that his livestock do not graze the pastures below the "safe degree of use". "Safe degree of use" is defined and described in sections 10.4 and 10.5 of the Range Use Plan and include forage growth tables that stipulate how much forage can be used in key forage species. In addition, the Respondent notes that section 4.6 of the Range Use Plan states that stubble heights must be closely monitored in preferred areas of the riparian areas.

The Respondent submits that, if forage use falls below the allowable stubble height in successive years, the desired plant communities may not be realized, and less desirable species and weeds may invade, thus preventing the key forage species from re-establishing themselves. When riparian areas are compromised, the vegetation, which holds the soil in place, is lost. Further, there is erosion, excessive stream sediment and the lowering of the water table.

On the facts of this case, the Respondent submits that Mr. Bolen grazed his livestock too long in certain pastures, thus causing damage to the riparian and upland areas. The Respondent refers to the Range Inspection Reports of Ms.

Banting, which outline her concern for the high levels of forage use and the impact on riparian areas.

In addition, Mr. Hart found that the Eimers, Jurik, Relief Camp and Pickering pastures were in the heavy use category, which is classified as 51% to 75% usage. Mr. Hart found heavy and severe use around two riparian areas, and found heavy and sometimes severe use of particular varieties of forage. The Respondent submits that it is clear from Mr. Hart's report that Mr. Bolen did not achieve a safe degree of forage use.

Mr. Bolen states that he was given permission by Jack Vandenberg, of the Ministry of Forests, to turn out his cattle into the Eimers pasture. He said that he did this after driving through all of the pastures and finding that Eimers had the most growth on it. Mr. Bolen states that he drove his cattle to the back of the pasture where the most grass was and left them.

Mr. Bolen acknowledges that he was instructed by Ms. Banting to move his cattle into the Bronze pasture on June 1. He states that he visited the Bronze pasture but was of the view that there was insufficient grass. He made a second visit on June 11, and found that there was still "no grass". Mr. Bolen submitted that he left a message for Ms. Banting about this, but received no response.

In regard to the Eimers pasture, Mr. Bolen states that Ms. Banting did an inspection on June 13, 2002 and found an area along Sand Creek that was heavily grazed. Mr. Bolen states that he found this "odd" because he kept his cattle pushed to the back end of that pasture. He said that the area Ms. Banting referred to "never grows any grass to speak of".

Mr. Bolen states that his cattle moved into Tie Lake Seeding then Jurik pastures for a day or two, and then moved into Bronze pasture. They were only in Bronze pasture for a matter of hours before he was instructed to move them into Jurik pasture. Mr. Bolen's grazing record show his cattle to be in Jurik pasture until July 15, in the Relief Camp pasture until August 9, then in Pickering pasture until August 29. He said that he brought his cattle home on August 30 and 31, and advised Ms. Banting of this on September 2. Mr. Bolen states that his cattle were not in Tie Lake Seeding long enough to have caused any overgrazing.

In regard to Ms. Banting's August 13, 2002 report on the Relief Camp pasture, Mr. Bolen takes issue with her finding that more than 50% of the forage had been used. First, he notes that Ms. Banting only drove through the range. In addition, his own observation was that there was grass left on the ridges.

Also in regard to the Relief Camp pasture, Mr. Bolen submits that Ms. Banting's evidence respecting his cattle is contradictory and factually incorrect. In her Range Inspection Report for an August 15, 2002, inspection of the Relief Camp pasture, Ms. Banting states "Drove into Relief Camp pasture and found two groups of cattle at slough on SE end of pasture. Total of 22 head of cattle counted with yellow and orange ear tags. Noted C&C Ranch, Hawke and Feeder Assoc. brands on cattle."

However, in the Non-Compliance Summary she issued for that inspection, Ms. Banting states "noted yellow and orange tag cattle with Hawke, C&C Ranch and Bolen brands." Mr. Bolen said his cattle have white ear tags. Mr. Bolen also advised that he knows his cattle were not in this pasture because he was the person who put the other ranchers' cattle back in the right pasture.

In regard to Mr. Hart's Range Utilization Check, Mr. Bolen notes as follows:

- When Mr. Hart was in the Eimer pasture in the fall of 2002, he noted fresh manure, even though no cattle were supposed to be in the pasture.
- Jurik pasture was over the safe degree of use. Although he wanted to move his cattle from Jurik pasture, the other range users said there was still grass left, they were not ready to move and were concerned they would use all the pasture up too soon and have to come home early.
- In the Pickering pasture, the lower slopes of the pasture and the top of the power line is really the only place where grass grows. In addition, all of the water is located on the bottom of the pasture except for some troughs. The cattle want to stay near the bottom where most of the grass and water are. He gets some cattle to "go for the salt on the power line at the top", but submits that they don't want to stay there.

Mr. Bolen also submits the Pickering Hills range unit users have been "picked on" in comparison to other range unit holders. He further attributes some of the problems on the range to elk eating the forage, lack of water in certain locations, not knowing how to measure stubble height, and All Terrain Vehicle (ATV) users leaving gates open.

In response, the Respondent argues that the Ministry of Forests actions regarding other range users is irrelevant to this appeal since allegations of contraventions are based on unique circumstances. The Respondent submits that, in regard to Eimers pasture, Mr. Bolen was there for 34 days and that Mr. Hart found that 30% of the pasture was in the heavy use category. None of the other tenure holders reported that they used that pasture before Mr. Hart conducted his survey. The Respondent also states as follows:

- wildlife do consume forage, but this occurs mainly in the early spring;
- the lack of available water is not an excuse since providing water by relocating or establishing water troughs at appropriate locations is the responsibility of Mr. Bolen and the other range users.
- if Mr. Bolen did not know how to measure stubble height, he should have asked a forestry official; and
- the problem on the range unit is not ATV users it is Mr. Bolen's own failure to keep his livestock away from the desirable grazing areas, and his failure to move his livestock to the next pasture soon enough.

The Forest Practices Board submits that, in 2001, it assessed the health of riparian areas where livestock grazing was the primary use in four forest districts in southern British Columbia. It concluded that heavy cattle use had caused a significant number of streams, lakes and wetlands to not function at an acceptable level in the drier areas of the southern interior of the province. The vast majority of the 1,750 range tenure holders in British Columbia are small-scale operations, such as Mr. Bolen's, and, cumulatively, they have a significant impact on the public's range resources. The Board argued that in a results-based regulatory regime, tenure holders must be held accountable for failure to meet the results set out in their plans.

The Board also submits that Mr. Bolen failed to achieve the results specified in his Range Use Plan. Instead, his livestock contributed to heavy to severe overutilization of forage in pastures and in wetland riparian areas. In the Board's view, such damage is significant, especially considering the potential cumulative effect of the 1,500 other small farmers licenced to use public rangelands.

The Commission's findings on whether Mr. Bolen failed to comply with section 10.2 of the Range Use Plan in relation to "safe degree of use"

In the Commission's view, there are two questions to be addressed under this issue. First, was there a contravention of section 10.2 of the Range Use Plan and, therefore, section 74(1) of the *Code* in regard to specific pastures. Second, if there was a contravention, was Mr. Bolen responsible for the contravention.

In regard to the first question, the Commission notes that the District Manager determined that there was overutilization in 5 of 7 pastures. However, in relation to the second question, that of Mr. Bolen's responsibility, the Respondent has based its argument on 4 pastures rather than 5. The Respondent does not submit that Mr. Bolen is responsible for any overgrazing in the Bronze pasture. Given that Mr. Bolen's cattle were in the Bronze pasture for one day, the Commission agrees that Mr. Bolen is not responsible for any overgrazing that occurred there. Therefore, it will only consider the overutilization arguments in relation to 4 pastures: Eimers, Jurik, Relief Camp and Pickering.

Eimers pasture

In regard to the Eimers pasture, Ms. Banting's only report was on June 13, 2002. In it, she notes that the pasture was green and wet, and that the area along Sand Creek was heavily grazed. In his report of September 30, 2002, Mr. Hart found that 30% of the pasture was in the heavy use category, and 70% in light use.

Jurik pasture

Ms. Banting did not prepare any reports in regard to the Jurik pasture.

Mr. Hart found that 56% of the pasture was in heavy use and 7% was in the severe use category. He notes that the level of use radiated out from the Bronze Lake area, that there were heavy and severe use areas on both open range and logged and seeded range sites. Away from the lake, the level of use moderated to some extent, although some areas of open range near the highway were still in the heavy use category, with 50% or more of the forage removed. Some of the orchard grass

in the logged and seeded areas had shown some recovery or re-growth, but in the open range in mid-pasture, there was less recovery.

Relief Camp pasture

Ms. Banting reported on the Relief Camp pasture on July 18, noting that it was still green but very dry. On July 31, she advised the ranchers to monitor the level of use in the pasture to ensure that no more than 50% of the forage was used. In neither report did she indicate that there was non-compliance with the stubble height standard. On August 13, 2002, after the cattle had been moved to the Pickering pasture, Ms. Banting noted that more than 50% of the forage was used in the Relief Camp pasture. On August 15, Ms. Banting located 22 head of cattle which had come back to Relief Camp. She expressed concern over the amount of forage which had been consumed and noted that the riparian areas had been heavily used.

Mr. Hart found only 2% of the Relief Camp pasture in the heavy use category and another 2% in severe use. He said the overall pasture showed safe level of use or less. At the time of his inspection on September 30, 2002, there were still cattle in the pasture. Mr. Hart said that the area of heavy use was closer to Spring Lake/Beaver Pond and there were a couple of patches of severe use near the lake.

Pickering pasture

Ms. Banting inspected this pasture on September 6, 2002, after Mr. Bolen had "brought his cattle home". Ms. Banting notes that favoured areas in the pasture had been overgrazed on the south end between the fenceline and the water troughs. Mr. Hart found the pasture had 45% heavy use, with the rest being safe use or less. The heavy use was mostly on the lower slopes of the pasture.

The Commission finds, based mainly on the observations of Mr. Hart, that there was overgrazing in at least 3 of the 7 pastures, Eimers, Jurik and Pickering. In these pastures, a substantial portion of the area was overgrazed, ranging from 30% in Eimers to 63% in the heavy or severe use category in Jurik.

In regard to the Relief Camp pasture, the Commission is concerned about the disparity in the observations of Ms. Banting and Mr. Hart. The Commission prefers the findings of Mr. Hart. The Commission accepts that there was overgrazing in the Relief Camp pasture, although not to the same extent as in the other pastures.

The Commission finds that the overgrazing that occurred in these 4 pastures was contrary to the safe degree of use provisions of the Range Use Plan and, therefore, in contravention of section 74(1) of the *Code*.

The next question is whether Mr. Bolen is liable for the overgrazing. The Commission finds that he is.

Mr. Bolen was part of a group of 5 ranchers who held agreements to use the range. It is not disputed that the group's cattle, with certain exceptions, was treated as one herd that moved in the same rotation. However, each rancher is responsible for ensuring that there is a safe degree of use of the pastures. There is no question

that Mr. Bolen's cattle were part of the herd that overused the Jurik, Relief Camp and Pickering pastures.

Mr. Bolen argues that he wanted to move from the Jurik pasture but the other users did not. However, there is no evidence that Mr. Bolen approached the Ministry of Forests to ask for a change in his rotation. Further, the evidence supports a conclusion that Mr. Bolen was quite capable of acting independently. For instance, he was the only rancher to turn out cattle into Eimers pasture while the others waited to go into the Bronze pasture.

In regard to the Eimers pasture, the Commission has reviewed the usage reports filed by the other tenure holders. According to those reports, none of the other range users had cattle in Eimers pasture until October 5, which is after Mr. Hart made his Utilization Check. (Suzanne Carter did not file a report on her usage as required.) However, Mr. Hart states in his report that he found relatively fresh manure, indicating that cattle were using the pasture or had recently left. The Commission must contrast that information with the known fact that Mr. Bolen grazed his cattle in that pasture for 34 days, the longest time spent in any pasture. While it is possible that stray cattle may have aggravated the situation, the Commission cannot ignore the fact that it was Mr. Bolen who was proven to have been in that pasture for a substantial period of time.

The Commission has also reviewed Mr. Bolen's submissions and photographs relating to the conditions on other ranges in the same forest district. He argues that large ranchers are not being penalized the same as smaller ranchers. The Commission does not accept the Respondent's argument that the treatment of other ranchers is completely irrelevant. However, the Commission cannot find, simply on the basis of Mr. Bolen's assertions and photographs, that there was unequal treatment as alleged.

The Commission also notes that this forest district has recently imposed penalties on two other ranchers— Trifon Vlachos on the Cherry TaTa range and Rick and Wade Lightburn on the Rosen Lake Range (see Forest Appeals Commission decisions *Trifon Vlachos v. Government of British Columbia* (Forest Appeals Commission, Appeal No. 2003-FOR-002(a), January 29, 2004) (unreported) (hereinafter "*Vlachos*"); *Rick Lightburn and Wade Lightburn v. Government of British Columbia*, (Forest Appeals Commission, Appeal No. 2003-FOR-003a, September 24, 2003)) (hereinafter "*Lightburn*"). These decisions support a finding that the Pickering Hills users were not being singled out.

The Commission further rejects Mr. Bolen's argument that there was a problem with water on the range. If there was such a problem, the Respondent is correct that it is the obligation of the agreement holder to use water troughs and other means to distribute cattle throughout the pasture.

Mr. Bolen also alleged that other range users contributed to the problems in certain pastures. The Commission recognizes that sharing a range with recreational users can result in problems such as gates being left open. However, it is the obligation of the agreement holder to patrol the range with sufficient regularity so that this problem is reduced.

Based on all of the evidence, the Commission finds that there was a contravention of section 10.2 of the Range Use Plan in that Mr. Bolen's cattle grazed **4** of the pastures below the safe degree of use defined in sections 10.4 and 10.5 of the plan. He was the main source, if not the sole source, of the overutilization of Eimers pasture. This, alone, is sufficient to find a contravention of section 74(1) of the *Code*.

The Commission also finds that the evidence supports a finding that he contributed to the overutilization of the Jurik and Pickering pastures, and to a lesser degree the Relief Camp pasture, in contravention of section 74(1) of the *Code*. He let his cattle remain in the pastures when they were clearly below the "safe degree of use"; he should have rotated them to the next pasture. This is particularly evident with respect to the Pickering pasture.

b) Failure to follow the rotation schedule

Mr. Bolen's rotation schedule is set out in section 10.2 of his Range Use Plan. Section 10.1 of the Range Use Plan requires that the agreement holder submit a grazing record documenting actual use to the Ministry of Forests no later than December 31 of each year. Mr. Bolen provided his report in compliance with this requirement.

Upon review of Mr. Bolen's report, it is apparent that he did not follow the rotation set out in the Range Use Plan. Specifically, his rotation was to begin in the Bronze pasture; however, he started in Eimers pasture. Mr. Bolen also used the Relief Camp pasture, which was not included in the 2002 schedule. In his submissions to the Commission, Mr. Bolen provides some explanation for these deviations.

Bronze pasture

Regarding the Bronze pasture, Mr. Bolen made two arguments: first, he was given permission to vary the schedule and, second, he did not use the Bronze pasture in rotation because the grass was not ready.

The evidence supports Mr. Bolen's first argument. An email dated May 30, 2002, from Jack Vandenberg of the Cranbrook Forest District to Barb Banting regarding "Turnout" identifies the turnout dates for various ranchers into various pastures. Included is "May 26 – Bolen into Eimers." There is also a subsequent note for June 1st "Ok for turnout into Bronze pasture. Russ Bolen needs to move from Eimers into Bronze." Clearly the Ministry of Forests had agreed to vary the rotation to allow Mr. Bolen to start in the Eimers pasture.

Regarding his second argument, both Mr. Bolen and Ms. Banting agree that Mr. Bolen was told to move from Eimers to Bronze pasture on June 1. Mr. Bolen also acknowledges that he did not make the move as instructed. However, he states:

- he inspected the Bronze Lake pasture on June 1 and June 11 and found that there was still insufficient grass;

- he left a message for Ms. Banting to this effect;
- on June 13, Ms. Banting inspected the Bronze Lake pasture, found no Bolen cows and noted that a preferred area was heavily grazed;
- she did not contact him until June 27, to direct him to move into Bronze pasture.
- on June 27 he moved his cattle into Tie Lake Seeding, and held them there until June 29 because one of the cows had calved and he wanted to let the calf have a day there before moving them;
- he moved his cattle into Jurik pasture and then into Bronze pasture on June 30.
- when he returned home from moving the cows into the Bronze pasture, there was a message on his answering machine from Ms. Banting instructing him to move his cattle to Jurik pasture.
- he returned to the range and moved his cattle into Jurik pasture; and
- his cattle were in the Bronze pasture for a matter of hours.

Ms. Banting's notes indicate her inspection of Bronze pasture was on June 28 and that she spoke to Mr. Bolen and told him to move to Jurik pasture on that day. Her notes further indicate that there was heavy use by cattle in all the openings she inspected in the Bronze Lake pasture.

There is no indication that Mr. Bolen was issued a Non-Compliance Summary for failing to move his cattle into Bronze pasture earlier. He and three other range tenure holders did receive a Non-Compliance Summary dated June 28, 2002, advising that all users had been called and told to move to the Jurik pasture that weekend. It is unclear from this note what non-compliance was being alleged. If it related to overgrazing of the Bronze pasture, then Mr. Bolen could hardly be responsible given that his cattle were there for less than one day. Further, his initial assertions that there was insufficient grass in Bronze pasture appear to be substantiated by the overgrazing which resulted from the use of the pasture by the other users' cattle.

Finally, it is noted that section 10.2 of the Range Use Plan required Mr. Bolen to "modify use of each pasture to ensure that his/her livestock do not graze the pastures below the 'safe degree of use'...." The Commission finds that Mr. Bolen did so in relation to Bronze pasture.

He was also required to submit such modifications in the rotation schedule to the Ministry for approval. In the circumstances, the Commission finds that this is a "technical effect" and does not warrant a finding that the plan was contravened in this regard.

Relief Camp pasture

The second deviation from the rotation was the use of the Relief Camp pasture. According to the Range Use Plan, this pasture was not to be used in 2002.

However, based on the evidence before the Commission, it appears that the Ministry sanctioned the use of this pasture. In her Range Inspection Report of July 18th, Ms. Banting notes that Mr. Bolen and Mr. Morrison had moved all of their cattle from Jurik and Bronze pastures into Relief Camp pasture that day. On July 31, she observed the cattle in that pasture; her note on the Range Inspection Report was: "Ranchers to monitor level of use in Relief Camp pasture to ensure no more than 50% forage is not used [sic]." The Respondent acknowledges that when the forest official discovered the cattle in the Relief Camp pasture, she gave verbal approval for the change to the schedule.

Accordingly, the Commission finds that Mr. Bolen did not contravene section 10.2 of the Range Use Plan with respect to the rotation schedule. Certainly there were deviations from the rotation schedule; however, the evidence is that the Ministry either approved or acquiesced in these deviations. In fact, the Respondent essentially conceded that the Ministry of Forests allowed such amendments in its submissions to the Commission.

c) Range developments

In his determination that there was a contravention of section 74(1) of the *Code*, the District Manager simply said that there had been a "failure to complete and maintain key range developments, as required in the Range Use Plan." He did not provide any details of what developments had not been completed or maintained.

The Range Use Plan contains provisions for "Proposed Developments" and "Maintenance of Range Developments". These provisions are set out earlier in this decision.

In her Evidence Summary presented to the District Manager, Ms. Banting states the following, apparently in regard to range developments:

In 1998, as a result of an investigation, an instruction letter was issued dated November 29, 1998 dealing with many of the same problems we continue to have today. In 2001 and 2002 all of the RUPs [range use plans] and tenures were renewed to address some of the on going non-compliance issues. The renewed RUPs included a daily maintenance schedule of which all ranchers agreed to. The schedule, ensuring one operator is checking the range on a daily basis, does not seem to be working.

The November 29, 1998 letter from the District Manager contains only one reference to range developments:

1. **Fence Maintenance** – Prior to turn out of your livestock in the spring of 1999 all the fences within your tenured area must be repaired and in effective operating condition and inspected by a Forest Official prior to turnout.

The letter refers to an investigation into alleged contraventions outlined in a letter of September 16, 1998. The District Manager states that no further enforcement action will be taken at this time.

The Commission was not provided with the September letter. However, the Commission was provided with a Range Utilization Check done by Mr. Hart in the fall of 1998, and an Investigation of the Range Unit done by Gary Tipper, a range specialist with the then Ministry of Environment, Land and Parks, dated December 7, 1998. Neither report deals with range developments.

In December 1998, the Pickering Hills range users made application pursuant to the Grazing Enhancement Fund Program for approval of several projects, including construction of roads, new fencing and cattleguards. The District Manager gave authorization for the projects on August 17, 1999. Ms. Banting states that these projects were never completed. Mr. Bolen does not dispute this.

On November 6, 2000, Ms. Banting held a meeting with some of the Pickering Hills range users. Mr. Bolen is not listed as attending. The discussion included the completion of the Grazing Enhancement Fund Projects. It was determined that funding would be sought for a solar unit and pump so that water troughs could be used instead of keyhole watersites, which become fouled.

During her inspections in the summer of 2002, Ms. Banting makes only two references to range improvements in her Range Inspection Reports. In a July 31, 2002 report of the Relief Camp pasture, she indicates that the fence needs upgrading at the water site beaver pond between Relief Camp and Tie Lake pastures, that the wire is too low and loose and needs extending into the beaver pond. She also noted that the ranchers needed to contact Galloway Lumber to resolve some fencing issues that have been breached due to logging. In addition, a quad guard needed to be installed west of the private lots on Tie Lake to mitigate the problem of the existing gate being left open. In a September 6, 2002 report, Ms. Banting noted that Mr. Bolen brought his cows home on September 3, except for three stragglers. In regard to range developments, she noted that cattle were walking around the end of the fence at Weatherhead Lake and that Ben Hawke, one of the other range users, would be out to extend the fence.

On September 19, 2002, Ms. Banting held a meeting for the Pickering Hills range users to discuss how they "were going to complete some of the unfinished Grazing Enhancement Projects."

On September 23, 2002, the District Manager sent Mr. Bolen a letter authorizing the development of three springs to be located adjacent to Tie Lake Seeding, Poplar Flats and east of Spring Lake pastures.

In an e-mail written on September 24, 2002, Ms. Banting states that the ranchers agreed, at the September 19th meeting, to complete three projects that fall: fencing near Tie Lake and the moving of a cattleguard, maintenance of a fence at the west side of Tie Lake, and the development of three springs. These developments were not completed contrary to their agreement.

On April 9, 2003, after the District Manager's determination was issued, Mr. Bolen's Range Use Plan was amended to include a provision that the three range development projects be completed before turnout on June 1, 2003. In a Range Inspection Report dated May 29, 2003, Ms. Banting reported that the projects had been completed.

In regard to the September 19, 2002 meeting, Mr. Bolen maintains that no date was set for completion of the projects. In addition, sufficient materials were not available. He also states that only one water trough was picked up by two of the ranchers; the other two did not become available. Mr. Bolen also points to an e-mail message from Virginia Stanford of Land and Water BC Inc., dated September 26, 2002, which states that the licence for the developments will not likely issue until the spring.

The Commission finds that there is insufficient evidence to establish the alleged contraventions in relation to range developments. The District Manager's determination did not specify which range developments were not completed. Further, it appears from the evidence that some of the issues raised relate to obligations under a previous range use plan. Regarding the Range Use Plan at issue in this appeal, the Commission notes that section 6.0 sets out "Proposed Developments" – not "required" developments. Accordingly, there is nothing in that plan setting out any timelines or deadlines for the developments to be done.

Further, the Commission is unable to determine from the evidence whether the two fencing "problems" identified in Ms. Banting's Range Inspection Reports were ever addressed. The Commission notes that the second fencing problem identified by Ms. Banting was identified after Mr. Bolen's cattle had left the range (except for three stragglers), and she indicated that one of the other range users, Ben Hawke, would be looking after the matter.

In addition, there is no photographic evidence of any fences or other range developments, which require repair or maintenance. In fact, the few photographs before the Commission show fences that are upright, and appear to be in good repair. Ms. Banting included two photographs taken on August 15, 2002. One shows a slough in the Relief Camp pasture; the fence is upright and there does not appear to be any loose or low wires. Similarly, three of the photographs taken by Mr. Hart show fences in Pickering, Jurik and Relief Camp pastures. The photograph of Jurik pasture shows some fence posts immediately adjacent to a cattleguard leaning slightly, but it appears to be functional. The other two fences shown appear to be in good condition.

If the District Manager based his decision on "agreements" made during the September 19, 2002 meeting, the evidence is contradictory. Ms. Banting states that the projects were to be completed that fall; Mr. Bolen states that there was no deadline. On the basis of the written materials, the Commission cannot resolve that conflict. Further, the Commission is unable to determine whether the three projects described in Ms. Banting's notes are, in fact, some of the "Proposed Developments" referred to in the Range Use Plan. Two of them appear to be the same, but because of the varying descriptions, that is not certain.

The Commission notes that the three projects have now been completed. The Commission does not know why the ranchers finally completed the range developments: whether it was the District Manager's determination or whether it was the amendment to the Range Use Plan which stated that cattle could not be turned out in 2003 until the developments were completed. However, the allegation is that Mr. Bolen contravened his Range Use Plan because he failed to complete or maintain range developments. The Commission finds that this contravention has not been proven on a balance of probabilities.

Summary of Findings on Issue #1

Based upon all of the evidence, the Commission finds insufficient evidence to establish that Mr. Bolen failed to "complete and maintain key range developments." Regarding the alleged failure to comply with the rotation schedule, the Commission finds that the deviations were appropriate in the circumstances and were either expressly approved or acquiesced to by Ministry officials and, therefore, do not form the basis of a finding of contravention of the plan.

However, the Commission finds that Mr. Bolen did contravene the Range Use Plan in relation to "safe degree of use." Accordingly, the Commission finds that Mr. Bolen contravened section 74(1) of the *Code*.

2. Whether Mr. Bolen was duly diligent in his attempts to prevent the contravention such that the defence of due diligence applies.

Section 119.1(1)(a) of the *Code* establishes a statutory defence of due diligence. Mr. Bolen submits that he did his best and that he was out on the range doing everything he could to stay in compliance with the *Range Act*. Mr. Bolen states that even after he and his partner were injured in a motor vehicle accident, they were on the range moving cattle back to the right pastures.

The Respondent submits that for the defence to apply, a person must have taken all reasonable care to avoid committing the prohibited act. If a harmful event is reasonably foreseeable, a duty arises to take reasonable care to prevent it from occurring. In the instant case, the Respondent submits that a reasonable person would realize that forage was limited and would employ range practices, such as herding, salting, fencing and controlled access to water, to keep the livestock away from the preferred grazing areas. Further, a reasonable person would have moved the cattle to another pasture before a safe degree of forage use was exceeded, and if there was no alternate pasture available, would have removed the livestock from the range. In the present case, the Respondent argues that it was foreseeable that Mr. Bolen would not achieve a safe degree of use, yet he did not take reasonable care to prevent it from occurring.

The Commission is of the view that not only should Mr. Bolen have been aware of potential overutilization of the forage, but the directions from Ms. Banting should have further alerted him to the Ministry's concerns. For example, on July 31, 2002, Ms. Banting wrote in her Range Inspection Report: "Ranchers to monitor level of use in Relief Camp pasture to ensure no more than 50% forage is not used [sic]."

On August 13, 2002, Ms. Banting's Range Inspection Report contained the following comments: "Will continue to monitor safe degree of use on the Pickering Hills Range Unit. More than 50% of the forage was utilized in Relief Camp. This continues to be a concern and all ranchers must continue to herd and salt cattle away from the preferred areas and improve cattle distribution."

The Commission finds that Mr. Bolen was "put on notice" of the Ministry of Forests concerns and, therefore, was aware of the problems or potential problems. In such a circumstance, he cannot say that the problems were not foreseeable.

Further, Mr. Bolen states that he wanted to move out of Jurik pasture, but the other users did not. If Mr. Bolen was aware that there was insufficient forage in that pasture, but did nothing because the other users did not want to move, then he is not exercising due diligence in remaining in the over-used pasture.

Accordingly, the Commission finds that Mr. Bolen has not established a defence of due diligence.

3. Whether the penalty is reasonable in the circumstances.

Mr. Bolen argues that he, as a small rancher, would have a hard time paying the \$500 penalty that has been assessed. He submits that "big name ranchers" are not being assessed fines when they exceed the stubble height standards. Further, Mr. Bolen submitted photographs of various sites in the Pickering Hills range unit taken in June 2003, which Mr. Bolen submits, show that there has been an excellent recovery of alleged abused areas.

The Respondent argues that in levying the penalty, the District Manager considered the factors set out in section 117(4) of the *Code*. He determined that the gravity and magnitude of the contravention was significant and continuous to some degree and that there is little doubt that a number of the pastures will require resting. The Respondent referred to a previous Commission decision in the case of *Rick Lightburn and Wade Lightburn v. Government of British Columbia*, (Forest Appeals Commission, Appeal No. 2003-FOR-003a, September 24, 2003). In that case, the penalty was reduced because of developments, which the Lightburns undertook after the determination. However, the Respondent notes that, in this case, the ranchers had failed since 1999 to complete developments. Further, they only did so in 2003 when the Ministry of Forests made it a requirement of their amended range use plans.

The Forest Practices Board supported the imposition of a deterrent penalty, but took no position on the amount of the penalty.

The Commission finds that an administrative monetary penalty is warranted in the circumstances of this case. The provisions in the Range Use Plans dealing with riparian areas, salting and safe degree of use of the range, are included to protect and maintain the range. The failure to ensure compliance in this case has resulted in significant, although not permanent, damage to the range. In this regard, the

Commission notes that the District Manager considered whether the Crown should be compensated for loss of range resources and decided there was no evidence that indicated the Crown would need to be made "whole" through compensation. He did, however, state that a number of pastures would require resting for a period of time. Therefore, he imposed the \$500 penalty solely for deterrence purposes. The Commission agrees with the District Manager that a deterrent penalty is appropriate.

The purpose of a deterrent penalty under the *Code* is to impede or prevent future misconduct or non-compliance by the person, or by the larger regulated population (e.g., other agreement holders).

In this case, the Commission is of the view that a deterrent penalty is primarily required to ensure that Mr Bolen understands the importance of complying with all of the requirements of his Range Use Plan and the legislation.

This Panel of the Commission has reviewed other Commission decisions involving contraventions of range use plans and/or trespassing cattle. In *Arlin Johnson v. Government of British Columbia* (Forest Appeals Commission, Appeal No.97-FOR-05, June 17, 1997) (unreported), the Forest Appeals Commission reduced a \$600 penalty to \$31.20 when a rancher's cattle had strayed onto and grazed on Crown land. The \$31.20 was the estimated grazing fees that Mr. Johnson would have paid if he had obtained a permit to use the Crown land. In that case, there was little or no harm done to the Crown land.

At the other extreme, are the cases involving *Rudolph and Celia Harfman v. Government of British Columbia*. In the first *Harfman* case, (Forest Appeals Commission, Appeal No. 98-FOR-10, July 20, 1999) (unreported), there were 31 proven and documented incidents of breaches of the Harfmans' grazing schedules and evidence that the Harfmans did not cooperate with the Ministry of Forests. The District Manager considered that 40% of the maximum \$10,000 penalty available under the *Administrative Remedies Regulation* was appropriate based on the number and continuous nature of the contraventions. On review, the administrative review panel reduced the penalty to \$1,000. The Commission, holding that the repeated and continuous contraventions and the inadequate cooperation with officials was costly to the province and damaging to the health of the range, reinstated the \$4,000 penalty.

In a subsequent decision involving the Harfmans (Forest Appeals Commission, Appeal No. 99-FOR-06, February 1, 2001) (unreported) the suspension and cancellation of the Harfmans' licence was upheld based on 19 new instances of their cattle being in trespass, their continued refusal to repair fences and their refusal to cooperate with officials. There was no irreparable damage found, but the Commission found there was a potential for such damage. The circumstances in the Bolen's case are much less serious than those in the case involving the Harfmans.

In *Lightburn (supra)*, the Lightburns were assessed a \$500 penalty for contravening their range use plans in regard to the protection of riparian areas and the safe degree of forage use. The Commission reduced the penalty to \$250. The basis for the reduction was that their subsequent actions, which included spending \$10,650 on a two-mile long fencing project and \$1,000 on a water project to control grazing practices, demonstrated that they had come to appreciate the importance of complying with their range use plans and that the measures they had taken would prevent similar problems from occurring in the future.

In the case of *Vlachos*, Mr. Vlachos received a \$500 penalty for a number of contraventions of his range use plan. The Commission held that there was no evidence that he appreciated the consequences of his failure to comply with his range use plan, nor was there any evidence that he had taken any steps to prevent similar problems in the future. Therefore, the Commission did not alter the amount of the penalty.

As stated above, the Commission finds that there should be some penalty assessed in this case. The Commission has, however, reached certain conclusions, which are different from those, which the District Manager took into account in assessing the penalty. In terms of the gravity and magnitude of the contravention, the Commission has upheld the finding that there was a contravention of the safe degree of use requirement, but finds that the evidence does not support the District Manager's conclusions in regard to failure to follow the rotation schedule and failure to complete range developments.

In the Commission's opinion, the breach of the safe degree of use requirement is the most serious of the alleged contraventions; the rotation schedule and range developments are intended not as ends in themselves, but as means to achieving the safe degree of use. The Commission notes that the District Manager found that Mr. Bolen had exceeded the safe degree of use in five pastures, while the Commission concluded that Mr. Bolen was only responsible for overutilization in four pastures.

In addition, the Commission accepts that Mr. Bolen had to be "pushed into" completing the range developments, which had been discussed for several years. While the Commission has held that this was not a breach of his Range Use Plan, it does demonstrate that there was a lack of appreciation of the importance of such developments. Further, there is little in Mr. Bolen's submissions to indicate that he appreciated the importance of adhering to the requirements of the Range Use Plan for the long-term health of the range.

In all of the circumstances, the Commission finds that it is not appropriate to impose the \$500 penalty on Mr. Bolen. This case is distinguishable from the *Vlachos* case (*supra*) for a number of reasons: Mr. Vlachos had a previous contravention, the magnitude of the incidents involved a number of contraventions and instances where instructions were not complied with, and the range damage, particularly in riparian areas. The situation was considerably more serious in that case than in Mr. Bolen's case.

The Commission believes that a \$300 penalty will highlight to Mr. Bolen the importance of complying with his Range Use Plan and deter him from future contraventions. In addition, Mr. Bolen will have this contravention on his "record" with the Ministry.

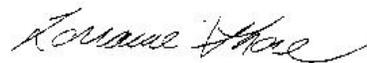
In all of the circumstances, the Commission finds that the \$500 penalty should be reduced to \$300.

DECISION

In coming to this decision, the Commission has carefully considered all of the evidence before it, whether or not specifically reiterated here.

Pursuant to section 138(2)(a) of the *Code*, the Commission confirms the finding that the Mr. Bolen contravened section 74 of the *Code*, but varies the monetary penalty to \$300.

The appeal is allowed, in part.



Lorraine Shore, Panel Chair
Forest Appeals Commission

June 23, 2004