UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	A.Q. Docket No. 07-0131
	)	
Ronald Walker, Alidra Walker,	)	
and Top Rail Ranch, Inc.,	)	
	)	
Respondents	)	**Decision and Order**

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint on June 14, 2007. The Administrator alleges that Ronald Walker, Alidra Walker, and Top Rail Ranch, Inc. [hereinafter Respondents], violated the Animal Health Protection Act, as amended (7 U.S.C. §§ 8301-8321) [hereinafter the Animal Health Protection Act], and the Control of Chronic Wasting Disease regulations (9 C.F.R. pt. 55) [hereinafter the Regulations] by restocking their premises, in violation of 9 C.F.R. § 55.4. Respondents filed a timely answer on August 8, 2007.

Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted a hearing in Denver, Colorado, on May 14-15, 2008. Lauren Axley and Darlene Bolinger, Office of the General Counsel, United States Department of

Agriculture, Washington, DC, represented the Administrator. Brenda L. Jackson, Canon City, Colorado, represented Respondents. The Administrator called five witnesses and Respondents called three witnesses, including Ronald Walker. The parties filed a "Joint Stipulations of Fact" which was admitted as Joint Exhibit 1 (JX 1). The Chief ALJ admitted 36 exhibits at the behest of the Administrator (CX) and 6 exhibits at the behest of Respondents (RX).

On March 20, 2009, the Chief ALJ issued a decision in which he found Respondents restocked their elk breeding premises with elk, in violation of an agreement with the Animal and Plant Health Inspection Service [hereinafter APHIS]. The Chief ALJ found Respondents' introduction of reindeer onto the elk breeding premises did not violate the agreement with APHIS, as the reindeer were not penned in an area of the elk breeding premises that was the subject of the agreement. The Chief ALJ assessed Respondents a $20,000 civil penalty for Respondents' violations. The Chief ALJ ordered that the $20,000 civil penalty be offset against the funds that APHIS withheld pending completion of the depopulation of Respondents' elk hunting herd.

On April 22, 2009, the Administrator appealed the Chief ALJ's decision challenging the holding that Respondents' introduction of reindeer onto the elk breeding premises did not violate Respondents' agreement with APHIS. The Administrator further challenged the Chief ALJ's decision to assess a $20,000 civil penalty rather than the $110,000 civil penalty recommended by the Administrator. For the reasons set forth in

this Decision and Order, *infra*, I find Respondents' introduction of the reindeer onto Respondents' elk breeding premises violated Respondents' agreement with APHIS. I assess Respondents a total civil penalty of $80,000.

Statutory and Regulatory Background

The Animal Health Protection Act authorizes the Secretary of Agriculture to take actions for "the prevention, detection, control, and eradication of diseases and pests of animals." (7 U.S.C. § 8301(1).) The Animal Health Protection Act is designed to protect, among other things, animal health, the health and welfare of the people of the United States, and the economic interests of the livestock industry (7 U.S.C. § 8301(1)(A)-(C)). The powers of the Secretary of Agriculture are broad and include the authority to seize, quarantine, treat, destroy, or dispose of animals affected with, or exposed to, livestock diseases (7 U.S.C. § 8306(a)). The Secretary of Agriculture is authorized to promulgate regulations as the Secretary of Agriculture determines necessary to carry out the Animal Health Protection Act (7 U.S.C. § 8315) and to seek civil and criminal penalties for violations of the Animal Health Protection Act (7 U.S.C. § 8313).

In accordance with the Animal Health Protection Act, the Secretary of Agriculture promulgated 9 C.F.R. pt. 55—Control of Chronic Wasting Disease. The Regulations include a Chronic Wasting Disease Indemnification Program (9 C.F.R. §§ 55.2-.8) which provides for paying owners of cervids destroyed as part of a Chronic Wasting Disease program up to 95 percent of each cervid's value, with an upper limit of $3,000 per cervid

(9 C.F.R. § 55.2). The Regulations also provide for cleaning and disinfection of premises after cervid removal has been accomplished (9 C.F.R. § 55.4) and for the creation of a herd plan whereby APHIS, the owner, and the state representative agree on a plan for eradicating Chronic Wasting Disease from a herd and preventing the future recurrence of Chronic Wasting Disease (9 C.F.R. §§ 55.1, .7(b)).

The Regulations specify that claims arising out of the destruction of cervids are only payable if the cervids have been appraised; the owners have signed the appraisal form indicating agreement with the appraisal amount; the owners agree to comply with a herd plan; and the owners agree they will not introduce cervids onto the premises until after the date specified in the herd plan (9 C.F.R. §§ 55.4, .7(a)-(b)). "Persons who violate this written agreement may be subject to civil and criminal penalties." (9 C.F.R. § 55.7(b)).

Facts

Ronald Walker and Alidra Walker own Top Rail Ranch, Inc. In 2004, Top Rail Ranch, Inc., consisted of a premises located in Penrose, Colorado, at which Respondents maintained an elk breeding herd and a premises in Canon City, Colorado, at which Respondents maintained an elk hunting herd. (JX 1 ¶¶ 1-2.) Respondents' breeding herd premises in Penrose, Colorado, is generally referred to as "E71," and Respondents' hunting herd premises in Canon City, Colorado, is generally referred to as "E85" (JX 1 ¶ 2).

Ronald Walker was born and raised on a ranch and has hunted all his life (Tr. 529). He has been an elk rancher since 1996 and has served as president of both the Colorado Elk Breeders Association and the North American Elk Breeders Association (Tr. 557-59.)

Chronic Wasting Disease is a disease of livestock that belongs to the family of diseases known as transmissible spongiform encephalopathy (Tr. 274-75). Chronic Wasting Disease is a fatal, progressive, degenerative neurological disease and is transmissible from one animal to another through direct contact, as well as through environmental contamination (Tr. 288-89). Chronic Wasting Disease cannot be detected by testing a live animal. Chronic Wasting Disease can only be detected by testing the brain tissue of a deceased animal. (Tr. 285.) The State of Colorado requires that any elk that dies must be tested for Chronic Wasting Disease. APHIS cooperates with the State of Colorado to implement this program. (JX 1 ¶ 4.) Once Chronic Wasting Disease is discovered in a herd, the common practice is to quarantine the herd and then depopulate the herd. Each euthanized animal is tested for Chronic Wasting Disease. (Tr. 303-10.)

Test results released in January 2005, taken from a sample collected by a USDA representative from a hunter-killed elk on the E85 premises, indicated that a 52-month-old elk bull tested positive for Chronic Wasting Disease (JX 1 ¶ 5). As a result of this positive sample and pursuant to its normal practices, the Colorado Department of Agriculture quarantined all elk on both the E71 premises and the E85 premises. Ronald Walker accepted the quarantine on February 2, 2005. The quarantine prohibited

live elk from entering or leaving the E71 premises and the E85 premises. (JX 1 ¶ 6; CX 2; Tr. 27-28, 584-86.)

Several months later, APHIS and Respondents began discussions concerning depopulating the two herds (JX 1 ¶¶ 7-9; Tr. 31-36, 482-84, 588-91). Over a period of time, a plan was developed whereby the two herds would be depopulated and Respondents would be paid a percentage of the appraised value of the herds, as authorized by the Regulations. The "Depopulation Agreement & Preliminary Premises Plans" became effective after it was signed by Ronald Walker on August 22, 2005 (CX 5).

The breeding herd on the E71 premises, consisting of 234 elk, was appraised at $429,637.50 (JX 1 ¶ 11). The Depopulation Agreement & Preliminary Premises Plans provided for the appraised value to be paid after completion of the E71 herd depopulation. The parties further agreed that APHIS would withhold 25 percent of the payment for the depopulation of the E71 herd until completion of the E85 herd depopulation. (CX 5 at 1-2.) APHIS allowed four specific elk in the E71 herd, referred to as "bottle babies,"[1] to avoid euthanasia as a negotiated exception to the usual practice of depopulating the entire herd prior to any indemnity payment (CX 5; JX 1 ¶ 13; Tr. 37, 40-43, 185-86, 483-85, 588-89). The Depopulation Agreement & Preliminary Premises

[1]Although these four elk were referred to as "bottle babies," they were not juveniles. Essentially, the term means that the elk were hand-raised and regarded as family pets.

Plans specifically exempted the four elk from depopulation and included a provision that, after each of the four bottle babies died, the bottle baby would be tested for Chronic Wasting Disease (CX 5).

The Depopulation Agreement & Preliminary Premises Plans referred to future "final premises plans" indicating these future plans would be "developed only after test results from samples collected from all depopulated and hunter killed animals are evaluated." (CX 5 at 2.) The Depopulation Agreement & Preliminary Premises Plans did not define the boundaries of the E71 premises. APHIS viewed the withholding of 25 percent of the payment for the depopulation of the E71 herd as leverage to ensure depopulation of the E85 herd. Previously, APHIS never allowed a bifurcated depopulation. (Tr. 83-84.)

By the time the depopulation of the E71 herd took place in September 2005, many of the elk had calved. Although no compensation was paid for these calves, a total of 65 calves were euthanized as part of the E71 herd depopulation. (Tr. 183-84.) Two of the elk euthanized as part of the E71 herd depopulation tested positive for Chronic Wasting Disease (JX 1 ¶ 15; Tr. 65).

When the depopulation of the E71 herd was completed, APHIS assumed that only the four bottle babies remained on the E71 premises (Tr. 56-59, 188-90). The bottle babies consisted of one bull and three cows (Tr. 184-85). APHIS was unaware that two of the bottle babies had calved, which resulted in six elk on the E71 premises after the

depopulation, not just the four discussed in the Depopulation Agreement & Preliminary Premises Plans (Tr. 77, 110). Ronald Walker testified that the state personnel, particularly Dr. Cunningham, then Colorado State Veterinarian, knew of the two newborn elk (Tr. 601-03). Although Respondents did not notify APHIS about the birth of the two elk, Respondents followed state procedures, registering the newborn calves with the Colorado Brand Board and tattooing them as required (Tr. 612, 628-29). Over the next few years, six additional calves were born as a result of mating within the bottle baby herd. The bottle baby bull, Howard, died a few months before the hearing (Tr. 610). At the time of the hearing, Respondents maintained 11 elk on the E71 premises (Tr. 628-29).

Respondents and APHIS negotiated an agreement in which the E71 herd depopulation would occur before the E85 herd depopulation (Tr. 39-41). Because every elk in the E85 herd came from the E71 herd and because living elk could not leave the E85 premises, Respondents and APHIS agreed that it would do no harm, in terms of the spread of Chronic Wasting Disease, if Respondents were allowed to conduct elk hunts on the E85 premises, provided that no new animals were introduced onto the E85 premises (Tr. 40). This agreement allowed Respondents to have two additional seasons of commercial hunts. These hunts would decrease APHIS' costs for the depopulation because there would be fewer elk to euthanize, resulting in lower indemnity payments. Furthermore, all hunter-killed elk would still be required to be tested for Chronic Wasting Disease. The Depopulation Agreement & Preliminary Premises Plans assumed the

25 percent remaining balance for the E71 herd indemnity would be paid by the end of 2006. The Depopulation Agreement & Preliminary Premises Plans anticipated that the depopulation of the E85 herd would be complete by that time. (CX 5.)

On September 20, 2005, Ronald Walker signed the "Final Premises Plan for Top Rail Ranch CO E-71, Penrose, CO" [hereinafter the E71 Final Premises Plan] and Dr. Roger Perkins, representing APHIS, signed the E71 Final Premises Plan the next day (CX 9; JX 1 ¶¶ 16-17). Although the state normally signs final premises plans and the E71 Final Premises Plan had a signature line reserved for this purpose, the Colorado State Veterinarian did not sign the E71 Final Premises Plan. The E71 Final Premises Plan refers to an attached diagram of the premises, but no such diagram was attached when the Chief ALJ admitted the exhibit into evidence. Dr. Perkins testified that the document admitted as CX 19 was the diagram referred to in the E71 Final Premises Plan. (Tr. 164-65.)

The E71 Final Premises Plan specifically states the entire E71 herd had been depopulated "with the exception of 4 elk." (CX 9 at 1.) By signing the E71 Final Premises Plan, Ronald Walker was making a representation that he knew to be untrue. He admitted as much on his direct testimony, stating the only way to get his money was to sign the E71 Final Premises Plan, even though he knew there were 6, rather than 4, elk on the E71 premises (Tr. 636-37).

Events did not transpire as planned. For a variety of reasons, Respondents and APHIS had difficulty agreeing on aspects of a plan to depopulate the E85 herd. Respondents insisted on conditions which APHIS believed made implementing the plan difficult, if not impossible. These conditions included not allowing motor vehicles to operate off the trails, requiring all killed elk to be manually carried off the premises, and severely limiting the duration of the operation. (Tr. 87-120.) Unlike the E71 premises, where the elk were kept in a series of corrals, the E85 premises consisted of approximately 1,500 acres of rough terrain (Tr. 542-44).

APHIS eventually agreed to Respondents' condition that only hunters familiar with the E85 premises be employed to complete the depopulation of the E85 herd (Tr. 112-21). APHIS found the initial bids for the E85 herd depopulation too high (Tr. 120). Finally, late in the winter of 2007, APHIS hired, with Respondents' approval, Roger McQueen, an independent hunter, to complete the depopulation of the E85 herd (Tr. 131-33).

The E85 herd depopulation was scheduled to begin in mid-March 2007. Because conditions were good for hunting, Mr. McQueen began the depopulation 1 day early and killed seven elk in that 1 day (Tr. 137-38). The following day, APHIS directed that the depopulation of the E85 herd be suspended because APHIS discovered Respondents' violation of the agreements regarding the E71 premises, resulting from the procreative activities of the bottle babies and Respondents' introduction of reindeer onto the

E71 premises (Tr. 133-34, 410-11, 632-33). APHIS reimbursed Respondents for the seven elk that Mr. McQueen killed (CX 37).

After suspension of the E85 herd depopulation, APHIS proposed to continue the depopulation of the E85 herd provided Respondents agree to depopulate all the elk on the E71 premises, including the four bottle babies (Tr. 141). APHIS sent Respondents this proposal in April 2007 (CX 40), but the Respondents rejected the proposal (CX 12). The record indicates that no further efforts to depopulate the E85 herd have been undertaken.

Ronald Walker admits purchasing seven reindeer, with the purpose of breeding them, subsequent to signing the Depopulation Agreement & Preliminary Premises Plans and the E71 Final Premises Plan (Tr. 642-45; JX 1 ¶¶ 25-26). Ronald Walker even exhibited the reindeer as part of a Christmas pageant in Florence, Colorado (Tr. 250). Reindeer, like elk, are cervids, but there has never been a reported case of Chronic Wasting Disease in a reindeer (Tr. 324-25, 399). The depopulation plan included a ban on keeping cervids on the E71 premises, but the parties disagree as to what constitutes the E71 premises and where Respondents kept the reindeer. Respondents did not dispute that they owned the reindeer, but rather contend the reindeer were kept out of the area that Respondents define as the E71 premises. (Tr. 643-45.) Respondents contend, with respect to the Depopulation Agreement & Preliminary Premises Plans, the E71 premises consisted of the fenced elk enclosure and the portions of Respondents' property that were not previously inhabited by elk were not covered by the conditions of the Depopulation

Agreement & Preliminary Premises Plans. Ronald Walker knew cervids could not be brought onto a quarantined property and he testified the reindeer were never situated in any portion of the property that was quarantined (Tr. 643-45.) The Administrator contends the entire ranch property located in Penrose, Colorado, was the E71 premises.

Discussion

Respondents contend neither Alidra Walker nor Top Rail Ranch, Inc., are proper parties to this matter. Respondents contend because only Ronald Walker signed the Depopulation Agreement & Preliminary Premises Plans and the E71 Final Premises Plan and because there is no indication that Ronald Walker was acting on behalf of either Alidra Walker or Top Rail Ranch, Inc., he should be the only respondent in the instant proceeding. Respondents also contend Top Rail Ranch, Inc., had no ownership interest in the E71 herd and the Administrator only named all three as respondents in the Complaint in order to increase the maximum civil penalty that could be assessed.

These contentions are belied by the Joint Stipulations of Fact (JX 1). The parties stipulated that Ronald Walker and Alidra Walker own and operate Top Rail Ranch, Inc., and that the ranch consists of an elk breeding herd (E71) as well as an elk hunting herd (E85) (JX 1 ¶¶ 1-2). The Joint Stipulations of Fact indicates that Ronald Walker's signature on the Depopulation Agreement & Preliminary Premises Plans was on behalf of both himself and Alidra Walker, which would likewise indicate that Ronald Walker was signing as the owner or authorized representative of both Alidra Walker and Top Rail

Ranch, Inc. (JX 1 ¶ 12). The Depopulation Agreement & Preliminary Premises Plans purports to be "an agreement between Top Rail Elk Ranch owners Ron and Alidra Walker," APHIS, and the Colorado Department of Agriculture (CX 5 at 1). Thus, the evidence clearly supports a finding that Alidra Walker and Top Rail Ranch, Inc., are proper parties in this action, along with Ronald Walker.

Withholding 25 percent of the indemnity payment for the depopulation of the E71 herd, as an extra assurance that Respondents would allow the depopulation of the E85 herd, was not inconsistent with the Regulations. Unusual circumstances are present in this case, principally the sparing of the four bottle babies and Respondents' negotiation for a two-hunting-season extension of time before the depopulation of the E85 herd would occur, in order to allow Respondents to arrange the more profitable elk hunts during that time. Therefore, APHIS' negotiation of a quid pro quo was not unreasonable. While there is no language in the Regulations allowing the withholding of a portion of the indemnity payment, there is also no language in the Regulations that would allow excepting four elk from the depopulation, nor is there any language that would allow a two-hunting-season postponement of depopulation.

Under the Depopulation Agreement & Preliminary Premises Plans, the withheld 25 percent of the indemnity was to be paid on the completion of the E85 herd depopulation and no later than December 2006. APHIS suspended the depopulation of the E85 herd because of APHIS' investigation into whether Respondents violated the

Depopulation Agreement & Preliminary Premises Plans and the E71 Final Premises Plan by restocking the elk (by allowing the bottle babies to breed and not reporting the information to APHIS) and by introducing reindeer onto the E71 premises.

The Depopulation Agreement & Preliminary Premises Plans contemplates that only the four identified bottle babies would be allowed to survive the E71 herd depopulation. Respondents' failure to notify APHIS that two of the bottle babies calved before the depopulation of the E71 herd and before the signing of the E71 Final Premises Plan, which represented that the four bottle babies were the only remaining elk on the E71 premises, constituted a deliberate misrepresentation of fact and was a violation of the Depopulation Agreement & Preliminary Premises Plans and the E71 Final Premises Plan.

Ronald Walker testified that the state veterinarian, Dr. Cunningham, saw the two calves and recommended that, during the depopulation of the E71 herd, the calves be locked in pen 7 with the bottle babies. Ronald Walker testified that the bottle babies and the calves were kept in clear view during the depopulation effort. (Tr. 601-05.) Other witnesses testified they did not see either the bottle babies or their two calves during the E71 herd depopulation (Tr. 188-89). Neither Ronald Walker nor Dr. Cunningham informed APHIS officials about the two calves born to the bottle babies, and APHIS officials did not know about the two calves at the time of the signing of the E71 Final Premises Plan. Ronald Walker did inform the Colorado Brand Board of the birth of the

two calves, as well as the three additional calves born in the spring of 2006, however, although he never notified APHIS of the births (Tr. 612).

The addition of any elk, other than the four bottle babies, to the E71 premises constitutes restocking of the E71 premises, in violation of the E71 Final Premises Plan. The goal of the parties throughout the process was to reduce the elk population of the E71 premises to zero, allowing only the four bottle babies to remain quarantined for the remainder of their lives. As stated in the E71 Final Premises Plan, the parties further contemplated that no cervids, other than the four bottle babies, would be allowed on the E71 premises until the four bottle babies died. After the death of the bottle babies and based on the Chronic Wasting Disease test results on the bottle babies, a reassessment of Chronic Wasting Disease risks on the property would be conducted before allowing restocking with cervids.

Respondents contend the failure of the E71 Final Premises Plan to address the issue of breeding indicates that no violation occurred. Respondents also contend APHIS was at fault for not developing "cooperative lines of communication" with Colorado so that APHIS would have known about the birth of calves which had been registered with the Colorado Brand Board. Neither contention is correct. Furthermore, the plain language of the E71 Final Premises Plan limited cervids on the E71 premises to the four bottle babies and prohibited additions to the E71 premises until after the four bottle baby elk died and were tested for Chronic Wasting Disease. I find difficult acceptance of

Respondents' argument that they did not know that additions to the herd through breeding presented a problem for APHIS, in light of Ronald Walker's misrepresentation, when Ronald Walker signed the E71 Final Premises Plan, that only four elk remained on the E71 premises.

Ronald Walker also testified that the births were a surprise on two counts. First, the bull elk had a prolapsed sheath which should have made breeding difficult if not impossible (Tr. 609-10). After three more calves were born, Respondents then separated the bull from the cows during the next normal breeding season, but the cows became pregnant once again outside the normal elk birthing cycle. Respondents continued to report the births to the Colorado Brand Board, but never reported any information on the births to APHIS.

Even taking Respondents' word that the births were a surprise and that Respondents took reasonable precautions to prevent the births, it is difficult to escape a finding that the births were restocking as that term is generally understood. Neither the Depopulation Agreement & Preliminary Premises Plans nor the E71 Final Premises Plan addresses breeding and the only possible interpretation of the agreements is that only the four bottle babies were to be on the E71 premises with no additional cervids allowed on the E71 premises until the death of the bottle babies.

Respondents also contend the E71 Final Premises Plan was not a "herd plan" as required by the Regulations. However, APHIS amply demonstrated that the difference

between the E71 Final Premises Plan and a typical herd plan resulted from Respondents' insistence on keeping the bottle babies and that provisions associated with a complete depopulation were not appropriate at the time of the signing of the E71 Final Premises Plan. Respondents' negotiation of these more lenient conditions does not render the E71 Final Premises Plan unenforceable.

Respondents' stocking of reindeer was a violation of the E71 Final Premises Plan. The E71 Final Premises Plan banned all cervids from the property unless "approved by the CO State Veterinarian and USDA Area Veterinarian in Charge." (CX 9 at 3.) It is undisputed that reindeer are cervids (9 C.F.R. § 55.1) and that Ronald Walker introduced reindeer onto the E71 premises (Tr. 642). Furthermore, Respondents do not claim and there is no evidence that the Colorado State Veterinarian or the USDA Area Veterinarian-in-Charge approved stocking reindeer on the E71 premises.

For the reasons discussed below, I find the prohibition in the E71 Final Premises Plan on reintroducing cervids onto the E71 premises without approval of the Colorado State Veterinarian and the USDA Area Veterinarian-in-Charge covers all contiguous Top Rail Ranch property in Penrose, Colorado.

APHIS argues the entire ranch in Penrose, Colorado, is covered by the E71 Final Premises Plan, while Respondents argue just the 12 pens and central alleyway with the appurtenant buildings and fixtures are subject to the E71 Final Premises Plan. My reading of the document is that most provisions are all encompassing applying to the

entire Penrose, Colorado, ranch while certain provisions have specific limited application, e.g., the fencing requirements.

The controlling document is titled: "Final Premises Plan for Top Rail Ranch CO E-71, Penrose, CO" (CX 9 at 1). The first sentence of the document identifies the two components of the Top Rail Ranch: the breeding location near Penrose, Colorado, referred to as CO E71 and the hunting location 29 miles north and west of the Penrose, Colorado, location, referred to as CO E85. The E71 Final Premises Plan does not divide the Penrose, Colorado, location into two components, the area with the pens and the rest of the property in Penrose, Colorado. Therefore, all the property in Penrose, Colorado, is governed by the E71 Final Premises Plan. The statement "[t]his final premises plan pertains only to the E71 facility" (CX 9 at 1) only indicates that the E71 Final Premises Plan does not apply to the E85 premises. Respondents' introduction of cervids, namely reindeer, onto the Top Rail Ranch, Penrose, Colorado, premises, without approval of the Colorado State Veterinarian and the USDA Area Veterinarian-in-Charge, violates the E71 Final Premises Plan and 9 C.F.R. § 55.4.

The restocking of elk via the pregnancies of the bottle babies are serious violations of the E71 Final Premises Plan and 9 C.F.R. § 55.4. The evidence shows that a total of eight calves were born to the bottle baby herd during three breeding cycles shortly before and after the depopulation of the E71 herd. I find that each calf is a separate restocking of E71 premises, in violation of the E71 Final Premises Plan and 9 C.F.R. § 55.4.

Respondents' introduction of seven reindeer onto the E71 premises constitutes seven violations of the E71 Final Premises Plan and 9 C.F.R. § 55.4.

The Animal Health Protection Act sets forth the maximum civil penalty that the Secretary of Agriculture may assess and factors that the Secretary of Agriculture must consider when determining the amount of the civil penalty, as follows:

> **§ 8313. Penalties**
>
> . . . .
>
> **(b) Civil penalties**
>
> **(1) In general**
>
> Except as provided in section 8309(d) of this title, any person that violates this chapter, or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided under this chapter may, after notice and opportunity for a hearing on the record, be assessed a civil penalty by the Secretary that does not exceed the greater of—
>
> (A)(i) $50,000 in the case of any individual, except that the civil penalty may not exceed $1,000 in the case of an initial violation of this chapter by an individual moving regulated articles not for monetary gain;
>
> (ii) $250,000 in the case of any other person for each violation; and
>
> (iii) $500,000 for all violations adjudicated in a single proceeding; or
>
> (B) twice the gross gain or gross loss for any violation or forgery, counterfeiting, or unauthorized use, alteration, defacing or destruction of a certificate, permit, or other document provided under this chapter that results in the person's deriving pecuniary gain or causing pecuniary loss to another person.

> **(2) Factors in determining civil penalty**
>
> In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider, with respect to the violator—
>
> (A) the ability to pay;
> (B) the effect on ability to continue to do business;
> (C) any history of prior violations;
> (D) the degree of culpability; and
> (E) such other factors the Secretary considers to be appropriate.

7 U.S.C. § 8313(b)(1)-(2). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalties that may be assessed under 7 U.S.C. § 8313(b)(1), as follows:

> **§ 3.91 Adjusted civil monetary penalties.**
>
> . . . .
> (b) *Penalties—*. . . .
> . . . .
> (2) *Animal and Plant Health Inspection Service*. . . .
> . . . .
> (vi) Civil penalty for any person [except as provided in 7 U.S.C. 8309(d)] that violates the Animal Health Protection Act (AHPA) or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided under the AHPA, codified at 7 U.S.C. 8313(b)(1), has a maximum of the greater of: $55,000 in the case of any individual, except that the civil penalty may not exceed $1,100 in the case of an initial violation of the AHPA by an individual moving regulated articles not for monetary gain, $275,000 in the case of any other person for each violation, and $550,000 for all violations adjudicated in a single proceeding; or twice the gross gain or gross loss for any violation or forgery, counterfeiting, or unauthorized use, alteration, defacing or destruction of a certificate, permit, or other document provided under the AHPA that results in the person's deriving pecuniary gain or causing pecuniary loss to another person.

7 C.F.R. § 3.91(b)(2)(vi).

I have analyzed the nature, circumstances, extent, and gravity of each violation as required by the Animal Health Protection Act (7 U.S.C. § 8313(b)(2)). I have also determined that Respondents have the ability to pay the civil penalty assessed in this Decision and Order and the civil penalty will not impact Respondents' ability to continue to do business. Respondents have no history of prior violations, but I do find Respondents culpable for the violations. Regarding the restocking of elk on the E71 premises via the pregnancies of the bottle babies, I find Respondents' violations of the E71 Final Premises Plan and 9 C.F.R. § 55.4 serious. Therefore, I assess a civil penalty of $3,000 for each of the eight elk introduced onto the E71 premises, in violation of the E71 Final Premises Plan and 9 C.F.R. § 55.4. Regarding the introduction of reindeer onto the E71 premises, in violation of the E71 Final Premises Plan and 9 C.F.R. § 55.4, I find the circumstances under which Respondents moved the reindeer for a Christmas demonstration, after having introduced them onto the E71 premises, and then returning them to the E71 premises, had the potential to expose other cervids to Chronic Wasting Disease. I find this violation extremely troubling in that it demonstrates a disregard for the seriousness of the Chronic Wasting Disease eradication program. Therefore, I assess a civil penalty of $8,000 for each of the seven reindeer Respondents introduced onto the E71 premises, in violation of the E71 Final Premises Plan and 9 C.F.R. § 55.4. Therefore, I assess Respondents a total civil penalty of $80,000.

Findings of Fact

1. Ronald Walker and Alidra Walker own and operate Top Rail Ranch, Inc. At the time of the occurrence of the violations alleged in the Complaint, Respondents operated an elk breeding herd on a premises located in Penrose, Colorado (E71), and an elk hunting herd on a premises located in Canon City, Colorado (E85).

2. The E71 premises consists of approximately 365 generally flat acres and includes 12 elk corrals as well as other property, including the residence of Ronald Walker and Alidra Walker.

3. The E85 premises consists of approximately 1,500 acres with significant ranges in elevation, thick woods, rocky outcroppings, and a few roads for access (Tr. 542-44). The E85 premises is enclosed by fencing. All elk in E85 are transported from the E71 premises and do not leave the E85 premises until they are hunted or otherwise killed.

4. After a hunt during the 2004 hunting season, the required testing was performed on the elk killed on the E85 premises. A 52-month-old elk bull tested positive for Chronic Wasting Disease. As a consequence of this test result, the Colorado Department of Agriculture issued an order quarantining all elk on the E71 premises and the E85 premises on January 31, 2005 (CX 2; Tr. 25-28).

5. Ronald Walker has been a hunter and rancher throughout his life. He is very knowledgeable about all aspects of raising and hunting elk. He is a past president of

the Colorado Elk Breeders Association and the North American Elk Breeders Association.

6. Ronald Walker, acting on behalf of Alidra Walker and Top Rail Ranch, Inc., signed a Depopulation Agreement & Preliminary Premises Plans for the E71 premises and the E85 premises on August 22, 2005 (CX 5). The Depopulation Agreement & Preliminary Premises Plans had been signed on August 1, 2005, by Dr. Cunningham on behalf of the State of Colorado and Dr. Perkins on behalf of APHIS. The Depopulation Agreement & Preliminary Premises Plans states that the E71 herd would be depopulated first with indemnity to be paid based on a percentage of the herd's appraised value. Twenty-five percent of that indemnity was to be withheld pending the depopulation of the E85 herd and the signing of a final premises plan for the E85 premises. The Depopulation Agreement & Preliminary Premises Plans allows four specifically identified elk, referred to as "bottle babies," to be exempt from the depopulation. These four bottle baby elk would be kept "under permanent isolation and quarantine." (CX 5 at 1.) Restocking of the E71 herd would not occur until the four bottle babies had died and had been tested for Chronic Wasting Disease. The E85 herd would be hunted through the end of the 2006 hunting season, at which time the remaining elk would be appraised and depopulated, with depopulation of the E85 herd to be completed no later than December 31, 2006.

7. The depopulation of the E71 herd was carried out on September 6-7, 2005. Two of the elk tested positive for Chronic Wasting Disease.

8. At the time of the E71 herd depopulation, two of the bottle babies had calves. Respondents did not inform APHIS of this fact at that time, although it appears that the state veterinarian, Dr. Cunningham, knew of the birth of the calves.

9. On September 20-21, 2005, Ronald Walker and APHIS signed the Final Premises Plan for the E71 premises. No one signed on behalf of the State of Colorado. In the E71 Final Premises Plan, Respondents specified that only the four bottle babies remained on the E71 premises and that each of the four bottle babies would be quarantined until its death. The E71 Final Premises Plan did not contain all the provisions normally associated with such plans because the E71 Final Premises Plan was exceptional due to the four elk being spared (normally a plan would describe measures to be taken before the empty premises could be used again). Ronald Walker signed the E71 Final Premises Plan even though it categorically stated that only the four bottle babies remained on the E71 premises, when he in fact knew that there were two calves on the E71 premises in addition to the bottle babies.

10. Although Respondents did not report the existence of the two elk calves to APHIS, Respondents reported the two elk calves to the Colorado Brand Board.

11. In subsequent years, the bottle baby cows calved again after being impregnated by the bottle baby buck. Ronald Walker stated he did not believe the buck

was capable of mating due to a prolapsed sheath. After the second series of births, Respondents separated the bull from the cows during the normal mating season. The cows became pregnant out-of-season and calved anyway. Respondents reported all the calves to the Colorado Brand Board, but did not inform APHIS.

12. Subsequent to the signing of the E71 Final Premises Plan and after difficult negotiations concerning a plan for the depopulation of the E85 herd, APHIS and Respondents reached an agreement in February 2007 (more than a month after the December 2006 deadline imposed by the E71 Final Premises Plan) regarding the depopulation of the E85 herd. Under this agreement, a hunter was hired to conduct the depopulation of the E85 herd, with indemnities to be paid for the killed elk.

13. The day after the hunter commenced the depopulation, which was 1 day earlier than he had told APHIS he would begin, APHIS directed him to stop depopulating the E85 herd. He had already killed seven elk, for which he was compensated and for which APHIS paid indemnity to Respondents. APHIS indicated to Respondents, and reiterated during the hearing, that the E85 herd depopulation was suspended because of Respondents' violations of the Depopulation Agreement & Preliminary Premises Plans and the E71 Final Premises Plan (Tr. 133-34).

14. In the spring of 2006, Respondents began purchasing reindeer, with the idea of establishing a reindeer breeding herd in 2006, when they purchased five reindeer cows from Tad Puckett. In the fall of 2006, Respondents purchased two breeding bull reindeer

from Mr. Puckett. The reindeer were kept on the E71 premises, but were never kept in the elk pens. Reindeer are cervids, but there is no recorded instance of a reindeer with Chronic Wasting Disease.

15. Chronic Wasting Disease is a transmissible spongiform encepalothopy which is fatal to elk, deer, and moose. Generally, death from Chronic Wasting Disease takes 2 to 5 years from the time of exposure. Chronic Wasting Disease is transmissible from animal to animal, either through direct contact or through environmental contamination. Currently, the only way to test for Chronic Wasting Disease is by testing the brain stem tissue and tonsils of deceased animals. No treatment or preventative vaccine exists for Chronic Wasting Disease. Depopulation of the contaminated herd is currently the best method to control Chronic Wasting Disease.

Conclusions of Law

1. Ronald Walker, Alidra Walker, and Top Rail Ranch, Inc., are all proper parties to this action.

2. The E71 Final Premises Plan, signed by Ronald Walker on behalf of Respondents and Dr. Perkins on behalf of APHIS, is a legitimate agreement under the Regulations, and is binding on both Respondents and APHIS.

3. By failing to inform APHIS of the existence of two calves at the time the E71 Final Premises Plan was signed and by allowing the bottle babies to breed without notifying APHIS, Respondents violated the provisions of the E71 Final Premises Plan

banning the restocking of cervids until after certain requirements were met and violated 9 C.F.R. § 55.4.

4. Respondents' introduction of reindeer onto the E71 premises violated the E71 Final Premises Plan restocking ban and 9 C.F.R. § 55.4, because the E71 Final Premises Plan prohibited the reintroduction of "cervids to this property" without "review[] and approv[al] by the CO State Veterinarian and USDA Area Veterinarian in Charge." (CX 9 at 3.)

5. Factoring in the severity of Respondents' violations, as well as the other factors required to be considered under the Animal Health Protection Act, I assess Respondents an $80,000 civil penalty for Respondents' violations of the E71 Final Premises Plan and 9 C.F.R. § 55.4.

The Administrator's Appeal Petition

The Administrator presented two issues in his appeal of the Chief ALJ's Decision:

> 1. Whether the Administrative Law Judge (ALJ) erred in finding that the Respondents did not violate the Final Premises Plan agreement and 9 C.F.R. § 55.4 by restocking their property with reindeer prior to the date specified in the plan.
>
> 2. Whether the ALJ erred in reducing the civil penalty requested by Complainant and assessing a lesser civil penalty based upon his conclusion that "there was absolutely no legitimate basis for APHIS to discontinue the depopulation of E85."

Regarding the first issue, I conclude Respondents violated the E71 Final Premises Plan and 9 C.F.R. § 55.4 by restocking the E71 premises with reindeer. I discuss my

reasoning in this Decision and Order, *supra*. I need not discuss this issue further in response to the Administrator's Appeal Petition.

Regarding the Administrator's appeal of the $20,000 civil penalty assessed by the Chief ALJ rather than the $110,000 civil penalty recommended by the Administrator, administrative law judges and the Judicial Officer have significant discretion when imposing a civil penalty under the Animal Health Protection Act. The United States Department of Agriculture's sanction policy provides that the administrative law judges and the Judicial Officer must give appropriate weight to sanction recommendations of administrative officials, as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991). However, I have repeatedly stated the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[2]

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[2]*In re Lorenza Pearson*, __ Agric. Dec. ___, slip op. at 69 (July 13, 2009); *In re Amarillo Wildlife Refuge, Inc.*, __ Agric. Dec. ___, slip op. at 16 (Jan. 6, 2009); *In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir.

(continued...)

After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of 7 U.S.C. § 8313(b)(2), and the remedial purposes of the Animal Health Protection Act, I conclude assessment of an $80,000 civil penalty is appropriate and necessary to ensure Respondents' compliance with the Animal Health Protection Act and the Regulations in the future, to deter others from violating the Animal Health Protection Act and the Regulations, and to fulfill the remedial purposes of the Animal Health Protection Act.

For the foregoing reasons, the following Order is issued.

ORDER

Ronald Walker, Alidra Walker, and Top Rail Ranch, Inc., are assessed, jointly and severally, a civil penalty of $80,000. The civil penalty shall be paid by certified check or money order payable to the Treasurer of the United States and sent to:

United States Department of Agriculture
APHIS, Accounts Receivable
P.O. Box 3334
Minneapolis, MN 55403

Payment of the civil penalty shall be sent to, and received by, the United States Department of Agriculture, APHIS, Accounts Receivable, within 60 days after service of

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[2](...continued)
Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002).

this Order on Respondents. Respondents shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 07-0131.

RIGHT TO JUDICIAL REVIEW

The Order assessing Ronald Walker, Alidra Walker, and Top Rail Ranch, Inc., a civil penalty is a final order reviewable under 28 U.S.C. §§ 2341-2351.[3] Ronald Walker, Alidra Walker, and/or Top Rail Ranch, Inc., must seek judicial review within 60 days after entry of the Order.[4] The date of entry of the Order is January 13, 2010.

Done at Washington, DC

January 13, 2010

_____

William G. Jenson
Judicial Officer

[3] 7 U.S.C. § 8313(b)(4)(A).

[4] 28 U.S.C. § 2344.