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

In this decision I find that Respondents did violate a "final premises" agreement with Complainant concerning restocking of their elk breeding facility. I find that Respondents did not violate the agreement by purchasing and breeding reindeer, as the reindeer were not penned in the area that was the subject of the agreement. I impose a civil penalty of $20,000 for the violations, but this penalty should be offset against the funds that Complainant has withheld pending completion of the depopulation of Respondent's elk hunting facility.

Procedural Background

This proceeding was initiated by the filing of a complaint on June 14, 2007, by the Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, alleging that Respondents Ronald Walker, Alidra Walker, and Top Rail Ranch violated the Animal Health Protection Act and the Chronic Wasting Disease Indemnification

Program Regulations by restocking their premises in violation of a herd plan agreed to by Complainant and Respondents. Respondents filed a timely answer on August 8, 2007.

I conducted a hearing in this matter in Denver, Colorado on May 14-15, 2008. Complainant was represented by Lauren Axley, Esq. and Darlene Bollinger, Esq. of USDA's Office of General Counsel. Respondents were represented by Brenda Jackson, Esq. Complainant called four witnesses and Respondents called two, including Mr. Walker. The parties filed a "Joint Stipulations of Fact" which was admitted as Joint Exhibit 1. I admitted 36 exhibits at the behest of Complainant and 6 at the behest of Respondents.

Following the hearing, Complainant submitted its opening brief, including proposed findings of fact and conclusions of law, on July 11, 2008; Respondents filed their brief on August 18, 2008; and Complainant's reply brief was filed on September 11, 2008.

Statutory and Regulatory Background

In enacting The Animal Health Protection Act, 7 U.S.C. § 8301 et seq., Congress provided the Secretary of Agriculture the authority to take actions for "the prevention, detection, control and eradication of diseases and pests of animals." The 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. The powers of the Secretary include the seizure, quarantine, destruction, or disposal of disease carrying animals or animals exposed to animals carrying certain diseases. The Secretary also is generally required to compensate owners of animals required to be destroyed under the Act. 7 U.S.C. § 8306(d). The Secretary is also empowered with the authority to seek civil and criminal penalties for violations of the Act, 7

U.S.C. § 8313, and to promulgate regulations "as the Secretary determines necessary to carry out this chapter." 7 U.S.C. § 8315.

In accordance with these Congressional directives, the Secretary promulgated the regulations at 9 C.F.R. Part 55—Control of Chronic Wasting Disease[1]. These regulations included setting up a CWD Indemnification Program, which provided for paying owners of herds to be destroyed as part of a CWD program up to 95% of each animal's value, with an upper limit of $3,000 per animal. The regulations also provide for cleaning and disinfection of premises after cervid removal has been accomplished and for the creation of a herd plan and/or a premises management agreement whereby the USDA, the owner and the state representative agree on a plan for eradicating CWD from a herd, and preventing its future recurrence.

The regulations, at 9 CFR § 55.7, specify that claims that arise out of the destruction of cervids are only payable if the cervids have been appraised and the owners have signed the appraisal form indicating that they agree with the appraisal, and that the owners will agree to comply with a herd plan and will not introduce cervids onto the premises until after the date specified in the herd plan. "Persons who violate this written agreement may be subject to civil and criminal penalties."

Facts

Respondents Ronald Walker and Alidra Walker own Respondent Top Rail Ranch, which in 2004 consisted of an elk breeding herd on premises located at 2055 Highway 50, Penrose, CO and a hunting herd located on premises at 1000 Walker Way, Canon City, Colorado. JX 1, Stip.

[1] Chronic Wasting Disease is hereinafter referred to as "CWD."

1 and 2. The breeding herd premises is generally referred to as E71 and the hunting herd premises is generally referred to as E85. Id. Stip. 2. Mr. 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. 557-559.

CWD is a disease of livestock that belongs to the family of diseases known as transmissible spongiform encephalopathy. Tr. 274-275. It is a fatal, progressive, degenerative neurological disease. It is transmissible from one animal to another through direct contact as well as through environmental contamination. Tr. 288-289. One of the difficulties in dealing with this disease is that there is currently no means of detecting the presence of the disease through testing a living creature—it 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 CWD. USDA works in cooperation with the state of Colorado to implement this program. JX 1, Stip. 4. Once CWD is discovered in a herd, the common practice is to quarantine the herd, and then to depopulate it, with each of the euthanized animals being tested for CWD. Tr. 303-310.

After a USDA representative collected samples from a hunter-killed elk at the E85 facility, test results released in January 2005 indicated that the 52-month old elk bull tested positive for CWD. JX 1, Stip. 5. As a result, and pursuant to their normal practices, the State of Colorado quarantined all elk on both the E71 and E85 premises. JX 1, Stip. 6, CX 2, Tr. 27-28, 584-586. Mr. Walker accepted the quarantine on February 2, 2005. At that point, no elk could enter or leave either the breeding herd or the hunting herd.

Several months later, the parties began discussions on how and when to depopulate the two herds. JX 1, Stip. 7-9, Tr. 31-36, 482-484, 588-591. Over a period of time, a plan was agreed to whereby the two herds would be euthanized and Respondents would be paid for a percentage of the appraised value of the herds, as per the regulations at 9 C.F.R. § 55.7(b). This Depopulation Agreement and Preliminary Premises Plan became effective after it was signed by Mr. Walker on August 22, 2005. CX 5. The herd at E71, consisting of 234 elk, was appraised at $429,637.50. JX 1, Stip. 11. The Plan provided for the appraised value to be paid after the E71 herd was depopulated, except that the parties agreed that 25% of the payment would be withheld until such time as the E85 herd was depopulated. CX 5, pp. 1-2. The parties agreed that 4 animals in the E71 herd, which were referred to as "bottle babies[2]" would be spared. CX 5, JX 1, Stip. 13. This was an exception to the usual rule where the entire herd would normally be depopulated, but the Walkers were adamant about the four elk. Tr. 37, 41-43, 185-186, 483-485, 588-589. The agreement to depopulate E71, CX 5, specifically mentioned the four animals as exempt from the program, with provisions that after they died they would each be tested for CWD. The Plan made it clear that only four animals from the herd would be retained, and that restocking of E71 with any cervids would not be allowed until after the death of the four retained elk. The Plan referred to a future "final premises plan" with strong implications that such a plan would be developed after all elk were gone from the premises and certain cleaning measures were undertaken. However, the plan did not define the boundaries of E71, so it is unclear, particularly in terms of future uses of the property, as to the boundaries the document is intended to cover. It is not clear whether the conditions imposed in the plan were confined to the corrals

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

(and surrounding alleyways) where the elk were kept, and the extent to which other areas of the property, such as corrals never used by the elk, were covered by future use restrictions. Both the withholding of 25% of the indemnity money and the allowance of the four bottle babies were exceptions to the normal depopulation agreement. Tr. 43-44, 83-84, 326-327, 407-410. APHIS viewed the withholding of the 25% as a form of leverage, as they had never allowed a split depopulation before. Tr. 83-84.

By the time the depopulation of E71 took place in September 2005, many of the females had calved. Although no compensation was paid for the 65 calves, they too were euthanized as part of the depopulation. Tr. 183-184. Two of the E71 elk tested positive for CWD. JX 1, Stip. 15, Tr. 66.

When this gruesome task was accomplished, APHIS personnel assumed that only the four bottle babies remained on E71. Tr. 56-58, 189. The bottle babies consisted of one bull and three cows. Tr. 185. APHIS was not aware that two of the bottle babies had calved and that there were actually six elk on E71 that had not been depopulated. Tr. 77, 110. Mr. Walker testified that the state personnel, particularly Dr. Cunningham, who had since retired and did not testify, knew of the two additional elk. Tr. 602-603. While not notifying federal officials of the existence of the two elk, Mr. Walker did follow state procedures, registering the newborn calves with the state brand board, and tattooing them as required. Tr. 612, 628-629. In the next few years six additional calves were born as a result of the bottle baby bull mating with the bottle baby cows. The bottle baby bull, Howard, died a few months before the hearing. Tr. 610. At the time of the hearing, there were eleven elk on E71. Tr. 628-629.

The parties had negotiated to have the E71 depopulation occur before the E85 depopulation to allow, at Respondents' request, two hunting seasons to transpire before the final depopulation would be undertaken. Tr. 40-41. Since every elk in E85 was stated to have come from E71 and since there was no way for a living elk to depart from E85, the parties apparently agreed that it would do no harm, in terms of the spread of CWD, if Respondents were allowed to conduct hunts, as long as no new animals were introduced to E85. Tr. 40. That way, Respondents would have two more seasons to conduct profitable hunts, and the depopulation of the remaining elk would be less costly for APHIS, as there would be fewer elk to kill and thus much less indemnity to pay. All hunted elk would still be required to be tested as per the regulations. The agreement the parties entered into assumed that the withheld indemnity for 25% of the E71 herd would be paid by the end of 2006, by which time it was apparently presumed that the depopulation of E85 would have occurred.

On September 20, Mr. Walker signed the Final Premises Plan (FPP) for E71 on behalf of Respondents, and Dr. Roger Perkins, on behalf of APHIS, signed the plan the next day. CX 9, J. Ex. 1. Although it was normal practice for such a plan to also be signed by the state, and there was a signature line reserved for this purpose, the Colorado State Veterinarian did not sign this plan. The plan refers to an "attached diagram" of the premises, but no such diagram is attached to CX 9. However, Dr. Perkins indicated that the document admitted as CX 19 was the diagram referred to in CX 9. Tr. 164-165. This diagram is reasonably consistent with the aerial photographs admitted as RX 3.

The FPP specifically referred to the fact that the entire E71 herd had been euthanized "with the exception of 4 elk," CX 9, p. 1, so it is indisputable that by signing the document, Mr.

Walker was unambiguously making a representation that he knew to be untrue. He admitted as much on his direct testimony, stating that the only way to get his money was to sign the FPP, even though he knew there were 6, rather than 4, elk on the E71 premises. Tr. 636-637.

Events did not transpire as planned. For a variety of reasons, the parties had considerable difficulty in agreeing on various aspects of the plan to depopulate E85. Mr. Walker insisted on a variety of conditions which APHIS thought made carrying out the plan exceedingly difficult, if not impossible, including such conditions as not allowing any motor vehicles to operate off the trails, thus requiring all killed elk to be manually carried off the premises, and severely limiting the duration of the operation. Tr. 87-120. Unlike E71, which was a series of corrals, E85 consisted of approximately 1500 acres of rough terrain. Tr. 542-544.

Eventually, APHIS agreed to Mr. Walker's insistence that hunters familiar with E85 be employed, and bids were solicited for this purpose. Tr. 112-121. However, the three bids that were submitted were deemed too costly by APHIS. Tr. 120. Finally, late in the winter of 2007, APHIS hired, with Mr. Walker's approval, Roger McQueen, an independent hunter known to Mr. Walker. Tr. 132-133. Interestingly, McQueen would be allowed to use motorized vehicles, including snowmobiles, rubber-tired all terrain vehicles, a 4 X 4 winch truck, a tractor and a backhoe in order to carry out the operation. Id. However, the fact that Mr. Walker went out of his way to make the E85 depopulation more difficult to accomplish is not material to any of my findings here, as an agreement was finally reached and was only not accomplished by the unilateral action of APHIS.

The E85 depopulation was scheduled to begin in mid-March 2007. Because conditions were good for hunting, Mr. McQueen began his work one day early and killed seven elk in that

one day. Tr. 137-138. The following day, APHIS directed that the depopulation be suspended. Tr. 133-134, 410-411, 632-633. The apparent reason for the suspension of the operation was that APHIS had discovered that there was a violation regarding E71, resulting from the procreative activities of the bottle babies, and because Respondents had purchased reindeer which were allegedly being housed in E71 in violation of the quarantine and the agreements that had been signed. Tr. 133-134, 410-411. APHIS reimbursed Respondents for the seven elk that McQueen killed. CX 37. No further depopulation efforts had been undertaken as of the date of the hearing.

Respondents admit purchasing reindeer, with the purpose of breeding them, subsequent to the date of signing the depopulation agreement. Tr. 642-645, JX 1, Stip. 24-25. Respondents even exhibited the reindeer as part of a Christmas pageant in Florence, Colorado. Tr. 250. Reindeers, like elk, are cervids, but there has never been a reported case of CWD in a reindeer. Tr. 324-325, 399. The FPP included a ban on keeping cervids in E71, but there is disputed evidence as to what constitutes E71, and where the reindeer were kept. Mr. Walker did not dispute that he owned the reindeers, but rather contended that they were kept out of the area that he defined as E71. Tr. 643-645. There is a lack of specificity in the various documents signed by the parties, as well as the state representatives involved, in terms of defining exactly what was meant by E71. Mr. Walker contends that, with respect to the depopulation agreement and FPP, E71 consisted of the fenced elk enclosure, and that the portions of his property that were not previously inhabited by elk were not covered by the conditions of the agreement; while he knew cervids could not be brought on to a quarantined property, he testified that the reindeer were never situated in any portion of the property that was quarantined. Tr. 643-645. One witness, Tad Puckett, who had sold the reindeer cows to Respondents after the depopulation took place,

testified that while he never saw the reindeer and the elk together, he saw them to the east or the north of Respondents' working barn, including in pen 1 or 2, both of which were part of the E71 property used by the depopulated elk. Tr. 453-454. However, Dr. Richard Brewster, who had been specializing in CWD in Colorado for the three or four years prior to his retirement in July 2007, testified that he did not see any reindeer when visiting E71 on December 27, 2006, Tr. 499,: Steve Rossi, a retired state employee who owned one of the four bottle babies testified that he visited many times and the reindeer were always kept in an area clearly separate from the 12 elk pens, Tr. 576-577; and Elizabeth Kelpis, the area manager for APHIS's Investigations and Enforcement Branch, testified that even though she saw eight elk and 6 reindeer on the property, they were never penned together, and the reindeer may well have been in the same pen indicated by Mr. Walker and Mr. Rossi—that is, a pen that was not one that had previously been used to corral the E71 herd. Tr. 259-262.

Discussion

I find that Alidra Walker and Top Rail Ranch were properly named parties to this action, along with Ronald Walker. I find that both the Depopulation and Preliminary Premises Plan, and the FPP were legitimate exercises of regulatory authority by APHIS. In particular, I find that it was proper to include in the Plans withholding of 25% of the indemnification for the E71 depopulation pending successful completion of the E85 depopulation. I also find that the birth of calves to the bottle baby cows was "restocking," in violation of the FPP, and when combined with the failure of Respondents to notify APHIS representatives of the calves born to the bottle babies, and Mr. Walker's signing of the FPP when he knew that more than four elk were excluded from the depopulation, was a violation warranting a civil penalty. I also find that there

was absolutely no legitimate basis for APHIS to discontinue the depopulation of E85. Finally, I find that neither of the Plans sufficiently defined the parameters of E71, so that it was unclear whether cervids were banned from areas on the Penrose property not specifically described as areas which the elk herd had occupied; that Complainant did not carry its burden of demonstrating that the reindeer were at any time in an area banned to cervids; and that the starting of a reindeer herd under these circumstances did not constitute a violation of the Act, the underlying regulations, or the FPP.

1. Respondents contend that neither Alidra Walker nor Top Rail Ranch are proper parties to this matter. They contend that since only Ron Walker signed the various agreements at issue and that since there is no indication that he was acting on behalf of either his wife or Top Rail, that he should be the only respondent in this proceeding. They also contend that Top Rail had no ownership interest in the E71 herd. They state in their brief that Complainant only named all three as parties in order to increase the maximum penalty that could be assessed.

These contentions are belied by the Joint Stipulations of Fact, J. Ex. 1. The parties stipulated that "Ronald and Alidra Walker own and operate the Top Rail Ranch, Inc." and that "The ranch consists of an elk breeding herd . . .(E71) . . . as well as a hunting herd . . . (E85)." (Stipulations 1 and 2). Stipulation 12 indicates that Mr. Walker's signature on the Depopulation Agreement was on behalf of both himself and his wife, which would likewise indicate that he was signing as the owner or authorized representative of both his wife and Top Rail, while the Plan itself purported to be "an agreement between Top Rail Elk Ranch owners Ron and Alidra Walker," APHIS and the State of Colorado. CX 5, paragraph 1. Thus, the evidence clearly

supports a finding that Alidra Walker and Top Rail Ranch, Inc. are proper parties in this action, along with Ron Walker.[3]

2. Withholding 25% of the indemnity for the depopulation of E71, as an extra assurance that the depopulation of E85 would be accomplished, was not inconsistent with the regulations. Because of the unusual factors present in this case, principally the sparing of the four bottle babies (which eventually grew to a group of eleven), and the fact that Respondents negotiated for a two hunting season extension of time before the depopulation of E85 would occur, in order to allow Respondents to arrange the more-profitable elk hunts during that time, APHIS was certainly allowed to negotiate a quid pro quo in terms of withholding a portion of the proceeds. While there was no specific language in the regulations allowing such a withholding, the regulations also appear to contain no language that would allow excepting four elk from the depopulation, nor is there any language that would appear to allow a two-hunting season postponement of depopulation.

3. While the withheld 25% of the agreed upon indemnity was supposed to be paid on the completion of the E85 depopulation, and no later than December 2006, it is apparent that Mr. Walker was engaging in various obstructive actions to delay the depopulation, presumably to allow Top Rail to continue hunting operations. However, after the parties finally reached agreement in February 2007, it was APHIS who unilaterally abrogated the agreement by electing to discontinue the depopulation of E85 just after it began because of its investigation into whether Respondents violated provisions of the depopulation agreement by restocking the elk

[3] Interestingly, the regulations only allow indemnity if "the owners" sign the appraisal agreement and the herd plan (emphasis added). Both these documents were only signed by Ron Walker, but neither Complainant nor Respondents are contending that the payment of the indemnity was unlawful.

(by allowing the bottle babies to breed and not reporting the information to APHIS) and by starting a herd of reindeer.

APHIS witnesses repeatedly testified to the importance of the CWD program and the need for prompt depopulation of herds where a positive test for CWD has occurred. Herd depopulation is certainly one of the more drastic remedies to animal disease that is permissible under USDA regulations. The imposition of quarantines, the creating of herd plans and final premises plans, the cleaning up and disinfection of the premises where the diseased animal had lived, all attest to the seriousness of the disease and the need to take prompt action. Complainant's decision to stop the depopulation of E85, due to what is effectively an unrelated series of events on E71, does not make sense. On the one hand, Complainant complains of the admittedly obstructionist role Mr. Walker played in terms of agreeing to conditions for depopulation of E85, and how APHIS was being extraordinarily lenient in allowing Respondents two extra hunting seasons before undertaking the final depopulation of E85. Yet after agreement was reached, APHIS unilaterally decided that because there was a pending investigation as to whether the agreements on E71 were violated that the depopulation should be entirely stopped, leaving possibly contaminated elk alive and putting the Respondents in a costly state of limbo. Even if there were violations of the provisions of the plans dealing with E71—and I find that there were—that is not a basis to stop the depopulation of E85. The record does not indicate if a motivating factor for APHIS was the payment of the 25% of the indemnification that was withheld, but that could have been worked out after the fact. Not completing the depopulation or at least allowing Respondents to conduct hunts until the elk were entirely removed from E85 is simply unfathomable in light of the purposes of the CWD eradication program.

4. Only the four specifically identified bottle babies were permitted to survive the E71 depopulation. The depopulation plan clearly contemplates only the four would be allowed to survive, and Respondents' failure to notify APHIS that two of the elk had calved by the time of the depopulation, and their subsequent signing of the FPP which represented that the four bottle babies were the only remaining elk in E71, constituted a deliberate misrepresentation of fact and was a violation of the depopulation plan, as was allowing the subsequent calving of the bottle babies..

Mr. Walker testified that the State veterinarian, Dr. Cunningham, saw the two calves that were kept with the bottle babies during the depopulation of E71, and told him to lock them in pen 7, where he stated the bottle babies were kept in clear view during the depopulation effort. Other witnesses testified that they did not see either the bottle babies or their two calves during the depopulation. It may be that Dr. Cunningham's failure to sign the FPP was related to his knowledge that the representation that only the four bottle babies survived the euthanization that took place a few weeks earlier. It is certainly clear that neither Mr. Walker nor Dr. Cunningham informed APHIS officials about the two calves born to the bottle babies, and that the APHIS officials did not know about the two calves at the time of the signing of the FPP. While Mr. Walker apparently did inform the state brand board of the birth of the two calves, as well as the three calves that were born in the spring of 2006 (and presumably three more that were born in 2007, as there were eleven elk at the time of the hearing (Tr. 628-629), factoring in the fact that the bull had died), he never notified APHIS, presumably because he knew that he had specifically represented to them that only the four bottle babies were alive at the time of signing the FPP.

The addition of any elk, other than the four bottle babies, to the E71 property constitutes restocking in violation of the FPP. The motivation of the parties throughout the process was to reduce the elk population of E71 to zero, with the exception being made that the four bottle babies would be allowed to live out their lives but remaining quarantined. The FPP contemplated a reassessment of CWD risks on the property before allowing restocking with cervids, depending on the test results on the bottle babies after their deaths. The Plan clearly did not contemplate additional elk living on E71, whether through intentional or inadvertent breeding, or through any other means, unless and until the four bottle babies died and were tested.

Respondents contend that the failure of the FPP to address the issue of breeding indicates that no violation occurred. They also contend that APHIS was at fault for not developing "cooperative lines of communication" with Colorado so that they would have known about the birth of calves which had been registered with the brand board. This does not change the fact that the plain language of the FPP limited the exceptions to the four bottle babies and that there were to be no additions to the elk herd until after they died and were tested. It is difficult to believe Mr. Walker's argument that he did not know that additions to the herd through breeding did not present a problem for APHIS, given his blatant misrepresentation when signing the FPP that he had just the four remaining elk on E71. He knew that having more than the four was inconsistent with his commitment in the depopulation plan and that being truthful would likely put his indemnity payments in jeopardy. While he maintained at hearing that they were visible in a pen during the depopulation, APHIS witnesses testified they did not see them; if they did see them and recognize them as bottle babies with two calves it is hard for me to believe that Dr. Perkins would have signed the FPP.

Mr. Walker also testified that the subsequent births were a surprise to him on two counts. First, the bull elk had a prolapsed sheath which should have made breeding difficult if not impossible. After three more calves were born, he 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. He continued to report the births to the state brand board, but never reported any information on the births to APHIS.

Even taking Respondents' word that the births were a surprise, and that they 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 agreement talks about whether breeding or restocking would have to be intentional or unintentional, and the only possible interpretation of the agreements is that only the four bottle babies were to be on the premises of E71, and that upon and until their deaths, no additional cervids would be allowed on E71.

Respondents also contend that the FPP was not a "herd plan" as required by the regulation. However, Complainant has amply demonstrated that the difference between the FPP and a typical herd plan was a result of 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 FPP. The fact that Respondents were able to negotiate these more lenient conditions does not render the FPP unenforceable.

5. Respondents stocking and breeding of reindeer was not a violation of the FPP. While the FPP did ban all cervids from the premises of E71 until after the deaths of the four bottle babies, the premises of E71 were not clearly enough defined to warrant a finding that all the property owned by the Respondents located at 2055 Highway 50 in Penrose was covered by the

ban of cervids. The FPP refers to an "attached diagram" which was not in fact attached to the copy of the FPP received in evidence. CX 9, p. 1. However, Respondents submitted a diagram that appears to be representative of the layout of the Penrose property, RX 3, as did Complainant, CX 19. These diagrams both indicate that the Penrose property covers substantially more area than the areas where the elk were kept, including the barn and feed storage areas. In CX 9, the parties agree that "[t]he facility is divided into 12 pens surrounding a central alleyway." If APHIS wanted to be sure that the entire Penrose property was subject to the agreement, rather than just the area inhabited by the elk, they could have so specified. In the face of what is at best characterized as an ambiguous definition of the property outside the 12 elk pens and the alleyway area, the stocking of reindeer for breeding purposes in other areas of the Penrose property cannot be deemed a violation of the FPP.

APHIS appears to contend that Respondents are in violation because the reindeer were in fact kept in the areas clearly specified in the FPP as being banned to cervids, other than the 4 bottle babies. The only testimony in support of this contention comes from Tad Puckett, who traded Ron Walker some reindeer cows in exchange for fencing material. Mr. Puckett testified that he knew of the CWD problem and the subsequent depopulation of E71, and that he questioned Ron Walker as to whether it was legal for him to have reindeer on his property. He stated that Ron Walker replied that he thought it was legal and that he would keep them in the back of his property. Mr. Puckett also stated that he observed the reindeer on several later visits to the Penrose property, and that he thought he once saw them in pen 1 or 2, and that they were always to his left as he drove to the barn. Both Mr. Walker and Mr. Puckett testified that they bore each other considerable ill will due to some business transactions that turned sour.

Mr. Walker testified that he always kept the reindeer on a portion of the property that was never utilized by the elk. Dr. Brewster apparently did not see the reindeer on any of his visits to the Penrose property; when Ms. Kelpis was on the property shortly before the hearing she saw both elk and reindeer on the property, but they were not in the same pen. Ms. Kelpis indicated that the reindeer could have been in the area marked in blue in RX 3; i.e., outside the areas designated as pens for the elk.

While neither Mr. Puckett nor Mr. Walker are fully credible as to the location of the reindeer, the burden of proof is on APHIS to demonstrate, by a preponderance of the evidence, that a violation exists with respect to whether the reindeer were housed in an area completely separate from the elk pens. The FPP does not define the E71 premises, even with reference to the diagram that was presumably attached and separately received into evidence, with sufficient clarity for me to hold that it was intended to ban the introduction of cervids on every inch of the Penrose property. Indeed, if that was the intent of the FPP than there would have been no need to refer to the diagram at all. While some aspects of the FPP could be interpreted to apply to the entire property, the FPP is simply too ambiguous on this issue to hold Respondents liable for stocking reindeer, as long as the reindeer were not and are not utilizing any of the property that was utilized by the elk herd. Given the ambiguity of the FPP as to this subject, and the lack of convincing testimony concerning whether the reindeer ever utilized the E71 property as described in the FPP, I find that the stocking of reindeer did not violate the terms of the FPP.

6. The appropriate remedy is a civil penalty of $20,000. The breeding/restocking of elk via the unplanned pregnancies of the bottle babies is a serious violation of the FPP. However, because I find that the stocking of reindeer did not violate the terms of the FPP, and because I

find that the subsequent actions of APHIS in cancelling the depopulation of E85 are inconsistent with the imposition of more significant civil penalties, the $110,000 civil penalty suggested by Complainant would be excessive for these violations. I am also directing that the civil penalty does not have to be paid directly by Respondents, but rather should be deducted from the indemnity funds that Complainants have been withholding from Respondents.

While my jurisdiction over this matter presumably does not include the authority to order APHIS to resume and finish the depopulation of E85, which undisputedly arose out of the unilateral actions of APHIS, it is clear that E85's depopulation is utterly unrelated to the violations alleged in the complaint, and that no valid reason exists for not completing that task. I am aware that completion of that task will generate an obligation on behalf of APHIS to indemnify Respondents for the remaining elk on E85 as well as generate the release of the withheld 25% of the indemnity (less the civil penalty of $20,000) for the E71 herd. I specifically do not speak to the fate of the elk born to the bottle babies, and leave that to the parties to sort out.

Findings of Fact

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

2. The Penrose property consists of approximately 365 generally flat acres and includes 12 designated elk corrals as well as other property, including the residence of the Walkers.

3. The E85 facility is approximately 1500 acres with significant ranges in elevation, with thick woods, rocky outcroppings and a few roads for access. Tr. 542-544. It is enclosed by fencing. All elk in E85 are transported from E71, and do not leave until they are hunted or otherwise killed.

4. After a hunt on during the 2004 hunting season, the required testing was performed on the killed elk on E85. The elk tested positive of chronic wasting disease (CWD). As a consequence of this test, the State of Colorado initiated discussions with Respondents, resulting in both the E85 and E71 herds being quarantined. Tr. 27-28. An order to this effect was issued on January 31, 2005. CX 2.

5. Respondent Ron 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. Respondent Ron Walker, acting on behalf of his wife and Top Rail, signed a Depopulation Agreement and Preliminary Premises Plan for E71 and E85 on August 22, 2005. CX 5. The document had been signed on August 1 by Dr. Cunningham on behalf of the State of Colorado and Dr. Perkins on behalf of APHIS. This Preliminary Plan indicates that the E71 herd would be depopulated first with indemnity to be paid based on a percentage of the herd's appraised value, with 25% of that indemnity to be withheld pending the depopulation and signing of a Final Premises Plan for E85. The Preliminary Plan makes it absolutely clear that only the four specifically identified bottle babies would be exempt from the depopulation and that they would be kept "under permanent isolation and quarantine." Restocking of the E71 herd would not occur until have the four bottle babies had died and tested negative for CWD. The

E85 herd would be hunted out through the end of the 2006 hunting season, at which point the remaining elk would be appraised and depopulated, with depopulation of E85 to be completed no later than December 31, 2006.

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

8. At the time of the E71 depopulation, two of the bottle babies had calves. Respondents did not make Complainant aware of this fact at that time, although it appears that the State veterinarian, Dr. Cunningham, was aware of the calves.

9. On September 20-21, 2005, the parties signed a Final Premises Plan (FPP) for E 71. No one signed on behalf of the State of Colorado. In this plan, Respondents specified that only the four bottle babies remained on the premises of E71, and that they would be quarantined until their death. The FPP did not contain all the provisions normally associated with such plans, because this 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). Respondent Ron Walker signed the FPP even though it categorically stated that only the four bottle babies remained on E71, when he in fact knew that there were two calves on the premises in addition to the bottle babies.

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

11. In subsequent years, the bottle baby cows calved again after being impregnated by the baby bottle buck. Respondent Ron Walker indicated that he did not believe that the buck was

capable of mating due to a prolapsed sheath. After the second series of births, Mr. Walker separated the bull from the cows during the normal mating season. The cows became pregnant out-of-season and calved anyway. All the calving activity was duly registered with the State, but no one informed APHIS.

12. Subsequent to the signing of the FPP, APHIS had difficulty in getting Respondent Ron Walker to agree to a reasonable plan for the depopulation of E85. However, an agreement was eventually reached in February, 2007 (over a month after the December, 2006 deadline imposed by the FPP) and a hunter was hired to conduct the depopulation, with indemnities to be paid for the killed elk.

13. The day after the hunter commenced the depopulation, which was one day earlier than he had told APHIS he would begin due to favorable weather conditions, APHIS unilaterally directed him to stop killing the elk. He had already killed seven elk, for which he was compensated and for which Respondents were paid indemnity. APHIS indicated to Respondents and reiterated at the hearing that the E85 depopulation was being suspended because of possible violations of the E71 FPP. Tr. 133-134.

14. No evidence was ever introduced which would explain how the discovery of a possible violation of the E71 FPP would justify suspending the depopulation of E85.

15. APHIS first became aware there were more than 4 elk on E71 in December 2006 but continued with plans to proceed with the E85 depopulation until March 2007.

16. Respondents began purchasing reindeer, with the idea of establishing a reindeer breeding herd in 2006 when he purchased five reindeer cows from Tad Puckett. The reindeer

were kept on the Penrose property, but were never kept in the elk pens, or in any of the property that was designated as part of E71 in agreements between the parties, or in the diagrams attached thereto. Reindeer are cervids, but there is no recorded instance of a reindeer with CWD.

17. CWD is a transmissible spongiform encepalothopy which has a fatal effect on elk, deer and moose. Generally, it takes two to five years from exposure to the disease before death. The disease is transmissible from animal to animal, either through direct contact or through environmental contamination. Currently, the only way to test for CWD is through testing the brain stem tissue and tonsils of deceased animals. There is no treatment or preventative vaccine for CWD. Depopulation of the contaminated herd is the current best method to control the disease.

Conclusions of Law

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

2. The Final Premises Plan (FPP) signed by Ron Walker on behalf of Respondents and Dr. Perkins on behalf of Complainant is a legitimate agreement under the regulations, and is binding on both parties.

3. By hiding from APHIS the existence of two calves at the time the FPP was signed, and by allowing the bottle babies to breed without notifying APHIS, Respondents violated the provisions of the FPP banning the restocking of cervids until after certain requirements were met.

4. Respondents' establishment of a reindeer breeding herd at the Penrose property was not a violation of the FPP restocking ban, because the FPP's definition of the E71 premises did

not clearly include property outside the vicinity of the elk pens and surrounding alleys, and because Complainant did not establish by a preponderance of the evidence that the reindeer were housed within the E71 premises.

5. Factoring in the severity of the violations, as well as the other statutory factors, I assess a civil penalty of $20,000 for the violation of the FPP's provisions. However, I direct that the civil penalty be collected by deducting it from the indemnity funds that are being held by Complainant for the E71 depopulation.

Order

Respondents have committed violations of the Animal Health Protection Act. Respondents are assessed a civil penalty of $20,000 which is to be offset from the indemnity funds owed to Respondents by APHIS.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.
this 20th day of March 2009

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MARC R. HILLSON
Chief Administrative Law Judge