**IN THE SUPREME COURT**
**OF THE**
**STATE OF SOUTH DAKOTA**

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**APPEAL NO. 28781**

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**MICHAEL J. KNECHT,**

**Plaintiff and Appellant,**

**vs.**

**GAYLE W. EVRIDGE and LINDA M. EVRIDGE,**

**Defendants and Appellees.**

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**APPEAL FROM THE FOURTH JUDICIAL CIRCUIT**
**PERKINS COUNTY, SOUTH DAKOTA**

**THE HONORABLE ERIC J. STRAWN**
**CIRCUIT COURT JUDGE**

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# BRIEF OF APPELLANT KNECHT

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*Notice of Appeal Filed: September 21, 2018*

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## PRELIMINARY STATEMENT

In this brief, Appellant Michael J. Knecht will be referred to as "Knecht" and Appellees Gayle Evridge and Linda Evridge will be referred to as "Evridges."

Citations to the certified record as reflected by the Clerk's Index are designated as "R" followed by the initial page number. Citations to the 2015 trial transcript are designated as "TT" followed by the page number and citations to the 2017 trial transcript are designated as "JT."

## STATEMENT OF JURISDICTION

Knecht respectfully appeals from: 1) the Circuit Court's Findings of Fact and Conclusions of Law and Declaratory Orders dated January 11, 2016, (R. 2209); 2) Judgment in Favor of the Evridges and against Knecht in the amount of $122,324,25 plus interest at 10% accruing beginning January 23, 2016, with Notice of Entry of Judgment on March 31, 2016, (R. 2400, 2401); 3) an Order on March 24, 2016, Motions Hearing , with Notice of Entry of Judgment on March 31, 2016, (R. 2398, 2401) and; 4) the Jury Verdict and resulting final Judgment and Notice of Entry of Judgment dated August 22, 2018 (R. 4236, 4238).

Knecht filed his Notice of Appeal and Docketing Statement on September 21, 2018. (R. 4360, 4362). This Court has appellate jurisdiction pursuant to SDCL § 15-26A-3(1) and SDCL § 15-26A-3 (4).

## REQUEST FOR ORAL ARGUMENT

Michael J. Knecht respectfully requests the privilege of appearing before this Court for oral argument.

## STATEMENT OF THE ISSUES

**I. Whether the trial court erred in declaring the Supplemental Lease valid and enforceable when it was unlawful and void.**

*Law Capital, Inc. v. Kettering*, 2013 S.D. 66, 836 N.W.2d 642.
*Willers v. Wettestad*, 510 N.W.2d 676, 680 (S.D. 1994).
*Nature's 10 Jewelry v. Gunderson*, 2002 SD 80, 648 N.W.2d 804.
*State ex rel. Meierhenry v. Spiegel, Inc.*, 277 N.W.2d 298 (S.D. 1979).

**II. Whether the trial court erred in ordering payment of funds where this void lease is not subject to restitution.**

*Commercial Tr. & Sav. Bank v. Christensen*, 535 N.W.2d 853 (S.D. 1995).
*Thurston v. Cedric Sanders Co.*, 80 S.D. 426, 125 N.W.2d 496 (S.D.1963).
*Smizer v. Drey*, 2016 S.D. 3, 873 N.W.2d 697.

**III. Whether the trial court erred in granting Summary Judgment and dismissing the deceit and fraud claims.**

*Stabler v. First State Bank of Roscoe*, 2015 S.D. 44, 865 N.W.2d 466.
*Poeppel v. Lester*, 2013 SD 17, 827 N.W.2d 580.
*Arnoldy v. Mahoney*, 2010 S.D. 89, 791 N.W.2d 645.
*Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121, 573 N.W.2d 493.

## STATEMENT OF THE CASE

Knecht brought this action asserting a breach of contract claim against Evridges, who counterclaimed for breach of contract. (R. 1, 3050). Upon stipulation of the parties, the Court bifurcated the trial of the matter into (i) a court trial on the declaratory judgment portion of the lawsuit to decide the legal issues

regarding the enforceability and construction of the two lease agreements entitled "Agricultural Lease" and "Supplemental Agricultural Lease" and (ii) a jury trial for any remaining issues including damages to be set thereafter. (R. 111). The court trial was conducted on August 24, 2015, August 31, 2015 and September 23, 2015. (R.1203-1825).

The Court entered its Findings of Fact and Conclusions of Law and Declaratory Orders on January 11, 2016, holding that 1) each lease constitutes a separate contract; 2) the Agricultural Lease is a valid and binding contact; 3) the Supplemental Lease is a valid and voidable contract, terminable by Knecht. (R.2209). Breach and damages, if any, were to be determined by jury trial. *Id.*

On January 12, 2016, Evridges' filed a motion for Court to Release funds held by Perkins County Clerk of Courts. (R. 2229). Several weeks later, Evridges' filed a motion for partial summary judgment requesting that the court order Knecht to make the lease payments due on the Agricultural Lease and Supplemental Lease for the second half of 2015 and first half of 2016, plus prejudgment interest. (R. 2233). Knecht resisted both motions. (R. 2317, 2336).

A hearing was held on March 24, 2016, which addressed both motions. (R. 2231) On March 30, 2016, the Circuit Court signed and filed an Order granting Evridges' Motion for Court to Release Funds instructing the Perkin's County Clerk of Courts to release the sum of $78,500.00 currently on file with the Clerk's office, and issue a check made payable to the trust account of Evridges' counsel.

(R. 2398). The March 30, 2016 Order also granted in part and denied in part Evridges' Motion for Partial summary. (R. 2398). The Court held that Knecht owed 1) $43,845.25 for the second half of the 2015 Agricultural Lease obligation; 2) $34,675.75 for the second half of the 2015 Supplemental Lease obligation; and 3) $43,845.25 for the first half of the 2016 Agricultural Lease obligation. (R. 2398). On March 31, 2016, notice of entry of order was filed. (R. 2405).

Knecht contested the Findings of Fact and Conclusions of Law and Declaratory Orders and resulting Judgment, and filed an interlocutory appeal. That appeal was dismissed by the South Dakota Supreme Court for lack of subject matter jurisdiction by Order dated July 18, 2016. (R. 2614).

On February 24, 2017, Evridges' filed a Motion for Summary Judgment alleging that they were entitled to judgment as a matter of law on counts III (Negligent Misrepresentation), IV (Deceit) and V (Fraud) of Knecht's amended complaint. Knecht resisted the motion. (R. 2711).

On March 10, 2017, a hearing was held on the Motion for Summary Judgment. (R. 2711). During the hearing, Knecht's counsel advised the Court that count III (negligent misrepresentation) of his Amended Complaint was to be withdrawn and dismissed. (R. 2961). At the conclusion of the hearing, the Circuit Court granted Evridges' Motion for Summary Judgment holding that Knecht "fail[ed] to assert a colorable claim for fraud or deceit; thus [his] claim for damages [is] covered by the terms of the parties' contracts." (R. 2961). On April 7,

2017, the Circuit Court signed and filed its order granting summary judgement and the notice of entry of order was filed April 24, 2017. (R. 2979, 2984).

A Jury Trial on the remaining issues of this case was held from December 13, 2017 to December 15, 2017 in Perkins County. (R. 3146). The Jury awarded Knecht $130,302.03 in damages against Evridges, plus post judgment interest. (R. 4236). And Evridges were awarded $68,626.91 in damages against Knecht, plus post judgment interest. (R. 4236). Of this amount, $20,000 was for alleged fencing damages and the remainder was for 2016 rent.

On July 26, 2018, Evridges' filed a motion for new trial arguing that 1) the Court failed to properly instruct the jury; 2) the Court made prejudicial evidentiary rulings; and 3) the damage awards were not supported by evidence. (R.3382). Knecht resisted this motion. (R. 3422).

On August 22, 2018, Judgment on Jury verdict and Notice of Entry of Judgment was filed. (R.4236, 4238). Evridges' withdrew their Motion for New Trial on August 31, 2018, with the intent of filing a motion for new trial pursuant to SDCL § 15-6-59B. (R. 4275). Six days later, Evridges' refiled their Motion for New Trial. (R. 4279). There was no ruling on the Motion by the Circuit Court, although such motion is deemed denied by operation of SDCL § 15-6-59(b).

On September 19, 2018, Evridges' filed a Notice of Appeal and Docking Statement, which is Appeal No. 28780. (R.4352, 4354). On September 21, 2018, Knecht filed his Notice of Appeal (case No. 28781). (R. 4360, 4362). This Court

consolidated the appeals by Order dated November 9, 2018.

## STATEMENT OF THE FACTS

Knecht sets forth a very detailed statement of facts because the claims at issue require an understanding of the sequence of events and issues presented.

### Mike Knecht

Knecht is a young rancher from Lodgepole, SD whose income is derived solely from raising cattle (R. 1203) (TT 4, 5). He purchased his first two cows at the age of 18 and has continued to grow his herd ever since. (R. 1203) (TT 5). In 2014, Knecht owned and cared for about 400 cattle. (R. 292). As his operation continued to grow, Knecht sought ranchland suitable to foster and develop his heard. (R. 2936).

### The Agreement between Knecht & Evridges

In late 2012, Knecht ran an advertisement in a local Ag paper seeking to lease ranchland on an annual basis. (R. 1203) (TT 7, 96). Several months later, Knecht received a phone call from Evridges, who told him they wanted to retire and rent out their ranch through a long-term lease. (R. 1203) (TT 97). Evridges also told Knecht that their land was tied to the Grand River Grazing Association ("Grand River"), which was especially attractive to Knecht because 1) it ensured his cattle would have more than enough grass and water during the summer

months[1] and 2) Grand River would provide salt and minerals to cattle grazing its lands, so no additional supplements were necessary. (R. 1203) (TT 15, 16).

After several phone calls between the parties, a viewing of the Ranch, and discussion of the terms, Knecht agreed to a lease the property. (R. 2209) (FF ¶ 9). The agreed upon yearly rent was $157,000, split into two semi-annual payments, with 10% down at the beginning of the contract, and the remainder due once Knecht's grazing permit was approved by Grand River. (R. 799, 2209) (AFF ¶8) (FF ¶ 9). Evridges also informed Knecht that the $157,000 figure was calculated using Animal Unit Months (AUMS), which is the total number of grazing livestock the ranch adequately supports. (R. 1203, 2209) (TT 522) (FF ¶9).

On December 3, 2013, Knecht met Evridges at their lawyer's office to execute a lease agreement for use of Evridges' ranch. (R. 2209) (FF ¶ 11). To his surprise, Knecht was presented with two sperate leases for the same ground: the "Agricultural lease" and the "Supplemental lease." (R. 1203, 2209) (TT 9) (FF ¶ 11). When Knecht questioned why there were two leases instead of one, he was told it was the only way Evridges could lease their ranch. (R. 1203, 2209) (TT 9, 140) (FF ¶ 11). Regrettably, Knecht did not have a lawyer present at the meeting and did not have a chance to consult with one because Evridges were set on "wrapping things up that evening". (R. 1203) (TT9). Knecht knew that Evridges were longstanding members of Grand River and their attorney reviewed the details

[1] The Grand River permit provided Knecht use of federal grasslands to graze his cattle from mid-May until October each year. (R.1203) (TT 15, 16).

of each lease agreement with him, so Knecht reasonably believed that the leases were both necessary and proper. (R. 799, 1203) (AFF ¶ 7) (TT 140-141). As such, Knecht executed both leases that evening, providing Evridges with two separate checks totaling $15,700.00 as a down payment.[2] (R. 799) (AFF ¶ 8).

## The Agricultural Lease

The Agricultural Lease is a grazing lease, for a three-year term, beginning December 1, 2013, that leased 3,070 acres of Evridges' ranch to Knecht at $28.55 per acre, rather than in accordance with AUMS as previously discussed. (R. 592 1203, 2209) (TT 522) (FF ¶9). A payment of $43,824.25 was due and payable on December 1st and November 10th of each respective year, for a total of $87,648.50 per annum. (R. 592). The lease provided Knecht with use of the following real estate for his cattle operation:

1) Twp. 21 N., Rge. 13 EBHM, Perkins Co., SD:
    a. Sec. 1: N1/2NW1/4; NW1/4NE1/4; S1/2NE1/4: N1/2SE1/4
    b. Sec. 2: E1/2NE1/4; NE1/4SE1/4
2) Twp. 21 N., Rge. 14 EBHM, Perkins Co., SD:
    a. Sec. 5: All
    b. Sec. 6: All
    c. Sec. 7: NW1/4; NE1/4; SE1/4; NE1/4SW1/4
    d. Sec. 8: NW1/4; N1/2SW1/4
3) Twp. 21 N., Rge. 13 EBHM, Perkins Co., SD:
    a. Sec. 36: All (shared use with LESSORS)

(R. 592). And, it is subject to the following provision:

**GRAND RIVER GRAZING REQUIREMENTS:**

[2] Knecht issued separate checks for the Agricultural Lease and for the Supplemental Lease because Evridges told him it was necessary for tax purposes. (R.799) (AFF ¶ 8).

This lease contemplates LESSORS assisting LESSEE with issuance of a grazing permit tied to the above property and both parties agree:

1. The Lessors and the Lessee hereby acknowledge that the Grand River Grazing Association may monitor grazing use of the based property included in this lease to assure that commensurability is maintained, and the stocking rates and management do not damage the rangeland.
2. The Lessors and the Lessee jointly acknowledge and agree that this lease is for privately owned property only and that the grazing permit on the National Grasslands associated with this base property is waived to the Grazing Association and issuance of the permit is authorized by the Board of Directors.
3. In the event a grazing permit is issued to the Lessee, said Lessee agrees to comply with all Association Rules of Management and to abide by any approved allotment management plans in effect on the grazing allotments involved.

(R. 592).

## The Supplemental Lease

The Supplemental Lease is similar to the Agricultural Lease in that it provides Knecht with use of the same 3,070 acres of Evridges' ranch, for a three-year term, beginning December 1, 2013, but it failed to specify a price per acre. (R. 596). Instead, the lease set forth a flat rate of $34,675.75, due and payable on December 1st and November 10th of each year, for a carrying capacity of 200 head cow/calf and six bulls that could be increased if conditions warranted. (R. 596). Like the Agricultural Lease, the Supplemental Lease included a provision regarding the Grand River grazing requirements. (R. 596). This provision was identical to the grazing requirements listed in the Agricultural Lease, however, it incorporated one additional sentence: "In the event the permit is not transferred, Lessee may terminate or renegotiate this lease." (R. 596).

## The Supplemental Lease is to be Kept Secret

After the leases were executed, Evridges advised Knecht that the Supplemental Lease had to be kept secret and that he was not to talk to the neighbors or tell anyone about its existence. (R. 799, 1203) (AFF ¶8) (TT 154). When Knecht questioned why this was so, Evridges responded that they didn't want anyone knowing their financial business and it was just the way things had to be done. (R. 1203, 2209) (TT 154) (FF ¶ 13). Furthermore, when Gayle Evridge was asked about the Supplemental Lease during the August 31, 2015 trial, he testified:

> [T]heres got to be two leases, and it's got to be hushed up, it's got to be quiet, it's got to be secret. Is this my wishes? No. I am extremely uncomfortable with this. I never plan [sic] in my life to have a second lease. This is not right, Its underhanded. There's nothing good about it. But if people get old, their livelihood depends on it, they may have to do it. I did not sign those two leases with a good feeling in my heart. I signed those two leases because I could not work on my own terms. (R. 1203) (TT 517-521).

## Grand River Grazing Association

Grand River Cooperative Grazing Association is an entity regulated by the U.S. Department of Agriculture, Forest Service with the authority to allow private parties access to government owned grasslands for grazing purposes. (R. 606, 868). Grand River operates in accordance with a set of management rules that are approved by the Forest Service. (R. 606, 868). All members of the association must abide by these rules to be issued a grazing permit. (R. 606, 868).

Knecht had never been a member of Grand River and never grazed cattle on government land, therefore he knew nothing about the rules. (R. 1203) (TT 9-10). Rather, Knecht relied on Evridges to get his permit approved and ceased to delve into the requisites of the permit because he was not required to disburse the remainder of his first lease payment until his permit had been issued. (R. 2209, ¶8; 2896 ¶7-8). Moreover, Evridges had been members of Grand River since 1991 and held a valid grazing permit for over 40 years. (R. 1203) (TT 516). For these reasons, Knecht trusted that Evridges would adhere to the necessary protocol for issuance of his grazing permit. (R. 2369, 2896 ¶¶7-8, 36).

**Violations of Grand River's Rules**

Although Evridges were fully aware of the Grand River's rules, they chose to blatantly ignore them. (R. 2209, ¶¶ 8, 19). First, Evridges knew that the grazing permit could not be subleased. (R. 1203) (TT 516). Nonetheless, they created the Supplemental Lease which purportedly did exactly that. (R. 2896, ¶8).

Second, Evridges knew that all leases involving land attached to a grazing permit had to be approved by Grand River. (R. 1203) (TT 568). In fact, before the Supplemental Lease was executed, Evridges presented Grand River's leasing committee with a hypothetical lease proposing $30 per acre cash rent for their land. (R. 1203) (TT 569). The committee rejected Evridges' proposed lease because the amount was too high. (R.1203) (TT 569). Knowing that Grand River would not accept a lease for $30 per acre, Evridges prepared the Agricultural

Lease at $28.55 per acre to ensure its approval. (R. 1203) (TT 569-570). They then created the Supplemental Lease, which leased the same ground, to receive additional compensation without Grand River's knowledge. (R. 1203, 2209) (TT 569-570) (FF ¶19). Evridges testified that one of the reasons they established the Supplemental Lease was to cover their overhead expenses from the ranch. (R. 1203) (TT 519, 569).

Third, Evridges were aware that Grand River had commensurability requirements limiting the number of livestock permitted to graze on their ranch during the winter months. (R. 2896, ¶65). Disregarding Grand River's rules, Evridges overloaded the ranch with more than 400 cattle of their own for several months of the winter. (R. 2896, ¶65).

Lastly, Evridges knew that pursuant to Grand River's rules of management, all leases had to be filed with the association by March 1st. During the August 31, 2015 trial, Evridges testified to the following:

> Q: Okay. And then go to the next page, which is 123 of Exhibit 4. It says, "All leases have to be in the Association Office by March 1st with appropriate documentation." Do you see that?
> A: I'm aware of that.
> Q: And in your testimony, you admitted that you did not turn in the second lease; right?
> A: That's correct.

(R.1203) (TT 517-518).

Evridges submitted the Agricultural Lease to Grand River to assist in transferring their grazing permit to Knecht but withheld the Supplemental Lease

because they knew it violated the rules and would be rejected. (R. 2209) (FF ¶ 17, 19).

**Knecht Occupies the Ranch**

In January of 2014, Grand River approved the Agricultural Lease and granted Knecht's grazing permit, authorizing 239 head cow/calf pairs and 6 bulls to graze on their land during the summer months. (R. 2896) (AFF2 ¶14). Knecht then tendered the remainder of his 2014 lease payment to Evridges. (R. 2896, ¶14). On February 28, 2014, Knecht brought around 200 head of cattle onto the ranch. (R. 799, ¶11). Shortly after, conflicts arose between Knecht and Evridges. (R. 799, ¶¶12-28). The most notable issue involves Evridges' use of land leased to and paid for by Knecht, without Knecht's consent. (R. 2896, ¶¶21-28). Specifically, during 2014, Evridges allowed 400 yearlings, 8 horses and 6 bulls to graze on the land Knecht leased, which prevented him from using significant portions of the ranch for his own herd. (R. 2896, ¶¶21-28). That year, Evridges admittedly used 40% of the land they leased to Knecht.[3] (R. 3964) (JT 671, 683).

**Knecht Discovers He's Been Duped**

Due to Evridges explanation of the leases, Knecht genuinely believed the Agricultural Lease was for use of Evridges' ranch (3,070 acres) and the Supplemental Lease was for use of Evridges' grazing permit with Grand River. (R.

[3] In 2015, Evridges used slightly less than 40% of the ranch that was leased to and paid for by Knecht. (R.3964) (JT 671). In 2016, Evridges' use of the ranch declined. (R.3964) (JT 671).

1203, 2896) (TT 154) (AFF2 ¶21-28). Evridges further explained that the Knecht would receive a small bill from Grand River for salt and oilers. (R. 1203) (TT 31). However, in April of 2014, Grand River sent Knecht an invoice for $14,047, which he paid.[4] (R. 608, 1203) (TT 31). This unexpected expense caused Knecht to question other Grand River members about the association's rules. (R. 1203) (TT 32). Thereafter, Knecht discovered that Grand River did not receive a copy of the Supplemental Lease. (R. 1203) (TT 33). And even though it was not Knecht's responsibility to submit the Supplemental Lease to Grand River, he did so because it was required by the rules. (R. 1203) (TT 33).

**Evridges Reject Knecht's Lease Payment for 2015**

On November 10, 2014, Knecht submitted the second half of the 2014 lease payment to Evridges, which they accepted. (R. 799, ¶28). In December of 2014, Knecht tendered the first half of the 2015 lease payment to Evridges, but it was rejected. (R. 799, ¶29). Several weeks later, Evridges' attorney sent Knecht a letter indicating that he was in violation of the lease agreements. (R. 945). The letter also explicitly stated that Evridges were aware Knecht had contacted Grand River, but wouldn't change the terms of their contract with Knecht. (R. 945).

**Knecht Brings Suit**

In December of 2014, Knecht filed suit against Evridges and deposited the first half of his 2015 lease payment with the Perkins County Clerk of Court. (R. 1,

[4] In 2015, Knecht received a second invoice from Grand River for $15,769.83, which he paid. (R. 2532, ¶24)

799, ¶28). In response to Knecht's lawsuit, Evridges falsely alleged that Kencht violated several terms of the lease and sought to terminate the agreements. (R. 2896, ¶¶32, 33). Evridges attempted to force Knecht off the land on three separate occasions but were unsuccessful. (R.947, 970, 2238). Although Knecht undoubtedly received much less than he had bargained for, Knecht refused to cancel the leases because "he had nowhere to go and … had to run his cattle." (R. 3431) (JT 126). Knecht testified "you can't just take cattle and box them up and put them away in [sic] a shelf for two years…I still had to have that lease." (R. 3431) (JT 126).

**Fences**

One of Evridges' allegations was that Knecht violated a provision in the Agricultural Lease requiring him to repair fences on the ranch, so long as they were damaged by Knecht's cattle and Evridges provided materials. (R. 592). In 2013, before Knecht occupied the ranch, a series of events occurred that destroyed many of Evridges fences. (R. 2896, ¶80). Specifically, in April of 2013, a prairie fire damaged 1,000 acres of Evridges' ranch, including numerous fences. (R. 1203) (TT46). Six months later, the Atlas snow storm further damaged Evridges' fences. (R. 1203) (TT 72-73). That same year, Evridges ran more than 950 head of cattle on their ranch which also damaged their fences. (R. 2896, ¶80). Knecht testified that by the time he leased the ranch in 2014, Evridges fences were "horrid" and "in pretty tough shape." (R. 1203) (TT 45). Even though Knecht's

cattle did not cause the damage, he repeatedly requested Evridges provide him with materials to repair the perimeter fences. (R. 1203 (TT 46); 2896, ¶82; 3431 (JT 127)). When Evridges failed to do so, Knecht repaired the fences at his own expense to ensure his cattle stayed within the boundaries of the ranch. (R. 1203 (TT 47); R. 2896, ¶82).

**Grand River Terminates Knecht's Grazing Permit**

On March 19, 2015, both Knecht and Evridges received a letter from the Grand River stating that the Supplemental Lease agreement violated the rules of management between Grand River and the United States Forest Service because it was not submitted to the association by March 1st. (R. 866). In addition to the violation of the lease, commensurability had been compromised by Evridges grazing on based acres which were to be used for winter grazing by Knect. (R. 866). Grand River further recommended that the parties operate solely under the Agricultural Lease agreement and terminate the Supplemental Lease. (R. 866).

A month later, Grand River sent a second letter indicating that Knecht would have a conditional grazing permit for 2015, so long as the Court held the Agricultural Lease to be valid. (R. 798). This letter also stated, "under no circumstance shall the second Supplemental Lease be in force, nor shall Evridges receive any remuneration from this lease." (R. 798).

In August of 2015, Grand River suspended Evridges' grazing permit, preventing Knecht's use of the permit in 2016. (R. 1007). A month later, Knecht

appeared in front of the Grand River board to request that his grazing permit be reinstated for 2016. (R. 2369). On February 19, 2016, Grand River sent a letter to Knecht affirming their decision to suspend his grazing permit for 2016. (R. 2369). In that letter, Grand River stated the following: "… if [Knecht's] request to have the 2016 permit was granted, the Court would require Knecht to pay Evridges for the amount in the Supplementary Lease which would create another violation." (R. 2369). Thus, Knecht lost his Grand River grazing permit for 2016. (R.2369, 2896, ¶30).

**The Impact of Losing Knecht's Grazing Permit**

The loss of Knecht's use of the grazing permit in 2016 adversely impacted his cattle operation in that it cost him the hay needed to carry his cattle operation through the next year. (R. 3431) (JT 138). Knecht's ability to use the benefits of the grazing permit in 2016, as specified in his lease, would have allowed him to save 800 tons of hay. (R. 3431) (JT 143). This hay would then be used to feed his cattle in the spring of 2017. Because Knecht did not have enough hay to feed all his cattle, some of Knecht's cattle had to be sold. (R. 3431) (JT 142). However, Knecht's testimony was stricken on this issue at trial and no further evidence was admitted. (R. 3433) (JT 144).

**STANDARD OF REVIEW**

Both contract interpretation and construction are questions of law reviewed *de novo*. *See Laska v. Barr*, 2016 S.D. 13, ¶ 5, 876 N.W.2d 50, 52; *Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, 2006 S.D. 6, ¶ 14, 709 N.W.2d 350,

354; *Campion v. Parkview Apartments*, 1999 S.D. 10, ¶ 23, 588 N.W.2d 897, 902. "Because [this Court] can review the contract as easily as the trial court, there is no presumption in favor of the trial court's determination." *Ziegler Furniture*, 2006 S.D. 6, ¶ 14, 709 N.W.2d at 354 (quoting *Cowan v. Mervin Mewes, Inc.*, 1996 S.D. 40, ¶ 6, 546 N.W.2d 104, 107).

This Court reviews a lower court's conclusions of law *de novo* and also treats mixed questions of law and fact, requiring the application of a legal standard, as questions of law subject to *de novo* review. *See Hanson v. Vermillion Sch. Dist. No. 13-1*, 2007 S.D. 9, ¶ 24, 727 N.W.2d 459, 467. It reviews a lower court's findings of fact under the clearly erroneous standard. *See id.*

## ARGUMENT AND AUTHORITIES

### I. THE TRIAL COURT ERRED IN HOLDING THAT THE SUPPLEMENTAL LEASE AGREEMENT WAS A VOIDABLE CONTRACT.

The Circuit Court erroneously held that the Supplemental Lease was an enforceable contract, voidable at Knecht's discretion. *See Findings of Fact and Conclusions of Law and Declaratory Orders*, R. 2209. In analyzing the issues, the Circuit Court applied the wrong legal test. Because the Supplemental Lease was void, and not voidable or terminable at the request of a party, Knecht was wrongly denied declaratory judgment in his favor and damages available to him.

**THE SUPPLEMENTAL LEASE AGREEMENT IS VOID AS A MATTER OF LAW BECAUSE A) IT IS CONTRARY TO AN EXPRESS**

**PROVISION OF THE LAW; B) IT VIOLATES THE POLICY AND PURPOSE OF THE LAW; AND C) IT VIOLATES PUBLIC POLICY.**

**A. The Supplemental Lease agreement is void as a matter of law because it violates an express provision of law.**

The Supplemental Lease agreement is void because it violates federal regulation 36 CFR 222. In South Dakota, it is well settled that a contract is unlawful if it violates "an express provision of law or ... the policy of express law." SDCL 53-9-1; *Law Capital, Inc. v. Kettering*, 2013 S.D. 66, ¶ 10, 836 N.W.2d 642, 645. Contracts contrary to statutory or constitutional law are invalid and unenforceable. *Willers v. Wettestad*, 510 N.W.2d 676, 680 (S.D. 1994) (citations omitted). And such contracts may be held void or voidable. *Warra v. Kane*, 269 N.W.2d 395, 397.

Federal regulation, 36 CFR 222.1(a) provides that:

> The Chief, Forest Service, shall develop, administer and protect the range resources and permit and regulate the grazing use of all kinds and classes of livestock on all National Forest System lands and on other lands under Forest Service control.

This regulation also authorizes the Forest Service to "recognize, cooperate with and assist…association-controlled land on which members livestock are permitted to graze." 36 CFR 222.7(1). For a grazing association to be recognized by the Forest Service, it must create a set of management rules that govern its activities, which are subject to approval by a Forest Supervisor. 36 CFR 222.7(a)(3)(iv). Upon approval, the association's rules of management are incorporated into and

become a term and condition of the grazing agreement established by the Forest Service. [5] Thus, any violations of the association's rules of management are considered a violation of the terms and conditions of the grazing agreement. *Id*.

The most recent Grand River Grazing Association rules of management were approved by the Forest Service under grazing agreement GRGA-2013 and became effective on March 1, 2013. All members of the association must abide by these rules. Evridges, who are longstanding members of the association, were cognizant of these rules but intentionally chose to disregard them.[6] In doing so, they created the Supplemental Lease with the purpose of circumventing a provision in the rules limiting the amount charged per acre for rent. This lease directly violated the association's rules of management. Because violations of the rules of management are considered a violation of the terms and conditions of the grazing agreement, the lease violated 36 CFR 222.3(c)(1)(vi), an express provision of the law. An unlawful contract is void. SDCL § 53-5-3 and SDCL § 20-2-2. This Court must deem the Supplemental Lease void as a matter of law. *Nature's 10 Jewelry v. Gunderson*, 2002 SD 80, ¶ 12, 648 N.W.2d 804, 807. The trial court allowed termination or renegotiation, but receipt of any funds by Evridges under

[5] Eric Olsen, National Resources Division, Office of the General Counsel, U.S Department of Agriculture, *National Grasslands Management, A primer.* p.21 (1997), https://www.fs.fed.us/grasslands/documents/primer/NG_Primer.pdf (last accessed Nov. 19, 2018).

[6] Evridges consulted with the grazing association prior to the execution of the any lease to inquire whether it would approve a rental rate of $30 per acre. When the grazing association rejected the per acre amount as too high, the Supplemental Lease was created and secreted from the association.

the lease violates the policy and purpose of federal law and this State. It cannot stand and must be declared *void ab initio*.

### B. The Supplemental Lease is void because it violates the policy and purpose of 36 CFR 222.

The Supplemental Lease agreement not only violates 36 CFR 222, but also violates the policy behind its enactment. A law's "policy is found in the letter or purpose of a constitutional or statutory provision or scheme, or in a judicial decision." *Niesent v. Homestake Mining Co.*, 505 N.W.2d 781, 783 (citation omitted). The purpose behind 36 CFR 222 is to provide the Forest Service with the authority to permit and regulate grazing on land within the national forest system. 36 CFR 222.1(a). In this respect, the Forest Service approves a set of rules proposed by a grazing association and conditions the association's grazing agreement on the premise that the rules will be enforced. 36 CFR 222.4(a)(4).

The Supplemental Lease deliberately ignores the grazing association's rules that the Forest Service ratified. It wrongfully allows Evridges to lease land within the national forest system at a higher rate than specified in grazing agreement. The lease's modification of the rules outlined in the grazing agreement usurps the Forest Service's authority to regulate lands within its purview, and instead attempts to self-regulate by creating a rule of its own. This is clearly a violation of the purpose and policy behind 36 CFR 222.1(a). Therefore, the Supplemental Lease must be declared void by this court. Funds received by Evridges were

unlawful and go directly against this policy and cannot be retained, as explained below in Section II.

### C. The Supplemental Lease is void under public policy.

Even if this court determines that the Supplemental Lease agreement is not contrary to an express provision of law or policy of express law, it is still void because it negates public policy. SDCL 53-9-3. "Public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against public good." *State ex rel. Meierhenry v. Spiegel, Inc.*, 277 N.W.2d 298, 300.

The South Dakota legislature has also addressed the public policy principle in statutory form:

> All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud or willful injury to the person or property of another or from violation of law whether willful or negligent, are against the policy of the law.

SDCL 53-9-3.

The Supplemental Lease agreement served as a means for Evridges to disguise their wrongdoing from the grazing association and willfully defraud Knecht. Evridges convinced Knecht to enter into the Supplemental Lease agreement, knowing that the lease violated the grazing association's rules, and would be invalidated if discovered. Regardless, they persuaded Knecht to commit to its terms and advised him to conceal the fraudulent lease to shield their actions

from the association. This is precisely the type of agreement SDCL 53-9-3 must prohibit as against the policy of the law.

Moreover, upholding the circuit court's interpretation of the Supplemental Lease as an enforceable contract is akin to nullifying federal law, and to do so would be injurious to the public and against public good. What is the purpose of providing a federal regulatory agency with the authority to promulgate regulations if its rules can simply be avoided through contract? Federal agencies such as Forest Service fulfill a vital purpose in managing lands and the rules imposed on their behalf cannot be made futile. This court must close the door and refuse to recognize the Supplemental Lease as a valid contract to demonstrate to the public that the laws endorsed or authorized by federal regulatory bodies are enforceable and must be followed. Further, Evridges must disgorge unlawful funds paid under the lease.

### D. Knecht is entitled to pursue damages for 2016 breaches due to the errors of law and the Judgment must be partially set aside as to Evridges' Counterclaims.

Knecht was awarded damages for breach of the leases by Evridges in 2014 and 2015, but the jury awarded no damages for breaches in 2016. (R. 3149-50 (verdict form)). The conduct of the Evridges continued in 2016, but Mike Knecht had to sell cattle, and was not allowed to address damages that resulted from his loss of grazing rights from the Association. (R. 3431-33) (JT 142-44). A proper

jury instruction informing the jury that the Supplemental Lease was void and not simply terminated by Knecht would likely have produced a different result. The jury instructions as a whole did not properly set forth the law upon which the jury decided the breach of contract action. *Dartt v. Berghorst*, 484 N.W.2d 891, 895 (S.D. 1992) (must "give a full and correct statement of the applicable law.") (citation omitted).

The jury heard that Knecht terminated the Supplemental Lease for 2016, not that it was void from the beginning. The jury should have been allowed to consider that the breaches of the Agricultural Lease alleged by Knecht were duties that the Evridges had under that contract regardless of termination of the other lease. The error of law likely caused the jury to wrongly award no damages for the 2016 breaches. *Id.*

As to the counterclaim damages awarded, the jury found that Knecht breached the leases and that Evridges suffered $20,000 in damages for fencing and the remainder of lease payments due for 2016. The fencing requirements in the lease provided that Knecht perform labor using materials supplied by Evridges to install and make repairs of any fences damaged by his cattle on the leased property. Again, because the jury was instructed and heard evidence about a terminated Supplemental Lease, the verdict on the counterclaims is not valid. It is likely that the jury decided issues based on lease termination and "the jury probably would have reached a different verdict, one more favorable to [Knecht],

had correct instructions been given." *LDL Cattle Co., Inc. v. Guetter*, 1996 SD 22 at ¶ 35, 544 N.W.2d at 530. Due to the error of law in not declaring the Supplemental Lease void, a new trial is necessary on 2016 damages and the counterclaims.

## II. THE TRIAL COURT'S ERROR IN DECLARING THE SUPPLEMENTAL LEASE AN ENFORCEABLE CONTRACT RESULTED IN WRONGFUL PAYMENT OF FUNDS TO EVRIDGES.

Disputes arose early in the lease relationship and Knecht brought the lawsuit below to protect his rights after investing a significant amount in cattle and lease commitments. He had no other land available to raise his cattle, but Evridges sought to remove him and eventually refused to accept lease payments. Evridges leveraged that situation by maximizing the uncertainty and costs faced by Knecht. When they refused his lease payments, Knecht requested and upon Court approval, paid certain amounts into the Clerk of Courts pending resolution of the lease claims.

However, under the erroneous ruling that the Supplemental Lease valid and enforceable, Evridges obtained an order requiring the payment of those funds to them. Unfortunately, the Circuit Court required Knecht to pay those amounts despite Knecht's correct argument that the funds available were not owed to Evridges. The Supplemental Lease was void and unenforceable, yet Knecht had paid lease payments to Evridges which should have either been credited toward other lease payments under the Agricultural Lease or refunded by Evridges.

Knecht also paid directly to the Association for the grazing permit in addition to his Supplemental Lease payments to Evridges. (R. 608, R. 2532, ¶24). Upon credit for the payments unlawfully received and retained by Evridges, no money was owed to Evridges.

**A. Lease payments for the Supplemental Lease were unlawful.**

As noted above, a void contract is unlawful from the beginning. It was never enforceable. Payments made under a void lease must be returned to the lessee. Courts " 'generally do not grant restitution under agreements that are unenforceable on grounds of public policy.' " *Commercial Tr. & Sav. Bank v. Christensen*, 535 N.W.2d 853, 859 (S.D. 1995), quoting E. Allen Farnsworth, Contracts, § 5.9 at 386 (2nd ed. 1990).

> If a contract is deemed void for noncompliance with a statute, it is a nullity conferring no right and creating no obligation as between the parties. A party thereto must then recover, if at all, upon an implied agreement on the part of the party receiving benefits to pay what the same were reasonably worth.

*Id*., quoting *Thurston v. Cedric Sanders Co*., 80 S.D. 426, 429, 125 N.W.2d 496, 498 (S.D.1963). The Supplemental Lease is an addition or supplement to the Agricultural Lease, which properly provides for the rent of the Evridges' property and the Grand River Grazing Association rights subject to its rules. The Agricultural Lease was approved by that very organization, and Evridges knew that rental rates higher than those in the Agricultural Lease were not acceptable to

the Association. Thus there is no implied agreement allowing restitution by Evridges for any rent paid under the Supplemental Lease.

Further, Evridge cannot receive any renumeration for the Supplemental Lease under the provisions of the Association's rules and federal policy. Knecht explained this to the trial court in Opposition to Defendants' Motion for Partial Summary Judgment, R. 2328-31:

> 6. The GRGA attorney stated in his letter April 15, 2015, that in the instance the Court determines that the Agricultural Lease (Tr.Ex. 1) is in force, Mr. Knecht's permit will remain in effect for the 2016 grazing season. "Under no circumstances shall the second Supplemental Agricultural Lease be in force nor shall Evridges receive any remuneration from this lease." (Tr.Ex. 2)(Italics added).
>
> *** * ***
>
> 8. The GRGA attorney stated in his letter February 19, 2016, that GRGA has affirmed its decision to suspend the grazing preferences of the Evridges, which prevents Mike Knecht from using the grazing permit for the 2016 summer grazing. In response to Mike Knecht's request for GRGA to reinstate the 2016 grazing permit he states "*if your request to have the 2016 permit was granted, the Court would require Knecht to pay Evridge for the amount in the supplementary lease which would create another violation.*" (Italics added) This means that the Supplemental Lease (Tr. Ex. 2) is unlawful, and that any payment of rent to Evridges under this unlawful lease would be a violation of the Rules of Management between GRGA and the United States Forest Service. (Knecht Aff. para 22, and letter attached)
>
> 9. The Court stated in its Findings of Fact and Conclusions of Law that Evridges caused the violation of the Rules of Management, as follows:
>
> > The Evridges have been members of Grand River Grazing Association since 1991. Evridges have had a grazing permit for over 40 years. Gayle Evridge knew the rules of the Grazing Association for obtaining and transferring the grazing permit. (F of F, 8)

> Gale Evridge advised that the Supplemental Lease had to be kept secret. When Knecht inquired as to the reason for keeping the lease secret, Gayle Evridge explained he was sorry but that is the way it had to
>
> be done. (F of F, 13)
>
> Gayle Evridge further explained that only the Agricultural Lease would be submitted to the Grazing Association. Knecht had never been a member of the Grazing Association and did not know the rules of the association. (F of F, 14)
>
> Pursuant to the Grazing Association Rules, all leases had to be filed with the association by March 1st, 2014. Gayle Evridge filed the Agricultural Lease with the association to assist in transferring the grazing permit to Knecht for the three-year lease term. The association transferred the permit to Knecht. (F of F, 1 7)
>
> Gayle Evridge knew that the grazing permit could not be subleased through the lease of his ranch. Gayle Evridge knew that the association could limit the per acre lease value of the Ranch. Evridge presented a lease amount of $30 per acre for the Ranch, but the Grazing Association rejected the per acre amount because it was too high. (F of F, 18)
>
> *The Supplemental Lease allowed Evridges to include the Grazing Association permit and receive compensation without the knowledge of the Grazing Association, which Evridge knew was a violation of the Grazing Association rules*. (F of F, 19) (Italics added)

> 10. The Supplemental Lease is unlawful and void from the beginning ...
>
> The Supplemental Lease violates the Rules of Management of the federal grazing land from the start, and is therefore an unlawful lease and void from the start, and no lease payments, or compensation, or remuneration can be
>
> made by Mike Knecht to Evridges under the Supplemental Lease.

R. 2329-31. Although Knecht argued this point to the trial court, it ignored the Association's clear determination that receipt of funds by Evridges on

the Supplemental Lease was in violation of federal rules governing the use of Forest Service managed grasslands.

The trial court's error in declaring the Supplemental Lease valid and enforceable resulted in a determination that rent was due under that agreement. Because this was *void ab initio* and not subject to restitution, the Evridges were not entitled to receive any payment for it and Knecht was entitled to an offset or credit for the amounts unlawfully received by Evridges under the Supplemental Lease. But even if an offset was not allowed, the trial court erred in ordering in release of the funds held by the Court because Evridges were owed nothing at the time. As explained by Knecht at R. 2333:

> 14. Mike Knecht has paid for his use of the federal grazing permit. … Where GRGA billed Mike Knecht and he paid GRGA $29,816.83 for his use of the 2014 and 2015 summer grazing permit, he should not also be required to pay rent again to the Evridges under the unlawful Supplemental Lease.
> 15. Mike Knecht has paid all of the lease payments required by the Agricultural Lease. The lease payments required by the Agricultural Lease are $87,648.50 per year. The lease payments for the Agricultural Lease for 2014 and 2015 and the first half of 2016 total $219,121.25. ($87,648.50 X 2.5) Mike Knecht has already paid rent of $235,500. (Tr.Ex. 3) He has already paid all of the lease payments required by the Agricultural Lease for 2014, 2015, and the first half of 2016, a total of $219,121.25, plus he has paid $16,378.75 more to be applied to the lease payment for the last half of 2016. The amount of rent Mike Knecht paid of $235,500, minus $219,121.25 rent for 2014, 2015 and half of 2016, leaves $16,378.75 left over to apply on the last half of the 2016 lease payment due November 10, 2016. All of the lease payments required by the Agricultural Lease have been paid, plus Mike Knecht has prepaid $16,378.75 toward the lease payment for the last half of 2016. The last half of the 2016 lease payment on the Agricultural Lease is $43,824.25, minus the prepaid $16,378.75, leaves a balance of $27,445.50, which will not be due

> until November 10, 2016, under the terms of the Agricultural Lease. (Tr.Ex. 1, p 2) There are no lease payments due under the Agricultural Lease at this time.

The trial court made an error of law in failing to declare the Supplemental Lease void, compounded by ignoring payment of the Association's separate invoicing of rent for the grazing acres. *Id*. and R. 608. When properly understood as a void lease, the payments made on the Supplemental Lease are owed by Evridges to Knecht. Summary Judgment was improper on these disputed facts. SDCL § 15-6-56. This came at a critical time for Knecht, and he suffered significant financial hardship as a result of the loss of funds during the difficult 2016 lease year. *See n. 3, supra.*

At a minimum, the trial court erred in releasing funds prior to the final rent being due on the Agricultural Lease (before the November 2016 payment was due). Because the trial court wrongly determined the Supplemental Lease to be valid and enforceable, the release was an abuse of discretion.

> An abuse of discretion also occurs when the court bases "its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell*, 496 U.S. at 405, 110 S.Ct. at 2461.

*Smizer v. Drey*, 2016 S.D. 3, ¶ 14, 873 N.W.2d 697, 702.

After the jury trial, the net verdict on the Agricultural Lease in favor of Mike Knecht was much greater than the amount of rent allegedly owed to Evridges, and the funds should have been held by the trial court until final judgment. R. 3149-50. This case should be remanded for entry of an order

declaring the Supplemental Lease void and requiring a new trial on the tort claims, including any damages resulting from loss of these funds or otherwise recoverable under the law.

## III. SUMMARY JUDGMENT DISMISSING THE FRAUD AND DECEIT CLAIMS WAS ERROR.

The trial court erred in its contract interpretation and in applying the law in this case. That error resulted in the grant of Summary Judgment to Evridges on Knecht's tort claims.

> Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL 15–6–56(c). We give no deference to the circuit court's decision to grant summary judgment—our review is *de novo*.

*Oxton v. Rudland*, 2017 S.D. 35, ¶ 12, 897 N.W.2d 356, 360 (citation omitted). This Court views the evidence most favorably to the nonmoving party and resolves reasonable doubts against the moving party. *Nicolay v. Stukel*, 2017 S.D. 45, ¶ 16, 900 N.W.2d 71, 78 (citations omitted). Here the Circuit Court erred in interpreting law and contracts to dismiss the claims, which this Court reviews *de novo*. *Poeppel v. Lester*, 2013 SD 17, ¶¶ 16-19, 827 N.W.2d 580, 584.

SDCL 20–10–1, states that "[o]ne who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." The Amended Complaint set forth claims for

Negligent Misrepresentation (Count Three)[7], Deceit (Count Four) and Fraud (Count Five). (R. 1128). The Amended Complaint describes Evridges' intentional withholding of material information and outright misrepresentation of the facts and legal requirements for transfer of the Association rights. It further describes promises about performance of the Agricultural Lease and the Supplemental Lease terms that Everidges did not intend to perform, or that were made to fraudulently induce Knecht to change his position in his own performance of the lease or decision to continue it. (R. 1128).

The trial stated the issue as: "Whether the representations by the Defendants when they entered into contracts with Plaintiff, amount to a separate tort action based on fraud or deceit or whether the parties' remedies are contained in the contract?" (R. 2963). The trial court erred in precluding claims that touch upon or include terms of the contracts at issue. The trial court then further erred in holding that Knecht must prove some fiduciary or other relationship; an independent duty arose in this business relationship. *Poeppel*, 2013 SD 17 at ¶¶ 27-28, 827 N.W.2d at 587-88.

> We hold [Defendant] had a duty to the plaintiffs which arose outside the contract obligation, namely, the "legal duty which is due from every man to his fellow, to respect his rights of property ... and refrain from invading them by ... fraud." *Smith*, 70 S.D. at 236, 16 N.W.2d at 539. **Simply put, a contract is not a license allowing one**

[7] Mike Knecht withdrew Count Three of the Amended Complaint (Negligent Misrepresentation). This withdrawal, however, is not dispositive to the other counts, which set forth claims for intentional misrepresentations and otherwise established the elements for deceit and fraud.

**party to cheat or defraud the other.**

*Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121, ¶ 22, 573 N.W.2d 493, 501 (emphasis added).

> "[L]egal duty ... may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud."
> *Smith v. Weber*, 70 S.D. 232, 236, 16 N.W.2d 537, 539 (1944) (quoting *Rich v. New York Cent. H.R.R.R. Co.*, 87 N.Y. 382 (N.Y. 1882)). "Whether a duty exists is a question of law, fully reviewable by this Court on appeal." *Fisher Sand & Gravel Co. v. State*, 1997 SD 8, ¶ 12, 558 N.W.2d 864, 867 (citing *Tipton v. Town of Tabor*, 538 N.W.2d 783, 785 (S.D.1995)).

*Delka v. Cont'l Cas. Co.*, 2008 S.D. 28, ¶ 15, 748 N.W.2d 140, 147. The Circuit Court misapplied the law.

### A. Contract Breach and Torts Are Separate and Allowed Claims as Presented.

The Circuit Court decided a fact and declared Knecht was not deceived. R. 2966 ("Even if there was deceit, the Association – which is not a party to this lawsuit – was deceived, not the Plaintiff."). The deceit claim is not prohibited merely because the Association was also deceived, as the Knecht claims are separate and distinct. He suffered different harms from the Association and has claims based some facts different or additional to those relating to the Association. (R. 1128).

A deceit within the meaning of § 20-10-1 is either:

> (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
> (2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
> (3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or
> (4) A promise made without any intention of performing.

SDCL § 20-10-2. It was deceit to withhold the Supplemental Lease from the Association and not disclose it to Knecht. This was also fraud, as set forth below. SDCL § 53-4-5. Knecht also alleged deceit and fraud based on actions taken during performance of the leases at issue, which is in addition to the inducement or would support it as evidence of a promise made without intention to perform it. SDCL § 20-10-1; SDCL § 53-4-5.

Knecht consistently claimed that the Supplemental Lease was void, and he demanded refund or set-off of all rents paid under it. He did not elect rescission. (R. 2329-31). Further, the deceit and fraud impacted the Agricultural Lease terms and performance, raising separate issues in the alternative to the breach of contract claims. The Agricultural Lease was valid, covering both deeded acres owned by Evridges and their grazing permit from the Association. Knecht fought to keep Evridges from terminating the Agricultural Lease because he had no other options for feeding his cattle. (R. 3431) (JT 126). But his pursuit of lease contract breach and declaratory judgment claims to obtain what he was entitled under that Agricultural Lease do not preclude deceit and fraud claims.

> This election of remedies rule does not prevent plaintiffs from pursuing "alternative remedies so long as no double recovery is awarded." *Ripple v. Wold*, 1996 S.D. 68, ¶ 7, 549 N.W.2d 673, 674–75.

*Stabler v. First State Bank of Roscoe*, 2015 S.D. 44, ¶ 13, 865 N.W.2d 466, 475. The Circuit Court erred in allowing only contract remedies.

### B. Deceit and Fraud Were Properly Pleaded and Supported by Evidence.

Whether a duty exists is a question of law; whether a defendant's conduct constitutes a breach of a duty is a question of fact. *Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶ 8, 780 N.W.2d 497, 500–01. Knecht properly alleged a duty for Evridges under the deceit and fraud claims. He pleaded and set forth a claim that Evridges had superior knowledge and failed to disclose it. This was done in abrogation of Evridges' duties under the Association rules, despite their knowledge of such rules during their 40 years of membership, and despite knowledge that the Association would not approve a lease agreement that allowed the profit Evridges sought.

Deceit was established by the facts discussed above, which also support fraud claims. "Fraudulent inducement entails willfully deceiving persons to act to their disadvantage." *Law Capital, Inc. v. Kettering*, 836 N.W.2d 642, 646 (S.D.2013). Fraud is one of the following acts:

> (1) The suggestion as a fact of that which is not true by one who does not believe it to be true;

> (2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
> (3) The suppression of that which is true by one having knowledge or belief of the facts;
> (4) A promise made without any intention of performing it; or
> (5) Any other act fitted to deceive.

SDCL 53–4–5; *see also Poeppel*, 2013 SD 17 at ¶ 827 N.W.2d at 587 (S.D.2013). Knecht alleged that defendants' fraudulent behavior induced him to act to its detriment. *Johnson v. Miller*, 818 N.W.2d 804, 808 (S.D.2012). This is an assertion of actual fraud. "Actual fraud is always a question of fact." SDCL § 53-4-5. This Court has confirmed that "Fraud as an inducement to enter a contract is a question of fact for the jury." *Poeppel*, 2013 S.D. 17, ¶ 20, 827 N.W.2d 580, 585, citing SDCL § 53-4-5.

Evridges owed to Knecht full disclosure of their attempted lease approval at $30.00/acre and the rejection of that rate by the Association, and their use of two leases to obtain the equivalent rate rejected by the Association. Had Knecht been aware of the rules and rejection of the contract, he would have declined to enter into the agreements. *Ducheneaux v. Miller*, 488 N.W.2d 902, 913 (S.D. 1992) (deceit where material facts about inability to comply with law withheld, deemed "basic to the transaction."). At trial, Gayle Evridge testified:

> [T]heres got to be two leases, and it's got to be hushed up, it's got to be quiet, it's got to be secret. Is this my wishes? No. I am extremely uncomfortable with this. I never plan [sic] in my life to have a second lease. **This is not right, Its underhanded. There's nothing good about it. But if people get old, their livelihood depends on it, they may have to do it. I did not sign those two**

> **leases with a good feeling in my heart. I signed those two leases because I could not work on my own terms**.

(R. 1203) (TT 517-521) (emphasis added). As noted previously, Gayle Evridge also responded to Knecht's attempts to question breaches of the lease with a statement that "Maybe this is not the best lease for you." R. 2223, ¶ 22. What followed were a series of conflicts, disputes and failures to perform lease terms which also support a finding of promises made without intention of performance. These facts support deceit and fraud claims. Additional facts would have been presented to the jury if the trial court had not erred in interpreting the law on the Supplemental Lease.

The deceit and fraud claims were pleaded and supported with particularity to survive Summary Judgment, as this burden only requires production of a factual dispute under evidence admissible at trial. *Schwaiger v. Mitchell Radiology Assocs., P.C.*, 2002 S.D. 97, ¶ 14, 652 N.W.2d 372, 378 (citing *Bruske v. Hille*, 1997 S.D. 108, ¶ 11, 567 N.W.2d 872, 876 (specific material facts must be presented in order to prevent summary judgment on fraud and deceit claims)). Knecht amply provided such material facts. Witness testimony and the Affidavit of Mike Knecht (R. 2896), together with those Findings of Fact by the trial court, are summarized in the "Plaintiff's Statement of Material Facts[.]" R. 2936 (filed March 6, 2017). It was not the province of the trial court to take these claims from the jury. *Arnoldy v. Mahoney*, 2010 S.D. 89, ¶¶ 43-44, 791 N.W.2d 645, 660 (reversing summary judgment on fraud and deceit claims where the record showed

disputed issues of fact on each tort; overruling declaratory judgment based on erroneous application of law). Knecht is entitled to a trial on the issues of deceit and fraud.

## CONCLUSION

The trial court erred in failing to declare the Supplemental Lease void and in dismissing the deceit and fraud claims. This Court must allow Knecht to seek his remedies to recover or set-off payments made under the Supplemental Lease and have a jury determine the tort claims and 2016 damages for breach of the Agricultural Lease. If there is a basis for a jury to decide matters in the Counterclaim, a new trial on the fencing claim is appropriate. The 2016 rent payments are a legal matter at this point and will likely be determined by the Circuit Court. For these reasons, the Judgment must be reversed in part and remanded.

Dated at Sioux Falls, South Dakota, this 20th day of December, 2018.

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellant Michael Knecht complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 9,664 words, excluding the Table of Contents, Table of Authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman font (13 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, December, 2018.

DONAHOE LAW FIRM, P.C.

Brian J. Donahoe

Brian J. Donahoe

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Appellants" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on January 27, 2016.

The undersigned further certifies that an electronic copy of "Brief of Appellants" was emailed to the attorneys set forth below, on November 20, 2018:

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Dated at Sioux Falls, South Dakota, December, 2018.

DONAHOE LAW FIRM, P.C.

Brian J. Donahoe

Brian J. Donahoe

# APPENDIX

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| | | |
|---|---|---|
| STATE OF SOUTH DAKOTA<br>COUNTY OF PERKINS | ) SS<br>) | IN CIRCUIT COURT<br>FOURTH JUDICIAL CIRCUIT |
| MICHAEL J. KNECHT,<br>Plaintiff<br>vs.<br>GAYLE EVRIDGE and LINDA EVRIDGE,<br>Defendants. | ) | CIV. NO. 14-22<br>COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECLARATORY ORDERS |

The above matter came before the Court on August 24, 2015, August 31, 2015, and September 23, 2015. Knecht was represented by James P. Hurley. Attorneys Steven Iverson and Thomas E. Brady represented Gayle and Linda Evridge. The purpose of the court trial was to determine the following issues: (1) whether the Agricultural Lease and the Supplemental Lease are valid, and (2) if valid, the terms of such leases.

The Court having heard the evidence, received exhibits, and being fully advised enters the following:



## FINDINGS OF FACT

1. Plaintiff, Michael Knecht ("Knecht") is a Perkins County resident.
2. Defendants, Gayle Evridge and Linda Evridge ("Evridges"), are Perkins County residents.
3. Evridges own 3,070 acres of property used for ranching and farming ("Ranch") along twelve miles of the North Grand River.
4. The Ranch is adjacent to the Grand River National Grassland. A portion of the Ranch has grazing rights with the Grand River Cooperative Grazing Association ("Grazing

Association"), a non-governmental entity tasked with controlling grazing of government-owned property within the national grassland.

5. In 2012, Knecht ran an advertisement in a local paper seeking to lease ranchland. Knecht was looking to lease ranchland for his cattle herd. He needed a place to lease for summer and fall grazing, preferably year round.
6. Linda Evridge called Knecht and said that she and her husband, Gayle Evridge, wanted to retire and rent the Ranch through a long-term lease. Knecht told Evridges that is what he had been looking for, a long-term lease to increase his cattle numbers over several years.
7. The Evridges said the Ranch was tied to the Grazing Association on the National Grasslands where they had over 200 summer grazing units currently, in addition to the cattle that could be kept year round on the Ranch.
8. The Evridges have been members of the Grand River Grazing Association since 1991. Evridges have held a grazing permit for over 40 years. Gayle Evridge knew the rules of the Grazing Association for obtaining and transferring the grazing permit.
9. After phone calls between the parties, a viewing of the Ranch, and discussion of terms, the parties agreed to a lease. Gayle Evridge explained to Knecht that the rent would be based on AUMs (Animal Unit Month) and that the total yearly lease would be $157,000.00. Evridges requested the yearly payment up-front each year, but Knecht, based on the advice of his banker, wanted the yearly lease amount payable in two yearly payments.
10. Evridges advised Knecht they would have their lawyer, Mr. Tim Parmley, prepare a written lease. Knecht met with the Evridges at Parmley's office in Lemmon, SD on December 3rd, 2013.

11. At the December 3rd meeting, Evridges presented Knecht with two leases. One lease was captioned, "Agricultural Lease," and the second lease was captioned, "Supplemental Lease." Evridges told Knecht that the only way they could lease the Ranch was by having two leases.

12. The Agricultural Lease had a per acre price of $28.55 for 3,070 acres for the Ranch. The Supplemental Lease had the same real property description, but a set yearly rental to graze 200 head cow/calf pairs and 6 bulls.

13. Gayle Evridge advised Knecht that the Supplemental Lease had to be kept secret. When Knecht inquired as to the reason for keeping the lease secret, Gayle Evridge explained he was sorry but that is the way it had to be done.

14. Gayle Evridge further explained that only the Agricultural Lease would be submitted to the Grazing Association. Knecht had never been a member of the Grazing Association and did not know the rules of the association.

15. Knecht and Evridges signed the Agricultural Lease and Supplemental Lease at Parmley's office at the December 3rd meeting. Knecht never consulted a lawyer about the leases.

16. Knecht made the payments as required for the lease. In early 2014, Knecht moved his cattle onto the Evridge Ranch.

17. Pursuant to the Grazing Association Rules, all leases had to be filed with the association by March 1st, 2014. Gayle Evridge filed the Agricultural Lease with the association to assist in transferring the grazing permit to Knecht for the three-year lease term. The association transferred the permit to Knecht.

18. Gayle Evridge knew that the grazing permit could not be subleased through the lease of his ranch. Gayle Evridge knew that the association could limit the per acre lease value of

the Ranch. Evridge presented a lease amount of $30.00 per acre for the Ranch, but the Grazing Association rejected the per acre amount because it was too high.

19. The Supplemental Lease allowed Evridges to include the Grazing Association permit and receive compensation without the knowledge of the Grazing Association, which Evridge knew was a violation of the Grazing Association rules.

20. When Knecht took possession of the Ranch in 2014, Evridges had some horses and bulls on the property. Knecht did not object to the Evridges keeping the horses and bulls until the lawsuit was filed. Although not in the Agricultural Lease, Knecht agreed to allow Evridges to keep some horses and bulls in pastures around their home.

21. In 2014, Knecht used the Evridge Ranch and the Grazing Association permit to graze his cattle.

22. The Evridges use of Section 36 consisted of feeding heifers from the first part of October through the first part of December. In October of 2014, Gayle Evridge asked Knecht if he could move his 400 head of heifers to another pasture on the Ranch. Knecht would not agree. Gayle Evridge told Knecht, "Maybe this is not the best lease for you." Evridges cut three fences and moved their heifers to other pastures on the Ranch without Knecht's permission. Evridges did not repair the fences. This lawsuit followed.

23. Evridges had engaged in an intensive grazing management plan for several years prior to leasing to Knecht. The intensive grazing plan required the Ranch to be divided into multiple pastures and the rotation of livestock on a regular basis. Evridges claim their intensive grazing plan was incorporated into the contracts. There is no mention of the intensive grazing plan in the contracts. There is a provision in the Agricultural Lease which provides Evridges have the ability to direct movement of cattle on the Ranch.

24. In April 2013, there was a prairie fire that damaged fences on the Evridge Ranch. In October 2013, fences on the ranch were further damaged by snow storm, Atlas.

25. The fences on the Ranch were not in a condition to operate the intensive grazing plan as contemplated by Evridges without Knecht completing fencing.

26. In 2015, Knecht tendered payment for the leases which was not accepted by the Evridges. The money, by Order of the Court, was deposited with the Perkins County Clerk of Courts.

27. In 2015, Knecht again made use of the Evridge Ranch and the Association Grazing permit. In August of 2015, the Grazing Association became aware of the Supplemental Lease. The Grazing Association advised that the failure to notify the Association of the Supplemental Lease was a violation and the grazing permit was suspended for 2016.

## CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court now enters the following Conclusions of Law:

1. The Court has jurisdiction over the parties and jurisdiction over the subject matter of this proceeding.
2. To the extent a Conclusion of Law as stated herein is actually a Finding of Fact, or vice versa, it is hereby redesignated as such.
3. The essential elements of a contract are set out in SDCL § 53-1-2. "Elements essential to the existence of a contract are: (1) Parties capable of contracting; (2) Their consent; (3) A lawful object; and (4) Sufficient cause or consideration."
4. The parties were capable of entering into a contract. The contracts also involve a lawful object.

5. Both contracts were put into writing and signed by the Evridges and Knecht, in accordance with the Statute of Frauds.
6. The consideration for the Agricultural Lease was annual rent of $87,648.50 to the Evridges in exchange for the right to graze cattle and farm the 3,070 acres comprising the Ranch.
7. The Agricultural Lease has all the essential elements of a valid contract. Thus, the Agricultural Lease of 3,070 acres of the Ranch is a valid contract and is legally binding on the parties as of December 3, 2013 for a term of three years.
8. The consideration for the Supplemental Agricultural Lease was annual rent of $69,351.50 in exchange for the right to graze an additional 200 cows and calves and six bulls directly tied to the Grand River Grazing Association permit.
9. The Supplemental Lease allows for grazing on the Grand River Grazing Association land. It states: "In the event the permit is not transferred, LESSEE may terminate or renegotiate this lease." The power to terminate in the event the permit does not transfer is not available in the Agricultural Lease.
10. The Supplemental Agricultural Lease has all the essential elements of a valid contract and is legally binding. However, Knecht may, pursuant to the written terms of the Supplemental Lease, choose to terminate this lease because the grazing rights from the Grazing Association did not transfer to Knecht for 2016. Therefore, the Supplemental Lease is a voidable contract.
11. The Court concludes the Agricultural Lease and the Supplemental Lease are separate contracts.

12. The Court also concludes that Knecht knew the Supplemental Lease involved the Grazing Association permit. Knecht made use of the permit and cannot seek recovery for money paid to Evridge in 2014 or 2015. Knecht received the benefits of the Supplemental Lease in 2014 and 2015. In 2016, the permit will not be issued. Knecht's remedy is included in the Supplemental Lease. He may terminate the lease. Knecht cannot seek recovery of the amounts he paid on the Supplemental Lease in 2014 or 2015.

13. SDCL § 53-8-5 provides that the execution of a contract in writing supersedes oral negotiations or stipulations. The statute states: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which precede or accompanied the execution of the instrument." Therefore, the Evridges may not insert additional terms to either lease.

14. Both of the lease contracts in this case were drafted by Evridges' lawyer. Knecht did not draft the leases.

15. In *Clements v. Gabriel*, 472 N.W.2d 480 (S.D. 1991), the South Dakota Supreme Court stated: "Ambiguities arising in a contract should be interpreted and construed against the scrivener." This rule of construction is to be applied against one who drafted an ambiguous contract. Weisser v. Kropuenske, 226 N.W.2d 760, 761 (S.D. 1929). "Any doubts arising from an ambiguity of language in a contract should be resolved against the speaker or writer, because they can by exactness of expression more easily prevent mistakes in meaning than the one with whom they are dealing." Enchanted World Doll Museum v. Buskohl, 398 N.W.2d 149, 152 (S.D. 1986).

16. Any ambiguities arising from either lease contract are resolved against the Evridges.

17. There are no terms referring to the implementation of a Grazing Plan. The provision allowing Evridges to direct the movement of cattle is vague and ambiguous. Therefore, the implementation of a Grazing Plan is resolved against the Evridges. Knecht was not obligated to implement a Grazing Plan on the Ranch.

**ORDER**

Based on the foregoing, the Court enters the following:

(1) The Agricultural Lease is a valid and binding contract.

(2) The Supplemental Lease is a valid and voidable contract. Knecht may terminate this lease.

(3) Knecht was not obligated to implement a Grazing Plan on the Ranch.

(4) Evridges are entitled to shared-use of Section 36 from the beginning of October to the beginning of December.

(5) Evridges may keep the small number of horses and bulls on the Ranch that were on the Ranch when Knecht took possession.

(6) There has been a failure to prove an anticipatory breach in either the Agricultural Lease or the Supplemental Lease.

(7) There has been a failure to prove a rescission of either the Agricultural Lease or the Supplemental Lease.

(8) Knecht may not recover money for the failure of the Grazing Association to transfer the permit for 2016. Knecht's remedy is contained in the contract and he may terminate the Supplemental Lease.

BY THE COURT:

1-11-16

The Honorable Randall Macy
Circuit Court Judge

ATTEST:
Trish Peck
Clerk of Court
By: _____
Deputy
(SEAL)

FILED
JAN 11 2016
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By_____

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|---|---|---|
| STATE OF SOUTH DAKOTA<br><br>COUNTY OF PERKINS | )<br>)SS.<br>) | IN CIRCUIT COURT<br><br>FOURTH JUDICIAL CIRCUIT |
| MICHAEL J. KNECHT,<br>Plaintiff,<br><br>vs.<br><br>GAYLE EVRIDGE, and<br>LINDA EVRIDGE,<br>Defendants. | ) | COURT FILE NO.<br>52CIV14-000022<br><br>**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT** |

This matter comes before the Court on Defendants' Motion for Summary Judgment. The hearing was held March 10, 2017. Mr. Knecht ("Plaintiff"), appeared personally and was represented by Mr. Robert Galbraith. Mr. Evridge and Mrs. Evridge ("Defendants"), appeared personally and were represented by Mr. Thomas Brady. Mr. Galbraith orally withdrew Count III (Negligent Misrepresentation) of Plaintiff's Amended Complaint. This Order addresses Defendants' Motion for Summary Judgment for the Fraud and Deceit Counts. The Court, having reviewed the briefs, statements of undisputed facts, Findings of Fact and Conclusions of Law, affidavits of the parties, and being fully advised on the matter, issues the following:

**FACTUAL BACKGROUND**

The facts of this case were litigated by the parties during a three-day bifurcated court trial. The facts involving negotiation and signing of the contracts are not in dispute. Defendants own a ranch in Perkins County, South Dakota. Plaintiff and Defendants over a period of time discussed Plaintiff leasing Defendants' ranch to run cattle.

Two leases were entered into: The Agricultural Lease, which allowed Plaintiff to lease Defendants' 3,070 acre ranch at a rate of $28.55 per acre for

three years, and the Supplemental Lease, which authorized Plaintiff to graze 200 head of cow/calf pairs and six bulls on Defendants' allotted Grand River Grazing Association ("Association") Permit. Both leases provide that the transfer of the grazing permit was subject to approval by the Association.

Prior to the signing of the leases, Plaintiff—after consultation with his banker—agreed to the financial terms of the leases. Defendants advised Plaintiff they would only lease the land if two leases were signed. Defendants' attorney drafted both leases. Prior to signing, Defendants' attorney went over the lease provisions with Plaintiff. At the time the leases were signed, Defendants advised Plaintiff that only the Agricultural Lease would be provided to the Association to accomplish transfer of the grazing permit. Defendants were aware of the Association rules; Plaintiff was not. Defendants advised Plaintiff that the Supplemental Lease of the grazing permit had to be kept secret and would not be presented to the Association. By rule of the Association, all leases had to be presented for approval as a requirement to transfer of the grazing permit.

Plaintiff applied for and was approved as a member of the Association in early 2014, before the lease was approved by the Association. *See* Trial Transcript, 318:11-24, August 31, 2015, 52CIV14-000022. The Agricultural Lease was presented to the Association and the permit was transferred to Plaintiff. Plaintiff ran his cattle on the grazing permit for two of the three years. Sometime after the permit was transferred, the Association found out about the Supplemental Lease and cancelled the permit for 2016, the last year of the Supplemental Lease. The Association cancelled the grazing permit for the 2016 year because the Supplemental Lease had not been presented to the Association for approval, which was a requirement. *See also* Trial Transcript, 311:25-312:17, August 31, 2015, 52CIV14-000022.



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After the Association cancelled the grazing permit for 2016, Plaintiff terminated the Supplemental Lease pursuant to the lease terms. The Supplemental Lease provides, "[i]n the event the permit is not transferred, lessee may terminate or renegotiate this lease." *See* Supplemental Lease, p. 4. Because the Association would not issue the grazing permit in 2016, Plaintiff, pursuant to the terms of the Supplemental Lease, voided the lease. *See also* Trial Transcript, 16:21-22; 7:10-20, August 24, 2015, 52CIV14-000022. Plaintiff could have renegotiated the lease.

**ISSUE**

Whether the representations by the Defendants when they entered into contracts with Plaintiff, amount to a separate tort action based on fraud or deceit or whether the parties' remedies are contained in the contract?

**STANDARD OF REVIEW**

"[The South Dakota Supreme Court] [i]n reviewing a grant or a denial of summary judgment under S.D.C.L. § 15–6–56(c), [] must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law." *Schliem v. State ex rel. Dep't of Transp.*, 2016 S.D. 90, ¶ 7, 888 N.W.2d 217, 221(citing *Gades v. Meyer Modernizing Co.*, 2015 S.D. 42, ¶ 7, 865 N.W.2d 155, 157–58) (quoting *Peters v. Great W. Bank, Inc.*, 2015 S.D. 4, ¶ 5, 859 N.W.2d 618, 621). "[The Court] view[s] the evidence 'most favorably to the nonmoving party and resolve[s] reasonable doubts against the moving party.' " *Gades*, ¶ 7, 865 N.W.2d at 158 (quoting *Peters*, 2015 S.D. 4, ¶ 5, 859 N.W.2d at 621). Pursuant to S.D.C.L § 15-6-56(e):

> When a motion for summary judgment is made and supported as provided in S.D.C.L. § 15-6-56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in S.D.C.L. § 15-6-56, must set forth specific facts showing that there is a genuine

> issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

**ANALYSIS**

a. *Claims of Fraud and Deceit*

An action for deceit requires proof of material misrepresentation in the formation of the contract and detrimental reliance. *See Moss v. Guttormson*, 1996 S.D. 76, ¶ 8, 551 N.W.2d 14, 16; *Littau v. Midwest Commodities, Inc.*, 316 N.W.2d 639, 643 (S.D. 1982); *Aschoff v. Mobil Oil Corp.*, 261 N.W.2d 120 (S.D. 1977). S.D.C.L § 20-10-1 states:

> One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.

S.D.C.L § 20-10-2 states:

> A deceit within the meaning of S.D.C.L § 20-10-1 is either:
>
> (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
> (2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
> (3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or
> (4) A promise made without any intention of performing

Plaintiffs Amended Complaint asserts claims of deceit and fraud; however, it fails to specify what subsection applies. The essential elements of deceit are:

> [T]hat a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage.

*Grynberg*, 1997 S.D. 121, ¶ 24, 573 N.W.2d 493, 502; *S.W. Croes Family Trust v. Dahl v. Sittner*, 474 N.W.2d 897, 900 (S.D. 1991); *Small Bus. Admin.*, 446

N.W.2d 55, 57 (S.D. 1989); *Holy Cross Parish v. Huether*, 308 N.W.2d 575, 576 (S.D. 1981).

Even in the absence of a fiduciary duty, a party may be bound to disclose facts relating to the transaction. *Lindskov v. Lindskov*, 2011 S.D. 34, ¶ 14, 800 N.W.2d 715, 719 (citing *Schwartz v. Morgan*, 2009 S.D. 110, ¶ 10, 776 N.W.2d 827, 831) (citing *Ducheneaux v. Miller*, 488 N.W.2d 902, 913 (S.D. 1992)). A party to a business transaction is under a duty to disclose facts basic to the transaction: (1) if he knows that the other party is about to enter into it under a mistake as to the facts; (2) if he knows that the other party would reasonably expect disclosure of the facts because of the relationship between them, the customs of the trade, or other objective circumstances; and (3) if the information is not otherwise discoverable by reasonable care. *Id.* (citing *Schwartz*, 2009 S.D. 110, ¶ 10, 776 N.W.2d 827 at 831) (citing *Ducheneaux*, 488 N.W.2d at 913) (adopting Restatement (Second) Torts § 551(2)(e)).

Plaintiff's allegations for fraud and deceit are based on Defendants representation to Plaintiff, that Defendants would only lease their land if it were done with two leases and Defendants failure to provide the Supplemental Lease to the Association for approval.

Plaintiff's argument is that by concealing the Supplemental Lease from the Association, Defendants were able to charge Plaintiff a larger rental amount by combining the Agricultural Lease and the Supplemental Lease. Todd Campbell, the Executive Director of the Association, testified that the grazing permit is tied to the land; a land owner can sublease the grazing permit to someone approved by the Association. *See* Trial Transcript, 302:6-21, August 31, 2015, 52CIV14-000022. There is no dispute that Plaintiff agreed to the terms of both leases. The Supplemental Lease contains remedies in the event the grazing permit is not issued, Plaintiff may terminate the lease or



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renegotiate. Plaintiff chose to terminate the Supplemental Lease. Even if there was deceit, the Association—which is not a party to this lawsuit—was deceived, not the Plaintiff.

Plaintiff has not established a fiduciary duty separate from the terms of the contract. *See Lindskov*, 2011 S.D. 34, ¶ 14, 800 N.W.2d 715, 719 (citing *Schwartz*, 2009 S.D. 110, ¶ 10, 776 N.W.2d 827 at 831). Additionally, Defendants, by the plain language in both leases, disclosed to Plaintiff that both leases were subject to the Association and its rules of management. *See Id.* (citing *Schwartz*, 2009 S.D. 110, ¶ 10, 776 N.W.2d 827 at 831) (citing *Ducheneaux*, 488 N.W.2d at 913) (adopting Restatement (Second) Torts § 551(2)(e)); *see e.g.* S.D.C.L § 17-1-4 (noting every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself); *W. Bank v. RaDec Const. Co.*, 382 N.W.2d 406, 410 (S.D. 1986) (noting a person has notice of a fact when he has actual knowledge of it, has received a notice or notification of it, or from all the facts and circumstances known to him at the time in question he has reason to know that it exists).

Plaintiff at the time he signed both leases was not fully informed of the rules of the Association or the requirements for issuance of a permit; however, Plaintiff was aware, by the explicit language in both leases that the leases were subject to the approval of the Association. *See* Trial Transcript, 15:20-22, August 24, 2015, 52CIV14-000022 (Mr. Hurley: And when you (Mr. Knecht) entered into Exhibit 1 and Exhibit 2, did the Evridges explain to you about the grazing permit? Mr. Knecht: They (the Evridges) explained some about it yeah.).

This Court previously found Plaintiff knew the Supplemental Lease involved the Association permit. *See* Findings of Fact and Conclusions of Law, ¶ 12, January 11, 2016, 52CIV14-000022. Moreover, Plaintiff applied for and was approved as a member of the Association in early 2014, before the lease was approved by the Association. *See* Trial Transcript, 318:11-24, August 31, 2015, 52CIV14-000022. Lastly, the lease contained a remedy in the event the lease was not approved by the Association and Plaintiff exercised that remedy—Plaintiff voided the lease.

Plaintiff fails to assert a colorable claim of fraud or deceit; thus, Plaintiff's claims for damages are covered by the terms of the parties' contracts.[1]

**CONCLUSION**

The dispute between the parties is covered by the remedies included in the terms of the contracts. Each party can still assert claims of damages arising from breach of contract. Plaintiff has failed to identify any duty created by law independent of the parties' contractual relationship which would amount to an independent tort. Plaintiff had actual as well as constructive notice that the Association in both leases had to approve the permit and if the permit was not approved the remedy was provided for within the four-corners

[1] As a general rule, punitive damages are not recoverable in a breach of contract claim. *Schipporeit v. Khan*, 2009 S.D. 96, ¶ 6, 775 N.W.2d 503, 504–05; *Grynberg v. Citation Oil & Gas Corp.*, 1997 SD 121, ¶ 22, 573 N.W.2d 493, 500; *see* SDCL § 21-3-2. The public policy reasons for this rule are explained in *Grynberg* as follows:

> First, breach of contract is generally a private injury, unlike a malicious tort, which some authorities have held to be a public injury. Second, our free market system allows economically efficient breaches of contract, for example, when it costs less for one party to breach an unwise contract and to pay the other party compensatory damages than it would cost to completely perform the contract. Third, "[w]hile compensatory damages encourage reliance on business agreements, the threat of additional punitive damages would create uncertainty and apprehension in the marketplace."

1997 SD 121, ¶ 17, 573 N.W.2d at 500 (internal citations omitted).

of the contract. The Court grants summary judgment in favor of Defendants on Counts IV and V (deceit and fraud) of Plaintiffs Amended Complaint.

Counsel for Defendants shall draft judgment consistent with this decision.

Dated this 7th day of April, 2017.

BY THE COURT:

Hon. Randall Macy
Circuit Court Judge

ATTEST: Trish Peck
Clerk of Courts
BY:
Deputy Clerk of Courts

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| STATE OF SOUTH DAKOTA )<br>)SS<br>COUNTY OF PERKINS ) | IN CIRCUIT COURT<br>FOURTH JUDICIAL CIRCUIT<br>52CIV14-000022 |
| **MICHAEL J. KNECHT**,<br><br>Plaintiff<br><br>vs.<br><br>**GAYLE EVRIDGE** and **LINDA EVRIDGE**,<br><br>Defendants. | **VERDICT FORM** |

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues, find as follows:

On the Plaintiff, Michael Knecht's, claim against the Defendants, Gayle Evridge and Linda Evridge, we find in favor of:

Plaintiff: X
Defendants: _____

If you find for the Plaintiff, please identify the Plaintiff's damages for each of the following years:

2014 62,800.00
2015 40,930.62
2016 0

On the Defendants, Gayle Evridge and Linda Evridge's, claim against the Plaintiff, Michael Knecht, we find in favor of:

Defendants: X
Plaintiff: _____

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4TH CIRCUIT CLERK OF COURT
By _____

If you find for the Defendants, please identify the Defendants' damages for the following:

That Knecht over-grazed Evridges' ranch resulting in temporary damages to the ranch 0

That Knecht damaged fencing on Evridges' ranch and has refused to repair the fencing 20,000

That Knecht failed to farm the Evridges' property in accordance with practices of good husbandry 0

That Evridges suffered a loss on the sale of their cattle in 2016 0

That Knecht failed to pay lease rent 43,824.25

Dated this 15 day of December, 2017.

Foreperson

FILED

DEC 15 2017

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By

| | |
|---|---|
| STATE OF SOUTH DAKOTA ) SS<br>COUNTY OF PERKINS ) | IN CIRCUIT COURT<br>FOURTH JUDICIAL CIRCUIT |
| MICHAEL J. KNECHT,<br>Plaintiff,<br>vs.<br>GAYLE EVRIDGE AND LINDA EVRIDGE,<br>Defendants. | 52CIV14-000022<br>**JUDGMENT ON JURY VERDICT** |

THIS MATTER, having been tried to a jury on December 13, 2017 through December 15, 2017, the Honorable Eric J. Strawn, Circuit Court Judge, presiding, the Plaintiff, Michael Knecht, appearing personally and through his counsel, Robert J. Galbraith, the Defendants Gayle Evridge and Linda Evridge, appearing personally and through their counsel, Thomas E. Brady, the issues having been duly tried, and the jury having rendered its Verdict, it is hereby

ORDERED ADJUGED AND DECREED that the Plaintiff, Michael J. Knecht, shall have a judgment against the Defendants, Gayle Evridge and Linda Evridge, jointly and severally, in the amount of $103,730.62, plus pre-judgment interest in the amount of $26,571.41 and post-judgment interest from the date of Verdict until the same is paid; and it is further

ORDERED ADJUDGED AND DECREED that the Defendants, Gayle Evridge and Linda Evridge, shall have a judgment against the Plaintiff, Michael J. Knecht, in the amount of $63,824.25, plus pre-judgment interest in the amount of $4,802.66 and post-judgment interest from the date of Verdict until the same is paid.

Dated this 22nd day of August, 2018, *nunc pro tunc*, December 15, 2017.

BY THE COURT:

Signed: 8/22/2018 3:24:58 PM

HONORABLE ERIC J. STRAWN
Circuit Court Judge

Attest:
Peck, Trish
Clerk/Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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Appeal No. 28781

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MICHAEL J. KNECHT,

Plaintiff and Appellant,

v.

GAYLE W. EVRIDGE and LINDA M. EVRIDGE,

Defendants and Appellees.

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Appeal from the Fourth Judicial Circuit
Perkins County, South Dakota

The Honorable Eric J. Strawn, Presiding Judge

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# BRIEF OF APPELLEES EVRIDGE

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## PRELIMINARY STATEMENT

This brief is in response to Plaintiff Michael J. Knecht's Appellant brief. Plaintiff-Appellant will be referred to as "Knecht." Defendants-Appellees will be referred to as "Evridges." Reference to the record shall be as designated as "CR," followed by the appropriate page number. Reference to Knecht's Appellant Brief will be referred to as "Knecht Br." followed by the appropriate page number.

## JURISDICTIONAL STATEMENT

Knecht seeks to appeal from the circuit court's Findings of Fact and Conclusions of Law and Declaratory Orders ("Declaratory Judgment"), dated January 11, 2016, by the Honorable Randall Macy, and specifically regarding the validity of the Supplemental Lease. Knecht Br. 6; CR 2209. The Declaratory Judgment determined, among other things, the validity of the parties' Supplemental Lease. CR 2209-16. The Declaratory Judgment was signed and filed January 11, 2016. CR 2216. Notice of Entry was filed on January 12, 2016. CR 2218.

The Court has no appellate jurisdiction to consider Knecht's arguments as to the validity of the Supplemental Lease as determined by the circuit court's Declaratory Judgment. *Midcom, Inc. v. Oehlerking*, 2006 S.D. 87, ¶ 11, 722 N.W.2d 722, 725 (citation omitted). The Declaratory Judgment finally and completely adjudicated all issues relating to the validity of the Supplemental Lease. CR 2216. Appellate jurisdiction is entirely statutory, and failure to timely appeal strips this Court of its appellate jurisdiction. *Id.*

## STATEMENT OF THE ISSUES

I. Whether this Court has jurisdiction to consider an appeal from the circuit court's Declaratory Judgment, which finally and completely adjudicated all issues relating to the validity of the parties' Supplemental Lease.

The circuit court made no ruling.

SDCL 21-24-1

SDCL 21-24-3

SDCL 21-24-13

*Hasse v. Fraternal Order of Eagles No. 2421 of Vermillion*, 2003 S.D. 23, 658 N.W.2d 410

*Carver v. Heikkila*, 465 N.W.2d 183 (S.D. 1991)

II. Whether Knecht waived his right to contest the validity of the Supplemental Lease by failing to raise this issue below.

The circuit court made no ruling.

*Action Mech., Inc. v. Deadwood Historic Pres. Comm'n*, 2002 S.D. 121, 652 N.W.2d 742

*Mortweet v. Eliason*, 335 N.W.2d 812 (S.D. 1983)

*Long v. State*, 2017 S.D. 79, 904 N.W.2d 502

*Husky Spray Serv., Inc. v. Patzer*, 471 N.W.2d 146 (S.D. 1991)

III. Whether the Supplemental Lease is unlawful and void because it is contrary to an express provision of the law, it violates the policy and purpose of the law, and it violates public policy.

The record does not show that Knecht raised this issue below. The circuit court did not rule on this issue.

*Ets-Hokin & Galvan, Inc. v. Maas Transp., Inc.*, 380 F.2d 258 (8th Cir. 1967)

*Bradley Grain Co. v. Peterson*, 267 N.W.2d 836 (S.D. 1978)

*Law Capital, Inc. v. Kettering*, 2013 S.D. 66, 836 N.W.2d 645

*Norbeck & Nicholson Co. v. State*, 32 S.D. 189, 142 N.W. 847 (1913)

SDCL 53-9-1

SDCL 53-5-3

36 C.F.R. §222.3

36 C.F.R. §222.7

IV. Whether entry of summary judgment on Knecht's claims of fraud and deceit should be affirmed.

The circuit court correctly held as a matter of law that Knecht failed to identify a duty independent of the parties' relationship which would amount to an independent tort.

*Schipporeit v. Khan*, 2009 S.D. 96, 775 N.W.2d 503

*Grynberg v. Citation Oil & Gas Corp*., 1997 S.D. 121, 573 N.W.2d 493

*Schwartz v. Morgan*, 2009 SD 110, 776 N.W.2d 827

*North Am. Truck & Trailer, Inc. v. M.C.I. Commc'n Servs., Inc*., 2008 S.D. 45, 751 N.W.2d 710

SDCL 20-10-2(3)

## RESPONSE TO KNECHT'S STATEMENT OF THE CASE

Likely anticipating Evridges' jurisdictional argument, Knecht mischaracterizes the record. Knecht asserts that he "contested" the circuit court's "Findings of Fact and Conclusions of Law and Declaratory Orders" related to the Supplemental Lease and "filed an interlocutory appeal" in 2016. Knecht Br. 9. This is incorrect. The circuit court entered its Declaratory Judgment on January 11, 2016, conclusively establishing the terms, validity, and enforceability of the Supplemental Lease. CR 2216. Evridges filed a Notice of Entry on January 12, 2016. CR 2218. The record is clear that Knecht failed to

file any notice of appeal on the issue that he now contests: the validity and enforceability of the Supplemental Lease. For him to suggest otherwise is a misstatement of the record.

While Knecht did file an appeal in 2016 (CR 2490-93), the appeal was not an appeal of the circuit court's January 11, 2016 Declaratory Judgment, but an appeal of a judgment and order granting Evridges' Motion for Partial Summary Judgment and Motion for Release of Funds, which only addressed the factual issue of recoverable damages. Indeed, Knecht's Notice of Appeal and Docketing Statement indicate he is appealing specifically from the March 30, 2016 Judgment and the March 30, 2016 Order. CR 2483-91; *see also* CR 2398-2400, 2323, 2337, 2354, 2356. (There is no petition for interlocutory appeal in the record.) Completely absent from Knecht's 2016 Notice of Appeal and Docketing Statement is any reference to the circuit court's Findings of Fact and Conclusions of Law and Declaratory Orders; the Findings of Fact and Conclusions of Law and Declaratory Orders are not even attached to the Docketing Statement. CR 2483-2500. The March 30, 2016 Order and Judgment did not address, nor were they related to, the circuit court's Declaratory Judgment conclusively establishing the validity and enforceability of the Supplemental Lease. Instead, the March 30, 2016 Order and Judgment related specifically to Evridges' Motion for Partial Summary Judgment and Motion for Release of Funds; in other words, the Evridges' claim for damages. The March 30, 2016 Order granted in part Evridges' Motion for Partial Summary Judgment for failure to pay rent, and ordered release of funds held by the Perkins County Clerk of Courts. The March 30, 2016 Judgment was entered to enforce the March 30, 2016 Order granting partial summary judgment. CR 2400.

## RESPONSE TO KNECHT'S STATEMENT OF FACTS

Knecht is required by statute to provide this Court with a statement of facts "relevant to the grounds urged for reversal" and which "must be stated fairly, with complete candor, and as concisely as possible." SDCL 15-26A-60(5). Knecht fails to do so. Instead, as he has done throughout the entirety of this lawsuit, Knecht dedicates twelve pages of his appellant brief to self-serving (and incorrect) facts that are largely irrelevant to any issue on appeal for the obvious purposes of coloring this Court's view of the Evridges, blurring the issues, and distracting the focus of this Court. For purposes of brevity, Evridges will provide this Court with reference to where errors in fact are present in Knecht's brief which are relevant to the issues on appeal.

## ARGUMENT

### I. This Court does not have jurisdiction to consider an appeal from the circuit court's Declaratory Judgment, which finally and completely adjudicated all issues relating to the validity of the parties' Supplemental Lease.

Nearly three years after its entry, Knecht seeks to appeal from the circuit court's Declaratory Judgment determining, among over things, the validity of the parties' Supplemental Lease. To do so, as noted above, Knecht misrepresents the procedural background of this case. But as the record reflects, and as a matter of law, Knecht's time to appeal ran on February 11, 2016, thirty days after notice of entry of the circuit court's Declaratory Judgment.

Indeed, Knecht initiated this action seeking "a declaratory judgment pursuant to SDCL 21-24-1. . . . to determine and establish his rights under the leases," as well as damages for breach of quiet enjoyment. CR 2. The parties stipulated, pursuant to SDCL 15-6-42(b), to bifurcate Knecht's declaratory judgment action from the parties' damage

claims. CR 111-14; *see also* CR 44-47, 3053-58, 3095. The circuit court entered an order, specifying

> Trial for the declaratory judgment portion of this lawsuit, to include issues as to the validity of either of the two documents titled "Agricultural Lease" and "Supplemental Agricultural Lease," or if valid, the terms of the agreement(s), will begin on August 24, 2015 at 9 AM . . . and will continue on August 31, 2015[.] Trial for any remaining issue, including damages, if any, shall be set thereafter.

CR 114. And a court trial was held on August 24, 2015, August 31, 2015, and September 23, 2015, with testimony related to the validity and terms of the agreements. CR 1203-1998.

On January 11, 2016, the circuit court issued Findings of Fact and Conclusions of Law and Declaratory Orders, conclusively determining, as relevant here, the validity and terms of the parties' Supplemental Lease. CR 2216. Evridges filed and served a Notice of Entry on January 12, 2016. CR 2218.

As this Court is well aware, the statutory time for appeal is thirty days after a judgment is "signed, attested, filed and written notice of entry thereof shall have been given to the adverse party." SDCL 15-26A-6. But until Knecht's September 21, 2018 Notice of Appeal, Knecht had never filed a notice of appeal of the circuit court's Declaratory Judgment. Knecht's September 2018 Notice of Appeal comes 983 days after Notice of Entry of the January 11, 2016 Declaratory Judgment, and 953 days after the time for appeal ran. *Id*. Failure to serve a notice of appeal "before the time for taking an appeal expire[s] is fatal to the appeal." *Long v. Knight Const. Co.*, 262 N.W.2d 207, 208 (S.D. 1978) (citation omitted). Indeed, "[t]his court is without jurisdiction of an untimely appeal." *Id.* at 209 (citation omitted). As Knecht failed to timely appeal from the circuit

court's Declaratory Judgment, this Court is without jurisdiction to consider Knecht's appeal as to the validity and enforceability of the Supplemental Lease.

It is anticipated that Knecht will assert (as he has in his statement of the case) that he attempted to appeal the circuit court's Declaratory Judgment in 2016, and this Court dismissed the appeal as not a final order. Knecht Br. 9; *see also* CR 2615. But as addressed above, Knecht did not appeal from the circuit court's Declaratory Judgment, but an order and judgment granting partial summary judgment, which addressed the factual issue of damages. CR 2483-2500. Summary judgment is, by its very nature, typically not a final judgment. *MGA Ins. Co. v. Goodsell*, 2005 S.D. 118, ¶ 33, 707 N.W.2d 483 (Zinter concurring). And this case is no different. Knecht fails to appreciate the unique nature of a declaratory judgment action.

As a matter of law, the circuit court's Declaratory Judgment was a final and appealable order. SDCL 21-24-1 and 21-24-3 authorize declaratory actions to determine the rights of parties to a contract. Like other judgments, declaratory judgments are subject to appeal. SDCL 21-24-13. In fact, declaratory judgments have "the force and effect of a final judgment or decree." SDCL 21-24-1. "Like any other judgment, a declaratory judgment which is valid and final 'is conclusive, *with respect to the matters declared*.'" *Carver v. Heikkila*, 465 N.W.2d 183, 186 (S.D. 1991) (emphasis in original) (citation omitted).

In this case, the parties stipulated to, and the circuit court so ordered, bifurcating Knecht's declaratory judgment action from the parties' breach of contract claims. CR 111-14; *see also* CR 44-47, 3053-58, 3095. (Notably, Knecht's prayer for relief on the declaratory judgment action requested "that the Court determine the rights of the parties

as to the Agricultural Lease contract and the Supplemental Lease contract." CR 2; 1143.) A court trial was held solely on Knecht's declaratory judgment action. CR 1203-1998; *see also* CR 2209 ("The purpose of the court trial was to determine the following issues: (1) whether the Agricultural Lease and the Supplemental Lease are valid, and (2) if valid, the terms of such leases."). From that, the circuit court issued Findings of Fact and Conclusions of Law and Declaratory Orders, granting the only relief it could have granted on the declaratory judgment action: the determination of the validity of the Supplemental Lease. CR 2209-17.

Without dispute, the circuit court's Declaratory Orders "'finally and completely adjudicate[d] all of the issues of fact and law involved in the'" declaratory judgment action. *Midcom, Inc. v. Oehlerking*, 2006 S.D. 87, ¶ 11, 722 N.W.2d 722, 725 (quoting *Griffin v. Dwyer*, 88 S.D. 357, 358, 220 N.W.2d 1, 2 (1974)). The Declaratory Orders "'finally and completely' adjudicate[d] all issues relating to the enforceability [and validity] of the [Supplemental Lease]." *Id.* (citation omitted). The Declaratory Judgment "end[ed] the [declaratory judgment] litigation on the merits and le[ft] nothing for the court to do but execute the judgment." *Id.* at 726 (citation omitted). Indeed, Knecht recognized the finality of the Declaratory Judgment in his Affidavit filed in opposition to Evridges' Motion for Partial Summary Judgment: "The Court made its decision on the validity of the leases in the Court's Finding of Fact, Conclusions of Law, and Declaratory Orders with Notice of Entry January 12, 2016." CR 2356. *See also* CR 2323 (admitting "The first part of the trial is now over"); CR 2337. Similarly, Knecht admitted during the jury trial that Judge Macy made a determination of the contractual relations of the parties. CR 3738.

Although a jury trial was later held on "remaining issues, including damages" (CR 114), this Court has recognized "[f]inality still inheres in the judgment or order even when there is a question to be decided after the judgment ending litigation on the merits, if it does 'not alter the order or moot or revise the decisions embodied in the order.'" *Midcom*, 2006 S.D. 87, ¶ 15, 722 N.W.2d at 726 (citations omitted). Nothing in the subsequent proceeding altered or revised decisions contained in the January 11, 2016 Declaratory Judgment declaring the parties' rights under the Supplemental Lease.

Here, Knecht's declaratory judgment action was bifurcated from his damage claim. The circuit court fully and completely adjudicated the declaratory judgment action. There was nothing left for it to do but execute on the Declaratory Judgment. And the jury verdict on the parties' competing damages claims certainly did not (and could not have) "alter the [declaratory] order or moot or revise the decisions embodied in the [declaratory] order." *Id. See also, In re Pooled Advocate Tr.*, 2012 S.D. 24, ¶¶ 23, 26, 813 N.W.2d 130, 139 (applying the "law of the case" doctrine to a declaratory judgment order and explaining "the 'law of the case' doctrine . . . stands for the general rule that 'a question of law decided by'" a court "becomes the law of the case, in all its subsequent stages[.]" "'The 'law of the case' doctrine is intended to afford a measure of finality to litigated issues.'"); *In re Estate of Siebrasse*, 2006 S.D. 83, ¶ 17, 722 N.W.2d 86, 90 ("The 'law of the case' doctrine is intended to afford a measure of finality to litigated issues. It is a rule of practice and procedure which for policy reasons provides that once an issue is litigated and decided it should remain settled for all subsequent stages of the litigation") (other citations omitted).

Knecht's time to appeal the circuit court's determination on the validity and enforceability of the Supplemental Lease ran on February 11, 2016, thirty days after notice of entry of its Declaratory Judgment. Because Knecht failed to timely appeal, this Court does not have jurisdiction to consider his appeal on this issue.

## II. Even if Knecht has timely appealed the circuit court's Declaratory Judgment – he has not – Knecht waived his right to contest the validity of the Supplemental Lease by failing to raise this issue below.

For the first time in the entire four-years of this litigation, Knecht claims that the Supplemental Lease is unlawful and void as a matter of law because it violates a federal regulation and negates public policy. Knecht Br. 23-28. Indeed, nowhere in Knecht's Appellant Brief, including his "very detailed statement of facts," does he direct this Court to a location in the record where this specific argument was raised below. And under this Court's cardinal rule, "[a]n issue not raised at the trial court level cannot be raised for the first time on appeal." *Action Mech., Inc. v. Deadwood Historic Pres. Comm'n*, 2002 S.D. 121, ¶ 50, 652 N.W.2d 742, 755 (citation omitted).

When Knecht initiated this case, he sought a declaratory judgment requesting "that the Court determine and establish his rights under the leas*es*[.]" CR 2 (emphasis added); *see also* CR 1143 ("That the Court determine the rights of the parties as to the Agricultural Lease contract and the Supplemental Lease contract."); CR 3738 ("Q. And you started a lawsuit in December of 2014 for declaratory judgment? A. Correct. Q. To get a determination of the contractual relations of the parties; correct? A. Correct. Q. And Judge Macy made a determination of the contractual relations of the parties, didn't he? A. Correct."). Notably absent from his Complaint (and later Amended Complaint) is

any claim or allegation that the Supplemental Lease is unlawful and void as a matter of law. CR 1-14, 1128-1154.

Following the order to bifurcate the matter, Knecht filed a Motion for Partial Summary Judgment. CR 153-56. Again, conspicuously absent from the motion was a single argument that the Supplemental Lease was unlawful and void. *Id.*

While his Motion for Partial Summary Judgment was pending, Knecht also filed a Motion for Leave to File an Amended Complaint, which was ultimately granted. CR 315, 1096. Nowhere in the Amended Complaint did Knecht raise or otherwise assert a claim the Supplemental Lease was unlawful and void. CR 1128-154. In fact, Knecht continued to request that "the Court determine the rights of the parties as to the Agricultural Lease contract and the Supplemental Lease contract." CR 1143.

At the declaratory judgment trial, no evidence or argument was presented to the circuit court that the Supplemental Lease was unlawful and void as a matter of law because it violated a federal regulation or was against public policy.[1] CR 1203-1998.

Following the declaratory judgment trial, the circuit court directed the parties to submit proposed Findings of Fact and Conclusions of Law, as well as a post-trial memorandum of law. CR 1976-977. Evridges filed Proposed Findings of Fact and Conclusions of Law for Declaratory Judgment prior to the August 24, 2015 court trial (CR 455), as well as Revised Proposed Findings of Fact and Conclusions of Law for Declaratory Judgment (CR 1171), Second Revised Proposed Findings of Fact and

[1] Admittedly, testimony was presented that the Supplemental Lease was a "violation of the rules of management" of the Grand River Cooperative Grazing Association ("Grazing Association"). *See e.g.* CR 1543-47; 1007. However, no evidence, testimony, argument, or authority was made that this alleged "violation" was a violation of an express provision of law, making the Supplemental Lease unlawful and thus void as a matter of law. This argument was simply never put before the circuit court.

Conclusions of Law for Declaratory Judgment (CR 2003), and Post-Trial Memorandum of Law (CR 1159) following the September 23, 2015 court trial. Knecht, on the other hand, only filed one set of Proposed Findings of Fact and Conclusions of Law, to which Evridges filed an objection.[2] CR 2108, 2169. Knecht did not file a single objection to any of Evridges' proposed findings of fact and conclusions of law. And most importantly, Knecht's Proposed Findings of Fact and Conclusions of Law did not raise the issue that the Supplemental Lease was unlawful and void as a matter of law, or even cite to a single authority in support of the same. *See Osdoba v. Kelley-Osdoba*, 2018 S.D. 43, ¶ 23, 913 N.W.2d 496, 503 ("An objection must be sufficiently specific to put the circuit court on notice of the alleged error so it has the opportunity to correct it."). In fact, Knecht's conclusions of law plainly admitted "[a]ll of the essential elements of a valid contract are present in the two written leases prepared by the [Evridges] and their lawyer" and concludes that "the Agriculture Lease . . . is a valid lease contract that is binding on the parties" and the "Supplemental Agricultural Lease . . . is cancelled, and the Evridges will not receive any remuneration from this lease." CR 2160, 2166-67.

In sum, nowhere in the settled record is a specific argument made that the Supplemental Lease is unlawful and void as a matter of law because it violates an express provision of the law (i.e., 36 C.F.R. §222.3(c)(1)(vi)) or negates public policy.

[2] In fairness, the settled record contains a document entitled "Evridges' Objections to Knecht's Draft Proposed Preliminary Findings of Fact and Conclusions of Law." CR 1999-2002. However, nowhere in the settled record is a document entitled, or arguably related to, "Knecht's Draft Proposed Preliminary Findings of Fact and Conclusions of Law." *See* CR. As this Court is aware, this Court's review is "'restricted to facts contained within the settled record.'" *Klutman v. Sioux Falls Storm*, 2009 S.D. 55, ¶ 36, 769 N.W.2d 440, 453 (citation omitted). "It is incumbent on the appellant . . . to present an adequate record on appeal." *Long v. State*, 2017 S.D. 79, ¶ 19, 904 N.W.2d 502, 510, *reh'g denied* (Dec. 19, 2017) (citation omitted). And "[i]t is immaterial if the settled record contains references to or an acknowledgment of items omitted from the settled record." *Klutman*, 2009 S.D. 55, ¶ 36, 769 N.W.2d at 453.

Evridges acknowledge that *following* the declaratory judgment court trial and entry of Declaratory Judgment and Notice of Entry, in response to Evridges' Motion for Partial Summary Judgment, Knecht did assert for the first time that "[t]he Supplemental Lease is in violation of federal Rules of Management of the federal grazing land" and then boldly concluded – without any authority or support – that the Supplemental Lease was thus "unlawful, unenforceable, and void[.]" *See e.g.* CR 2324. But other than his own unsupported, self-serving (and incorrect) assertions, Knecht never fully presented this specific argument or made a specific request that the circuit court address this issue.[3] The settled record is devoid of any attempt by Knecht to bring this specific issue to the circuit court and allow an opportunity to rule on it. Knecht never made a motion, presented no testimony (particularly from anyone with the Grazing Association or U.S. Forest Service) or evidence, or even submitted a proposed jury instruction to this effect.

"This court has said on countless occasions that an issue may not be raised for the first time on appeal. Thus, an issue not presented at the trial court level will not be

[3] Knecht completely misrepresented the Grazing Association's position. Relying on letters from the Grazing Association, Knecht asserted, "I have learned from the Grand River Grazing Association that the Supplemental Agricultural Lease Agreement . . . is unlawful" and "I understand that Rules of Management between Grand River Grazing Association and the United States Forest Service are based on federal law, and a violation is a serious matter. This means the Supplemental Agricultural Lease is unlawful[.]" CR 2358-59; *see also* 2360. Knecht even went so far as to claim that "the Supplemental Agricultural Lease has been declared unlawful by the Grand River Grazing Association and such lease must be cancelled and void from the beginning[.]" CR 2362. But even a quick review of the correspondence shows this is factually untrue. Consistent with the remedies afforded under the regulations (and Rules of Management), *see* discussion *infra* Section III.A, the only action the Grazing Association ever considered (and later implemented) was suspending and cancelling Knecht's grazing permit for 2016, because the Supplemental Lease was not turned in by March 1. *See* CR 1007. The Grazing Association never "declared" the Supplemental Lease "unlawful" and directed that it "be cancelled and voided from the beginning." *See* CR 2369-73. Moreover, the Grazing Association was never a party to this lawsuit, and its decisions were not binding on the circuit court.

reviewed at the appellate level." *Mortweet v. Eliason*, 335 N.W.2d 812, 813 (S.D. 1983). An "appellant must affirmatively establish a record on appeal that shows the existence of error. He or she must show that the trial court was given an opportunity to correct the grievance he or she complains about on appeal." *Husky Spray Serv., Inc. v. Patzer*, 471 N.W.2d 146, 153-54 (S.D. 1991) (citation omitted). "Objections must be made to the trial court to allow it to correct its mistakes." *Id.* at 154 (S.D. 1991) (citation omitted). "An objection must be sufficiently specific to put the circuit court on notice of the alleged error so it has the opportunity to correct it." *Osdoba*, 2018 S.D. 43, ¶ 23, 913 N.W.2d at 503 (citation omitted).

> Raising a legal argument for the first time in an appellate brief limits the opposing party's ability to respond. Had the issue been specifically raised below, "the parties would have had an opportunity to consider whether additional evidence was needed to decide the issue and certainly would have had an opportunity to brief the issue for the trial court's consideration."

*Gabriel v. Bauman*, 2014 S.D. 30, ¶ 23, 847 N.W.2d 537, 544 (citing *Hall v. State ex rel. S. Dakota Dep't of Transp*., 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 27 (collecting cases)). *See also Fortier v. City of Spearfish*, 433 N.W.2d 228, 231 (S.D. 1988) (holding "[s]ince this issue was not framed in the pleading and was not addressed by the affidavits in support of or resistance to the motion for summary judgment, we do not believe the issue was properly before the trial court. Therefore, we will treat the issue as not being properly before us, and we decline to rule on the merits of the trial court's decision on this issue.").

Knecht's issue regarding the validity and enforceability of the Supplemental Lease was not properly preserved for review. Accordingly, it is waived.

## III. Even if Knecht had raised the issue below – he did not – the Supplemental Lease is not unlawful and not void.

### A. The Supplemental Lease is neither expressly prohibited nor contrary to the policy and purpose of law.

Knecht relies on SDCL 53-9-1 and SDCL 53-5-3 to argue that the Supplemental Lease is unlawful and void as a matter of law. Knecht Br. 24-26. Knecht claims that Supplemental Lease violated "a provision in the rules [of management] limiting the amount charged per acre for rent," and in turn, "violated 36 CFR §222.3(c)(1)(vi), an express provision of the law." Knecht Br. 25. Knecht's argument is fundamentally flawed.

By way of background, 36 CFR § 222.3(c)(1)(vi) authorizes the Forest service to issue permits for livestock grazing on Forest Service lands. Any permit issued is subject to certain provisions and requirements prescribed by the Forest Service, such as:

> (A) The amount and character of base property and livestock the permit holder shall be required to own.
>
> (B) Specifying the period of the year the base property shall be capable of supporting permitted livestock.
>
> (C) Acquisition of base property and/or permitted livestock.
>
> (D) Conditions for the approval of nonuse of permit for specified periods.
>
> (E) Upper and special limits governing the total number of livestock for which a person is entitled to hold a permit.
>
> (F) Conditions whereby waiver of grazing privileges may be confirmed and new applicants recognized.

36 C.F.R. § 222.3.

Pursuant to 36 C.F.R. §§ 222.3 and 222.7, the United States Department of Agriculture, U.S. Forest Service, and the Grazing Association entered into a "Grazing

Agreement" "for the annual permitted use of up to 61,000 head months of grazing on National Forest Lands in the portion of the Grand River National Grassland." CR 868. As part of the Grazing Agreement, the Grazing Association "Develop[ed] the Rules of Management . . . with the assistance of the Forest Service, as needed, to facilitate administration of the livestock grazing activities authorized under this Agreement." CR 876. The Rules of Management are "the set of policies, procedures, and practices developed by the Association for their use in administering livestock grazing on lands covered by this Agreement and are approved by the Forest Service." CR 869. "The [Rules of Management] become[] a part and condition of the Grazing Agreement upon approval by the Forest Service." CR 876. The Grazing Agreement expressly provides that "[v]iolation of any of the terms and conditions of this Agreement may result in the suspension, cancellation or termination of this Agreement." CR 879.

Under the Grazing Association's Rules of Management, members ("any person, partnership, association, corporation, or legally authorized agent of either thereof, owning or leasing forage producing land within or contiguous to the boundaries of the grazing district") (CR 886) are permitted to lease their "base property."[4] CR 892. The Grazing Association "has full control of all leases and permits." *Id.* Among other things, the Rules of Management require that "[a]ll leases must be in written form, including the following: [1] Land descriptions [2] Terms of the lease, including the price and length of time (a minimum of three years is encouraged). [3] [Required] clauses . . . ." CR 892-93. "All leases have to be in the Association Office by March 1st with appropriate documentation." CR 893. There is no express provision on the amount charged for

[4] Base property is the "[p]roperty to which a grazing preference/privilege is attached." CR 884.

leasing base property. *See* CR 892-93. In fact, the Rules of Management are completely silent as to amount charged for rent. *Id.*

Knecht inaccurately asserts that Evridges "created the Supplemental Lease with the purpose of circumventing a provision in the rules limiting the amount charged per acre for rent. This lease directly violated the association's rules of management," and in turn violated an express provision of the law, thus the Supplemental Lease is void. Knecht Br. 25. Knecht's argument is factually in error and legally flawed.

Pursuant to SDCL 53-9-1, "[a] contract provision contrary to an express provision of law or to the policy of express law, though not expressly prohibited or otherwise contrary to good morals, is unlawful." And under SDCL 53-5-3, "[w]here a contract has but a single object and such object is unlawful in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void." This Court has made clear that contracts are to be construed to carry out valid contractual relations rather than be construed so as to render them invalid or impossible to perform. *See Thunderstik Lodge, Inc. v. Reuer*, 613 N.W.2d 44, 48 (S.D. 2000).

None of the provisions in the Supplement Lease are unlawful. Moreover, the provisions comply with the Rules of Management requirements. Indeed, the Supplemental Lease includes the description of Evridges' deeded land, terms of the lease, including the price and length of time, the required clauses with language from the Rules of Management, and notarized signatures. CR 8-12. Nowhere in the Grazing Association's Rules of Management is any provision limiting the amount charged for rent. *See e.g.* CR 881-908. Likewise, the regulations are silent on the amount charged

for rent. *See e.g.* 36 C.F.R. §222.3. In short, the Supplemental Lease, in and of itself, is simply "not expressly prohibited" or "contrary to the express provisions of law."

If anything, the failure to submit the Supplement Lease to the Grazing Association is the only action that runs contrary to the Rules of Management, and in turn, the Grazing Agreement.[5] But this does not make the Supplemental Lease unlawful and void.

It is axiomatic that "[a] contract in violation of a statutory provision generally is void or illegal only if the legislative body enacting the statute evidences an intention that such contracts be considered void or illegal." *Ets-Hokin & Galvan, Inc. v. Maas Transp., Inc.*, 380 F.2d 258, 260 (8th Cir. 1967). "Otherwise, even though the parties to a contract may be subject to a statutory penalty as the result of performing a contract, the contract itself remains in full force and effect." *Id.*

Neither the authorizing regulations nor the Grazing Agreement and Rules of Management provide that contracts involving grazing permits are illegal or void when a member leasing base property is out of compliance with the Rules of Management leasing requirements. As discussed above, 36 C.F.R. §222.3 governs the issuance of grazing permits. Subsection (a) provides grazing must be authorized by a grazing permit. 36 C.F.R. §222.3(c)(1)(i) provides that permits will be issued to persons who own

[5] Knecht also inaccurately contends that Evridges violated the Rules of Management by "subleas[ing]" the grazing permit. Knecht Br. 16. But no violation for subleasing was ever noted by the Grazing Association. *See* CR 2369-73. In fact, the executive director of the Grazing Association plainly defined "subleasing" to mean that a "member cannot sublease out – cannot lease it to someone and that person cannot lease it to someone else, which would be a sublease." CR 1536. This is not what occurred. It is undisputed that Evridges leased their base property to Knecht, and Knecht only. There was no sublease of the lease to Knecht. Nor did Evridges charge Knecht for use of their grazing privileges. *See* CR 1851, 1881.

livestock and the base property. Under the regulations, as well as the Grazing Agreement, the Forest Service has the power to cancel, modify or suspend a permit. 36 C.F.R. §222.4(a); *see also* CR 879. When the permittee does not comply with permit requirements, the Forest Service may cancel it. 36 C.F.R. §222.4(a)(2); CR 879. Additionally, the Forest Service has other remedies against individuals who do not obtain permits. It may sue a grazer for trespass. *See e.g. United States v Dann*, 873 F.2d 1189 (9th Cir. 1987). It may also sue in equity for an injunction prohibiting grazing. *United States v Gardner*, 107 F.3d 1314 (9th Cir. 1997). Similarly, the Rules of Management provide that when a member fails to comply with the rules, the member's annual grazing permit may be suspended or canceled. CR 895.

In this case, Knecht's grazing on national grassland was undisputedly done under a permit. The only possible regulatory (or even rule) violation during the term of the leases was that Evridges leased their base property to Knecht and did not submit the Supplemental Lease to the Grazing Association as required under the Rules of Management. But this is a technical violation peripheral to the central purpose of the regulations. The parties' contracts did not require or result in grazing without a permit, which would have circumvented federal oversight of grassland grazing. *See Bradley Grain Co. v. Peterson*, 267 N.W.2d 836, 838 (S.D. 1978) (holding contract valid and enforceable where it was merely collaterally connected to an unlawful purpose contemplated by statute). The contracts merely involved a supplemental lease operated consistent with other permit requirements. As a matter of law, the Supplemental Lease is neither expressly prohibited nor contrary to the policy and purpose of an express provision of law. The Supplemental Lease is not unlawful and void.

**B. The Supplemental Lease is not void under public policy.**

Knecht asserts, in the alternative, that the Supplemental Lease is void because it negates public policy under federal law and SDCL 53-9-3. Knecht's argument is nonsensical.

"'Public policy is found in the letter or purpose of a constitutional or statutory provision or scheme, or in a judicial decision.'" *Domson, Inc. v. Kadrmas Lee & Jackson, Inc.*, 2018 S.D. 67, ¶ 15, 918 N.W.2d 396, 402 (quoting *Niesent v. Homestake Mining Co.*, 505 N.W.2d 781, 783 (S.D. 1993)). 16 U.S.C. §580l grants the Secretary of Agriculture the power to issue permits to graze on Forest Service land. The regulations implementing this authority are at 36 C.F.R. §222. SDCL 53-9-3 provides that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud or willful injury to the person or property of another or from violation of law whether willful or negligent, are against the policy of the law."

First, what Knecht fails to recognize is that there is nothing in the regulations that even addresses leases. While the Rules of Management require that all leases be turned into the Grazing Association, there is no rule that limits the amount charged for rent. CR 881-908. Contrary to Knecht's unsupported contention, upholding the circuit court's interpretation of the Supplement Lease would not "nullify[] federal law" or allow Evridges to contract around the Rules of Management. Knecht Br. 28.

Moreover, although Knecht claims that the Supplemental Lease is contrary to SDCL 53-9-3 because it "served as a means for Evridges to disguise their wrongdoing from the [G]razing [A]ssociation and willfully defraud Knecht," his argument misapprehends the applicable law. Knecht Br. 27. The plain language of the

Supplemental Lease neither purports to exempt Evridges "from responsibility for [their] own fraud or willful injury to the person of another" nor "from violation of law whether willful or negligent." SDCL 53-9-3.

> [T]his Court has cautioned ever since territorial days, "The power of courts to declare a contract void for being in contravention of sound public policy, is a very delicate and undefined power; and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

*Law Capital, Inc. v. Kettering*, 2013 S.D. 66, ¶ 13, 836 N.W.2d 642, 645 (citations omitted). "'Until firmly and solemnly convinced that an existent public policy is clearly revealed,' this Court's duty is 'to maintain and enforce contracts rather than to enable parties thereto to escape from their obligation on the pretext of public policy.'" *Id.*, 2013 S.D. 66, ¶ 14, 836 N.W.2d at 646 (citations omitted). As a matter of law, the Supplemental Lease in this case did not contravene public policy and should not be deemed void.

### C. Knecht failed to object to the jury instructions or propose an alternative on this issue.

Knecht claims that the jury's award of damages to Knecht and Evridges are invalid because the jury was not instructed that the Supplemental Lease was void. Knecht Br. 28-30. However, Knecht did not object or propose such an instruction at trial on these grounds. *See* CR 2823-43. This Court has made clear that "[f]ailure to object to the jury instruction or propose an alternative instruction waives the issue for appeal." *Schaffer v. Edward D. Jones & Co.*, 1996 S.D. 94, ¶ 15, 552 N.W.2d 801, 807 (citation omitted). Therefore, this argument is waived for failure to preserve it at trial.

### D. Even if the Supplemental Lease is void for legality – it is not – Knecht cannot recover payments made to Evridges.

Knecht claims that lease payments he made under the Supplemental Lease were unlawful, and therefore the circuit court erred in determining that rent was due and ordering release of funds held by the clerk. Knecht Br. 30-37. He further asserts that the Evridges should be "disgorge[d]" from the "unlawful funds paid under the lease." Knecht Br. 28. Again, Knecht's argument is legally flawed.

This Court has recognized the fundamental principle that "absent a showing of '. . . , fraud, undue influence, or collusion, in making of the payment"" *Bozied v. City of Brookings*, 2001 S.D. 150, ¶ 20, 638 N.W.2d 264, 272, the general rule:

> is that illegal contracts–illegal by reason of being expressly prohibited by law–are unenforceable, *and no one can acquire any legal right under such a contract*. If one of the parties has performed in whole or in part he cannot avoid the contract and recover from the adversary party a reasonable compensation for such performance. No right, therefore, arises out of an illegal transaction even on the theory of constructive contracts. *The law leaves the parties to illegal contracts where it finds them, and gives them no assistance in extricating themselves from the situation in which they have placed themselves–no recovery can be had for services rendered thereunder,* either on the express contract, or on an implied contract, or on quantum meruit.

*Norbeck & Nicholson Co. v. State*, 32 S.D. 189, 142 N.W. 847, 849 (1913) (emphasis added).

In this case, there has been no showing of fraud, undue influence, or collusion. *See* CR 2961. Moreover, both parties performed under the Supplemental Lease. Knecht received benefits of the Agricultural Lease for three years and the Supplemental Lease for two years. CR 2215.

While Knecht claims he was "duped," a review of the facts contradicts Knecht's feigned innocence. Indeed, the Agriculture Lease and Supplemental Lease have specific,

unambiguous provisions addressing the Grazing Association, which state in part, "In the event a grazing permit is issued to the Lessee, said *Lessee agrees to comply with all Association Rules of Management* and to abide by any approved allotment management plans in effect on the grazing allotments involved." CR 6, 11 (emphasis added). The leases were executed on December 3, 2013. If Knecht did not know about the Rules of Management prior to December 3, 2013, he was certainly put on notice that his actions were governed by the Rules of Management on December 3, 2013. CR 2966. Moreover, Knecht became a member of the Association sometime early 2014, before the Agriculture Lease was approved by the Grazing Association. CR 1552, 2966, 3699-3700, 3707. At that time, Knecht either knew about the Rules of Management or was placed on sufficient notice that such rules existed, and he failed to diligently inquire and follow the Rules of Management as well. Why did Knecht not submit the Supplemental Lease to the Grazing Association when he became a member? Knecht waited almost an entire year while enjoying the benefits of the same. CR 3712.

If the Supplemental Lease is illegal – it is not – Knecht cannot now recover for monies paid under the Supplemental Lease, or any further damages resulting from loss of these funds. "The law leaves the parties to illegal contracts where it finds them, and gives them no assistance in extricating themselves from the situation in which they have placed themselves–no recovery can be had for services rendered thereunder[.]" *Norbeck & Nicholson Co.*, 142 N.W. at 849. The circuit court correctly ordered release of funds held by the clerk.

## IV. Entry of Summary Judgment on Knecht's Claims of Fraud and Deceit Was Proper and Should Be Affirmed.

Determinative of this appeal issue is the fact that Knecht never raised any of the arguments he raises on appeal at the circuit court level. While he now argues on appeal that the contract breach and torts are allowable separate claims and that there existed sufficient evidence of fraud and deceit, the briefing below in response to Evridges' Motion for Summary Judgment contains no such arguments; indeed, Knecht's responsive brief does not contain any argument or authorities at all. CR 2893-95. As the Court has routinely held, issues not raised below cannot be considered for the first time on appeal. *See e.g. Hall v. State ex rel. S. Dakota Dep't of Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 26. None of the arguments advanced on the issue of the propriety of the circuit court's entry of summary judgment on the fraud and deceit claims were raised below, and the Court should decline to consider them now. On this basis alone, summary judgment on the fraud and deceit claims should be affirmed. If the Court were to consider this issue, the arguments are, in any event, without merit.

**Summary Judgment Standard of Review**

The Court in *Cowan Bros., L.L.C. v. Am. State Bank,* 2007 S.D. 131, ¶ 12, 743 N.W.2d 411, 416, reiterated the standard of review on a motion for summary judgment:

> In reviewing a grant or a denial of summary judgment under SDCL 15-6-56(c), we determine whether the moving party has demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists.
>
> * * *

> We will affirm the circuit court's ruling on a motion for summary judgment when any basis exists to support its ruling. . . . However, summary judgment is not the proper method to dispose of factual questions. . . . Only when fact questions are undisputed will issues become questions of law for the court.

*Id.*, 2007 S.D. 131, ¶¶ 12-13, 743 N.W.2d at 416 (internal citations omitted). Applying these standards to the circuit court's entry of summary judgment on Knecht's fraud and deceit claims, the dismissal of those claims should be affirmed on both bases set forth by the circuit court.

**A. Evridges Owed No Duty to Knecht Beyond the Contract.**

The Court has repeatedly explained that South Dakota adheres to the independent tort doctrine, which provides that "a breach of duty may arise from a contractual relationship, and while matters complained of may have their origin in contract, the gist of an action may be tortious." *Schipporeit v. Khan*, 2009 S.D. 96, ¶ 7, 775 N.W.2d 503, 505 (other citations omitted). The independent tort doctrine has two functions:

> First, it maintains the symmetry of the general rule of not allowing punitive damages in contract actions, because the punitive damages are awarded for the tort, not the contract. Secondly, the independent tort requirement facilitates judicial review of the evidence by limiting the scope of review to a search for the elements of the tort.

*Id.* (other citations omitted). However, "'[c]onduct which merely is a breach of contract is not a tort. . . .'" *Id.* (quoting *Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121, ¶ 18, 573 N.W.2d 493, 500). Thus, to establish both breach of contract and tort liability, there must be "'a breach of a legal duty independent of contract' . . . This independent legal duty must arise 'from extraneous circumstances, not constituting elements of the contract.'" *Id.* "

> An independent legal duty may be related to a contract between the parties, but it must be :born of that wider range of legal duty which is due

> from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud."

*Id.* (other citations omitted).

Although not entirely clear, Knecht appears to argue that his allegations establish both a contractual duty and an independent duty arising under tort, stating the "trial court erred in precluding claims that touch upon or include terms of the contracts at issue. The trial court then further erred in holding that Knecht must prove some fiduciary or other relationship; an independent duty arose in this business relationship." Knecht Br. 37. As to this issue, the circuit court concluded, "Plaintiff has failed to identify any duty created by law independent of the parties' contractual relationship which would amount to an independent tort." CR 2977.

The circuit court's conclusion was correct, as a simple business contractual relationship such as that existing between Evridges and Knecht is not sufficient to create a duty. *See Schwartz v. Morgan*, 2009 SD 110, ¶ 12, 776 N.W.2d 827, 831 (reiterating that "'[t]his [C]ourt has never imposed a duty to disclose information on parties to an arm's-length business transaction, absent an employment or fiduciary relationship.'" (quoting *Taggart v. Ford Motor Credit Co*., 462 N.W.2d 493, 499 (S.D.1990)). *See also Lindskov v. Lindskov*, 2011 S.D. 34, ¶ 19, 800 N.W.2d 715, 720 (holding "an arms-length transaction between business partners with equal bargaining power" created no duty and holding defendant did not commit fraud or deceit as a matter of law).

In this case, there was no employment or fiduciary relationship between Evridges and Knecht. In fact, even now on appeal, Knecht has not identified any duty, other than through the parties' agreements, that Evridges owed to Knecht and breached. Knecht's appeal brief is silent on this issue, other than to simply state "an independent duty arose

in this business relationship," without any explanation of the genesis of such a duty. Knecht Br. 37. Knecht has simply failed to demonstrate that the circuit court's conclusion that Knecht failed to establish a "fiduciary duty separate from the terms of the contract" is in any way correct.

For this reason alone, summary judgment was proper and should be affirmed. Additionally, even if such a duty beyond the parties' contract did exist, which is explicitly denied, Knecht could not establish the essential elements of his claims of fraud and deceit, as a matter of law.

**B. Knecht Did Not Establish the Essential Elements of His Claims.**

As to Knecht's claim of deceit, he was required to establish "The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact[.]" SDCL 20-10-2(3). The elements of fraud are similar:

> [T]hat a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage.

*North Am. Truck & Trailer, Inc. v. M.C.I. Commc'n Servs., Inc*., 2008 S.D. 45, ¶ 8, 751 N.W.2d 710, 713.

The basis for Knecht's fraud and deceit claims is Evridges' *failure to disclose* certain information to Knecht. Knecht Br. 37. There is no claim, however, of any assertion or representation of facts that were untrue. *See id.* The alleged suppression of a fact does not amount to fraud, however, which as noted above, requires an actual misrepresentation and not simply the failure to disclose. *See North Am. Truck*, 2008 S.D.

45, ¶ 8, 751 N.W.2d at 713. In any event, the record is devoid of evidence to support Knecht's claims of fraud and deceit, and the undisputed facts demonstrate that the Knecht was fully apprised of the facts he claims were not disclosed by Evridges, and he could not have relied on such facts to his detriment.

Knecht argues he was entitled to "full disclosure of [Evridges'] attempted lease approval at $30.00/acre and the rejection of that rate by the Association, and their use of two leases to obtain the equivalent rate rejected by the Association," and that had he been so aware, he would have "declined to enter into the agreements." Knecht Br. 41. But Knecht's testimony at the declaratory judgment trial reveals he was aware of the Grazing Association and the permit:

> Q And when you entered into Exhibit 1 and Exhibit 2, did the Evridges explain to you about the grazing permit?
>
> A They explained some about it, yeah.
>
> Q Was that an attractive feature for you?
>
> A Certainly.

CR 1217. Moreover, as addressed above, Knecht was put on notice that his actions were governed by the Rules of Management when he signed the leases. *See supra* II.D. The Agriculture Lease and Supplemental Lease have specific, unambiguous provisions addressing the Grazing Association. *See supra* II.D.; *see also* CR 5, 11. Further, Knecht was well-aware that there was going to be two separate leases at least by November 2013, when Evridges provided him with draft leases at his home and urged him to seek counsel for review. CR 1664-65, 1899-1901; *but cf.* CR 1340-41 (Knecht testifying that he was "possibly" provided a draft lease prior to December 2013). And the Evridges have never denied instructing Knecht to keep the Supplemental Lease "quiet" or failing to submit

Supplemental Lease to the Grazing Association. CR 1685, 1752, 1785, 1882. Gayle Evridge explained to Knecht the reason for the two leases:

> It is customary that there is two leases. One that's presented, one that's kept secret. No different than I told Mike. I said, "Mike, I'm sorry. It's got to be by the acre and it's got to have – there's got to be two leases, and it's got to be hushed up, it's got to be quiet, it's got to be a secret." Is this my wishes? No. I am extremely uncomfortable with this. However, to acquire 50 percent of market value, that second lease has to be there.

CR 1752-53. These facts are undisputed and establish that Knecht had knowledge of the very facts he claims were not disclosed and that constitute fraud and deceit. While Evridges may not have been forthcoming with the Grazing Association, they were forthcoming with Knecht, and the basis for his fraud and deceit claims is plainly unsupported. Knecht was indisputably aware of the facts he claims were not disclosed to him, and he could not have relied upon any such facts to his detriment, as a matter of law. The circuit court's conclusions based on the undisputed facts should be affirmed.[6]

For all these reasons, the circuit court's entry of summary judgment against Knecht on his claims of fraud and deceit was correct and should be affirmed.

## CONCLUSION

Based on all of the above, Evridges respectfully request that this Court dismiss Knecht's appeal of the circuit court's Declaratory Judgement on the validity of the Supplemental Lease for lack of jurisdiction, or in the alternative, waiver. Evridges further request that this Court affirm the circuit court's entry of partial summary judgment on Knecht's fraud and deceit claims.

[6] Knecht's Brief includes an argument on pleading fraud with particularity. Knecht Br. 42-43. Evridges never argued he failed to plead with particularity, and the circuit court never so held. As such, this argument requires no further response.

Dated this ____ day of January, 2019.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By:_____

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## CERTIFICATE OF COMPLIANCE

Pursuant to SDCL §15-26A-66, Cassidy M. Stalley, counsel for the Appellant does hereby submit the following:

The foregoing brief is 31 pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 30 pages, 8,343 words and 42,582 characters (no spaces) in the body of the brief, including footnotes.

_____
Cassidy M. Stalley

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the _____ day of January, 2019, she electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

Mr. Brian J. Donahoe
Mr. Daniel A. Weinstein
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The undersigned further certifies that the original and two (2) copies of the Brief of Appellant in the above-entitled action were mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, the date above written.

_____

Cassidy M. Stalley

**APPENDIX**
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UNITED STATES DEPARTMENT OF AGRICULTURE
U.S. FOREST SERVICE

AND

GRAND RIVER COOPERATIVE GRAZING ASSOCIATION

GRAZING AGREEMENT # GRGA-2013

THIS GRAZING AGREEMENT IS BETWEEN THE U.S. FOREST SERVICE, AN AGENCY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE (HEREINAFTER "THE FOREST SERVICE"), AND THE GRAND RIVER COOPERATIVE GRAZING ASSOCIATION (HEREINAFTER "THE ASSOCIATION"), A GRAZING COOPERATIVE ESTABLISHED UNDER THE LAWS OF THE STATE OF SOUTH DAKOTA. THIS AGREEMENT IS THE ASSOCIATION'S TERM GRAZING PERMIT AND ESTABLISHES THE WORKING RELATIONSHIP BETWEEN THE FOREST SERVICE AND THE GRAND RIVER COOPERATIVE GRAZING ASSOCIATION.

THIS AGREEMENT IS FOR THE ANNUAL PERMITTED USE OF UP TO 61,000 HEAD MONTHS OF GRAZING ON NATIONAL FOREST SYSTEM LANDS IN THAT PORTION OF THE GRAND RIVER NATIONAL GRASSLAND IN PERKINS & CORSON; COUNTY(IES) AS SET FORTH IN EXHIBITS A - F ATTACHED HERETO AND INCORPORATED BY REFERENCE HEREIN.

A. **DEFINITIONS.** The words, grouped by category:

*Parties:*

1. "Forest Service (FS)" means the United States Department of Agriculture-Forest Service (USDA-FS), represented by the Grassland Supervisor of the Dakota Prairie/Grasslands.

2. "Association" means the Grand River Cooperative Grazing Association, represented by the Board of Directors.

3. "Association Member" means a member of the Grand River Cooperative Grazing Association.

*Lands:*

4. "National Forest System (NFS) Lands" means federally owned forest, range, and related lands and resources throughout the United States and its territories. NFS lands include all National Forest lands reserved or withdrawn from the public domain of the United States, all National Forest lands acquired through purchase, exchange, donation, or other means, the National Grasslands and Land Utilization Projects administered under Title III of the Bankhead-Jones Farm Tenant Act, and other lands, waters, or interests therein which are

administered by the Forest Service or are designated for administration through the Forest Service as a part of the system.

5. "National Grasslands" are part of the National Forest System and refer to those lands acquired and administered by the United States under Title III of the Bankhead-Jones Farm Tenant Act, other statutes, Executive Order 10046, and which are now permanently held and administered by the Forest Service.

6. "Association Administered Lands" mean all lands administered by the Association for livestock use and rangeland resources including, but not limited to, private, state, other agency, and NFS lands.

7. "Association Controlled Lands" mean private or state lands leased, owned, or waived to the Association, by a member or non-member, for management purposes.

8. "Waived Lands", also known as self-furnished range lands means the private, state, and other agency lands within a grazing allotment on which the Association permits livestock numbers and seasons of use through issuance of an Association Annual Grazing Permit. The member or non-member relinquishes control of the waived lands, for grazing purposes only, to the Association.

9. "Allotment" means an area of land, designated on a map, which includes NFS and/or non-NFS lands comprising a logical management unit for livestock grazing and management.

*Documents:*

10. "Grazing Agreement" is a type of term grazing permit that can be issued for a period not to exceed 10 years by the Forest Service to qualified grazing associations established under state law.

11. "Rules of Management (ROM)" is the set of policies, procedures, and practices developed by the Association for their use in administering livestock grazing on the lands covered by this Agreement and are approved by the Forest Service.

12. "Forest Service Policies and Procedures" include those applicable policies and procedures established by the Chief of the Forest Service (and supplemented by the Regional Forester and Forest/Grassland Supervisor) in the Forest Service Directives system for use, management, and protection of NFS lands. With respect to rangeland management and the administration of livestock grazing on NFS lands, applicable Forest Service policies and procedures are set forth in Chapter 2200 of the Forest Service Manual (FSM) and Forest Service Handbook (FSH) 2209.13 on grazing permit administration.

13. "Forest or Grassland Plan" refers to the land and resource management plan required by the National Forest Management Act of 1976 (16 U.S.C. 1600), developed for each unit

of the National Forest System that provides direction for the management of the lands and resources of that unit. The Dakota Prairie Grasslands Land and Resource Management Plan as amended establishes the kind of management practices that may occur and the timing and location of these practices. This "Grassland Plan" became effective in 2002 and includes the 2006 Livestock Grazing Record of Decision and will apply to this agreement.

14. "Allotment Management Plan (AMP)" is a document that specifies the program of action designated to reach a given set of objectives. It is prepared in consultation with the Association and the Association Member(s) involved, prescribes the manner in and extent to which livestock operations will be conducted in order to meet the multiple-use, sustained yield, economic, and other needs and objectives as determined for the lands involved; describing the type, location, ownership, and general specifications for the range improvements in place or to be installed and maintained on the lands to meet the livestock grazing and other objectives of land management; and contains such other provisions relating to livestock grazing and other objectives as may be prescribed by the Chief, Forest Service, consistent with applicable law. (36 CFR 222.1(2). The AMP is based on the Decision Notice for the Environmental Assessment (EA) or Record of Decision for the Environmental Impact Statement (EIS).

15. "Annual Operating Instructions (AOIs)" are detailed, Forest Service approved, instructions for livestock grazing administration to be implemented in a given year on a given allotment developed by the Association. AOIs are based on the AMP and may address the number of livestock permitted to graze, season of use, responsibilities for improvement construction or maintenance, and pasture rotation schedules.

*Permits:*

16. "Association Preference Grazing Permit" is a document (grazing permit) issued by the Association authorizing the grazing of livestock under specific conditions. Preference permits shall be issued for the number of livestock for which applicants have established preference in accordance with the provisions of Section 2 & 4 in the Association By-laws. The preference permit is issued to a member authorizing livestock grazing on certain lands covered by this Agreement for a specific period not to exceed ten years or the expiration date of this Agreement, whichever is shorter. The holder has priority for receipt of a new permit upon expiration of the grazing permit provided the holder is in compliance with the terms and conditions of the expiring permit. If preferences are based wholly or partially on leased commensurate property, the preference permits shall be conditioned upon the continuance of such leases or their equivalent.

17. "Association Annual Grazing Permit" is a grazing permit issued by the Association to a member annually authorizing livestock grazing on certain lands covered by this Agreement for a specified period of time during the current years grazing season. The Annual Grazing Permit is usually issued after the AOI's have been approved, are in accordance with the AOI, and after the member has paid their grazing bill.

18. "Association Temporary Grazing Permit" is a grazing permit issued by the Association for a period not to exceed one year to a member or non-member, and that has no priority for re-issuance.

*Fees and Fee Computations*:

19. "Grazing Value" is the monetary amount the Forest Service determines annually to be the value of grazing (by head-month for one cow/horse and one sheep/goat (the value for a head month for ewes, rams and/or goats equals 1/5$^{th}$ that of an adult cow)) on the National Grasslands covered by the Agreement before deducting costs of required land use practices.

20. "Grazing Fee" is the amount paid by the Association to the Forest Service in return for the privilege of grazing livestock on the National Grasslands covered by the Agreement. The grazing fee is determined by taking the grazing value and subtracting the expenses incurred by the Association in connection with land use practices approved by the Forest Service.

21. "Land Use Practices (LUPs)" are those Forest Service approved administrative costs and conservation practices undertaken by the Association as part of its management of the livestock grazing activities on the National Grasslands covered by the Agreement. Satisfactory completion of the approved LUPs will result in a reduction in the grazing fee owed by the Association to the Forest Service.

22. "Conservation Practices (CPs)" are a type of land use practice that may be used to reduce the Grazing Fee on the National Grasslands covered by this Agreement. Conservation practices may include structural and non-structural rangeland treatments and improvements on Association administered lands that are approved in advance by the authorized officer and are necessary to properly administer the Agreement. Conservation practices shall be designed and implemented to achieve desired resource conditions as described in the land and resource management plan, project decisions, and rules of management. Examples of conservation practices include: fences, water developments, vegetation manipulation, land exchange, watershed protection, wildlife habitat improvement, and studies to determine rangeland health and stocking rates.

23. "Administrative Costs" are a type of land use practice that may be used to reduce the Grazing Fee for grazing on the National Grasslands covered by this Agreement. Administrative costs are costs that would otherwise be borne by the Forest Service if it were directly administering the grazing permits of the Association members and may include routine administrative and clerical expenses incurred by the Association related to activities like issuance of grazing permits, collection of grazing fees, monitoring livestock use, enforcement of permit terms, and record keeping. Administrative costs must be approved by the authorized officer in advance and may include, but are not limited to, expenses incurred by the Association for salaries and benefits, payroll taxes, postage, copying, depreciation, office space, utilities, accountant's fees, directors'

expenses related to administering the Agreement, and legal fees (except for legal fees associated with administrative or legal challenges against the Forest Service).

24. "Animal-Unit (AU)" is considered to be one mature (1000-pound) cow or the equivalent based upon average forage consumption of 26 pounds of dry matter per day. Five sheep or goats are the general equivalent of one cow.

25. "Animal-Unit Month (AUM)" refers to the amount of feed or forage required by an animal-unit for one month.

26. "Head-Month (HM)" is one month's use and occupancy of the rangeland by one weaned or adult cow (with or without calf), bull, steer, heifer, horse, burro, mule, bison, ewe (with or without lambs), ram, or goat (a head month for ewes, rams and/or goats equals $1/5^{th}$ of an adult cow).

27. "Excess Livestock" means any livestock owned or controlled by the holder of a grazing permit issued by the Association, but grazing on Association administered lands in greater numbers, or at times or places other than authorized in the grazing permit, Grazing Agreement, Annual Operating Instructions, or authorized on the Bill for Collection.

28. "Unauthorized Livestock" means any livestock that is not authorized by permit to graze upon Association administered lands and which is not related to use authorized by a grazing permit.

29. "Unauthorized Use Rate" means the grazing fee charged for excess or unauthorized livestock use.

B. **PURPOSE.** The purpose of this Agreement is to:

1. Authorize the Association to administer the permitted livestock grazing activities of its members on the NFS lands covered by this Agreement consistent with applicable federal law, regulation, Forest Service policies and procedures, and direction in the Forest or Grassland Plan and AMPs.

2. Extend sound practices of rangeland resource management through demonstration and by working with other federal, state, local, or private landowners to administer livestock grazing activities consistently across rangelands regardless of the ownerships involved.

C. THE PARTIES JOINTLY AGREE THAT:

1. Securing sound resource management on all lands covered by this Agreement is the principal objective of this Agreement.

2. They will cooperate with each other and assist individuals, local, State, and Federal agencies to demonstrate sound and practical principles of land use and resource management on the lands covered by this Agreement.

3. The vegetation resource will be developed to its reasonable sustainable potential to provide for all values and uses that include, but are not limited to, livestock grazing.

4. Livestock grazing is one of the many recognized multiple uses that occurs on the NFS lands covered by this Agreement.

5. Managing for sustainable rangelands provides for stability of family ranches and the communities of which they are a part. The presence of working ranches in the West is necessary to maintain the open spaces that are needed for vistas, recreation opportunities and to retain habitat and migration corridors for native species.

6. All of the multiple use activities occurring on the NFS lands covered by this Agreement must be carried out consistent with the applicable laws and applicable regulations governing the occupancy and use of NFS lands.

7. The Forest Service's authority to permit other uses or activities besides livestock grazing on the NFS lands covered by this Agreement is not affected by this Agreement.

8. The Forest Service is responsible for and retains the authority for the administration of grazing and all other uses on NFS lands in accordance with applicable federal law, regulation, Forest Service policies and procedures, and Grassland Plan direction.

9. Through this Agreement, the Forest Service authorizes the Association to administer livestock grazing activities on those NFS lands shown in Exhibit A and described in Exhibit B.

10. By entering into this Agreement, the Association agrees to act as the Forest Service's permittee and agent in all matters pertaining to the grazing permits it issues and the administration of those permits with respect to the administration of livestock grazing on the NFS lands described in Exhibit B. Administration shall be in accordance with applicable federal and state law, regulation, Forest Service policies and procedures, and Grassland Plan direction.

D. **FOREST SERVICE RESPONSIBILITIES.** The Forest Service will:

1. Make available to the Association the NFS lands shown in Exhibit A and described in Exhibit B and the rangeland improvements described in Exhibit D for livestock grazing purposes.

2. Notify the Association of all proposed as well as recent changes in lands and/or improvements included in the agreements and the reasons for the changes.

Although there may be other circumstances, this notification is most often done annually at the beginning of the new fee year because it involves informing the Association of additional improvements constructed during the previous field season, and a listing of NFS lands added or subtracted during the previous year, if and when applicable, usually as a result of a finalized land exchange. The District Ranger can inform the Association by letter, but some Districts use a local form, especially for the annual updates.

As applicable, included with the notice:

1. A revised map of the area included in the Grazing Agreement.
2. A revised listing, by legal or other description, of acreages covered by the agreement.
3. A revised listing of improvements to be maintained by the Association.

3. Determine maximum permitted number of livestock and seasons of use for the NFS lands shown in Exhibit A and described in Exhibit B in accordance with Forest Service policies and procedures.

4. Assist the Association with the determination of maximum permitted number of livestock and seasons of use for the Association controlled lands described in Exhibit C.

5. Notify the Association on or before the 1st day of March of each year of:

   a. Required Land Use Practices (LUPs) for the upcoming season of use and how those LUPs will be considered in the establishment of the grazing fee.

   b. The estimated grazing fee (charged on the head-month basis) to be paid for livestock use on the NFS lands shown in Exhibit A and described in Exhibit B for the upcoming season of use taking into account the estimated costs of approved LUPs on the NFS lands described in Exhibit B.

   c. Additional fees or credits accrued from the past grazing season that were not reflected in the estimated grazing fee paid at the beginning of the season. Such unanticipated fees or credits may include adjustments if the amount of actual grazing use was greater than or less than the originally authorized amount of use (final fee determination).

6. Prepare AMPs in consultation and coordination with the Association and the affected member(s) in compliance with the decisions reached in the NEPA process.

7. Review and approve the Rules of Management (ROM) developed by the Association that are consistent with the terms and conditions of this Agreement. If requested, the Forest Service will act as a resource and assist in the development of the ROM.

8. Perform improvement work, as deemed necessary or desirable, on NFS lands other than those conservation practices that are the responsibility of the Association under this Agreement.

9. Contact the Association, in writing, when situations are found pertaining to livestock grazing on NFS lands that need administrative actions. However, if the Association does not achieve compliance the Forest Service reserves the right (but not the obligation) to take appropriate administrative action or to prosecute any act or omission involving violations of federal law, regulation, or Forest Service policies or procedures pertaining to livestock grazing on NFS lands including, but not limited to, excess and unauthorized use or noncompliance with the terms and conditions of this Agreement or the ROM.

10. Authorize reductions in the annual grazing fee charged for grazing on National Grasslands described in Exhibit B by as much as 75% for approved LUPs in accordance with agency procedure set forth in Chapter 20 of FSH 2209.13 in order to determine the grazing fee due the FS. In the rare case where the District Ranger decides to allow greater than the 75% of the grazing value to be used that year for LUPs the approval and rationale for doing so should be documented in a letter to the Association from the authorized officer.

11. Require the Association to implement conservation practices on Association administered NFS lands that are necessary to properly administer the agreement.

12. Review potential conservation practices and administrative costs necessary to facilitate such practices with the Association. Approve conservation practices that will improve proper livestock use and resource management.

13. Furnish the Association with appropriate technical assistance necessary for implementation of required conservation practices, and provide updated specifications as they become available.

14. Comply with the Freedom of Information Act (FOIA) and other relevant laws and regulations when responding to requests from the public for information pertaining to grazing administered by the Association on NFS lands covered by this Agreement.

15. Audit the Association's records at least once every five years to assure the Association is in compliance with the terms and conditions of this Agreement and the ROM.

16. Agree to review disputes between Association members and the Association regarding the operation of this agreement only after the Association has made a good faith effort to resolve the dispute. Disputes between Association members will only be reviewed after the Association has had the opportunity to resolve the dispute.

17. Consult and cooperate with the Association, when needed, to develop annual operating instructions (AOIs). FS will approve the AOIs that are in accordance with the AMP for the allotment and will meet the objectives of the AMP and Grasslands Plan.

18. Keep the Association informed of applicable NEPA processes concerning the Dakota Prairie Grasslands and rulemaking or major changes in policy processes related to grazing management.

19. Provide civil rights information.

E. ASSOCIATION RESPONSIBILITIES. The Association will:

1. Develop the Rules of Management (ROM), with the assistance of the Forest Service, as needed, to facilitate administration of the livestock grazing activities authorized under this Agreement.

2. Submit the ROM to the Forest Service for review and approval. The ROM becomes a part and condition of the Grazing Agreement upon approval by the Forest Service.

3. Issue Association annual grazing permits for the lands covered by this Agreement for a period not to exceed ten years or the date of expiration of this Agreement, whichever is shorter. The current Association members are listed in Exhibit E. Update Exhibit E annually and provide it to the Forest Service by April 1; if no changes, a letter stating such will suffice.

4. Administer Association annual grazing permits in conformance with applicable federal law, regulation, Forest Service policy and procedure, Dakota Prairie Grasslands Plan and AMP direction, AOIs, and the approved ROM.

5. Reserve the option to participate in the NEPA process concerning any decision related to the Dakota Prairie Grasslands.

6. Consult and cooperate with the Forest Service regarding the development of AMPs for the lands covered by this Agreement and implement the approved AMPs.

7. Consult and cooperate with the Forest Service during pasture meetings or other subsequent meetings to discuss annual operating instructions (AOIs) that are in accordance with the AMP for the allotment to meet the objectives of the AMP and Grasslands Plan.

8. Develop AOIs to be submitted to the Forest Service prior to the beginning of the permitted grazing season for review and approval.

9. Regularly monitor compliance of livestock grazing activities authorized under this Agreement to assure they are consistent with direction in the approved AOIs, and the ROM.

10. Strive to integrate Association controlled lands in order to create natural management units and demonstrate sound land management programs and practices.

11. Timely pay all fees due the United States under this Agreement. (Grazing fees may be paid in two installments as provided for in the ROM.)

12. Identify potential conservation practices and administrative costs necessary to facilitate livestock grazing on the Association administered lands covered by this Agreement and submit a list of such land use practices to the Forest Service for review and approval.

13. Implement and construct in a timely manner the required conservation practices approved by the Forest Service.

14. Maintain existing improvements listed in Exhibit D in a timely manner so that they serve their intended purpose and last for their expected lifetime.

15. Submit to the Forest Service by the 28th day of February of each year, completed Certification of Costs of Required Conservation Practices and Actual Administrative Costs forms, for the previous calendar year, with supporting information as may be required by the Forest Service.

16. Promptly investigate allegations of non-compliance of Association annual grazing permit terms and conditions by Association members.

17. Report to the Forest Service all claims of alleged non-compliance and the Association's handling of those claims, including those of excess livestock use.

18. Following the investigation of non-compliance and after a determination that a violation has occurred, take action to suspend or cancel Association annual grazing permits, in whole or in part, where appropriate. Where taken, permit action shall be in cooperation with the Forest Service and be consistent with the applicable policies set forth in R1 Interim Directive and Washington Office Forest Service Handbook 2209.13 at Chapter 10, Section 16.

19. Attempt to resolve disputes between Association members or between an Association member and the Association before requesting assistance from the Forest Service.

20. Authorize Forest Service entry on Association controlled lands to determine whether the livestock grazing activities occurring on the allotments in which these lands are located are consistent with the terms and conditions of this Agreement.

21. Take all reasonable precautions to prevent unauthorized livestock use. Cooperate with the Forest Service in the prosecution or defense as outlined in the ROM.

22. Maintain records consistent with Forest Service Handbook 2209.13 24(6) related to the administration of livestock grazing activities authorized by this Agreement that would otherwise be retained by the Forest Service if it were directly administering livestock grazing through Forest Service term grazing permits.

23. Separate the Association records unrelated to the administration of livestock grazing authorized by this Agreement from those records described above.

24. Make available to the Forest Service upon request the records identified above for inspection and copying. There shall be no deletions or redactions in the records and they shall be provided to the Forest Service free of charge.

25. Promptly forward any Freedom of Information Act (FOIA) request received by the Association to the Forest Service and fully cooperate with the Forest Service in the timely processing of FOIA requests for agency records pertaining to the livestock grazing activities authorized under this Agreement that are in the possession of the Association.

F. ADDITIONAL REQUIREMENTS.

1. Association annual and/or preference grazing permit holders must satisfy, at a minimum, the same applicable eligibility and qualification requirements that apply to the holders of Forest Service grazing permits, subject to the Section 425, Pub. L. 110-161 except as spelled out in the ROM. As stated in Section 425, Pub. L. 110-161, "In fiscal year 2008 and thereafter, the Forest Service shall not change the eligibilty requirements for base property, and livestock ownership as they relate to leasing of base property and shared livestock agreements for grazing permits on the Dakota Prairie Grasslands that were in effect as of July 18, 2005."

2. Association preference grazing permits may be issued for up to ten years but may not extend beyond the expiration date of this Agreement.

3. This Agreement may be immediately terminated or modified by the Forest Service if the use of NFS lands shown in Exhibit A and described in Exhibit B are required for military or national security purposes.

4. This Agreement may be terminated by either party six months after providing written notice to the other party with reasons for wanting to terminate. If the six month period expires between May 1 and November 30, the effective date of the termination will be February 28 of the following year.

5. This Agreement may be amended at any time by mutual consent of the parties or by the Forest Service thirty (30) days after written notice to the Association in order to bring the Agreement into conformance with changes in law, regulation, executive order, development or revision of an allotment management plan, or other management needs.

6. Failure of the Association to promptly inspect and enforce where necessary alleged non-compliance of this Agreement or Association annual grazing permit terms and conditions may lead to action by the Forest Service to suspend or cancel this Agreement.

7. This Agreement may not exceed ten years in length and expires on the 28th day of February 2023, unless terminated as provided for above or cancelled in accordance with applicable federal law or regulations.

8. The permanent improvements on NFS lands identified in Exhibit D are the property of the United States unless specifically designated otherwise (for example a Cooperative Agreement) or authorized by a special use permit.

9. This Agreement is subject to all applicable rules and regulations of the US Secretary of Agriculture and may be suspended or cancelled, in whole or in part, for noncompliance therewith.

10. Any disagreement between the Association and the Forest Service regarding an interpretation of applicable Secretary's rules and regulations, the Forest Service shall use its interpretation. If the interpretation leads to a decision, the Association can then exercise its remedies as described below.

11. Violation of any of the terms and conditions of this Agreement may result in the suspension, cancellation or termination of this Agreement.

12. If the Association disagrees with a decision by the FS, it can pursue remedies, including:

    a. Informal resolution with the authorized officer or as provided in any applicable MOU;
    b. Administrative appeal when available in accordance with agency regulations such as 36 CFR 215 and 36 CFR 251.80;
    c. Mediation when available under 36 CFR 251.103 or any applacable MOU.

    If mediation is requested by the Association use the South Dakota Department of Agriculture Mediation Program when appropriate. Decisions subject to mediation will be those outlined in 36 CFR 251.103 Mediation of term grazing permit disputes.

    Nothing in this Agreement shall constitute a waiver of the Association's rights under federal law, including, but not limited to, the Agriculture Credit and Mediation Act and the Administrative Procedure Act.

13. If an Association member disagrees with an Association decision, the member must first seek review of the decision by the Association and only afterwards request review by the authorized officer. Association members may not appeal Association decisions related to the grazing authorized by this Agreement pursuant to 36 CFR 251.

14. Association members may not appeal Forest Service decisions related to the grazing authorized by this Agreement pursuant to 36 CFR 251.

15. No member of Congress shall be admitted to any share or part of this Agreement or to any benefit that may arise, unless it be made with a corporation for its general benefit.

16. The Association shall comply with the non-discrimination provisions of Title VI of the Civil Rights Act, applicable USDA regulations under Title VI, and Executive Order No. 11246. During the term and performance of the Agreement:

a. The Association shall not discriminate against any persons or organizations on the basis of race, color, national origin, gender (in educational or training programs or activities), age, or disability and shall comply with the provisions of Title VI of the Civil Rights Act of 1964, as amended, Section 504 of the Rehabilitation Act of 1973, as amended, Title IX of the Education Amendments Act of 1972, and the Age Discrimination Act of 1975.
b. The Association shall include and require compliance with the above nondiscrimination provisions in any third party agreement made with respect to performance of this grazing agreement.
c. The Forest Service shall have the right to enforce the foregoing nondiscrimination provisions by requesting voluntary compliance, suit for specific performance, cancellation of the Agreement under 36 C.F.R. 222.4(b), or by any other remedy available under the laws of the United States or the State in which the determination of a breach or violation has been made.

17. The Association shall hold the United States harmless from all loss, expense, liability, or other obligation of any nature arising out of any accident or occurrence causing injury to persons or property and due directly or indirectly to the use and management of the National Forest System lands and improvements.

18. The Association will be given first priority for receipt of new Grazing Agreement at the end of the term period provided the Association is in compliance with the terms and conditions of the expiring Grazing Agreement.

19. The Association may apply for renewal of this Agreement in accordance with the Administrative Procedure Act, (5 USC 558(c)) and pursuant to any other applicable law providing for renewal of grazing permits and agreements.

20. Exhibits to this Agreement include:

**Exhibit A.** Map of All Lands Covered by this Agreement
**Exhibit B.** List of National Forest System Lands Covered by this Agreement
**Exhibit C.** List of State, Private, and Other Lands Covered by this Agreement
**Exhibit D.** List of Improvements Owned by the Forest Service
**Exhibit E.** Association Membership List (membership list will be obtained from the AOIs on an annual basis)
**Exhibit F.** List of Preference HMs for National Forest System Lands, State, Private, and Other Lands on Allotments Covered by this Agreement

GRAND RIVER COOPERATIVE GRAZING ASSOCIATION
RULES OF MANAGEMENT
As of February 26, 2013

# RULES OF MANAGEMENT

As provided in the grazing agreement, Section A, Documents - #11; Section E, Clause's #1 and #2, the Grand River Cooperative Grazing Association (the Association), shall develop rules of management (ROM) for use by the Board in administering the grazing program on all National Grassland lands controlled by the Association and submit the ROM to the Forest Service for review and approval.

The Association shall devlop Rules of Management simultaneously with development of the grazing agreement and use Chapter 10, 20, and 30 of Forest Service 2209.13 as a guide.

Rules of Management is the set of policies, procedures, and practices developed by the Association for their use in administering livestock grazing to its members on the lands covered by this agreement and approved by the Forest Service.

## I. TERMS DEFINED

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| Allotment | Means an area of land, designated on a map, with included NFS and /or non-NFS lands comprising a logical management unit for livestock grazing and management. |
| Allotment Management Plan (AMP) | A document that specifies the program of action designated to reach a given set of objectives. It is prepared in consultation with the Association and the Association Member(s) involved, prescribes the manner in and extent to which livestock operations will be conducted in order to meet the multiple-use, sustained yield, economic, and other needs and objectives as determined for the lands involved; describing the type, location, ownership, and general specifications for the range improvements in place or to be installed and maintained on the lands to meet the livestock grazing and other objectives of land management; and contains such other provisions relating to livestock grazing and other objectives as may be prescribed by the Chief, Forest Service, consistent with applicable law. (36 CFR 222.1(2). The AMP is based on the Decision Notice for the Environmental Assessment (EA) or Record of Decision for the Environmental Impact Statement (EIS). |
| Annual Operating Instructions (AOIs) | Detailed, Forest Service approved, instructions for livestock grazing administration to be implemented in a given year on a given allotment developed by the Association. AOIs are based on the AMP and may address the number of livestock permitted to graze, season of use, responsibilities for improvement construction or maintenance, and pasture rotation schedules. |
| Animal Unit (AU) | Considered to be one mature (1000-pound) cow with or without a calf, or the equivalent based upon average forage consumption of 26 pounds of dry matter per day. Five sheep or goats are the general equivalent of one cow. |

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| Animal Unit Month (AUM) | refers to the amount of feed or forage required by an animal-unit for one month.<br>The following table shows the conversion factor for different classes of livestock: |

| | |
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| Cow | 1.0 AUM |
| Cow/nursing calf | 1.0 AUM |
| Yearling | 0.70 AUM |
| Bull | 1.5 AUMs |
| Horse | 1.5 AUMs |
| Sheep/goat | 0.2 AUM |
| Ewe/lamb Nanny/kid | 0.2 AUM |

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| Association | Means the Grand River Cooperative Grazing Association and all of its members, represented by the Board of Directors. |
| Association Administered Lands | All lands administered by the Association for livestock use and rangeland resources including, but not limited to, private, state, other agency, and National Forest System lands. |
| Association Controlled Lands | Means private or state lands leased, owned, or waved to the Association, by a member or a non-member, for management purposes. |
| Association Member | Means a member of the Grand River Cooperative Grazing Association. |
| Base Property | Property to which a grazing preference/privilege is attached. |
| Board | Board of Directors of the Grand River Cooperative Grazing Association. |
| Commensurability | Feed and forage necessary to maintain the grazing preference during the part of the year not included in the established summer grazing period on National Grasslands. |
| Common Allotment | An allotment where two or more operators are permitted to graze livestock, and where such livestock are intermingled. |
| Dependency | A livestock grazing operation shall be considered dependent on the Association for summer grazing privileges to the extent that such unit is unable to provide grazing during the established summer grazing period for the applicant's livestock and for which the headquarters unit is commensurate. |
| Excess Livestock | Any livestock owned or controlled by the holder of a grazing permit issued by the Association, but grazing on Association administered lands in greater numbers, or at times or places other than authorized in the grazing permit, Grazing Agreement, or authorized on the Bill for Collection. |

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|---|---|
| Head Month (HM) | Term used for billing purposes.<br>Head month is one month's use and occupancy of the rangeland by one weaned or adult cow (with or without calf), bull, steer, heifer, horse, burro, mule, bison, 5 ewes (with or without lambs), 5 rams, or 5 goats.<br><br>Animals not more than six months old on the first day of May which are a natural increase of the permitted livestock will not be counted. |
| Headquarters | Property within or adjacent to the Association boundaries which includes shelter, water and feed used for the wintering of livestock grazed on Association administered lands. |
| Grazing Permit | Annual authorization to graze livestock and a record of stocking and fees.<br><br>Class A- means a term permit which maintains equity in the Association and is based on preference numbers.<br><br>Temporary- means a permit issued for numbers exceeding preference numbers or Class A numbers.<br><br>Fill-in- means numbers reallocated on an annual basis to members in a pasture based on approved non-use for personal convenience within that allotment. |
| Grazing Preference | Numbers originally issued based on commensurability, dependency, and priority of use and is also the basis for determining equity in the Association.<br><br>All grazing preferences were established on a twelve month basis with eight months in common grazing area, two months of winter grazing and two months of winter feed on headquarters. Deviation from this formula has been and is accepted because of management, but the year round operation on commensurate and base property does not change unless authorized by the Board. |
| Grazing Privilege | Authorization to graze permitted livestock on Association Administered lands. |
| Non-use of Grazing Permit | Stocking below grazing permit.<br><br>(1) Absence of grazing use on current year's forage production.<br>(2) Lack of exercise, temporarily, of a grazing privilege on Association administered lands.<br>(3) An authorization to refrain, temporarily, from placing livestock on public ranges without loss of preference for future consideration. |

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| Pasture/ Pasture Complex | Consists of like numbered allotments and would also include private allotments bordering or in the vicinity of the numbered allotments; and includes all allotments in Corson and Perkins counties. |
| Permitted Numbers | Number of HM derived through current NEPA decisions which are implemented through AMPs. |
| Private Allotments | An allotment with a single permit for a grazing term which may include National Grasslands. |
| Stocking Rate (SR) | Stocking Rate will be based on the following table: |

| Class | Unit |
|---|---|
| Cow (*Animals not more than six months old on the first day of May which are a natural increase of the permitted livestock will not be counted.*) | 1 |
| One Bull | 1.5 |
| One horse | 1.5 |
| Five sheep | 1 |
| Yearling animal less than 18 months of age on May 1 | .7 |

| | |
|---|---|
| Unauthorized Livestock | Any livestock that is not authorized by permit to graze upon Association administered lands and which is not related to use authorized by a grazing permit. |
| Upper Limit | Governs the size of a term or temporary permit that may be held by a person, partnership, or corporation. |

## II. DISTRIBUTION OF GRAZING PRIVILEGES

The Association shall make as equitable a distribution of stock on each range allotment as possible so that each member's stock will have a fair share of the available grazing. This will be consistent with good land management practices and give full consideration to protection of the land from erosion and maximum production of desirable forage on a sustained yield basis. Each pasture or allotment is considered an independent unit and will stand on its own merit. Adjustments in use on any one unit not affect any other unit.

Any change in distribution of grazing privileges on each range allotment requires approval by the Forest Service.

## III. MEMBERSHIP

Eligibility

Eligibility for membership includes any person, partnership, association, corporation, or legally authorized agent of either thereof, owning or leasing forage producing land within or contiguous to the boundaries of the grazing district (SDCL 40-23-12) maintained and operated by this corporation may become a member upon payment of the membership fee and upon compliance with the bylaws and with the regulations and limitations determined by the Board and by the terms of the lease of leased land within the area.

When any member shall dispose of all or a part of the lands owned or leased by the member so that another individual or other individuals shall, by the purchase and ownership or lease of such lands, acquire right to membership in this grazing district, then the rights and interest in the grazing district involved shall be determined by the bylaws of the Association, the Rules of Management, and the Grazing Agreement between the Association and the Forest Service.

Qualified Applicant

Qualified applicant means any citizen of the United States or any person who has filed a declaration of intention to become a citizen of the United States, any group, association, or corporation, eighty percent of whose capital stock is owned by persons meeting the preceding citizenship requirements, and which is authorized to do business in the State of South Dakota, provided the member is engaged in the raising of livestock wholly within the boundaries of the Association on a unit operated as headquarters during the base period established for the project and has requested grazing privileges from the Association. Applicants whose headquarters are situated outside the Association boundary will be considered for grazing preferences and membership only to the extent they are able to prove priority of use to Association administered land, as set forth in Article VIII, Section 1, (d), of these Bylaws (By-Laws, Article VIII, Section 1, (a)).

Applicant must own or lease base property used for a year around operation of livestock to be grazed under permit on Association Administered lands.

Applicant must furnish proof of control of base property with a notarized copy of a lease, copy of deed, contract for deed, or other legal authorization to use the base property

Applicant must own or have an equitable share of or operational interest in livestock permitted to graze on Association Administered lands.

A membership may involve more than one individual, however, partnerships or husband, wife, and minor children are a membership entity regardless of the legal interest of each in livestock or designated base property (refer to Section VII – Ownership & Stocking of Animals)

A minor who is the head of a family and its principal means of support will be considered as having, for all practical purposes the same status as an applicant of the Association legal age of eighteen (18).

When minors of any age inherit base property or share in an organization with a grazing preference, they may be considered as having established a legal entity for themselves separate and apart from that of their parents or guardian. The grazing preference may be carried in the name of the parents, guardian, trustee or partnership until such time as the minor becomes of legal age or the guardianship or trust is dissolved. The grazing preference so acquired will not be charged against the upper limit of the parents or guardian.

Application Procedure

Applications for membership and grazing preference shall be on forms furnished by the Association. The applications shall specify the basis for membership such as type of control of base property.

Applicant must be informed of the Association rules and regulations, as well as the pertinent information regarding the grazing allotment and headquarters.

Recommendation for action on the application for membership will be made by pasture director(s) of the pasture.

The Board shall act on the application. The applicant will be informed of the Board's decision in writing.

## IV. BASE PROPERTY

Base property is designated property on which a grazing preference was established as original members came into the Association. Base property is identified in the Association records on the original applications and consisted of deeded acres.

Loss of control of base property or any part of the base property will result in a proportionate loss of grazing preference. This required reduction will be calculated on the percent of base property lost.

If the base property is put to uses other than to support a livestock grazing operation, the grazing preference will be adjusted according to these Rules of Management.

The Board may permit substitution of base property with lands acquired through exchange with the FS for lands on which the permit was originally based in the event that the land exchange provides for a more efficient livestock operation, if lands acquired are immediately equal or greater carrying capacity, and, if the headquarters facilities are not involved in the exchange.

Transfer of Base Property

When base property is sold, the grazing preference reverts to the Association for allocation by the Board to the new owner in accordance with the rules of management. When base property is leased the grazing preference reverts to the Association for allocation by the Board to the lessee in accordance with the rules of management.

Sub-division of existing base property will be examined by the Board to establish that the sub-division will result in a bona fide livestock grazing operation. Recommendation for action on the application will be made by the pasture or allotment members concerned and/or directors of the pasture. The Board shall act on the application. The applicant will be informed of the Board's decision.

If the new owner/lessee of base property does not apply for the grazing preference within 180 days from closing, the grazing preference will be considered relinquished. The responsibility for applying shall fall on the new owner/ lessee, but the Board will do its due diligence in notifying the individual of the opportunity to apply.

Acquirement of Base Property by a Lending Agency

In the event a lending agency accepts deed or acquires ownership of the base property, it is understood that such ownership is not for the purpose of operation, but incidental to its principal lending function. When control of base property passes from an Association member to the lending agency, the membership and grazing preference or proportionate part thereof which is based upon such property will immediately be held in trust for the lending agency for such temporary period as the property is operated directly by the lending agency.

During such temporary period, the grazing preference, which would ordinarily accrue to the preference holder, will be allocated to the lending agency. When the lending agency makes disposition of the property by sale or lease, the membership and grazing preference formerly based thereon will be allocated to the new operator in so far as such allocation is consistent with the application of the upper limit policy and provided he/she otherwise meets the requirements of a qualified applicant as defined by the Rules of Management.

## V. COMMENSURABILITY

A farm or ranch unit shall be commensurate for the number of animal units for which it can, under sound use, normally provide feed and forage during that portion of the year not included in the established summer grazing period from lands owned or leased within or adjacent to the boundaries of the Association. Commensurate property shall include a ranch headquarters of shelter, water and feed and shall be used for the wintering of livestock grazed on Association administered lands.

Subdivision of existing commensurate property will be examined by the Board to establish that the subdivision will result in a bona fide livestock grazing operation.

Commensurability table based on stocking rate: *

In calculating the commensurate rating of the privately-owned or leased lands used for wintering purposes, the following rating will be applied:

| Grazing acres | AUMs<br>Carrying capacity of pasture unit |
|---|---|
| 1 acre irrigated alfalfa | 8 |
| 1 acre bottom land subject to flooding | 6 |
| 1 acre native hay | 2 |
| 1 acre cultivated dry-land forage | 5 |
| 20 acres crop aftermath | 1 |
| Cash crops | 0 |

*Morrison's Feeds & Feeding ratings used by Association since 1949.
1 acre feed crops (corn, sorghums, oats, barley) – 2.5 AUM
1 acre crested wheatgrass or upland native hay – 1 AUM
1 acre hay, creek-flooded or sub-irrigated – 3 AUM
3 acres grassland for winter grazing – 1 AUM
10 acres crop aftermath hay – 1.5 AUM
1 acre alfalfa hay – 1.5 AUM

No commensurate rating will be given for feed crops which are fed to other than the operator's permitted livestock or sold.

At least two months of winter feed and forage requirements necessary for each animal unit should be in the form of stacked food.

## VI. MEMBER RESPONSIBILITIES

Members shall:

Comply with the By-laws, Rules of Management, policies and allotment management plans of the Association now in effect or which may hereafter be adopted.

Do all in their power independently and voluntarily to prevent fire on Association Administered lands or other lands within the grazing area, and shall require their employees to do likewise. They may take initial actions, within their capabilities, and in a safe and prudent manner, to prevent a wildfire from becoming larger and more complex until arrival of the local fire department or Forest Service personnel.

Assume responsibility for the loss or injury of, or damages by permitted livestock, except as provided by the

State Uniform Limited Liability Company Act South Dakota Codified Laws, Chapter 47-34A.

Not obstruct the Forest Service in the administration and management of the National Grasslands.

Exercise diligence in preventing, detecting, and reporting unauthorized livestock use on Association Administered lands.

Report promptly to the Association office any change of commensurability or base property.

Cooperate with the Association and the Forest Service in counting livestock.

Not obstruct the general public in the lawful use of the National Grasslands.

Conform to the Association's Anti-Discrimination and Sexual Harassment Policy described as follows:

**The Association's Anti-Discrimination & Sexual Harassment Policy**

**Anti-Discrimination Policy**

The Grand River Cooperative Grazing Association (Association) is an equal opportunity employer. The Association will not discriminate in employment, recruitment, and advertisements for employment, compensation, termination, upgrading, promotions, and other conditions of employment against any employee or job applicant on the basis of race, creed color, national origin, or sex.

**Sexual Harassment Policy**

I.

Sexual harassment is unacceptable and shall not be tolerated. No member of the District may sexually harass another. Any employee or Association Board of Directors (Board) member will be subject to disciplinary action for violation of this policy.

If anyone feels that she/he is being discriminated against on the basis of sex, she/he or their personal representative should feel free to contact the President or Vice-President or any of the Board.

II.

Sexual harassment is herein defined as unwelcome sexual advances, requests for sexual favors and other verbal or physical misconduct of asexual nature including the following:

- Submission to such conduct in made either explicitly or implicitly a term or condition of an individual's employment or grazing privileges, and/or
- Submission to or rejection of such conduct by an individual is used as the basis for academic or employment decisions affecting such individuals, and/or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates and intimidating, hostile or offensive environment.

III.

Sexual harassment is illegal under both South Dakota and Federal law. In some cases, it may also be liable to prosecution under criminal statutory law. The Board has established a non-retaliatory grievance procedure for

handling sexual harassments complaints. All reported incidents of sexual harassment will be promptly and thoroughly investigated and all substantial acts of sexual harassment will result in immediate and appropriate corrective action, including sanctions.

Confidentially consistent with due process will be maintained.

IV.

The employees and Board members of the District are responsible for maintaining an environment free from sexual harassment. It is the obligation of each employee and Board member to become fully informed of the provisions of this policy and to assure individual compliance. To assure dissemination of the policy, copies will be distributed to all employees and Board members. Copies will also be posted at appropriate locations throughout the Association and the policy will be announced in appropriate Association publications and at the next Annual Meeting of the members.

V.

Any employee who feels that he or she has been subject to sexual harassment on the work place should report the incident immediately to the President or Vice-President of Association. If either of them is involved in the activity, the violation should be reported to the Secretary/Treasurer of the Association or to Association's attorney.

## VII. GRAZING PREFERENCE AND PERMITS

GRAZING PREFERENCE

The maximum grazing preference upper limit shall be based on 1800 head months for cow/calf operations. This includes any grazing privileges granted by any other association. (300 cow/calf pairs x 6 months=1800 cow/calf pair HMs).

Members who own or control grazing lands in common allotments may pool such lands for common grazing, but its grazing capacity will not count toward the maximum grazing preference of the member and will be considered as self-furnished range.

Grazing Preference held by Estates

Not more than three years will be allowed for settlement of estates during which time strict compliance with membership qualifications may not be required. If more than three years are required to settle the estate, the Board shall review the continuation of the grazing preference.

During the three year period, no permit will be issued except to a legally appointed administrator, executor or personal representative of the estate who has appeared at the Association office and given proof of authority. This person may designate a representative who will do business with the Association on behalf of the estate.

A copy of the Final Decree of Distribution will be filed at the Association office.

Transfer in Ownership or Control of Commensurate Property

If the new owner or controller operates no other farm or ranch within or adjacent to the Association boundaries, he/she shall be eligible for reallocation of the preferences formerly based thereon, up to the maximum limit.

If the new owner or controller operates a farm or ranch within or adjacent to the Association boundaries and the newly acquired property and the original farm or ranch will be operated by the new owner or controller, he/she may be granted the preference formerly based upon the acquired dependent commensurate property insofar as it is needed in establishing a total operation which will not exceed the upper limit.

However, if the newly acquired unit is to be operated by another party under a bona fide lease contract with terms similar to those in common practice in the area, the lessee of the property may be granted the preference as provided above if he/she otherwise qualifies under Leasing of Base Property.

Leasing of Base Property

The basic intent of leasing to provide the opportunity for the lessee to eventually become a ranch owner operating in the local area, utilizing principles learned on the National Grassland.

Under the authority granted in the Bylaws and Rules of Management, the Board has full control of all leases and permits.

Grazing permits are tied directly to the base property and not the individual member. Upon leasing of the base property and headquarters of operator, the grazing permit is relinquished to the Board who can reissue the permit to the lessee. Grazing privileges cannot be subleased through the leasing of the base property.

> Surrendering the permit in no way jeopardizes the member's permit. If a member commences operating the headquarters again, or sells the headquarters unit, the Board can reissue the permit to the member or to the new owner upon an approved Application for Membership.

Member operators have the option to winter either on their own headquarters or lease headquarters, or both, provided leased headquarters remain commensured for permitted numbers.

> A member lessee must winter permitted livestock on the leased headquarters for a minimum of four months.

Based on reasonable conditions, all leases must show intent to maintain an existing livestock operation or start a new operator in the livestock business.

Leases shall be for a three year minimum, and are subject to review by the Board at least every three years. The Board may consider leases for a shorter time for special needs. The lease must be for private lands only and cannot purport to assign or transfer a grazing preference. These policies are subject to revision as the Board deems necessary.

All leases must be in written form, including the following:

- Land descriptions
- Terms of the lease, including the price and length of time (a minimum of three years is encouraged).
- The following clauses:
  - The lessor and the lessee hereby acknowledge that the Grand River Cooperative Grazing Association may monitor grazing use of the base property included in this lease to assure that commensurability is maintained and that stocking rates and management do not damage the rangeland.
  - The lessor and the lessee jointly acknowledge and agree that this lease is for privately-owned property only and that the grazing permit on the National Grasslands associated with this

base property is waived to the Grand River Cooperative Grazing Association. Such grazing permit may be issued to the lessee for the duration of this lease provided the lease is approved by the Grand River Cooperative Grazing Association and issuance of the permit is authorized by the Board.

- In the event a grazing permit is issued to the lessee, said lessee agrees to comply with all Grand River Cooperative Grazing Association Rules of Management and to abide by any approved allotment management plans and annual operating instructions in effect on the grazing allotments involved.
- Notarization of the signatures of all parties involved, including the dating of the document.

Leases must contain a statement that lessee will be subject to Association control of base property to assure that stocking rates and overall management maintains commensurability and provides for development and retention of healthy range conditions which demonstrate good grasslands agriculture. Lease agreements will make the lessee subject to all Association Rules and Regulations including the compliance with any approved allotment management plan and annual operating instructions.

All leases have to be in Association Office by March 1st with appropriate documentation.

Upon termination of the lease, the base property owner, upon application, shall again be issued the grazing preference provided the necessary requirements of the Association are met.

Adjustment of Grazing Preference

Increase in a member's grazing preference shall be governed by the Association upper limit. The member must be commensurate for any increase and the increase must be documented in the AMP or amendment to the AMP and by Board action. Any member shall be entitled to retain his/her preference permit so long as he retains control of the base property upon which such permit is based. A member with a total operating unit less than the Association upper limit may increase his/her total operating unit within the area to the maximum limit but not beyond.

Decrease in a member's grazing preference must be documented through the AMP or AMP amendment, or by Board action. Reductions of grazing preference will be made if a member's base property ceases to be commensurate for the full preference or if the member loses control of any part of the base property.

When the Association releases control of a tract of land in the common grazing area, a new lessee or owner may utilize the land not subject to the Association regulations provided the tract is fenced out of the common grazing area. If the owner or lessee is a member of the Association, the grazing preference will be reduced proportionately.

Before any specific action is taken by the Board to adjust a member's grazing preference, the member shall be notified in writing of the proposed change and given the opportunity to appear and be heard by the Board. If the member's grazing preference is based on leased or mortgaged headquarters, no action which would adversely affect the grazing preference will be taken by the Board until the owner of the headquarters property and recorded mortgagor have been notified and given an opportunity to safeguard their interest in having the grazing preference maintained. Within thirty (30) days of the said meeting, the member shall be notified in writing of the change, if any, in the preference of his/her livestock grazing operation.

Relinquished or Underutilized Permitted Numbers

Distribution of relinquished or underutilized permitted numbers shall be governed by the following priorities:

- First consideration will be given to the need for range protection as determined by the Association in consultation with the Forest Service.
- Second consideration will be given on a pro rata basis to members in the allotment whose permitted numbers have been reduced for range protection. Member permits have priority.
- Third consideration will be given to members in the allotment where the relinquished or underutilized permitted numbers was located, provided they are commensurate for the increase and are within the upper limit. If this consideration is selected by the Board, all allotment members will be notified of the opportunity. Applications must be made by interested members and commensurability shown. The relinquished permitted numbers would be divided equally to those who apply and are eligible. Member permits have priority.
- Fourth consideration will be given to members in the pasture complex where the relinquished or underutilized permitted numbers are located, provided they are commensurate for the increase and are within the upper limit. If this consideration is selected by the Board, all allotment members will be notified of the opportunity. Applications must be made by interested members and commensurability shown. The relinquished permitted numbers would be divided equally to those who apply and are eligible. Member permits have priority. The permitted numbers would be prorated based on preference, commensurability, and upper limit (Pasture Complex Identification Sheet).
- Fifth consideration will be given to members outside the Pasture Complex, but within the Association where the relinquished or underutilized permitted numbers are located, provided they are commensurate for the increase and are within the upper limit. If this consideration is selected by the Board, all allotment members will be notified of the opportunity. Applications must be made by interested members and commensurability shown. The relinquished permitted numbers would be divided equally to those who apply and are eligible. Member permits have priority. The permitted numbers would be prorated based on preference, commensurability, and upper limit.

- Sixth consideration will be given to non-members within the Association boundaries where the relinquished or underutilized permitted numbers are located. Applicants must be eligible for membership under Article VIII of the Bylaws of the Association. Applicant would qualify for temporary fill-in permits only.
  All application forms must be returned to applicants, noting intent to accept or reject, within a two week period.

<u>Suspension or Cancellation of Grazing Permit (Grazing Agreement, Section E; Clause 18)</u>

Suspension and cancellation guidelines are to be employed when informal attempts to resolve the non-compliance situation have not been successful. The first opportunity to remedy occurs when the non-compliance situation is determined and documented and the member is contacted by phone or in person and provided information regarding the noncompliance and instructions for resolution. These informal discussions are to be documented. Normally it is only when the informal attempts at resolution are unsuccessful that the actions will move to the suspension and cancellation guidelines. The guidance below generally assumes that informal resolution has not been successful.

The guideline objectives are:

1. To obtain consistency on administrative actions taken on non-compliance with the terms and conditions of the grazing permit.
2. To provide a firm but fair approach that will encourage compliance.

The annual grazing permit of a member may be suspended or canceled for any of the following reasons:

- Failure to comply with the By-laws, Rules of Management, Policies of the Association, the terms of the annual grazing permit, or AMP of the allotment or headquarters.
- Failure to report any changes in commensurability and base property.
- Failure to furnish the required number of bulls for the established season as set by the local pasture or allotment, or by the Rules of Management whichever is applicable.
- Deviation from the permit, including, but not limited to, excess numbers and exceeding the season specified in the permit.
- Failure to comply with the Rules that all female livestock entering the area administered by the Association must be calf-hood vaccinated for brucellosis and meet all other state health requirements.

As directed by the Board because of loss of vegetation due to drought, fire, or some other act of God, or withdrawal of any lands from Association Administered lands.

Any other specific cases included in the Rules of Management, but not listed above.

Grazing privileges that have been suspended or canceled may be restored at the discretion of the Board. All penalties which occur for unforeseen circumstances or hardships are subject to relief from the rules if seen so by the Board.

GRAZING PERMITS

Preference Grazing Permits

A Grazing Permit is tied directly to the base property and not an individual member. Surrendering the permit to the control of the Association in no way jeopardized the permit. If a member sells the base property, the new owner will be issued the preference upon an approved Application for Membership (see Application procedure, in Section IV. Membership.)

If a member commences operating the base property again, the permit will be re-issued through the following process.

1. Upon the decision of a member to re-establish livestock operation in order to fill the allotment, re-application must be made to regain the permit.
2. The member must appear in person, before the Board, with written Application and intent.
3. Permit will be re-granted providing the regulations of the By-Laws and Grazing Agreement are met.

Annual Grazing Permits

Permits for grazing of livestock on the Association administered lands will be issued annually by the Association.

Annual permits, specifying brands on the permitted livestock, will be issued when the member pays their grazing bill. Billing is sent out in April and due 10 days prior to the turn on date. Credit will be allowed for

changes in stocking or season and applied to the next years grazing bill.

Permits will be based upon proper use of the range resources and commensurability of the headquarters.

Grazing permits may be issued to qualified members up to but not exceeding their preference numbers. Numbers above their preference will be issued as temporary numbers.

Temporary Permits

Temporary permits may be issued only after review and agreement by the Association and Forest Service.

Temporary permits may be issued to members and non-members on an annual basis but will not be the basis for establishment of grazing preferences or permanent increase of an established grazing preference.

Temporary permits may be granted in excess of the upper limit and/or preference based on increased grazing capacity resulting from reseeding or other range improvements which are beneficial to the range, and as long as these continue to be effective.

Temporary permits on headquarters, where NFS lands are fenced in with the headquarters, may be granted if the range condition of the NFS lands, as mutually agreed upon by the Forest Service and the Association, demonstrates good grassland condition. There may be other NFS land parcels on the headquarters that are not in approved condition. If the condition and trend of the NFS land deteriorates as a result of the temporary increased use, it will automatically result in total non-use of the NFS land parcel until the range is returned to satisfactory condition. The fee shall be based on the percentage of NFS lands listed on the permit times the total head months to be grazed times the current annual rate.

Permit for temporary grazing must be on form provided by the Association and must indicate the kind and number of animals, the season of use, location of grazing area, and any other information requested by the Association. On headquarters under lease, the application must show concurrence of the landowner.

Temporary permits in common grazing areas may be granted if there is surplus forage remaining after meeting protection needs and restoring permits previously reduced for range protection. Such permits will be issued on a pro rata basis of the member's common dependency.

When a member owns, purchases or leases lands in the common grazing area which are not administered by the Association or its members, the member shall be entitled to the Association established stocking rate of the lands on a temporary permit.

Other temporary permits may be issued at the discretion of the Board based on the stocking rate.

Adjustments in Annual Authorized Numbers

Annual adjustment of stocking rates will be recommended by the Association. Actual annual stocking will be determined between the Forest Service and Association and must be consistent with applicable NEPA decisions. The amount of actual forage use, up to 50%, on the allotment over a period of years will be considered in this determination.

If a mutually agreeable stocking rate cannot be determined, the Association Natural Resources Committee will review the records and the range on the allotment and make recommendations to the Board. The Board may call in qualified range specialists for further evaluation. If a mutually agreeable stocking rate cannot be decided, if requested by the Association, the Forest Service will use the South Dakota Department of

Agriculture to facilitate in negotiation. If after facilitation, a stocking rate still cannot be agreed upon, then the Forest Service will make the decision.

Increased grazing capacity resulting from improved management, improvements in range conditions from reseeding, or other range improvement work will be recognized as belonging to the members of the allotment showing the increase, provided that permits shall be issued and charges made at the current grazing fee rate for the stock so permitted. Determination of grazing capacity shall be by mutual agreement between the Association and the Forest Service.

Increased grazing capacity will be recognized as belonging to the allotment. The increased capacity will be distributed among the users of that unit where preference had been reduced for protection and who are using the unit at the time of restoration.

Use of increased capacity may consist of increased forage for existing numbers of animals, increase in permitted animals, or increased length of season.

Permitting greater numbers for a shorter season is an allotment decision under an AMP or AOI.

When the total amount of available forage on an allotment necessitates a reduction in the total numbers to be grazed, temporary permits issued to utilize excess forage will be first to be reduced or eliminated. If elimination of all temporary permits issued to utilize excess forage is insufficient to accomplish the required reduction, annual permits will be reduced on a pro rata basis until the necessary reduction is made. Reduction may be made by either a shorter season or pro rata cut in numbers, or both.

In an emergency situation such as loss of summer range due to any disaster, animal units may be distributed through the Association administered land as determined by the Board, in consultation with the Forest Service and allotment or members concerned.

Non-Use of Grazing Permits

Nonuse for 10 percent or less of a preference need not be requested and will not reduce the preference.

Non-use of grazing permits may be taken on an annual basis for range protection or personal convenience.

Any planned non-use of annual permit numbers must be requested prior to March 1st or at the spring pasture meetings, whichever is later. Failure to do so may result in the member being liable for the current year's grazing fees.

Applications for Nonuse will be in Writing.

When non-use is granted within common areas, the member to whom it is granted shall not be liable for grazing fees in the amount of the non-use permitted. The member granted non-use will continue to share pro rata cost of permanent improvements and annual maintenance costs on the full dependency in common.

Non-use for range protection may be approved for a period of five (5) consecutive years. Such non-use will be covered by a written Memorandum of Understanding between the member, the Association and the Forest Service.

Non-use for personal convenience cannot exceed four consecutive years. Nonuse on the fourth year will require Board and Forest Service approval. This means that at least ninety (90) percent of grazing permitted numbers must be stocked one year in five. Except under special circumstances, non-use over ten (10) percent of the established grazing permitted numbers for a period in excess of four years will result in the preference being reduced to the number of units grazed in the year in which the least non-use was taken.

The Board and the Forest Service may authorize filling in behind non-use for personal convenience. Notice and priority for filling in behind non-use will be given: (1) to allotment members, (2) to pasture members, (3) to the Association members as a whole, and (4) to non-members who must become a member to have a grazing permit.

Nonuse on account of foreclosure where the member has not waived his/her preference to the Association will be granted for, but not to exceed, one full grazing season following the foreclosure.

Non-use rules will automatically be waived when the Forest Service requests reduced stocking for range protection and on grazing preferences in estate status.

Association Fees Paid to the Forest Service

The grazing year is from May 1 to the following April 30. Payment to the Forest Service will be in two substantially equal HM payments which will be due on April 26 and September 26.

Member Fees Paid to the Association

Members grazing fees are due 10 days before the grazing season starts. A grazing permit will not be issued until all fees have been paid.

Insufficient funds checks do not constitute payment and are liable to the rules of the Association for failure to pay fees prior to the deadline date.

Any Association Administered lands allocated to a member's headquarters for winter grazing or private summer allocation shall be charged at the current Association rate for full carrying capacity, unless otherwise determined by the Board.

Development costs for permanent developments and maintenance of these developments that are for the benefit of a specific allotment or member shall be charged back to the allotment or member. In common grazing allotments, the costs will be pro-rated according to common dependency regardless of the annual stocking rate by the individual member or allotment as a whole.

Annual costs such as salt, range rider, oil, supplemental feed, etc., will not be paid from Association funds. The allotments may assess funds to be deposited in allotment checking accounts which the Association treasurer will disburse and who will keep records of the account.

Grazing Fee Credit

Credit will be allowed for head months (HMs) on which the Association is granted credit. Since this is not a cash credit, but is shown on the following year Forest Service billing, the credit to the member will be posted to his/her account. Cash payment for unused grazing fees will be given to individuals who have leased or sold their headquarters, if their account is paid.

The procedure to receive credit for unused grazing will be as follows:

1. Association will mail a Credit Application form if requested.
2. Each Member will be responsible (not the Association) for filling in the Credit Application, obtaining directors' signature and returning form to the Association by December 15.
3. Credit will be allowed only on the percentage of federal land in common areas at the current Forest Service rate.

## VIII. OWNERSHIP AND STOCKING OF ANIMALS

All livestock permitted on Association Administered lands shall be branded with the owner's registered South Dakota brand. The Association will maintain a brand book or have a brand book computer file showing the kind and location of each owner's brand. Sheep will be satisfactorily marked to identify ownership. (See Association's branding policy for additional information)

Livestock owned by members of the immediate family of the holder of the grazing preference may be grazed under the grazing preference. Numbers permitted to graze under this provision will be limited to not more than fifty (50) percent of the grazing preference. In no case will the permit holder own less than 50 percent of the livestock except as provided for share livestock. The intent is to allow minor children to establish a livestock herd of their own and to eventually acquire a ranch operation in the local area and thereby expand the demonstration and practice of good grassland agriculture. The Association must annually advise the District Ranger of ownership of livestock to be grazed under this provision. Notification will include the number of animals and the brands or other identifying marks to provide for verification of permitted livestock during range inspection.

Other owned livestock will be allowed on privately owned lands, including headquarters, to the carrying capacity of the privately owned lands.

Share Livestock

Share livestock operation may be authorized by the Board. The preference holder may run livestock owned by someone else, other than as provided above, with the provision that the member will manage the livestock and share in the ownership of the offspring of such livestock. Any share agreement must be in writing and approved by the Board. Applicants must appear in person before the Board on or before March 1st, with their Share Agreement. The Agreement will indicate that the livestock are managed by the member on a year around basis and will indicate the percent of the offspring which are to become the property of the member and will carry his/her brand. Livestock permitted under this type of agreement shall consist of females two years old or older which meet all state health requirements, including calf-hood vaccination for brucellosis. This provision is to provide an opportunity for the member to build up their herd and to allow for eventual replacement of share livestock with livestock owned by the member. Share livestock agreements may also be authorized where required as part of a lease agreement. The general intent of share livestock agreements is to provide an opportunity for the member to acquire ownership of their herd over a period of time. No Share Agreement will be approved by the Board with less than 50 percent of offspring to the members. In cases where more than 50 percent of the permitted livestock are under a share livestock agreement, this agreement must provide for gradual replacement of the share livestock with livestock owned by the member. The Association will monitor this intent to be sure ownership of the herd is accruing to the member at a reasonable rate.

Share livestock owners shall not exceed the 1800 HM Upper Limit in aggregate on the Association Administered lands on May 1. Both parties must brand their share of the offspring with their registered South Dakota brands. After approval of the Share Agreement, the livestock must be inspected by the Pasture Director before the permit may be issued and cattle turned on to Association Administered lands.

If a lending agency acquires the livestock of a member, the Association and the lending agency may enter into a temporary grazing agreement for the balance of the current season. The sole purpose of this agreement is to allow the lending agency an orderly disposition of the livestock. This agreement shall not be considered as a violation of the rules of the Association or jeopardize the preference status of the base property.

Yearling Policy

The upper limit rates for yearlings will be based on 300 head divided by 0.7, which equals about 430 head, for a six-month grazing period. The stocking rate formula is a cow/calf AU divided by 0.7, equaling yearling AU. All allotments may qualify for the 0.7 conversion ratio upon the approval of the Pasture membership.

The grazing fee for yearlings will be the same per head as for cow/calf. The Forest Service mandates that a yearling HM be charged the same as a cow/calf HM.

For community allotments, there must be a 100 percent vote of members in that allotment to run yearlings (steers and spayed heifers). If yearling heifers are run, they must furnish the bull. If spayed heifers are run, they will be classified as steers.

All yearling operations must comply with all commensurability policies of the Grazing Agreement- they must also be commensurate on private land. A minimum of 3 months commensurability from private lands is required for yearling operations. Hay and feed must be harvested and not sold below commensurability.

All yearling operations must be declared to the Board by February 1. Yearling operations may be declared in one or more pastures. 100 percent of allotted livestock numbers must be on headquarters on or before March 1.

Compressed grazing seasons will not be allowed for excess of the 430 head upper limit in common pastures.

The Board and the Forest Service have final discretion on all applications.

Bull Policy

Each allotment will decide by ~~simple~~ 2/3 majority, the breed, quality, ratio of bulls to cows, and season of bull use. Each Pasture Member will be allowed only ONE vote on any decisions pertaining to bulls. If no majority is reached, the Board will make the decision.

exception for composite

Only purebred or registered sires of the approved breed will be permitted on Association Administered lands which are grazed by livestock owned by more than one member. They shall conform to the requirements of the Association and shall be furnished in the number and manner prescribed by the Board. Not less than one yearling bull per twenty five (25) cows or one two-year-old or over per thirty-five (35) cows will be permitted in any common grazing area.

A turn-in date between June 1 and June 20 may be set by a two thirds majority vote of the Pasture Membership. It will take a unanimous vote of the Pasture Membership for a turn-in date prior to or following the time frame of June 1 to June 20.

A removal date may be set by a two thirds majority vote of the Pasture Membership which is from 60 days to 90 days following the turn-in date set pursuant to the paragraph above. A removal date may be set which is less than 60 days or more than 90 days following the turn-in date set pursuant to the paragraph above, upon a unanimous vote of the Pasture Membership.

It will take a two thirds majority vote of the Pasture Membership in order to change the breed of bull. Upon a change of breed, that breed must be maintained for a minimum of three (3) years and a member will have a transition period of two years to incorporate the new breed.

Any change for turn-in date, or the breed of bull must meet a winter pasture meeting deadline.

It is mandatory that all bulls be removed by the scheduled removal date. A bull or bulls may be removed up to 7 days prior to removal date without prior approval. Any bulls removed earlier than 7 days must be approved by 2/3 majority vote of the members in that pasture. A breach of this section will result in a $500 penalty fee per bull. This penalty will be automatically assessed and charged to the Member's grazing fee the following year. Any request for a waiver of this penalty must be presented in writing to the Pasture Director prior to the occurrence of a violation. Any two (2) Directors may extend the removal date, however, if in their discretion the request is based upon event(s) beyond the control of the requesting Member including without limitation: weather or illness.

When leasing a bull, the Association office must receive written notification of such and the Owner's brand must be stated. Aside from share cattle, all other bulls must be branded with the Member's brand.

Any Member of a Community Pasture is entitled to make requests for Bull Inspection in a residing pasture; with the expectation such action will be taken.

A standing committee will act on written requests for review of sires. The appraisal will take into consideration the age, pedigree, fertility, quality, condition, birth weight, number of bulls and period of time the bulls have run in the area. The decision of the merit of a bull by the committee will be final.

Animal Health

All female cattle brought onto the Association administered lands and all self-owned replacement female cattle shall have been calf hood vaccinated for brucellosis and shall comply with the State animal health laws.

The Board may refuse to grant grazing preference and/or annual permit to any applicant/member whose herd is infected with any contagious disease. The Board will comply with all SD State laws before re-issuance of grazing preference or annual permit.

Infection of a herd by a contagious disease during the grazing season will be considered by the Board and they may require the removal of infected livestock from the common allotment and the unused portion of the grazing fees may be refunded. If feasible, the local pasture or allotment may provide temporary isolation area for infected livestock. If a member shows up with infected livestock and they infect the rest of the herds in the common allotment, that member will withstand the entire cost for cleanup of the contagious disease for all members' cattle.

## IX. EXCESS or UNAUTHORIZED LIVESTOCK GRAZING USE

Excess Livestock Grazing Use

Any member grazing livestock in excess or deviation of his/her AOI, whether on private or in a common grazing allotment, is in excess use and is in violation of the Grazing Agreement.

Grazing of lesser number of livestock or shorter season is not a deviation of the grazing permit on an annual basis. However, the non-use rules apply.

When excess use is reported in to the office, either verbally or in writing, the following steps will be taken to return the Association member to compliance as quickly as possible:

1. The Association secretary will notify the Pasture Director for the area where the excess use has taken place and the Pasture Director or Secretary of the Association will call or go see the member who is responsible to resolve the situation.
2. This will be followed up with a letter to the member, with a copy to the Forest Service, documenting the call or visit and what needs to be done to correct the issue. If the call or visit does not resolve the situation, then the excess use is to be reported to the president and/or vice president of the Association.
3. When the president and/or vice president feel there are adequate grounds for investigating reported excess use, the Excess Use Committee will be appointed by the president or vice president shall be informed and take action.
4. The committee will investigate whether such excess use was willful or unintentional. Unintentional excess use may be settled on the ground and settlement reported to the Board.
5. If the committee determines the excess use is willful or intentional, the alleged overage shall be removed immediately, and proof of such removal presented at the office within three (3) days, pending Board action.
6. The Board will arrange for a hearing, including notice to the suspected violator to appear and be heard.
7. If the Board decides that excess use has occurred and the violator is a member of the Association, the Board shall apply the rules. If the violator is not a member of the Association, this violation will be handled under rules of unauthorized grazing use.
8. Violators shall be assessed five times the Association monthly grazing fee per animal for the first five units and ten (10) times the grazing fee per animal for each over five, and/or suspend or revoke the member's permit. The fine is to be reassessed every three (3) days until the violator proves he is complying.
9. If excess use is determined, the violator will be assessed all costs involved. If no excess use is found, the costs will be assumed by the Association.
10. Stray livestock found on the range for which ownership cannot be established may be impounded and disposed of by the Association in accordance with the State law.
11. The Association shall report promptly to the Forest Service any violations by its members or others of any excess use on the National Grasslands. If the Association is unable, under existing state laws, to prohibit further excess use by legal action or otherwise, it will cooperate with the Forest Service in securing evidence and supplying witnesses so that legal action in the Federal courts may be completed.

Unauthorized Livestock Grazing Use

Any non-member grazing livestock on Association administered lands is considered unauthorized livestock grazing use and is in violation of the grazing agreement.

When unauthorized use is reported in to the office, either verbally or in writing:

1. The Association secretary will notify the Pasture Director for the area where the unauthorized use has taken place and the Pasture Director or Secretary of the Association will call who is responsible to resolve the situation.
2. This will be followed up with a letter to the violator, with a copy to the Forest Service, documenting the call or visit and what needs to be done to correct the issue. If the call or visit

does not resolve the situation, then the unauthorized use is to be reported to the president and/or vice president of the Association.

3. The Association shall report promptly to the Forest Service any violations by others of any unauthorized use on the National Grasslands. If the Association is unable, under existing state laws, to prohibit further unauthorized use by legal action or otherwise, it will cooperate with the Forest Service in securing evidence and supplying witnesses so that legal action in the Federal courts may be completed.

## X. REMOVAL OF VIOLATIONS

If no further violations occur within 3 years, first offense letters can be removed from the Association members file.

## XI. ALLOTMENT MANAGEMENT PLANS

An allotment is the smallest division of the range for use, planning, and management purposes. The two basic categories of allotments are common allotments and private allotments.

Any adjustments of allotment boundaries will be agreed upon by the Association and the Forest Service, with all changes subject to approval by the Forest Service.

AMPs will be developed by the Association and the Forest Service for every allotment and will be completed on a priority basis within the guidelines contained in the current Grassland Plan including the Demonstration Project (DEMO). The DEMO project was developed cooperatively with the grazing associations and other livestock grazing interests as a vehicle to implement the livestock grazing portion of the Grassland Plan and develop AMP's while meeting all applicable laws and regulations. (See 2006 Livestock Grazing Record of Decision)

AMPs may include the following:

1. Inventory analysis of vegetative structure, seral condition, Proper Functioning Condition (PFC) status, apparent livestock use patterns, key wildlife areas, and existing range improvements for the allotment so it can be included in the objectives for the area it was analyzed in the AMP project.
2. Map of the area with the boundary of the allotment and a map of the AMP project area of which the allotment is a part of.
3. Grazing system to be implemented.
4. Necessary range improvements and proposed Conservation Practices (CP) construction schedule.
5. Vegetative monitoring schedule for the next 10 years for the allotment.
6. Baseline monitoring data.

The signature of the Association president and authorized agent of the Forest Service will indicate approval.

AMPs that are not acceptable to the Association will be resolved per the dispute resolution in the Grazing Agreement.

Approved AMPs cannot be altered by changes in Forest Service personnel or the Association. Changes in AMPS will be made through the AMP planning process.

Pasture Directors or their designated representatives will monitor and check for compliance with the AMP including monitoring, the rotation schedule, moving dates, salting and riding efforts, and any necessary construction.

## XII. ANNUAL OPERATING INSTRUCTIONS (AOI)

Allotment Annual Operating Instructions are developed at the spring pasture meetings with the Forest Service, Association Pasture Directors, and Association members participating in those meetings. Whatever is agreed to in those meetings will be documented and included in the AOI for that allotment. Whatever is not mutually agreed upon by the Forest Service, Association Pasture Directors and member will be brought to the Board for review. Any adjustments in the AOI will be negotiated between the Forest Service and Board, especially annual stocking rate. Grazing issues addressed include livestock numbers, season of use, pasture rotations, new construction and maintenance of improvements, and any other information needed for the annual management of the grazing allotment. AOI's are submitted to the Forest Service for final approval.

## XIII. RANGE IMPROVEMENTS

Grazing Value Credit

In determining the annual grazing fees to be paid to the Forest Service, a credit against the grazing value may be allowed for the necessary administrative costs and required Conservation Practices (CPs) performed by the Association under the current Forest Service supplement up to a combined total of fifty (50) percent of the current grazing value. This percentage may be increased with Forest Service approval.

Require that CPs alone will usually be limited to 50 percent of the annual grazing value; this is designed to be comparable to the 50 percent of the grazing fee that comes back to National Forest units through the Range Betterment Fund. Administrative costs will usually be limited to 25 percent of the grazing value.

Administrative costs represent expenses incurred by the Association which would otherwise be costs to the Forest Service if there were no Grazing Agreement. These costs have priority over any other credits against the grazing value. They include Administrative expenses incurred by the Association for administering the terms of the Grazing Agreement. Examples include: office rent, clerical help, board meetings, office supplies, etc.

Conservation practices represents expenses incurred by the Association in performing the required on-the-ground range improvements, or other practices designed to enhance the productivity of the National Grasslands. They include expenses incurred by the Association for the protection of natural resources from wildfire, insects, noxious weeds, disease, and expenses incurred by the Association for specific efforts to demonstrate the merits and results of grazing management programs or practices on the National Grasslands.

Conservation Practices Implementation

1. Annual projects should be scheduled in approved allotment management plans.
2. Emergency projects may be approved by the Forest Service and the Association if: funds are available, it is determined that the project is essential to keep livestock on the allotment, and the project can be completed during the current grazing season.
3. Projects to be completed each year will be prioritized by the Forest Service and the Association from the multi-year programs contained in the AMPs and emergency projects.

4. Forest Service responsibilities are to develop a listing of projects scheduled for the current year; provide technical designs, cost estimates, and standards of construction for improvements. If funds are not available to provide technical design and archeology, the Association may contract for these. Forest Service will secure right of way easements in cooperation with the Association; assure that work accomplished conforms to design specifications and assure that proper allowances are made to the Association by auditing project records.
5. The Association will purchase and account for the necessary supplies required to complete the annual CP program; administer the work listed in the annual CP program in a timely manner through contracts, Association employees, or Association members; maintain accurate cost records of supplies, equipment, and labor for each project involved in the annual program; and serve as custodian of the funds derived from the grazing value allowance and assessments made to Association members.
6. Completed projects accepted by the Forest Service and the Association will be credited against the grazing value by the Forest Service.
7. Any changes in projects under construction exceeding $500 must be approved by the Forest Service.

Range Improvements on National Grasslands

Project work plans must be secured prior to construction of any improvements and all developments placed on National Forest Service lands.

Archeology surveys and sensitive, threatened, and endangered species inventories must be completed before any new construction of range developments. Forest Service will complete inventories.

Improvements and developments must be to Forest Service standards and become the property of the Forest Service unless otherwise stated on the project work plan.

Copies of all project work plans must be furnished by the Forest Service. The signature of the Association president indicates approval of the plan.

Any major changes in existing developments will be mutually agreed upon by the Association and the Forest Service.

All necessary developments will be kept in good repair or replaced. The maintenance will be done to standards agreed upon by the Association and the Forest Service and which will insure the full useable life of the improvement.

In the event the Association members concerned are unable or unwilling to do necessary maintenance work, it is the responsibility of the Pasture Director and the Board to insure maintenance is accomplished.

Reimbursement of improvements when there is a change of Association members in an allotment is to be settled between the parties concerned.

## MANAGEMENT PRACTICES

Fences and Car Passes

In common areas, the State fencing law applies where there are livestock on both side of the fence, unless otherwise agreed upon.

Common pasture fence is maintained by the Association Fence crew. Private allotment fence maintenance is the responsibility of the Association member. Materials will be provided by the Association, except in Corson County where all expenses are the Association members.

Salting

No livestock salt should be placed closer than eighty (80) rods (440 yards/.25 miles) from any water development located on Association Administered lands, unless terrain or management needs dictate otherwise. Association members will be encouraged to locate salt at those points in the pastures where insufficient grazing use is apparent and to move salt around periodically to draw cattle to the various areas being under-used in order to secure a more uniform usage of the entire pasture and reduce over-grazing around watering facilities. The amount and location of salt to be placed in common pasture areas will be determined by the Association and or at the pasture meetings.

Hay Cutting

Allotments on which hay cutting is permitted will be designated annually by the Association and Forest Service. A permit issued by the Association is required prior to any hay cutting. Haying will only be allowed on those allotments where it is approved in the AMP or is needed for administrative purposes.

A. Members will have first priority for hay cutting permits.

B. No lands will be selected for hay cutting which would interfere with the use of other lands for grazing purposes.

C. Sites will not be cut more than one (1) year out of two (2).

D. All hay must be removed from the cut area by November 1.

E. No permits will be issued for less than ten dollars ($10.00).

F. Applications for hay permits are due in the Association office by June 1st. No applications will be accepted after June 1st. Payment for estimated acres will be included with application for hay cutting.

G. Cut and leave haying – advance approval of the Forest Service is required where the hay is to be cut and left on the site and used in the permitted grazing period; this requires no payment. Special haying plans or exceptions may be provided for in individual management plans on a case by case basis. This is for grazing purposes only and cannot be stacked.

H. Hay must be used for the member's livestock and cannot be sold or traded.

The Association will furnish the Forest Service with a list of members by whom hay permits were requested, the legal description of the area to be hayed, and the proposed acreage of these areas. The Forest Service will then prepare a supplemental bill to the Association, at the established rate per acre, for all hay to be cut and removed. Any operator who hays on Association Administered Lands without first securing a

permit from the Association will be charged a fee at least triple the current rate for the type of privilege involved for the amount of the unpermitted use and their grazing permit may be revoked in whole or part.

An operator shall not sell or trade surplus fee derived from his commensurate lands that have been made available by the permitted hay cutting.

## XV. ASSOCIATION ADMINISTRATIVE POLICIES

Association Examination and Copying of District Records Policy

Any Association member or stockholder of the Grand River Cooperative Grazing Association (Association) may upon written notice given to the Secretary-Treasurer at least one week in advance examine the books, records of account, minutes of the Board and/or any committee as provided in this section.

1. No examination of any record, minutes or account of the Association may be performed by any member or stockholder, their agent or their attorney unless supervised by a member of the Records and Files Committee.
2. All requests for examination of the records, minutes, or accounts of the Association and requests for production of copies thereof shall be subject to a search fee in the amount of Fifteen Dollars per hour ($15.00/hr.) of search time with a minimum charge of $15.00. In the event of a request for production of a specific document no copy or search charge will apply to the first five (5) pages.
3. All requests for production of copies of any record, minutes, or account of the Association shall be subject to a copy charge of Twenty-Five cents per page ($0.25/page) copied.
4. All direct examinations and the production of copies shall be performed at any reasonable time following the receipt of the written notice required here under. No such direct examination nor production of copies will be performed except during regular Association business hours.
5. Every written notice required pursuant to this section shall state
    a. the reason(s) for the request for examination and/or production,
    b. the exact document(s) being searched for or the type and nature of the documents being searched including a time frame not to exceed five (5) years,
    c. in the case of direct examination of the Association records, the name(s) of the person(s) who will be performing the examination.

No search or copying of Association records will be allowed if the stated purpose is to examine the personal records of any other member or stockholder of the Association, unless the request comes from an attorney in fact or personal representative of the member or stockholder whose records are requested to be examined or reproduced. Any document(s) requested for production which contains any personal information on any other member or stockholder of the Association will have such personal information redacted.

Policy on Distribution of Meeting Minutes

1. Monthly Board Meetings

    - Meeting minutes are taking during the monthly Board meetings. Normally the minutes are kept in the office and are not distributed to the membership.
    - The membership can get a copy of the minutes by requesting them from their Pasture Director or by stopping at the Association office and getting a copy from the Association secretary.
    - All Pasture Directors get a copy of each monthly meeting minute.

2. Association Annual Meeting

1825 on 30 of 70



- Annual Meeting minutes are taking during the Annual Meeting and kept at the Association office.
- The previous year's meeting minutes are available to the membership at the current year's annual meeting.
- The membership can get a copy of the annual meeting minutes by requesting them from their Pasture Director or by stopping at the Association office and getting a copy from the Association secretary.
- All Pasture Directors get a copy of the annual meeting minutes.

3. Special Meetings

- Special Meeting minutes are taken during the Special Meeting and kept at the Association office.
- The membership can get a copy of the special meeting minutes by requesting them from their Pasture Director or by stopping at the Association office and getting a copy from the Association secretary.
- All Pasture Directors get a copy of the special meeting minutes.

Note: Any change to the above policy on meeting minutes would have to be made by the Board or by the membership at the Annual Meeting.

Code of Federal Regulations
Title 36. Parks, Forests, and Public Property
Chapter II. Forest Service, Department of Agriculture
Part 222. Range Management (Refs & Annos)
Subpart A. Grazing and Livestock Use on the National Forest System (Refs & Annos)

36 C.F.R. § 222.3

# § 222.3 Issuance of grazing and livestock use permits.

Currentness

(a) Unless otherwise specified by the Chief, Forest Service, all grazing and livestock use on National Forest System lands and on other lands under Forest Service control must be authorized by a grazing or livestock use permit.

(b) Grazing permits and livestock use permits convey no right, title, or interest held by the United States in any lands or resources.

(c) The Chief, Forest Service, is authorized to issue permits for livestock grazing and other use by livestock of the National Forest System and on other lands under Forest Service control as follows:

(1) Grazing permits with priority for renewal may be issued as follows: On National Forests in the 16 contiguous western States 10–year term permits will be issued unless the land is pending disposal, or will be devoted to other uses prior to the end of ten years, or it will be in the best interest of sound land management to specify a shorter term. On National Forest System lands other than National Forests in the 16 contiguous western States, the permit term shall be for periods of 10 years or less. Term grazing permits for periods of 10 years or less in the form of grazing agreements may be issued to cooperative grazing associations or similar organizations incorporated or otherwise established pursuant to State law. Such an agreement will make National Forest System lands and improvements available to the association for grazing in accordance with provisions of the grazing agreement and Forest Service policies. Term permits authorized in this paragraph may be in the form of private land or on-and-off grazing permits where the person is qualified to hold such permits under provisions the Chief may require. Permits issued under this paragraph are subject to the following:

(i) Except as provided for by the Chief, Forest Service, paid term permits will be issued to persons who own livestock to be grazed and such base property as may be required, provided the land is determined to be available for grazing purposes by the Chief, Forest Service, and the capacity exists to graze specified numbers of animals.

(ii) A term permit holder has first priority for receipt of a new permit at the end of the term period provided he has fully complied with the terms and conditions of the expiring permit.

(iii) In order to update terms and conditions, term permits may be cancelled at the end of the calendar year of the midyear of the decade (1985, 1995, etc.), provided they are reissued to the existing permit holder for a new term of 10 years.

(iv) New term permits may be issued to the purchaser of a permittee's permitted livestock and/or base property, provided the permittee waives his term permit to the United States and provided the purchaser is otherwise eligible and qualified.

(v) If the permittee chooses to dispose of all or part of his base property or permitted livestock (not under approved nonuse) but does not choose to waive his term permit, the Forest Supervisor will give written notice that he no longer is qualified to hold a permit, provided he is given up to one year to reestablish his qualifications before cancellation action is final.

(vi) The Chief, Forest Service, shall prescribe provisions and requirements under which term permits will be issued, renewed, and administered, including:

(A) The amount and character of base property and livestock the permit holder shall be required to own.

(B) Specifying the period of the year the base property shall be capable of supporting permitted livestock.

(C) Acquisition of base property and/or permitted livestock.

(D) Conditions for the approval of nonuse of permit for specified periods.

(E) Upper and special limits governing the total number of livestock for which a person is entitled to hold a permit.

(F) Conditions whereby waiver of grazing privileges may be confirmed and new applicants recognized.

(2) Permits with no priority for reissuance, subject to terms and conditions as the Chief, Forest Service, may prescribe, are authorized as follows:

(i) Temporary grazing permits for periods not to exceed one year, and on a charge basis, may be issued:

(A) To allow for use of range while a term grazing permit is held in suspension.

(B) To use forage created by unusually favorable climatic conditions.

(C) To use the forage available when the permit of the normal user's livestock is in nonuse status for reasons of personal convenience.

(D) To allow a person to continue to graze livestock for the remainder of the grazing season where base property has been sold, the permit waived, and a new term permit issued.

(E) To allow grazing use in the event of drought or other emergency of National or Regional scope where such use would not result in permanent resource damage.

(ii) Livestock use permits for not to exceed one year may be issued under terms and conditions prescribed by the Chief, Forest Service, as follows:

(A) Paid permits for transportation livestock to persons engaged in commercial packing, dude ranching, or other commercial enterprises which involve transportation livestock including mining, ranching, and logging, activities.

(B) Paid or free permits for research purposes and administrative studies.

(C) Paid or free permits to trail livestock across National Forest System lands.

(D) Free permits to persons who reside on ranch or agricultural lands within or contiguous to National Forest System lands for not to exceed 10 head of livestock owned or kept and whose products are consumed or whose services are used directly by the family of the resident, and who distinctly need such National Forest System lands to support such animals.

(E) Free permits to campers and travelers for the livestock actually used during the period of occupancy. This may be authorized without written permit.

(F) Paid or free permits for horses, mules, or burros to persons who clearly need National Forest System land to support the management of permitted livestock.

(G) Free permits for horses, mules, or burros to cooperators who clearly need National Forest System land to support research, administration or other work being conducted. This may be authorized without written permit.

(H) Paid permits to holders of grazing permits for breeding animals used to service livestock permitted to graze on lands administered by the Forest Service.

(I) Paid permits or cooperative agreements entered into as a management tool to manipulate revegetation on a given parcel of land.

Credits

[42 FR 56732, Oct. 28, 1977, as amended at 43 FR 27532, June 26, 1978; 44 FR 61345, Oct. 25, 1979; 46 FR 42449, Aug. 21, 1981]

AUTHORITY: 7 U.S.C. 1010- 1012, 5101–5106; 16 U.S.C. 551, 572, 5801; 31 U.S.C. 9701; 43 U.S.C. 1751, 1752, 1901; E.O. 12548 (51 FR 5985).; 92 Stat. 1803, as amended (43 U.S.C. 1901), 85 Stat. 649, as amended (16 U.S.C. 1331–1340); sec. 1, 30 Stat. 35, as amended (18 U.S.C. 551); sec. 32, 50 Stat. 522, as amended (7 U.S.C. 1011), unless otherwise noted.

Notes of Decisions (68)

Current through Dec. 28, 2018; 83 FR 67148.

End of Document

Code of Federal Regulations
Title 36. Parks, Forests, and Public Property
Chapter II. Forest Service, Department of Agriculture
Part 222. Range Management (Refs & Annos)
Subpart A. Grazing and Livestock Use on the National Forest System (Refs & Annos)

36 C.F.R. § 222.4

§ 222.4 Changes in grazing permits.

Currentness

(a) The Chief, Forest Service, is authorized to cancel, modify, or suspend grazing and livestock use permits in whole or in part as follows:

(1) Cancel permits where lands grazed under the permit are to be devoted to another public purpose including disposal. In these cases, except in an emergency, no permit shall be cancelled without two years' prior notification.

(2) Cancel the permit in the event the permittee:

(i) Refuses to accept modification of the terms and conditions of an existing permit.

(ii) Refuses or fails to comply with eligibility or qualification requirements.

(iii) Waives his permit back to the United States.

(iv) Fails to restock the allotted range after full extent of approved personal convenience non-use has been exhausted.

(v) Fails to pay grazing fees within established time limits.

(3) Cancel or suspend the permit if the permittee fails to pay grazing fees within established time limit.

(4) Cancel or suspend the permit if the permittee does not comply with provisions and requirements in the grazing permit or the regulations of the Secretary of Agriculture on which the permit is based.

(5) Cancel or suspend the permit if the permittee knowingly and willfully makes a false statement or representation in the grazing application or amendments thereto.

(6) Cancel or suspend the permit if the permit holder is convicted for failing to comply with Federal laws or regulations or State laws relating to protection of air, water, soil and vegetation, fish and wildlife, and other environmental values when exercising the grazing use authorized by the permit.

(7) Modify the terms and conditions of a permit to conform to current situations brought about by changes in law, regulation, executive order, development or revision of an allotment management plan, or other management needs.

(8) Modify the seasons of use, numbers, kind, and class of livestock allowed or the allotment to be used under the permit, because of resource condition, or permittee request. One year's notice will be given of such modification, except in cases of emergency.

(b) Association permits or grazing agreements may be canceled for noncompliance with title VI of the Civil Rights Act of 1964 and Department of Agriculture regulation promulgated thereunder.

**Credits**

[42 FR 56732, Oct. 28, 1977, as amended at 46 FR 42449, Aug. 21, 1981]

AUTHORITY: 7 U.S.C. 1010–1012, 5101–5106; 16 U.S.C. 551, 572, 5801; 31 U.S.C. 9701; 43 U.S.C. 1751, 1752, 1901; E.O. 12548 (51 FR 5985).; 92 Stat. 1803, as amended (43 U.S.C. 1901), 85 Stat. 649, as amended (16 U.S.C. 1331–1340); sec. 1, 30 Stat. 35, as amended (18 U.S.C. 551); sec. 32, 50 Stat. 522, as amended (7 U.S.C. 1011), unless otherwise noted.

Notes of Decisions (32)

Current through Dec. 28, 2018; 83 FR 67148.

**End of Document**

Code of Federal Regulations
Title 36. Parks, Forests, and Public Property
Chapter II. Forest Service, Department of Agriculture
Part 222. Range Management (Refs & Annos)
Subpart A. Grazing and Livestock Use on the National Forest System (Refs & Annos)

36 C.F.R. § 222.7

§ 222.7 Cooperation in management.

Currentness

(a) Cooperation with local livestock associations—

(1) Authority. The Chief, Forest Service, is authorized to recognize, cooperate with, and assist local livestock associations in the management of the livestock and range resources on a single range allotment, associated groups of allotments, or other association-controlled lands on which the members' livestock are permitted to graze.

(2) Purposes. These associations will provide the means for the members to:

(i) Manage their permitted livestock and the range resources.

(ii) Meet jointly with Forest officers to discuss and formulate programs for management of their livestock and the range resources.

(iii) Express their wishes through their designated officers or committees.

(iv) Share costs for handling of livestock, construction and maintenance of range improvements or other accepted programs deemed needed for proper management of the permitted livestock and range resources.

(v) Formulate association special rules needed to ensure proper resource management.

(3) Requirements for recognition. The requirements for receiving recognition by the Forest Supervisor are:

(i) The members of the association must constitute a majority of the grazing permittees on the range allotment or allotments involved.

(ii) The officers of the association must be elected by a majority of the association members or of a quorum as specified by the association's constitution and bylaws.

(iii) The officers other than the Secretary and Treasurer must be grazing permittees on the range allotment or allotments involved.

(iv) The association's activities must be governed by a constitution and bylaws acceptable to the Forest Supervisor and approved by him.

(4) Withdrawing recognition. The Forest Supervisor may withdraw his recognition of the association whenever:

(i) The majority of the grazing permittees request that the association be dissolved.

(ii) The association becomes inactive, and does not meet in annual or special meetings during a consecutive 2 year period.

(b) Cooperation with national, State, and county livestock organizations. The policies and programs of national, State, and county livestock organizations give direction to, and reflect in, the practices of their members. Good working relationships with these groups is conducive to the betterment of range management on both public and private lands. The Chief, Forest Service, will endeavor to establish and maintain close working relationships with National livestock organizations who have an interest in the administration of National Forest System lands, and direct Forest officers to work cooperatively with State and county livestock organizations having similar interests.

(c) Interagency cooperation. The Chief, Forest Service, will cooperate with other Federal agencies which have interest in improving range management on public and private lands.

(d) Cooperation with others. The Chief, Forest Service, will cooperate with other agencies, institutions, organizations, and individuals who have interest in improvement of range management on public and private lands.

AUTHORITY: 7 U.S.C. 1010–1012, 5101–5106; 16 U.S.C. 551, 572, 5801; 31 U.S.C. 9701; 43 U.S.C. 1751, 1752, 1901; E.O. 12548 (51 FR 5985).; 92 Stat. 1803, as amended (43 U.S.C. 1901), 85 Stat. 649, as amended (16 U.S.C. 1331–1340); sec. 1, 30 Stat. 35, as amended (18 U.S.C. 551); sec. 32, 50 Stat. 522, as amended (7 U.S.C. 1011), unless otherwise noted.

Notes of Decisions (6)

Current through Dec. 28, 2018; 83 FR 67148.

End of Document

**IN THE SUPREME COURT**
**OF THE**
**STATE OF SOUTH DAKOTA**

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**APPEAL NO. 28781**

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**MICHAEL J. KNECHT,**

**Plaintiff and Appellant,**

**vs.**

**GAYLE W. EVRIDGE and LINDA M. EVRIDGE,**

**Defendants and Appellees.**

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**APPEAL FROM THE FOURTH JUDICIAL CIRCUIT**
**PERKINS COUNTY, SOUTH DAKOTA**

**THE HONORABLE ERIC J. STRAWN**
**CIRCUIT COURT JUDGE**

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# REPLY BRIEF OF APPELLANT KNECHT

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## PRELIMINARY STATEMENT

In this brief, Appellant Michael J. Knecht will be referred to as "Knecht" and Appellees Gayle Evridge and Linda Evridge will be referred to as "Evridges." Citations to the certified record as reflected by the Clerk's Index are designated as "CR" followed by the page number.

## RESPONSE TO EVRIDGES' STATEMENT OF THE CASE

The Circuit Court's Declaratory Orders were interlocutory rulings and could not be appealed until a final judgment issued ending litigation on the merits. Despite Evridges' allegations to the contrary, Knecht's notice of appeal and docketing statement clearly indicate that his appeal arose from the Circuit Court's grant of partial summary judgment and "all of the declaratory judgment claims and issues." CR. 2492. This Court's denial of Knecht's interlocutory appeal for lack of finality ratifies the intermediate nature of the Circuit Court's Declaratory Orders.

## RESPONSE TO EVRIDGES' STATEMENT OF FACTS

All of the facts presented in Knecht's brief were "stated fairly [] with complete candor" and are relevant to the "grounds urged for reversal." SDCL 15-26A-60(5). A detailed statement of facts was appropriate in this case because the claims at issue require a complete understanding of the sequence of events and issues presented.

## ARGUMENT

### I. Jurisdiction to Determine the Validity of the Supplemental Lease Exists.

This Court has jurisdiction to determine the validity of the Supplemental Lease agreement because Judge Macy's Declaratory Orders were interlocutory and not a final decree. Interlocutory orders are not appealable as a matter of right. *In re Swanson's Estate,* 61 S.D. 371, 293 N.W. 361. And a final judgment was not entered until August 22, 2018. CR. 4238. As such, Knecht's Notice of Appeal, filed on September 21, 2018, was timely, and this court has jurisdiction to determine the validity of the Supplemental Lease agreement. CR. 4360. SDCL § 15-26A-6*; See also Hiller v. Hiller,* 2015 S.D. 58, ¶ 11, 866 N.W.2d 536, 540. (Supreme Court's appellate jurisdiction is limited to appeals only from a final order or judgment.)

Evridges' allegation that the Orders issued after the declaratory action were final and subject to appeal is false. A declaratory judgment entered on certain issues in a case is not a final appealable order where issues decided are not separate and distinct from the plaintiff's basic claim, which has yet to be adjudicated. *See, e.g., Fetters v. U. S. Fire Ins. Co.*, 399 So. 2d 427 (Fla. 5th DCA 1981). This action involves claims by both parties for breach of contract. Furthermore, the validity and enforceability of the contracts at issue are an integral part of the underlying action as a whole. Breach and damages arising from said breach cannot be decided without first assessing a contract's validity. They are

undeniably interrelated. Because enforceability and validity of contract are not separate and distinct from a claim for breach and damages, a final order did not issue until Knecht's basic claim for breach was resolved in its entirety. *Davis v. Farmland Mut. Ins. Co.,* 2003 SD 111, ¶ 18, 669 N.W.2d 713, 719.

When an order or judgment fails to adjudicate all of the issues of fact and law involved in the case, but rather reserves further question or direction for future determination, it is deemed intermediate or interlocutory and is not appealable. *Id*.; *Midcom, Inc. v. Oehlerking*, 2006 S.D. 87, ¶11, 722 N.W.2,d 722, 725 (A final judgment must "finally and completely adjudicate all of the issues of fact and law involved in the case" on the merits). The Declaratory Orders did not resolve all of the issues of fact and law in this case. Instead, they erroneously decided a specific legal issue (validity and enforceability) and reserved the factual issues of breach and damages for further determination. *See, e.g., Villines v. Harris,* 362 Ark. 393, 208 S.W.3d 763, 766 (2005) (Finding an order not final because the amount of damages in a dispute had yet to be decided and a later hearing would be conducted to accomplish that task); *See also Production and Maintenance Employees' Local 504 v. Roadmaster Corp*., 954 F.2d 1397, 22 Fed. R. Serv. 3d 1 (7th Cir. 1992) (Decision that fixes liability but not damages is not appealable despite the entry of an order, because such an order is not a final disposition of a claim.). Likewise, an order determining the legality of a contract but failing to ascertain factual issues such as breach and damages is not final because the underlying cause of action has not been resolved on the merits.

Evridges' argument that the Declaratory Orders were final because "finality still inheres in a judgment or order where there is a question to be decided after judgment on the merits if it does not alter the order or moot or revise decisions embodied in the order" fails for two reasons. *Midcom*, 2006 S.D. 87, ¶15, 722 N.W.2d 722, 727. First, the declaratory action did not end this litigation on the merits. There were still issues of fact to be determined. Second, issues that do not alter the order or moot or revise the decisions embodied in the order must be "collateral to" and "separate from" the judgment. *Id.* The issues of breach and damages in a contract claim are wholly related to a contract's validity. Such issues remedy the injury giving rise to the action and cannot be tried independently. Accordingly, the Declaratory Orders were interlocutory rulings and could not be appealed until a final judgment issued ending litigation on the merits.

Evridges allege that Knecht's interlocutory appeal solely addressed the Circuit Court's award of partial summary judgment for payments due on both leases but, once again, this is false. Evridges' Motion for Partial Summary Judgment was based on the notion that the Supplemental Lease was a valid and enforceable contract. CR. 2299. And Knecht disputed the legality of the lease to resist that motion. CR. 2332. When the motion was granted in part, Knecht appealed the court's award of partial summary judgment as well as its basis for such judgment. Knecht's notice of appeal and docketing statement clearly indicate that his appeal arose from the Circuit Court's grant of partial summary judgment and "all of the declaratory judgment claims and issues." CR. 2492. This Court's

denial of Knecht's interlocutory appeal for lack of finality further ratifies the intermediate nature of the Circuit Court's Declaratory Orders. *See South Dakota Dept. of Transp. v. Freeman*, 378 N.W.2d 241 (S.D. 1985) (holding intermediate order on necessity of taking in condemnation action was not appealable as a matter of right, even though an adverse ruling would resolve case).

## II. The Issue regarding the Validity and Enforceability of the Supplemental Lease was Properly Preserved below.

Evridges' contention that Knecht waived his right to contest the validity and enforceability of the Supplemental Lease by failing to raise the issue is absurd. Throughout the entirety of this litigation, Knecht has consistently contested the validity of the Supplemental Lease. CR. 52, 73, 137, 299, 324, 327, 2166, 2196, 2201-2202, 2331-2332, 2358, 2363-2364, 2392, 2398, 2410-2411. This Court has held "[t]o preserve issues for appellate review litigants must make known to trial courts the actions they seek to achieve or object to the actions of the court, giving their reasons. *Action Mech. Inc. v. Deadwood Historic Preservation Com'n*, 2002 S.D. 121, ¶50, 652 N.W.2d 742, 755. Knecht did exactly that. His disapproval and objection to the validity of the Supplemental Lease is explicit in the pleadings and other documentation submitted to the Circuit Court.

Before the court trial, in Knecht's Objections to Defendant's Motion for Bifurcated Trial and Motion for Speedy Hearing and Advancement on Calendar, he alleged: "[I] was told it was illegal for the Evridges to charge rent for the Grand River Summer Grazing Permits." CR 52. His stated reasoning for this objection

was a letter from the Association indicating that "[u]nder no circumstances shall the second 'Supplementary Agricultural Lease' be in force nor shall Evridges receive any remuneration from this lease." CR 52, 73. That same letter was filed with the Court and referenced in support of Knecht's objection to the Supplemental Lease's validity in his Amended Complaint, Pretrial Submission, and Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment. CR. 299, 324, 327, 1140. After the court trial, Knecht's Proposed Findings of Fact and Conclusions of Law included an ad damnum clause asking the court to find that Evridges were due no remuneration under the Supplemental Lease. CR. 2166. In response to Evridges' Second Termination of the Lease, Knecht explained to the court that the Supplemental Lease not only violated the Association's rules, but also the rules of the United States Forest Service, which is federal law. CR. 2196.

Moreover, If Knecht's objection to the validity of the Supplemental Lease was not clear to the Court from the statements referenced above, his Statement of Material Facts in Opposition to Evridges' Motion for Partial Summary Judgment surely resolves any doubt.

> The Supplemental Lease is unlawful and void from the beginning[.] … SDCL 53-9-1 provides that a contract that is contrary to an express provision of law or policy of express law, though not expressly prohibited or otherwise contrary to good morals, is unlawful. *See Commercial Trust and Sav.Bank v. Christensen*, 535 N.W.2d 853, 858 (S.D. 1995) holding that relief is not generally granted under agreements that are unenforceable as against public policy and *McKellips v. Mackintosh*, 475 N.W.2d 926, 929 (S-D, 1991) holding that because "contract is void as against public policy it is unlawful and therefore, unenforceable under SDCL 53-9-1… The Supplemental

> Agricultural Lease has been unlawful and void from the beginning, and no payments can be paid to Evridges under the unlawful Supplemental Agricultural Lease.

CR 2331-2332, 2358.

Even though Knecht did not state the specific provisions of federal law violated, his objections were "succinctly specific to put the circuit court on notice of the alleged error" because they informed the court of the action sought and were supported by sufficient evidence and reasoning. *Osdoba v. Kelley-Osdoba*, 2018 S.D. 43, ¶23, 913 N.W.2d 496, 503. Accordingly, this issue was properly preserved for review by this Court.

## III. The Supplemental Lease is Void as a Matter of Law

Evridges confuse Knecht's arguments in their response to his initial brief. They attempt to mislead this Court by transposing Knecht's arguments into something they are not. Knecht did not argue the provisions in the Supplemental Lease are merely unlawful. Instead, he argues the Supplemental Lease is void as a matter of law because, as a whole, it violates several of the Association's rules of management, which, in turn, violates 1) federal regulations, 2) the policy behind these regulations and; 3) public policy. *Law Capital Inc. v. Kettering*, 2013 S.D. 66, ¶10, 836 N.W.2d 642,645 (A contract contrary to an express provision or law, or policy of express law, is invalid and unenforceable). Such contracts may be held void or voidable. *Warra v. Kane*, 269 N.W.2d 395, 397. Void contracts are invalid and unlawful from inception. *Nature's 10 Jewelers v. Gunderson*, 2002 SD 80, 648 N.W.2d 804, 807.

The Association's rules of management are a "set of policies, procedures, and practices developed by the Association for their use in administering livestock grazing" on federal land. CR. 869. These rules must meet certain criteria for approval by the U.S. Forest Service. 36 CFR § 222.7(a)(3)(iv). Upon approval, the rules of management are incorporated into and become a term and condition of the Association's grazing agreement with the Forest Service.[1] Any violations of the rules of management are considered violations of the terms and conditions of the grazing agreement. *Id.* Thus, violations of the rules of management are akin violating the very regulations that govern the grazing agreement.[2] This fact is substantiated by the Association itself through correspondence addressed to both parties, which is discussed further in section D.

### A. The Supplemental Lease Violates Express Provisions of the Rules of Management

The Supplemental Lease violates several express provisions of the Association's rules of management rendering it unlawful and void as a matter of law. First, the rules of management expressly state that the Association "has full control of all leases and permits." CR. 892. Therefore, any leases involving land attached to a grazing permit must first be approved. Before executing the

[1] Eric Olsen, National Resources Division, Office of the General Counsel, U.S Department of Agriculture, *National Grasslands Management, A primer.* p.21 (1997), https://www.fs.fed.us/grasslands/documents/primer/NG_Primer.pdf (last accessed Nov. 19, 2018).

[2] The Rules of management explicitly state that "the forest service is responsible for and retains the authority for the administration of grazing and all other uses on [federal] lands in accordance with applicable federal law." CR. 873.

Supplemental Lease, Evridges presented the Association's board with a lease proposing $30 cash rent per acre, which was rejected as too high. CR. 1837. Evridges then created two leases for the same ground; the Agricultural Lease at $28.55 per acre, and the Supplemental Lease requiring additional payment based upon a carrying capacity of 200 head cow/calf and six bulls. CR. 781, 787. The Supplemental Lease was secreted from the Association because it allowed Evridges to circumvent the rules by charging more rent than they could otherwise, and Evridges knew it was prohibited.[3] This is a clear violation of the rule granting the Association full control of all leases and permits. CR. 892, 1837. The Supplemental Lease stripped the Association of its authority to govern all leases and instead put Evridges in the board's shoes. Because violations of the rules of management are considered a violation of the terms and conditions of the grazing agreement, the lease violated 36 CFR § 222 and is void as a matter of law.

Second, pursuant to the Association's rules of management, "all leases [involving grazing permits] ha[d] to be [filed with the] association office by March 1st". CR 893. During the August 31, 2015 trial, Evridges admitted that they were aware of this rule but neglected to follow it because they knew the lease was

[3] 36 CFR § 222 provides the Forest Service with authority to regulate grazing on federal land. This is the main purpose of the regulations and not "peripheral to the central purpose" as alleged by Evridges. Evridges' Br. P.19. "The Chief, Forest Service, shall develop, administer and protect the range resources and permit and regulate the grazing use of all kinds and classes of livestock on all National Forest System lands and on other lands under Forest Service control." 36 CFR §222.1(a). The Supplemental Lease usurps the Forest Service's authority by allowing Evridges to create their own rules for grazing on federal land. This is a direct violation of the purpose and policy of 36 CFR § 222. The Supplemental Lease is unlawful.

unlawful and would be rejected CR. 1751, 1752. Because the Supplemental Lease was not submitted to the association by March 1st, it violated an express provision of the rules of management which, in effect, violated 36 CFR § 222, an express provision of federal law. The Supplemental Lease is unlawful and void as a matter of law.

Third, the rules of management state that "[leases] cannot purport to assign or transfer a grazing preference" without prior approval from the board.[4] CR. 892. However, the Supplemental Lease did exactly that. Evridges specifically told Knecht that the purpose or object of the Supplemental Lease was to provide him with access to the grazing privileges. CR. 2897. The lease also had no per acre cost but rather listed a carrying capacity identical to that of the grazing permit. CR. 787. Furthermore, it was executed without the board's authority several months before Knecht's permit was approved. Because a lease cannot purport to assign or transfer a grazing preference without first being approved by the board, and the Supplemental Lease proceeded to do so, it violated an express provision of the rules of management and is therefore unlawful and void as a matter of law.

### B. The Object of the Supplemental Lease is Unlawful

[4] At trial, the executive director of the Association testified that a grazing privilege can in fact be leased, but only by the board, and only to someone that has previously been approved by the board (CR. 1536). The Supplemental Lease, which purported to transfer grazing privileges, was executed by Evridges (who are not board members) without prior approval from the board. CR. 1834. This is another clear example of Evridges' self-regulating grazing privileges on federal land in direct violation of the purpose and policy of 36 CFR § 222.

A careful review of the Supplemental Lease clearly indicates the sole object of the lease itself is unlawful. Where a contract has but a single object, and such object is unlawful, in whole or in part, the entire contract is *void*. SDCL § 53-5-3 (emphasis added). "The object of a contract is the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do." *Philbrick v. Landis* 77 S.D. 90, 94, 86 N.W.2d 392, 394. As previously discussed, Evridges told Knecht that the Supplemental Lease provided him with use of their grazing permit. CR. 2897. The express provisions of the lease further confirmed this assertion because it identified a carrying capacity (rather than a price per acre) identical to that of the grazing permit. CR. 787. Its object and purpose was to provide additional rent over the amount allowed by the Association and to do so in secret. Additionally, because the Agricultural Lease effectively provided Knecht with use of Evridges' deeded acreage (while also including the grazing permit transfer on approval), it cannot be argued that the Supplemental Lease had alternative objects. That said, the lease's sole object was to unlawfully assign or transfer a grazing preference in violation of the Association's rules of management and 36 CFR § 222, an express provision of federal law. Accordingly, the Supplemental Lease is void as a matter of law. *See Uhlig v. Garrison*, 2 Dakota 71, 2 N.W.253 (Dakota 1879) (Holding a contract for the lease of real property to be void where the object of the contract violated federal law.).

### C. The Supplemental Lease Violates Public Policy

"Public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against public good." *State ex rel. Meierhenry v. Spiegel, Inc.*, 277 N.W.2d 298, 300. The Supplemental Lease was created solely to deceive Knecht and avoid federal regulations. Its purpose was clearly against the public good and injurious to polices that aim to prevent harm to public land.

Evridges created the Supplemental Lease with knowledge of its invalidity. CR. 1837. They then convinced Knecht to execute the lease and secret it from the grazing association to shield their wrongdoing and benefit financially. CR. 1356, 1752, 1753. It was therefore a contract in furtherance of Evridges' fraud and unenforceable as against public policy. SDCL § 53-9-3. Alternatively, the direct and indirect purpose or object of the Supplemental Lease is unlawful and contrary to the policy of express law. SDCL § 53-9-1. As mentioned above, the lease's object – to transfer or assign grazing privileges without the board's authority – was a direct violation of the Association's rules and federal law. The lease was used to circumvent the Association's limitation on the amount charged for leased acreage with grazing privileges. CR. 1752. Contrary to Evridges' contention, a written provision in the rules of management specifying an acceptable amount per acre is not necessary. As specified in the rules, the Association "has full control of all leases and permits," and their approval is a prerequisite to issuance of a grazing permit. CR. 892. More importantly, after

Evridges vetted the Association's board to determine an acceptable amount of rent per acre, they knowingly created a second lease in direct violation of the rules which enabled them to charge more for rent. CR. 1837. That was indisputably wrong. Evridges further testified that they had "been leasing with multiple leases for 40 years" and it has become "customary" for members of the Association to execute two leases for the same ground. CR. 1752. Unfortunately, they were the ones that got caught. CR. 1753. Furthermore, the attempt to circumvent the law by disguising the real intent of the contract under a valid agreement is unavailing when the contract is used to avoid public policy. *Neve v. Davis*, 2009 S.D. 97, ¶ 13, 775 N.W.2d 80, 83-84 (gambling debt not collectible); *See also* SDCL § 53-9-3 (contracts that protect one from his own fraud void against public policy.)

This court must not ignore Evridges' blatant disregard of the Association's rules and its governing federal regulations. To do so would condone the intentional circumvention of established law through contract. SDCL § 53-9-1. It would also demonstrate to other Association members that violating the rules and laws governing those rules is of no consequence. This court must close the door to the unlawful practice of creating two leases for the same ground which has become customary among Association members. Upholding the validity of the Supplemental Lease is contrary to the public interest and inconsistent with sound policy and good morals. The Supplemental Lease is void as a matter of law.

### D. Reimbursement for Payments made on the Supplemental Lease is Required

As a matter of law, Evridges must not receive any remuneration for the Supplemental Lease because it violates the Association's rules and federal law. This truth is confirmed by the Association itself through a series of letters addressed to both Knecht and Evridges. In 2015, both parties received correspondence from the Association stating that "a violation of the rules of management between [Grand River] and the United States Forest Service … occurred" because the Supplemental Lease was not submitted to the Association by March 1st. CR. 866. Grand River further recommended that the parties operate solely under the Agricultural Lease agreement and terminate the Supplemental Lease. CR. 866. A month later, Grand River indicated that "under no circumstance shall the second Supplemental Lease be in force, nor shall Evridges receive any remuneration from this lease." CR. 798. The Association also explained that Knecht's rent payments on the Supplemental Lease were in violation of their rules and to allow the payments to continue would constitute additional violations. CR. 2369.

The Circuit Court was presented with this information on several occasions but ignored the Association's clear determination that receipt of funds by Evridges on the Supplemental Lease violated federal rules governing the use of federal grasslands. CR 853. As a result, the Supplemental Lease was improperly validated by the Court requiring rent to be paid to Evirdges when no funds were due under the void lease. The Circuit Court abused its discretion by ordering the release of funds to Evridges because its ruling was based on an erroneous review of the law

or on a clearly erroneous assessment of evidence. *Smizer v. Drey*, 2016 S.D. 3, ¶14, 873 N.W. 2d 697, 702. Evridges must be disgorged from the unlawful funds paid under the void Supplemental Lease.

Given that the Supplemental Lease is unlawful and void, it cannot be enforced, and any payments made by Knecht under the void agreement must be returned. Although courts "generally do not grant restitution under agreements that are unenforceable on grounds of public policy" there is an exception to that rule. *Commercial Trust and Sav. Bank v. Christensen,* 535 N.W.2d 853, 859 (S.D. 1995). Restitution may be granted for payments made under a contract that is void as against public policy to prevent forfeiture by party who is ignorant of technical rules or regulations. *Id.* When Knecht executed the Supplemental Lease agreement he was excusably ignorant of the Association's rules. He had never been a member of the Association and had never grazed his cattle on federal land. CR. 1211, 1212. To his detriment, Knecht relied on Evridges intentional misrepresentation that the agreement was valid and necessary for use of their grazing permit. CR. 2897. Knecht then made payments on the unlawful lease under the mistaken belief that it was enforceable. CR. 799. Had Knecht known that the lease was unlawful, he would not have agreed to its terms. And it would be inequitable for this Court to allow Evridges to profit from Knecht's erroneous belief in the legality of the void contract, especially considering that Evridges' intentional misrepresentations are what led to such belief. Knecht brought suit and challenged the legality of the

Supplemental Lease lost and funds by Circuit Court order. Knecht must be reimbursed for the payments made under the void Supplemental Lease.

### E. Damage Award for 2016 must be Reversed and Remanded.

Because the Supplemental Lease is void as a matter of law, a proper instruction informing the jury of that fact would have produced a different result. Instead, the Jury heard that Knecht terminated the Supplemental Lease for 2016, which prevented it from considering that the breaches of the Agricultural Lease were duties Evridges had under contract regardless of termination of the other lease. This error caused the jury to award no damages for the 2016 breaches. *Dartt v. Berghorst*, 484 N.W. 2d 891, 895 (S.D. 1992) (Instructions must give a full and correct statement of the applicable law.).

Evridges wrongly allege this issue was waived because Knecht failed to object or propose an instruction on these grounds. The case presented to the jury did not include the issues because the lease at issue was terminated by Knecht when it should have been declared *void ab initio*. The record clearly illustrates that Knecht objected to Evridges' attempts to admit Judge Macy's Orders regarding the validity of the Supplemental Lease throughout the jury trial. CR. 3969, 4149. Furthermore, any attempt to propose an instruction to the contrary would be futile because the issue was decided by the Circuit Court's interlocutory Orders and could not be addressed until this appeal. The jury was instructed on an incorrect rule of law regarding these damages, and failure to object doesn't waive the issue. *Estate of Billings v. Deadwood Congregation of Jehovah* Wit. 506 N.W..2d 138,

143 (S.D. 1993) (verdict resulting from palpable mistake of law on how to measure damages, new trial necessary).

**IV. Summary Judgment dismissing the Fraud and Deceit Claims was Error.**

Evridges' allegation that Knecht failed to raise issues argued on appeal is false. While Knecht's initial response to Evridges' Motion for Summary Judgment may not contain such arguments, his Motion for Reconsideration certainly does. CR. 3022, 3028. Accordingly, Knecht's arguments pertaining to his fraud and deceit claims were preserved below.

**A. Evridges owed a Duty to Knecht Independent of Contract.**

The Circuit Court erred in granting partial summary judgment for Evridges on Knecht's fraud and deceit claims. No fiduciary or other relationship is necessary to establish a duty independent of contract. This Court has held that a party to a business transaction has a duty to disclose facts basic to the transaction.

> [T]he facts basic to the transaction analysis is best suited to cases in which the advantage taken of the plaintiff's ignorance is so shocking to the ethical sense of the community and is so extreme and unfair as to amount to a form of swindling, in which the plaintiff is led by appearances into a bargain that is a trap, of whose essence and substance he is unaware. *Ducheneaux v. Miller,* 488 N.W.2d at 913 (quoting Restatement (Second) Torts § 551(2)(e)(cmt 1)).

*Lindskov v Lindskov*, 2011 S.D. 34, ¶18, 800 N.W.2d 715. Evridges had a duty to disclose facts basic to the transaction that were 1) unknown to Knecht; 2) reasonably expected due to the nature of their agreement; and 3) not otherwise discoverable by reasonable care. *Ducheneaux*, 488 N.W.2d at 913. The true nature

of the Supplemental Lease was unknown to Knecht, and he believed it to be valid. Knecht would reasonably expect disclosure of the lease's true object or intent because he sought use of the grazing permit and would not knowingly agree to a contract endangering that use or a contract in violation of law. The lease's invalidity was not reasonably discoverable by Knecht because at the time of execution he had no knowledge of the Association's rules and was not afforded an opportunity to learn. When Evridges and Knecht met to execute the contracts, Evridges "were set on wrapping things up that evening" despite Knecht's lack of knowledge. CR. 1211.

Had Evridges disclosed the truth about the Supplemental Lease instead of intentionally misleading Knecht to believe otherwise, this lawsuit would not be in front of this court. Nevertheless, Evridges had a duty to disclose material facts basic to the transaction and failed to do so. *See Ducheneaux*, 488 N.W.2d at 913 (Failure to disclose material facts about inability to comply with law "deemed basic to the transaction"). Knecht's tort claims must be presented to a jury.

**B. Deceit and Fraud were Supported by the Evidence**

Pursuant to SDCL § 20-10-1(3), deceit is established by "the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or a promise made without any intention of performing[.]" Fraud occurs by "the suppression of that which is trust by one having knowledge or belief of the facts; a promise made without any intention of performing it; or any other act fitted to deceive. SDCL

§53-4-5. And" [f]raudulent inducement entails willfully deceiving persons to act to their disadvantage." *Law Capital, Inc. v. Kettering*, 836 N.W. 2d 642, 646 (S.D. 2013).

Again, Evridges had a duty to disclose the object and their true intent with the Supplemental Lease to Knecht and deceived him by failing to do so. SDCL §20-10-2(3). Had Knecht known the lease was unlawful and would not be allowed by the Association, he would not have agreed to its terms. *See Ducheneaux,* 488 N.W.2d at 913 (deceit where material facts about inability to comply with law withheld). When Knecht questioned why the lease was to be secreted, Evridges willfully mislead him by stating they simply did not want people knowing their business. CR. 1356. Evridges further deceived and defrauded Knecht by failing to fulfill promises regarding performance on both leases which they had no intention of performing. CR. 1128.

Before Knecht agreed to the Supplemental Lease, he inquired about the necessity of two leases and was told it was the only way Evirdges could lease their land. CR. 799, 1356. This was false, and Evridges intentionally misrepresented the nature and purpose of the Supplemental Lease to Knecht's detriment. They knew the Association's discovery of the Supplemental Lease would cause Knecht to lose his grazing permit but failed to inform him of that fact because they benefited financially from the agreement. CR. 799, 1356. That is fraud. Knecht's claims of fraud and deceit were supported by the evidence and the Circuit Court's dismissal of such claims must be reversed and remanded.

## CONCLUSION

For all these reasons, as well as those stated in Knecht's other briefings on this matter, the Judgment must be reversed in part and remanded.

Dated at Sioux Falls, South Dakota, this 22nd day of January, 2019.

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellant Michael Knecht complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 4,987 words, excluding the Table of Contents, Table of Authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman font (13 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, January 22, 2019.

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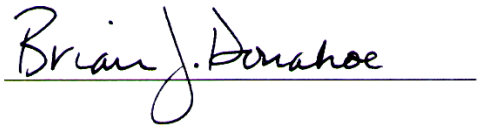

Brian J. Donahoe

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Reply Brief of Appellant" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on January 22, 2019.

The undersigned further certifies that an electronic copy of "Brief of Appellants" was emailed to the attorneys set forth below, on January 22, 2019:

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Dated at Sioux Falls, South Dakota, January 22, 2019.

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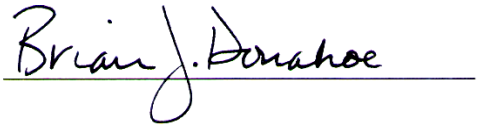

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