TESTIMONY BY

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ON

EXPLOSION OF FEDERAL REGULATIONS THREATENING JOBS AND ECONOMIC SURVIVAL IN THE WEST

BEFORE THE

SUBCOMMITTEE ON NATIONAL PARKS, FOREST AND PUBLIC LANDS
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ELKO, NV
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Honorable Chairman Bishop, Ranking Member Grijalva, and Members of the Subcommittee:

My name is JJ Goicoechea. I am a 4th generation rancher in Nevada, a practicing veterinarian and current president of the Nevada Cattlemen's Association. I am speaking on behalf of the Nevada Cattlemen's Association, the Public Lands Council and the National Cattlemen's Beef Association. I offer this testimony to provide our industry's concern over recent actions on the part of the federal land management agencies to diminish our water rights and restrict our long-standing, legally protected access to forage on federal lands.

Many producers in Nevada and across the West have experienced impediments when dealing with the United States Forest Service on the issue of privately held water rights. The Forest Service's continued unwillingness to allow water owners the ability to maintain and improve water developments and range improvements, such as water troughs, spring boxes and pipelines, places the natural resources and the health of the range at risk. In order to properly manage our grazing allotments by ensuring we meet utilization criteria and protect the resources, it is imperative that we also manage our water sources so that they are adequately dispersed and

located in areas that provide water to livestock and wildlife without putting undue pressure on forage.

Permittees understand and embrace the practice of caring for rangelands as it ensures the perpetuation of their operations. They have developed methods of managed grazing that serve as excellent tools for combating invasive plant species, promoting healthy, diverse populations of browse and forbs, and reducing wildfire severity and size. In order to maximize the numerous benefits of livestock grazing, water must be available and dispersed in multiple, well-calculated locations.

However, our time-honored tradition of stewardship of the resource is being imperiled by the Forest Service's refusal to issue water improvement permits—and exacerbated by its recent decisions regarding utilization standards in riparian areas. For example, utilization guidelines in the Martin Basin Environmental Impact Statement (EIS) called for just thirty-five (35) percent utilization of herbaceous species within riparian areas. While these guidelines were established in order to protect sensitive areas (such as functioning "at-risk" streams and nonfunctioning streams) and plant species, this policy, when combined with the Forest Service's new policy of withholding water improvement permits, serves only to harm the resource in the long-run. 35 percent utilization is an arbitrary and unrealistically low number—if we are unable to make water improvements. Animals tend to congregate around water sources, especially in the warmer summer months, and 35 percent utilization can be reached within only a few days. Once utilization is met, the livestock will be removed from the allotment and the remaining uplands will have received very little usage. As a result, plant species in these upland areas will start to decline in health and diversity, leading to a less productive and unhealthy rangeland. A second, all too common consequence of underutilized uplands is the destruction of these areas by severe and intense wildfires. All this can be prevented, however, if we retain the option of implementing water improvements that can disperse those water sources to non-sensitive areas.

Thus, with the continued postponement and, in some cases, refusal of permits to allow maintenance or development of range improvements, the Forest Service is failing to protect the resources it is tasked with caring for.

Local Forest Service personnel tend to understand the need for, and importance of, dispersing water in order to properly manage grazing allotments; however, their hands are often tied by directives from regional and national agency offices. In a letter dated August 29, 2008, Intermountain Regional Director Harv Forsgren directed his subordinates: "The Intermountain Region will not invest in livestock water improvements, nor will the agency authorize water improvements to be constructed or reconstructed with private funds where the water right is held solely by a livestock owner." Director Forsgren's letter changed the methods by which many permittees were properly managing their allotments—through privately-funded water

developments and improvements. Some district offices in Nevada had told permittees that the issue at hand was the use of agency monies to make improvements on water they (the Forest Service) did not own; however, Director Forsgren's letter makes clear that any improvement on privately-owned water, even if funded by the permittee, is not allowable under the new policy.

The crux of the problem is twofold: not only does the agency's demand for ownership of private water rights violate longstanding private property rights that are at the foundation of this country, the policy is in some cases a violation of state law, resulting in paralyzing deadlock. Director Forsgren's letter, for example, took stock water developments and improvements completely off the table in Nevada, where state law forbids ownership of stock water rights by an entity that does not own, lease or possess livestock. As stated in Nevada's NRS 533.503, federal agencies cannot hold stock water rights, as they are not able to prove beneficial use. Nevada Revised Statute Chapter states, in part:

> The State Engineer shall not issue a certificate of appropriation based upon a permit to appropriate water for the purpose of watering livestock unless:
>
> (a) The holder of the permit makes satisfactory proof that the water has been beneficially used, is legally entitled to place on the lands the livestock which have been watered pursuant to the permit, and:
>
> (1) Owns, leases or otherwise possesses a legal or proprietary interest in the livestock which have been watered pursuant to the permit;

Because the federal agencies cannot own nor have proprietary interest in the livestock, they cannot be issued a certificate of appropriation for the purpose of watering livestock. The policies of the Forest Service state that "The United States cannot obtain livestock water rights via Federal law" and that "compliance with the State law process is mandatory." This seems to run contrary to the new policy, as the agency has stated it will continue to deny water improvement permits unless it owns a portion or all of the water.

The agency's continued denial of permission to develop, maintain, or replace water sources and range improvements presents a major threat not just to the resource, but to ranchers such as myself: the prospect of losing the water rights on grounds of forfeiture or abandonment. Nevada water law states that the water must be put to "beneficial use." In the case of stock water, of course, that use is for watering livestock. If the water cannot be used to water livestock, it will no longer be a valid right. Groundwater rights, if not used for five (5) years, are subject to forfeiture. Surface water rights can be lost through abandonment of the water. If the holder of a grazing permit is not permitted to use the allotment due to lack of water sources, presence of sensitive areas or species, or any other reason, there is no beneficial use of the stock water. This could be construed as abandonment of a surface water right, and thus loss of the water could result. The fact that the Forest Service would help facilitate the loss of a personal property right

such as a water right flies in the face of the principles upon which our nation was founded, in my view constituting a federal regulatory "taking" of private property.

During the last two years, multiple meetings between public land ranching representatives and officials from the Forest Service have belied inconsistent messages as to the reason for which the federal government is seeking to obtain water rights. Throughout the meetings, however, one message has remained constant: the Forest Service claims to fear that privately-held water rights will be sold away or separated from the grazing allotments to which they are tied. While I cannot speak for all states, the process through which water rights would be changed in regard to type and point of use in Nevada is arduous and offers many opportunities for intervention by interests both within and outside of agriculture. The notion that ranchers would sell their permitted stock water, change the use (presumably to municipal use), and somehow acquire the permit to build a pipeline off of National Forest System lands is absurd. For one thing, many stock water sources flow at a rate of under five gallons per minute; such an effort would be futile. The Forest Service's theory of protecting the water by denying a healthy rangeland management practice, that is consistent with state law, is not a reasonable explanation to many ranchers and users of public lands.

Thanks to improvements largely accomplished by ranchers' investments of their own time and resources on National Forest System lands, abundant wildlife habitat has sprung out of landscapes formerly lacking a large number of water resources. Not only that, many private stock water owners on National Forest System lands have memorandums of understanding (or MOUs) with the Forest Service, where they voluntarily allow the agency to put a designated amount of water to use on agency initiatives. Now, the agency's demand for partial ownership of water rights is threatening these MOUs and the spirit of cooperation that has long existed on the range.

The Forest Service's demand flies in the face of federalism and the prior appropriation doctrine for water rights which exists in much of the West. By law, the federal government, except in narrow cases, is required to give primacy over the waters within individual states to those states' laws, regulations, and agencies. For the benefit of the resource, which ranchers are striving every day to improve, and which the Forest Service is mandated to care for, the current Forest Service policy of delaying maintenance and establishment of stock water resources needs to be reevaluated and discarded.

Why is it that the Forest Service continues to attempt to bully stewards of the land into giving up precious rights, granted and protected by law? Would it not benefit the agency, the resource, the wildlife, the permittee, sportsmen, and all federal land users to have a healthy rangeland with abundant sources of water, located outside of sensitive areas?

Clean Water Act Guidance

While not directly related to the Forest Service's attempts to take water rights, the Environmental Protection Agency and Army Corps of Engineers are in the process of finalizing "guidance" which would amount to the largest federal power grab in our Nation's history. The "guidance," as drafted by the agencies, would effectively remove the word "navigable" from the Clean Water Act (CWA), resulting in "legislation by regulation"—or, in this case, not even regulation—only "guidance"—guidance that has the force of law, but does not have to be vetted through standard rulemaking procedures. This effective re-writing of statute by regulatory fiat is a clear breach of our checks-and-balances system.

Both Congress and the Supreme Court of the United States have made it clear: there are limits to the federal government's authority over water in the United States. Congress has rejected numerous attempts to pass legislation that would remove "navigable" from the definition of "Waters of the United States," as this guidance would do. In both the 110th and 111th Congress, legislation was introduced to remove "navigable" from the Clean Water Act. These attempts failed. The Supreme Court has also been very clear: the terms "navigable" and "waters of the United States" have significant meaning. The "guidance" removes virtually all limits from federal jurisdiction over water, save swimming pools and birdbaths. Dry washes and rain puddles in the back pasture were never intended to be "waters of the U.S.," regulated by the federal government. You don't need a permit to drive a tractor across your hayfield. This "guidance" doesn't just represent water control; it represents land control.

Ultimately, the "guidance" will expand at unprecedented levels the universe of all permitting programs under the CWA, increasing regulations and expenses for farmers and ranchers and stifling economic growth and opportunity. Through the language of the guidance itself, the agencies admit that it will result in an increase in jurisdictional determinations, which will add costs and hurt job creation across the country. The average time it takes for an individual to complete the application and receive a CWA Section 404 Dredge and Fill permit is currently 788 days. How many of us can afford to wait for over two years to fix a clogged stream? How many more thousands of dollars will I have to spend when the government finds 50 new "waters of the U.S." on my place that need a permit? And by increasing the number of waters and individuals subject to permitting across the country, how much longer will it now take me to get my permits?

I urge Congress to stop this land-grab and stop these federal agencies from taking control of nearly every drop of water in the United States.

Endangered Species Act

Another major pressure on rural communities across the West stems from the Endangered Species Act (ESA). The ESA, which has not been reviewed or updated by Congress for nearly 25 years, has had less than a two-percent success rate for species recovery. Meanwhile, radical

environmental groups has used it as a tool to stop activities they oppose—even beneficial activities such as livestock grazing, which rural communities and the health of the range depend on. Their method is to use the "citizen suit" provision of the ESA to file endless lawsuits (usually on process decisions and errors, such as missed deadlines by the agency) and get reimbursed by taxpayer dollars. They clog the system with a constant stream of petitions to list more and more species, sucking up resources that should be going toward actual recovery efforts for actually threatened or endangered species. This allows for more missed deadlines, more litigation, and more opportunities to place restrictions on activities such as grazing.

Perhaps this is the reason for the knee-jerk reaction on the part of the federal land management agencies when, in 2010, the U.S. Fish & Wildlife Service found the Greater Sage Grouse "warranted but precluded" under the ESA. The listing of the bird would have such far-reaching and potentially devastating impacts across the West that the BLM and Forest Service have embarked on a sage grouse conservation plan, unprecedented in its size and scope, in an attempt to preempt the bird's listing. The BLM and Forest Service expect to revise, by 2014, over 100 resource and land management plans to implement sage grouse conservation measures.

But will the medicine be worse than the disease? The agencies' plans focus heavily on regulating grazing. But we in the ranching business, whose families have been in the business for generations, know the positive relationship between grazing and the sage grouse. Evidence of this relationship has been demonstrated by landscape-scale level statistics. Permitted livestock levels have dropped dramatically on BLM and Forest Service lands from 1940 to today. Sage grouse numbers have mirrored that decline. Grazing improves sage grouse habitat by increasing the quality and accessibility of forbs for sage grouse. It is also used to control the spread of noxious and invasive weeds and, as mentioned previously, to reduce the risk of catastrophic wildfire.

Thus, grazing is both compatible with and beneficial to sage grouse habitat conservation. Ranchers are the stewards of sage grouse habitat on both the private and public land they use. In fact, the federal agencies themselves recognize that (as stated in BLM in Instructional Memorandum (IM) No. 2012-043), grazing can be "used as a tool to protect intact sagebrush habitat and increase habitat extent and continuity which is beneficial to [the] Greater Sage-Grouse and its habitat." The IM continues, "Given the potential financial constraints in addressing the primary threats identified by the FWS, <u>enhanced management of livestock grazing may be the most cost-effective opportunity</u> in many instances to improve Greater Sage-Grouse habitat on public lands." According to Natural Resources Conservation Service (NRCS), grazing "has been responsible for retaining expansive tracts of sagebrush-dominated rangeland from conversion to cropland" and can "stimulate growth of grasses and forbs, and thus livestock can be used to manipulate the plant community toward a desired condition."

However, these services can only be provided by ranches that are stable and viable; thus, the best strategies for agency land managers to employ will be those that work for ranchers and greater sage-grouse, alike. Reducing livestock numbers is not effective as a mitigation strategy, and would in fact be detrimental to habitat and, ultimately, sage grouse numbers.

Why, then, do the agencies insist upon listing grazing as a threat to sage grouse habitat? Perhaps they are catering to environmental groups' demands in hopes that they can avoid going to court—because if history is any measure, these groups will challenge any decision that involves using grazing as a beneficial tool, even when both science and common sense are against them. They know that through tricks and manipulation of the laws, they can still reap taxpayer dollars and probably achieve many of the unreasonable demands they make.

We hope this does not become just another example of the ESA's being commandeered by environmental groups to further limit the productive use of natural resources on our public lands, as has happened with logging in the northwest, grazing and recreation in the southwest, and now—quite possibly—ranching and energy development in the interior west, intermountain region, Rockies, and beyond. With the economy of our nation in its current state, can we as a nation afford to cripple multiple viable and productive industries, just to avoid litigation by environmental groups?

The livestock industry has submitted to Congress its priorities for ESA reform, which I have submitted for the record along with this testimony. Without these reforms, I am afraid this vicious cycle of regulation and litigation will continue. Specifically, we call for more rigorous data quality requirements, a better mechanism to delist species, and increased transparency regarding the agencies' plans to list species, recovery plans, and all economic impact. The recommendations also ask for greater focus on working with landowners and operators to incentivize species recovery and protection plans. They indicate that livestock producers should have a seat at the table when decisions are being made about the land they own or manage.

I appreciate the opportunity to provide this testimony on behalf of ranchers across the West concerned with the apparent drive by the Federal Government to amass water rights and exercise more control over rural communities. From the Forest Service and Fish and Wildlife Service to the Environmental Protection Agency and Army Corps of Engineers, the rural west is under attack by federal agencies and their regulatory red-tape. Ranching and agriculture are a vital part of the economies of rural Nevada and across the West. The protection of our water rights and our right to continue grazing livestock will allow ranching and the countless rural communities across the West that depend on ranching to continue to thrive. I thank the members of this committee for your interest in this matter and, and thank you for the opportunity to testify before you today.

2012 ESA Reform Priorities

Jointly Submitted to the U.S. House Committee on Natural Resources by Karen Budd Falen, Public Lands Council and National Cattlemen's Beef Association

Federal Implementing Agency Mechanisms:

- Consistent with the Data Quality Act, the implementing agencies should require more rigorous criteria in listing decisions. Independent, peer reviewed science should be used to reach decisions.
- A more prompt and simplified "delisting" or "downlisting" mechanism should be implemented. Recovery plans needs to include specific delisting criteria which, when met, automatically result in delisting. Operators of water storage reservoirs, water diversion structures, canals, or other artificial water delivery facilities should be exempt from liability under ESA for any take of specified aquatic species that results from predation, competition, or other adverse effects attributable to non-native aquatic species introduced by another person into the river basin where the facility is located.
- In determining whether a Federal agency action is likely to result in the destruction or adverse modification of critical habitat, the agencies would consider the offsetting effects of habitat conservation measures proposed to be implemented as part of the action including the protection and management of certain alternative habitat.
- Landowners and operators should be able to enter into voluntary partnership agreements with the agencies, under which the owners and operators manage the land for the protection and enhancement of both protected and candidate species, in exchange for incentive payments. Where the operator of such land is not the owner, both the owner and the operator must enter into the agreement.

State/Local involvement:

- The agencies should be required to notify and provide a copy of a listing petition to the governor and wildlife management agency of each state in which the species is believed to occur and to solicit the assessment of such agency as to whether the petitioned action is warranted.
- Public hearings, especially in rural areas, should be held in states affected by proposed listings.
- The agencies should be able to enter into species recovery agreements and species conservation contract agreements with individuals. Grants should be made available to promote the voluntary conservation of endangered and threatened species by private property owners.
- County and local governments should be involved as cooperating agencies in species listing and critical habitat designation.
- Legislative efforts to promote more state and local management of endangered species would allow ranchers and their communities to adjust based on local conditions.

Transparency:

- The agencies should make certain information available to the public (specifically on the Internet):

    - Litigation costs and other general expenditures made primarily for the conservation of species. This should also be included in an annual report to Congress.
    - Information upon which a proposed regulation is based, including information not supporting a listing or other regulation (with an exception for disclosures protected under the Freedom of Information Act or the Privacy Act).
    - Lists of threatened or endangered species.
    - Lists of final and proposed regulations under the ESA.
    - Lists of results of five-year reviews.
    - All draft and final recovery plans, and other required reports and data.
- Federal grazing permittees should be guaranteed access to agency deliberations on ESA issues that affect their livelihoods.
- Economic impact studies should take place and be distributed prior to any listing.