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Testimony of

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on

H.R. 3102

before the

Subcommittee on Forests and Forest Health
Committee on Resources
United States House of Representatives

June 17, 2004

This testimony contains my professional opinions, based on sixteen years of experience as a teacher and scholar of natural resources law and public land law at Arizona State University and as a participant in the management of public lands, including National Forests, in Arizona, New Mexico, and Utah.

In preparing this testimony, I have been assisted by Guy R. McPherson, who is a Professor in the School of Natural Resources and in the Department of Ecology and Evolutionary Biology at the University of Arizona. Professor McPherson has provided information about the range programs and Cooperative Extension Services at the land grant universities, including the University of Arizona, and has verified the accuracy of my description of the nature and role of these programs.

I. Introduction

H.R. 3102 (108th Congress, 1st Session), entitled “A Bill To utilize the expertise of New Mexico State University, the University of Arizona, and Northern Arizona University in conducting studies under the National Environmental Policy Act of 1969 in connection with the grazing allotments and range and continuing range analysis for National Forest System lands in New Mexico and Arizona, and for other purposes,” was introduced by Representative Steve Pearce (R, NM) on September 16, 2003. H.R. 3102 would do three things:

(1) Sections 1(a) and 1(b) would require the Secretary of Agriculture to enter into cooperative agreements to “use” New Mexico State University, the University of Arizona, and Northern Arizona University to “conduct all studies required by the National Environmental Policy Act” (NEPA) and to “perform related activities” for all National Forest grazing allotments in New Mexico and Arizona. The studies and related activities would include, but not be limited to, range studies, “human dimension” studies, economic impact studies, cumulative effects studies, water quality studies, and “involvement in the planning and implementing of the 10-year plan.”

(2) Section 1(c) would require the Secretary of Agriculture to “utilize” the same three universities “to perform all range and continuing range analysis” for National Forests in New Mexico and Arizona. “Range analysis” would include range monitoring, “involvement” in consultation pursuant to section 7 of the Endangered Species Act, and “involvement” in the planning and implementation of annual operating plans for grazing allotments. (Section 1(c).)

(3) Section 1(d) would require the assignment of a United States Fish & Wildlife Service employee to the

“NEPA study team” and would declare that assignment of such an employee “shall be deemed to satisfy the consultation requirements” of section 7 of the Endangered Species Act.

For National Forest rangelands in Arizona and New Mexico, H.R. 3102 would virtually repeal the Endangered Species Act by eliminating the consultation that is the key to the Act’s implementation on federal lands. Furthermore, the bill would undermine NEPA as applied to these rangelands by transferring federal agencies’ responsibilities under NEPA to non-federal, non-governmental entities that are not designed or equipped to perform such responsibilities, are not open and accountable to the public, the Congress, or the courts, and are closely associated with the livestock industry.

II. H.R. 3102 Is Based on a False Premise

According to a press release dated September 16, 2003, from H.R. 3102’s sponsor, Representative Steve Pearce, H.R. 3102 is necessary because “[c]urrently, many ranchers are prohibited from grazing their cattle on forest lands in the Southwest Region because required studies on the health of the rangeland have not been completed.” This premise is incorrect. Under a series of appropriations riders, the latest of which (Pub. L. 108-108, § 325) is in effect until 2008, existing grazing permits are renewed when the studies required by NEPA are incomplete. Therefore, ranchers are not prohibited from grazing cattle because rangeland health studies have not been completed. Moreover, even before the passage of these riders, ranchers were not prohibited from grazing their cattle on forest lands in the Southwest Region because required studies on the health of the rangeland had not been completed.

III. H.R. 3102 Would, In Effect, Repeal the Endangered Species Act with respect to National Forest Rangelands in Arizona and New Mexico

Rangelands and riparian areas of the National Forests in Arizona and New Mexico provide essential habitat for numerous species of plants and animals that have been listed as threatened or endangered under the Endangered Species Act (ESA). Livestock grazing has been implicated as a principal cause of the decline of many of these species. Faithful implementation of the ESA is imperative if these species are to survive.

On federal lands, the key provision of the ESA is section 7, 16 U.S.C. § 1536. Section 7 establishes procedures to evaluate the effects of proposed federal agency actions on threatened and endangered species and ensure that such actions do not jeopardize such species or damage their critical habitat. Importantly, section 7 gives an oversight role to the U.S. Fish & Wildlife Service (USF&WS), an agency that is separate and independent from the Forest Service and that possesses special expertise in the protection of threatened and endangered species. Section 7 also requires documentation that enables members of the public, the Congress, and, if need be, the courts, to determine whether agencies have complied with the ESA.

H.R. 3102, however, would eliminate section 7 procedures, eliminate independent oversight by the USF&WS, and eliminate documentation of ESA compliance with respect to livestock grazing on National Forests in Arizona and New Mexico. The elements of section 7 that would be overridden by H.R. 3102 include the following:

- the requirement that the Forest Service conduct a biological assessment to determine whether proposed grazing or grazing management is likely to affect a threatened or endangered species, 16 U.S.C. § 1536(c)(1);
- the requirement that the USF&WS prepare a biological opinion to determine whether proposed grazing or grazing management will jeopardize the continued existence of a threatened or endangered species or adversely modify or destroy its critical habitat, 16 U.S.C. § 1536(b) ;
- the requirement that the USF&WS identify alternatives for grazing or grazing management that will not jeopardize a threatened or endangered species or damage its critical habitat, 16 U.S.C. § 1536(b)(3)(A); and
- the requirement that the USF&WS identify reasonable and prudent measures to minimize the “take” of threatened and endangered species by grazing or grazing management on National Forests in Arizona and New Mexico, 16 U.S.C. § 1536(b)(4).

In place of these key requirements, H.R.3102 would substitute a token provision, section 1(d), calling for the appointment of a single employee of the USF&WS to the Forest Service's "NEPA study team." The presence of this single USF&WS employee on a team would be "deemed to satisfy the consultation requirements of section 7." Under this provision, there would be no independent determination by the USF&WS of whether grazing or grazing management will jeopardize a threatened or endangered species or damage its critical habitat, no development of alternatives that protect threatened and endangered species, and no development of measures to minimize the "take" of such species. There would also be no documentation that would allow the public, the Congress, or the courts, to determine the extent, if any, to which the Forest Service has complied with the ESA in its management of livestock grazing on the National Forests of Arizona and New Mexico.

IV. H.R. 3102 Would Inappropriately Transfer Forest Service NEPA Responsibilities to Selected State Universities

State universities undoubtedly have resources and expertise that can be usefully employed by the Forest Service and other federal land management agencies to assist them in performing their responsibilities under NEPA and other federal laws. Under existing law, agencies may enter into cooperative agreements or contracts with universities for the collection and analysis of data or the provision of expert advice. Furthermore, university scientists may, and do, sit on agencies' advisory committees, participate in agency planning processes, and comment on proposed agency plans and decisions.

H.R. 3102, however, would place state universities in an inappropriate role by transferring to them governmental functions that they are not designed or equipped to perform. Further, because they are not government agencies, university departments are not open and accountable to the public, the Congress, or the courts. Moreover, H.R. 3102 selects land grant universities (New Mexico State and the University of Arizona) whose cooperative extension programs tie them closely to the livestock industry, while excluding other state universities (Arizona State and the University of New Mexico) that have departments with enormous expertise in relevant disciplines but are not so closely associated with the livestock industry.

A. State Universities Are Not Designed or Equipped to Perform the Forest Service's NEPA Functions

The National Environmental Policy Act (NEPA) requires much more than scientific study of the impacts of agency actions. NEPA facilitates public participation in agency decision-making, requires agencies to develop and explore alternative courses of action, and furthers accountability of agencies to the public, the Congress, and the courts. If the Forest Service's NEPA responsibilities were assigned to state universities, these essential functions of NEPA could be compromised or lost, because universities are not designed to perform these functions.

I have recently spoken with Professor George Ruyle, Chairman of the Rangeland and Forest Resources Program in the School of Natural Resources at the University of Arizona. Professor Ruyle confirmed that the University of Arizona is currently not set up or equipped to perform the Forest Service's NEPA functions for National Forest rangelands in Arizona.

The following are specific examples of the inappropriateness of state universities to perform the Forest Service's NEPA functions:

Public participation. An essential function of NEPA is the facilitation of public participation in agency decision-making. NEPA regulations require federal agencies to "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment" and to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. §§ 1500.2(d), 1506.6. University departments, however, are not public agencies, and are not designed, equipped, or required to facilitate public participation in their work. Transferring the Forest Service's NEPA responsibilities to state universities will severely limit the ability of the public to participate in NEPA processes.

Development and consideration of alternatives. A key requirement of NEPA is that federal agencies develop and consider alternatives to their proposed actions. Development and evaluation of alternatives "is the heart of [an] environmental impact statement" (EIS). 40 C.F.R. § 1502.14. Consideration of alternatives is also required for lesser agency actions that are accompanied by an environmental assessment (EA) rather than an EIS. 40 C.F.R. § 1508.9(b). The development and consideration of alternatives requires evaluation of

trade-offs between competing interests and resources. For example, an alternative that maximizes livestock production may be harmful to wildlife habitat, water quality, or recreational opportunities. Designing a preferred alternative that achieves the optimum balance between competing resources and interests is an essentially governmental function, not a scientific one. Transferring the Forest Service's NEPA responsibilities to state universities will inappropriately take this function away from responsible government officials.

Openness. Citizens expect and deserve access to people, processes, and documents involved in the management of public lands, including National Forests. The names, responsibilities, and lines of authority of Forest Service officials are publicly available, and Forest Service personnel are generally accessible for contact by members of the public. Forest Service processes for environmental analysis and decision-making are set forth in Forest Service regulations and the Forest Service Handbook, and Forest Service documents are available to the public through the Freedom of Information Act (FOIA). Furthermore, Forest Service personnel are covered by civil service rules that protect employees who reveal information critical of the agency to the public. However, if the Forest Service's NEPA responsibilities are transferred to state universities, it is unlikely that the people, processes, and documents will be open to the public. University personnel are not required to be available to the public, their processes are not set forth in publicly-available regulations or handbooks, their records are not subject to FOIA, and they are not protected by federal civil service rules.

Accountability. Federal agency officials are accountable in a variety of ways. They are appointed by agency heads who in turn are appointed by the elected President and confirmed by Congress. They are subject to congressional oversight, and their actions are subject to administrative appeal, and, as a last resort, to judicial review in the courts. Transferring the Forest Service's NEPA responsibilities to state universities, however, would place these responsibilities in the hands of entities that are not accountable to the public, the Congress, or the courts.

B. The Association Between the Land Grant Universities and the Livestock Industry Makes Assignment of the Forest Service's NEPA Responsibilities to the Land Grant Universities Inappropriate

Two of the three state universities selected by H.R. 3102 to take over the Forest Service's NEPA responsibilities for grazing in Arizona and New Mexico – the University of Arizona and New Mexico State University – are land grant universities established pursuant to the Morrill Act. As such, they have a specific mission to assist farmers and ranchers. The range programs in these land grant universities receive a major part of their funding from the Department of Agriculture's Cooperative Extension Service, and these university range programs provide services to ranchers through the universities' own Cooperative Extension Services, with which the range programs are intertwined. Some faculty members' salaries in the university range programs are paid by Cooperative Extension funds; these faculty members are designated as "extension specialists" or "extension agents" and assistance to farmers and ranchers is their primary function. Therefore, the history, structure, function, and funding of these university range programs closely associate them with the interests of the livestock industry. At the same time, H.R. 3102 gives no role to two other state universities – Arizona State University and the University of New Mexico – whose faculties include experts in many pertinent subjects (including wildlife, range vegetation, soils, and watersheds) but which lack programs designed to serve the livestock industry.

Although H.R. 3102 does not refer to specific departments or programs within the land grant universities, it is very likely that the NEPA responsibilities that H.R. 3102 would give to these universities would be assigned to the range management and Cooperative Extension programs that are closely associated with the livestock industry. In fact, the press release accompanying Representative Steve Pearce's introduction of H.R. 3102 explicitly states that, under the bill, NEPA studies would be conducted by New Mexico State University's Range Improvement Task Force (RITF), which is part of NMSU's College of Agriculture and Home Economics and a majority of whose members are extension specialists. The RITF has long taken positions favorable to the livestock industry on controversial environmental, economic, and administrative issues related to livestock grazing on public lands, including National Forests.

While university range management and Cooperative Extension programs provide valuable services, the close association of these programs with the livestock industry makes transfer of Forest Service NEPA responsibilities to them inappropriate. The Forest Service is legally required to protect all of the resources under its management from impairment, and to consider and balance the interests of all types of users of the National Forests. See 16 U.S.C. § 531(a) (definition of "multiple use"). Livestock grazing is just one of

many resources and uses of the National Forests in the Southwestern Region. Other resources and uses, some of which are more economically important than grazing on southwestern forests, include wildlife, recreation, soils, and watersheds. Livestock grazing can, and often does, adversely impact these other resources and uses.

A key function of NEPA is, through the design and evaluation of alternatives, to assess the spectrum of possible tradeoffs between uses and resources that may sometimes compete or conflict. Assignment of the Forest Service's NEPA responsibilities to institutions closely associated with one user group would create a perception, and a danger, that that group's interests would be favored at the expense of others. In recent years, personnel of the range management and Cooperative Extension programs at the University of Arizona and New Mexico State University have sometimes acted as advocates in opposition to Forest Service decisions to restrict or limit livestock grazing in order to protect vegetation, soils, watersheds, or wildlife habitat. While there is nothing improper about university personnel expressing opinions on controversial issues, it would be troubling for institutions that have been associated with one side of a controversy to be assigned as arbiters of that same controversy.

V. Conclusion

The press release from Representative Steve Pearce that accompanied introduction of H.R. 3102 described the bill as “designed to restore and preserve grazing rights for New Mexico's ranchers.” The specific provisions of the bill – bypassing the requirements of the Endangered Species Act and assigning NEPA responsibilities to institutions associated with the livestock industry – confirm that it will advance the interests of one group of users of the southwest's National Forest at the expense of other uses and resources. For this reason, I believe that passage of H.R. 3102 would be unwise.