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**Testimony of Karen Budd-Falen, Esq., Cheyenne, Wyoming
Before the U.S. House of Representatives
Committee on Resources, Subcommittee on Forests and Forest Health
Oversight Hearing on Livestock Grazing Policies on National Forests
April 8, 1997, Longworth House Office Building, Room 1334**

My name is Karen Budd-Falen. I am both a rancher and an attorney who represents ranchers and local governments who are dependant upon the use of the federal lands. The information provided at this hearing is based both upon my personal knowledge as a fifth generation rancher on a family owned ranch located near Big Piney, Wyoming, and upon the problems of my clients, whose livelihoods are dependent upon the conservation and use of the federal lands. I am here to discuss with you my concern for federal land management, based upon personal experience and my knowledge of the statutory authorities binding the actions of the U.S. Forest Service. While not all employees of the Forest Service are attempting to eliminate the federal lands user, in my view, the Forest Service is not following the mandates of the federal statutes or the U.S. Constitution. This failure is leading to the unnecessary elimination of many federal lands grazing permits and leases.

- I. Humboldt-Toiyabe National Forests, Nevada
 - A. General Description of the Problem
 - 1. Humboldt National Forest

The Humboldt National Forest is located in the eastern side of Nevada and encompasses over two and one-half million (2,500,000) acres. In 1986, the Forest Service promulgated the Humboldt National Forest Land and Resource Management Plan (LRMP or Forest Plan). The Forest Service listed goals and objectives in the Humboldt LRMP which projected that in 1995, the Humboldt National Forest would annually produce 300,298 animal unit months (AUMs) of livestock grazing. Until 1993, livestock grazing permits existed for over 300,000 AUMs on the Humboldt National Forest. However, between 1987 and 1993, the Humboldt National Forest actually authorized only 215,546 AUMs per year.

Although over 300,000 AUMs were authorized in 1993, the Humboldt National Forest reduced the permitted livestock grazing to approximately 241,000 AUMs and authorized only approximately 199,000 AUMs of livestock grazing. In 1994, the Humboldt National Forest slightly

increased the permitted livestock grazing to 261,006 AUMs, but only authorized 221,803 AUMs. Thus, between 1987 and 1994, the Forest Service reduced grazing on the Humboldt by 38,994 AUMs. In terms of the loss of ranchers, in 1987, there were 160 individual livestock grazing permittees on the Humboldt National Forest. In 1994, only 135 livestock grazing permittees remained. In other words, 25 grazing permittees have ceased grazing on the federal lands since the implementation of the Humboldt National Forest LRMP. See attachments 1 and 2.

The Forest Service stated in the Humboldt LRMP that it would further evaluate or change direction with respect to livestock grazing management if the record of actual livestock grazing use varied by ten (10) percent or more. In a letter dated October 30, 1995, the Nevada Land Action Association (NLAA) representing the Humboldt National Forest permittees requested the Humboldt Forest Supervisor to evaluate why livestock grazing has been substantially reduced over what was projected in the Humboldt LRMP and to amend the Humboldt LRMP in a manner which will correct the inequity between the livestock grazing program and the Humboldt LRMP. The Forest Service responded on December 6, 1995, admitting that the livestock grazing program has been reduced, but denying to amend the Humboldt LRMP. This same information regarding the severe reduction in livestock grazing was presented to the Forest Supervisor again on February 6, 1997. On March 24, 1997, the Forest Service responded by stating that it would continue to monitor the goals and outputs of the Humboldt LRMP and that the Plan would be "revised and amended as part of an [sic] continuous planning process." The letter contained neither a time frame for the start or completion of the "continuous planning process," nor a recognition of the fact that since 1987, livestock grazing on the Humboldt National Forest has been systematically reduced by almost 39,000 AUMs.

2. Toiyabe National Forest

The Toiyabe National Forest is located in the western portion of Nevada and encompasses over 3,000,000 acres. In 1986, the Forest Service promulgated the Toiyabe LRMP. The Toiyabe LRMP projected that between the years 1991 and 2000, permitted grazing use for domestic livestock would be 98,000 AUMs per year.

In 1985, livestock grazing permits existed for over 105,000 AUMs on the Toiyabe National Forest, although the Forest Service actually authorized only 88,824 AUMs. Except for the year 1991, the Toiyabe National Forest has steadily reduced both the AUMs permitted and the AUMs actually authorized. By 1994, the permitted number of AUMs on the Toiyabe National Forest was 69,346 AUMs, and the number of AUMs authorized was only 56,062 AUMs, or 57 percent of the yearly amount projected in the Toiyabe LRMP. In terms of human impact, in 1985, there were 75 individual livestock grazing permittees on the Toiyabe National Forest. In 1994, only 44 livestock grazing permittees remained. See attachments 1 and 2.

Like the Humboldt Forest Plan, the Forest Service in the Toiyabe LRMP agreed that it would further evaluate or change management direction with respect to livestock grazing if the record of actual livestock grazing use varied by ten (10) percent or more. In contravention of the Toiyabe LRMP and the regulations, the Forest Service has never monitored and identified the reasons why

the actual livestock grazing use has remained at less than sixty (60) percent of the AUMs projected in the Toiyabe LRMP. The Forest Service also has never examined methods or alternatives which would bring the livestock grazing program into compliance with the Toiyabe LRMP. Furthermore, the Forest Service has never examined possible amendments to the LRMP which will return livestock grazing outputs on the Toiyabe National Forest to the 98,000 AUM level projected in the LRMP.

In a letter dated October 30, 1995, the NLAA requested that the Toiyabe Forest Supervisor to evaluate why livestock grazing is less than projected in the Toiyabe LRMP and to amend the Toiyabe LRMP in a manner which will correct the inequity between the livestock grazing program and the Toiyabe LRMP. The Forest Service responded to the NLAA's request on December 6, 1995 by stating that although the livestock grazing program has been reduced, the Forest Service would not consider review of the Toiyabe LRMP. This same information regarding the severe reduction in livestock grazing was presented to the Forest Supervisor on February 6, 1997. On March 24, 1997, the Forest Service responded by stating that it would continue to monitor the goals and outputs of the Toiyabe LRMP and that the Plan would be "revised and amended as part of an [sic] continuous planning process." The letter contained neither a time frame for the start or completion of the "continuous planning process," nor a recognition of the fact that since 1991, livestock grazing on the Toiyabe National Forest has been systematically reduced by 35,654 AUMs.

B. Statutory Violations

One of the primary statutes governing management of national forest system land is the National Forest Management Act (NFMA) which requires that the national forests be managed for outdoor recreation, range, timber, watershed, wildlife and fish. 16 U.S.C. § 1604(g)(3)(A). Under the requirements of NFMA, the Forest Service must complete LRMPs or forest plans for each national forest. The LRMPs guide all natural resource management activities, establish management standards and guidelines and describe resource management practices, levels of resource production and management, and the availability and suitability of lands for the activities to occur in each national forest. Livestock grazing permits, wildlife management plans and other authorized activities must comply with the direction contained in the applicable forest plan.

The Forest Service is also required to monitor and evaluate, on a periodic basis, whether the goals and objectives stated in the governing LRMP on a particular forest are being met. 36 C.F.R. § 219.12(k). Forest Service regulations state that if the evaluation shows that the goals and objectives are not being attained, the Forest Supervisor must examine changes in management direction, revisions or amendments to the LRMP to either meet the goals and objectives of the LRMP, or the Forest Supervisor must revise the goals and objectives of the LRMP so that they are attainable. 36 C.F.R. § 219.12(k).

Consistent with the regulations, the Humboldt and Toiyabe LRMPs themselves also require the Forest Service to reevaluate or change the management direction of the livestock grazing program if actual livestock grazing use is more than ten (10) percent less than the amount predicted

in the LRMPs. As stated above, data collected from the Forest Service show that on the Humboldt and the Toiyabe National Forests, actual livestock grazing use is over ten percent (10%) less than predicted in the LRMPs. However, the agency has refused to evaluate the reasons for this deviation from the objectives of the LRMPs, and has refused to amend or revise the LRMPs. Consequently, the Forest Service has violated the NFMA, the accompanying regulations, the Humboldt LRMP and the Toiyabe LRMP. The Forest Service's violations of the NFMA, the accompanying regulations, the Humboldt LRMP and the Toiyabe LRMP constitute agency action unlawfully withheld as prohibited by the APA. 5 U.S.C. § 706(1).

Although there have been claims that market forces, the lack of suitable grazing allotments, the conflict between livestock grazing and resource preservation are the cause of the substantial decline in grazing on the Humboldt and Toiyabe, the experiences of the individual affected permittee do not support these contentions. Resource Concepts, Inc., (RCI) an independent consulting firm in Carson City, Nevada, took on the task of reviewing each decision from the Humboldt and Toiyabe National Forest eliminating or reducing livestock grazing to determine the reasons for the individual reduction. The significant majority of reductions occurred because the grazing permittee could not comply with the standards and guidelines in the Humboldt and Toiyabe LRMPs. The standard and guideline causing the most problems were the forage utilization standards. Under the LRMPs as written, once the specified utilization for an area is reached, such as a 35 percent utilization standard in a riparian area, livestock must be removed from the area. There is no determination of whether livestock or other wildlife (elk) caused the utilization standard to be met, no quantification of the amount of forage remaining on the riparian area or the rest of the allotment, no determination of whether the utilization standard is an appropriate measure of the health of that particular area on the allotment. The standard is rigid and once met, livestock grazing is eliminated or the rancher can face a penalty including permanent or temporary, cancellation or suspension of all or part of his grazing permit. Because of the Uniform Action Guide for the Humboldt provides little flexibility in how penalties for violation of utilization standards are administered, many grazing permittees "voluntarily" relinquish their grazing permits simply because they cannot meet the standards set by the agency.

II. Apache-Sitgreaves National Forest

A. General Description of the Problem

Prior to 1995, the Forest Service held the position that the reissuance of regularly-expiring livestock grazing ten year term permits did not require analysis pursuant to the National Environmental Policy Act (NEPA). 42 U.S.C. §§ 4321, *et seq.* However, without the benefit of rulemaking or other formal decision making process, in 1995, the Forest Service changed its policy to one that mandates that term grazing permit reissuance be allowed only upon the completion of NEPA analysis.

In 1995, the ten year term livestock grazing permits for 13 permittees covering 20 grazing allotments on the Apache-Sitgreaves (A-S) National Forests were set to expire. Pursuant to the new

agency policy, the Forest Service completed its alleged NEPA process and reissued the permits. The problem is that none of the new permits were reissued for the same terms and conditions as the expiring permits; rather every permit which was evaluated received a direct reduction in livestock grazing of between 40 percent and 85 percent as well as an indirect reduction in livestock grazing mandated by a new terms and conditions with which the permittees will never be able to comply. These severe reductions in permitted grazing numbers and seasons of use, and the host of new terms and conditions will severely impact the economic viability of the permittees' ranches in Arizona and New Mexico.

B. Statutory Violations

1. National Environmental Policy Act

Contrary to what the Forest Service may assert, there is no court decision or other legal requirement that the agency complete NEPA documentation prior to grazing permit renewal. In fact, prior to 1995, the agency took the position that livestock grazing was an ongoing activity and that NEPA compliance was not necessary when the agency issued yearly grazing authorizations, term grazing permits, or allotment management plans (AMPs). However, the agency has abandoned this position, without the benefit (or burden) of a judicial ruling.

Even, assuming *arguendo* that NEPA is necessary, the decisions issued to the 13 permittees on the A-S violated NEPA. Consider the following examples:

a. The NEPA documents issued to the A-S permittees stated that the “no-action” alternative was a “no grazing” alternative. This statement is in error because (1) NEPA regulations state that the no action alternative is maintenance of the *status quo*; in this case, the *status quo* is continuation of grazing pursuant to the terms and conditions of the expiring ten year term grazing permits; (2) the grazing allotments had been determined to be suitable for grazing under the currently existing LRMP; and (3) the elimination of grazing violates the multiple use mandates of the Multiple Use and Sustained Yield Act (MUSYA), 16 U.S.C. 528 *et. seq.*, the National Forest Management Act (NFMA), 16 U.S.C. § 1604 *et. seq.*, and the Federal Lands Policy and Management Act (FLPMA), 43 U.S.C. § 1701 *et seq.*

b. The decisions also failed to adequately analyze cumulative impacts and connected actions such as (1) the economic impacts to the local economy with the elimination of 40 percent to 85 percent of the grazing on the federal lands; (2) the possibility that reduction of livestock numbers will cause fuel loading, which could lead to catastrophic fires with severe impacts on wildlife, fish, and forest ecosystems, and (3) the loss of the range and water improvements currently maintained by the ranchers, particularly since many of these improvements are decades old, and wildlife populations have grown dependent upon these developed water sources.

c. The decisions also failed to adequately consider opportunities for mitigation such as offering additional grazing elsewhere on the National Forest System or considering other livestock

management tactics such as changes in the grazing system or improvement of the forage base on the allotment by chaining and burning of pinyon-juniper areas, and timber harvest or thinning.¹

2. Violation of Agency Regulations

a. Like the problems on the Humboldt, Toiyabe and Sawtooth National Forests, the Forest Service in this case also used the forest plan standards and guidelines to unnecessarily eliminate livestock grazing. For example, the A-S decisions imposed terms and conditions on the allotments that are not authorized by the Forest Plan, such as utilization standards. In fact, the agency admits that it ignored the current vegetative and range condition on these allotments when it calculated the forage utilization standards. The decisions issued to the A-S permittees do not state the biological or scientific basis for the utilization standards, nor are the utilization standards supported by adequate range trend/condition or production/utilization studies.

b. Additionally, the utilization levels established for Northern goshawk territories are based upon a Forest Service document entitled "*Management Recommendations for the Northern Goshawk in the Southwestern United States*" (hereinafter Goshawk Recommendations). This document is based upon questionable scientific tactics and theories.² The utilization levels

¹ Assuming for the purpose of argument that current grazing on the allotments exceeded capacity, it should be noted that excess forage utilization will not cease unless alternatives such as developments of alternate water, fencing, changes in pasture rotation or timing, etc., are implemented. Mere removal of a pre-determined number of livestock will never achieve desired utilization unless distribution of the remaining numbers is improved and wildlife (elk) impacts are lessened. None of these improvements were considered in any of the A-S decisions.

² The Goshawk Recommendations allege that a minimum stubble height is required on National Forest allotments to protect the habitat of the prey species upon which the Northern goshawk depends. This assertion may be accurate in the case of species that were analyzed, such as the vole. However, numerous other Northern goshawk prey species, such as the jackrabbit, do not require excessive stubble heights. In fact, some prey species, such as various ground squirrels and deer mice, actually thrive better in habitats with lesser stubble heights. The Goshawk Recommendations failed to take these simple biological principles into consideration. Moreover, the Goshawk document fails to incorporate two basic scientific facts about the goshawk: a major portion of the goshawk's diet consists of songbirds, hunting for which takes place almost exclusively in dense, forested areas, areas typically not known for "stubble height." This is just a small sampling of the inadequate scientific extrapolations and concoctions used by the Forest Service in developing the Goshawk Recommendations. However, it is a good example of why the agency must go back and use the proper procedures, both legal and scientific, to ground-truth these guidelines before it can force untried and unproven restrictions upon livestock producers and rural communities throughout the Southwest.

recommended to “protect” the Mexican spotted owl were based on draft documents that had not completed the public comment requirements.

An additional problem is the complete lack of monitoring data on any of the allotments. An agency decision to change a grazing allotments' management regime must be supported by scientific data; a change that is not based on adequate monitoring data is arbitrary and capricious under the APA and must be set aside as unlawful. 5 U.S.C. § 706(2). Moreover, Forest Service policy in Region 3 requires at least three years of production and utilization studies before an adjustment in livestock rates can be imposed. Finally, the Apache-Sitgreaves Forest Plan requires the agency to monitor capacity (and adjust it accordingly) with production/utilization and trend/condition studies. For example, most of the utilization studies on the A-S allotments were between 20 to 30 years old. There were also no current trend or condition studies conducted on the allotments. Rather, most of the data used to support the decisions was taken from satellite imagery which was not ground-truthed. The Forest Service also used several “scientific” studies to support its conclusions that livestock grazing should be reduced on the allotments. However, reliance on these studies was also misplaced. For example, the Forest Service cited studies from Montana to indicate that the suitability of these allotments for grazing was questionable. Montana is not Arizona. As such, the “scientific” information and monitoring supplied by the agency to support its reductions was clearly suspect.

d. The NEPA documents also ignored the impact of grazing by elk on the A-S allotments. Given that elk herds in the area have increased dramatically in the last decade, they utilize a significant portion of the forage available on this allotment. It is arbitrary and capricious for the agency to ignore elk impact on these allotments. Moreover, assuming *arguendo* that the range is in poor condition (as the EA suggests), the agency acted arbitrarily and capriciously by failing to consider the possibility that such condition is attributable to impact by elk. The agency contended that considering elk impact was beyond the scope of analysis for these decisions. The agency also assumes that the impacts from elk are at a constant baseline level throughout all alternatives. The agency position is absolutely wrong. The agency cannot reduce grazing on these allotments based on its suggestion that the riparian and other vegetative conditions of the allotments are poor, without considering the possibility that such conditions might be attributable to other ungulates. Moreover, it is absurd to assume that elk use will remain constant throughout varying livestock use levels. The agency abused its discretion by narrowing its decision so far as to ignore verifiable on-the-ground environmental conditions.

III. Conclusion

Although some may claim that these case examples show that national forest system lands are not conducive to livestock grazing, I disagree. I believe that the reason forest plan standards and guidelines are eliminating livestock grazing is the fact that the permittees are being regulated off the federal lands. Just using my father as an example, if we had been the poor stewards of the federal lands as claimed, we would have run ourselves out of business four generations ago. With good management, the federal lands can sustain viable livestock grazing. Creating standards and

guidelines that are not based upon on-the-ground conditions of each individual allotment or area in the allotment is not good management.

I also believe that there are solutions to these problems. First, management on the federal lands must be tailored on an allotment-by-allotment basis. For example, most of the data on the A-S was “gathered” through satellite imagery; there was no ground truthing or individual allotment monitoring to determine the individual carrying capacity of each individual piece of land. On the Humboldt and Toiyabe National Forests, utilizations standards are imposed and enforced, not because there are proven to be beneficial in a given situation but because that is what the plan says. Flexibility has been eliminated and rigid standards govern; the resources are suffering from this mind-set.

When presented with the concept of the need for increased monitoring and flexibility, the Forest Service is likely to claim a lack of manpower and funding for the task. However, I personally know of local governments and ranchers who have offered to participate in a partnership with the federal agencies to monitor allotments and develop flexible standards and guidelines tailored to each individual situation. These offers are always met with resistance.

Second, Congress should mandate that grazing permittees on Forest Service land have the right to due process in administrative appeals. Under the current system, Forest Service appeals are heard by “the next higher line officer.” There is no right to cross examine the decision maker, no right to present evidence regarding the use of the allotment, no right to present your case to an independent decision maker. The Department of Agriculture already has an administrative body in place to hear administrative appeals from other agencies with in the Department; Forest Service permittees are just not allowed to access those judges. Until there is independent review of agency decisions, there will never be accountability in the decision making process on grazing on federal lands.