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Written Testimony of:

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Before the Committee on Resources, Subcommittee on Forests and Forest Health
Regarding: Access Language in Spanish Peaks Wilderness Bill
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My name is Karen Budd Falen. I am a fifth generation rancher in Wyoming and an attorney specializing in the protection of private property rights throughout the West. I offer this testimony to voice my concern over the Forest Service's current policies regarding access to private inholdings and private property rights on Forest Service managed lands. This testimony is based upon personal knowledge and experience in fighting access issues against the Forest Service. Although the cases discussed below are from Colorado, the Forest Service's misguided access policy is not unique to Colorado. The Forest Service has a long history of "claiming" to provide access to private inholdings and private rights, and then so regulating access, that the use and enjoyment of property is effectively denied. In other cases, the Forest Service creates public access (across private property), where none should exist. No one would deny that the Forest Service can and should manage its lands to protect our natural resources. But in these and many other cases, the terms and conditions on access imposed by the Forest Service go far beyond protecting the environment to denying the property owner the use and enjoyment of his property

in violation of the Fifth Amendment of the U.S. Constitution. Given the Forest Service policies described below, with regard to the Spanish Peaks Wilderness Bill, I urge the Committee to amend the access language in Section 3 not only to guarantee the existence of the road, but to ensure that the Forest Service will not over-regulate or over-condition the use of the road to effectively deny access to private property.

I. Denying Access To Private Property Is A "Taking"

Although there is no question that the Forest Service has the right to "reasonably manage" its land, as the examples below point out, such regulation often restricts or "takes" the use of private property without due process and just compensation. The U.S. Supreme Court has warned federal agencies that the Court would not tolerate agency regulation that "goes too far" and results in a taking of property. However, despite the Supreme Court mandates, the Forest Service access policy often takes private property and property rights.

To determine if property has been taken by a federal law or regulation, the courts focus on two criteria. The first criteria includes an analysis of "what" property has been taken and the second involves a discussion of whether there is a proper nexus between the regulation asserted by the federal agency and the legitimate interest that the federal agency purports to protect via the regulation.

Property, "in its most general sense, includes everything that has an exchangeable value." 1 Thomson on Real Property, § 5 (1980). Property, in a legal sense, "consists in the domination which is rightfully and lawfully obtained over a material thing, with the right to its use, enjoyment and disposition." Id. The term property, "in the Fourteenth Amendment of the Constitution embraces all valuable interests which man may possess outside of life and liberty."

Campbell v. Holt, 115 U.S. 620 (1885). "The right to property includes not only the right to acquire it but the right to possess it as well. It consists not only of ownership and possession but of the unrestricted right of use, enjoyment and disposal." Thomson on Real Property, § 5 (1980). "Anything which destroys any of these elements to property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right. Therefore a law which forbids the use of a certain kind of property, strips it of an essential attribute and in actual result proscribes its ownership." Spain v. Dallas, 235 S.W. 513 (1921). See also Helvering v. Ellias, 122 F.2d 171 (1941) cert. den. 62 S.Ct. 361 (1941).

The analysis of whether a regulation has "gone too far" as to result in the taking of private property is evolving. Initially, the courts required that all economic use of property be taken before it was determined that a regulation had gone too far as to result in a taking. This theory was fully explained and adopted in the 1978 Supreme Court case of Penn Central Transp. Co. v. City of New York. In Penn Central, the Supreme Court held that **all use and enjoyment** of property had to be taken before compensation pursuant to the Fifth Amendment of the Constitution would be allowed. 438 U.S. 104, 107, reh'g den, 439 U.S. 883 (1978). The Court's majority in that case determined that since the landowners admittedly retained some use of their property, no taking had occurred.

After the Penn Central case, there followed a series of cases in which the "nature" of the interference with the property right would determine the outcome. In those cases, the court was very careful to separate land use regulations from physical intrusions, allowing compensation only for the latter. In these cases however, Justice Rehnquist, although still in the minority,

refused to follow an approach in which the owner's property as a whole would be examined to determine if the government's action had an "unduly harsh" economic impact or kept the property from being "economically viable." Coggins, Public Natural Resources Law, § 14.03[3] (1991).

After numerous Supreme Court cases regarding property takings, Rehnquist's approach to determine whether property was being taken by governmental regulation found its way into the majority view. Under the Rehnquist analysis, property ownership was considered a "bundle of sticks." In analyzing property takings cases, the first determination to be made was which "stick" had been taken by the governmental regulation (for example, the right to exclude others or the right to quiet enjoyment of the property) and then the court would determine how important that "stick" was to the use, enjoyment or economic value of the property. As described by Justice Rehnquist:

> The term [property] is not used in the "vulgar and untechnical sense of the physical thing with respect to that which the citizen exercises rights recognized by law. [Instead, it] . . . denote[s] the group of rights inhering [sic] in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . The constitutional provision is addressed to every sort of interest the citizen may possess.

438 U.S. at 142-143 (Rehnquist, J. dissenting (quoting United States v. General Motors Corp., 323 U.S. 377-78 (1945)). Emphasis in original.

The idea that the taking of "one stick" in the bundle can result in an unconstitutional taking of property is now firmly imbedded in American law. In First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), the Supreme Court held that the temporary interference with a property's use constituted a taking of that property without just compensation. In other words, as opposed to the Penn Central analysis in

which **all use** of property must be taken before compensation will be granted, the First Church analysis would allow compensation for regulations which take less than the entire economic value of the property.

The Supreme Court case of Nollan v. Calif Coastal Comm'n, 483 U.S. 825 (1987) takes the First Church analysis even further. In Nollan, a state agency attempted to regulate a private land owner's right to exclude others from his property. Although the imposition of this regulation did not deprive the landowner of all economic value of his property, the Supreme Court ruled that the loss of this one "stick" constituted a taking of private property. See also Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992) (holding the reverse of the Penn Central case by requiring compensation for the taking of one economically viable or development use of the property, rather than all uses of the property.)

After the courts have determined which stick in the bundle has been taken, the second part of the takings analysis focuses on the regulation itself and whether that regulation advances a legitimate state interest or has "gone too far" resulting in a taking of private property. This analysis has also been through a significant metamorphose over the last several decades. In Penn Central, the court stated:

> In instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be protected by prohibiting particular contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected recognized real property interests. (citations omitted) Zoning laws are of course the classic example, (citations omitted) which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.

438 U.S. 104 (1978). (In Penn Central, the court determined that the preservation of "landmark structures" would "economically" improve the quality of life for the citizens of the New York City as a whole, even though the law only effected certain areas and structures in the city).

In 1987, the relative ease of showing the nexus between the regulation and its asserted legitimate public purpose became more stringent. In Nollan v. California Coastal Commission, 483 U.S. 825 (1987), the California Coastal Commission conditioned the issuance of a building permit for a new home along Nollan's private beach front property upon his granting of public access across his private property. According to the California Coastal Commission, such public access was needed because the home would create a "psychological barrier" to "access" to the beach. However, as found by the Supreme Court:

> It is quite impossible to understand how a requirement that people already on a public beach be able to walk across the Nollan's property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it [the access requested from the Nollan's] lowers any "psychological barrier" to using the public beaches, or how it helps remedy any additional congestion on them caused by the construction of the Nollan's new house.

The Court went on to say:

> We view the Fifth Amendment's property clause to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe a condition for abridgement of property rights as a "substantial advancing" of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power.

Id. Emphasis in original.

Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992) also discussed the issue of the legitimate state interest in regulating private property. In that case, the Supreme Court

limited the rule that "harmful or noxious uses" of property may always be regulated. The Court determined that the distinction between "harm-preventing" regulations (requiring no compensation for taking) and "benefit-conferring" regulations (requiring compensation for taking) "is often in the eye of the beholder." The Court stated:

> It becomes self evident that noxious-use logic cannot serve as a touch-stone to distinguish regulatory "takings"--which require compensation--from regulatory deprivations that do not require compensation. A fortiori, the legislatures's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed.

112 S.Ct at 2899.

As described by these cases, the Court must make an honest determination whether the regulation of property substantially advances a legitimate state interest. No longer will governmental pronouncements regarding the legitimacy or necessity of the regulation be merely accepted as fact. Even with these court mandates, as will be shown below, the Forest Service over regulation or denial of access regularly results in a taking of private property. Most property owners do not have the funds or time to pursue a case to the Supreme Court to protect the use and enjoyment of their property. Thus, I urge the Congress to take a proactive stand to ensure the right to access property is unimpeded.

II. Forest Service Is Mandated To Provide Access To Private Property

Congress has clearly provided for the right of access over federal lands to private property. For example, the Alaska National Interest Lands Conservation Act ("ANILCA") states:

> Notwithstanding other provisions of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide access to nonfederally owned land within the boundaries of the National Forest System

> as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof.

16 U.S.C. § 3210 (a). Emphasis added.

Although ANILCA § 3210(a) allows the Forest Service to assert reasonable terms and conditions upon the use of roads located within National forest boundaries, the Act also affirmatively requires the Secretary of Agriculture to secure to the property owner the reasonable use and enjoyment of his land. Rather, under the guise of compliance with the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1761, the Forest Service routinely (1) requires the property owner to secure a special use or other temporary permit to access his property and (2) asserts terms and conditions in that permit essentially denying access to the property. See Section III. below.

To determine what Congress meant in the ANILCA provision allowing for "terms and conditions as the Secretary of Agriculture may prescribe," consider the legislative history developed by this body:

> The section on access to inholdings provides that, where a State or private interest in land is surrounded by one or more conservation system units, . . . the Secretary shall grant the owner of the private interest such rights as may be necessary to assure adequate access for economic and other purposes.
>
> The Committee enacted this provision in recognition of the fact that restrictions placed on public access on or across many federal land areas in Alaska may interfere with the ability of private inholders to exercise their right to use their lands. The Committee believes that owners of inholdings should not have their ability to enjoy their land reduced simply because restrictions are placed on general public access to the land surrounding their inholdings. This provision directs the Secretary to grant the owner of an inholding such rights as are necessary to assure adequate access to the inholding, and is intended to assure a permanent right of access to the concerned land across, though or over these Federal lands by such State or private owners or occupiers and their successors in interest.

Act of Dec. 2, 1980, Pub. L. No. 96-487, 1980 U.S.C.C.A.N. (94 Stat.) 249. Emphasis added.

After describing the type of access that was to be granted, the Congressional record goes further to describe the terms and conditions that would be allowed to condition that access. As described in the United States Congressional Code and Administrative News:

> The Committee believes that routes of access to inholdings should be practicable in an economic sense. Otherwise, an inholder could be denied any economic benefit resulting from land ownership. However, we do not believe that the access route which is chosen must be, in all instances, the most economically feasible alternative. Rather this subsection provides the guarantee of an adequate and feasible alternative for economic and other purposes ; that is, a route which will permit economic access to, and use of, such lands while also seeking to ameliorate adverse impacts on the area or conservation system unit involved. In this regard, the Committee expects the Secretary to regulate such access in order to protect the natural and other values for which the units were established.

Id. Emphasis added.

After reviewing the above Congressional pronouncements, it is clear that the Congress guaranteed access to private properties and property within federal lands, only pursuant to such terms and conditions as would protect "the natural and other values for which those units were established." However, consider the current and unresolved Colorado case studies below:

III. Colorado Case Studies - Forest Service Taking Of Private Property Rights

A. Over-Regulation of Existing Access

- Taking of Property

Wholly within Gunnison National Forest, the Overland Ditch and Reservoir Company owns a private right-of-way across Forest Service lands. This right-of-way, specifically recognized by the Federal District Court for the District of Colorado, is for an approximately 20 mile ditch and a reservoir for 6,200 acre feet of water which supplies water to 115 share owners. This ditch and reservoir right-of-way, created by Congress under the Act of 1891, 26 Stat. 1095,

1101 (1891) (codified as amended at 43 U.S.C. § 946-49), is private property. Once Congress created the ditch and reservoir right-of-way, Congress also guaranteed access to this property. Id. However, despite Congressional protection for a permanent right of access to Overland's property, the Forest Service has attempted to limit (take) Overland's right of access to its private property by (1) restricting the historic (and existing) roads which Overland can use to reach its property, (2) placing restrictions on snow removal on those roads which effectively stops the use of those roads, (3) closing some roads via locked gates, signs and even destroying some roads without even providing any notice to the Overland, (4) refusing to maintain or to allow Overland to maintain these roads and (5) mandating that the Overland acquire a renewable special use permit. This permit, allegedly authorized by the FLPMA can only be renewed at the discretion of the Forest Service. In other words, through the proposed FLPMA permit, the Forest Service has reduced permanent access, guaranteed by Congress, to a special use permit, which is revokable "at will" by the agency, and which can be used only upon terms and conditions specified by the agency. If the Overland does not agree to these terms and conditions proposed by the Forest Service each time the special use permit is issued, the Forest Service has the right to deny the permit and the Overland will no longer be allowed to access its property.

B. Denial of Access without Condemnation of Private Property

Within the Routt National Forest, Don Sorchych owns private property, bounded on three sides by National forest land. The historic access to this property has always been over an existing road, located on Forest Service land. In approximately 1995, after Mr. Sorchych purchased the property, the Forest Service notified him that it would no longer allow access over the National forest system lands to his private property. According to the Forest Service, the

road density in the area was too high (according to the Routt National Forest Land Use Plan), thus the road to this private property would be "rehabilitated." When Mr. Sorchych complained that the Forest Service was cutting off his access to his private property, the Forest Service responded that he had to attempt to force access to his property, across adjacent private property first. If he was unsuccessful in forcing access across this private property across several sections of adjacent private lands, the Forest Service would reinstate his original access across the Forest Service lands.

C. Taking of Public Access Across Private Property

Within the Routt National Forest, Shooting Star Ranch owns property adjacent to and surrounded on three sides by National forest lands. This property was originally part of the National forest, but through an exchange in 1951 was conveyed into private hands. As part of the exchange, the Forest Service reserved unto itself, a road across the newly created private lands. According to the specific terms of the documents, the purpose of the road was to allow the Forest Service access to the National forest for fire protection and administrative purposes only. Even more frustrating is that the newly created public road could not be used by the general public. While the south end of the road does access National forest lands, the north end of the road abuts private property, across which there is neither Forest Service access nor general public access. The Forest Service lands which could be reached by the new road are also closed to vehicular access. Thus, the Forest Service created a road across private property for vehicular access, which the public could not reach by vehicle; if for some reason the public did want to travel the road, the public could only walk down the road, to turn around and walk up the road.

IV Conclusion

As the above testimonies show, regardless of the federal statutes and Supreme Court pronouncements, the Forest Service regularly takes private property via expanding or prohibiting access. Again, with regard to the Spanish Peaks Wilderness Bill, I urge the Committee to amend the access language in Section 3 to not only guarantee the existence of the road, but to ensure that the Forest Service will not over-regulate or over-condition the use of the road to deny access ("take") private property.