Budd-Falen Law Offices, P.C.

Karen Budd-Falen
Franklin J. Falen
L. Eric Lundgren +
Gus Redmond Michaels III +
Jeffrey B. Teichert * ◊
John M. McCall +

300 East 18th Street
Post Office Box 346
Cheyenne, Wyoming 82003-0346
Telephone 307/632-5105
Telefax 307/637-3891
falen.law@worldnet.att.net

+ admitted in Colorado
* admitted in Arizona
◊ admitted in Utah

November 3, 1998

Corrected Testimony of Karen Budd Falen, Esq., Cheyenne, Wyoming
Before the U.S. House of Representatives
Committee on Resources
Oversight Hearing on the Endangered Species Act's Impact in New Mexico
October 26, 1998, Clovis, New Mexico

For information regarding this testimony contact:
Karen Budd-Falen
BUDD-FALEN LAW OFFICES, P.C.
623 West 20th Street
Post Office Box 346
Cheyenne, Wyoming 82003-0346
(307) 632-5105

My name is Karen Budd-Falen. I am both a rancher and an attorney who represents private property owners, ranchers and local governments. Today, I am testifying on behalf of the New Mexico Cattle Growers Association.

The New Mexico Cattle Growers Association ("NMCGA") is a nonprofit association with approximately 1700 members, including those who either own their ranch in fee simple and those who graze livestock on federally managed (Bureau of Land Management ("BLM") or United States Forest Service) lands. The vast majority of ranchers who graze their livestock on the BLM or National Forest lands are physically and economically dependent upon the use of those federal lands for their livelihoods. In many cases, these ranches consist of a small amount of deeded property surrounded by vast tracts of BLM or National Forest lands. Those federally managed lands are often encumbered with private water rights, private improvements, county roads and access rights. These small amounts of private property, the private rights on the federal lands and the federal land grazing allotments themselves constitute the ranch. The deeded property of the typical ranch is insufficient to support the ranchers' herds for an extended period of time. Thus, if a rancher cannot access his

BLM or National Forest grazing allotment or his private rights located on that allotment, he must either lease other pasture (if any is even available), purchase alternate forage such as hay (which is extremely expensive), or sell his herd. Any of these options, even for a single grazing season, can force a ranch into bankruptcy. The longer access to allotments and private property within those allotments is denied, the more severe the consequences to each individual rancher and to the rural community dependent upon the multiple use and sustained yield of the National Forest and BLM managed lands.

In specific response to your question, the Endangered Species Act ("ESA") has had a dramatic and detrimental affect on rural communities and industries in New Mexico. The ESA seems to be the ligation tool of choice for environmentalists. For example, between 1993 and 1998, 75 separate cases were filed in the Federal District Court for the District of Arizona alone. Of those 75 cases, 67 were filed by environmental groups. All of those cases specifically concerned "alleged violations" of the Endangered Species Act. As a result of that litigation, the United States government, often voluntarily through stipulated settlements, paid approximately $5,329,659.60 in attorneys fees and costs to the environmental groups and their attorneys.

In response to this litigation, rural ranchers, counties and private property owners have had to fight back with litigation and Congressional action of their own. However, in the same time frame described above, representatives of the rural and ranching community have only filed five cases; only one of those cases ended with the payment of approximately $7,000.00 to the rural and ranching representatives.

As a result of this litigation, one of the biggest costs to the ranchers and rural communities is their costs of participation in the litigation filed by the environmental groups. In most cases, the federal government will not, and in fact cannot, adequately represent the property rights and interests of the rural communities and private property owners when the government is sued by the environmentalists. This is particularly true when environmental groups request the removal of livestock through a preliminary or permanent injunction. For example, in the "Tucson settlement," (the settlement agreement among the Southwest Center for Biological Diversity, Forest Guardians and the Forest Service in the case entitled Southwest Center for Biological Diversity and Forest Guardians v. Forest Service, Civ. Nos. 97-666 and 97-2562), the livestock industry intervened. A settlement agreement between the environmental groups and the federal government was reached, despite the Court's refusal to sign a stipulated settlement based upon the objections of the NMCGA and Arizona Cattle Growers Association. Although, at least in the Tucson case, the livestock industries' intervention may not have altered the initial outcome, attempted intervention is better than watching the disruption and destruction of an industry, culture, local economy and way of life.

Although it is my position that the ESA needs reform, frankly, the biggest problem with the ESA is the federal government's refusal to follow the mandates of the Act. Let me give you some examples:

1. Gila and Apache Sitgreaves National Forests Permittees

One of the biggest problems facing ranchers on federal lands is the Forest Service's and BLM's refusal to involve grazing permittees and lessees as applicants in the section 7 consultation process under the ESA. In many cases, it is clear that the BLM and Forest Service would rather "cut a deal" with the Fish and Wildlife Service ("FWS") to ensure a no-jeopardy opinion, than include the grazing permittees in the consultation process. My assumption is that by excluding the permittees, the FWS and the consulting federal agency believe that they can insulate both agencies from having to justify their decisions "on the record" with good scientific data.

The failure to provide the grazing permittees with applicant status is a particular problem in the Gila National Forest in New Mexico and the Apache-Sitgreaves National Forests in Arizona. 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 six permittees on the Gila and 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 and ESA section 7 consultation process and reissued the permits. The problem is that none of the new permits were reissued with 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 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. The majority of these reductions were based upon the then-DRAFT Mexican spotted owl and goshawk utilization guidelines issued by the Forest Service following consultation with the FWS. The permittees were not involved in the implementation of these draft guidelines on their individual grazing permits. Although many of the permittees wrote to the Forest Service requesting "applicant" status and specific involvement in the ESA section 7 consultation process, the Forest Service declined that request, stating that the permittees could only comment on the biological evaluation to the FWS. The permittees were NOT involved in any of the informal discussions or preparation of the biological evaluation or biological opinion. The permittees were simply told that they were bound by the outcome of the process.

Under the ESA, when a federal agency proposes actions that might impact wildlife, fish, or plant species listed as threatened or endangered under the ESA, the federal agency must consult with the FWS to ensure that the action does not jeopardize the continued existence of threatened or endangered species, or result in the adverse modification of critical habitat. When a proposed federal action involves a third party who is an applicant for a permit or the holder of a permit issued by the federal agency, the federal agency must cooperate with and assist the third party in the ESA

consultation process. 16 U.S.C. § 1536(a)(3) and 50 C.F.R. Part 402. By administrative law judge decision within the Department of the Interior, this includes federal land grazing permittees or lessees.

Under the regulations, to facilitate the ESA consultation process, the action agency and the third party applicant ("applicant") are to prepare a "biological assessment" or "biological evaluation" (hereinafter referred to generally as a "biological assessment") that identifies the proposed action and any threatened or endangered species in the project area. 16 U.S.C. § 1536(c)(1). Based upon the biological assessment, the action agency and the applicant determine whether the proposed action is likely to adversely affect a listed species or its designated critical habitat. 50 C.F.R. § 402. The action agency and applicant then submit the biological evaluation to the FWS. The FWS reviews the biological evaluation and issues one of two documents: (1) a "concurrence statement" whereby the FWS concurs with the action agency's finding that the proposed action is not likely to adversely affect listed species or their critical habitat (known as a No-Jeopardy Opinion), or (2) a formal biological opinion whereby the FWS fully analyzes the proposed action and its possible impact on listed species or their critical habitat.

During the NEPA grazing analyses, the Gila and Apache-Sitgreaves National Forests engaged in the ESA section 7 consultation process with the FWS. The FWS and Forest Service reviewed the proposed grazing reductions, and the FWS issued "No Jeopardy" biological opinions concurring with the Forest Service's findings that proposed actions would not likely adversely affect listed species and/or their critical habitat. However, the FWS "No Jeopardy" opinions were conditioned on compliance with particular mitigation conditions. These mitigation conditions included requirements such as fence construction, exclusion of livestock from certain parts of allotments, restrictions on placement of mineral supplements, and forage utilization standards based on Draft Mexican spotted owl and goshawk guidelines. The burden to comply with and undertake these mitigation measures falls directly upon the ranching industry. Despite their obvious role in implementing the Forest Service's proposed grazing actions and the burden imposed by the mitigation measures, the affected permittees (applicants) were not informed of the ESA consultation process, nor did the federal government involve or seek the participation of the ranchers in the consultation process. By failing to involve the ranchers in the consultation process, the Gila and Apache-Sitgreaves National Forests violated the ESA and agency regulations.

In addition to the affects that these reductions have had on the individual ranchers, local governments and communities are also adversely affected by these grazing reductions. At a hearing in Las Cruces, New Mexico earlier this year, Cathy Cosgrove, an economist and range scientist, testified that the specific reductions proposed by the Forest Service on the Gila and Apache-Sitgreaves National Forests have had "significant impacts" on the local economy. In fact, her office conducted a study and found that 60 percent of the money that local ranchers spent went toward the cost of maintaining their operations, such as the cost of labor, the cost of fencing, the cost of water troughs, etc. Increasing those costs by forcing ranchers to complete additional fence maintenance or forcing them to develop additional water sources because their livestock can no longer access streams substantially cuts into an already slim profit margin.

Additionally, the study determined that for the three county economic area, the Forest Service grazing reductions resulted in a $10 million economic loss. That loss included a loss of local jobs, as well as a direct loss to the local economy in terms of the available funds local ranchers have to spend for medical care, food and supplies. Again, this is a direct impact because of a reduction in grazing between 40 percent and 85 percent for 19 ranchers on the Arizona and New Mexico border because of alleged ESA concerns.

Although environmentalists may argue that these losses are acceptable to protect endangered species, the record in this case shows that livestock grazing these allotments has not had an adverse affect on any threatened or endangered species in this area. In fact the environmental assessments which propose these reductions affirmatively state that livestock grazing has not had an adverse impact on any threatened or endangered species or their habitats. Thus, these ranchers and their local communities are suffering economic and lifestyle losses without any corresponding benefits to species allegedly protected under the ESA. See Exhibit 1.

2. The "Tucson Settlement" and Subsequent Litigation

In addition to the loss of grazing permits, the ESA can also result in the loss of private property, private property rights and access to private property. This Committee has already held hearings discussing the Forest Service, Forest Guardians and Southwest Center for Biological Diversity settlement agreement in the case of Forest Guardians and Southwest Center for Biological Diversity v. Forest Service, Civ. No.s 97-666/97-2562.

As a result of that settlement, the Forest Service has issued decisions eliminating livestock use in riparian areas and water sources on 13 separate allotments in Arizona and New Mexico. The grazing permittees, either individually or through counsel, appealed each of those decisions through the Forest Service administrative appeals process. Although in each case, the permittees requested a stay of the implementation of those decisions pending a decision on the merits of the permittees' appeals, the Forest Service refused to stay any of the decisions. As a result of those decisions, access to private property has been denied, access to private stock water rights which are recognized as private property has been denied and the use of county roads has been denied to the affected ranchers. As a result of this direct taking of private property, some of the individual permittees have filed suit in the Federal District Court for the District of New Mexico requesting that the decisions be set aside.

3. Recommendations for Reform of the ESA

A. Listing Decisions Must Be Based Upon Scientific Data

Under present court interpretations of the ESA, species can be listed as threatened or endangered without any current scientific study or data. In its present state, all the ESA requires is a "literature search" to determine if there were greater numbers of a species "in the past" than are

presently known. The FWS does not even have to have current population data to list a species. Thus, species can be listed based on estimates and a literature search; no science is involved.

Additionally concerning is that species can also be listed based upon an opinion that the habitat for the species is shrinking, regardless of whether the population numbers are in decline. Thus, a literature search can produce an opinion that the estimated habitat size is smaller now than "in the past," and a species can be listed; again no science is involved. Although the ranching and rural community does not oppose the protection of truly threatened or endangered species, it is imperative that listing decisions be based upon actual science and monitoring data. If the "best scientific and commercial data available" is none, the FWS must gather the necessary data to list, rather than listing species based upon estimates and guesses.

B. Constitutional Principles Must Be Followed

The Fifth Amendment to the U.S. Constitution provides that private property shall not be taken for public use without due process and just compensation. Note that the Founding Fathers did not say that neither the public nor the federal government could take private property, just that private property could not be taken without due process and just compensation. The implementation of the ESA has not followed these mandates. For example, although the Tucson settlement and the decisions implementing it, deny private property owners the right to use and access private property (let alone federal grazing permits), not a single private property owner has been compensated and no hearings or other due process procedures have been conducted. The courts have held that protection of threatened or endangered species is an important public purpose. Thus, the Fifth Amendment mandates that those private property owners bearing this public cost must be compensated.

C. Applicant Status Must Be Strengthened

As stated above, private property owners, as well as federal land grazing permittees and lessees have the right to participate in the ESA section 7 consultation process. As described by one court, if the federal agency will not act as an advocate for the applicant in the consultation process, the agency should "get out of the way" and allow direct consultation between the affected individual and the FWS. While this mandate sounds strong, it is rarely followed by either the Forest Service or the BLM. For example, in the Gila and Apache-Sitgreaves permittees case, the Forest Service biological evaluation proposed fencing, grazing reductions and utilization standards, without ever contacting the affected permittees. Thus, the proposed action itself resulted in the 40 percent to 85 percent reductions in livestock use, even before the FWS prepared its biological opinion. The permittees were never given any chance to review or oppose these reductions before they were presented to the FWS. As a consequence, the FWS issued No Jeopardy opinions, accepting the proposed actions of the Forest Service. The Forest Service then issued final decisions to the permittees which, by law, had to be in compliance with the FWS biological opinions. Therefore, even though the process allowed for full permittee participation, in reality, the grazing permittees were never consulted nor included in the process. Certainly those directly affected by the section

7 consultation should be allowed to participate in that process. Any ESA revisions must strengthen that right of participation.

On behalf of the NMCGA, I sincerely appreciate the opportunity to present this evidence to you. Should you have any questions, please do not hesitate to contact me.