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VIA E-MAIL

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Dear Kate, Matt, Jason, Pete, Travis, and Mike:

Since I have talked to all of you before, I thought I would start with you. Below are some recent court cases I have been directly involved in–or my clients are hurting from–that illustrate a significant problem for property rights owners and public lands users. Frankly, we are getting killed out here and I do not see any relief without significant help from Congress.

1. Renewal of BLM Term Grazing Permits with a Categorical Exclusion

In 2007, the Western Watersheds Project ("WWP") sued the Bureau of Land Management ("BLM") in federal district court claiming that the BLM was "mismanaging" seven grazing allotments in Idaho by renewing those term grazing permits with a NEPA categorical exclusion. Rather than litigating the case before a judge and trying to defend its actions, the BLM, using its complete and unbridled power, voluntarily settled the case with the WWP. However, rather than the settlement agreement just including the seven allotments that were the subject matter of the case, the BLM used the case to dictate a nationwide policy eliminating the BLM's ability to use categorical exclusions to renew all livestock grazing permits across the West. In addition to voluntarily settling, the BLM paid WWP's attorney fees under EAJA.

2. Renewal of Forest Service Term Grazing Permits with a Categorical Exclusion

In a similar case in 2007, the WildEarth Guardians ("WEG"), sued the Forest Service in federal district court because the Forest Service had renewed the grazing permits on 26 allotments in New Mexico via use of individual categorical exclusions. The Forest Service had completed scientific studies on every one of these allotments showing that continued grazing was not harming the environment in any way.

The New Mexico Cattle Growers Association and Arizona/New Mexico Coalition of Counties ("NMCGA") intervened and joined the Forest Service to defend its decisions to allow ranching to continue. The New Mexico Federal District Court ruled in favor of the Forest Service and the NMCGA on all issues. There was no part of the federal district court case that the WildEarth Guardians won.

The WEG appealed the case to the Tenth Circuit Court of Appeals. This case was accepted into the Court's mediation/settlement program. The Forest Service agreed to discuss settlement with the WEG, even though these discussions specifically impacted the rights of the individual permittees on the 26 allotments. At the end of the settlement process, in a complete reversal of the Forest Service's previous position, the Forest Service agreed to settle with the WEG and complete NEPA on seven of the permit renewals that the federal district judge upheld. Additionally, the Forest Service paid taxpayer funded attorneys' fees to the WEG.

3. Inequitable Settlement Treatment of Forest Service Rancher

Compare that to a 2007 case where a New Mexico rancher had a dispute with the Forest Service over grazing on his allotments and the management of a river that ran through his private property. After years of frustration and fighting, the rancher finally sued the Forest Service in federal district court. The rancher lost his case and appealed to the Tenth Circuit Court. Like the categorical exclusion case above, this case was also included in the Tenth Circuit Court's mediation program. However, the Forest Service would not even talk to the rancher about settlement. The rancher tried and tried to get the Forest Service to talk to him, but the Forest Service flatly refused to even talk about the issues, let alone try to come up with a long-term solution. This is certainly a different posture from the Forest Service's willingness to settle the Forest Service categorical exclusion case with the WEG.

4. Expansion of "Environmental Alternatives" under NEPA including a "No Grazing" Alternative

I predict that such disparate treatment and environmentalists' increased litigation are going to become more prevalent. On January 5, 2011, the Idaho Federal District Court determined that in addition to a "no action" alternative (i.e., *status quo* grazing) and the proposed alternative, the BLM is going to be required to include a no grazing alternative. See Western Watersheds Project v. Rosenkrance, 09-CV-298 (Jan. 5, 2011). The Office of Hearings and Appeals ("OHA") has already used this ruling to reject a BLM NEPA document for failure to consider enough environmental alternatives. See WWP v. BLM, NVL-0100-10-3 (Feb. 1, 2011).

There are huge problems with these stories on a lot of different levels. First, although the ranchers have complained and, in some cases, sought the courts' assistance to block these settlement agreements, the Justice Department, citing 5 U.S.C. § 2414, claims to have complete discretion to settle any case at any time, even if the government wins the case. So the bureaucracy argues that it has absolute discretion to choose who it talks to, what it talks about and can pay taxpayer money anytime it wants to, even if the environmental group could not win the money otherwise if the issue were before the court. It also shows the complete disparity in treatment between users of the public lands and environmental groups.

Second, with the latest Idaho District Court and OHA decision, there is no question that environmental concerns will be elevated above everything else in federal decisions. To try to at least give "our side" a legal cause of action so that we have some chance of winning in federal court, I have drafted and am attaching a proposed "The National Community Stability Policy Act of 2011." It looks a lot like NEPA (in fact a lot of language is "plagiarized" from NEPA). Although there is an argument that NEPA requires some consideration of economic impacts, anyone who has read an EIS or EA knows that the number of pages and type of analysis of environmental impacts compared to economic impacts is tremendously skewed toward the environment. While I am not saying that this Act or something like it will solve all our problems, as it stands now, we have nothing to use as a hammer in court, thus it is easy for environmental groups to continuously litigate and the Justice Department to settle with environmental groups. With the focus on employment and jobs, Congress should at least require the federal agencies to consider whether their decisions impact rural communities.

If you have any other ideas, I would be happy to work with you on them. Thank you.

Sincerely,

/s/Karen Budd-Falen

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Enclosure