BUDD-FALEN LAW OFFICES
L.L.C.
ATTORNEYS FOR THE WEST

KAREN BUDD-FALEN
BRANDON L. JENSEN [1]
KATHRYN BRACK MORROW [1, 2]
[1] ALSO LICENSED IN COLORADO
[2] ALSO LICENSED IN NEW MEXICO

300 EAST 18TH STREET • POST OFFICE BOX 346
CHEYENNE, WYOMING 82003-0346
TELEPHONE: 307/632-5105
TELEFAX: 307/637-3891
WWW.BUDDFALEN.COM

FRANKLIN J. FALEN
LAURA C. ROWE
ABIGAIL M. JONES [3, 4]
[3] ALSO LICENSED IN NEW YORK
[4] ALSO LICENSED IN NEW JERSEY

**MEMORANDUM**

**FROM:** **KAREN BUDD FALEN**
**BUDD-FALEN LAW OFFICES, LLC**

**DATE:** **MAY 23, 2011**

**RE:** **LEVELING THE PLAYING FIELD: SUPPORT FOR THE GRAZING IMPROVEMENT ACT OF 2011**

---

If jobs and the economy are the #1 concern for America, why are rural communities and ranchers under attack by radical environmental groups and overzealous federal regulators? America depends upon the hundreds of products that livestock provide, yet radical groups and oppressive regulations make it almost impossible for ranchers to stay in business. Opposition to these jobs comes in the form of litigation by radical environmental groups to eliminate grazing on public lands, radical environmental group pressure to force "voluntary" grazing permit buy-outs from "willing sellers," and holding permittees hostage to the court deference given to regulatory "experts." The playing field is not level and the rancher is on the losing side. The Grazing Improvement Act of 2011 will level the playing field. I urge your support.

The Grazing Improvement Act of 2011 does the following:

**1. Term of Grazing Leases and Permits.** Both BLM and Forest Service term grazing permits are for a 10 year term. This bill extends that term to 20 years. This extension does not affect either the BLM's or Forest Service's ability to make interim management decisions based upon resource or other needs, nor does it impact the preference right of renewal for term grazing permits or leases.

**2. Renewal, Transfer and Reissuance of Grazing Leases and Permits.** This section codifies the various "appropriation riders" for the BLM and Forest Service requiring that permits being reissued, renewed or transferred continue to follow the existing terms and conditions until the paperwork is complete. Thus, the rancher is not held hostage to the ability of the agency to get its job done–a job that is admittedly harder because of radical environmental appeals, litigation and FOIA requests.

This bill also codifies the ability of the BLM and Forest Service to "categorically exclude" grazing permit renewal, reissuance or transfer from the paperwork requirements under National Environmental Policy Act ("NEPA") if the permit or lease continues current grazing management on the allotment. Minor modifications to a permit or lease can also be categorically excluded from NEPA if monitoring indicates that the current grazing management has met or is moving toward rangeland and riparian objectives and there are no "extraordinary circumstances." Finally, this section allows the BLM and Forest Service to continue to set their priority and timing for permit renewal or reissuance.

**3. Applicability of Administrative Procedure Act**. This provision is really what levels the playing field for the rancher, against the environmental "willing buyer" and the arbitrary decisions of the governmental regulator. First, this provision applies a real decision making process, with an independent hearing officer or judge, to Forest Service administrative appeals. Currently, legal challenges to Forest Service decisions are heard by the "next higher Forest Service line officer." There have long been allegations that this system is significantly skewed so that the Forest Service decision maker is "almost always right." For example, out of the 28 decisions that were administratively appealed in Forest Service Region 2 (Wyoming, Colorado, Kansas, Nebraska, South Dakota) from 2009 to the present, only 2 were rejected as being legally or factually wrong. In that same time period, in California, out of 78 appeals, only 13 decisions were either rejected or withdrawn. In Arizona and New Mexico, the Forest Service "independent review by the next higher line officer" only found 15 out of 83 decisions were deficient. In other words, just considering these three Forest Service regions, the agency found itself right 85% of the time. In a fair and equal system, no one is right that many times!

This provision would change that pattern so that Forest Service grazing permittees would appeal the decisions they believed were legally, factually or scientifically wrong to an independent law judge and the Forest Service would have to show why its decision is right, rather than the permittee having to show why the decision is wrong. The permittee would also be able to cross-examine Forest Service "experts" on the reasons for the decision and the agency would have to supply some justification for its decision. It is critical that Forest Service permittees have the ability to protect themselves from arbitrary decisions; an ability they do not have now.

Second, this Act would level the playing field for BLM permittees. Like the Forest Service provisions discussed above, this bill "changes" the current appeals system by requiring the BLM to prove its decision is legally and scientifically correct; rather than forcing the permittee to prove why the decision is legally and scientifically wrong. Additionally, the OHA has determined that when the BLM issues a decision adversely affecting a permittee's grazing privileges, the BLM decision can still be upheld, even if the BLM did not comply with all of the grazing regulations. In short, under the current appeals system, the permittee's experts have to show why the BLM experts are wrong (a burden that is very hard to carry) and the BLM decision can still be held to be correct,

even if the BLM only substantially complied with its regulations. This is not a level playing field and a problem that absolutely needs corrected.

Finally, this section also returns to the law the "automatic stay" provisions eliminated by the Bruce Babbitt "Range Reform '94" regulations, except for decisions of a temporary nature and except in emergency situations.

In truth, this bill is more than mere technical changes to erroneous agency regulations, it gives some very real protection to the permittees. For example, the Ruby Pipeline "donation" to Western Watersheds Project to purchase grazing preferences on a "willing seller" basis only works if the permittee is honestly "willing to sell." However, if the permittee is always behind the curve in protecting his grazing permit and the only way he can "win" is by "voluntarily selling" his permit for pennies on the dollar, the word "willing" is truly compulsion. And, in the case of the Forest Service, the current administrative appeals process is like asking your father to change the decision of your mother, when your mother and father agreed on the decision before it was dictated to you.

Finally, this bill reverses the U.S. Justice Department capitulations to environmental groups during the course of recent litigation. These "settlements" have significantly restricted the BLM's and Forest Service's ability to legitimately use categorical exclusions to renew grazing permits. Neither the Justice Department nor the federal bureaucrats should be allowed to make Congressional policy without the Congressional branch of government. Make no mistake–this is not just a public lands ranchers' bill; this bill will help preserve family ranches, rural communities and the American beef supply. This is an American jobs bill! I urge your support and ask that you request your Congressional representatives support this bill.

-END-