

Statement Of

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On behalf of the

New Mexico Cattle Growers' Association

On

NEPA Litigation: The Causes, Effects and Solutions

To The

Task Force on

Improving the National Environmental Policy Act

U.S. House of Representatives Committee on Resources

Thursday, November 10, 2005
1324 Longworth House Office Building
Washington, D.C.

Madam Chairwoman, members of the Task Force and Committee, and especially New Mexico's Congressman Tom Udall, ranking member, and Congressman Steve Pearce, on behalf of the membership of the New Mexico Cattle Growers' Association (NMCGA), thank you for holding a hearing on this most vital portion of the National Environmental Policy Act (NEPA) debate, and for the opportunity to testify before you.

My name is Caren Cowan and I am executive director of the NMCGA, an organization with members in all 33 of New Mexico's counties and 14 other states. Growing up on a commercial beef cattle operation in southeastern Arizona, where family vacations consisted of trips to the Cattle Growers' conventions, I thought I knew what I was getting into when I accepted this position with the NMCGA. Organizations like NMCGA have, for well over a century, looked after the interests of ranchers who care for the land and its creatures and have handed down family operations from generation to generation.

For many decades that meant working on producer education and range betterment, mixed in with public policy and making sure there was a regulatory climate conducive to sound land management. For organizations in the West where much of the land is held in state or federal hands, that also meant a healthy dose of cooperation with state and federal land and wildlife management agencies. These trade organizations also provided the social component so necessary for an industry where much of the work is solitary with families who live in isolation, many miles from the highway. There was always a buddy at a meeting that was suffering the same whims of Mother Nature and a cyclical market.

Imagine my surprise, when being on the job for about two (2) weeks in July of 1998, word came down that there was a very real possibility that literally hundreds of families in New Mexico and Arizona were in jeopardy of losing their livelihoods and their homes due to an environmental lawsuit. My job description changed rather radically that day and since then I find that instead of helping producers do a better job on the ground and working with other groups and agencies with the same goal, I spend a good portion of my time working through the court system just to keep ranchers on the ground. I know that federal land and wildlife management agencies are in the much the same shape.

It is my understanding that NEPA was and is intended to cause federal agencies to take a step back and look at the potential consequences on the environment of their contemplated "major federal actions," to involve the public in decision making and to mitigate potential consequences of actions. I do not believe that NEPA was ever intended to halt natural resource use, sometimes to the detriment of natural resources, or to deprive families and rural economies of livelihoods.

NEPA is not about actions that are taken, but is pre-action analysis. Litigation on NEPA is on procedure not environmental impacts. Additionally, NEPA does not contain a "citizen's lawsuit provision" as do other federal environmental laws. Given that Congress made their intent clear with these provisions in other laws, it seems to me that it was never Congress's intent that NEPA would be fodder for the endless litigation we are now facing.

However, today's interpretation by the courts and regulatory regime have made NEPA one of two primary federal environmental laws that are the vehicles for environmental elitists to stop use of federal lands, causing great harm and destruction along the way. A whole cottage industry of so-called environmental groups has sprung up using the courts for the admitted purpose of eliminating land use.

In the grazing industry, there is a “*zero-grazing movement, which aims to clear every head of cattle off the 265 million acres of wildlands the U.S. government owns in 11 Western states,*” according a November 2002 article in the **Wall Street Journal** (Attachment A). In New Mexico, as in many other areas, these groups have already all but eliminated the timber industry.

Yet logging still provides fodder for NEPA litigation. Many suits are filed on the environmental analysis of post-fire salvage logging. There is a short “shelf-life” for scorched timber before insect infestation sets in. Even a slight delay in projects can render the timber useless, so it is quite easy for a NEPA lawsuit to eliminate a project whether or not the environmental group plaintiffs prevail.

Far from the intent of NEPA, the groups relying on litigation to mold the landscape to their selfish views are regional and national in scope. Here are some statistics on lawsuits filed by so-called environmental groups based on research on Public Access to Court Electronic Records (PACER) system (this does not include cases filed in New Mexico because the state does not use PACER):

- Center for Biological Diversity, which originated in New Mexico and now has its main office in Arizona, has only been in existence for 15 years, and since that time has filed a total of 414 cases
- Forest Guardians, which originates in New Mexico, has been in existence 14 years and has filed a total of 58 cases
- Oregon Natural Desert Association, from Oregon, has been in existence 18 years and has filed a total of 40 cases
- Western Watersheds Project, from Idaho, has been in existence 12 years and has filed a total of 44 cases

Even some of the longstanding organizations have refitted their purposes to litigation as well.

- Defenders of Wildlife has been in existence 58 years and has filed a total of 163 cases
- National Wildlife Federation has been in existence 69 years and has filed a total of 191 cases
- Sierra Club has been in existence 107 years and has filed a total of 739 cases

In the spirit of full disclosure, NMCGA and other organizations in New Mexico and throughout the West have gotten in the litigation game as well, not because our industry is litigious by nature, but because that is where the game is being played. However, although the NMCGA has been in existence nearly a century, we have only intervened in a few cases and have filed a few cases under the ESA, only one of which had a NEPA component. This would amount to a total of less than a dozen cases in over 90 years.

Admittedly, this huge number of cases filed by the environmental groups listed above does not relate only to NEPA. The Endangered Species Act (ESA) and the Clean Water Act (CWA), as well as land management statutes and the Freedom of Information Act (FOIA) all play into the strategy of litigation by those who would drive all use from the land just for preservation's sake.

Just cursory computer search turn up some fairly startling data regarding the use of NEPA. A search of WESTLAW, a commercial data service that provides data bases for all published federal court decisions as well as a few arbitrarily selected non-published federal decisions for all federal courts, revealed that from January, 2000 to the end of last month, a total of 999 cases were decided containing the acronym NEPA or the phrase "National Environmental Policy Act." A search using the word "environmental" as the filter netted 3,902 cases, meaning that NEPA made up more than 25 percent of all environmental litigation.

A detailed evaluation of every environmental case filed in the Oregon Federal District Court for a four (4) year period gives a glimpse of the magnitude of the issue. According to PACER there were a total of 148 “environmental” cases filed from 2002 through October 28, 2005. Electronic documents were not available for eight (8) of those cases. Of the 140 remaining cases, only 28 were **not** filed by “environmental” organizations, meaning that 80 percent of the “environmental” cases were filed by “environmentalists.” Some 63 cases or 53 percent of “environmentalist environmental” cases included at least one NEPA claim. The balance of the cases included 39 that were primarily ESA claims, with the remaining 10 involving a variety of statutes. Clearly, NEPA appeared to be the vehicle of choice for litigation. Logging was the focus of 78 percent of the NEPA suits with 49 suits, with grazing and recreation or access coming in with five a piece. Hunting was target of another three cases, while mining drew one claim.

To get the entire picture of the frequency and impact of NEPA claims, one must physically pull the dockets and pleadings for every environmental case filed in every district court in the nation. However, that human labor is not necessary because these “environmental” groups are quite vocal about their aims and means of achievement. I had the dubious honor to be invited to participate on a panel at the annual meeting of the National Public Lands Grazing Campaign regarding a tax-payer funded buyout of federal lands ranching last year. During the question and answer period of the presentation, I was repeatedly ask how NMCGA formulated policy and what the general membership thought about the potential of a buyout of livestock grazing preference rights on federal lands. The answer was the same, our members determine policy and they have determined not to support a tax-payer funded buyout.

Eventually panel moderator Andy Kerr said that what the people assembled really wanted to know was just what kind of pressure was it going to take for ranchers to accept the buyout proposal. Were the groups involved just going to have to keep suing? My answer was, of course, yes. John Horning, Forest Guardians executive director, shouted from the back of the room that he was happy to oblige.

The Forest Guardians, as reported in the **Wall Street Journal**, describes itself as “relentless” and “uncompromising.” *“First they track down ranchers who have permits to feed their livestock on federal land...,”* the story says. *“The next step is to sue..., accusing the government of mismanaging the land where the ranchers’ cows graze. If the Guardians win in court, or if the government settles, the number of cows a rancher is allowed to graze with his permit is cut...”*

These statements raise another issue, that of the “settling” of cases by government agencies to avoid further litigation. In the Oregon court research, there were 63 NEPA cases in the past three years, 32 of which have been resolved. In 11 of the resolved cases, the environmental organization lost.

In 21 cases the organization won at least part of its case. Of those 21 cases, 13 were “settled” by the federal agency prior to the court issuing a ruling. Thus, the environmental organizations proved their case in only eight (8) cases. However, when the environmental groups prevail, at least in part, or settle, their legal costs and fees are paid by the federal government. Again, determining the total amount of those payments is difficult without physically going to each federal district court and pulling individual documents. But preliminary research indicates that since the attorney fees paid by federal agencies are generally less when cases are settled rather than litigated, federal agencies may be settling cases to reduce financial exposure rather than vigorously defending themselves are risk a loss in court. Additionally, according to numerous published federal court decisions, attorney hourly fees for individual attorneys with between 10 and 20 years of experience range between \$200 per hour and \$350 per hour. For example in a recent request for attorneys fees filed by the National Wildlife Federation (in a case that is NOT completed) the attorneys requested \$1,054,055.65 in fees, with the lead attorney requesting \$325 per hours. In that case, the NWF is even charging law clerks at \$100 per hour.

This is also a bone of contention for NMCGA. Environmentalists sue the government so the government must defend itself with tax payer dollars. Groups like NMCGA often must hire lawyers to protect the industry, then the government pays for the environmentalists’ lawyers --- we get to pay THREE TIMES.

But, perhaps the most interesting aspect of this debate is “who” is bringing the litigation and the attorneys employed. A substantial amount of litigation in the Northwest is done by the Lewis and Clark College of Law’s Pacific Environmental Advocacy Center (PEAC). PEAC grants college credit to law students who assist with briefing and litigation for a client list such as Oregon Natural Desert Association, Forest Guardians, National Wildlife Federation, Great Lakes United, Audubon Society and other environmental organizations. Although PEAC is supported by the Lewis and Clark Law School, including payment of professors who write briefs and participate in, PEAC requests and is granted attorney fees and costs. For more information, see <http://law.lclark.edu/peac> . The Law School at the University of Denver has the same type of program called the Environmental Law Clinic. According to its website, the clinic assumed

the environmental responsibilities from Earthjustice and is now run by attorneys associated with the Center for Biological Diversity. See <http://law.du.edu/naturalresources/clinic>

Even more disturbing is the fact that while land and wildlife management agencies and land users are devoting resources, manpower and funding, to NEPA compliance and litigation, fewer and fewer resources are available to enhance the land. According to the Bureau of Land Management (BLM) in Utah, for every hour that the BLM spends writing a single grazing environmental assessment (EA), once litigation is filed, BLM staff spends 3 to 4 hours defending it in litigation. The Utah BLM also reports that only three EAs, which also included substantial livestock reductions, have NOT been appealed out of over 40 EAs covering the grazing allotments in Utah alone. Once an EA is appealed to the Office of Hearing and Appeals, it takes an average of five years to get a final decision, just from the administrative law judge. It would be interesting to compare the time that the agency is spending on preparing for litigation versus what is spent on on-the-ground land management. According to the Utah BLM, the Nevada and Idaho BLM offices suffer the same problems. According to this BLM official, the BLM grazing program is “paralyzed” in litigation. Based upon this amount of litigation, the BLM will not be able to complete all grazing term permit renewals by 2009 as directed by Congress.

The Government Accounting Office (GAO) recently issued a report on how costly grazing on federal lands is to tax payers. My question is how much of that cost is in land management versus regulatory compliance and litigation? On the other hand, what is the value of the land and wildlife stewardship the livestock industry provides?

NMCGA receives numerous NEPA documents on grazing allotments representing untold man hours of labor in creation. Grazing is an “action” that has been ongoing in the West for literally hundreds of years. It is hardly a “major federal action.” But some of the documents we have received lately defy reason. They are on renewal of grazing of a dozen or less animals. Where is the line drawn for a “major federal action?”

In conclusion, NMCGA believes that there must be revision of NEPA to relieve the burden imposed by litigation or the threat of litigation. That revision should include:

- Using the NEPA process as Congress intended, not as a vehicle to justify decisions that have already been made, nor as fodder for endless lawsuits
- Ongoing activities, like livestock grazing, that have been going on for hundreds of years should fall under a categorical exclusion. If uses, such as grazing, are to be analyzed that should be on the overarching use of the land, not micro managing items like seasons of use, grazing methods, and animal numbers. There is extensive NEPA

analysis at the forest management level, which includes grazing. Why is there additional NEPA necessary?

Thank you for your time and attention. If you have questions, I'd be happy to try and answer them.

Attachment A: November 2002 **Wall Street Journal** article
Green Group Works to Push Ranchers Off Federal Lands

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CATTLE RUSTLING

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Green Group Works to Push
Ranchers Off Federal Lands

Aiming to Save Species Hurt by Grazing Cattle,
The Forest Guardians Target Ranchers in Debt
By JIM CARLTON
Staff Reporter of THE WALL STREET JOURNAL

WEED, N.M. -- Jimmy Goss has survived wildfires, flash floods and being
struck by lightning while herding cows in the Sacramento Mountains. He's not
sure he'll survive the Forest Guardians.

Hardline environmentalists, the Guardians are leaders of the zero-grazing movement, which aims to clear every head of cattle off the 265 million acres of wildlands the U.S. government owns in 11 Western states.

The Guardians use an unusual legal approach. First, they track down ranchers who have permits to feed their livestock on federal land for just pennies a head. The next step is to sue under the U.S. Endangered Species Act or other laws, accusing the government of mismanaging the land where the ranchers' cows graze.

If the Guardians win in court, or if the government settles, the number of cows a rancher is allowed to graze with his permit is cut. That hands the Guardians a double victory: Not only does the land get a breather, but the rancher has to pay much more to feed his displaced cows on private land.

Indeed, the Guardians' most controversial tactic is to single out the financially vulnerable -- ranchers who have used their permits as collateral for bank loans, a common form of financing for small ranching operations. "We want to put the squeeze on ranchers to get off the land," says John Horning, the coordinator of the Guardians' antigrazing campaign. "If some ranchers go out of business along the way, so be it."

A Guardians suit forced Mr. Goss and his wife, Frances, to put 200 of their 553 beef cows out to pasture with a neighbor who charges them 10 times as much as the Forest Service did. They have had to dig into retirement savings to make payments on their grazing-permit loan. "It makes you want to cry, what they've done to us," Mrs. Goss says.

About 25,000 ranchers have grazing permits in the West, where upwards of three million cows, or about 10% of America's beef cattle, feed on land owned by the U.S. government. By their own estimate, the Guardians have managed to clear 5,000 cows off two million acres managed by the U.S. Forest Service, winning or settling some 18 lawsuits, and they have dozens more suits pending. In one of the potentially most significant, a federal judge in Tucson ruled last month that the Forest Service failed to properly monitor and restrict grazing on hundreds of allotments across about 15 million acres in New Mexico and Arizona. The judge is considering remedies, including severely restricting the livestock that can graze there.

Mr. Horning says the Guardians sympathize with the ranchers they go after and don't hold them entirely accountable for the damage done by their cattle. According to the Guardians, their main enemy is the U.S. government, and its grazing-permit program, which zero-grazers say subsidizes an industry that threatens hundreds of varieties of plants and dozens of species of animals.

The only way to protect the land, they say, is to put it off-limits to

livestock that crush delicate fauna around mountain streams, causing erosion and harm to fish, and destroy meadows that are home to a multitude of wild creatures, including threatened and endangered species.

The Forest Service says the Guardians exaggerate the injury caused by cattle. For one thing, agency officials say, wild animals, including fast-growing herds of elk that roam many Western states, probably do as much harm to pastureland as livestock. The government's main argument is that public land can and should continue to be available for multiple uses, including grazing. "I believe that properly managed grazing has an excellent future in the Forest Service," says David Stewart, director of rangeland management for the Forest Service's Southwestern region.

'Relentless'

Formed in 1989, the Forest Guardians have 2,000 members and an annual budget of \$400,000, mostly from small contributors, the group says. The group describes itself in its literature as "relentless" and "uncompromising." In fact, it has drawn criticism from mainstream environmental groups uncomfortable with the Guardians' zeal for putting ranchers, especially small-time family operations, into financial binds.

"They're a little too extreme," says George Grossman, a longtime official in the Sierra Club's office in Santa Fe, N.M., where the Guardians are based. "I think zero anything is not the way to go. I mean, we're talking about people losing their livelihoods."

So far, few ranchers targeted by the Guardians have gone out of business, according to lawyers for ranchers, though many say they have been pushed to the brink.

After the Guardians sued last spring, the Forest Service ordered 77-year-old Lena Shellhorn to remove her 80 cows from the Gila National Forest in southwestern New Mexico. Now the cows feed on the 258 acres she and her two sons own in Glenwood, N.M. But it isn't pastureland, so the Shellhorns have to haul feed in, significantly raising operating costs.

"If we can't get these cattle back in the forest, I'll just go broke," says Mrs. Shellhorn, whose ancestors started ranching nearby in 1878.

Like Mrs. Shellhorn and many of the ranchers the Guardians single out, the Gosses aren't well off. They live in a three-bedroom log house that Mr. Goss built in this tiny community of some 20 residents high in the Sacramento Mountains, an Old West refuge for gunslingers and renegade Apaches. Mrs. Goss's ancestors settled here around 1880. Mr. Goss's grandfather arrived a few years later. The families ran cattle over a roughly

100,000-acre expanse of ponderosa and fir forest now known as the Sacramento Allotment, part of the Lincoln National Forest. Mr. Goss, 65, worked for years as a logger. In his mid-50s, he went back to the ranching he had grown up with. "My granddaddy worked to give us this," Mr. Goss says, "and I'm busting my behind so my grandkids can have it too."

To find ranchers with grazing-permit loans, the Guardians use the federal Freedom of Information Act to get the names of participants in what's known as the escrow-waiver loan program.

Under the program, the U.S. government provides banks with verification of ranchers' grazing permits, so banks can accept the numbers of livestock allowed to feed under the permits as collateral for business loans. In the past 20 years, banks have issued more than \$450 million in grazing-permit loans to about 300 ranching operations, according to records obtained by the Guardians.

The Guardians say another New Mexico-based environmental group, called Gila Watch, gave them the inspiration for the grazing-permits tactic. Gila Watch in 1995 successfully sued the Forest Service to remove all cattle from 125,000 acres of the Gila National Forest, home to the endangered Mexican spotted owl. One rancher with a grazing permit there went out of business after he couldn't keep paying his grazing-permit loan, and the Guardians decided to put that kind of financial squeeze on ranchers throughout the West.

The group's lawsuits are filed under the 1973 Endangered Species Act or other federal environmental laws, including the National Forest Management Act and the Clean Water Act. The laws require federal managers of the nation's public land to protect creatures and plants that the government has determined are threatened or endangered. The suits typically argue that the government needs to take action in order to carry out that legally required protection. For example, an endangered spotted owl may be threatened by cattle grazing, in part, because cows trample the land where field mice, a preferred source of food for the spotted owl, live in burrows.

Effective Tactic

The Guardians don't sue only in cases where ranchers are in debt. The group says it goes to court whenever it thinks it can force the Forest Service or another federal agency to change its grazing policies. But critics say the Guardians go after loan-holders more often than not and acknowledge the tactic can be effective. "It doesn't take a mathematician to figure out how many head of cattle it takes for the rancher to make his bank note," says G.B. Oliver III, an executive at the Western Bank of Alamogordo, in Alamogordo, N.M., which gave the Gosses a \$170,000 loan in 1989, with the

553 cows then on their grazing permit as collateral.

The U.S. government doesn't dispute that a lot of the public land in the West has been excessively grazed. When fires were raging across the Southwest last summer, several Forest Service officials said publicly that one reason was a build-up over the past century of dense ponderosa pine forests. The forests grew up in part after cattle mowed down the native grasses that used to catch fire and keep the timber in check. In recent years, the Forest Service has been keeping cows out of burned areas to help forests recover.

The Forest Service and the ranching industry say smarter land management -- not zero-grazing -- is the best answer for all concerned. "There is no question our performance on the public lands has vastly improved," says Ted Hoffman, president-elect of the Idaho Cattle Association.

Many ranchers take protective steps themselves, fencing off streams and declaring some hard-hit meadows off limits until they can recover. In the Lincoln National Forest, Mr. Goss moves his cows regularly so they won't feed too long in one spot. On a sunny afternoon, he showed how he does it. Driving down a dusty road in his pickup truck, Mr. Goss stopped a few yards from where several brown heifers were munching grass in the shade of pine trees. They perked up when they saw him fetch a bucket full of grain cubes from the back of the truck and hurried forward when he started handing them out. "This gives them more incentive to wait for me to come back," said Mr. Goss, surrounded by cows.

The Goss case started in April 2000, when the Guardians sued the Forest Service in U.S. District Court in Albuquerque. The Guardians argued the Gosses' cows had nibbled the threatened Sacramento Mountains thistle and other vegetation, including native grasses and streamside willows, to the nub, putting the threatened Mexican spotted owl at risk and upsetting the ecosystem.

In June 2000, the Forest Service ordered the Gosses to cut their herd from 553 head to 400. In August of that year, the agency ordered them to cut it again, to 335. Forest Service officials say they did so because it was clear they had allowed too many cattle on the land, not because the Guardians had sued. The judge in the case ultimately ruled that 335 was the right number.

Now, the Gosses pay \$2,700 more every month to put their cows out to pasture than they did before the Guardians sued. With their grazing-permit loan eating up \$30,000 of the \$120,000 their operation grosses every year, and other expenses now consuming the rest, the Gosses live on monthly Social Security checks of \$900, and what they had saved for retirement.

The strain weighs on the whole Goss family. "It's like we're watching them slowly kill our folks," the couple's 34-year-old daughter, Kendra Mydock, says on her parents' front porch as thunder rumbles. "Hey," her father says, "we're not dead yet."

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