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Office of Policy Development and Research
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5641
Washington, DC 20210

Regulatory Information Number (RIN) 1205-AB70 -- Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Open Range in the U.S.

The following comments are being submitted by the American Sheep Industry Association (ASI) and the Public Lands Council (PLC). ASI is the national trade organization representing the interests of more than 79,500 sheep producers located throughout the United States. PLC is the only national organization dedicated solely to representing the roughly 22,000 ranchers who hold grazing rights on federal lands.

The U.S. sheep industry produces approximately $500 million in farm-gate receipts annually from sales of lambs, wool, cull breeding stock, etc. The direct and value-added multiplier effects (Shiflett, ASI, 2011) were calculated to be: "An estimated $486.5 million…supports an additional $1.2 billion in economic activity for a total of $1.7 billion." The sheep industry supports backward-linked industries that supply sheep production. It also supports local businesses through expenditures of sheep-industry generated income on goods and services. The sheep industry produces many and varied products from lamb chops served in fine dining restaurants to lanolin. Estimates of retail lamb and wool, wholesale pelts, variety meats, meal, tallow and lanolin and retail sheep cheese sales revealed that $785.6 million in production generates an additional $1.9 billion in multiplier effects, summing to a total economic impact of $2.7 billion.

<u>38 percent of sheep production in the United States is under the care of H-2A sheepherders.</u> Changes to the H-2A sheepherder program, therefore, would have a significant negative impact on the sheep industry and all related businesses – lamb processors, wool warehouses, textile mills, trucking and feed companies, veterinarians, fencing businesses and, most importantly, on the 79,500 family farms and ranches that raise sheep in America.

The U.S. Department of Labor (DOL) was not required by the courts to change the special procedures of the sheepherder and livestock worker programs, however, it has proposed to do so. Our comments will focus on two of the top changes in the proposal – wage and job definition. These two changes, as proposed, will mean that most of the sheep ranches employing H-2A herders today will find the program unaffordable or unavailable to them in 2016. Sheep-producer reactions to the proposed wage and our economic analysis of it concludes the expense is not sustainable for ranches to continue in the sheep business.

The sheep on these ranches must be herded. If left to themselves, the sheep would be killed by predators, lost to disease/starvation or not recoverable by the rancher. However, there is no alternative to the H-2A sheepherder as American workers have declined to herd sheep for a living since the 1950's. Also, there is no current pool of American workers who are trained in the specialty of herding sheep.

Therefore, if there are no H-2A herders on U.S. ranches – for lack of any alternatives – the sheep will be sold. History demonstrated this in the case of the National Wool Act, which was phased out by the federal government in 1993-1995. Tens of thousands of sheep ranches subsequently went out of production and millions of breeding sheep were disposed of when they could not budget a profit on their operation. In the late 1990's, linked allied industries followed the sheep producers by also going out of business as the lack of lamb, wool and customers forced them out.

Since 38 percent of the sheep in the United States are cared for by H-2A herders, the loss of these sheep would severely erode total industry infrastructure affecting not only the size of the U.S. sheep production but also negatively affecting the forward and backward-linked industries and economic activity. The shrunken infrastructure would then have a very negative impact on the remaining sheep farm and ranch families who do not employee H-2A herders.

The vast majority of all sheep operations fall into the small business category; in fact, all but 0.02 percent of the total sheep operations in the United States are small businesses. The western sheep-range operations that hire H-2A herders will typically run one-to-two bands of sheep ranging from 900 head to 1,200 head each, with some being larger.

Wage Rate Effect on Profitability

At 24 percent of the total operating costs, hired labor is a significant cost to sheep ranchers. Therefore, tripling the labor rate will significantly deteriorate the profitably of sheep operations employing herders. In an enterprise budget for an Idaho sheep operation with ewes on range and selling feeder lambs, total returns to land, risk and management is an estimated $60 per head (Painter, K., University of Idaho, 2014). Sheep ranchers in Idaho represent a typical western sheep operation where bands of sheep graze on federal lands accompanied by an H-2A herder. When the hired labor rate is increased by three, returns fall to -$6 per head. Thus, returns fall by 111 percent for the range operator selling feeder lambs. Increasing the hired labor rate by three reduces total returns to the 1,000-head ranch from nearly $60,000 to a negative $6,400, 111 percent lower.

1,000-Head Idaho Range Operation Returns

	Idaho: 1000-head with lambing on range, lambs sold as feeders		
	Returns to land, risk and management, $ per head	Returns to land, risk and management, total $	Income above operating costs, $
Baseline, 2014	$60.00	$59,797	$83,161
Hired wage rate increased by three	-$6.00	-$6,370	$16,994
% change	-111%	-111%	-80%

Source: K. Painter, University of Idaho, 2014.

When herder wage-rates triple, income above operating costs fall from over $83,000 for an operation selling feeders to less than $17,000, or a reduction of $66,167 (80 percent). This loss in revenue to the rancher also means a profound loss to his or her local, rural economy in multiplier effects. This is important because rural economies depend upon the local tax base to help fund schools and infrastructure. In 2014, $1 of revenue produced by a sheep producer generates $1.71 in backward-linked industries and another $0.80 in forward-linked goods and services for a total $3.47 in total revenue generated in the local, rural economy (Shiflett, ASI, Sheep and Lamb Industry Economic Impact Analysis, April 2008, Revised March 2011).

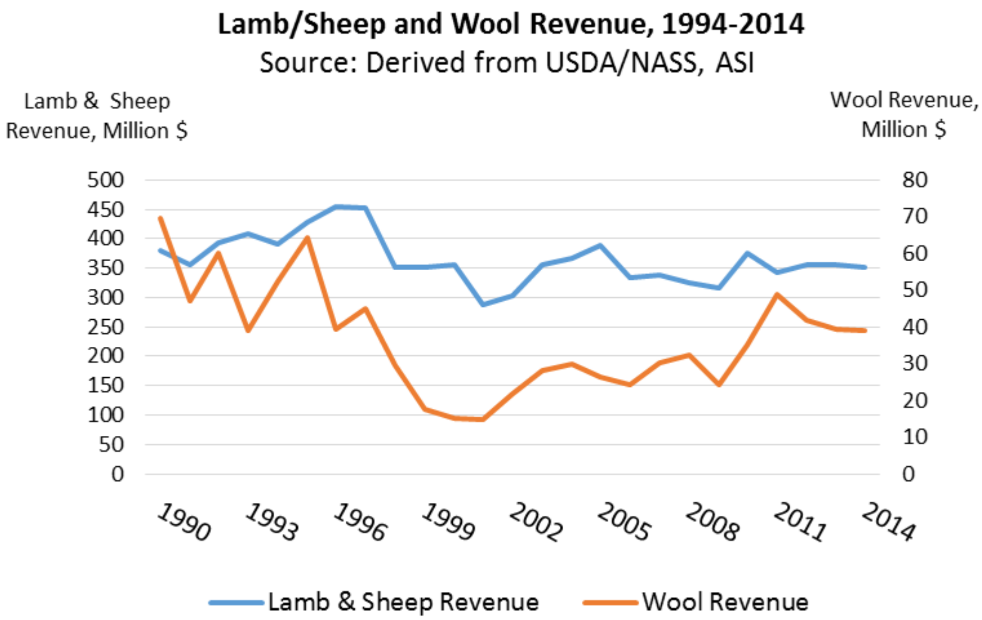
An estimated loss of $66,167 per rancher means that not only is the rancher suffering a debilitating loss, but his or her local economy is losing an estimated $229,320 in backward and forward-linked businesses as well. Given an estimated 598 operations that employ herders, the total local loss is an estimated $137.1 million in rural communities across the West.

To put this sheep industry loss into perspective, total injury was compared to the agriculture, forestry, fishing and hunting gross domestic product (GDP) of western states provided by the Bureau of Economic Analysis (2013). For some western states – Idaho, Colorado, Oregon and New Mexico, for example – the loss in sheep and sheep related economic activity would affect 3 to 5 percent of the total agriculture, forestry, fishing and hunting GDP. For other western states, the impact is more significant with the sheep loss accounting for 14 percent of the GDP in both Utah and Wyoming.

Additionally, tripling herder wages will not benefit local, rural economies as most herders elect to send their paycheck back to their families in Peru or Mexico. According to the Colorado Wool Growers Association survey, – *The Real Wage Benefits Provided To H-2A Sheep Herders and the Economic Cost to Colorado Ranchers* – ranchers typically wire home herders' paychecks on their behalf (March 5, 2010).

The loss of sheep-rancher revenue from increased labor rates will also have an impact on rural employment. For a given loss of over $66,000 per sheep rancher (from Painter, above), 1.67 jobs will be lost at the ranch with a total loss in the local economy of 2.62 jobs. If an estimated 598 sheep operations employing herders suffer this loss, the total rural-employment loss is an estimated 1,568 jobs.

Wool and lamb revenue alone totaled an estimated $391 million in 2014. From 1990 to 2014, lamb and wool revenue was volatile; it reached a high of $343 million and a low of $158 million (in constant dollars), a difference of $185 million, or 81 percent of annual revenue over the 24 years (see graph below). Such revenue volatility equates with high business risks for sheep producers so, with 24 percent of current production cost being labor, tripling the wage rates/cost (a total operating cost increase of 35 percent) along with high-risk/revenue volatility would make sheep production an unattractive enterprise.



During recent years (2005-2014), the standard deviation of lamb and wool revenue from its mean has been high, as demonstrated by the following table.

	Million $s		
	Lamb/sheep revenue	Wool revenue	Lamb/sheep and wool revenue
Average	$348.12	$34.17	$382.29
Standard deviation (STD)	$22.25	$8.18	$25.03
STD % of Average	6%	24%	7%

We request the Department withdraw the proposed wage methodology and replace it with a version that addresses the base-wage stagnation of the past twenty years yet at a rate that sustains the H-2A sheepherders and sheepherder program as well as the sheep industry.

The department has alternative formulas and will receive alternative methodologies for wage determination during this comment period. Key provisions ought to include an update to the base wage that has been static since the 1990's and recognize the employer cost for providing food and housing. An index, such as the Bureau of Labor Employment Cost Index, could serve as an adjustment factor annually and should be capped in order to provide consistent budget projections for the ranch.

ASI provided input to the development of the two-wage methodologies contained in the comments of the Western Range Association (WRA) and Mountain Plains Agricultural Service (MPAS) and ask full consideration of adoption by the DOL.

In the text below, we specifically quote the WRA and the MPAS wage proposals for endorsement.

ASI, WRA and MPAS submitted a wage proposal in October 2014 to the Department that was referenced but not analyzed in the proposed rule. We ask that the Department consider that proposal in addition to these set forth below. In response to the specific question about deducting the cost of food from wages, the ASI proposal included an excellent discussion of this point – both as to the appropriateness and the amount of such a deduction – looking to the USDA "liberal" meal plan to best reflect the protein-rich diet appropriate for active young to middle-aged men working outdoors in high-altitude environments. The wage proposals included below do not include such a deduction, but the commenters encourage the Department to consider permitting one, or at least permitting a deduction reflecting the difference between the more extensive and more expensive food provided to these workers compared to the subsistence and meal charges that the Department uses for other workers.

Proposal #1 – Inflation-Updated Wage Rates

The only problem that the NPRM identifies with the state-survey-based wage methodology in place for more than 60 years for this industry is that the dwindling number of U.S. workers in the occupation has made it increasingly difficult to conduct a statistically valid survey of those workers. As a result, the once-valid survey results have become frozen in time. The NPRM offers no argument that the surveys conducted by the state workforce agencies were not valid at the time that they were prepared. The NPRM cites 1994 as the last year for which such surveys were conducted with statistically valid results, and the Department has essentially used those results for more than 20 years since that time.

Rather than scrap the old methodology that benefited from the expertise of the state workforce agencies and looked to the actual wages being paid in this occupation, a methodology that the Department of Labor recognized and relied upon, and impose a wage system better suited for crop agriculture, there is a way to update those survey results to the present day labor market and also to create a path forward to avoid future wage stagnation. The key is the Bureau of Labor Statistics' Employment Cost Index (ECI) for wages and salaries, considered to be the most accurate measure of inflation in wages and salaries.

In the stakeholder-negotiated, bipartisan, Senate-passed comprehensive immigration reform bill in the last Congress, S. 744, agricultural employers and the United Farm Workers agreed to a wage methodology for nonimmigrant agricultural workers that provided for guaranteed annual increases in farmworker wages in order to eliminate the danger of wage stagnation. In Section 2232 of the Bill, a new Section 218A in the INA would have been created. Section 218A(f)(3)(B) provided an "escalator" clause tied to the ECI. After a one-time shift to a base wage rate with a multi-year phase-in, future wage rates would increase annually as follows:

- By 1.5% if the percentage increase in the ECI during the previous calendar year were less than 1.5%;
- By the percentage increase in the ECI if such percentage were between 1.5% and 2.5%, inclusive, in the previous calendar year; or
- By 2.5% if the percentage increase in the ECI exceeded that amount in the previous calendar year.

This proposal won the approval of Senators from both political parties, the UFW, and agricultural employers by providing for a guaranteed raise each year on a defined inflation "track" of between 1.5% and 2.5%.

Using that same agreed-upon methodology, it is possible to start from the highest state survey figure of $800 and apply this inflation track from 1994 to the present to get a current version of what had been a valid monthly salary in 1994. Going forward, using that updated monthly figure as the starting point, Mountain Plans and Western Range would propose this same ECI-based inflation model for calendar years 2017 and beyond, guaranteeing consistent and predictable increases in the wage rate for years into the future. Bear in mind, ranch owners do not enjoy the same guarantee of future price increases for the meat and wool that these workers produce. By offering this proposal, they understand that they are agreeing to absorb increased risk as to future profitability in an extremely difficult international marketplace.

As set forth in the attached report of labor market economist, Dr. Stephen Bronars, taking the highest of the existing survey results ($800/month) and updating that figure from 1994 dollars to 2015 dollars using the ECI-model described above yields a monthly wage rate of $1,280.73 in 2015 dollars. Mountain Plains and Western Range propose that wage rate as the base wage rate for 2016.

The following table sets forth the resulting range of wages for the upcoming years, showing the 1.5% and 2.5% increase levels with a 2.0% assumption for calculating the next year. The NPRM proposes a five-year phase-in under which employers would pay 60% of the full amount in 2016, 70% in 2017, 80% in 2018, 90% in 2019, and the full rate of pay in 2020 and beyond, since "the full wage increase in a single year could lead to significant disruptions that might cause job losses that could be avoided by a gradual implementation period." 80 Fed. Reg. 20314. If DOL were willing to use this inflation-based model instead of the crop agriculture AEWR model, the full phase-in period would not be required, and Mountain Plains and Western Range would propose a 4-year phase-in, starting at a higher initial percentage (80%, 85%, 90%, and 100%).

	1.5%	2.5%	Phased 1.5%	Phased 2.5%
2016	$1,280.73	$1,280.73	$1,024.58 (80%)	$1,024.58 (80%)
2017	$1,299.94	$1,312.75	$1,104.95 (85%)	$1,115.84 (85%)
2018	$1,325.94	$1,339.00	$1,193.35 (90%)	$1,205.10 (90%)
2019	$1,352.46	$1,365.78	$1,352.46	$1,365.78
2020	$1,379.51	$1,393.10	$1,379.51	$1,393.10

As with Proposal #2, discussed below, this proposal involves a single national rate, subject to the exceptions for California and Oregon to the extent that those states would require a higher monthly salary under their own methodologies. Because food, housing, and clothing would already be provided by the employer, the differences in cost of living from state to state would be irrelevant and the monthly salary would effectively be 100% disposable income for the workers.

Proposal #2 – FLSA Rate in place of AEWR

If DOL is determined to transition away from a survey-based monthly salary in favor of a monthly salary using the 44-hour week estimate and a base wage rate, Commenters submit that the Federal Minimum Wage of $7.25/hour is a more reasonable starting point than the Farm Labor Survey based AEWRs, which are projected to range from $11.19 to $17.02/hour in the states in which this work would be performed by the time of full implementation. Unlike the ASI proposal from 2014, this proposal would not follow the California and Oregon model and give credit for food and housing. The $7.25/hour in the FLSA was intended by Congress to serve as a living wage, and those paid at that rate must purchase their own food, housing, and clothing from those earnings. Thus, paying that full amount to workers involved in the production of grazing livestock amounts to double-pay of thousands of dollars per season worked. Still, this is a more reasonable approach than that proposed in the NPRM.

Using the NPRM's estimate of hours worked and the FLSA hourly wage rate results in a monthly salary of $1,381.27. Since many of these herds and workers travel across state lines, because food, housing, and clothing are already provided for free, and in order to create a more uniform process, Commenters would propose this single monthly rate in all states, except to the extent that the California or Oregon state statutes or judicial settlements require a higher rate already. While this will place a greater burden on employers in some states more than others, the FLSA wage rate applies uniformly across the nation and serves as a model for this proposal. As the NPRM observes, "[e]stablishing a single set of procedures for these occupations will create administrative efficiencies for the Department." 80 Fed. Reg. 20303.

If DOL were willing to change the base rate to the FLSA rate, Commenters would welcome the change and would even propose a shorter phase-in period of 4 years, with annual phased-in rates of 75% in 2016, 80% in 2017, 90% in 2018, and 100% by 2019 and thereafter. Using the $1,381.27 figure as the 100% mark and this four-year schedule, the monthly phased-in rates of pay would be $1,035.95 for 2016, $1,105.02 for 2017, $1,243.14 for 2018, and $1,381.27 for subsequent years. As recognized in the NPRM, the phase-in period would allow employers who have built their businesses around a starting wage level of $750 to $800 for the most part to adjust to the significantly higher wage levels.

Labor costs under this model will nearly double for ranchers – hundreds of dollars per worker per month, even without considering the increased cost of workers' compensation insurance that is tied to wages – but it is at least potentially a burden that some ranchers can survive, unlike the AEWR approach proposed. Looking to the University of Wyoming study referenced above, using the phased-in FLSA-based wage methodology instead of the NPRM's wage methodology would mean that ranches could break even perhaps 56% of the time, on average. That's not much better than a flip of the coin for survival, but at least offers a chance at staying alive that the NPRM does not. Moreover, as quoted above, this proposal meets the monthly salary request of the plaintiffs from the *Mendoza* litigation, who sought $1,300 to $1,500 per month. If the purpose of an "adverse effect wage rate" is to be the level of pay at which qualified, willing, and able U.S. workers would take the job, then this proposal meets that test.

"Open Range" and "Limits on Incidental" Work (Job Definition)

The second critical issue for which we provide comment is the job definition of a sheepherder as proposed in 20 C.F.R. § 201 (proposed); 80 Fed. Reg. 20339.

The proposal suggests that no fences would be allowed in connection with sheepherders and, further, half of the herders' year must be away from the ranch headquarters and livestock facilities.

Our membership, and that of the WRA and MPAS, indicate a majority of sheep operations would not be eligible to hire H-2A herders under this scenario. California sheep operations are a great example of this impact as they utilize targeted grazing under temporary fencing to reduce fire danger on a wide variety of forage from federal grazing allotments, private-native and -crop pastures and leased grasslands.

The herding livestock industry has adapted to a wide variety of sheep grazing as federal-grazing allotments have been continuously reduced in some locations in recent years. The sheep still graze throughout the year but not as often are they out of sight of a fence. Note, fences that are/were built to control cattle are generally not adequate to control sheep or lambs.

Nationally, 46 percent of our sheep spend part of the year on federal grazing permits or allotments, however, the availability of federal grazing declines constantly and the forage is seldom, if ever, replaced with other federal-leased ground. Private grass, supplemental hay and crop aftermath are the available options to maintain year-round feed for the animals and that does not fit the Department's apparent view of grazing out of sight of fencing or facilities.

U.S. Forest Service, this month, announced plans to close two sheep allotments entirely and reduce the days of grazing by half on two more allotments that two Utah sheep operations depend upon. No alternative federal-grazing allotments were offered as replacement, which is typical of the decades-long erosion of federal grazing of sheep.

We ask the Department to update their description of sheepherder duties and the management of sheep production to "Grazing Livestock Production System."

Grazing Livestock Production System – a livestock production system that is dependent on the utilization of herbage or forage on a piece of land via grazing or supplementation. In the context of this subpart, production refers to the processes and methods used to transform tangible inputs (grasses, grazing and forage) and intangible inputs (sunshine and animal husbandry) into goods (protein, wool, by-products and carbon sequestration). Resources and practices are used to create animal products that are suitable for consumption or further processing. Practices may include but are not limited to: animal husbandry, temporary fencing, permanent fencing, management of urban interface, transport of water for animal use, use of structures and corrals to facilitate production practices, assistance with production of feed sources for animals being cared for, assistance with repair and maintenance of equipment and facilities used in production practices, trailing livestock and/or assistance in loading and unloading animals into livestock trucks for movement.

Sheep require feed every day of their lives; therefore, they require the presence of a sheepherder. Today's reality of grazing is increasingly a mix of native grass on federal, state and/or private leases, hay and alfalfa grazing, crop aftermath grazing, feeding under power lines and in vineyards and even small parcels in residential areas for fuel load management. Consequently, the time proposed herding in sight of livestock facilities and fencing should be recognized as full-time sheepherding.

For decades, the sheep industry has successfully maintained a legal labor force through the use of the H-2A program and is dedicated to its continued use. The American Sheep Industry Association respectfully requests that the Department of Labor seriously consider the stakeholder's input as it reviews this proposed rule.

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