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Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

Re: RIN 1205-AB70, Temporary Agriculture Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Open Range in the United States

Dear Ms. Gagliardi,

The Wyoming Wool Growers Association (WWGA) appreciates the opportunity to provide the Department of Labor (DOL or Department) with comments on the Notice of Proposed Rulemaking on Temporary Agriculture Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Open Range in the United States, RIN 1205-AB70, published in the Federal Register on April 15, 2015. As a membership organization that serves the sheep producers of Wyoming we work to protect, preserve and enhance the lamb and wool industry and the ranching community and lifestyle of Wyoming and the West. Our organization was formed in 1905 and remains one of the foremost agricultural organizations in the state. We are very concerned about this proposed rule as it will negatively affect a substantial number of our members.

We are concerned about the substantial changes in the DOL's Notice of Proposed Rulemaking (NPRM) intended to replace informal Training and Employment Guidance Letters (TEGLs) as to the "special procedures" for H-2A sheep, goat and livestock herding occupations. We are disappointed that the DOL would grant our industry only 45 days to properly consider, analyze and provide meaningful comment on the proposed changes to the special procedures that have governed the sheep industry's use of the H-2A program for several decades. While we understand that the DOL is operating under a timetable set in a court order, the Department is reminded that the order did not required changes to the special procedures already in use, only that it publish them for public comment.

The comment period for these proposed changes has been held during one of the busiest times in sheep production, when producers are in the throes of shearing, lambing and preparing to trail sheep to summer pasture. Many are also dealing with substantial weather events, from late spring snowstorms to heavy rains and flooding, and while trying to care for their animals they are also trying to understand, analyze and determine the impact of a lengthy and complex proposed rulemaking on procedures that they have used for years.

Several of our members who utilize the H-2A program have indicated they do not believe they will be able to comply with the new regulations as proposed and will likely be out of the sheep business within 3 years. It is unfortunate that the Department did not see fit to provide the producers who will bear the brunt of these proposed regulatory changes sufficient time to thoroughly review, analyze and prepare the best possible input on this important policy matter. The situation has added to a general sense that the federal government is out of touch with good, hard-working Americans.

By its own admission, what the Department proposes will have a significant economic impact on the ranchers who participate in the H-2A program to hire sheep and livestock herders. However, the Department did not consider the subsequent downstream or upstream economic impact of its policy proposal. The loss of America's wool and lamb industry will, in turn, mean the loss of numerous American jobs, from the families who operate the ranches in question to grocery checkers in the small communities that serve these ranches; from the mechanic at the local auto shops who repair vehicles for the ranchers to the textile workers in North Carolina who process, spin and weave the wool produced by these ranchers into fabric used for the uniforms of the U.S. military, and other apparel.

The proposed rules will have a significant impact on Wyoming's sheep producers, whether they use the H-2A program or not. In Wyoming, 86% of the state's total agricultural receipts are generated by livestock products and sheep (wool) and lambs are among the top agriculture products in the state. Wyoming ranks among the top five states in the nation for wool production and our wool is used to supply textile manufacturers all over the country. A substantial portion of our sheep is under the care of H-2A herders and we believe strongly that the sudden and drastic impacts from the Department's proposed changes to the H-2A program will result in more hardship on our producers than the Department has considered. Loss of these large range operations will mean even greater difficulty in securing shearers and veterinarians, finding markets for products and finding transportation for animals destined to any market that can be found. Rural communities, particularly Sweetwater, Uinta, Lincoln and Sublette Counties of Wyoming, as well as those in other states, will be affected substantially.

Textile workers in the West and the East will also feel the impact, at a time when the textile sector is beginning to climb back. The mills that process our wool and the factories that produce apparel from that wool employ Americans who are likely to end up losing their jobs. **We stand with the many other commenters who address the rippling affect that the proposed increase in production costs will have on the livelihoods of Americans across the country and ask that you give due consideration to these concerns.**

According to a recent analysis of the impact of the proposed wage increase, completed by the University of Wyoming (and provided as supporting documentation), the proposed wage hikes would increase the annual operating costs for a Wyoming range sheep operation by \$39,600 for two foreign herders and would increase total annual operating costs by 40% (to \$137,447.50). Using current prices, the analysis indicated that income above operating costs would be reduced by 78% to \$11,313. In fact, for most range sheep producers in the state, the cost is likely to be substantially higher as, on average, employers who utilize the H-2A program employ 4.2 H-2A workers, according to a recent survey conducted by the Mountain Plains Agricultural Service. This average is quite a lot higher than the estimated number of H-2A workers per employer assumed

by the Department for the purpose of estimating compliance costs. We believe the Department has underestimated the costs associated with this proposed rule change, a contention that is supported by others, including the Office of Advocacy of the Small Business Administration submitted May 22, 2015.

We urge the DOL to slow down with its desire to change the procedures governing foreign workers in herding occupations. We are not opposed to changes that are reasonable and gradual, and we believe there are sound alternatives that will accomplish the goals and objectives of the Department without destroying an industry and a chosen way of life for many, many people. We believe the Department can meet the requirements of the court order by publishing the “Special Procedures” currently in use as regulations and then working with **stakeholders** (by which we mean producers who use the H-2A program) to develop changes to the regulations that will meet the desired objectives of the Department, including implementing a reasonable wage methodology that addresses the static wage rate and credits employers for the nonwage benefits provided in connection with these herding occupations. This approach would better serve the purposes of the Department than employing an unrealistic one-size fits all approach that threatens to deal a significant blow to the country’s sheep industry and would directly and indirectly affect Americans who work in related industries from Oregon to South Carolina and from Maine to Texas.

“OPEN RANGE”, “LIMITS ON INCIDENTAL WORK” AND OTHER DEFINITIONS

We do appreciate that the DOL attempts to recognize some of the unique characteristics of occupations involved in grazing livestock production. However, many of the terms and definitions used in the proposed rule reflect the lack of understanding of the true circumstances and requirements of sheep production. For example, the Department’s DOL’s insistence that “open range” livestock grazing must only take place away from fences is unrealistic, impractical and reveals a staggering lack of knowledge of livestock and sheep production in today’s world. Even when grazing on the vast allotments of land in a sparsely populated state such as Wyoming, herders may be in some proximity to fences.

Fencing is used for numerous reasons, not all related to the control and management of livestock. According to a publication entitled *Fences*, published by the Bureau of Land Management, the US Forest Service and the Society for Range Management, fencing is also used to protect people and vegetation.¹ In a December 2013 publication of the Society for Range Management, entitled “Stewardship”, fencing is discussed in terms of conservation and vegetation management:

“A fence is designed to facilitate vegetation management. If the management is good, then the fence does its job to facilitate the land manager’s actions to apply good management. If the management is poor, then the fence facilitated the land manager’s actions to apply poor management. A fence built across a poorly managed pasture, without a change in management, does nothing but make two poorly managed pastures

¹ “Fences”, USDI Bureau of Land Management, USDA Forest Service Technology & Development Program and Society of Range Management, 2nd Printing February 1999, p. 1, obtained via internet May 28, 2015 at <http://www.fs.fed.us/t-d/pubs/pdfpubs/pdf88242803/pdf88242803dpi300.pdf>

out of the same acreage. The fence does not influence the management; it merely influences the livestock's movement or lack of it.”²

Sometimes fences are also used to identify property lines. An example would be grazing allotments on public lands, which are often delineated by fences put there not for the primary purpose of livestock management but to indicate the start of a new allotment.

In Wyoming, much of the land used for grazing is on federal lands. Producers who hold grazing permits on public land can be required, as a condition of their federal grazing permits, to use fences to ensure that livestock cannot enter particular areas, such as sensitive ecological or riparian areas. Sometimes fencing is required for purposes of wildlife management rather than livestock management. For example, one WWGA member who utilizes the H-2A program has grazing allotments in grizzly bear habitat. As a condition of her 2014 grazing permit, if a conflict with bears occurred, or potential conflict was apparent, the sheep were **required** to be penned each night.³ For resource management purposes, the sheep were not allowed to be kept overnight in the same place more than one time so the fence had to be removed each morning and set up in a different location each evening as long as there was a potential for conflict. The required fencing was deemed a resource management tool for the protection of the grizzly bears (a protected species) as well as mitigation of conflict between the sheep and bears. The requirements were mandated by the DOL's sister agency, the Department of Agriculture. The USDA often requires herders ensure, among other things, that the grazing livestock do not unintentionally violate these and other resource requirements (such as staying in an area too long, bedding down too close to a stream, etc.).

In addition, there are some instances in which Wyoming statutes require fencing, such as railroad rights of way (WY §37-9-304). Entities owning or operating railroad tracks are required to “construct, maintain and keep in repair on each side of the track thereof, a sufficient fence... as to prevent stock from getting on the railroad track of the corporation.”⁴ The purposes of these fences are secondary to the herders management of the animals (i.e., they were not put there for the sole purpose of managing the sheep). We would like clarification as to whether the presence of these types of fences would disqualify an employer from eligibility, or would place an employer in non-compliance.

As stated above, it is our opinion that the Department's definitions of “Open Range” and “Limits on Incidental Work” are outdated and do not adequately describe the realities of ranching today. We endorse the thoughtfully considered alternative definition proposed by Mountain Plains Agriculture Services (MPAS) and Western Range Association (WRA), which is endorsed by the ASI and the Public Lands Council, and **we urge the Department to adopt “Grazing Livestock Production System” as the description of shepherd duties and the management of sheep production.**

² “Stewardship”, Vol. 1, No. 2, December 2013, p. 3, obtained via internet May 29, 2013 available at <http://www.rangelands.org/stewardship/2013-dec-issue-2.pdf>

³ Elk Ridge Complex Annual Operating Instructions 2014, (.pdf) p. 5 first obtained via internet July 2014, again May 28, 2015, available at: http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3809862.pdf

⁴ §37-9-304. Fences and cattle guards; generally, found at <http://legisweb.state.wy.us/statutes/titles/Title37/T37CH9AR3.htm>

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.

This would more accurately reflect the fact that herding of sheep goes beyond just controlling animal movement. It is about animal care and husbandry (keeping sheep safe from harm and injury, ensuring they have proper food, etc.) and natural resource management (ensuring the natural resources are not overgrazed, mitigation of fire risks by reducing fuel loads on rangelands, control of invasive weeds and plants, etc.). It is also about ensuring a sustainable supply of renewable fiber for human apparel and a ready supply of protein for human sustenance. The raising of sheep is a process that relies on regular and timely activities, such as shearing, breeding, lambing, feeding, and marketing. Each step of the process is essential and not one step is mutually exclusive from another.

We ask the Department to adopt the above proposed description of sheepherder duties that recognizes the totality of the process not just particular seasonal aspects of it.

PROPOSED WAGE INCREASES

Many have commented on the significant wage hike that is proposed by the Department. It is not hyperbole to say that these proposed wages will rupture the already fragile sheep industry. The margins made by producers are very slim and often producers make no profit at all. We have heard from numerous members who have relayed the massive economic impact the proposed wage increases will have. One producer reported to us that he would need to pay an additional \$80,000 to just upgrade his housing to meet the requirements of this rule, outside the wage hikes or other additional costs. Another has said his labor costs will go to \$68,000 per person when the wage hikes kick in. But because the nonwage benefits are not considered by the Department to be part of the compensation provided, this information is unlikely to be made known to the general public.

We agree that acceptable wage methodologies should include provisions that update the base wage that has been static for two decades and recognizes the employer cost for providing nonwage benefits, such as food and housing. We endorse the alternative proposals outlined in the comments submitted May 29 by the ASI and the Public Lands Council, which were put forward by WRA and MPAS. For sake of brevity we will not restate them here but associate our comments with them.

We join ASI, PLC, MPAS and WRA and many others in requesting the Department withdraw the proposed wage methodology and replace it with a version that addresses base-wage stagnation at a rate that sustains the H-2A shepherders and shepherd program as well as the sheep industry.

655.235 STANDARDS FOR MOBILE HOUSING

Historically, the necessity for mobile housing to keep herders near the sheep has been recognized. The Department also recognized a variance that MPAS had that allowed two herders to temporarily share a camp. We request that the DOL reinstate that previous rule that allows two herders in a camp temporarily, provided there is clear space for two separate sleeping bags. The Department's limit of three days for temporary shared occupancy circumstances is not reasonable and is unworkable for a number H-2A employers in Wyoming. Requiring additional camps is impractical. Additional camps would unnecessarily create more work for the herders and may increase the impact on the natural resources, which likely would run contrary to the interests and requirements of land and resource managers.

In some areas during the winter, for instance, two herders are necessary to complete additional duties in a reasonable and timely manner, including animal husbandry activities, such as supplemental feeding. In these instances, herders have work horses so they may move the camp and the sheep if they determine it is necessary, such as to find fresh feed, to minimize impact on rangeland resources (in accordance with good range management practices) or to move sheep to sheltered areas because of an impending storm. These additional activities may need to be carried out over several days, and most certainly beyond the three day limit. Natural encumbrances, such as limited daylight hours, the threat of an impending storm, and weather-affected terrain, make it difficult for a single herder to accomplish this work in a timely and safe manner for himself and the animals. Having an additional herder to provide help with these duties is a benefit to the herders and provides an additional safety measure for both the workers and the animals.

Again, we urge the Department to reinstate the previous rule that allows two herders in a camp temporarily, provided there is clear space for two separate sleeping bags. Otherwise, the Department is likely setting up the H2A employers for non-compliance, creating additional work for herders, and requiring activities that may unnecessarily negatively impact the rangeland.

CONCLUSION

The WWGA appreciates the opportunity to provide input in this important matter and would again reiterate our "asks" in this lengthy document.

- 1.) Take the time to introduce changes to the H-2A program by publishing the current "Special Procedures" as required by the Court.
- 2.) Re-examine the compliance costs and the socio-economic disruption this rulemaking will have on the sheep and livestock industries, allied businesses and communities across the country;
- 3.) Give earnest consideration to alternatives that will ease that economic impact;
- 4.) Work with stakeholders in the sheep industry who utilize the H-2A program to identify changes that can be made that satisfy the objectives of the Department and needs of the sheep and livestock industries;

- 5.) Replace the outdated “Open Range” and other Job Definitions with “Grazing Livestock Production System” as proposed by WRA and MPAS and endorsed by ASI and PLC (should the DOL not replace the outdated definition of “open range” we would ask for clarification of the “no fences” requirement);
- 6.) Withdraw the proposed wage methodology and replace it with a version that addresses base-wage stagnation at a rate that sustains the H-2A shepherders and shepherd program as well as the sheep industry (WRA and MPAS have provided a number of good alternatives for the Department to consider); and
- 7.) Reinstate the previous rule that allows two herders in a camp temporarily, provided there is clear space for two separate sleeping bags and abandon the three day limit, which is impractical for a number of reasons.

Lastly, it is frustrating to have the history of the effort our producers have made to recruit American workers be ignored and downplayed. America offers its citizens a wide array of employment opportunities that give people vocational choices that were not available to our great grandparents. Americans, for the most part, do not choose to work as shepherds. Many people, even individuals from rural communities, are removed from the pastoral life that used to be common in this country. Few have the skills or the interest needed to be a sheep herder. While this is a testament to the greatness of America – that we have choices – it does leave our industry in need of qualified labor. Through the H-2A program, our sheep producers have a legal mechanism by which to supply their labor needs with qualified employees. Please work with us to develop a reasonable and effective program.

Sincerely,



Amy W. Hendrickson
Executive Director

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Enclosures