Testimony of Scott W. Horngren

before the

House Committee on Oversight and Government Reform

Subcommittee on the Interior, Energy, and Environment

"Preserving Opportunities for Grazing on Federal Land"

July 24, 2018

Good morning Chairman Gianforte, Ranking Member Plaskett, and members of the Committee. I am Scott Horngren, an attorney with the Western Resources Legal Center (WRLC) and an adjunct professor at Lewis & Clark Law School in Portland, Oregon. WRLC is a nonprofit organization that provides clinical education at Lewis & Clark Law School for those students that are interested in supporting resource uses such as livestock grazing, timber harvest, mining, and oil and gas exploration and production. My testimony does not represent the position of Lewis & Clark Law School. Rather, my remarks are based on my 30 years of experience as a litigator in federal cases involving grazing and other natural resource issues. I have extensive experience in defending environmentalists' lawsuits seeking to stop grazing and forest management under the National Environmental Policy Act, Endangered Species Act, and Clean Water Act.

My testimony today will focus on ways federal agencies can build better cooperative working relationships with grazing permittees to avoid disruptions in responsible grazing and support healthy rangeland. In particular, I will focus on how litigation by environmental groups disrupts that cooperative relationship and halts needed research. I will also cover streamlining the cumbersome procedures for renewal of grazing permits, eliminating the annual vulnerability of the grazing program to litigation, and affirming that the primary use of land in a BLM grazing district established under the Taylor Grazing Act should be for grazing as the primary use rather than as sage grouse or bighorn sheep reserves.

Litigation Has Threatened the Advancement of Knowledge by Halting Agency Research About the Interaction Between Domestic and Bighorn Sheep.

A great example of the cooperative working relationship between grazing permittees and federal agencies, is the nation's only Sheep Experiment Station operated by the USDA Agricultural Research Service in Idaho. The U. S. Sheep Experiment Station conducts a wide range of research including cooperative research with stockgrowers' associations and universities. The research is vital to the nation's sheep industry and the American Sheep Industry Association has cooperatively funded research projects at the Experiment Station. The Experiment Station produces reliable scientific data and information to improve the health of sheep, the quality of wool grown, and the health of rangeland.

One important Experiment Station research project involves assessing a variety of conditions related to the seasonal and lifetime infection and transmission of pneumonia in domestic and bighorn sheep. In its final year, the research project relied on sheep grazing in the Forest Service's Snakey and Kelly grazing allotments which have been used by the Experiment Station for sheep research since 1924. These two grazing allotments serve as winter rangeland that is representative of rangeland used by sheep permittees and provides environmental variables that allow the Experiment Station's research to be given practical application by sheep producers.

The Western Watersheds Project, whose goal is to halt all public lands grazing, filed a lawsuit in 2010 to stop sheep grazing on the allotments. In response to the lawsuit, in 2013 the Forest Service agreed to settle the case and to prepare a new environmental assessment (EA) under the National Environmental Policy Act for grazing on the allotments. The settlement provided that grazing could continue under the terms and conditions of the existing grazing permits while the EA was being prepared. The Forest Service was working on the EA when Western Watersheds Project filed its most recent lawsuit in October 2017 before the winter grazing season.

The Forest Service argued that based on the prior settlement that grazing could continue and the research could be completed. However, the court disagreed and enjoined grazing and completion of the research which was in the final year of the 5-year research project. The American Sheep Industry Association moved to intervene in the case but the court deferred ruling on the motion until after settlement discussions between Western Watershed Project and the Forest Service. Last month, the Forest Service settled the case, and agreed not to allow domestic sheep grazing on the allotments until further analysis under the National Environmental Policy Act (NEPA). The settlement agreement included Forest Service payment of $80,000 in attorneys fees to Western Watershed Project. However, the Forest Service in the settlement agreement did not include any commitment or deadline to complete further NEPA analysis. So Western Watersheds Project stopped the very research designed to promote multiple use and inform how range conditions and other factors can influence sheep disease among domestic and bighorn sheep, and there is no commitment by the Forest Service to complete the NEPA analysis.

Renewal of a 10-Year Permit for Ongoing Grazing Should Be a Straightforward Process That Meaningfully and Timely Involves the Permittee.

The Forest Service and Bureau of Land Management (BLM) have a huge task to complete NEPA analysis for over 6,500 grazing allotments on western public lands. Congress has long recognized this problem and, most recently in the 2015 Defense Authorization Act, H.R. 3979, reaffirmed that the agencies can prioritize completion of the NEPA analysis among the allotments. It also has provided that grazing can continue under the existing permit terms and conditions until the NEPA analysis for an allotment is complete.

Preparation of environmental impact statements and environmental assessments is a time-consuming and expensive process for renewal of 10-year grazing permits. Congress should enact legislation that allows the Forest Service and BLM to comply with NEPA for renewal of grazing permits through a more timely and less expensive categorical exclusion. Many of the allotments involved have been successfully grazed by ranching families for half a century or more. The categorical exclusion would be used only on those allotments where the rangeland is in satisfactory condition and where there is no more than a 10% increase in permitted use. In recent years Congress has endorsed the use of categorical exclusions under NEPA for new forest health and fuel reduction projects on forest lands under the Healthy Forest Restoration Act and other laws. There is no reason why the categorical exclusion tool could not be used to reauthorize longstanding, responsible grazing.

Consultation between agencies about the effect of grazing on species listed under the Endangered Species Act (ESA) is also disrupting grazing and undermines the cooperative relationship between the Forest Service, BLM, and the permittees. The Forest Service and BLM feel that their hands are tied and they must accept any restrictions on grazing demanded by the Fish and Wildlife Service or the National Marine Fisheries Service as part of the consultation. The ESA consultation is a drawn-out process with limited or no opportunity for the permittee to participate. Often, the permittee, who is entitled to review a draft biological opinion, is only given a few days to review the opinion which has been in preparation for half a year or longer. The ESA consultation often is not completed until just before the grazing season begins, forcing the permittee to accept unworkable and overly-restrictive conditions imposed in the consultation to turn out their livestock for the season. Agencies should be directed to stop forcing permittees into this Hobson's choice between whether to delay turn out or accept unworkable operation conditions in a biological opinion.

Once a 10-Year Permit Is Renewed, the Annual Grazing Instructions Issued by an Agency Should Not Be Considered an "Action" Subject to Litigation.

After a 10-year permit is approved, it can be challenged by environmental groups and that should be the end of the litigation. But if the 10-year permit survives the litigation challenge, then grazing can be disrupted year after year for the life of the permit by more environmentalist lawsuits. That is because an agency's two or three page "annual operating instructions" (AOIs) that implement the permit are considered a new "final agency action" that is subject to litigation. The AOI merely confirms for the allotment the level of livestock use, utilization standards, and particular pastures to be grazed based on annual variation in range conditions and weather. The AOIs are consistent with the approved 10-year permit.

The Ninth Circuit held that these annual instructions are a new final agency action under the Administrative Procedure Act, and under the law anything interpreted as final agency action is subject to litigation. Oregon Nat. Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977 (9th Cir. 2006).

A well-reasoned dissent argued that:

> "the AOIs are merely a way of conducting the grazing program that was already authorized and decided upon when the permits were issued. The AOIs reflect nothing more sophisticated or final than the 'continuing (and thus constantly changing) operations' of the Forest Service in reviewing the conditions of the land and its resources, and assuring that the mandated grazing programs go forward without undue disruption of the resource itself.
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> In pragmatic terms, if every AOI for every permit in every allotment every year is to be open to litigation by ONDA, and others, it is a little difficult to see how the grazing program can continue, if the purpose of the program is to feed animals. They need to eat *now* rather than at the end of some lengthy court process." Id. at 991-992 (original emphasis).

Environmentalists should not have multiple bites at the litigation apple. Congress should clarify that the annual operating instructions that are consistent with the approved 10-year permit are not new final "actions" and that the final agency action subject to challenge is the 10-year grazing permit. By analogy, the annual operating plan for a long-term timber sale contract that schedules which units to harvest and what roads to build in a given year is not considered a final agency action. Rather, the NEPA analysis for approval of the timber sale is the final action subject to litigation. The same should be true for a grazing permit.

If There Is a Significant Reduction in Permitted Use for Renewal of a 10-Year Permit, Then the Permittee Should Be Allowed to Challenge the Reduction Before It Is Implemented.

Agency decisions to significantly reduce or eliminate the amount of permitted grazing in renewing a 10-year a grazing permit should be automatically stayed if the permittee challenges the reduction or elimination. This will ensure that the permittee is allowed an opportunity for a hearing required by the Administrative Procedure Act for a person to dispute the imposition of a sanction involving a permit. Currently, under the BLM procedures there is no automatic stay of a decision to reduce or eliminate grazing in a 10-year permit renewal decision.

Language in prior Appropriations Acts acknowledged the hardship that an agency decision to reduce or eliminate of permitted grazing imposed on family-owned ranches. For example, language provided that "[u]pon appeal any proposed reduction [in grazing] in excess of 10 per centum shall be suspended pending final action on the appeal, which shall be completed within 2 years after the appeal is filed." Pub. L. 96-126 Title I, § 100 Nov. 27, 1979, 93 Stat. 956 (see also Pub. L 102-381, Title I, Oct. 5, 1992, 106 Stat. 1378). Congress should include similar language in an authorizing bill.

Agencies Should Not Eliminate Areas Designated for Livestock Grazing in Resource Management Plans to be used as Sage Grouse or Bighorn Sheep Reserves.

The Taylor Grazing Act (TGA), 43 U.S.C. §§ 315-315r (2000), provides for and protects rangeland for grazing purposes. The TGA authorizes the Secretary of the Interior "to establish grazing districts . . . which in his opinion are chiefly valuable for grazing and raising forage crops." *Id.* § 315. Furthermore, "So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded." *Id.* § 315. The TGA accomplishes this by mandating that the Secretary "shall make provision for the protection, administration, regulation and improvement of such grazing districts." *Id.* § 315a. The Federal Land Policy and Management Act calls of managing public lands administered by the BLM for multiple-use and the Forest Service also must manage national forests for multiple-use under the Multiple-Use Sustained-Yield Act. The BLM should not be allowed to significantly reduce and eliminate livestock grazing to manage grazing districts for sage grouse rather than livestock grazing or to always favor introduced bighorn sheep over domestic sheep, and the agencies need to carefully consider the multiple-use implication of giving priority to a single species.