

**IN THE SUPREME COURT FOR THE STATE OF NEVADA**

ABEL CÁNTARO CASTILLO,

Appellant,

vs.

WESTERN RANGE ASSOCIATION,

Respondent.

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**CASE NO. 85926**

U.S. District Court Case No.:  
3:16-cv-00237-RCJ-CLB

**APPELLANT'S APPENDIX VOLUME 4 OF 5**

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5/4/2022	Exhibits 8 through 10 to Plaintiff's Opposition to Defendant's Motion for Summary Judgment, ECF Nos. 307-8 through ECF 307-10	3	296-349
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# **EXHIBIT 11**

# Castillo v. Western Range Association

United States District Court  
District of Nevada  
Case Number: 3:16-cv-00237-RJC-VPC

Report of Plaintiffs' Survey Expert for Class Certification

June 25, 2021

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## **I. Assignment and Results in Brief**

1. I was retained by Cohen Millstein in the matter of *Castillo, et al. v. Western Range Association, et al.* (case number: 3:16-cv-00237-RJC-VPC) (hereafter “this matter”) to conduct a survey of the potential class members regarding unpaid work time. These potential class members worked as shepherds and ranch hands for Defendant from 2010 to 2018. Defendant provided a list of approximately 445 potential class members. Defendant also provided potential contact information for these individuals of an address and/or telephone number. There were 383 individuals listed with a potential telephone number. Cohen Millstein retained Davis Research to administer the survey based on my recommendation.

2. In accord with generally accepted survey science and my usual protocol in conducting wage and hour surveys, the following process occurred:

- I drafted the survey instrument and provided it to Davis Research with the instruction to commence a pilot study.
- Davis Research attempted to contact a random sample of potential class members on the telephone from the contact list provided by Defendant.
- Davis Research found the vast majority of phone numbers were incomplete or no longer connected to the individuals listed by Defendant.
- I then instructed Davis Research to attempt to survey the entire list of potential class members to determine the maximum sample size that could be acquired via telephone.
- Fourteen individuals were contacted on the phone about taking the survey. Eight individuals that worked for Defendant as shepherds completed the full survey. One individual that worked as a shepherd terminated the survey during the questioning. Two



individuals did not work as shepherds. Three individuals were contacted but refused to participate in the survey.

- I subsequently instructed Davis Research to send a letter to every potential class member asking them to contact the firm to take the survey via a toll-free telephone number.
- One individual responded to the letter and completed the survey on the telephone.

3. Davis Research considers the contact information provided by Defendant to be exhausted based upon the attempts to reach all individuals on the list (see Exhibit C). The individuals who took the survey were able to provide responses to the questions at a very high rate. There was only one “I don’t know” response to a question. Therefore, the survey participants were able to provide information on the variables of interest in this matter. These variables of interest are (1) the typical number of hours worked per day on the range with the flock, (2) the typical number of hours worked per day during lambing season, and (3) responsibilities and limitations when not actively performing typical job duties on the range or during lambing season.

4. Based on the results of the pilot study, I can conclude the following:

- If an individual can be contacted to take the survey, they will likely participate and be able to provide answers to the survey questions. There were zero “I don’t know” responses to the questioning sequence about working on the range and one “I don’t know” response during the questioning sequence about working during lambing season.
- The list of contact information for individuals who worked for Defendant from 2010 to 2018 will not yield any further survey responses.
- Defendant will need to produce names and contact information for potential class members that worked from 2019 to the present in order to obtain enough survey responses to be statistically valid to make class-wide projections of unpaid work time. It

is more likely that this contact information will be current and accurate such that the sample size will increase significantly.

- If the Court will allow half of the potential future survey participants to be promised anonymity, the cooperation rate will likely increase resulting in a larger sample size.

Following a summary of my professional qualifications, this report provides a detailed analysis on how the foregoing conclusions were reached.

## **II. Professional Qualifications**

5. My resume, fee schedule and list of trials and depositions in the last four years are attached as Exhibit A. I received a Ph.D. in economics from the University of Utah. My primary fields of expertise are labor economics, statistics, survey methodology and forensic economics. My publications in the fields of labor economics, forensic economics, survey science and statistics have been cited 138 times according to Google Scholar. I have publications in the following peer-reviewed journals: Journal of Legal Economics, Industrial Relations, Journal of Policy Analysis and Management, and the American Journal of Industrial Medicine. In addition, I am the co-author of a peer-reviewed book published by the W.E. Upjohn Institute for Employment Research.<sup>1</sup>

6. I am an adjunct associate professor of economics at St. Mary's College in Moraga, California. I teach managerial economics in the Master of Business Administration program. I am a former member of the Board of Directors of the American Academy of Economic and Financial Experts. My term as a board member was April 2017 to April 2020.

<sup>1</sup> Levine, David I., Frank W. Neuhauser, Richard Reuben, Jeffrey S. Petersen, and Christian Echeverria, *Carve-outs" in Workers' Compensation: An Analysis of the Experience in the California Construction Industry*, W.E. Upjohn Institute for Employment Research, Kalamazoo, MI 2003.

7. I have substantial expertise in projecting class-wide damages based on conducting surveys and utilizing inferential statistical analysis, i.e., using the data sample of survey responses to project to a larger population. My experience is in the form of academic qualifications and litigation consulting experience.

8. I am the lead author of peer-reviewed journal articles regarding survey methodology and statistical analysis in class action wage and hour cases. The title of the articles and the citations are below:

- “The Margin of Error on Damages Calculations Based on Sample Survey Data in Class Action Wage and Hour Cases,” *Journal of Legal Economics*, Volume 25, No. 1-2, September 2019.
- “Surveys in Class Action Wage and Hour Cases and the Use of Anonymous Respondents,” *Journal of Legal Economics*, Volume 22, No. 1, October 2015

The article on survey methodology describes the unique aspects of conducting surveys in wage and hour class actions and remedies for potential bias among the survey respondents. The article on margin of error describes how to project class-wide damages from survey data and protect Defendant from overpaying.

9. I have conducted surveys in seventeen class actions and fifteen of the surveys were in wage and hour cases. Recently, in the class action wage and hour class case *Kristal Nucci et al. v. Rite Aid Corporation*, the Honorable Judge Lucy H. Koh cited the results of a survey I conducted several times in her order for class certification.<sup>2</sup> Judge Koh writes, “Dr. Petersen’s expert report and underlying survey demonstrate that whether a common policy was communicated across all class members is capable of class-wide resolution. Importantly, these common questions are not merely peripheral, but rather, go directly to liability on a class-wide basis.”<sup>3</sup> In the federal case

<sup>2</sup> *Kristal Nucci, et al. v. Rite Aid Corporation, et al.* Case number 19-CV-01434-LHK. Order Denying Motion to Strike and Granting Class Certification.

<sup>3</sup>Ibid, p.26.

titled *Coleman v Brown*, I was designated as the survey expert in a Special Master research team appointed by the Honorable Kimberly Mueller.<sup>4</sup> My role was to supervise the design and implementation of a survey to psychiatrists employed by the California Department of Corrections.

10. I was trained in survey protocol, survey design, and survey question writing during my employment with the United States Government Accountability Office (GAO) as a Senior Economist. The GAO is the non-partisan research entity for members of Congress. I have also conducted a survey outside of litigation during my tenure as a postdoctoral fellow at the University of California, Berkeley. I designed the survey and oversaw the administration to the survey participants who were trauma victims treated at San Francisco General Hospital. The results of the survey were presented at the American Association for the Surgery of Trauma annual meeting and published in the conference proceedings.<sup>5</sup>

11. I have presented at six professional conferences of survey experts, statisticians and damages experts regarding conducting surveys in class action wage and hour cases and projecting damages from the survey responses. I have also presented to attorneys on surveying in wage and hour class actions in light of the U.S. Supreme Court Decision in *Tyson Foods v. Bouaphakeo*.

The titles of the presentations and the conferences are listed below:

- “Wage and Hour Surveys: Assisting With the Liability Determination and Assessing Nonresponse Bias,” 32<sup>nd</sup> Annual Conference of the American Academy of Economic and Financial Experts, April 2021.
- “Statistical Evidence in Wage and Hour Class Actions Since Tyson Foods: Impact on Certification and Trial,” Webinar hosted by Strafford Publications, June 2020

<sup>4</sup> *Ralph Coleman, et al. v. Edmund Brown, Jr, et al.* Case number 2:90-cv-0520 KJM KJN P.

<sup>5</sup> Petersen, Jeffrey S., L. Papadakis, D. Morabito, A. Boccillari, R.C. Mackersie “Return Economic Productivity Following Acute Traumatic Injury: The Influence of Financial, Physical, and Psychosocial Factors,” *Proceedings of the American Association for the Surgery of Trauma Fifty-Ninth Annual Meeting*, 1999, p.223.

- “The Implications of Recent Legal Decisions for Survey Methodology in Class Action Wage and Hour Cases,” Annual Conference of the Pacific Chapter of the American Association for Public Opinion Research, San Francisco, CA, December 2019.
- “Duran Duran: The Important Issues in the Two Duran Decisions for Surveys and Statistical Analysis,” Western Economic Association Annual Conference, San Francisco, CA, June 2019.
- “The Margin of Error on Damages Calculations in Class Action Wage and Hour Cases,” Allied Social Science Associations Annual Conference, National Association of Forensic Economics, Atlanta, GA, January 2019.
- “Survey Design and Analysis in Class Action Wage and Hour Cases,” Annual Conference of the Pacific Chapter of the American Association for Public Opinion Research, San Francisco, CA, December 2018.
- “Using Surveys to Assess Damages in Class Action Wage and Hour Cases,” 30<sup>th</sup> Annual Conference of the American Academy of Economic and Financial Experts, Las Vegas, NV, April 2018.

12. I have published two peer-reviewed journal articles that utilize inferential statistical analysis from survey data.<sup>6,7</sup> According to Google Scholar, one of the articles has been cited 79 times.

13. I have worked on 86 class action cases in determining the payments due the class members.<sup>8</sup> The breakdown between plaintiff and defense retentions in these cases is 85 percent for plaintiffs and 15 percent for Defendant. I have testified at trial for both plaintiffs and Defendant in class action cases. In addition, I have testified at trial twice in class action wage and hour cases where I conducted a survey on behalf of plaintiffs and once on behalf of Defendant where I analyzed the survey conducted by plaintiffs’ expert.

<sup>6</sup> Petersen, Jeffrey S. and Craig Zwerling, “Comparison of Health Outcomes Among Older Construction and Blue-Collar Employees in the United States,” *American Journal of Industrial Medicine*, Volume 34, Number 3, 1998.

<sup>7</sup> Petersen, Jeffrey S. and Phillip Allman, “The Effect of the Intent to Retire at Age 70 or Older on Work Life Expectancy,” *Journal of Legal Economics*, Volume 23, No. 2, April 2017.

<sup>8</sup> In addition to these matters, I have worked on over 3,000 legal cases involving income loss for individual plaintiffs. Retentions on these matters are approximately two-thirds plaintiff and one-third defendant.

14. I have worked on over 50 individual wage and hour cases where I conducted a telephone interview with plaintiffs. I asked the plaintiffs to provide estimates of hours worked, off-the-clock work time, frequency of meal and rest periods, and/or unreimbursed job-related expenses. The estimates provided by the plaintiffs were subsequently used to project the amount of unpaid wages they may be due. These interviews have provided me a unique perspective on how to structure a survey in a wage and hour class action. This one-on-one interaction allowed me to assess what individuals can recall and estimate; and what potential biases may be in the estimates. I have two important conclusions from this experience. First, unpaid work time, interrupted meal and rest periods, and not receiving meal and rest periods are distinctive in individuals' memories. Second, informing the plaintiffs that they may be questioned by the defense about the accuracy of their answers significantly reduces the likelihood of biased responses.

### **III. Sample Survey Regarding Unpaid Work Time and Unreimbursed Work Expenses**

15. In collaboration with Davis Research, I conducted a pilot study of the potential class members regarding unpaid work time. This section discusses the acceptability of sample surveying in legal proceedings, the methodology for the pilot survey and the methodology for the full survey of the class members.

#### ***Sample Surveys in Litigation***

16. Sample surveying is an accepted method in legal proceedings as stated in the Federal Judicial Center's *Reference Manual on Scientific Evidence* (hereafter "*Reference Manual on Scientific Evidence*"):

*Sample surveys* are used to describe or enumerate the beliefs, attitudes, or behaviors of persons or other social units. Surveys typically are offered in legal proceedings to establish or refute claims about the characteristics of those individuals ... As a method of data collection, surveys have several crucial potential advantages over less systematic approaches. When properly *designed, executed, and described*, surveys (1) economically present the characteristics of a large group of respondents or other units and (2) permit an assessment of the extent to which the measured respondents or other units are likely to adequately represent a relevant group of individuals or other units.<sup>9</sup>

17. Moreover, the *Reference Manual on Scientific Evidence* states that surveys are an efficient way to inform the Court. Also, the failure to conduct a survey suggests that survey responses would have been unfavorable to the plaintiff:

Although surveys are not the only means of demonstrating particular facts, presenting the results of a well-done survey through the testimony of an expert is an efficient way to inform the Court about a large and representative group of potential witnesses. In some cases, courts have described surveys as the most direct form of evidence that can be offered.<sup>10</sup> Indeed, several courts have drawn negative inferences from the absence of a survey, taking the position that failure to undertake a survey may strongly suggest that a properly done survey would not support the plaintiff's position.<sup>11,12</sup>

<sup>9</sup> Diamond, Sheri Seidman, "Reference Guide on Survey Research," Federal Judicial Center, *Reference Manual on Scientific Evidence*, Third Edition, p.361-362.

<sup>10</sup> Footnote #60 from *Reference Manual* -- See, e.g., *Morrison Entm't Group v. Nintendo of Am.*, 56 Fed. App'x. 782, 785 (9th Cir. Cal. 2003).

<sup>11</sup> The cases cited that support this issue are found in footnote #61 in the *Reference Manual* -- *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 695 (2d Cir. 1994); *Henri's Food Prods. Co. v. Kraft, Inc.*, 717 F.2d 352, 357 (7th Cir. 1983); *Medici Classics Productions LLC v. Medici Group LLC*, 590 F. Supp. 2d 548, 556 (S.D.N.Y. 2008); *Citigroup v. City Holding Co.*, 2003 U.S. Dist. LEXIS 1845 (S.D.N.Y. Feb. 10, 2003); *Chum Ltd. v. Lisowski*, 198 F. Supp. 2d 530 (S.D.N.Y. 2002).

<sup>12</sup> Diamond, Sheri Seidman, "Reference Guide on Survey Research," Federal Judicial Center, *Reference Manual on Scientific Evidence*, Third Edition, p.372.

18. The *Reference Manual on Scientific Evidence* also states that attorneys may participate in drafting the survey questions:

An early handbook for judges recommended that survey interviews be “conducted independently of the attorneys in the case.” Some courts interpreted this to mean that any evidence of attorney participation is objectionable. A better interpretation is that the attorney should have no part in carrying out the survey. However, some attorney involvement in the survey design is necessary to ensure that relevant questions are directed to a relevant population.<sup>13</sup>

I typically collaborate with attorneys on the survey questions for the reason noted above – “to ensure relevant questions are directed to the relevant population.” The *Reference Manual on Scientific Evidence* further states that whether attorneys are involved in drafting the questions is largely irrelevant since the “key issues for the trier-of-fact concerning the design of the survey are the objectivity and relevance of the questions on the survey and the appropriateness of the definition of the population used to guide sample selection. These aspects of the survey are visible to the trier-of-fact and can be judged on their quality, irrespective of who suggested them.”<sup>14</sup>

### ***The Foundation for Surveys in Class Action Wage and Hour Cases***

19. The U.S. Supreme Court States ruling in *Anderson v. Mt. Clemens Pottery Co.* (1946) shows that the focus of the Court when evaluating survey responses should be on the reasonableness of the responses. The decision in *Mt. Clemens* states employees may provide estimates regarding

<sup>13</sup> Ibid, p.374.

<sup>14</sup> Ibid, p. 374.



the issues in question in litigation when there are no employer records available to assess the issues and damages that can be projected from these estimates (pp. 687-688):

The solution [to the lack of employer records] is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative [sic] the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

For these class members testifying under oath, in court, the trier-of fact was permitted to rely upon representative testimony and draw conclusions about the class as a whole without regard to sample size, confidence interval, or margin of error. As a professional in survey research, however, evaluating survey responses rather than sworn testimony, I do not draw class-wide inferences without consideration of such factors.

20. The Court in this matter is in the position of being able to determine if the survey responses can be utilized as a matter of “just and reasonable inference.” The role of the survey expert is to

devise survey questions that are unbiased and valid in order to provide the Courts with the best possible data on which to make this determination.

21. The pilot study in this matter confirms that survey participants will be able to provide estimates to the variables interest in this matter in accord with the *Mt. Clemens* decision.

***The Foundation for Utilizing Averages from Survey Results to Project Class-Wide Damages***

22. There is precedent that the average of survey responses can be utilized to project class-wide damages. The leading precedent is the decision about sampling and extrapolation in *Bell v.*

*Farmers Insurance*.<sup>15</sup> The *Duran I* decision stated that *Bell* is the “premier case approving the use of representative testimony in an overtime class action.”<sup>16</sup> The *Bell Court* stated (p.8):

It was within trial court's discretion, in class action on behalf of approximately 2400 claims representatives against an insurance company seeking compensation for unpaid overtime, to use statistical methodology of random sampling and extrapolation for the determination of aggregate class-wide damages; trial court was permitted to weigh the disadvantage of statistical inference, the calculation of average damages imperfectly tailored to the facts of particular employees, with the opportunity it afforded to vindicate an important statutory policy without unduly burdening the courts.

The next section shows the survey methodology in this matter that generated unbiased and valid survey responses.

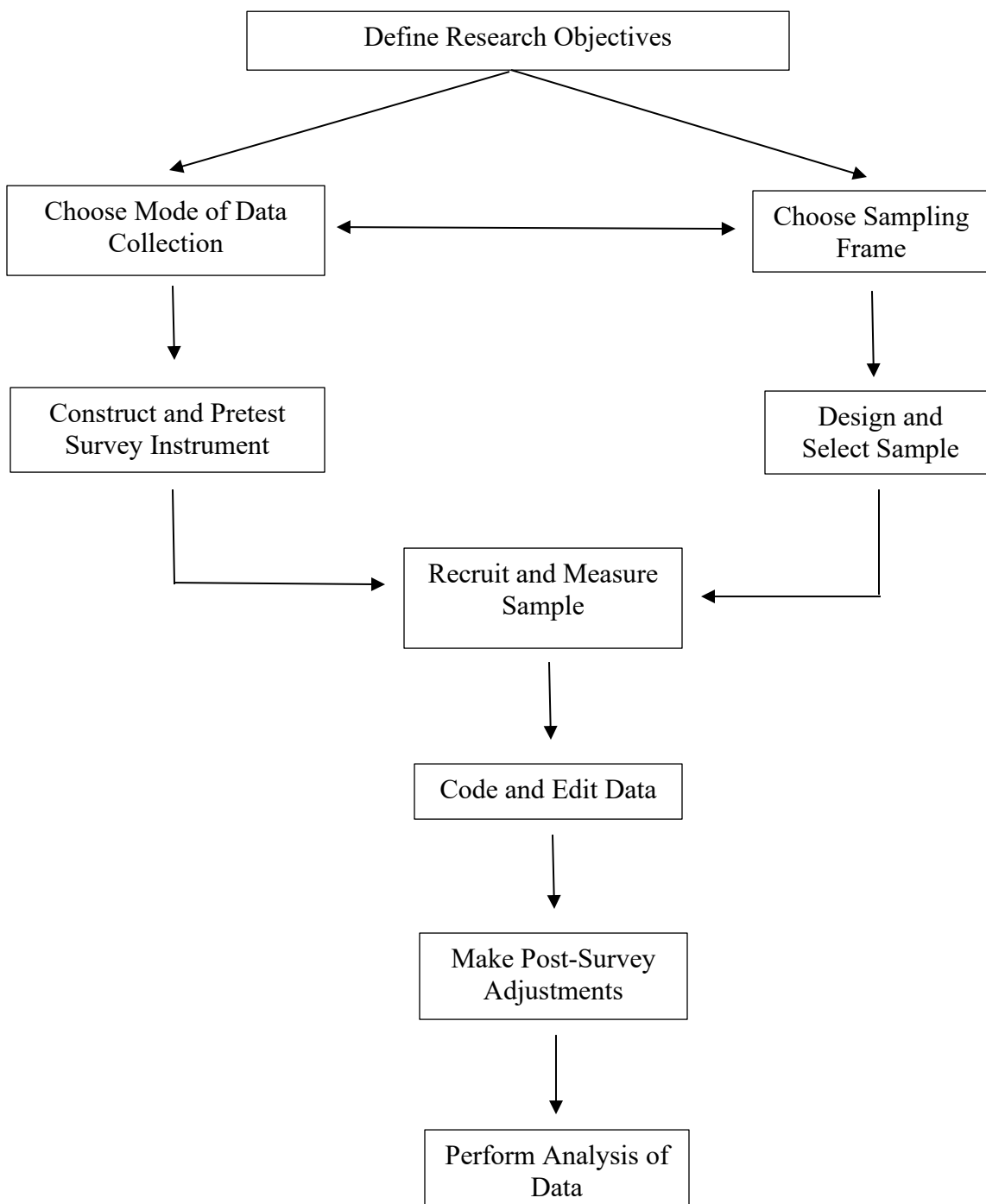
<sup>15</sup> *Bell v. Farmers Insurance Exchange*. 2004. Cal.App 4th 715, 9 Cal.Rptr.3d 544.

<sup>16</sup> *Duran et al. v. U.S. National Bank Association*. 2014. California Supreme Court, 59 Cal.4th 1172, Cal. Rptr. 3d 371, 325 P.3d 916.

***Sampling Plan for Survey and Statistical Analysis***

23. Figure 1 shows the methodology for the design and process of the pilot survey that was conducted in this matter. This is a well-established methodology as described in *Survey Methodology* by Robert M. Groves.<sup>17</sup> Dr. Groves is a preeminent survey scientist and he was formerly the Director of the U.S. Bureau of the Census. Each step of the survey design and process is described below. This process resulted in a representative data set that is statistically reliable and valid.

<sup>17</sup> Groves, R. M., Fowler, F.J., Couper, M.P., Leprowski, J.M, Singer, E., Tourangeau, R., *Survey Methodology*, John Wiley & Sons, New Jersey, 2009.

**FIGURE 1: SURVEY DESIGN AND PROCESS<sup>18</sup>**

<sup>18</sup> Source: Groves, Robert M. et al. 2009. *Survey Methodology*, New Jersey: John Wiley and Sons, Inc., page 47.

### ***Research Objectives***

24. The research objectives of the survey are as follows:

- Account for the categories of work performed by the shepherds on a 24-hour basis.
- Determine the amount of time shepherds were responsible for the flock.
- Determine how frequently shepherds were able to leave the flock for a personal activity.
- Determine whether shepherds had access to personal entertainment options while on the range.
- Determine how frequently shepherds were able to leave the ranch or lambing area for a personal activity.
- Determine how frequently shepherds had meal periods, leisure time or sleep interrupted by job duties.

### ***Mode of Data Collection***

25. The survey was administered telephonically by Davis Research. According to peer-reviewed science on wage and hour surveys, telephone surveys tend to be the preferable method for obtaining survey responses.<sup>19</sup>

### ***Sampling Frame***

26. Sampling frames are lists or procedures intended to identify all elements of a target population. According to *Survey Research Methods* by Floyd Fowler, “Any sample selection procedure will give some individuals a chance to be included in the sample while excluding others. Those people who have a chance of being included among those selected constitute the

<sup>19</sup> Petersen, Jeffrey S., Phillip Allman, and William Lee, “Surveys in Class Action Wage and Hour Cases and the Use of Anonymous Survey Respondents,” *Journal of Legal Economics*, Volume 22, Number 1, October 2015.

sample frame.”<sup>20</sup> The sample frame is evaluated based on: (1) how comprehensively it covers the target population, (2) whether the probability of being selected can be computed, and (3) how efficiently the members of the sample frame can be contacted.<sup>21</sup> Therefore, the sampling frame goes hand-in-hand with determining the method of data collection.

27. The individuals that could potentially be contacted to take the survey in this matter were former shepherds for whom Defendant provided valid contact information of a current telephone number or address. Davis Research loaded 717 telephone numbers for 383 individuals and determined that approximately 60 individuals could potentially be surveyed because one of their listed phone numbers was potentially current. Davis Research subsequently determined that 55 individuals that could not be reached via telephone could potentially be contacted via mail. These individuals were sent a letter which asked them to contact Davis Research to take the survey.

28. The nine survey responses that were obtained from this sample frame are likely random responses since obtaining a response was a function of having a current telephone number. According to peer-reviewed research on wage and hour surveys, this is not a potential source of bias since there is no reason the individuals without working telephone numbers should be any different than individuals with working telephone numbers.<sup>22</sup> This is the only conclusion that can be drawn from the sample frame at this stage of the project due to the large number of individuals who did not have valid contact information provided by Defendant.

<sup>20</sup> Fowler, Floyd. 2014. *Survey Research Methods, Fifth Edition*, Sage Publications Inc., page 15.

<sup>21</sup> Fowler, Floyd. 2014. *Survey Research Methods, Fifth Edition*, Sage Publications Inc., page 16.

<sup>22</sup> Petersen, Jeffrey S., Phillip Allman, and William Lee, “Surveys in Class Action Wage and Hour Cases and the Use of Anonymous Survey Respondents,” *Journal of Legal Economics*, Volume 22, Number 1, October 2015, page 28.

29. If contact information is provided for individuals who worked for Defendant from 2019 to the present, the same sample frame will be utilized for the second phase of the survey project.

***Construct and Pre-test Survey Instrument***

30. I consulted with Dr. Thomas Acker, Professor of Spanish at Colorado Mesa University, prior to designing the survey instrument. Dr. Acker had previously conducted an in-person survey of shepherds in Colorado. He wrote a report of his findings titled “Overworked and Underpaid: H-2A Herders in Colorado.” Dr. Acker provided valuable information to me about what the shepherds in this matter would likely be able to recall and estimate in a survey.

31. The survey instrument is the questionnaire that is administered to the survey participants [see Exhibit B for the survey instrument in this matter]. The survey methodology textbook *Designing and Conducting Survey Research* states that the introduction of the survey instrument should build trust in the survey participants so they will be willing to be forthcoming with information:

A questionnaire is a conversation, and, like most conversations, it builds on itself, beginning with an introduction. It is important to inform potential respondents about the purpose of the study in order to convey its importance and alleviate any concerns that potential respondents are likely to have. From the researcher’s point of view, there is a need to convince potential respondents that their participation is useful to both the survey’s sponsor or client and the respondents themselves.<sup>23</sup>

32. The issue of trust between the survey respondent and survey interviewer has become more important over the last decade due to the increase in identity theft and the perception among the

<sup>23</sup> Rea, Louis M. and Richard A. Parker, *Designing and Conducting Survey Research: A Comprehensive Guide, Fourth Edition*, Josey-Bass, 2014, page 39.

general public that identity theft should be a genuine concern. Therefore, potential survey respondents are not likely to participate in a survey unless they know why the survey is being conducted and how their responses are going to be used. This is especially the case for low income individuals who would fear losing their jobs as a result of participating in a survey. These individuals need to be reassured that retaliation for participating in a survey is not allowable under the law and legal action will be taken if they are retaliated against. Therefore, the “double blind” method is not advisable in a wage and hour class action survey. A double-blind survey would require that the survey respondents be unaware of the survey sponsor and the purpose of the survey. In other words, the survey respondents are “blind” about the purpose of the survey. The *Reference Manual on Scientific Evidence* advises that the double-blind method be utilized “whenever possible.”<sup>24</sup> Therefore an analysis of whether it is possible to use the double-blind method is warranted.

33. When a survey respondent is first contacted on the phone it is imperative to gain their trust as noted above. If a survey is conducted using the double-blind method, the survey interviewer cannot inform the survey respondent why they are calling. The dialogue would be as follows if a double-blind survey were utilized in this matter:

- (Survey Interviewer) – I am calling to conduct a survey regarding your work experiences with Western Range.
- (Survey Respondent) – Why do you want this information? How is it going to be used? Who are you calling on behalf of? What is this all about?
- (Survey Interviewer) – Sorry, I cannot answer any of those questions, all I can do is ask you the survey questions.

<sup>24</sup> Diamond, Sheri Seidman, “Reference Guide on Survey Research,” Federal Judicial Center, *Reference Manual on Scientific Evidence*, Third Edition, p.410-411.



When the survey respondent does not have these important questions answered they are likely to terminate the call and not participate in the survey. As noted above, the survey methodology textbook *Designing and Conducting Survey Research* states that during the initial phase of the survey “it is important to inform potential respondents about the purpose of the study in order to convey its importance and alleviate any concerns that potential respondents are likely to have.”<sup>25</sup> This is why a double-blind survey was not used in this matter.

34. The advisable method for conducting the survey in this matter is to make the survey interviewer and the respondents “as blind as possible.” Therefore, the scripted survey introduction only revealed that the survey is regarding employment issues at Western Range as part of a litigation matter and the survey participants need to be accountable to Defendant regarding their responses. No other information about the litigation was divulged unless the survey participant expressed concern about participating in the survey and potentially having to be questioned by the defense. If this occurred, then a script was read assuring the survey participant that no legal action could be taken against them for participating in the survey.

35. The California Court of Appeals decision in *McCleery v. Allstate Insurance*<sup>26</sup> also shows why double-blind surveys should not be used in wage and hour class actions. A double-blind anonymous survey was conducted in this matter as the basis for projecting class-wide damages.<sup>27</sup> The Court’s decision in this matter did not allow the survey results to be used to project class-wide damages. The decision highlights the importance of transparency in conducting surveys in litigation so that the defense can defend itself against claims made against them.<sup>28</sup>

<sup>25</sup> Rea, Louis M. and Richard A. Parker, *Designing and Conducting Survey Research: A Comprehensive Guide, Fourth Edition*, Josey-Bass, 2014, page 39.

<sup>26</sup> Court of Appeal of the State of California, Second Appellate District, Division One, Filed 7/1/19. Los Angeles Superior Court Case BC410865.

<sup>27</sup> *Ibid.*, see page 2.

<sup>28</sup> *Ibid.*, see page 25.

Transparency is also necessary to induce accountability among the survey respondents. Double-blind surveys do not have transparency and do not impose accountability. According to peer-reviewed research on class action wage and hour surveys, transparency and accountability are essential parts of survey methodology in wage and hour class actions.<sup>29</sup>

36. Finally, there is an ethical consideration to disclose to the survey participants that the survey is part of litigation. If a double-blind survey is conducted, survey participants do not know they are participating in litigation. If the Court subsequently requires the survey participants names to be disclosed, which occurred in *Duran*, individuals who were promised anonymity are no longer anonymous. Their survey responses will be shown to their past or former employer. Individuals should be informed about this possibility and a double-blind survey does not allow this information to be conveyed.

37. The mental process of answering questions from a survey instrument is generally found in four groups of processes: comprehension, retrieval of information, estimation and judgement, and reporting of an answer.<sup>30</sup> Comprehension includes both the question being asked and the instructions previously given on the survey instrument. Therefore, both the question and the instructions must be easily comprehended. Retrieval is the process of recalling information relevant to answering the question. Estimation and judgement are the processes of combining or supplementing the recall of information.

38. In this matter, comprehension of the questions is not likely to be an issue. The topics are very straightforward and familiar to the survey respondents. The more difficult issue is the

<sup>29</sup> Petersen, Jeffrey S., Phillip Allman, and William Lee, "Surveys in Class Action Wage and Hour Cases and the Use of Anonymous Survey Respondents," *Journal of Legal Economics*, Volume 22, Number 1, October 2015, page 32.

<sup>30</sup> Source: Groves, Robert M. et al. 2009. *Survey Methodology*, New Jersey: John Wiley and Sons, Inc., page 220-222.

retrieval of information interacting with estimation and judgement. All of the survey participants have the necessary information stored in their memories since they experienced the working conditions at Western Range. However, in the process of retrieving this information, their process of estimation and judgement may be influenced by their self interest in anticipation of receiving a payout from the litigation. Therefore, the Defendant in this matter could potentially overpay due to inflated survey responses. This situation is known as moral hazard which is defined as “any situation in which one person makes the decision about how much risk to take while someone else bears the cost if things go badly.”<sup>31</sup> According to peer-reviewed literature on wage and hour surveys, the solution to self-interest bias and moral hazard in a wage and hour survey is to conduct the survey without anonymity and to ensure the survey participants are aware they need to be accountable for the accuracy of their survey responses:

Survey researchers should assess potential bias among surveyed class members in class action wage and hour cases through the lens of moral hazard ... Survey respondents who are anonymous bear no risk associated with inflating their work hours because there is no accountability. Anonymous survey respondents can be very costly to the defense because inflated estimates of work hours lead to higher damages. Survey respondents who are not anonymous bear considerable risk when inflating a work hour estimate. They might look foolish, and possibly be subject to perjury, if they cannot substantiate their estimate of work hours during a deposition and/or trial testimony. Informing survey respondents in a class action wage and hour case at the outset of the survey that they may be questioned

<sup>31</sup> Krugman, Paul R. 2009. *The Return of Depression Economics and the Crisis of 2008*. New York: W.W. Norton

by the defense about the accuracy of their answers is a useful tool in limiting moral hazard.<sup>32</sup>

39. In accord with peer-reviewed science, the survey in this matter was not conducted anonymously during the pilot phase, i.e. the testing of the survey instrument. To control for the potential of self-interest bias, the following statement was read to the survey participants during the introduction of the survey:

This survey is part of a litigation matter and therefore I need your answers to be as accurate as possible. Your answers will not be anonymous and you may be questioned by the Defendant about your answers.

40. In this matter, it is advisable to change the introductory script for half of the potential survey participants for the second phase of surveying and promise them confidentiality. Three individuals would have potentially participated in the survey if they were promised confidentiality. I draw this conclusion based on a former shepherd who lives in Peru who contacted these individuals after they refused to participate. According to this former shepherd, all of the individuals that refused to participate were doing so because they did not want Defendant to know they were participating in the survey.<sup>33</sup> They felt it would impact their ability to gain future employment from the company. I anticipate this will also occur in the second phase of the survey. This revised script will promise confidentiality by not linking their name to the survey responses or revealing that they participated in the survey. According to peer-reviewed research on class action wage and hour surveys, this is the methodology that

<sup>32</sup> Petersen, Jeffrey S., Phillip Allman, and William Lee, "Surveys in Class Action Wage and Hour Cases and the Use of Anonymous Survey Respondents," *Journal of Legal Economics*, Volume 22, Number 1, October 2015, page 32-33.

<sup>33</sup> Contact with the shepherd was coordinated by Dr. Thomas Acker. I provided the phone numbers for the individuals that refused to participate to Dr. Acker who then provided them to the shepherd. I also had a conference call with Dr. Acker and the former shepherd to discuss what he could discuss with the individuals that refused to participate in the survey. The former shepherd is not a plaintiff in this matter nor a potential class member.

should be employed when the refusal rate is high during the pilot phase. Dividing the sample in half, confidential and non-confidential, allows for statistical analysis of whether confidentiality is potentially biasing the results:

Class members may simply not want to participate in the survey because they can be identified. This is problematic for the response rate and may lead to bias. However, damages experts should not assume this is an issue without testing it. If a damages expert is confronting a high refusal rate because class members are concerned about being identified, then an anonymous survey may be needed. Anonymity should not be the first course of action but it may be needed as a backup method if the response rate will otherwise be too low for valid statistical results. Anonymity should only be used if class members are saying they do not want to participate. This program of action will allow the damages expert to compare the anonymous respondents with the non-anonymous respondents to see if there is any substantial difference between the two groups.<sup>34</sup>

However, I will only utilize this methodology if the Court approves it in advance. It is my understanding that this is the only way individuals can be guaranteed confidentiality. If the Court does not approve this methodology, then all future surveying will be conducted in the same manner as the pilot study and confidentiality will not be promised.

41. Besides testing the difference between the confidential and non-confidential survey responses, additional questions were asked to test for potential bias. These questions asked whether the survey respondents were aware of the lawsuit in this matter and how certain they were about their answers.

<sup>34</sup> Petersen, Jeffrey S., Phillip Allman, and William Lee, "Surveys in Class Action Wage and Hour Cases and the Use of Anonymous Survey Respondents," *Journal of Legal Economics*, Volume 22, Number 1, October 2015, page 35.

42. The survey instrument asked respondents to provide the following information regarding their employment with Western Range:

- whether they worked with a flock of sheep or goats,
- a 24-hour time accounting of a typical workday when on the range with the flock,
- whether they thought they were responsible for the flock during sleep hours and the frequency of their sleep being disrupted by attending to the flock,
- whether they thought they were responsible for the flock during meal preparation and eating and the frequency of this activity being disrupted by attending to the flock,
- whether they thought they were responsible for the flock regardless of what they were doing,
- whether they left the flock to engage in a personal activity and the frequency of leaving,
- whether they worked during lambing season,
- a 24-hour time accounting of a typical workday during lambing season,
- whether they left the lambing location to do a personal activity and the frequency of leaving,
- whether during lambing their meals or sleep were interrupted by work and the frequency of this occurring,
- whether they thought they had off-duty time at the lambing location and the frequency of their off-duty time being interrupted.

43. The 24-hour time accounting was done in accord with the method utilized by the United States Bureau of Labor Statistics American Time Use Survey (ATUS). The methodology utilized by this survey asks participants to account for their time throughout the day resulting in categories of time usage that sum to 24 hours. The starting point for the time accounting in the

ATUS is 4AM. Survey participants are asked what they were doing at this hour and when the activity concluded. If they respond “sleeping” and “6AM,” the next question asks about what they did next and when the activity concluded. This process continues until all hours are accounted for until 4AM the next day. This method ensures there will not be double counting of activities of daily living. The same method was used for the survey in this matter. Survey respondents could choose from a list of typical shepherd work activities or provide an open-ended answer.

44. The survey also asked the respondent to provide the following information:

- their level of certainty about the responses they provided in the survey,
- level of education,
- age,
- whether they knew anything about a lawsuit involving Western Range.

45. The survey was translated into Spanish by Davis Research. I asked Dr. Acker to review the translation due to his experience interviewing shepherds. He made suggestions to some of the language to make the questions more understandable to the shepherds. See Exhibit B for the English and Spanish versions of the survey instrument.

### ***Design and Select Sample***

46. This section assumes that Defendant will produce the names and contact information for employees that worked for Western Range from 2019 to the present. The selection process for the potential survey participants will be a simple random sample. This is a selection process that

allows each member of the sample frame to have an equal probability of being selected for the survey.<sup>35</sup>

47. The necessary sample size depends upon the targeted margin of error. In wage and hour surveys I have conducted in the past, I have typically targeted the margin of error at five percent for proportional data.<sup>36</sup> . Proportional data refers to survey questions that ask about percentages (such as the percentage of time something occurs) or a “yes or no” response. Due to sample size limitations, I have not always been able to achieve a five percent margin of error and that may occur in this matter as well. However, this does not invalidate the survey results as there is no required margin of error to establish the validity of the survey responses. There is no guidance in statistical science quantifying what constitutes a margin of error that is too high with respect to sample survey data in class action wage and hour cases. As an illustration, consider a survey of likely voters prior to an election. If there are only two candidates on the ballot and the sample mean shows one candidate will receive 52 percent of the vote and the margin of error is five percent; then the margin of error is “too high” because it shows that an outcome could be that this candidate may receive 47 to 57 percent of the vote. The survey cannot make a prediction about who is likely to win the election given that margin of error and particular sample mean. If, however, the survey showed a candidate receiving 60 percent of the vote and a seven percent margin of error, then the margin of error is not too high because the low end of the predicted outcome is 53 percent of the vote. This type of reasoning does not apply to liability or damages in a class action wage and hour case. The margin of error is a statistic in a wage and hour case that assists the Court by providing information about the magnitude of potential error in the

<sup>35</sup> Source: Groves, Robert M. et al. 2009. *Survey Methodology*, New Jersey: John Wiley and Sons, Inc., page 103.

<sup>36</sup> Rea, Louis M. and Richard A. Parker, *Designing and Conducting Survey Research: A Comprehensive Guide, Fourth Edition*, Josey-Bass, 2014, page 165.



results. Whether it is “too high” is a subjective assessment to be made by the Court when balancing the welfare of plaintiffs and Defendant.<sup>37</sup>

48. There is precedent that a margin of error of ten percent or less is acceptable in a class action wage and hour case if damages are to be projected from the average of the survey responses.

The legal precedent is the decision about margin of error in *Bell v. Farmers Insurance*.<sup>38</sup> The *Duran I* decision stated that *Bell* is the “premier case approving the use of representative testimony in an overtime class action.”<sup>39</sup> The peer-reviewed statistical method for projecting damages in a class action wage and hour case when the margin of error is above ten percent is to use the lower bound of the 95 percent confidence interval.<sup>40</sup> This protects Defendant’s welfare by ensuring it does not overpay for damages based on the survey results because there is a 97.5 percent probability that the lower bound is not an overpayment.. These two options should be considered by the Court when assessing the margin of error:

Option 1: deny payments to class members and grant a windfall to Defendant because the variance in data points caused a margin of error greater than ten percent. Option 2: use the lower bound of the 95 percent confidence interval to award damages in those cases only in which the margin of error exceeds ten percent. The latter option ensures (to a 97.5 percent procedural reliability) defendant is not overpaying and subsequently redistributes income among the class members. Undoubtedly, all class members would prefer some payments for damages as opposed to no payments. Therefore, the welfare of the class members is addressed under Option 2 in a way ignored under Option 1. Defendant’

<sup>37</sup> Petersen, Jeffrey S. and Phillip Allman, “The Margin of Error on Damages Calculations Based on Sample Survey Data in Class Action Wage and Hour Cases,” *Journal of Legal Economics*, Volume 25, No. 1-2, September 2019.

<sup>38</sup> *Bell v. Farmers Insurance Exchange*. 2004. Cal.App 4th 715, 9 Cal.Rptr.3d 544.

<sup>39</sup> *Duran et al. v. U.S. National Bank Association*. 2014. California Supreme Court, 59 Cal.4th 1172, Cal. Rptr. 3d 371, 325 P.3d 916.

<sup>40</sup> Petersen, Jeffrey S. and Phillip Allman, “The Margin of Error on Damages Calculations Based on Sample Survey Data in Class Action Wage and Hour Cases,” *Journal of Legal Economics*, Volume 25, No. 1-2, September 2019.

welfare is also addressed by Option 2 since there is little chance across cases of general overpayment for damages. Option 1, on the other hand, rewards Defendant with a windfall for wrongdoing and harms the welfare of the class members.<sup>41</sup>

49. The sample size is based upon the size of the class and the type of questions to be asked of the survey participants. The formula for determining the sample size when proportions are the data being gathered is as follows<sup>42</sup>:

$$n = (Z^2 (p (1 - p)) N) / (Z^2 (p (1 - p)) + (N - 1) ME^2)$$

where,

n	=	sample size
N	=	population size (i.e., the size of the class)
Z	=	Z score for the level of confidence
p	=	unknown proportion for the sample
ME	=	acceptable margin of error for the proportional variable

50. The proportion that requires the largest sample size is 50 percent. Therefore, to be as conservative as possible in estimating the sample size, 50 percent is inputted into the above equation for the variable “p” if there is no information available. The “Z score” is associated with the desired level of confidence. According to the *Reference Manual on Scientific Evidence*, a 95 percent confidence interval is widely accepted among scientists:

<sup>41</sup> Petersen, Jeffrey S. and Phillip Allman, “The Margin of Error on Damages Calculations Based on Sample Survey Data in Class Action Wage and Hour Cases,” *Journal of Legal Economics*, Volume 25, No. 1-2, September 2019, page 150.

<sup>42</sup> Rea, Louis M. and Richard A. Parker, *Designing and Conducting Survey Research: A Comprehensive Guide, Fourth Edition*, Josey-Bass, 2014, page 167.

Traditionally, scientists adopt the 95 percent level of confidence, which means that if 100 samples of the same size were drawn, the confidence interval expected for at least 95 of the samples would be expected to include the true population value.<sup>43</sup>

51. Davis Research will likely need to attempt to contact every class member when conducting the second phase of surveying. If a survey is going to be conducted on the population, then a random sample of class members can be conducted at the onset of the survey. This will establish the random response rate and the random survey responses. These responses can be compared to the full sample responses to determine if there is any bias due to the full sample not being entirely random. This method will be utilized in this matter. I can determine the size of the random sample after Defendant produces the contact information for class members employed from 2019 to the present.

### ***Recruit and Measure Sample***

52. This phase of the project refers to implementation of the survey instrument to the survey participants. Based upon my recommendation, the law firm Cohen Milstein retained Davis Research to gather the survey responses.

53. To encourage participation, an incentive payment of \$20 was offered for completing the survey. The American Association of Public Opinion Research (AAPOR) lists incentive payments on their best practices guide:

<sup>43</sup> Diamond, Sheri Seidman, "Reference Guide on Survey Research," Federal Judicial Center, Reference Manual on Scientific Evidence, Third Edition, p.381.

Specific procedures designed explicitly to stimulate survey cooperation or participation should be considered, such as ... offering monetary (i.e., cash) or non-monetary (some other valued reward) incentives to encourage participation.<sup>44</sup>

54. Davis Research has obtained nine survey responses to date. They reported considerable obstacles to contacting the potential survey respondents due to a large number of non-working telephone numbers that were provided by Defendant. There were only 60 individuals that could potentially be contacted via telephone. The total number that Davis Research was able to get on the telephone was fourteen. Davis Research subsequently sent 55 letters that asked individuals to contact the firm to take the survey via telephone. Only one individual responded to the letter and took the survey. See Exhibit C for the report of Bill Davis in this matter.

#### ***Code and Edit Data***

55. The pilot survey responses were coded by Davis Research and sent to me in an Excel spreadsheet.

#### **IV. Summary of Pilot Survey Responses**

56. This section provides a summary of the survey responses to date. Due to the current sample size, no class-wide inference can be made regarding liability and damages from these responses. The conclusion that can be drawn from the pilot survey is that if class members can be contacted via telephone there is a high likelihood they will be able to provide responses to the survey questions. Therefore, the survey instrument will be administered in its current form if Defendant provide contact information for employees from 2019 to the present. With more recent

<sup>44</sup> American Association of Public Opinion Research, "Best Practices for Survey Research," <https://www.aapor.org/Standards-Ethics/Best-Practices.aspx>.

employees, the contact information is more likely to be accurate, and Davis Research should be able to significantly expand the sample size to a level where class-wide inferences could be drawn from the survey responses.

57. Table 1 shows an accounting of the type of work performed by the survey respondents.

Nine individuals reported working on the range with sheep. Six individuals reported working on the ranch during lambing season.

**Table 1: Background Employment Questions**

Question #	Question (Abbreviated)	Response	Number of Responses	Percent
1	Ranch in records matches ranch where employed?	Yes	11	100.0%
		No	0	0.0%
		DK / REF	0	0.0%
		Total	11	100.0%
2	Work as a shepard with sheep or goats?	Sheep	9	81.8%
		Goats	0	0.0%
		Other Livestock	2	18.2%
		Neither	0	0.0%
		DK / REF	0	0.0%
		Total	11	100.0%
4	Work at the ranch during lambing season?	Yes	6	60.0%
		No	4	40.0%
		DK / REF	0	0.0%
		Total	10	100.0%

Note: DK = Don't know answer to question. REF = Refused to answer question.

58. Table 2 shows the responses to the 24-hour time accounting questioning sequence for shepherds working on the range with a flock of sheep. The nine survey respondents<sup>45</sup> reported approximately 11.4 hours per day of working with the flock. The remaining 12.6 hours of the

<sup>45</sup> Although eleven individuals agreed to take the survey, two of them did not work with sheep or goats, but instead other livestock, and thus fell outside the scope of the claims in this case.

day were spent sleeping (7.7 hours), preparing and eating food (3.9 hours), bathing (0.8 hours) and leisure time (0.2 hours).

**Table 2: Survey Responses Regarding Typical Workday on the Range with Flock**

Question #	Question (Abbreviated)	Response	Average Hours Per Day
2	Hours per day?	Sleeping	7.72
		Preparing and eating food	3.89
		Bathing	0.78
		Leisure time	0.22
		Attending to flock	6.78
		Herd flock	2.11
		Bed down flock	0.83
		Guard flock	0.56
		Administer medicine	0.44
		Pack up camp	0.00
		Bring water to flock	0.39
		Other Work	0.28
			-----
		Total	24.00

Note: DK = Don't know answer to question. REF = Refused to answer question.

Note: Results are based on nine survey responses. All respondents answered the full 24-hour time questioning sequence.

59. Table 3 shows an accounting of the survey responses for job duties during the time period when not actively attending to the flock. This questioning sequence is assessing the shepherd's responsibility for the flock during the categories noted above that sum to 12.6 hours per day (sleeping, preparing and eating food, bathing and leisure time). There are eight survey responses to all of these questions (except question 3 which has nine) because one individual terminated the survey after responding to question 3. Eight of the nine survey respondents to question 3 state that they would check on the flock if they heard a disturbance at night. The one survey respondent who stated they did not check on the flock is the individual that terminated the survey

after this question. The remaining eight survey participants all gave estimates of how frequently they checked on the flock at night and the responses ranged from “three to six nights a week” to “not very often, a few times a year.” These eight survey respondents also stated they would check on the flock if they heard a disturbance while eating, bathing, or resting and gave estimates of the frequency of being disrupted. The eight survey respondents also stated they felt they were responsible for the sheep no matter what they were doing. Three of the eight survey respondents stated they had left the flock to engage a personal activity and provided the frequency that this occurred. One responded stated “every day” and the other two stating “not very often, a few times a year.” Table 3 also shows the responses to questions about personal activities they may have engaged in and personal entertainment devices they may have had on the range.

**Table 3: Survey Responses Regarding Job Duties When on the Range with the Flock**

Question		Number of	
#	Question (Abbreviated)	Responses	Percent
3	If hear disturbance when sleeping, did you wake up and check on the sheep?	Yes	8 88.9%
		No	1 11.1%
		DK / REF	0 0.0%
		Total	9 100.0%
3A	How frequently did this happen?	Every night	0 0.0%
		Three to six nights per week	2 25.0%
		Once or twice a week	3 37.5%
		Once a month	2 25.0%
		Not very often, a few times a year	1 12.5%
		DK / REF	0 0.0%
		Total	8 100.0%
3B	If hear disturbance when eating, bathing or resting; did you stop what you were doing and check on the sheep?	Yes	8 100.0%
		No	0 0.0%
		DK / REF	0 0.0%
		Total	8 100.0%
3B-1	How frequently did this happen?	Every day	0 0.0%
		Three to six days per week	1 12.5%
		Once or twice a week	4 50.0%
		Once a month	3 37.5%
		Not very often, a few times a year	0 0.0%
		DK / REF	0 0.0%
		Total	8 100.0%
3C	Always responsible for the sheep regardless of what you were doing?	Yes	8 100.0%
		No	0 0.0%
		DK / REF	0 0.0%
		Total	8 100.0%
3D	Ever leave flock and do personal activity for an hour or more?	Yes	3 37.5%
		No	5 62.5%
		DK / REF	0 0.0%
		Total	8 100.0%
3D-1	How frequently did this happen?	Every day	1 12.5%
		Three to six days per week	0 0.0%
		Once or twice a week	0 0.0%
		Once a month	0 0.0%
		Not very often, a few times a year	2 25.0%
		Never	5 62.5%
		DK / REF	0 0.0%
		Total	8 100.0%

Note: DK = Don't know answer to question. REF = Refused to answer question.



**Table 3 continued: Survey Responses Regarding Job Duties When on the Range with the Flock**

Question #	Question (Abbreviated)	Response	Number of Responses	Percent
3F	Did you every leave the flock and do the following?	Go into town	2	25.0%
		Go to a restaurant	1	12.5%
		Go to a store	1	12.5%
		None of the above	6	75.0%
		DK / REF	0	0.0%
		Total	8	
3F-1	How frequently did this happen?	Every day	0	0.0%
		Three to six days per week	0	0.0%
		Once or twice a week	1	12.5%
		Once a month	0	0.0%
		Not very often, a few times a year	1	12.5%
		Never	6	75.0%
		DK / REF	0	0.0%
		Total	8	100.0%
3G	Did you have any of the following when you were on the range?	Television	3	37.5%
		Cell phone for watching programs	4	50.0%
		None of the above	4	50.0%
		DK / REF	0	0.0%
		Total	8	

Note: DK = Don't know answer to question. REF = Refused to answer question.

60. Table 4 shows the responses to the 24-hour time accounting questioning sequence for working during lambing season. The six survey respondents reported approximately 13.5 hours per day of work. The remaining 10.5 hours of the day were spent sleeping (7.0 hours), preparing and eating food (2.6 hours), bathing (0.3 hours) and leisure time (0.6 hours).

**Table 4: Survey Responses Regarding Typical Workday During Lambing Season**

Question		Average Hours	
#	Question (Abbreviated)	Response	Per Day
4	Hours per day?	Sleeping	7.00
		Meal Preparation or eating	2.58
		Bathing	0.33
		Leisure time/doing anything I want	0.58
		Examine Animals for signs of ill	0.75
		Assist in lambing	7.08
		Assist in docking	0.00
		Shearing	1.33
		Other Work <sup>1</sup>	4.33
			-----
		Total	24.00

Note: DK = Don't know answer to question. REF = Refused to answer question.

Note: Results are based on six survey responses. All respondents answered the full 24-hour time questioning sequence.

1. The majority of these hours were described by the survey participants as giving the sheep water and checking on them.

61. Table 5 shows an accounting of the survey responses for job duties during the time period when not performing typical lambing work. This questioning sequence is assessing the workers' responsibilities at the ranch or lambing area during the categories noted above that sum to 10.5 hours per day (sleeping, preparing and eating food, bathing and leisure time) and whether they could leave the ranch to engage in personal activities.

**Table 5: Survey Responses Regarding Job Duties When at the Ranch During Lambing Season**

Question #	Question (Abbreviated)	Response	Number of Responses	Percent
5B	Ever leave the ranch and do a personal activity?	Yes	0	0.0%
		No	6	100.0%
		DK / REF	0	0.0%
			-----	-----
		Total	6	100.0%
5D	Did you ever leave the ranch and do the following?	Go into town (Yes)	0	
		Go to a restaurant (Yes)	0	
		Go to a store (Yes)	0	
		None of the above	0	
		DK / REF	0	
5E	Did you have any of the following when you were at the ranch?	Television	3	50.0%
		Cell phone for watching programs	3	50.0%
		DK / REF	0	0.0%
			-----	
		Total	6	
5F	Did you have regular meal times?	Yes	5	83.3%
		No	1	16.7%
		DK / REF	0	0.0%
			-----	-----
		Total	6	100.0%
5F-1	Were your meals interrupted by work?	Yes	5	83.3%
		No	1	16.7%
		DK / REF	0	0.0%
			-----	-----
		Total	6	100.0%
5F-2	How frequently did this happen?	Every day	5	83.3%
		Three to six days per week	0	0.0%
		Once or twice a week	0	0.0%
		Once a month	0	0.0%
		Not very often, a few times a year	0	0.0%
		Never	1	16.7%
		DK / REF	0	0.0%
			-----	-----
5G	Was your sleep interrupted by work?	Yes	0	0.0%
		No	6	100.0%
		DK / REF	0	0.0%
			-----	-----
		Total	6	100.0%
5H	Were you ever considered off duty?	Yes	0	0.0%
		No	6	100.0%
		DK / REF	0	0.0%
			-----	-----
		Total	6	100.0%

Note: DK = Don't know answer to question. REF = Refused to answer question.

## **V. Conclusion**

62. Davis Research obtained nine survey responses for the pilot study. I cannot use these survey responses alone to offer expert opinions about class-wide liability and damages because the sample size is too small. However, an important conclusion can be drawn from the pilot study regarding expanding the sample size with future surveying. The survey participants were able to provide categories of work to account for all 24 hours in the day during a typical workday when on the range with the flock and at the ranch during lambing season. The survey participants were also able to provide information about their work responsibilities that can be used to assess whether they were engaged in compensable work even when not actively engaged in shepherding duties. Therefore, it can be inferred survey participants in this matter can provide information on the variables of interest in this matter. These variables of interest are (1) the typical number of hours worked per day on the range with the flock, (2) the typical number of hours worked per day during lambing season, and (3) whether they were on duty even when they were not actively performing their shepherding duties. The importance of this conclusion is that if Defendant produce contact information for employees for 2019 to the present, it is likely that a large enough sample size can be gathered to assess these variables of interest on a class-wide basis. The contact information provided by Defendant for employees from 2010 to 2018 will not yield any further survey responses.

63. I am prepared to testify to the contents of this report in deposition or at trial if called upon to do so. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 25, 2021 at Oakland, California.



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Jeffrey S. Petersen, Ph.D.

# **EXHIBIT A**

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## JEFFREY S. PETERSEN

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Allman & Petersen Economics, LLC  
 7677 Oakport Street, Suite 610  
 Oakland, CA 94621

Phone: (510) 382-1550  
 FAX: (510) 382-1472  
 E-mail: jeff@allmaneconomics.com

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### EMPLOYMENT HISTORY

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2003 – present	<b><i>Partner</i></b> Allman & Petersen Economics, LLC Oakland, California
2014 – present	<b><i>Adjunct Associate Professor of Economics</i></b> St. Mary's College Moraga, CA
1999 – 2001	
1998 – 2003	<b><i>Senior Economist</i></b> U.S. Government Accountability Office (formerly the General Accounting Office) San Francisco, California
1999 – 2001	<b><i>Economics Instructor</i></b> Golden Gate University San Francisco, California
1995 – 1998	<b><i>Postdoctoral Fellow</i></b> University of California, Berkeley
1990 – 1995	<b><i>Research and Teaching Assistant</i></b> University of Utah Salt Lake City, Utah

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### EDUCATION

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1996	Postdoctoral Training Program in Health Economics University of California, Berkeley
1995	Ph.D. in Economics, University of Utah
1989	B.A. in Economics, San Jose State University

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### PUBLICATIONS

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#### ***Peer-Reviewed Book***

*“Carve-outs” in Workers’ Compensation: An Analysis of the Experience in the California Construction Industry*, W.E. Upjohn Institute for Employment Research, Kalamazoo, MI 2003 (co-authored with David Levine, Frank Neuhauser, Richard Reuben, and Christian Etcheverria).

***Peer-Reviewed Journal Articles***

- “The Margin of Error on Damages Calculations Based on Sample Survey Data in Class Action Wage and Hour Cases,” *Journal of Legal Economics*, Volume 25, No. 1-2, September 2019 (co-authored with Phillip Allman).
- “The Effect of the Intent to Retire at Age 70 or Older on Work Life Expectancy,” *Journal of Legal Economics*, Volume 23, No. 2, April 2017 (co-authored with Phillip Allman).
- “Surveys in Class Action Wage and Hour Cases and the Use of Anonymous Respondents,” *Journal of Legal Economics*, Volume 22, No. 1, October 2015 (co-authored with Phillip Allman and William Lee).
- “Carve-Outs from the Workers Compensation System,” *Journal of Policy Analysis and Management*, 2002, Volume 21, No. 3, (co-authored with David Levine and Frank Neuhauser).
- “Health Care and Pension Benefits for Construction Workers: The Role of Prevailing Wage Laws,” *Industrial Relations*, 2000, Volume 39, No. 2.
- “A Comparison of Health Outcomes Among Older Construction and Blue-Collar Employees in the United States,” *American Journal of Industrial Medicine*, 1998, Volume 34, No. 3, (co-authored with Craig Zwerling).

***Other Publications***

- “The Margin of Error on Damages Calculations Based on Sample Survey Data in Class Action Wage and Hour Cases,” proceedings of the 2019 Allied Social Sciences Association, National Association of Forensic Economics Section (co-authored with Phillip Allman).
- “International Responses to an Aging Labor Force,” *Work Options for Mature Americans*. Teresa Ghilarducci and John Turner eds., Notre Dame, Indiana: University of Notre Dame Press, 2005. (co-authored with Charles Jeszeck, Anthony Defrank, Katherine Leavitt, Janice Peterson, Yunsian Tai, and Howard Wial).
- “Benefits vs. Wages: How Prevailing Wage Laws Affect the Mix and Magnitude of Compensation to Construction Workers,” in *The Economics of Prevailing Wage Laws*, Peter Philips and Hamid Azari eds., Ashgate Publishing, 2005. (co-authored with Erin Godtland).
- “Private and Public Sector Employment Policies to Extend the Labor Force Participation of Older Workers,” *Proceedings of the 55<sup>th</sup> Annual Industrial Relations Research Association Annual Conference*, 2003.
- “Return to Economic Productivity Following Acute Traumatic Injury: The Influence of Financial, Physical, and Psychosocial Factors,” *Proceedings of the American Association for the Surgery of Trauma Fifty-Ninth Annual Meeting*, 1999, (co-authored with Lara Papadakis, Diane Morabito, Herb Ochitill, Alicia Bocellari, and Robert Mackersie).



*Portable Pensions for Casual Labor Markets: Lessons from the Operating Engineers Central Pension Fund*, Quorum Books, Westport, CT, 1996 (co-authored with Teresa Ghilarducci, Garth Mangum, and Peter Philips).

***Selected General Accounting Office Reports***

“Older Workers: Policies of Other Nations to Increase Labor Force Participation,”  
GAO-03-307, Feb. 2003

“Older Workers: Demographic Changes Pose Challenges for Employers and Workers,”  
GAO-01-85, Nov. 2001

“Characteristics of Persons in Labor Force Without Pension Coverage,”  
GAO/HEHS-00-131, Aug. 2000

“Social Security Reform: Implications of Raising the Retirement Age,”  
GAO/HEHS-99-112, Aug. 1999

**REVIEWER FOR PEER-REVIEWED JOURNALS AND BOOKS**

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Industrial Relations (University of California, Berkeley)

Perspectives (peer-reviewed section of the Social Security Bulletin)

Journal of Legal Economics

Palgrave Macmillan, Economics & Business Publications

The Earnings Analyst

**PRESENTATIONS**

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“Wage and Hour Surveys: Assisting with the Liability Determination and Assessing Nonresponse Bias,”  
32<sup>nd</sup> Annual Meeting of the American Academy of Economic and Financial Experts, April 2021.

“Statistical Evidence in Wage and Hour Class Actions Since Tyson Foods: Impact on Certification and Trial,” Webinar hosted by Strafford Publications, June 2020

“The Implications of Recent Legal Decisions for Survey Methodology in Class Action Wage and Hour Cases,” Annual Conference of the Pacific Chapter of the American Association for Public Opinion Research, San Francisco, CA, December 2019.

“Duran Duran: The Important Issues in the Two Duran Decisions for Surveys and Statistical Analysis,” Western Economic Association Annual Conference, San Francisco, CA, June 2019.

“The Margin of Error on Damages Calculations in Class Action Wage and Hour Cases,” Allied Social Science Associations Annual Conference, National Association of Forensic Economics, Atlanta, GA, January 2019.

- “Survey Design and Analysis in Class Action Wage and Hour Cases,” Annual Conference of the Pacific Chapter of the American Association for Public Opinion Research, San Francisco, CA, December 2018.
- “Surveys in Class Action Wage and Hour Cases,” CLE Seminar, San Francisco, CA, October 2018.
- “Using Surveys to Assess Damages in Class Action Wage and Hour Cases,” 30<sup>th</sup> Annual Meeting of the American Academy of Economic and Financial Experts, Las Vegas, NV, April 2018.
- “Working to Age 70 or Older – How Much Does Intention Matter? Evidence from the Health and Retirement Study,” 28<sup>th</sup> Annual Meeting of the American Academy of Economic and Financial Experts, Las Vegas, NV, March 2016.
- “Policies to Extend the Labor Force Participation of Older Workers” – Industrial Relations Research Association Section of the Allied Social Sciences Association Annual Meeting, Washington, DC, Jan. 2003.
- Discussant for the panel “The Population Age 50-70 -- Past Trends and Future Projections” at the National Academy of Social Insurance conference on the Implications of an Aging Workforce for Income Security and Employee Benefits, Washington, D.C., Nov. 2001
- “Raising the Eligibility Ages for Social Security Benefits: Work and Health Issues Associated with this Policy Change” - School of Public Policy, University of California, Los Angeles, Jan. 2001
- “The Labor Market for Older Workers” - Bay Area Labor Economists Fall Workshop, Public Policy Institute of California, San Francisco, CA, Nov. 2000
- "Raising the Eligibility Ages for Social Security Benefits: An Analysis of the Policy Implications"  
- Association for Public Policy Analysis and Management Annual Research Conference, New York, NY, Oct. 1998.
- "Carving Out Construction Employees from the Workers Compensation System in California: Putting Theory into Practice"  
- Industrial Relations Research Association Section of the Allied Social Sciences Association Annual Meeting, Chicago, IL, Jan. 1998  
- National Occupational Injury Research Symposium, National Institute of Occupational Safety and Health, Morgantown, WV, Oct. 1997
- "Return to Work Following Acute Traumatic Injury"  
- American Association for the Surgery of Trauma Annual Meeting, Boston, MA Sept. 1999  
- National Occupational Injury Research Symposium, National Institute of Occupational Safety and Health, Morgantown, WV, Oct. 1997
- "Health Care and Pension Benefits for Construction Workers: The Role of Prevailing Wage Laws"  
- Health Economics Research Organization Section of the Allied Social Sciences Association Annual Meetings, New Orleans, LA, Jan. 1997
- “Retirement from the Construction Industry” – University of California, Berkeley, Department of Demography, May 1995.

## **HONORS**

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Member of the Board of Directors, American Academy of Economic and Financial Experts	2017-2020
National Research Service Award, Public Health Postdoctoral Fellowship, U.S. Department of Health and Human Services	1995-1997
Outstanding Scholar Athlete Honor Roll, San Jose State University	1988-1989
NCAA Division I Tennis Team, San Jose State University	1987-1989

## **PROFESSIONAL ORGANIZATIONS**

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American Economic Association

National Association of Forensic Economics

American Academy of Economic and Financial Experts

American Association for Public Opinion Research

Western Economic Association International

**ALLMAN & PETERSEN ECONOMICS, LLC**

Phillip H. Allman, Ph.D.  
Jeffrey S. Petersen, Ph.D.  
Max Allman, MA, CFA

7677 Oakport Street, Suite 610 • Oakland, CA 94621  
TEL (510) 382-1550 FAX (510) 382-1472

**FEE SCHEDULE (1/25/19)**

(1) Economic research and analysis, report preparation, document review, office and client consultations, deposition preparation and trial preparation.<sup>1</sup>

-- Ph.D. Economist	\$550 / hour
-- Senior Economist	\$375 / hour
-- Economist or CPA	\$250 / hour
-- Survey Administration	\$125 / hour

(2) Deposition testimony<sup>2</sup> \$650 / hour

(3) Arbitration and trial testimony<sup>3</sup> \$650 / hour

(4) Travel time \$250 / hour

<sup>1</sup> Bills will be submitted periodically and are due upon presentation, not at the conclusion of the case.

<sup>2</sup> Payment for deposition testimony shall be paid in accordance with C.C.P. '2034 (i) (3) --i.e. payment of an expert's fees for the anticipated length of a deposition shall be paid at the commencement of his/her deposition, and any outstanding balance shall be paid within five days of receiving an itemized statement of the expert's services.

<sup>3</sup> All invoices to date must be paid prior to trial testimony. In addition, an additional retainer must be paid prior to the trial testimony based upon the estimated invoice for the testimony.

**Trial & Deposition List for Jeffrey S. Petersen (Last Four Years)**

<b>Case</b>	<b>Case Number</b>	<b>Jurisdiction</b>	<b>Date</b>
<b>Trials &amp; Arbitrations</b>			
Fernandez et al. v. Villas Papillon	RG13683606	Alameda	February, 2017
Shields et al. v. Security Paving Company	BC4922828	Los Angeles	September, 2017
Robinson Jr. et al. v. Open Top Sightseeing	4:14-CV-00852-PJH	Northern District of California	October, 2017
Yumul et al. v. Indus Investments et al.	BC565881	Los Angeles	April, 2018
Zarate v. Sungrow USA Corporation	01-18-0003-8025	American Arbitration Association	September, 2019
<b>Depositions</b>			
Fernandez et al. v. Villas Papillon	RG13683606	Alameda	February, 2016
Bowerman et al. v. Field Asset Services	CV 13-00057 WHO	Northern District of California	March, 2017
Bowerman et al. v. Field Asset Services	CV 13-00057 WHO	Northern District of California	June, 2017
Robinson Jr. et al. v. Open Top Sightseeing	4:14-CV-00852-PJH	Northern District of California	July, 2017
Ruiz et al. v. Jack in the Box	RG16807477	Alameda	August, 2017
Shields et al. v. Security Paving Company	BC4922828	Los Angeles	September, 2017
Pineda et al. v. Lithographix	BC612372	Los Angeles	January, 2018
Zarate v. Sungrow USA Corporation	01-18-0003-8025	American Arbitration Association	June, 2019
Dueker et al. v. CRST Expedited	2:18-cv-08751-FMO-FFM	Central District of California	September, 2019
Nevarez et al. v. Costco Wholesale Corp.	2:19-cv-03454-SVW-SKx	Northern District of California	January, 2020
Sephora Wage and Hour Cases	CGC-16-550894	San Francisco	June, 2020
Dhawan v. Regents of the Univ. of CA	RG18911598	Alameda	October, 2020
Van Bebber v. Dignity Health	1:19-cv-00264-DAD-EPG	Eastern District of California	October, 2020
Ayala v. UPS Supply Chain Solutions	5:20-cv-00117-PSG-AFM	Central District of California	February, 2021
Christensen v. Carter's Retail	8:20-cv-00776 JLS (KESx)	Central District of California	April, 2021
Nucci v. Rite Aid	19-CV-01434-LHK	Northern District of California	June, 2021
Crump v. Hyatt	4:20-cv-00295-HSG	Northern District of California	June, 2021

# **EXHIBIT B**

Respondent Name: \_\_\_\_\_

Hello, may I please speak with [RESPONDENT NAME]? I am not selling anything.

**IF THE PERSON WHO ANSWERS THE PHONE SAYS: “Who’s Calling”:**

This is \_\_\_\_\_, I am with Davis Research calling to speak with [RESPONDENT FIRST NAME] about his/her work with Western Range and we are offering \$20 for completing a survey. I am not trying to sell you anything.

**IF THE PERSON WHO ANSWERS THE PHONE SAYS: “Why are you calling? / Can you tell me what you are calling about?”:**

We have been asked to conduct a survey by the lawyers who represent sheepherders who performed work for Western Range.

**IF THERE IS NO ANSWER, LEAVE THE FOLLOWING VOICE MAIL:**

Hello, I am \_\_\_\_\_ calling from Davis Research and I am not trying to sell you anything. I am calling to conduct a survey about employment issues at Western Range at the request of lawyers who represent the sheepherders. Please return my phone call at \_\_\_\_\_ so I can administer the survey to you. This survey should take approximately 20 minutes of your time. As a token of our appreciation we will send you \$20 for completing the survey.

**ONCE RESPONDENT IS ON THE PHONE:**

Hello, I am \_\_\_\_\_ calling from Davis Research. I am calling to conduct a survey about employment issues at Western Range at the request of attorneys who represent the employees. This survey should take approximately 20 minutes of your time. As a token of our appreciation we will send you \$20 for completing the survey.

This survey is part of a litigation matter and therefore I need your answers to be as accurate as possible. Your answers will not be anonymous and you may be questioned by the defendants about your answers. Therefore, take your time when responding to the questions. Even if you’re not completely sure of the exact answer to a question, please give me your best estimate. If you don’t know the answer to a question, it is okay to answer “I don’t know.” We simply need survey answers that are as accurate and honest as possible.

**READ ONLY IF NEEDED:** You will be represented free of charge by the lawyers for the employees should there be questions about your survey answers. This is not likely since there will be hundreds of individuals completing the survey. It is illegal for Western Range to take action against you for participating in this survey.

**READ ONLY IF NEEDED IF RESPONDENT REQUESTS ANONYMITY:** Your anonymity cannot be guaranteed. It is illegal for Western Range to take action against you for participating in this survey and the attorneys for the plaintiffs will represent you free of charge.

**READ IF REFUSES TO TAKE SURVEY AND NOTE RESPONSE:** It is very important to understand why you don't want to take the survey, can you please tell me your reason? Probe repeatedly, with question – is there another reason you don't want to take the survey? Keep asking question until respondent says “no other reason.”

This survey is going to start by asking you about the ranches you worked at. I need to confirm where you worked.

[FOR INPUT RANCH NAME – PLEASE INSERT RANCH NAME IN FIRST POSITION OR SECOND, THIRD OR FOURTH AS APPLICABLE]

1. Our records indicate you worked for the [INPUT RANCH NAME] in the past. Does that sound correct to you?

1. Yes

2. No [IF MULTI-RANCH =1, ASK Q1 AGAIN FOR RANCH 2, 3 OR 4 AS APPLICABLE, OTHERWISE, END INTERVIEW]

99. (DO NOT READ) Refused [END INTERVIEW]

NOTE TO PROGRAMMER: Create variable “MULTI RANCH” for individuals who worked at multiple ranches. Assign a “1” to individuals who worked at multiple ranches and a “0” to those who only worked at one ranch.

**SKIP LOGIC:**

- If Q1 = 1 and MULTI RANCH = 0 then read, “This survey only pertains to your work experience at [INPUT RANCH NAME] anytime between May 2010 through December 2018. If you worked as a shepherd any other time, please disregard those work experiences when answering the questions.” Then continue with Q2.
- If Q1 = 1 and MULTI RANCH = 1 then read, “This survey only pertains to your work experience at at [INPUT RANCH NAME] anytime between May 2010 through December 2018. We understand that you worked at other ranches and we will ask about those at the end of the survey.” Then continue with Q2.

2. Did you work as a shepherd with a flock of sheep or goats you were responsible for?

[IF RESPONDENT SAYS BOTH, ASK, “Well, did you work primarily with sheep or goats?”]

1. Yes, sheep

2. Yes, goats

4. Yes, other livestock

3. No



99. (DO NOT READ) Refused [END INTERVIEW]

**SKIP LOGIC:**

- If Q2 = 3; SKIP TO Q4

**PROGRAMMING NOTE:** If Q2 is 1, then no changes below, but if Q2 is 2, then replace the word “SHEEP” with “GOAT” for the balance of the survey. If Q2 is 4, then replace “SHEEP” with “LIVESTOCK”.

- If Q2 = 2, then “flock of sheep” becomes “goats”
- If Q2 = 2, then “sheep” becomes “goats”
- If Q2 = 4, then “flock of sheep” becomes “livestock”
- If Q2 = 4, then “sheep” becomes “livestock”

The next questions ask about your typical work day when you were a shepherd taking care of the flock of sheep. Typical means what you did on most work days when you were out on the range with the flock grazing. We will go thru an entire 24 hour day and I will ask you about all the different things you typically did.

[As needed for clarification]

We need to know the specific tasks and all of the different things you did during specific time frames to account for your entire 24-hour day. This would include time sleeping, eating, bathing, any personal time and then your specific work duties, which can be categories, such as guarding the flock, bringing water to the flock, herding the flock or rounding up strays – however best you see to describe what you are typically doing in a day on the range. We want you to be specific to the types of tasks and things you would do during a typical day.

[START Q2 LOOP. POPULATE VARIABLE START\_TIME with 4:00 am. INCREMENT DATA IN A 24 HOUR LOOP IN 30 MINUTE INCREMENTS. ONCE YOU HAVE DATA FOR All 48 DATA POINTS, MOVE ON TO Q3.]

2A\_X. [INITIAL: So let’s begin. When you worked as a shepherd on the range, what would you typically be doing at 4:00 am? [DO NOT READ CHOICES]

[ALL SUBSEQUENT: Now what typically were you doing at [INSERT NEXT TIME SLOT OPEN] [AS NEEDED] when you worked as a shepherd on the range? [AS NEEDED: Again, we need to account for all 24-hours and each hour of the day needs to have a general category of what you were typically doing.]

[INTERVIEWER: If more than one item mentioned, say, “I realize you may have been doing more than one thing, but what were you primarily doing at <INSERT TIME>?]

1. Sleeping

2. Preparing and eating food
3. Bathing or gathering water to bath
4. Leisure time / doing anything I wanted
5. Attend to flock grazing on range
6. Herd flock and round up strays
7. Bed down flock
8. Guard flock
9. Administer medicine or drenching
10. Pack up camp and move to new location
11. Bring water to flock
12. Other: code open ended response

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q2A = 98 or 99; SKIP TO Q3

2B\_X. "When would you typically be done [INSERT 2A\_X]?"

TIME OF DAY

\_\_\_ : \_\_\_ AM/PM

[ROUND TO CLOSEST 30 MINUTE TIME. (e.g., 1:00 pm, 1:30 pm)]

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q2B\_X = 98 or 99 ASK Q2B\_X1
- IF ALL 24-HOURS ACCOUNTED FOR (48 DATA POINTS), THEN SKIP TO Q3, OTHERWISE GO BACK TO Q2A\_X AND RESUME WITH NEXT TIME SLOT UNTIL ALL 24-HOURS ACCOUNTED FOR

2B\_X1. "How long would you typically be [INSERT 2A\_X] after [START\_TIME]?"

ACTIVITY LENGTH

\_\_\_ hours \_\_\_ minutes

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

NOTE TO INTERVIEWER:

Probe for best estimate if initially say “Don’t know” or “Refused”

NOTE TO PROGRAMMER:

Coding should calculate the interval such that the next question should be at the start of the next time interval.

**SKIP LOGIC:**

- If Q2B\_X1 = 98 or 99; SKIP TO Q3
- IF ALL 24-HOURS ACCOUNTED FOR (48 DATA POINTS), THEN SKIP TO Q3, OTHERWISE GO BACK TO Q2A\_X AND RESUME WITH NEXT TIME SLOT UNTIL ALL 24-HOURS ACCOUNTED FOR

I have more questions about your work duties when you were on the range with the flock.

3. If you were sleeping and heard a disturbance, did you get up and check on the sheep?

1. Yes
2. No

98. (DO NOT READ) Don’t know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q3 = 2, 98 or 99; SKIP TO Q3B

3A. How frequently did this happen? Would you say...

1. Every night
2. Three to six nights a week
3. Once or twice a week
4. Once a month
5. Not very often, a few times a year

98. (DO NOT READ) Don’t know

99. (DO NOT READ) Refused

3B. If you were preparing or eating food, bathing or resting and you heard a disturbance with the sheep, did you stop what you were doing and check on the sheep?

1. Yes
2. No

98. (DO NOT READ) Don't know  
99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q3B = 2, 98 or 99; SKIP TO Q3C

3B-1. How frequently did this happen? Would you say...

1. Every day
2. Three to six days a week
3. Once or twice a week
4. Once a month
5. Not very often, a few times a year

98. (DO NOT READ) Don't know  
99. (DO NOT READ) Refused

3C. Were you always responsible for the sheep regardless of what you were doing?

1. Yes
2. No

98. (DO NOT READ) Don't know  
99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q3C = 1, 98 or 99; SKIP TO Q3D

3C-1. On a typical workday, how many hours per day were you not responsible for the sheep?

CODE NUMBER OF HOURS [RANGE 0.5 TO 23.5]

98. (DO NOT READ) Don't know  
99. (DO NOT READ) Refused

3D. Did you ever leave the flock of sheep and do a personal activity for an hour or more?

1. Yes
2. No

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q3D = 2, 98 or 99; SKIP TO Q3F

3D-1. How frequently did this happen? Would you say...

1. Every day
2. Three to six days a week
3. Once or twice a week
4. Once a month
5. Not very often, a few times a year

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

3F. Did you ever leave the flock and do any of the following?  
[SINGLE RESPONSE GRID QUESTION]

**ROWS:**

- a. Go into town
- b. Go to a restaurant
- c. Go to a store

**COLUMNS:**

1. Yes
2. No

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q3F = 2, 98 or 99 for all rows; SKIP TO Q3G

3F-1. [IF 2 OR MORE YES IN 3F SAY, How frequently did you go to each of these?

[IF ONLY 1 YES IN 3F SAY, “How frequently did you ...?” Would you say...  
[SINGLE RESPONSE GRID QUESTION]

ROWS:

- a. Go into town [if 3FA = 1]
- b. Go to a restaurant [if 3FB = 1]
- c. Go to a store [if 3FC = 1]

COLUMNS:

- 1. Every day
- 2. Three to six days a week
- 3. Once or twice a week
- 4. Once a month
- 5. Not very often, a few times a year
- 98. (DO NOT READ) Don't know
- 99. (DO NOT READ) Refused

3G. Did you have any of the following when you were on the range?  
[SINGLE RESPONSE GRID QUESTION]

ROWS:

- a. Television
- b. Cell phone for watching programs you enjoy

COLUMNS:

- 1. Yes
- 2. No
- 98. (DO NOT READ) Don't know
- 99. (DO NOT READ) Refused

4. Did you work at the ranch during lambing season, or other times when you were not out by yourself grazing your flock, but instead with other shepherds and workers all together at the ranch?

1. Yes
2. No

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q4 = 2, 98, 99; SKIP TO Q6

The next questions ask about your typical work day when at the ranch working with other workers during lambing season or doing other work. Typical means work that occurred frequently and repeatedly. We will go thru an entire day and I will ask you about all the different things you typically did.

[AS NEEDED FOR CLARIFICATION]

As we did with the previous section, we need to know the specific tasks and all of the different things you did during specific time frames to account for your entire 24-hour day when at the ranch working with others during lambing season. As before, this would include time sleeping, eating, bathing, any personal time and then your specific work duties, which can be categories, such as assisting in lambing, assisting in docking, shearing or however best you see to describe what you are typically doing in a day on the range when working with others on the ranch. We want you to be specific to the types of tasks and things you would do during a typical day.

[START Q4A LOOP. POPULATE VARIABLE START\_TIME with 4:00 am]

4A\_X. [INITIAL: So let's begin. When you worked at the ranch with other workers, what would you typically be doing at 4:00 am? [DO NOT READ CHOICES]

[ALL SUBSEQUENT: Now what typically were you doing at [INSERT NEXT TIME SLOT OPEN] [AS NEEDED] when you worked at the ranch with other workers?" [AS NEEDED: Again, we need to account for all 24-hours and each hour of the day needs to have a general category of what you were typically doing.]

[INTERVIEWER: If more than one item mentioned, say, "I realize you may have been doing more than one thing, but what were you primarily doing at <INSERT TIME>?]

1. Sleeping
2. Meal preparation or eating
3. Bathing
4. Leisure time / doing anything I wanted

5. Examine animals for signs of illness
6. Assist in lambing
7. Assist in docking
8. Shearing
9. Other: code open ended response

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q4A = 98 or 99; SKIP TO Q5B

4B\_X. "When would you typically be done [INSERT 4A\_X]?"

TIME OF DAY

\_\_\_ : \_\_\_ AM/PM

[ROUND TO CLOSEST 30 MINUTE TIME. (e.g., 1:00 pm, 1:30 pm)]

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q4B\_X = 98 or 99 ASK Q4B\_X1
- IF ALL 24-HOURS ACCOUNTED FOR (48 DATA POINTS), THEN SKIP TO Q5B, OTHERWISE GO BACK TO Q4A\_X AND RESUME WITH NEXT TIME SLOT UNTIL ALL 24-HOURS ACCOUNTED FOR

4B\_X1. "How long would you typically be [INSERT 2A\_X] after [START\_TIME]?"

ACTIVITY LENGTH

\_\_\_ hours \_\_\_ minutes

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

NOTE TO INTERVIEWER:

Probe for best estimate if initially say "Don't know" or "Refused"

NOTE TO PROGRAMMER:

Coding should calculate the interval such that the next question should be at the start of the next time interval.



**SKIP LOGIC:**

- If Q4B\_X1 = 98 or 99; SKIP TO Q5B
- IF ALL 24-HOURS ACCOUNTED FOR (48 DATA POINTS), THEN CONTINUE TO Q5B, OTHERWISE GO BACK TO Q4A\_X AND RESUME WITH NEXT TIME SLOT UNTIL ALL 24-HOURS ACCOUNTED FOR

5B. Did you ever leave the ranch during lambing season and do a personal activity for an hour or more?

1. Yes
2. No

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q5B = 2, 98 or 99; SKIP TO Q5D

5B-1. How frequently did this happen?

1. Every day
2. Three to six days a week
3. Once or twice a week
4. Once a month
5. Not very often, a few times a year

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

5D. Did you ever leave the ranch during lambing season and do any of the following?  
[SINGLE RESPONSE GRID QUESTION]

**ROWS:**

- a. Go into town
- b. Go to a restaurant
- c. Go to a store

**COLUMNS:**

1. Yes
2. No

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q5D = 2, 98 or 99 for all rows; SKIP TO Q5E

5D-1. [IF Q5D = 2 OR MORE YES: How frequently did you go to each of these?]  
[IF Q5D = 1 OR YES: How frequently did you ....]  
[SINGLE RESPONSE GRID QUESTION]

**ROWS:**

- a. Go into town [if 5DA = 1]
- b. Go to a restaurant [if 5DB = 1]
- c. Go to a store [if 5DC = 1]

**COLUMNS:**

1. Every day
2. Three to six days a week
3. Once or twice a week
4. Once a month
5. Not very often, a few times a year

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

5E. Did you have any of the following when you were at the ranch during lambing season?  
[SINGLE RESPONSE GRID QUESTION]

**ROWS:**

- a. Television
- b. Cell phone for watching programs you enjoy

**COLUMNS:**

1. Yes
2. No

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

5F. Did you have regular times for meals at the ranch during lambing season?

1. Yes
2. No

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q5F = 2, 98 or 99; SKIP TO Q5G

5F-1. Were your meals ever interrupted by work during lambing season?

1. Yes
2. No

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q5F-1 = 2, 98 or 99; SKIP TO Q5G

5F-2. How frequently did this happen? Would you say...

1. Every day
2. Three to six days a week
3. Once or twice a week
4. Once a month
5. Not very often, a few times a year

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

5G. When you were at the ranch during lambing season, was your sleep ever interrupted by work?

1. Yes
2. No

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q5G = 2, 98 or 99; SKIP TO Q5H

5G-1. How frequently did this happen? Would you say...

1. Every night
2. Three to six nights a week
3. Once or twice a week
4. Once a month
5. Not very often, a few times a year

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

5H. When you were at the ranch during lambing season, did you have time periods where you were considered off duty?

1. Yes
2. No

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q5G = 2, 98 or 99; SKIP TO Q6

5I. Were your off duty time periods ever interrupted by work during lambing season?

1. Yes
2. No

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q5I = 2, 98 or 99; SKIP TO Q6

5I-1. How frequently did this happen? Would you say...

1. Every day

2. Three to six days a week

3. Once or twice a week

4. Once a month

5. Not very often, a few times a year

98. (DO NOT READ) Don't know

99. (DO NOT READ) Refused

[IF MUTLI RANCH FIELD IS 1, ASK Q6 OTHERWISE SKIP TO TEXT BEFORE Q7.  
FOR NEW RANCH FIELD – INSERT RANCH NAME IN SECOND POSITION OR  
THREE OR FOUR AS APPLICABLE.]

6. Our records indicate you worked for [NEW RANCH – POSITION 2, 3 or 4]. Are the employment experiences you just told me about for [INPUT SURVEY RANCH POSITION ONE NAME] the same as your work experiences for [NEW RANCH– POSITION 2, 3 or 4]?

1. Yes [CHECK IF ADDITIONAL RANCHES AVAILABLE TO ASK ABOUT IN POSITION 3 OR 4, OTHERWISE SKIP TO TEXT BEFORE Q7]
2. No [CONTINUE WITH Q6A]

98. (DO NOT READ) Don't Know [CHECK IF ADDITIONAL RANCHES AVAILABLE TO ASK ABOUT IN POSITION 3 OR 4, OTHERWISE SKIP TO TEXT BEFORE Q7]

99. (DO NOT READ) Refused [SKIP TO TEXT BEFORE Q7]

- Q6A. I would like to ask you the same questions again and have you answer them regarding your work for [NEW RANCH– POSITION 2, 3 or 4] and we will pay you an additional \$20. Can we begin the questions?

1. Yes, continue to ask questions about [NEW RANCH– POSITION 2, 3 or 4]
2. No, do not want to answer questions about [NEW RANCH– POSITION 2, 3 or 4]

[IF YES, GO BACK TO Q2A\_X AND CONTINUE THROUGH 5I-1 AND ADD “NEW\_2, NEW\_3 or NEW\_4” TO VARIABLE NAMES.]

[IF NO, PROCEED WITH TEXT BEFORE 7]

We are almost finished, I just have a few concluding questions that will be used for statistical purposes.

7. Please think about all the work experiences you have described for me during this survey. How sure are you that the answers you gave me accurately describe your work experiences at [INPUTE RANCH NAME]? [IF Q6A=1 ADD, ...”and [INSERT NEW RANCH]?”]

1. Not sure at all
2. Slightly sure
3. Moderately sure
4. Very sure
5. Completely sure

98. (DO NOT READ) Don’t know  
99. (DO NOT READ) Refused

8. What is the highest level of education you have completed? [DO NOT READ CHOICES]

1. Less than grade level 5
2. Grade level 5-8
3. Grade level 9-11
4. High school diploma
5. More than high school

98. (DO NOT READ) Don’t know  
99. (DO NOT READ) Refused

9. What is your age?

[ENTER VALUE 16 TO 99 OR RF FOR REFUSED]

10. Prior to my call today, did you know anything about a lawsuit involving Western Range?

1. YES
2. NO
8. (DO NOT READ) Don’t Know
9. (DO NOT READ) Refused

**SKIP LOGIC:**

- If Q10 = 2, 98 OR 99, SKIP TO CONCLUDING STATEMENT

11. Please tell me, in as much detail as you can, everything you can remember about the purpose of any lawsuit involving Western Range. I am going to type your answer as you speak it, so it would help me if you speak slowly while I type. Please don’t tell me how you learned what you

know or who told you – just tell me what you know about the purpose of any lawsuit involving Western Range.

TYPE OPEN-ENDED ANSWER

**[PROBE REPEADETLY “WHAT ELSE DO YOU REMEMBER ABOUT THE PURPOSE OF ANY LAWSUIT INVOLVING WESTERN RANGE?” UNTIL THE RESPONDENT SAYS “NOTHING”]**

**CONCLUDING STATEMENT:** That’s all the questions I have for you. Thank you very much for your help. We would like to send you the \$20 (or \$40, \$60 or \$80 depending on numbers of times Q6A = 1). What would be the best way to send you the money?

- 01 MAIL CHECK (United States Address Only)
- 02 E-MAIL AMAZON GIFT CARD
- 03 PayPal
- 04 E-mail for arrangements
- 05 Other (Specify)
- 06 PREFER NOT TO RECEIVE

[IF E-MAIL]

What e-mail should we send that to?

[ENTER E-MAIL]

[IF MAIL CHECK]

To what address should we send the check? Please allow for up to three weeks for it to arrive.

[COLLECT FULL ADDRESS INFORMATION]

Thank you and have a good day/evening.



Nombre del encuestado: \_\_\_\_\_

Hola, ¿podría hablar con [NOMBRE DEL ENCUESTADO]? No le estoy vendiendo nada.

**SI LA PERSONA QUE ATIENDE EL TELÉFONO DICE: "¿Quién habla?"**

Mi nombre es \_\_\_\_\_, llamo en nombre de Davis Research para hablar con [NOMBRE DEL ENCUESTADO] acerca de su trabajo en Western Range y estamos ofreciendo \$20 por responder a una encuesta. Le quiero asegurar que no estamos tratando de venderle nada.

**SI LA PERSONA QUE ATIENDE EL TELÉFONO DICE: "¿Por qué llama?" / ¿Podría decirme el motivo de su llamada?"**

Nos han pedido hacer una encuesta de parte de los abogados que representan a los pastores que trabajan en Estados Unidos para Western Range.

**SI NO ATIENDE NADIE, DEBE DEJAR EL SIGUIENTE MENSAJE DE VOZ:**

Hola, mi nombre es \_\_\_\_\_ y llamo de parte de Davis Research, el motivo de la llamada no es venderle nada. Estoy llamando para hacer una encuesta sobre temas relacionados con el empleo en Western Range por pedido de los abogados que representan a los pastores. Le agradecería que me devuelva la llamada al \_\_\_\_\_ para poder realizar la encuesta con usted. La encuesta le tomará aproximadamente 20 minutos. Como muestra de agradecimiento, le enviaremos \$20 por responder a la encuesta.

**UNA VEZ QUE EL ENCUESTADO ESTÉ EN EL TELÉFONO:**

Hola, soy \_\_\_\_\_ y llamo en representación de Davis Research. Estoy llamando para hacer una encuesta sobre temas relacionados con el empleo en Western Range por pedido de los abogados que representan a los pastores. La encuesta le tomará aproximadamente 20 minutos. Como muestra de agradecimiento, le enviaremos \$20 por responder a la encuesta.

Esta encuesta es parte de un asunto de litigio y, por lo tanto, necesito que sus respuestas sean tan precisas como sea posible. Sus respuestas no serán anónimas y los demandados de Western Range podrían cuestionar sus respuestas. Por eso, tómese su tiempo para responder las preguntas. Aunque no esté completamente seguro de la exactitud de alguna respuesta, trate de responder de la mejor manera posible. Si no sabe la respuesta de alguna pregunta, está bien que diga que "no sabe". Simplemente necesitamos que las respuestas de la encuesta sean tan exactas y sinceras como sea posible.

**LEER SOLO SI ES NECESARIO:** En caso de que haya alguna pregunta sobre sus respuestas a la encuesta, será representado gratuitamente por los abogados laborales. Es poco probable que esto ocurra, dado que habrá cientos de personas respondiendo a la encuesta. Es ilegal que Western Range tome medidas contra usted por participar en esta encuesta.

**LEER SOLO SI ES NECESARIO, SI EL ENCUESTADO QUIERE MANTENER SU ANONIMATO:** No se puede garantizar que su identidad esté protegida. Es ilegal que Western Range tome medidas contra usted por participar en esta encuesta, además, los abogados que representan a los trabajadores que están demandando a la Western Range lo representarán gratuitamente.

**LEER SI SE REHÚSA A RESPONDER LA ENCUESTA Y REGISTRAR LA RESPUESTA:** Es muy importante saber por qué no desea responder a la encuesta, ¿sería tan amable de decirme sus motivos? **INTERVIEWER NOTE:** Responda repetidamente, preguntando: ¿Hay algún otro motivo por el cual no desea responder a la encuesta? Continuar preguntando hasta que el encuestado diga: "No hay ningún otro motivo".

La encuesta comenzará preguntándole sobre las granjas en las que trabajó. Necesito confirmar dónde trabajo y en qué fechas.

[INFORMACIÓN DE LA GRANJA – INGRESAR EL NOMBRE DE LA GRANJA EN LA PRIMERA, SEGUNDA, TERCERA O CUARTA POSICIÓN, SEGÚN CORRESPONDA]

1. Nuestros registros indican que usted trabajó para el [COLOQUE EL NOMBRE DEL RANCHO] en el pasado. ¿Eso le suena correcto?

1. Sí
2. No [TERMINAR ENTREVISTA]

99. (NO LEA) Rechazado [TERMINAR ENTREVISTA]

NOTA PARA EL PROGRAMADOR: cree la variable "MULTI FUNDO" para personas que hayan trabajado en varios fundos. Asígnele un "1" a las personas que hayan trabajado en varios fundos y un "0" a aquellos que solo han trabajado en un fundo.

#### **LÓGICA DE EXCLUSIÓN:**

- Si la P1 = 1 y MULTI FUNDO = 0 entonces lea, "Esta encuesta solo está relacionada a su experiencia laboral en [COLOQUE EL NOMBRE DEL FUNDO] en cualquier momento entre mayo de 2010 a diciembre de 2018. Si trabajó como pastor en cualquier otro momento, por favor no tenga en cuenta esas experiencias laborales al responder las preguntas". Luego continúe con la P2.
  - Si la P1 = 1 y MULTI FUNDO = 1 entonces lea, "Esta encuesta solo está relacionada a su experiencia laboral en [COLOQUE EL NOMBRE DEL FUNDO] en cualquier momento entre mayo de 2010 a diciembre de 2018. Comprendemos que trabajó en otros fundos y le preguntaremos sobre eso al final de la encuesta". Luego continúe con la P2.
2. ¿Trabajó como pastor de un rebaño de ovejas o de cabras bajo su responsabilidad?
- [SI EL ENCUESTADO RESPONDE AMBOS, PREGUNTAR: "Entonces, ¿trabajó principalmente con ovejas o cabras?"]
1. Sí, ovejas
  2. Sí, cabras

4. Si, otro ganado
3. No

99. (NO LEER) No responde [FINALIZAR LA ENTREVISTA]

**LÓGICA DE OMISIÓN:**

- Si Q2 = 3; PASAR A Q4

**NOTA DE PROGRAMACIÓN:** Si Q2 es 1, sin cambios a continuación, pero si Q2 es 2, entonces reemplazar "OVEJA" por "CABRA" para una encuesta equilibrada.

- If Q2 =2, then “rebaño de ovejas” pasa a ser “cabras”
- If Q2 =2, then “ovejas” pasa a ser “cabras”
- If Q2 = 4, then “rebaño de ovejas” pasa a ser “ganado”
- If Q2 = 4, then “ovejas” pasa a ser “ganado”

Las siguientes preguntas son acerca de su día de trabajo habitual cuando era pastor a cargo de un rebaño de ovejas. "Habitual" significa lo que hacía la mayoría de los días de trabajo cuando estaba por la granja, haciendo pastar al rebaño. Repasaremos un día completo de 24 horas y le preguntaré sobre todas las diferentes cosas que hizo típicamente.

[COMENZAR BUCLE DE Q2. COMPLETAR LA VARIABLE START\_TIME con 4:00 a. m. INCREMENTAR LOS DATOS EN UN BUCLE DE 24 HORAS, EN INCREMENTOS DE 30 MINUTOS. UNA VEZ QUE OBTENGA LOS DATOS DE LOS 48 PUNTOS DE DATOS, PASAR A Q3.]

2A\_X. [INICIAL: Comencemos. Cuando trabajaba como pastor en el campo, ¿qué hacía típicamente a las 4:00 a. m.? [NO LEER LAS OPCIONES]

[TODAS LAS SIGUIENTES: Ahora bien, ¿qué solía hacer a [INSERTAR SIGUIENTE ESPACIO DE HORA ABIERTO] [SEGÚN SEA NECESARIO] cuando trabajaba como pastor en el campo?"]

[ENTREVISTADOR: Si se menciona más de una labor, decir: "Entiendo que hacía más de una cosa, pero, ¿qué estaba haciendo principalmente a las <INSERTAR HORA>?"]

1. Dormía
2. Preparaba la comida y comía
3. Se bañaba o juntaba agua para el baño
4. Tiempo libre / hacía lo que quería
5. Atendía al rebaño mientras pastaba en el campo
6. Reunía rebaños y juntaba a los animales descarriados
7. Hacía descansar al rebaño
8. Guardaba el rebaño

9. Administraba medicamentos o empapaba
10. Levantaba el campamento y se trasladaba a un nuevo lugar
11. Llevaba agua para el rebaño
12. Otro: codificar respuesta abierta

98. (NO LEER) No sabe
99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q2A = 98 o 99; PASAR A Q3

2B\_X. “¿Cuándo terminaría típicamente? [INSERTAR 2A\_X]?”

HORA DEL DÍA

\_\_\_ : \_\_\_ A. M. / P. M.

[REDONDEAR EN 30 MINUTOS. (ejemplo: 1:00 p. m., 1:30 p. m.)]

98. (NO LEER) No sabe
99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q2B\_X = 98 o 99 PREGUNTAR Q2B\_X1
- SI SE COMPLETARON LAS 24 HORAS (48 PUNTOS DE DATOS), PASAR A Q3, DE LO CONTRARIO, VOLVER A Q2A\_X Y RETOMAR CON EL SIGUIENTE ESPACIO HASTA COMPLETAR LAS 24 HORAS.

2B\_X1. “¿Cuánto tiempo típicamente [INSERTAR 2A\_X] después de [START\_TIME]?”

DURACIÓN DE LA ACTIVIDAD

\_\_\_ horas \_\_\_ minutos

98. (NO LEER) No sabe
99. (NO LEER) No responde

NOTA PARA EL ENTREVISTADOR:

Sondear mejor estimación si inicialmente dice: "No sé" o "No responde".

NOTA PARA EL PROGRAMADOR:

La codificación debe calcular el intervalo de manera que la siguiente pregunta quede al comienzo del siguiente intervalo de tiempo.

**LÓGICA DE OMISIÓN:**

- Si Q2B\_X1 = 98 o 99; PASAR A Q3
- SI SE COMPLETARON LAS 24 HORAS (48 PUNTOS DE DATOS), PASAR A Q3, DE LO CONTRARIO, VOLVER A Q2A\_X Y RETOMAR CON EL SIGUIENTE ESPACIO HASTA COMPLETAR LAS 24 HORAS.

Tengo unas preguntas más sobre sus tareas laborales cuando estaba en la granja con el rebaño.

3. Si cuando dormía escuchaba algún disturbio, ¿se levantaba para ir a ver cómo estaban las ovejas?

1. Sí
2. No

98. (NO LEER) No sabe

99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q3 = 2, 98 o 99; PASAR A Q3B

3A. ¿Con qué frecuencia ocurría algo así? Diría que...

1. Todas las noches
2. Tres a seis noches por semana
3. Una o dos veces a la semana
4. Una vez al mes
5. No ocurría a menudo, algunas veces al año

98. (NO LEER) No sabe

99. (NO LEER) No responde

3B. Si estaba preparando la cena o comiendo, bañándose o descansando y escuchaba un disturbio con las ovejas, ¿dejaba de hacer lo que estaba haciendo para ir a ver a las ovejas?

1. Sí
2. No

98. (NO LEER) No sabe

99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q3B = 2, 98 o 99; PASAR A Q3C

3B-1. ¿Con qué frecuencia ocurría algo así? Diría que...

1. Todos los días
  2. Tres a seis días por semana
  3. Una o dos veces a la semana
  4. Una vez al mes
  5. No ocurría a menudo, algunas veces al año
98. (NO LEER) No sabe  
99. (NO LEER) No responde

3C. ¿Usted siempre era el responsable de las ovejas, sin importar qué estuviera haciendo?

1. Sí
  2. No
98. (NO LEER) No sabe  
99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q3C = 1, 98 o 99; PASAR A Q3D

3C-1. En un día de trabajo típico, ¿cuántas horas por día usted no estaba a cargo del cuidado de las ovejas?

CODIFICAR NÚMERO DE HORAS [CLASIFICAR DE 0.5 A 23.5]

98. (NO LEER) No sabe  
99. (NO LEER) No responde

3D. ¿Alguna vez dejó al rebaño de ovejas para hacer una actividad personal durante una hora o más?

1. Sí
2. No

98. (NO LEER) No sabe

99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q3D = 2, 98 o 99; PASAR A Q3C

3D-1. ¿Con qué frecuencia ocurría algo así? Diría que...

1. Todos los días

2. Tres a seis días por semana

3. Una o dos veces a la semana

4. Una vez al mes

5. No ocurría a menudo, algunas veces al año

98. (NO LEER) No sabe

99. (NO LEER) No responde

3F. ¿Alguna vez dejó al rebaño para ir a alguno de los siguientes lugares?  
[PREGUNTA DE RESPUESTA ÚNICA]

**FILAS:**

a. Ir a la ciudad

b. Ir a un restaurante

c. Ir a una tienda

**COLUMNAS:**

1. Sí

2. No

98. (NO LEER) No sabe

99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q3F = 2, 98 o 99 para todas las filas; PASAR A Q3G

3F-1. [SI 2 O MÁS SON SÍ EN 3F, DECIR: ¿Con qué frecuencia iba a cada uno de estos lugares?

[SI SOLO 1 ES SÍ EN 3F, DECIR: ¿Con qué frecuencia usted...?" Diría que...  
[PREGUNTA DE RESPUESTA ÚNICA]

**FILAS:**

- a. Iba a la ciudad [si 3FA = 1]
- b. Iba a un restaurante [si 3FB = 1]
- c. Iba a una tienda [si 3FC = 1]

**COLUMNAS:**

- 1. Todos los días
- 2. Tres a seis días por semana
- 3. Una o dos veces a la semana
- 4. Una vez al mes
- 5. No ocurría a menudo, algunas veces al año
- 98. (NO LEER) No sabe
- 99. (NO LEER) No responde

- 3G. ¿Tenía alguno de los siguientes artículos cuando estaba en la granja?  
[PREGUNTA DE RESPUESTA ÚNICA]

**FILAS:**

- a. Televisión
- b. Teléfono celular para ver programas que disfruta

**COLUMNAS:**

- 1. Sí
- 2. No
- 98. (NO LEER) No sabe
- 99. (NO LEER) No responde

4. ¿Trabajó en la granja durante la temporada de cría, o en otras ocasiones en las que no estaba solo pastando al rebaño, sino que estaba con otros pastores y trabajadores todos juntos en la granja?

- 1. Sí
- 2. No
- 98. (NO LEER) No sabe
- 99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**



- Si Q4 = 2; PASAR A Q6

Las siguientes preguntas son sobre un día típico de trabajo cuando estaba en la granja trabajando con otros trabajadores durante la temporada de cría o haciendo otra tarea. Típico significa trabajo que usted hacía de manera frecuente y repetida. Repasaremos un día completo y le preguntaré sobre todas las diferentes cosas que hizo típicamente.

[COMENZAR BUCLE DE Q4A. COMPLETAR LA VARIABLE START\_TIME con 4:00 a. m.]

4A\_X. [INICIAL: Comencemos. Cuando trabajaba en la granja con otros trabajadores, ¿qué hacía típicamente a las 4:00 a. m.? [NO LEER LAS OPCIONES]

[TODAS LAS SIGUIENTES: Ahora bien, ¿qué solía hacer a [INSERTAR SIGUIENTE ESPACIO DE HORA ABIERTO] [SEGÚN SEA NECESARIO] cuando estaba en la granja con otros trabajadores?"]

[ENTREVISTADOR: Si se menciona más de una actividad, decir: "Entiendo que hacía más de una cosa, pero, ¿qué estaba haciendo principalmente a las <INSERTAR HORA>?"]

1. Dormía
2. Preparaba la comida o comía
3. Se bañaba
4. Tiempo libre / hacía lo que quería
5. Revisaba si los animales tenían algún signo de enfermedad
6. Asistía con la cría
7. Asistía a cortar o cercenar rabos
8. Esquilaba
9. Otro: codificar respuesta abierta

98. (NO LEER) No sabe

99. (NO LEER) No responde

#### **LÓGICA DE OMISIÓN:**

- Si Q4A = 98 o 99; PASAR A Q5B

4B\_X. “¿Cuándo terminaba típicamente? [INSERTAR 2A\_X]?”

HORA DEL DÍA

\_\_\_ : \_\_\_ A. M. / P. M.

[REDONDEAR EN 30 MINUTOS. (ejemplo: 1:00 p. m., 1:30 p. m.)]

98. (NO LEER) No sabe

99. (NO LEER) No responde

#### **LÓGICA DE OMISIÓN:**

- Si Q4B\_X = 98 o 99 PREGUNTAR Q4B\_X1
- SI SE COMPLETARON LAS 24 HORAS (48 PUNTOS DE DATOS), PASAR A Q5B, DE LO CONTRARIO, VOLVER A Q4A\_X Y RETOMAR CON EL SIGUIENTE ESPACIO HASTA COMPLETAR LAS 24 HORAS.

4B\_X1. “¿Cuánto tiempo solía [INSERTAR 2A\_X] después de [START\_TIME]?”

DURACIÓN DE LA ACTIVIDAD

\_\_\_ horas \_\_\_ minutos

98. (NO LEER) No sabe

99. (NO LEER) No responde

NOTA PARA EL ENTREVISTADOR:

Sondear la mejor estimación si inicialmente dice: "No sé" o "No responde".

NOTA PARA EL PROGRAMADOR:

La codificación debe calcular el intervalo de manera que la siguiente pregunta quede al comienzo del siguiente intervalo de tiempo.

**LÓGICA DE OMISIÓN:**

- Si Q4B\_X1 = 98 o 99; PASAR A Q3
- SI SE COMPLETARON LAS 24 HORAS (48 PUNTOS DE DATOS), ENTONCES CONTINUAR CON Q5B, DE LO CONTRARIO, VOLVER A Q4A\_X Y RETOMAR CON EL SIGUIENTE ESPACIO HASTA COMPLETAR LAS 24 HORAS.

5B. ¿Alguna vez dejó la granja durante la temporada de cría para hacer una actividad personal durante una hora o más?

1. Sí
2. No

98. (NO LEER) No sabe

99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q5B = 2, 98 o 99; PASAR A Q5D

5B-1. ¿Con qué frecuencia ocurría algo así?

1. Todos los días

2. Tres a seis días por semana
3. Una o dos veces a la semana
4. Una vez al mes
5. No ocurría a menudo, algunas veces al año
98. (NO LEER) No sabe
99. (NO LEER) No responde

5D. ¿Alguna vez dejó la granja durante la temporada de cría para hacer algo de lo siguiente?  
[PREGUNTA DE RESPUESTA ÚNICA]

FILAS:

- a. Ir a la ciudad
- b. Ir a un restaurante
- c. Ir a una tienda

COLUMNAS:

1. Sí
2. No

98. (NO LEER) No sabe
99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q5D = 2, 98 o 99 para todas las filas; PASAR A Q5E

5D-1. [SI Q5D = 2 O MÁS ES SÍ: ¿Con qué frecuencia iba a cada uno de estos lugares?]  
[SI Q5D = 1 O ES SÍ: ¿Con qué frecuencia usted...]  
[PREGUNTA DE RESPUESTA ÚNICA]

FILAS:

- a. Iba a la ciudad [si 5DA = 1]
- b. Iba a un restaurante [si 5DB = 1]
- c. Iba a una tienda [si 5DC = 1]

COLUMNAS:

1. Todos los días
2. Tres a seis días por semana
3. Una o dos veces a la semana

4. Una vez al mes

5. No ocurría a menudo, algunas veces al año

98. (NO LEER) No sabe

99. (NO LEER) No responde

5E. ¿Tenía alguno de los siguientes artículos cuando estaba en la granja durante la temporada de cría?

[PREGUNTA DE RESPUESTA ÚNICA]

FILAS:

a. Televisión

b. Teléfono celular para ver programas que disfruta

COLUMNAS:

1. Sí

2. No

98. (NO LEER) No sabe

99. (NO LEER) No responde

5F. ¿Tenía un horario regular para comer en la granja durante la temporada de cría?

1. Sí

2. No

98. (NO LEER) No sabe

99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q5F = 2, 98 o 99; PASAR A Q5D

5F-1. ¿Alguna vez el trabajo interrumpía su hora de comer durante la temporada de cría?

1. Sí

2. No

98. (NO LEER) No sabe

99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q5F-1 = 2, 98 o 99; PASAR A Q5G



5F-2. ¿Con qué frecuencia ocurría algo así? Diría que...

1. Todos los días
  2. Tres a seis días por semana
  3. Una o dos veces a la semana
  4. Una vez al mes
  5. No ocurría a menudo, algunas veces al año
98. (NO LEER) No sabe  
99. (NO LEER) No responde

5G. Cuando estaba en la granja durante la temporada de cría, ¿el trabajo alguna vez interrumpía sus horas de sueño?

1. Sí
  2. No
98. (NO LEER) No sabe  
99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q5G = 2, 98 o 99; PASAR A Q5H

5G-1. ¿Con qué frecuencia ocurría algo así? Diría que...

1. Todas las noches
  2. Tres a seis noches por semana
  3. Una o dos veces a la semana
  4. Una vez al mes
  5. No ocurría a menudo, algunas veces al año
98. (NO LEER) No sabe  
99. (NO LEER) No responde

5H. Cuando estaba en la granja durante la temporada de cría, ¿había periodos en los que usted estaba fuera de servicio?

1. Sí
2. No

98. (NO LEER) No sabe

99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q5G = 2, 98 o 99; PASAR A Q6

5I. ¿Alguna vez el trabajo interrumpía los periodos en los que usted estaba fuera de servicio durante la temporada de cría?

1. Sí
2. No

98. (NO LEER) No sabe

99. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q5I = 2, 98 o 99; PASAR A Q6

5I-1. ¿Con qué frecuencia ocurría algo así? Diría que...

1. Todos los días
2. Tres a seis días por semana
3. Una o dos veces a la semana
4. Una vez al mes
5. No ocurría a menudo, algunas veces al año

98. (NO LEER) No sabe

99. (NO LEER) No responde

[SI EL CAMPO MULTI RANCH (MÚLTIPLES GRAJAS) ES 1, PREGUNTAR Q6, DE LO CONTRARIO, SALTAR EL TEXTO HASTA Q7. PARA EL CAMPO DE GRANJA NUEVA – INGRESAR EL NOMBRE DE LA GRANJA EN LA SEGUNDA, TERCERA O CUARTA POSICIÓN, SEGÚN CORRESPONDA.]

6. Nuestros registros indican que usted trabajó para [GRANJA NUEVA – POSICIÓN 2, 3 o 4]. ¿La experiencia de trabajo sobre la que recién me contaba en [INGRESAR NOMBRE DE LA GRANJA DE LA POSICIÓN UNO] ha sido la misma experiencia que ha tenido en [GRANJA NUEVA – POSICIÓN 2, 3 o 4]?

1. Sí [CONTINUAR CON Q6A]
2. No [COMPROBAR SI HAY MÁS GRANJAS DISPONIBLES SOBRE LAS CUALES PREGUNTAR PARA LA POSICIÓN 3 O 4, SALTAR EL TEXTO HASTA Q7]

98. (NO LEER) No sabe [SALTAR EL TEXTO HASTA Q7]

99. (NO LEER) No responde [SALTAR EL TEXTO HASTA Q7]

- Q6A. Ahora, le haré las mismas preguntas de nuevo y le pido que responda con respecto a su trabajo en [GRANJA NUEVA – POSICIÓN 2, 3 o 4] y le pagaremos \$20 adicionales. ¿Comenzamos con las preguntas?

1. Sí, continuar con las preguntas sobre [GRANJA NUEVA – POSICIÓN 2, 3 o 4]
2. No, no quiere responder las preguntas sobre [GRANJA NUEVA – POSICIÓN 2, 3 o 4]

[SI DICE "SÍ", VOLVER A Q2A\_X Y CONTINUAR DESDE 5I-1 Y AGREGAR "NEW\_2, NEW\_3 o NEW\_4" A LOS NOMBRES DE LAS VARIABLES.]

[SI DICE "NO", SALTAR EL TEXTO HASTA 7]



Ya casi terminamos, ahora unas preguntas finales con fines estadísticos.

7. Piense en todas las experiencias de trabajo que describió durante la encuesta. ¿Qué tan seguro está de que las respuestas que me dio describen con precisión su experiencia laboral en [INGRESAR NOMBRE DE LA GRANJA]? [SI Q6A=1 AGREGAR, ... "y [INGRESAR NUEVA GRANJA]?"]

1. Nada seguro
2. Algo seguro
3. Bastante seguro
4. Muy seguro
5. Completamente seguro

98. (NO LEER) No sabe

99. (NO LEER) No responde

8. ¿Cuál es el más alto nivel de educación que ha completado? [NO LEER LAS OPCIONES]

1. Menos que 5.º grado
2. Grado 5.º a 8.º
3. Grado 9.º a 11.º
4. Diploma de la escuela secundaria
5. Más educación después de la escuela secundaria

98. (NO LEER) No sabe

99. (NO LEER) No responde

9. ¿Cuántos años tiene?

[INGRESAR UN VALOR DE 16 A 99 O RF SI NO RESPONDE]

10. Antes de mi llamada de hoy, ¿había escuchado algo acerca de la demanda relacionada con Western Range?

1. Sí
2. NO
8. (NO LEER) No sabe
9. (NO LEER) No responde

**LÓGICA DE OMISIÓN:**

- Si Q7 = 2, 98 o 99, PASAR A LA DECLARACIÓN DE CIERRE

11. Por favor, dígame, con el mayor detalle posible, todo lo que pueda recordar sobre el propósito de alguna demanda involucrando Western Range. Voy a escribir su respuesta, así que me ayudaría

si habla lentamente mientras escribo. Por favor, no me diga cómo se enteró ni quién se lo conto, solo dígame lo que sabe sobre una demanda involucrando a Western Range.

RESPUESTA ABIERTA

**[SEGUIR PREGUNTANDO: "¿QUÉ MÁS RECUERDA SOBRE EL PROPÓSITO DE CUALQUIER DEMANDA QUE INVOLUCRA A WESTERN RANGE?" HASTA QUE EL ENCUESTADO DIGA: "NADA"]**

**DECLARACIÓN DE CIERRE** Estas son todas las preguntas que tenía para usted. Muchas gracias por su ayuda. Quisiéramos enviarle los \$20 (o \$40, \$60 u \$80 dependiendo de la cantidad de veces de Q6A = 1). ¿A qué dirección se los enviamos? Si actualmente está en los Estados Unidos, también puedo enviarle una tarjeta de regalo de Amazon, como alternativa. ¿Qué preferiría?

01 CHEQUE POR CORREO

02 TARJETA DE REGALO DE AMAZON POR E-MAIL

03 PREFIERE NO RECIBIR NADA

[SI ES E-MAIL]

¿A qué dirección de e-mail se la enviamos? Tenga en cuenta que la recibirá directamente de Amazon, por lo tanto, revise su carpeta de correo basura durante la próxima semana.

[INGRESAR E-MAIL]

[SI ES CHEQUE POR CORREO]

¿A qué dirección le enviamos el cheque por correo postal? Por favor espere hasta tres semanas para que llegue.

[RECOMPILAR LA INFORMACIÓN DE LA DIRECCIÓN COMPLETA]

Gracias y que tenga un buen día/buenas noches.

# **EXHIBIT C**

## **June 8, 2021**

This report presents a summary of the survey methods used to conduct the Western Range survey of sheepherders. The survey was conducted via telephone by Davis Research, an independent public opinion research organization, with headquarters in Calabasas, California.

Davis Research was responsible for programming the questionnaires onto its computer-assisted telephone interviewing system, translating the survey into Spanish, pre-testing the survey instrument, sample management, data collection, data processing and the delivery of clean and fully documented data file at the conclusion of the project.

## **Study Design Plan**

A total of 11 telephone interviews were conducted by Davis Research between December 30, 2020 and April 20, 2021. Respondents first confirmed that they worked for the ranch listed and were employed to be a sheepherder or caregiver for other animals such as goats. If respondents working during lambing seasons, additional questions were asked about that. The average interview length was 49 minutes and all surveys were conducted in Spanish. A total of four different staff members completed interviews on this project.

The questionnaire was programmed into our computer-assisted telephone interviewing (CATI) system. CATI offers numerous advantages when administering surveys by telephone. It controls the telephone scripts read to survey respondents by displaying each appropriate questionnaire item one at a time. The interviewer simply reads each question aloud over the telephone to the respondent and enters the answers given. CATI controls all skip patterns so that only the appropriate questions appear. The CATI program also performs various quality control functions by rejecting ineligible codes entered by an interviewer to any pre-coded question, and only allows answers within an acceptable range for permitting numeric

responses. It also randomizes numbers and automatically brings numbers up to be called at different times of the day and different days of the week.

### **Interviewing Training Procedures**

When hired, interviewers complete a training course and receive quarterly feedback. Additionally, they receive ongoing training and monitoring from our full-time quality assurance staff. The initial training covers standards outlined in the Marketing Research Association's code of research standards. This covers data validity, confidentiality, along with proper interviewing techniques, computer interface and system familiarity. Live monitoring of interviews was continuous by our dedicated quality assurance team, whose sole job responsibility is to monitor, train, and provide feedback directly to interviewers.

Prior to the start of data collection, all interviewers working on the study were required to attend a personal briefing session where specific calling procedures were described in detail. These sessions provided interviewers with an overview of the study and included a question-by-question review of all items included in the survey. The sessions reviewed recommended best-practice approaches for dealing with different interviewing situations, and provided specific instructions for the procedures to be followed when documenting the results of each call attempt, scheduling callbacks, and maintaining the survey's strict confidentiality procedures.

### **Contact Methods**

A total of 383 records with telephone numbers were received. Respondents had up to six different telephone numbers, while most had between one and four numbers. We made up to 12 attempts per telephone numbers with the goal of reaching the named respondent. Calls were made at different times of the day and week to maximize response rate. Our calling efforts determined that a majority of the telephone numbers were not accurate. We reached 14 respondents, 11 completed most or all of the survey and 3 refused to participate. When called,

some who answered asked us to call back, but ultimately were not able to reach the named respondent.

Those that we could not reach via telephone were sent international letters requesting they contact us. One person responded to the letter and completed the survey via telephone. No further survey respondents are expected to respond from the provided lists.

Following is a summary of our telephone contacts:

#### **Disposition of Interview Attempts**

	<b><i>Total</i></b>
<b><i>Total records Available</i></b>	<b>383</b>
<i>Total records attempted</i>	383
<i>Total completed Interviews</i>	11
<i>Refusals (Net)</i>	3
<i>Invalid Telephone Numbers / Wrong Numbers (Net)</i>	312
<i>Not available for duration of study (attempted)</i>	57
<b><i>COOPERATION RATE 2 (AAPOR)</i></b>	<b>79%</b>
<b><i>RESPONSE RATE 2 (AAPOR)</i></b>	<b>15%</b>

The calculated cooperation rate above includes refusals at any point in the survey. This percentage is within the normal and expected ranges for surveys of this type.

I am prepared to testify about all of the information contained in this report



Bill Davis  
 Managing Member  
 Davis Research LLC  
 26610 Agoura Road Suite 240  
 Calabasas, CA 91302

# **EXHIBIT 12**

OMB Approval: 1205-0466  
Expiration Date: 11/30/2011

Application for Temporary Employment Certification  
ETA Form 9142  
U.S. Department of Labor



JUL 11 2012

Please read and review the filing instructions carefully before completing the ETA Form 9142. A copy of the instructions can be found at <http://www.foreignlaborcert.doleta.gov/>. In accordance with Federal Regulations, incomplete or obviously inaccurate applications will not be certified by the Department of Labor. If submitting this form non-electronically, ALL required fields/items containing an asterisk ( \*) must be completed as well as any fields/items where a response is conditional as indicated by the section ( § ) symbol.

A. Employment-Based Nonimmigrant Visa Information

1. Indicate the type of visa classification supported by this application (Write classification symbol): \* H-2A

B. Temporary Need Information

1. Job Title * SHEPHERDER		3. SOC (ONET/OES) occupation title * FARMWORKER, FARM AND RANCH ANIMALS	
2. SOC (ONET/OES) code * 45.2093		4. Is this a full-time position? * <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
		Period of Intended Employment	
		5. Begin Date * 09/10/2012 (mm/dd/yyyy)	6. End Date * 09/09/2013 (mm/dd/yyyy)
7. Worker positions needed/basis for the visa classification supported by this application			
<div style="display: flex; justify-content: space-between;"> <div> <div style="border: 1px solid black; padding: 2px; width: 40px; text-align: center;">3</div> <p>Total Worker Positions Being Requested for Certification *</p> </div> <div> <p>Basis for the visa classification supported by this application (Indicate the total workers in each applicable category based on the total workers identified above)</p> <div style="display: flex; justify-content: space-between;"> <div> <div style="border: 1px solid black; padding: 2px; width: 40px; text-align: center;">0</div> <p>a. New employment *</p> </div> <div> <div style="border: 1px solid black; padding: 2px; width: 40px; text-align: center;">0</div> <p>d. New concurrent employment *</p> </div> </div> <div style="display: flex; justify-content: space-between;"> <div> <div style="border: 1px solid black; padding: 2px; width: 40px; text-align: center;">3</div> <p>b. Continuation of previously approved employment * without change with the same employer</p> </div> <div> <div style="border: 1px solid black; padding: 2px; width: 40px; text-align: center;">0</div> <p>e. Change in employer *</p> </div> </div> <div style="display: flex; justify-content: space-between;"> <div> <div style="border: 1px solid black; padding: 2px; width: 40px; text-align: center;">0</div> <p>c. Change in previously approved employment *</p> </div> <div> <div style="border: 1px solid black; padding: 2px; width: 40px; text-align: center;">0</div> <p>f. Amended petition *</p> </div> </div> </div> </div>			
8. Nature of Temporary Need: (Choose only one of the standards) *			
<input checked="" type="checkbox"/> Seasonal <input type="checkbox"/> Peakload <input type="checkbox"/> One-Time Occurrence <input type="checkbox"/> Intermittent or Other Temporary Need			
9. Statement of Temporary Need *			
OTHER: WESTERN RANGE ASSOCIATION EMPLOYEES ARE NEEDED ON A YEAR ROUND BASIS			

ETA Form 9142  
Case Number

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Case Status: Certified

Validity Period: 9/10/12 to 9/9/13

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OMB Approval: 1205-0466  
Expiration Date: 11/30/2011

Application for Temporary Employment Certification  
ETA Form 9142  
U.S. Department of Labor



### C. Employer Information

**Important Note:** Enter the full name of the individual employer, partnership, or corporation and all other required information in this section. For joint employer or master applications filed on behalf of more than one employer under the H-2A program, identify the main or primary employer in the section below and then submit a separate attachment that identifies each employer, by name, mailing address, and total worker positions needed, under the application.

1. Legal business name *		
WESTERN RANGE ASSOCIATION		
2. Trade name/Doing Business As (DBA), if applicable		
3. Address 1 *		
1245 E. BRICKYARD ROAD, SUITE 190		
4. Address 2		
5. City *	6. State *	7. Postal code *
SALT LAKE CITY	UTAH	84106
8. Country *	9. Province	
USA		
10. Telephone number *	11. Extension	
801-486-2004		
12. Federal Employer Identification Number (FEIN from IRS) *	13. NAICS code (must be at least 4-digits) *	
14. Number of non-family full-time equivalent employees	15. Annual gross revenue	16. Year established
9	2,278,500.00	1953
17. Type of employer application (choose only one box below) *		
<input type="checkbox"/> Individual Employer <input type="checkbox"/> Association – Sole Employer (H-2A only)		
<input type="checkbox"/> H-2A Labor Contractor or Job Contractor <input checked="" type="checkbox"/> Association – Joint Employer (H-2A only)		
<input type="checkbox"/> Association – Filing as Agent (H-2A only)		

### D. Employer Point of Contact Information

**Important Note:** The information contained in this Section must be that of an employee of the employer who is authorized to act on behalf of the employer in labor certification matters. The information in this Section must be different from the agent or attorney information listed in Section E, unless the attorney is an employee of the employer. For joint employer or master applications filed on behalf of more than one employer under the H-2A program, enter only the contact information for the main or primary employer (e.g., contact for an association filing as joint employer) under the application.

1. Contact's last (family) name *	2. First (given) name *	3. Middle name(s) *
MELENDEZ	LEONORA	J
4. Contact's job title *		
LEGAL DOCUMENTS SPECIALIST		
5. Address 1 *		
1245 E. BRICKYARD ROAD, SUITE 190		
6. Address 2		
7. City *	8. State *	9. Postal code *
SALT LAKE CITY	UTAH	84106
10. Country *	11. Province	
USA		
12. Telephone number *	13. Extension	14. E-Mail address
801-486-2004	101	15. legal@westernrange.net

ETA Form 9142  
Case Number

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Case Status: Certified

Validity Period: 9/10/12 to 9/9/13

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**E. Attorney or Agent Information (If applicable)**

1. Is/are the employer(s) represented by an attorney or agent in the filing of this application (including associations acting as agent under the H-2A program)? If "Yes", complete Section E. *			<input type="checkbox"/> Yes	<input type="checkbox"/> No
2. Attorney or Agent's last (family) name §		3. First (given) name §		4. Middle name(s) §
5. Address 1 §				
6. Address 2				
7. City §		8. State §	9. Postal code §	
10. Country §		11. Province		
12. Telephone number §	13. Extension	14. E-Mail address		
15. Law firm/Business name §			16. Law firm/Business FEIN §	
17. State Bar number (only if attorney) §		18. State of highest court where attorney is in good standing (only if attorney) §		
19. Name of the highest court where attorney is in good standing (only if attorney) §				

**F. Job Offer Information**

**a. Job Description**

1. Job Title * SHEEPHERDER	
2. Number of hours of work per week ON CALL 24/7 Basic *: _____ Overtime: _____	3. Hourly Work Schedule * ON CALL 24/7 A.M. (h:mm): _____ : _____ P.M. (h:mm): _____ : _____
4. Does this position supervise the work of other employees? * Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	4a. If yes, number of employees worker will supervise (if applicable) § _____
5. Job duties – A description of the duties to be performed <b>MUST</b> begin in this space. If necessary, add attachment to <u>continue and complete</u> description. *	
<p>"Attends sheep and/or goat flock grazing on range pasture: Herds flock and rounds up strays using trained dogs. Beds down flock near evening campsite. Guards flock from predatory animals and from eating poisonous plants. Drenches sheep and/or goats. May examine animals from signs of illness and administer vaccines, medications and insecticides according to instructions. May assist in lambing, docking, and shearing. May perform other farm or ranch chores related to the production of husbandry of sheep and/or goat on an incidental basis."</p> <p>Must have experience with 800 - 1000 head flocks. One reference may be required.</p>	

ETA Form 9142  
Case Number: [REDACTED]

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Case Status: Certified

Validity Period: 9/10/12 to 9/9/13

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OMB Approval: 1205-0466  
 Expiration Date: 11/30/2011



Application for Temporary Employment Certification  
 ETA Form 9142  
 U.S. Department of Labor

**F. Job Offer Information (continued)**

**b. Minimum Job Requirements**

1. Education: minimum U.S. diploma/degree required *	
<input checked="" type="checkbox"/> None <input type="checkbox"/> High School/GED <input type="checkbox"/> Associate's <input type="checkbox"/> Bachelor's <input type="checkbox"/> Master's <input type="checkbox"/> Doctorate (PhD) <input type="checkbox"/> Other degree (JD, MD, etc.)	
1a. If "Other degree" in question 1, specify the diploma/degree required §	1b. Indicate the major(s) and/or field(s) of study required § (May list more than one related major and more than one field)
2. Does the employer require a second U.S. diploma/degree? * <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
2a. If "Yes" in question 2, indicate the second U.S. diploma/degree and the major(s) and/or field(s) of study required §	
3. Is training for the job opportunity required? * <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
3a. If "Yes" in question 3, specify the number of months of training required § UP TO SIX MONTHS	3b. Indicate the field(s)/name(s) of training required § (May list more than one related field and more than one type) SHEEPHERDER
4. Is employment experience required? * <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
4a. If "Yes" in question 4, specify the number of months of experience required § 6 MONTHS	4b. Indicate the occupation required § SHEEPHERDER
5. Special Requirements - List specific skills, licenses/certifications, and requirements of the job opportunity. *	
MUST BE QUALIFIED SHEEPHERDER AND MUST BE IN GOOD HEALTH	

**c. Place of Employment Information**

1. Worksite address 1 *	
14463 PANAMA LANE	
2. Address 2	
3. City *	4. County *
BAKERSFIELD	
5. State/District/Territory *	6. Postal code *
CALIFORNIA	93313
7. Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above? *	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
7a. If Yes in question 7, identify the geographic place(s) of employment with as much specificity as possible. If necessary, submit an attachment to <u>continue and complete</u> a listing of all anticipated worksites. §	
SHEEPHERDING IS A MIGRATORY JOB, WORKERS MOVE EVERY SEASON TO DIFFERENT WORK SITES.	

ETA Form 9142

Case Number: [REDACTED]

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Case Status: Certified

Validity Period: 9/10/12 to 9/9/13

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**G. Rate of Pay**

1. Basic Rate of Pay Offered *	1a. Overtime Rate of Pay (if applicable) \$
From: \$ <u>1422.52</u> Monthly To (Optional): \$ _____ - _____	From: \$ _____ - _____ To (Optional): \$ _____ - _____
2. Per: (Choose only one) * <input type="checkbox"/> Hour <input type="checkbox"/> Week <input type="checkbox"/> Bi-Weekly <input checked="" type="checkbox"/> Month <input type="checkbox"/> Year <input type="checkbox"/> Piece Rate	
2a. If Piece Rate is indicated in question 2, specify the wage offer requirements: \$	
3. Additional Wage Information (e.g., multiple worksite applications, itinerant work, or other special procedures). If necessary, add attachment to <u>continue and complete</u> description. \$	
PLUS FREE ROOM AND BOARD AND TWO WEEKS PAID VACATION PER YEAR	

**H. Recruitment Information**

1. Name of State Workforce Agency (SWA) serving the area of intended employment *		
REFER TO ITEM #6		
2. SWA job order identification number *	2a. Start date of SWA job order *	2b. End date of SWA job order * (In H-2A this date is 50% of contract period)
3. Is there a Sunday edition of a newspaper (of general circulation) in the area of intended employment? *		<input type="checkbox"/> Yes <input type="checkbox"/> No
Name of Newspaper/Publication (in area of intended employment for H-2B only) *		Dates of Print Advertisement \$
4.	From:	To:
5.	From:	To:
6. Additional Recruitment Activities. Use the space below to identify the type(s) or source(s) of recruitment, geographic location(s) of recruitment, <u>and</u> the date(s) on which recruitment was conducted. If necessary, add attachment to <u>continue and complete</u> description. *		
<p>Open Job order and continuous efforts for domestic herders in applicable regions through local, state and federal employment services by the employer and Western Range Association. See Training and Employment Guidance Letter No. 32-10</p>		

ETA Form 9142

Case Number: [REDACTED]

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Case Status: Certified

Validity Period: 9/10/12 to 9/9/13

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**I. Declaration of Employer and Attorney/Agent**

In accordance with Federal regulations, the employer must attest that it will abide by certain terms, assurances and obligations as a condition for receiving a temporary labor certification from the U.S. Department of Labor. Applications that fail to attach Appendix A.2 or Appendix B.1 will be considered incomplete and not accepted for processing by the ETA application processing center.

1. For H-2A Applications ONLY, please confirm that you have read and agree to all the applicable terms, assurances and obligations contained in <b>Appendix A.2.</b> §	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
2. For H-2B Applications ONLY, please confirm that you have read and agree to all the applicable terms, assurances and obligations contained in <b>Appendix B.1.</b> §	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A

**J. Preparer**

Complete this section if the preparer of this application is a person other than the one identified in either Section D (employer point of contact) or E (attorney or agent) of this application.

1. Last (family) name §	2. First (given) name §	3. Middle initial §
4. Job Title §		
5. Firm/Business name §		
6. E-Mail address §		

**K. U.S. Government Agency Use (ONLY)**

Pursuant to the provisions of Section 101 (a)(15)(h)(ii) of the Immigration and Nationality Act, as amended, I hereby certify that there are not sufficient U.S. workers available and the employment of the above will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. By virtue of the signature below, the Department of Labor hereby acknowledges the following:

This certification is valid from 9/10/12 to 9/9/13

*William J. Carlson*  
Administrator

Department of Labor, Office of Foreign Labor Certification

8/13/12  
Determination Date (date signed)

Case number

Certified  
Case Status

**L. OMB Paperwork Reduction Act (1205-0466)**

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101 (a)(15)(H)(ii)). Public reporting burden for this collection of information is estimated to average 1 hour per response for H-2A and 2 hours 45 minutes for H-2B, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification \* U.S. Department of Labor \* Room C4312 \* 200 Constitution Ave., NW \* Washington, DC \* 20210. **Do NOT** send the completed application to this address.

ETA Form 9142  
Case Number:                     

FOR DEPARTMENT OF LABOR USE ONLY

Case Status: Certified

Validity Period: 9/10/12 to 9/9/13

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## Application for Temporary Employment Certification

ETA Form 9142 – APPENDIX A.2  
U.S. Department of Labor



For Use in Filing Applications Under the H-2A Agricultural Program ONLY

### A. Attorney or Agent Declaration

*I hereby certify that I am an employee of, or hired by, the employer listed in Section C of the ETA Form 9142, and that I have been designated by that employer to act on its behalf in connection with this application. If I am an agent and not an employee of the employer, then I have attached a Letter of Representation from the employer. I also certify that to the best of my knowledge the information contained herein is true and correct. I understand that to knowingly furnish false information in the preparation of this form and any supplement hereto or to aid, abet, or counsel another to do so is a felony punishable by a \$250,000 fine or 5 years in a Federal penitentiary or both (18 U.S.C. 1001).*

1. Attorney or Agent's last (family) name	2. First (given) name	3. Middle initial
4. Firm/Business name		
5. E-Mail address		
6. Signature		7. Date signed

### B. Employer Declaration

By virtue of my signature below, I HEREBY CERTIFY the following conditions of employment:

1. The job opportunity is a full-time temporary position, the qualifications for which do not substantially deviate from the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops.
2. The worksite for which the employer is requesting H-2A certification does not currently have workers on strike or being locked out in the course of a labor dispute.
3. The job opportunity is and will continue to be open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship, and the employer has conducted and will continue to conduct the required recruitment, in accordance with regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which certification is sought. Any U.S. workers who applied or apply for the job were or will be rejected only for lawful, job-related reasons, and the employer must retain records of all rejections as required by 20 CFR 655.167.
4. The job opportunity offers U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers and complies with the requirements at 20 CFR 655, Subpart B.
5. The employer understands that it must offer, recruit at, and pay a wage that is the highest of the adverse effect wage rate in effect at the time the job order is placed, the prevailing hourly or piece rate, the agreed-upon collective bargaining rate (CBA), or the Federal or State minimum wage, and, furthermore, that if a new Adverse Effect Wage Rate is published, or the employer is notified of a new prevailing wage rate during the contract period, and that new rate is higher than the wage determined by the NPC (except the CBA) during the application process the employer will increase the pay of all employees in the same job occupation to the higher rate.
6. There are no U.S. workers available in the area(s) capable of performing the temporary services or labor in the job opportunity, and the employer will conduct positive recruitment as specified by the NPC and continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until completion of 50 percent of the contract period calculated from the first date of need indicated in Section B.5 of ETA Form 9142.
7. All fees associated with processing the temporary labor certification will be paid in a timely manner.



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## Application for Temporary Employment Certification

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U.S. Department of Labor



8. During the period of employment that is the subject of the labor certification application, the employer:
  - (i) Will comply with applicable Federal, State and local employment-related laws and regulations, including health and safety laws;
  - (ii) Will provide for or secure housing for workers who are not reasonably able to return to their permanent residence at the end of the work day that complies with the applicable local, State, or Federal standards and guidelines for housing without charge to the worker;
  - (iii) Where required, has timely requested a preoccupancy inspection of the housing and received certification;
  - (iv) Will provide insurance, without charge to the worker, under a State workers' compensation law or otherwise, that meets the requirements of 20 CFR 655.122(e).
  - (v) Will provide transportation in compliance with all applicable Federal, State or local laws and regulations between the worker's living quarters (i.e., housing provided by the employer under 20 CFR 655.122(h)) and the employer's worksite without cost to the worker.
9. The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the Application for Temporary Employment Certification in the area of intended employment except for lawful, job related reasons within 60 days of the date of need, or if the employer has laid off such workers, it has offered the job opportunity that is the subject of the application to those laid-off U.S. worker(s) and the U.S. worker(s) refused the job opportunity, was rejected for the job opportunity for lawful, job-related reasons, or was hired.
10. The employer and its agents have not sought or received payment of any kind from the H-2A worker for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.
11. The employer has and will contractually forbid any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2A workers to seek or receive payments from prospective employees...
12. The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has with just cause:
  - (i) Filed a complaint under or related to Sec. 218 of the INA (8 U.S.C. 1188), or any Department regulation promulgated under Sec. 218 of the INA;
  - (ii) Instituted or caused to be instituted any proceeding under or related to Sec. 218 of the INA, or any Department regulation promulgated under Sec. 218 of the INA;
  - (iii) Testified or is about to testify in any proceeding under or related to Sec. 218 of the INA or any Department regulation promulgated under Sec. 218 of the INA;
  - (iv) Consulted with an employee of a legal assistance program or an attorney on matters related to Sec. 218 of the INA or any Department regulation promulgated under Sec. 218 of the INA; or
  - (v) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by Sec. 218 of the INA, or any Department regulation promulgated under Sec. 218 of the INA.
13. The employer has not and will not discharge any person because of that person's taking any action listed in paragraph 12(i) through (v) listed above.
14. The employer will inform H-2A workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under 20 CFR 655.135(i), unless the H-2A worker is being sponsored by another subsequent employer.
15. The employer has posted the Notice of Workers' Rights as required by 20 CFR 655.135(l) in a conspicuous place frequented by all employees.
16. If the application is being filed as an H-2A Labor Contractor the following additional attestations and obligations apply under 20 CFR 655.132:
  - (i) The H-2A Labor Contractor has provided a copy of the MSPA Farm Labor Contractor (FLC) certificate of registration if required under MSPA, 1801 U.S.C. et seq., to have such a certificate identifying the specific farm labor contracting activities it is authorized to perform;
  - (ii) The H-2A Labor Contractor has provided with this application a list of the names and locations of each fixed-site agricultural business to which the H-2A Labor Contractor expects to provide H-2A workers, the expected beginning and ending dates when the H-2A Labor Contractor will be providing the workers to each fixed site, a description of the crops and activities the workers are expected to perform at such fixed site, and copies of the fully-executed work contracts with each fixed-site agricultural business so identified;
  - (iii) The H-2A Labor Contractor is able to provide proof of its ability to discharge financial obligations under the H-2A program and has secured a surety bond as required by 29 CFR 501.9, the original of which is attached and shows the name, address, phone number, and contact person for the surety, and provides the amount of the bond (as calculated pursuant to 29 CFR 501.9);



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## Application for Temporary Employment Certification

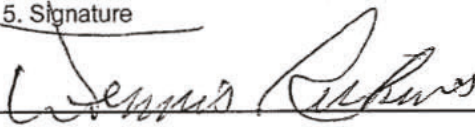
ETA Form 9142 – APPENDIX A.2  
U.S. Department of Labor



- (iv) The H-2A Labor Contractor has engaged in and will engage in recruitment efforts in each area of intended employment in which it has listed a fixed-site agricultural business as required in 20 CFR 655.121, 655.150-155; and
- (v) Where the fixed-site agricultural business(s) will provide housing or transportation to the workers, proof that:
  - a. All housing used by workers and owned, operated, or secured by the fixed-site agricultural business complies with the applicable housing standards in 20 CFR 655.122(d);
  - b. All transportation between the worksite and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local laws and regulations and that it will provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500, except where workers' compensation is used to cover such transportation as described in § 655.122(e); and
  - c. Certificates of occupancy from the SWA for all employer owned housing and copies of all drivers' licenses, vehicle registration, and insurance policies for all drivers and vehicles used to transport H-2A workers.

I hereby acknowledge that the agent or attorney identified in section E (if any) of the ETA Form 9142 and section A above is authorized to represent me for the purpose of labor certification and, by virtue of my signature in Block 5 below, I take full responsibility for the accuracy of any representations made by my agent or attorney.

I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained therein is true and accurate. I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a felony punishable by a \$250,000 fine or 5 years in the Federal penitentiary or both (18 U.S.C. 1001).

1. Last (family) name RICHINS	2. First (given) name DENNIS	3. Middle initial
4. Title EXECUTIVE DIRECTOR		
5. Signature 		6. Date signed 06/20/2012

### OMB Paperwork Reduction Act

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101(a)(15)(H)(ii)). Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification \* U.S. Department of Labor \* Room C4312 \* 200 Constitution Ave., NW \* Washington, DC \* 20210. Do NOT send the completed application to this address.



# **EXHIBIT 13**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

-oOo-

ABEL CANTARO CASTILLO; ALCIDES  
INGA RAMOS; RAFAEL DE LA CRUZ,  
and those similarly situated,

Case No.  
3:16-cv-00237-MMD-VPC

Plaintiffs,

vs.

WESTERN RANGE ASSOCIATION;  
EL TEJON SHEEP COMPANY; MELCHOR  
GRAGIRENA; MOUNTAIN PLAINS  
AGRICULTURAL SERVICE; and ESTILL  
RANCHES, LLC,

Defendants.

=====

VIDEOTAPED DEPOSITION VIA ZOOM VIDEOCONFERENCE OF

ABEL CANTARO CASTILLO

VOLUME I

Wednesday, June 24, 2020

Reno, Nevada

Job No. 633092

Reported By: PEGGY B. HOOGS, CCR #160, RDR, CRR

1 A Yes. At the ranch.

2 Q Is he an honest and truthful person?

3 A Yes.

4 Q Did his duties differ from yours in any  
5 significant ways?

6 A Yes.

7 Q How so?

8 A At work, he worked with the car, he had  
9 provisions, and he would bring -- he would bring us  
10 medicine for the sheep.

11 Q Were there any other things that he did that  
12 you --

13 A No.

14 Q Were there any things that you did that he  
15 didn't?

16 A Yes.

17 Q What things did you do that he did not?

18 A I was a parishioner --

19 THE INTERPRETER: I'm sorry. I do not know  
20 what that means.

21 THE WITNESS: I saved the babies, yeah.

22 BY MS. WINOGRAD:

23 Q Lambing?

24 A Yes.

25 Q Is there anything else that you did that he

1     didn't do besides the lambing?

2             A     No.

3             Q     Are you aware that -- let me ask you this: Did  
4     you work -- go ahead -- did you work more hours than  
5     Mr. Archi Lozano?

6             A     We all worked the same hours.

7             Q     Okay. So you didn't work any more than he did?

8             A     No.

9             Q     And he didn't work any more than you did?

10            A     We all worked the 24 hours, all the guards --  
11     guarding.

12                   MR. HOOD: Objection to translation.

13                   THE INTERPRETER: All guarding, as sheepherders  
14     all the time.

15     BY MS. WINOGRAD:

16            Q     Did you receive two weeks of paid vacation each  
17     year?

18            A     Yes.

19            Q     Did you receive any discretionary bonuses  
20     during your time at El Tejon?

21            A     Yes.

22            Q     If Mr. William Archi Lozano indicated that he  
23     worked an average of eight hours per day, do you believe  
24     he was lying?

25                   MR. HOOD: Objection to form and foundation.

1 THE WITNESS: We all worked 24 hours  
2 as sheep -- as guardian. That's the way the work was.

3 BY MS. WINOGRAD:

4 Q You were on call 24 hours; correct?

5 MR. HOOD: Objection to form and foundation.

6 THE WITNESS: Yes.

7 BY MS. WINOGRAD:

8 Q Did you ever sleep?

9 A I was sleeping, but I was spending as being a  
10 guard. It's a lot.

11 Q Fair enough. And did you ever take --

12 THE INTERPRETER: I'm sorry. That question  
13 broke up. Can you repeat that?

14 MS. WINOGRAD: I interrupted him. I'm sorry.  
15 My apologies.

16 BY MS. WINOGRAD:

17 Q Did you ever take naps during the day?

18 A Twenty minutes or so, around there.

19 Q If Mr. William Archi Lozano indicated that he  
20 worked eight hours per day, was he lying?

21 MR. HOOD: Objection to form and foundation.

22 THE WITNESS: Miss, he -- pardon me. Miss, he  
23 only --

24 THE INTERPRETER: He's really breaking up.

25 /////

1 was, that you were paid less than Nevada's minimum wage?

2 A The work hours -- according to the -- they  
3 should pay me for the hours worked, but they did not pay  
4 me according to the hours worked because I worked -- I  
5 worked 24 hours.

6 Q Were you working when you were sleeping?

7 A I was always -- I was always on guard.  
8 Sometimes I would not sleep.

9 Q So of those 24 hours every day when you --

10 A Every day. There's no rest. Not one day. Not  
11 one day.

12 Q I didn't finish my question. Let me start it  
13 again.

14 A Okay. Ask me again.

15 Q Of the 24 hours that you worked every single  
16 day, did you take meals?

17 A Every night.

18 THE INTERPRETER: Finish the question.

19 MS. WINOGRAD: I did.

20 THE INTERPRETER: I'm sorry. He spoke a little  
21 bit ahead.

22 MS. WINOGRAD: My bad. Try again.

23 BY MS. WINOGRAD:

24 Q Of the 24 hours a day that you worked every  
25 single day, did you take meals?

1 BY MS. WINOGRAD:

2 Q With regard to the 2012 accident, besides you  
3 and the driver, was anyone else in the truck?

4 A No.

5 Q And the accident occurred around Eureka?

6 A Yes.

7 Q Okay. Here's a tough one. Eureka,  
8 California -- Eureka, California or Eureka, Nevada?

9 A Nevada.

10 Q What was the purpose of the trip?

11 A Every April we take sheep to Nevada to the  
12 Sierra to -- to fatten up the sheep.

13 Q You indicated that they came and picked you up  
14 after the accident. Who were "they"?

15 A The person, the camper person.

16 Q Was the camper person from El Tejon?

17 A Yes.

18 Q Do you know who that person was?

19 A Ricardo Yauri Garcia. Garcia, yes.

20 Q Is that the same gentleman I asked you about  
21 earlier?

22 A His brother.

23 Q You said you fainted, but you weren't hurt; is  
24 that correct?

25 A No. My head was swollen.

1 Q Did you go to the doctor?

2 A No. I was not taken at all to get checked.

3 Q Did you ask?

4 A I told them, but they didn't take me.

5 Q Who is the "they"?

6 A They said, "Who's going to be with the sheep?"

7 Q Okay. Who's "they"?

8 A The person is a camper, the field person, and  
9 they talked to the boss. They talked.

10 Q From El Tejon?

11 A Yes, El Tejon.

12 Q At the time that they didn't take you to the  
13 doctor, did you ask them to?

14 A Yes. I asked them to have myself be checked,  
15 but I wasn't taken because there were no men who was  
16 going to be with the sheep.

17 Q So the only people that you asked to take you  
18 to the doctor were from El Tejon; correct?

19 A Yes.

20 Q Did you ever call Western Range Association and  
21 talk to anyone and let them know you had an accident?

22 A No. I did not know the telephone number.

23 Q Did you ask anyone from El Tejon to contact  
24 Western Range Association to let know there had been an  
25 accident?



1           A     No.

2           Q     Other than the 2012 accident, have you had any  
3     other accidents or injuries while you were working at  
4     El Tejon?

5           A     Yes.

6           Q     How many?

7           A     In 2014, in May, I had my gums infected. My  
8     face was swollen, and there I asked for pills to the  
9     field person, and the boss did not listen to me, did not  
10    help me, not one pill.

11          Q     In 2014 when your gums were infected, did you  
12    ask anyone at El Tejon to take you to a dentist?

13          A     Yes.

14          Q     Who did you ask?

15          A     The field person, Ricardo Yauri.

16          Q     What did he tell you?

17          A     He told me that "I'm going to speak to the  
18    boss."

19                And I told him, "I also called the boss, and  
20    the boss told me to wait. The field person will have to  
21    take you," but they never -- but I was never taken to the  
22    doctor. They didn't bring me not one pill.

23          Q     Now, I believe that you worked at El Tejon  
24    until May 6th; is that correct?

25          A     June. Until the 10th of June in 2014.

1           Q    When you say you talked to the boss, who did  
2   you mean?

3           A    Melchor Gragirena, the boss.

4           Q    And then you sued him; correct?

5           A    Yes.

6           Q    What did you sue him for?

7           A    The reason was I had an infected molar, my face  
8   was swollen, and he did not even send me one pill. He  
9   did not send me to the doctor. That's why I sued him.

10          Q    How do you know you had an infected molar?

11          A    I was going to -- I had a lot of infection. I  
12   almost died. I was in the mountains by myself. The  
13   story of a sheepherder is very -- is a very sad one.

14          Q    How did you know you had an infected molar?

15          A    I had -- I had a cavity and it swelled up.

16          Q    Was there some time that you went to a dentist  
17   or a doctor who informed you you had an infected molar?

18               MR. HOOD: I'm going to object based on my  
19   standing immigration objection. To the extent responding  
20   to this question requires you to reveal your physical  
21   location after you left your employment with Western  
22   Range Association and El Tejon, I'd instruct you not to  
23   answer. To the extent -- otherwise I would instruct you  
24   to answer.

25               THE WITNESS: Yes.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

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ABEL CANTARO CASTILLO; ALCIDES  
INGA RAMOS; RAFAEL DE LA CRUZ,  
and those similarly situated,

Case No.  
3:16-cv-00237-MMD-VPC

Plaintiffs,

vs.

WESTERN RANGE ASSOCIATION;  
EL TEJON SHEEP COMPANY; MELCHOR  
GRAGIRENA; MOUNTAIN PLAINS  
AGRICULTURAL SERVICE; and ESTILL  
RANCHES, LLC,

Defendants.

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VIDEOTAPED DEPOSITION VIA ZOOM VIDEOCONFERENCE OF

ABEL CANTARO CASTILLO

VOLUME II

Thursday, June 25, 2020

Reno, Nevada

Job No. 633096

Reported By: PEGGY B. HOOGS, CCR #160, RDR, CRR

1 BY MS. WINOGRAD:

2 Q Mr. Cantaro, I want to clarify a couple of  
3 things that you said yesterday.

4 You indicated that you worked 24 -- that when  
5 you were at El Tejon, you worked 24 hours each and every  
6 day.

7 Is that your testimony?

8 A Yes.

9 Q And were some of those hours hours that you  
10 were on call?

11 A I don't understand, Miss.

12 Q Okay. Do you know what "on call" means?

13 A There were moments where the boss would call  
14 me, asking me how the sheep were.

15 Q Okay. Let me tell you how I'm using the words  
16 "on call." When I reference "on call," it includes hours  
17 during which you may be required to work, but you are not  
18 actively working.

19 Do you understand that?

20 MR. HOOD: Objection. Form and foundation.

21 MS. WINOGRAD: I'm asking whether he  
22 understands how I am utilizing the words "on call."

23 THE WITNESS: No.

24 BY MS. WINOGRAD:

25 Q Which portion --

1 MS. WINOGRAD: Duly noted, and these are things  
2 that we raise later, but I'm going to go ahead and see if  
3 he can answer it.

4 THE WITNESS: I have always worked the  
5 24 hours.

6 BY MS. WINOGRAD:

7 Q Every single day?

8 A Every day. Every day, yes.

9 Q While you were at El Tejon, did you work while  
10 you were sleeping?

11 A Moments I would work, I would sleep little.  
12 Every day I was on guard with the sheep.

13 Q Okay. I am asking these questions as yes-or-no  
14 questions so that we can get through this faster. I will  
15 repeat my question.

16 While you were sleeping at El Tejon, were you  
17 working?

18 MR. HOOD: Objection. Form.

19 You can answer.

20 THE WITNESS: Yes.

21 BY MS. WINOGRAD:

22 Q When you were eating meals as an employee of  
23 El Tejon, were you working?

24 A Yes.

25 Q Did you ever have days off while you were

1 working at El Tejon?

2 MR. HOOD: Objection. Form.

3 You can answer.

4 THE WITNESS: No.

5 BY MS. WINOGRAD:

6 Q Did you ever go into town with other herders to  
7 do shopping?

8 A No.

9 Q You testified yesterday that you established a  
10 Facebook account while you were working at El Tejon; is  
11 that correct?

12 A Yes.

13 Q At the time you were establishing your Facebook  
14 account, were you working?

15 A Yes.

16 Q Did you ever check your Facebook account while  
17 you were at El Tejon?

18 A Yes, a few minutes. Not much.

19 Q Did you communicate with your family in Peru  
20 while you were working as an employee of El Tejon using  
21 WhatsApp?

22 A No. On the phone I would call for a few  
23 minutes at night --

24 Q While you --

25 A -- while I dined, while I was having dinner.

1 Q While you were an employee of El Tejon, did you  
2 use the Facebook Messenger app to contact your family?

3 A Yes.

4 Q And when you did so, were you working?

5 A While I was having dinner, for a moment I would  
6 communicate with my family.

7 Q Were there any other ways that you were  
8 communicating with your family in Peru when you were an  
9 employee of El Tejon?

10 A Telephone calls.

11 Q From what phone did you call?

12 A My boss would sometimes tell me, "Call the  
13 family -- for a moment call your family, young man."

14 Q My question was, from what phone did you call  
15 your family in Peru?

16 A Tejon.

17 Q And you testified yesterday that you did not  
18 have another phone; correct?

19 (Interruption in deposition, video froze.)

20 (A discussion was held off the record.)

21 MS. WINOGRAD: Can you read back my last  
22 question, please. I think he did answer.

23 (The record was read by the reporter.)

24 MR. HOOD: Objection. Form.

25 /////

1           A     For the telephone they gave me.

2           Q     And did they pay when you called your family in  
3     Peru?

4           A     The boss would tell me, "Call your family for a  
5     little while because we have credit," he would tell me.

6           Q     My question was yes or no. When you would  
7     communicate with your family in Peru, were those calls  
8     paid for by El Tejon Ranch?

9           A     Yes, the company.

10          Q     Did El Tejon Ranch provide you with food?

11          A     Yes, but very little, very little.

12          Q     Did you complain to Western Range about the  
13     fact that you were not getting enough food?

14          A     No. No, because the boss would prohibit us to  
15     call Western -- Western Range Association.

16          Q     So how did the boss prohibit you from calling  
17     Western Range?

18          A     He would tell us, the boss would tell us we  
19     didn't even have a number -- the boss would say, "Don't  
20     complain to Western Range Association." He would talk to  
21     us in a vulgar way.

22          Q     My question was, how did your employer preclude  
23     you from contacting Western Range?

24          A     He didn't want us to call for anything. The  
25     boss would prohibit us from everything.



1           Q    Okay.  How did the boss prohibit you from  
2   calling Western Range?

3           A    He would say -- he would say, "If you call  
4   Western Range Association, I will deport you to Peru."

5           Q    Did Western Range ever preclude you or prohibit  
6   you in any way from calling them?

7           A    I did not have communication with Western Range  
8   Association.

9           Q    Did you ever speak with Dennis Richins?

10          A    No.

11          Q    Did you ever speak with Leonardo Melendez?

12          A    No.

13          Q    Did you ever contact anyone at Western Range at  
14   any time before you left El Tejon?

15          A    No.

16          Q    Did your phone that you set the Facebook  
17   account on have internet access?

18          A    No.  I don't remember, Miss, since I don't know  
19   how to carry out in my way -- in my way, my own manner, I  
20   created the Facebook.

21          Q    So if I understand correctly, you don't know  
22   one way or the other?

23                THE INTERPRETER:  I'm sorry.  You broke up the  
24   question.  "If I understand correctly" --

25   /////

1 Q No, that was not my question.

2 My question was -- and Mr. Hood's objection is  
3 already in the record -- my question was, as you sit here  
4 today on the 25th of June, 2020, that El Tejon Ranch  
5 underpaid you by more than \$30,000?

6 A Less what they owe me.

7 Q So it is your testimony that El Tejon owes you  
8 more than \$30,000?

9 A According to my hours of work.

10 Q Do you have any documents that indicate what  
11 hours you were working?

12 A I think it's enough with my testing -- I think  
13 it's enough with my testimony that I say I worked  
14 24 hours.

15 Q I'm not questioning that that is your  
16 testimony. I'm asking whether you have any documents  
17 that show how many hours you actually worked.

18 A Documents, no.

19 Q Do you know of any witnesses who can testify as  
20 to how many hours you actually worked at El Tejon?

21 A All the workers are witnesses of the hours that  
22 we worked.

23 Q Tell me their names, please.

24 A William Yauri Garcia, Ricardo Yauri Garcia,  
25 Roman Cantaro and others that I don't remember their

# **EXHIBIT 14**

**All pages in this document are designated by Western Range Association as Confidential  
pursuant to the Stipulation of the parties and pending Court Order**

**THE OPEN RANGE SHEEP INDUSTRY IN CALIFORNIA AND THE  
QUESTION OF IMPOSING A STATE MINIMUM WAGE ON  
SHEEPHERDERS**

James S. Holt, Ph.D.

Prepared for the  
California Industrial Wage Commission (IWC)  
October 3, 2000

## EXECUTIVE SUMMARY

Most sheepherders in California, like most sheepherders in the United States, are aliens legally admitted to the United States for the express purpose of working as sheepherders. In 1999 the California Economic Development Department estimated there were 206 legally admitted aliens and 29 domestic workers employed as open range sheepherders in California.

Shepherding is a unique occupation, which is regulated under a specific set of federal guidelines applicable to the shepherding occupation in all 10 Western states where open range sheepherders are employed. Shepherding is an exempt occupation under IWC wages orders, and should remain so for the following reasons:

1. An hourly wage standard is not appropriate for the shepherding occupation.
2. IWC coverage is not necessary to protect the wages of California sheepherders. Their wages are protected by a wage special wage scheme for sheepherders in all 10 western states promulgated and revised annually by the U.S. Department of Labor.
3. The current wage protections in place for sheepherders in California are working. Earnings of California sheepherders are comparable to the earnings of IWC-protected peer workers.
4. Imposing on California sheepherders an hourly minimum wage, or a minimum wage rate higher than that under the current federal regulatory scheme, would hasten the extinction of an industry already in severe economic distress.

California sheepherders' earnings, including imputed amounts for housing and food, exceed the earnings of a full-time farmworker working at the average California farmworker hourly wage. California sheepherder's annual earnings are in the 80<sup>th</sup> percentile of U.S. farmworker annual earnings, including imputed values for food and housing, and in the 70<sup>th</sup> percentile even ignoring the value of the free food and housing provided to California sheepherders. California sheepherder wages have kept pace with the wages of IWC-regulated farm and non-farm workers in California.

The California sheep industry is in severe economic distress. Wool prices at the farm level are down 60 percent from 1980 prices, while lamb prices have increased only 18 percent from 1980 prices. The prices of farm inputs have increased 53 percent, and the wages of sheepherders 78 percent, during these two decades. As a result, many California sheep ranchers are operating at returns below cost, and are rapidly disappearing. The number of commercial sheep ranches in California has declined by more than 50 percent in the past 15 years, and there are now fewer than 100 such operations left. To impose a minimum wage scheme on shepherding that would further increase the wages of California sheepherders would be unnecessary and unfair, and further hasten the disappearance of this industry from the state.

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# THE OPEN RANGE SHEEP INDUSTRY IN CALIFORNIA AND THE QUESTION OF IMPOSING A STATE MINIMUM WAGE ON SHEEPHERDERS

James S. Holt, Ph.D.<sup>1</sup>

Prepared for the  
California Industrial Wage Commission (IWC)  
October 3, 2000

## Introduction

Most sheepherders in California, like most sheepherders in the United States, are aliens *legally admitted to the United States for the express purpose of working as sheepherders*. In 1999 the California Economic Development Department (EDD) estimated there were 206 legally admitted aliens and 29 domestic workers employed as open range sheepherders in California. Alien sheepherders are admitted and employed under the so-called "H-2A" provisions of the federal Immigration and Nationality Act (INA) enacted in 1952. (8 U.S.C. 1101 *et seq.*) The alien sheepherder program has existed in more or less its present form since before the INA was enacted. It was brought under the "H-2" visa category of the INA in 1952, and under the "H-2A" visa category in amendments to the INA in 1986. Legally admitted aliens have been the principal source of open range sheepherders in California and the United States for well over half a century.

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<sup>1</sup> Dr. James S. Holt is Senior Economist with the law firm of McGuiness, Norris and Williams in Washington, D.C. McGuiness, Norris & Williams is General Counsel to the Western Range Association, on whose behalf this report was produced. Dr. Holt is an agricultural labor economist and a nationally recognized expert on the H-2A temporary alien worker program and on agricultural labor policy. Dr. Holt has served as a technical consultant on the H-2A program to the Western Range Association for more than 10 years. He is also a nationally recognized expert on agricultural employment and wage statistics.



At the turn of the last century and through the early 1900's most sheepherders in the United States came from the Basque regions of France and Spain. Many present day U.S. sheep ranchers are former Basque sheepherders or the sons or daughters of these herders. For the last several decades the principal source of sheepherders for U.S. sheep ranches has been Peru and Chile, with smaller numbers from Mexico, Spain, Mongolia and China. Most H-2A sheepherders grew up in their home countries in sheepherding families and learned the occupation from their earliest days. All alien H-2A sheepherders must be experienced sheepherders in their home country.

Sheepherding is now, and always has been, exempt from the California Industrial Wage Commission's (IWC) minimum wage orders. This report addresses the question of whether the IWC should retain the exemption from the minimum wage for sheepherders in California, or whether this occupation should be subjected to the California hourly minimum wage or some other IWC minimum wage order. The report argues that the IWC should retain the current sheepherder exemption for the following reasons:

1. An hourly wage standard is not appropriate for the sheepherding occupation.
2. IWC coverage is not necessary to protect the wages of California sheepherders. Their wages are protected by a wage special wage scheme for sheepherders in all 10 western states promulgated and revised annually by the U.S. Department of Labor.
3. The current wage protections in place for sheepherders in California are working. Earnings of California sheepherders are comparable to the earnings of IWC-protected peer workers. Furthermore, over the past two decades the wages of California sheepherders have kept pace with the earnings of their peer workers and with other IWC-protected workers.



4. Imposing on California sheepherders an hourly minimum wage, or a minimum wage rate higher than that under the current federal regulatory scheme, would hasten the extinction of an industry already in severe economic distress.

### **The Occupation of Sheepherding**

Sheepherding is one of man's oldest occupations, and it has changed little since biblical times. An "open range" sheepherder tends a flock of sheep and lambs (now typically referred to as a "band") in open range. This is in contrast to farm flocks of sheep kept in fenced pastures, where sheepherders are not required.

A band of sheep typically numbers approximately 1,000 ewes, together with their lambs. When the lambs are present, the band of ewes and lambs will number from 2,000 to 2,500 head. The open range sheepherder lives and travels with this band of sheep day and night, protecting the sheep from predators and from eating poisonous plants, moving the band to new grazing land each day and bedding them down at night. Typically, during a portion of the year the sheep range is in the mountains or desert, often in exceedingly remote areas. The sheep typically graze on the lower elevations in the spring, gradually moving to higher elevations in the summer and back to lower elevations in the fall. At other times, and especially during the shearing and lambing seasons, the sheep are grazed on pasture on the valley floor and on the aftermath of hay and other crops.

While the herders are living with the flocks on the open range they live in mobile housing called "sheep camps" or "sheep wagons" that move daily with the band of sheep. Sheep camps are typically travel trailers mounted on motorized vehicles or specially outfitted horse-drawn wagons. In wilderness areas where such camps are not permitted, the sheepherders live in tents. All sheepherder housing must meet *specific*

federal standards for sheepherder housing, and is inspected and certified annually or biannually by the California Economic Development Department (EDD), depending on the jurisdiction and accessibility.

Herders typically work individually with one band, or in pairs with two bands that graze together. The herders travel in motorized vehicles or on horseback. They are usually accompanied by several herding dogs, whose job it is to assist the herder to move the flock, and several guard dogs who protect the sheep and lambs from predators. While on the range, the herders are supplied with food, water and other living necessities by a "camp tender" who re-supplies the camp from once a week to once or twice a month, depending on the remoteness of the locations.

Typically during several months in the winter and early spring during lambing season the bands are on the valley floor. When the herders are on the valley floor they live in their sheep camps or in bunk houses. Bunk houses must also be inspected and licensed by the EDD.

A herder's "work day" typically consists of moving the sheep to new pasture in the morning, observing the sheep during the day as they graze to assure that there are no problems, bedding the band down at night, and being alert during the night for possible indications of predators. The presence of predators is usually signaled by the actions of the guard dogs or signs of restiveness among the sheep that experienced herders have learned to recognize. In some circumstances the herder strings temporary fencing during the day to keep the sheep in or out of specific areas, such as areas where poisonous plants have been detected. Also, in some circumstances where water is not naturally available, the herder may secure water for the sheep using a water truck.

For periods of a few weeks during the shearing and lambing seasons the work day is very different. During lambing the herders and the rancher must observe and

assist ewes who are having difficulty in lambing or care for weak lambs and assure that lambs are nursing. This is an extremely intense period, and, of course, lambing occurs around the clock. Shearing is typically done by contract shearing crews, but the rancher and herder assist by moving sheep to and from the shearers.

### **The Western Range Association**

The H-2A shepherd program is administered by the U.S. Department of Labor (USDOL) and the Immigration and Naturalization Service (INS). Virtually all employers of the H-2A shepherd program in California are members of the Western Range Association (WRA), headquartered in Citrus Heights, CA, which assists its rancher members to use the program. The WRA assists its rancher members by completing and filing the necessary applications with the USDOL and the INS, conducting required recruitment for domestic shepherders, recruiting alien shepherders, arranging and paying for transportation to and from the herders' home country and within the United States, securing visa extensions for herders, transferring herders among members, and generally assisting both herders and rancher members in using the program.

The Western Range Association has voluntarily organized itself as a "joint-employer association" within the meaning of the H-2A regulations. This means the Association assumes joint liability with its members for compliance with H-2A program requirements and all employment-related laws and regulations. For example, if a member files for bankruptcy and fails to pay the herders, the WRA will assure that the herders' wages are paid. The Association suspends and terminates the membership of members who fail to comply with Association rules or legal requirements. Since the H-2A program is very difficult for an individual rancher to use, the threat of suspension or termination by the WRA is an effective means of securing compliance.



As a joint employer with its members the WRA is also a joint guarantor with its members of the written employment contract entered into with every shepherd. Among other things, the contract guarantees the herder full time employment for three years. If a rancher no longer needs a herder, or a herder is dissatisfied with his employer, the WRA will transfer the herder to another rancher member. Individual rancher members cannot terminate a herder's employment with the WRA, they can only refer the herder to the association for reassignment. Involuntary termination of herders by the WRA are very rare. Herders who are terminated, whether voluntarily or involuntarily, are offered prepaid return transportation to their home country by the WRA.

### **The H-2A Shepherd Program**

Before an alien shepherd can be admitted to the United States to work for a U.S. employer, an application for a temporary alien labor certification must be filed with the USDOL and the California EDD. The regulations of the USDOL governing H-2A temporary alien labor certifications and the obligations of employers of H-2A workers are published at 20 C.F.R. §655, Subpart B. However these regulations give the Secretary of Labor authority to promulgate special rules for H-2A workers who are to be employed in special circumstances. The Secretary of Labor has recognized the unique circumstances of the shepherd occupation by issuing special "Shepherd Guidelines" [ETA Field Memorandum 74-89, "Special Procedures: Labor Certification for Shepherders Under the H-2A Program"].

The WRA conducts year 'round recruitment for domestic shepherders. All qualified U.S. applicants are required to be offered jobs. Typically the WRA receives fewer than a dozen domestic applicants a year. To be considered qualified, a U.S. applicant need only have 90 days of prior experience as a shepherd. The WRA files applications for temporary labor certification on behalf of their employer members. If a

qualified domestic herder is not available, the job is “certified” for the employment of an H-2A alien shepherd. The WRA then files a petition for the admission of an alien herder with the INS, or a petition to transfer an available herder already in the United States, to the certified rancher. The recruitment of alien herders is done by the Association’s “co-ordinators” in the sending countries, principally Peru and Chile. Herders are subject to the same admission and eligibility requirements as are all other aliens.

The H-2A alien shepherders admitted under petitions from members of the WRA are permitted to work for any H-2A certified member of the WRA, and the Association may assign and transfer herders as needed. The aliens are not permitted to work for any other employers. This same restriction applies to all H-2A workers in all occupations.

### **Regulation of Wages Under the H-2A Shepherd Program**

The fact that shepherd’s wages are exempt from the California state minimum wage *does not mean that the wages of H-2A shepherders in California are unprotected*. In fact, they are protected by federal wage standards specific to the shepherding occupation and applicable to all 10 western states where H-2A alien shepherders are employed. This special minimum wage structure for H-2A shepherd wages recognizes the unique characteristics of the shepherding occupation. It differs from the wage structure applicable to H-2A workers in occupations other than shepherding.

In non-shepherding occupations the USDOL annually sets minimum *hourly* wages, called Adverse Effect Wage Rates (AEWRs), applicable to all persons, both domestic and alien, employed in occupations for which employers are approved to employ H-2A aliens. An H-2A employer must pay the greater of the adverse effect

wage rate, the prevailing wage for the occupation in the area of employment, or the federal, state or local statutory minimum wage.

Shepherders are not subject to the hourly AEWRs imposed on all other H-2A occupations, because the USDOL recognizes that a minimum *hourly* wage standard is not appropriate to this occupation. Instead, the USDOL sets a minimum *monthly* wage based on the prevailing wages paid to domestic (i.e. non H-2A) shepherders in California. This prevailing wage is determined annually in a survey of domestic shepherd wages conducted by the California EDD, and is reviewed and certified by the USDOL. A similar scheme is used in the other states in which open range shepherders are employed. The current (2000) H-2A minimum wage for shepherders in California is \$900 per month plus free room and food. California's minimum shepherd wage is the second highest among the 10 western open range sheep producing states. Since virtually all open range shepherders, both alien and domestic, are employed by ranchers who are in the H-2A program, *the California H-2A shepherd minimum wage is effectively the minimum wage for all shepherders in California.*

The H-2A shepherd wage standard is not the only place where the unique characteristics of this occupation and the inappropriateness of an hourly minimum wage is recognized in minimum wage statutes and regulations. The federal Fair Labor Standards Act (FLSA) exempts *all* workers engaged in the range production of livestock from the hourly minimum wage and overtime provisions of the Act. This exemption has been in the Act since it was written in 1938. The rationale for the exemption is that hours of work is not a meaningful concept for workers who live on the range and are responsible for livestock on a 24-hour a day, 7-day-a-week basis. The FLSA recognizes that in such circumstances the concept of hours of work and a minimum hourly wage is inappropriate.



### **Non-Wage Benefits of Shepherders**

In addition to their cash wages, California shepherders receive substantial non-wage benefits. It has already been mentioned that shepherders are provided with housing and food at no cost to the worker. Housing must meet applicable federal standards. Mobile sheep camps are inspected annually or biannually depending on the jurisdiction according to special shepherd mobile housing standards promulgated by the USDOL. Permanent housing (bunk houses) are inspected and approved annually according to federal Occupational Safety and Health Administration (OSHA) farm labor camp standards. Herders are covered by Workers Compensation Insurance. In addition, they are covered for non-occupational accidents and illness by a Western Range Association group insurance policy to which the shepherd is required to contribute only \$13 per month. Herders are entitled to two weeks paid vacation, which they can take either as actual vacation or as extra compensation.

All Western Range Association shepherders are covered by a written employment contract which guarantees the herder employment for 3 years. As a joint employer, and to fulfill this contract guarantee, the WRA may transfer the herders from one ranch to another as needed during the 3-year period. The Western Range Association pays the cost of herders' inbound transportation to the United States, as well as the cost of transportation from one employer to another if the herder is transferred. In accordance with provisions of the USDOL H-2A regulations and H-2A shepherd guidelines, part of the cost of the inbound transportation to the United States is deducted in increments from herders' initial monthly paychecks, but is fully reimbursed to the herder when the herder completes the first half of the 3-year employment contract.. The WRA provides return transportation to the home country to all herders, although USDOL regulations do not require paying return transportation to herders who do not complete their contracts.

As a practical matter, most herder's out-of-pocket expenses are limited to the \$13 monthly insurance charge and their expenses for personal items such as cigarettes , clothing, and the like. Most herders save a very substantial portion of their cash wages. It is not unusual for herders to save or send home \$7,000 or more annually. This is substantially more than the annual savings of the average middle income U.S. worker.

The WRA provides all of its sheepherders with a "welcome package" in addition to their employment contract, which explains the terms and conditions of employment, the medical insurance program, and other information that herders may need. It includes a telephone number to the WRA which is staffed by Spanish speaking staff and which herders may call collect for any reason. Herders are also provided with the telephone numbers of their consulates in Los Angeles, San Francisco, and other areas. The WRA takes complaints of non-compliance and mistreatment very seriously, and responds as promptly as possible to all requests for assistance from herders. If a herder requests reassignment to another ranch because of alleged mistreatment or for other reasons, the WRA will accommodate such requests provided the herder is adequately performing his duties. Very few herders are involuntarily terminated by the WRA, and if they are, their return transportation is provided. Well over half of all herders return for additional contracts when their previous contract is completed. Of those who do not, many have accumulated enough money that they have been able to set themselves up in ranching or other businesses in their home countries and no longer need to work in the United States.

In addition to housing inspections by the California EDD, the USDOL's Wage and Hour Division conducts audits of employers' compliance with the H-2A regulations and other applicable labor laws both on a complaint-driven and random basis. The Peruvian consulates also visit their sheepherders periodically. As explained above, the WRA has voluntarily entered into a joint-employment arrangement with its members, and therefore the Association as well as its members is obligated for



compliance with applicable regulations. The Association guarantees the pay of herders if, for any reason, the rancher is unable to pay them.

### **The Performance of Shepherd Wages in California**

The H-2A regulatory structure described above that governs the wage rates of California shepherders has performed well in protecting shepherd's wages as measured by a variety of standards. First, the imputed value of California shepherd earnings exceeds the earnings of California farmworkers generally. Second, the rate of growth in shepherd wages over the past two decades is comparable to the rate of growth in hourly earnings of California farmworkers generally and the rate of growth in hourly earnings of non-farm workers in California and the United States.

### **Comparison of Shepherd Earnings With California Farmworkers Earnings**

California's shepherd earnings compare favorably with the earnings of their peers in the California hired farm work force. We compare the imputed monthly earnings of a California shepherd with the imputed monthly earnings of a California farmworker employed full time, year 'round, at the average hourly earnings of California farmworkers.

The average hourly earnings of non-supervisory field and livestock workers in California in 1999 were \$7.27 per hour, as reported by the National Agricultural Statistics Service, U.S. Department of Agriculture. A farmworker who worked 40 hours per week for 52 weeks a year at the average hourly wage of \$7.27 per hour would earn \$15,120 annually or \$1260 per month. Of course, these figures substantially exceed the actual average earnings of California farmworkers, because they do not average 40 hours of work per week, and, on average, work far less than 52 weeks a year. However,

we know of no current data on actual monthly or annual earnings of California farmworkers.

If the value of housing and food provided to sheepherders is imputed, even at the conservative allowances permitted by the Industrial Wage Commission (\$27.05 per week for housing and \$8.70 per day for food), and added to the current \$900 monthly prevailing wage for California sheepherders, the imputed monthly earnings of California sheepherder are \$1282 per month. This is more than the imputed earnings of a full-time farmworker – who is currently protected by the IWC wage order – even if the average farmworker were able to work for 52 weeks a year. Furthermore, this comparison ignores the fact that the sheepherders also receive 2 weeks paid vacation, or the equivalent in extra pay, and fully paid transportation to and from the place of employment, non-occupational medical insurance for which the herders are required to contribute only \$13 per month, and a variety of contractual and employment guarantees.

We are not aware of current yearly earnings data for farmworkers in California with which to compare the earnings of sheepherders. However, the U.S. Department of Labor's National Agricultural Worker Survey (NAWS) reports data on the distribution of personal incomes of farmworkers *nationally*.<sup>2</sup> Comparing the annual earnings of California sheepherders, including the imputed value of housing and food, to personal incomes of farmworkers nationally, California sheepherders are in the 80<sup>th</sup> percentile of farmworker earnings. They are in the 70<sup>th</sup> percentile of farmworkers nationally *based solely on their cash monthly salary, ignoring the value of the free housing, food and other benefits provided*. Thus, one must conclude that California sheepherder's earnings are

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<sup>2</sup> "Findings from the National Agricultural Workers Survey (NAWS) 1997-1998" *A Demographic and Employment profile of United States Farmworkers*. Research Report No. 8. U.S. Department of Labor, Office of the Assistant Secretary for Policy, Office of Program Economics. March 2000

not substandard relative to their peers in the labor market who are protected by the IWC's wage orders, nor of their peers in the labor market nationally.

It is also worth noting that the average annual income of a California sheepherder, including the imputed value for housing and food based on IWC allowances, of \$15,384 is well above the federal 2000 poverty guidelines for a single person of \$8350. In fact, it exceeds the federal poverty guidelines for a 3 person family unit of \$14,150. In their home countries where the families of H-2A sheepherders live, these incomes allow the herders and their families to live handsomely.

#### **Rate of Growth in Sheepherder, Farmworker and Non-farmworker Earnings**

The absence of state minimum wage protection has not hindered the rate of growth in sheepherder wages over the past two decades. California sheepherder wages have kept pace with the growth in wages of IWC-protected farmworkers generally, and of IWC-protected non-agricultural workers in California. [See Table 1.]

During the two decades from 1980 through 1999 the average hourly earnings of non-supervisory field and livestock workers in California increased from \$4.26 per hour to \$7.27 per hour, an increase of 71 percent. The prevailing monthly wage for California open range sheepherders increased from \$450 per month to \$800 per month, or 78 percent. The average hourly earnings of non-supervisory manufacturing workers in California during the same period increased from \$7.71 per hour to \$13.95 per hour, or 81 percent. In other words, sheepherder wages have kept pace with the wages of their peers and other workers in IWC-regulated occupations in California.

**TABLE 1. CAPARISON OF MONTHLY WAGER OF SHEEPHERDERS,  
HOURLY WAGES OF FARM WORKERS AND HOURLY EARNINGS OF  
MANUFACTURING WORKERS, CALIFORNIA, 1980-1989**

ITEM	AMOUNT		PERCENTAGE INCREASE 1980-1989
	1980	1999	

Sheepherders

Prevailing Wage	\$450/month	\$800/mo.	78%
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Farm Workers

Average Hourly Earnings	\$4.26/hour	\$7.27/hr.	71%
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Manufacturing Workers

Average Hourly Earnings	\$7.71/hour	\$13.95/hr.	81%
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Sources: Sheepherders, Western Range Association, based on U.S. Department of Labor Prevailing Wage Orders; Farm Workers, National Agricultural Statistics Service, U.S. Department of Agriculture; Manufacturing Workers, Bureau of Labor Statistics, U.S. Department of Labor



## **The Economic Decline of the California Sheep Industry**

Advocates for terminating the shepherd minimum wage exemption in California contend that imposing a minimum hourly wage will result in only small increases in ranchers' production costs, since sheep ranching is not a labor-intensive industry. They argue that such small increases in costs will not hurt the industry, but will merely result in sheep ranchers "sharing their wealth" with their herders. The problem with that argument is two fold. First, since there is no basis for objectively determining work hours of shepherders, it assumes that some low number of hours of work will be imputed to the occupation or that a minimum monthly wage will be set that results in only a small increase in shepherders wages. Secondly, it fails to recognize the fact that the sheep industry is already operating at negative returns, and that even a small increase in production costs will not result in sharing ranchers profits, but in increasing ranchers' losses.

The sheep industry in California and nationwide is, and has for a prolonged period, been in a severe economic depression. This depression has resulted from steep declines in prices for the industry's products and rising costs of production. Wool prices, in particular, have declined dramatically during the past decade. Lamb prices have failed to increase even in pace with the rise in farm production costs, much less sufficiently to offset the drop in wool prices. These economic conditions have led to a severe decline in the number of sheep and lambs on farms, and in the number of commercial sheep operations in California and the United States. However, even this decline in domestic production has not produced a recovery in product prices, due to increasing imports of both wool and lamb. Thus, California sheep ranchers are now operating at returns below their cost of production. Many producers are living off depreciation and depleting assets hoping to hang on until there is a rebound in wool and lamb prices, if it occurs. The imposition of an hourly minimum wage on the sheep

industry in California will further increase producer costs and hasten the rate at which operators are being forced out of business.

### **Wool and Lamb Prices**

Wool and lamb meat are the two products of the sheep industry. Over the past decade the price per pound of wool at the farm level in California averaged 26 percent less than during the preceding decade. [See Table 2] The farm price for wool in California in 1999 was at its lowest level in two decades, *down 60 percent from the price in 1980!* In 1999 the market value of the wool produced by some California sheep raisers was less than the cost of transporting it to market.

Farm prices for lamb over the past decade averaged less than 11 percent higher than they did during the preceding decade. [See Table 3.] This small increase was far short of the amount necessary to offset the decline in wool prices, and far less than the amount necessary to offset increases in farm production costs. The price received by California farmers for lamb in 1999 was only 18 percent higher than it was 20 years earlier, in 1980.

### **Input Costs**

In contrast to a meager 18 percent increase in the farm price of lamb and a devastating drop of 60 percent in the farm price of wool, prices *paid* by farmers for production inputs increased 53 percent during the two decades 1980 through 1999. [See Table 4. This table is for the United States; corresponding data is not available for individual states.] During the same two decade period, the California prevailing sheepherder wage (the minimum wage for employers of H-2A sheepherders) increased 78 percent, from \$450 per month to \$800 per month. (The California sheepherder prevailing wage increased another \$100 per month, to \$900, in 2000.) There were no

**TABLE 2. FARM PRICE PER POUND OF WOOL, CALIFORNIA AND UNITED STATES, 1980-1999**

<b>YEAR</b>	<b>CALIFORNIA</b>	<b>UNITED STATES</b> Price per pound, \$
1999	.35	.38
1998	.61	.60
1997	.79	.51
1996	.67	.78
1995	1.02	1.04
1994	.65	.70
1993	.46	.84
1992	.67	.74
1991	.56	.55
1990	.82	.80
1989	1.37	1.24
1988	1.43	1.38
1987	.87	.92
1986	.66	.67
1985	.63	.63
1984	.81	.80
1983	.57	.61
1982	.71	.69
1981	.94	.94
1980	.88	.88

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Source: National Agricultural Statistics Service, U.S. Department of Agriculture

**TABLE 3. FARM PRICE PER HUNDRED WEIGHT FOR LAMB, CALIFORNIA AND UNITED STATES, 1980-1999**

<b>YEAR</b>	<b>CALIFORNIA</b>	<b>UNITED STATES</b> Price per pound, \$
1999	74.50	74.50
1998	72.30	72.30
1997	91.60	90.30
1996	89.40	88.20
1995	79.20	78.20
1994	65.60	65.60
1993	65.70	64.40
1992	62.90	59.50
1991	53.80	52.20
1990	55.50	55.50
1989	69.30	66.10
1987	74.90	77.60
1986	68.60	69.00
1985	68.30	68.70
1984	59.70	60.10
1983	56.40	53.90
1982	54.50	53.10
1981	56.30	54.90
1980	63.00	63.60

Source: National Agricultural Statistics Service, U.S. Department of Agriculture



**TABLE 4. INDEX OF PRICES PAID BY FARMERS (1990-92=100)**

<b>YEAR</b>	<b>INDEX (1990-92=100)</b>
1999	115
1998	115
1997	118
1996	115
1995	109
1994	106
1993	104
1992	101
1991	100
1990	99
1989	96
1988	91
1987	87
1986	85
1985	86
1984	89
1983	86
1982	86
1981	82
1980	75

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Source: National Agricultural Statistics Service, U.S. Department of Agriculture

significant cost-saving technological changes in sheep raising during this period to offset the increased input costs and falling commodity prices. Consequently, the profitability of the sheep industry plummeted. Many ranchers abandoned or were forced out of the sheep business.

### **Number of Sheep Farms and Sheep Inventory**

The U.S. Census of Agriculture, which is conducted every five years by the Bureau of the Census and the U.S. Department of Agriculture, dramatically tells the story of an industry in decline, both in California and the United States. [See Table 5] In the 15-year period from the 1982 Agricultural Census to the 1997 Agricultural Census, the number of farms with sheep dropped by 35 percent nationwide and by 45 percent in California. The number of head of sheep also dropped by 35 percent. Thus, the decline in the number of farms was not the result of large ranches absorbing smaller ones, but of farmers going out of the sheep business.

The number of commercial sheep operations with 1,000 head or more declined even more – by *55 percent in California in just 15 years*, and 41 percent nationwide. In 1997 the Census of Agriculture identified only 110 farms with 1000 or more head of sheep remaining in California. The Western Range Association estimates that in the year 2000 there are fewer than 80 such operations remaining in California. The sheep industry is perilously close to extinction in California.

### **Conclusion**

There is no evidence of a need for IWC regulation of sheepherder wages in California. Sheepherder wages in California are regulated by a specific federal scheme applicable to sheepherders in all 10 Western states where open range sheepherders are employed. This scheme recognizes the unique characteristics of the sheepherding

**TABLE 5. FARMS WITH SHEEP AND LAMBS, CALIFORNIA AND UNITED STATES, AGRICULTURAL CENSUS YEARS 1982, 1987, 1992 AND 1997**

ITEM	CALIFORNIA	UNITED STATES
------	------------	---------------

**All Sheep and Lambs**

Number of Farms

1997	3014	65,790
1992	3692	80,839
1987	4602	92,489
1982	5565	101,583

Number of Head

1997	787,041	7,821,885
1992	859,835	10,770,391
1987	979,506	11,059,397
1982	1,214,585	12,438,011

**Sheep and Lambs, Farms with 1000 Head or More**

Number of Farms

1997	110	1306
1992	147	1906
1987	199	1955
1982	245	2205

Source: U.S. Censuses of Agriculture, U.S. Department of Commerce and U.S. Department of Agriculture

occupation. This regulatory scheme produces wages that are comparable to those of IWC-regulated peer workers in California and which have kept pace with IWC-regulated wages for at least the past 20 years. Furthermore, sheepherders under the H-2A program receive more employment benefits and protections, and are much more heavily regulated, than any IWC-regulated category of agricultural workers. Finally, to impose a minimum wage scheme on the sheepherding occupation that increased wages would further increase the losses of an industry already under severe economic stress and rapidly disappearing in California.

# **EXHIBIT 15**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

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ELVIS RUIZ, FRANCISCO JAVIER )	
CASTO and EDUARDO MARTINEZ, )	
	) Case No. CV-11-3088-RMP
Plaintiffs, )	
	)
vs. )	
	) Deposition of:
MAX FERNANDEZ and ANN )	DENNIS RICHINS
FERNANDEZ, a marital )	
community; WESTERN RANGE )	
ASSOCIATION, a foreign )	
nonprofit organization, )	
	)
Defendants. )	

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November 06, 2012; 01:44 p.m.

November 07, 2012; 09:56 a.m.

Location: 1245 Brickyard Road

Salt Lake City, Utah 84106

Reporters: Katie Harmon, RPR, CSR &  
Susan Sprouse, RPR, CSR

1           A.    Well, he was told about shepherding but I  
2   don't know that he really had ever done it.

3           Q.    I guess that's my question.  How did he get  
4   that information?  Do you know?

5           A.    Through whoever was helping him set it up.

6           Q.    Who might that have been?

7           A.    I don't know.  I'd have to go back and see who  
8   it was before my time.

9           Q.    All right.  Let me ask you to turn to page 6  
10   of the report.  By the way, are you familiar with this  
11   report before you actually go there?

12          A.    Yes.  I was at every one of these meetings.

13          Q.    What meetings?

14          A.    The industrial welfare meetings that brought  
15   this on.

16          Q.    I see.  Well, the meeting that you might be  
17   referring to is a hearing before the Industrial Wage  
18   Commission of California?

19          A.    Yes.

20          Q.    In October 2000?

21          A.    Yes.

22          Q.    Okay.  So you were in attendance then?

23          A.    Yes.

24          Q.    And it's my understanding that this report was  
25   submitted on behalf of Western Range to the industrial

1 wage commission at that hearing. Is that correct?

2 A. Now say that again.

3 Q. It's my understanding that this report was  
4 provided to the Industrial Wage Commission at the  
5 hearing that you attended. Is that correct?

6 A. Yes.

7 Q. And Mr. Holt testified at the hearing. Is  
8 that correct?

9 A. Yes.

10 Q. And he testified on behalf of Western Range?

11 A. Yes.

12 Q. Did you and he have any interaction in terms  
13 of preparing for that testimony?

14 A. I can't remember. That's been a lot of years  
15 ago. I don't know.

16 Q. Why did Western Range pick Mr. Holt to  
17 testify?

18 A. He was more knowledgeable about H-2A than  
19 anyone that we knew.

20 Q. And in terms of that knowledge of the H-2A  
21 program, that would extend to Western Range's  
22 obligations and its responsibilities --

23 A. Yes.

24 Q. -- into the program? Is that right?

25 A. Yes.



1 Q. All right. If you would turn now to page 6,  
2 there's a discussion about the occupation of  
3 shepherding. And Mr. Holt writes that shepherding is  
4 one of man's oldest occupations and it has changed  
5 little since biblical times. Is that a fair statement?

6 A. Yes.

7 Q. It goes on to say and, quote, "open range"  
8 closed quote, shepherd tends a flock of sheep and  
9 lambs now typically referred to as a band in open range.  
10 Is that a true statement?

11 A. Yes. Yes and no. Now they are required to  
12 have shepherders that they put electric fence around  
13 because things have changed.

14 Q. You're referring to the open range?

15 A. Yes.

16 Q. You say "they require shepherders". Who are  
17 you talking about?

18 A. The member.

19 Q. Okay. We're not talking about the Department  
20 of Labor?

21 A. No. I don't think so.

22 Q. Okay. All right. Now the next sentence reads  
23 -- okay, but before we get to the next sentence. So  
24 other than your modification to the statement that would  
25 be a fair and accurate statement?

1 doesn't.

2 Q. But in terms of the exemption under the  
3 federal minimum wage laws, do you know that the  
4 exemption for open range production of livestock exempts  
5 the worker who does that work from the minimum wage  
6 requirements under federal law?

7 A. Yes. Because he's on call 24 hours a day.

8 Q. All right. So going to the next sentence,  
9 Mr. Holt says, "This is in contrast to farm flocks of  
10 sheep kept in fence pastures where sheepherders are not  
11 required." Was that true at the time he wrote this  
12 report?

13 A. Yes. It's still true. Farm flock is a lot  
14 different than the regular range operation.

15 Q. What is a farm flock?

16 A. Someone that might have 50 head of sheep, 25  
17 head of sheep.

18 Q. But they are kept in fenced in pastures?

19 A. Small pastures, right.

20 Q. What if you had 500 sheep in a fenced in  
21 pasture, would that be a farm flock?

22 A. No. That would be considered more of a range  
23 operation.

24 Q. Even though they are fenced in?

25 A. Right.

1           A.    Most of them is not outside the job. Most of  
2   them have been living conditions and also food, food  
3   things.

4           Q.    We don't have to talk about those things. I'm  
5   just asking about the work outside the job description.  
6   You said it's come up on your watch. I want to know  
7   what kinds of things raised that problem with you.

8           A.    The one I can think of is working with cows.

9           Q.    Okay. And what, what -- why would working  
10   with cows be outside the job description?

11          A.    It doesn't qualify as a sheepherder. It's  
12   open range cow herder.

13          Q.    So even if the cows were on the open range,  
14   it's outside the job description?

15          A.    That's right.

16          Q.    All right. Could you turn to page 8 of  
17   Mr. Holt's report? There's a description of the Western  
18   Range Association. Is this something that Mr. Holt  
19   would have received input from Western Range before he  
20   would have submitted this report on behalf of Western  
21   Range to the California commission?

22          A.    I'm sure it probably was.

23          Q.    Do you recall having read this before he did  
24   so?

25          A.    I've read it but it's been years ago.

1 Q. But you -- I'm just asking whether you would  
2 have read this at the time that it was submitted?

3 A. I don't know that I did because he prepared  
4 it, then gave it to the meetings in the Industrial  
5 Welfare Commission.

6 Q. Now, you were on the board at the time. Did  
7 the board make some decision to have him submit this  
8 report to the board -- or to the commission?

9 A. Yes.

10 Q. So he couldn't -- he wouldn't have done that  
11 on his own or he would have gotten --

12 A. Yes.

13 Q. -- would have got the board's approval. Is  
14 that right?

15 A. Yes.

16 Q. Now and the board would not have allowed an  
17 inaccurate report about its own activities to be  
18 submitted to the California Commission?

19 A. Yes.

20 Q. Is that true? Yes?

21 A. Yes.

22 Q. On page 8 at the bottom of the page it  
23 describes Western Range as follows: "The Western Range  
24 Association has voluntarily organized itself as a joint  
25 employer organization within the meaning of the H-2A

1 regulations." That's true?

2 A. Yes.

3 Q. This means -- back to the quote -- "This means  
4 the association assumes joint liability with its members  
5 for compliance with the H-2A program requirements and  
6 all employment related laws and regulations." Is that  
7 true?

8 A. Yeah.

9 Q. Okay. And then it goes on to say, "For  
10 example, if a member files for bankruptcy and fails to  
11 pay the herders, the WRA would assure that the herders  
12 wages are paid." Is that also true?

13 A. Yes.

14 Q. Then it says, "The association suspends and  
15 terminates the membership of members who fail to comply  
16 with association rules or legal requirements." And I  
17 gather that's true as well?

18 A. Yes.

19 Q. He goes on to say, "Since the H-2A program is  
20 very difficult for an individual rancher to use, the  
21 threat of suspension of termination by the Western Range  
22 Association is an effective means of securing  
23 compliance."

24 A. Yes.

25 Q. Okay. So that, that's a true statement?

# **EXHIBIT 16**



June 1, 2015

VIA WWW.REGULATIONS.GOV

Adele Gagliardi  
Administrator  
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

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

Dear Ms. Gagliardi,

Mountain Plains Agricultural Services (Mountain Plains or MPAS) and Western Range Association (Western Range or WRA) (collectively, "Commenters") submit the following comments with respect to the Notice of Proposed Rulemaking (NPRM) issued April 15, 2015, *Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Open Range in the United States*, RIN 1205-AB70 (NPRM or the "Rule"). Those two organizations represent nearly all of the U.S. employers using the H-2A program to hire foreign workers involved in the production of grazing livestock (sheep, goats, and cattle). Since there have been shortages of U.S. workers willing to perform this work since World War II and virtually no U.S. workers at all for decades, Mountain Plains and Western Range's employer members must rely on the "special procedures" under which the Department of Labor (DOL) has administered the H-2A visa program (and its predecessors) for more than 60 years. These associations, their members, the businesses that supply them and purchase the meat and wool that they produce, and the rural communities in which they operate share in the grave concern that the Rule will deeply wound or eliminate this industry and end a way of life in the American West.



Adele Gagliardi  
 Administrator, Office of Policy Development and Research  
 June 1, 2015  
 Page 2 of 40

This grave concern stems from the numerous proposed changes to the longstanding special procedures. Each specific concern is discussed in turn – but the two most alarming changes in the Rule are the tripling of monthly wage rates in conjunction with new and unrealistic limits on work that may be performed by H-2A workers involved in the grazing production of livestock.

These two changes alone will exclude hundreds of ranchers from the H-2A program and will cause any who remain to operate at a loss, sell their herds, and go out of business. As DOL has refused multiple requests by Mountain Plains and Western Range to meet to discuss any proposed changes to the special procedures – reversing decades of valuable stakeholder-agency interaction – Mountain Plains and Western Range fear that the Department has issued the proposed Rule based on fundamental misunderstandings of the unique characteristics of the livestock grazing industry and that the resulting errors will cause the extinction of that industry.

MPAS and WRA offer these comments in response to DOL's specific questions raised in the NPRM, to better explain their industry, to identify those areas of the Rule that will cause the greatest harm, to propose alternatives to address the Department's policy concerns without inflicting that harm. Many of the rancher-members of MPAS and WRA graze their livestock on the same land that generations of their family have used since the 1800's. They work shoulder to shoulder with and treat their workers as part of the family and understand DOL's role in protecting those workers; they hope to pass the ranch on to their children and grandchildren, and they understand and support updating the H-2A rules for this industry in a way that balances those two goals.

#### Range Production of Sheep and Livestock

Mountain Plains Agricultural Service was created in 1988, as employers engaged in range production of livestock sought more certainty for their workforce following the enactment of the Immigration Reform and Control Act of 1986 ("IRCA"). Mountain Plains has approximately 280 members who operate in 16 states, primarily in the Rocky Mountains. Mountain Plains acts as an "agent" on behalf of its employer members who utilize the H-2A visa program to hire workers involved in the production of grazing livestock (sheep, goats, and cattle). Mountain Plains does not file a "master" application for H-2A workers; each member employer is a single employer. Mountain Plains is based in Casper, Wyoming.

Western Range Association was first incorporated in 1953, after the enactment of the Immigration and Nationality Act ("INA") in 1952. In the 60-plus years since its incorporation, Western Range has grown to include 216 members in 11 western states. Western Range files "master" applications for H-2A sheepherders, who transfer between WRA members as the need for workers requires. Western Range is based in Salt Lake



Adele Gagliardi  
 Administrator, Office of Policy Development and Research  
 June 1, 2015  
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City, Utah. A more extensive history of Western Range and its role in this program and the larger H-2A program are included below as an Addendum to this document.

Roughly 40% of all sheep in the U.S. and beef cows in the Western United States are herded by H-2A workers. The notion of "open range" is antiquated and inaccurate, as discussed below, but the production of grazing livestock in the American West is performed on a combination of privately-owned and federally-owned public land for which livestock producers pay annual grazing fees. Through the grazing of sheep and cattle, these producers help the U.S. government manage more than 250 million acres of public land. Prescribed grazing is a critical conservation practice on behalf of local governments throughout the West as well.

Whether individually or as part of a team, herders can tend a large "band" or "herd" of 1,000 head of livestock or more, often in rugged high altitude terrain or dry desert conditions, hauling water for the animals, herding them to grazing areas and making sure they have enough to eat, keeping them from going astray, and protecting them from the constant threat of natural predators like coyotes, mountain lions, and wolves, harmful or poisonous plants, and man-made dangers like highways and domesticated dogs. During lambing, calving or kidding season, the herders assist the animals in the birthing process, and at all times, the herders provide for the health and medical needs of the herd.

Dating back to World War II, sheep producers found it first difficult and later impossible to find United States workers able and willing to perform the difficult work of "range" sheepherding. In recent years, the number of U.S. born sheepherders has essentially dropped to zero. For example, in 2012, Western Range's members sought to hire nearly 1,000 sheepherders. Out of that number, only 22 U.S. workers even applied, and only 2 met the qualifications and were hired. Neither completed the job contract. In 2014, Mountain Plains filed H-2A applications seeking 49 goat/sheepherders, 27 goatherders, 734 sheepherders, 235 grazing cattle herders, and 30 sheep shearers and wool graders. Of the more than 1,000 positions for which Mountain Plains' employers needed workers, exactly 2 qualified U.S. workers applied. One was not interested in the job and the other was hired but quit before completing his contract.

Even where there are "U.S." workers applying for work in the production of grazing livestock, nearly all are foreign-born, possible former H-2A workers who have obtained permanent resident status by marrying U.S. spouses. The remote and demanding nature of this work makes it unattractive to U.S. workers. Without the sheepherders hired from Peru, Mexico, and Chile, the generations' old industry of grazing livestock would disappear forever in the United States.

Even with access to the H-2A program, grazing livestock producers face an unforgiving present and an uncertain future: producers face both rising input costs (feed,



Adele Gagliardi  
 Administrator, Office of Policy Development and Research  
 June 1, 2015  
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water, transportation, etc.) and a price-taking market in which more than half of the U.S. lamb supply and most of the U.S. wool supply is provided by China, Australia, and New Zealand. Prolonged droughts only compound these problems, and large, well-established sheep operations are going out of business every year. Where U.S. herds included more than 56 million head of sheep at the beginning of World War II, the current total is now less than 10% of that figure, with fewer than 5.3 million head of sheep as of the January 30, 2015 USDA NASS Sheep and Goat Report.<sup>1</sup> According to USDA data, lamb imports have increased from approximately 6,000 pounds per month in January 2000 to more than 20,000 pounds per month in March 2015, primarily from Australia, due in part to the increase in purchase power of the U.S. dollar vs. the Australian dollar in recent years.<sup>2</sup>

The attached report by Stephen Bronars, Ph.D., "Analysis of the Wages of H-2A Temporary Foreign Workers Employed in the Herding and Production of Range Livestock" (Bronars Report), addresses the current world market for the wool and meat produced by this industry, as well as suggesting an alternative to the NPRM's proposed wage methodology and a discussion of how that wage alternative would provide a far better standard of living for herders than that seen by other workers in this region. First, as discussed in the Bronars Report, the massive increase in mandated wages proposed in the NPRM assumes that employers would be able to pay those increased wages by raising prices, without losing their market share to foreign competitors in the global market. As shown in that report, however, U.S. producers account for less than seven tenths of one percent of the world's wool production and less than nine tenths of one percent of the world's lamb production. U.S. market share has been shrinking for decades, but United Nations data show that U.S. wool production is down 65% since 1990, while lamb production is down 56% over that same period. Beef producers in the U.S. face the same pressures, with roughly 3% of the world's beef supply produced on the range.<sup>3</sup> The unavoidable bottom line of these market conditions is that U.S. producers will not be able to increase their prices and will, instead, be forced out of business by the tripling of their labor costs, leaving foreign competitors to slightly increase their own production to meet that demand at a lower price.

Due to the fortitude of U.S. ranchers and the hard work of the H-2A herders that they hire, some family ranches have stayed in business. The estimated value of direct production by sheep under the care of H-2A workers is \$275 million, with revenue created in indirect "upstream" and "downstream" businesses valued at more than \$665 million. The value created by H-2A workers involved in the production of grazing goats

<sup>1</sup> By way of contrast, in the early 1800's there were fewer than 10 million people in the United States but more than 7 million head of sheep. U.S. sheep herds stayed above that number for 200 years before dropping below 7 million head in 2003 and staying below that figure ever since.

<sup>2</sup> <http://www.ers.usda.gov/data-products/livestock-meat-international-trade-data.aspx#26050>

<sup>3</sup> Range beef producers face competition both from foreign producers as well as U.S. feedlots. Increasing the operating costs for range producers will eliminate their remaining market share and lead to only foreign or feedlot beef.

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and cattle involves similar “multiplier” effects on local economies. This is a small industry relative to some, but it plays a significant role in the livelihood and survival prospects of small towns throughout the West. From the meat on a family’s dinner table to the wool in the uniforms worn by the U.S. military, the range production of sheep and livestock contributes to the American economy and continues the American story. The Commenters respectfully urge the Department of Labor to reconsider its proposed Rule, which threatens to end this way of life.

### Early Program History and Mendoza Litigation

The Department of Labor set forth the early history of the program to admit foreign workers to address the shortages of U.S. workers in the production of grazing livestock in Field Memorandum No. 24-01 (FM 24-01):

Historically, employers in several western states have utilized the provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101, et seq., to import nonimmigrant foreign workers to work as sheepherders and goatherders in conjunction with their ranching activities.

The unique occupational characteristics of sheepherding (spending extended periods of time grazing herds of sheep in isolated mountainous terrain; being on call to protect flocks from predators 24 hours a day, 7 days a week) have been recognized by the Department, the United States Citizenship and Immigration Service (USCIS), and Congress as significant factors in limiting the number of U.S. workers who might be interested in and capable of performing these jobs.

During the early 1950’s, Congress enacted three special laws authorizing the admission of a certain number of “foreign workers skilled in sheepherding” for many of these jobs. Special privileges were granted with respect to the issuance of visas which enabled the foreign workers to gain entry into the U.S. on an expedited basis, provided that they were otherwise admissible into the U.S. for permanent residence. There were no required tests of U.S. worker availability or adverse effect at the time.

During 1955 and 1956, the House Judiciary Committee (Committee), in response to requests from sheep ranchers, undertook an investigation to examine allegations that a number of foreign sheepherders admitted under the special laws were leaving sheepherding shortly after arriving in the U.S., and were instead employed in other industries and occupations.

The Committee’s investigation substantiated many of these allegations. In a report issued on February 14, 1957, the Committee stated that American



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employers and the sheep raising industry had not fully benefitted from the services of foreign shepherders, as was intended by the special legislation. The Committee recommended that no additional special legislation be enacted to admit foreign shepherders and also that the future importation of foreign shepherders be governed by the H-2 temporary worker provisions of the INA and administered by the Immigration and Naturalization Service (INS) (now, USCIS) and the Department. H.R. Rep. No. 67, 85<sup>th</sup> Cong., 1st Session (1957).

Following the issuance of the Committee's report, Congress permitted the special legislation to expire. No additional legislation for shepherders has been enacted to date. The labor certification program for temporary foreign shepherders and goatherders was implemented consistent with the H-2 program administered by INS (now, USCIS) and the Department.

After Congress passed the Immigration Reform and Control Act of 1986 ("IRCA"), the H-2 program was divided into the agricultural H-2A program and the non-agricultural H-2B program. With IRCA, shepherders came under the H-2A program, subject to special procedures that have been in place, in one form or another, since that time. DOL issued regulations for the H-2A program on June 1, 1987 (the "1987 Rule").<sup>4</sup> In the 1987 Rule, 20 C.F.R. § 655.93(c) specifically provided for the continued use of "special procedures" in the sheep industry and the extension of such procedures to other range production of livestock.

DOL issued Field Memorandum No. 74-89 (FM 74-89), effective May 31, 1989, setting forth special procedures for temporary foreign herders. As stated in DOL's Field Memorandum No. 24-01 (FM 24-01), the 1987 Rule "was based on past experience under the shepherding program, and is consistent with the views of IRCA's Congressional sponsors." Further explaining the 1987 Rule in 2011, DOL stated that:

The 1987 regulations provided for the administration of the H-2A Program by the Employment and Training Administration (ETA) Regional Administrators, and instituted procedures to offset the adverse effects of immigration on U.S. workers, procedures which did not exist until that time. Although neither the IRCA amendments nor the INA specifically address the employment of nonimmigrant foreign shepherders and goatherders in the U.S., the Department's 1987 regulations established special procedures for certain occupations, as long as they did not deviate from the Secretary's statutory responsibility to determine U.S. worker availability and to make a determination as to the adverse effect of foreign workers on the wages and working conditions of U.S. workers.

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<sup>4</sup> 54 Fed. Reg. 20496 (June 1, 1987).

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TEGL 32-10 (76 Fed. Reg. 47256, 47257 [Aug. 4, 2011]). On August 1, 2001, DOL issued FM 24-01, which continued the special procedures set forth in FM 74-89. DOL next issued TEGL 15-06 on February 9, 2007. This TEGL reiterated (nearly verbatim) DOL FM 24-01.

The 1987 Rule was replaced in 2008 (the 2008 Rule)<sup>5</sup> and again in 2010 (the 2010 Rule)<sup>6</sup> through notice-and-comment rulemaking. The 2010 Rule is currently in effect and governs DOL's administration of the H-2A program, including the special procedures. The 2010 Rule explicitly authorize the OFLC Administrator to "establish, continue, revise or revoke" special procedures in order "[t]o provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the Immigration and Nationality Act (INA), while not deviating from statutory requirements." 29 C.F.R. § 655.102. The 2010 regulations reference by name the "special procedures currently in effect for the handling of applications for sheepherders in the Western States (and adaption of such procedures to occupations in the range production of other livestock), and for custom combine harvesting crews." *Id.* The regulations further provide that "[p]rior to making determinations under this section, the OFLC Administrator may consult with affected employer and worker representatives." *Id.* After the 2010 Rule took effect, DOL issued new guidance for the special procedures at issue here in 2011 (TEGL 15-06, Change 1, "Open Range Production of Livestock" and TEGL 32-10 "Sheepherding and Goatherding").

Those two TEGLs were the subject of a lawsuit in U.S. District Court for the District of Columbia, *Mendoza v. Solis*, 1:11-cv-01790-BAH. DOL was a defendant in the *Mendoza* litigation, and MPAS and WRA intervened as defendants. While the District Court agreed with the Intervenor-Defendants that the Plaintiffs in that case lacked standing to bring the case, that decision was subsequently overturned on appeal to the U.S. Court of Appeals for the District of Columbia. The D.C. Circuit further ruled that the TEGLs issued in 2011 were "legislative rules" that required notice-and-comment rulemaking pursuant to the Administrative Procedure Act. The decisions in *Mendoza* required that the special procedures undergo notice-and-comment rulemaking to bring them into compliance with the requirements of the APA, but did not require the substance of the TEGLs be cast aside and radically re-written.

On remand, the District Court set a schedule that allowed DOL 5½ months to prepare the NPRM for issuance by April 15, 2015, with a Final Rule to be issued by November 1, 2015 and to take effect by December 1, 2015. Of the 6½ months between issuance of the NPRM and issuance of the Final Rule, DOL allotted only 30 days for public comment on the rule, later agreeing to a 45-day comment period after significant

<sup>5</sup> 73 Fed. Reg. 77110 (Dec. 18, 2008).

<sup>6</sup> 75 Fed. Reg. 6883 (Feb. 12, 2010).



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public outcry from the grazing livestock industry and from Congress. This is particularly ironic because the argument driving the *Mendoza* litigation giving rise to the current rulemaking was the lack of adequate opportunity for public comment on the special procedures.

#### Administrative Procedure Act Concerns

Beyond the disastrous substance of the rules discussed below, there are serious concerns with the procedure by which the Rule has been prepared. The truncated public comment period aside, it appears that the Department has failed to meet its procedural requirements for preparing and issuing the NPRM. The NPRM does not include a proper Initial Regulatory Flexibility Analysis (IRFA) of the Rule's impact on the regulated community (nor on other parts of the U.S. economy or other agencies of the U.S. government). See 5 U.S.C. § 603. In particular, the only "alternatives" identified in the NPRM relate to the phase-in period for the new wage methodology: immediately, over a 3-year period, or over a 5-year period. This does not come close to satisfying the requirements of Section 603(c), of describing "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."<sup>7</sup>

The new definition of range production of livestock proposed in the NPRM represents a radical departure from statutory language, previous DOL regulatory text, and a long series of DOL guidance documents with respect to the special procedures for range production of livestock. The APA requires that changes in regulatory practice be based on an agency's reasoned explanation for the change. The NPRM does not explain why a definitional change is necessary, does not identify any problem or confusion with the longstanding definition of the work covered by the special procedures, and makes no effort to explain why the particular definition chosen for the Rule is necessary or appropriate. As discussed below, the definition's reliance on "unenclosed" land is at least 100 years out of date, suggesting that the reasoned explanation for the change required by the APA is not possible.

#### *The Department of Labor Has Not Met its RFA Requirements*

The NPRM openly concedes that it "will have a significant economic impact on a substantial number of small entities." 80 Fed. Reg. 20330. The purported IRFA in the NPRM, however, contains only the most cursory analysis of the statutory factors from Section 603. The NPRM states that it is issuing the NPRM in response to the D.C.

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<sup>7</sup> As set forth in the comments of the American Sheep Industry Association and the Small Business Administration Office of Advocacy, all but 0.02% of the total sheep operations in the United States are small businesses. All or nearly all of the members of Mountain Plains and Western Range would meet the statutory definition of "small business" for agricultural enterprises.

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Circuit's decision in *Mendoza* and because of "the continuing difficulty the Department experiences in determining an appropriate AEWWR using the current wage setting methodology." *Id.* This explains why DOL is considering taking any action, but does not explain why the Department is considering *this* particular action.

The analysis of the impact of the Rule on small businesses contains a similarly brief discussion, contains repeated underestimation of the actual costs to be imposed, and fails to include a number of significant costs. Mountain Plains and Western Range contend that the defects inherent in the NPRM's IRFA render the rulemaking invalid as contrary to the requirements of the APA and the Regulatory Flexibility Act. For example, the NPRM attaches no economic impact to the change in definition of "open range" – a change that will exclude an estimated 40% or more of the employers currently using the H-2A program in this industry, as discussed in greater depth below.

The NPRM takes the current workforce and provides a projection of the impact of the wage "transfer" from employers to workers. Unlike most economic analyses of proposed rules, this is not simply a transfer from employers to employees, normally a zero-sum prospect. Here, since very nearly 100% of the workforce consists of nonimmigrant foreign workers with little or no opportunity to spend money while in the United States, this is a transfer of tens of millions of dollars from U.S. employers to foreign markets. This is not a situation where U.S. workers would have more money in their pocket to spend within the U.S. economy, but rather, where all or nearly all of the paycheck of these workers is wired out of the U.S. to Peru or Mexico, where that money is used to build homes and buy consumer items there, a significant net loss for the U.S. economy.

#### *The NPRM Fails to Consider the Impact of Forcing Ranches Out of Business*

The NPRM does not analyze the cost to ranches of going out of business because of this massive wage increase or the change in the definitions of who may use the program, forcing them to sell their herds, their equipment, and their land into a buyer's market as hundreds or thousands of other ranches face the same plight.<sup>8</sup> If the Rule were to take effect as currently written, and all of the H-2A sheep producers were forced to slaughter 40% of the country's sheep without being able to sell them to market (as would likely happen, since the world market could not absorb that influx of supply), the total loss would be \$212 million, based on the total value of the U.S. sheep supply. While these are small employers in a single part of the economy, the direct losses associated

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<sup>8</sup> The NPRM actually states that the Department of Labor estimates that the number of H-2A employers will increase from the current 560 to 669 by 2025 with the Rule in effect, based on "an annual growth rate of two percent." 80 Fed. Reg. 20327. This statement alone demonstrates how fundamentally wrong DOL's assumptions are and how much the Department misunderstands this industry and the terrible consequences of the Rule on these small businesses.



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with them forced out of business would be huge, to say nothing of the “upstream” or “downstream” losses that would ensue.

The NPRM does not calculate the loss to rural communities if these ranchers are forced out of business by the Rule. Each of the jobs at issue in this rulemaking in the production of grazing livestock creates at least 8 full-time U.S. jobs, upstream and downstream, from suppliers to processors, truck drivers to shearers, supermarket clerks in rural Wyoming to butchers at a natural meat cooperative in New York City. Losing 2,000 H-2A workers could mean the loss of tens of thousands of U.S. jobs. For small Western towns already battling to stay alive, this Rule could turn them into ghost towns.

Even for East Coast sheep operations that pasture-raise their sheep and cattle and do not use H-2A workers, the loss of Western livestock producers will cause shippers, shearers, and processors to go out of business, leaving them unable to continue their operations as well. No consideration is given to these workers or businesses in the NPRM, which somehow assumes (against the weight of all economic theory and the entire history of this industry) that employers have an unlimited capacity to increase wages and the economy will suffer no ill-effects from tripling or quadrupling labor costs in an industry that operates on razor-thin margins already.

Beyond the tangible economic cost of lost jobs, lost farms, and lost businesses, there would be an incalculable injury to the Western lands, themselves. Grazing livestock producers manage 250 million acres of Western land, and grazing activities contribute significantly to fire suppression, endangered species management (the protected sage grouse needs grasslands grazed to a reasonable height), and related conservation activities. The lands under the stewardship of the Department of the Interior, the Forest Service, and the Bureau of Land Management would suffer tremendously without the presence of range livestock producers.

### *The NPRM Fails to Properly Value the Costs of the Rule*

On the more technical aspects of the Rule, beyond the two largest concerns with the definition of the job and the new wage methodology, the NPRM misunderstands and/or underestimates the impact that it will have on employers. The Rule proposes to change how camps or mobile housing facilities are used, introducing a “one worker to a camp” requirement. The NPRM does not include the cost of purchasing additional housing in its summary of costs per employer. 80 Fed. Reg. 20334. If it had, it would see that employers will have to spend \$20,000 or more to purchase each additional camp, with some operations facing a bill of \$80,000 to comply. Even that assumes that: (1) employers will be able to locate such housing in order to purchase it; and (2) they will be able to actually use the new housing. In Winter months, when the days are short and the nights are dark, it will be impossible for herders traveling on horseback and towing camp wagons to follow the sheep to be able to move the herd, move one wagon, then loop back



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to move the second wagon before nightfall. These workers often travel over terrain with no roads, and the NPRM's changes to housing create serious safety concerns. This is just one example of how the Rule will have far-reaching effects on this industry to an extent not analyzed by DOL in the NPRM (and perhaps not considered or understood by the Rule's authors).

Even without considering all of the additional or "hidden" costs built into the changes in the rule<sup>9</sup>, the Department estimates that the additional costs will constitute between 19.5% and 24.1% of total revenue for sheep or livestock employers with 3 workers, respectively. 80 Fed. Reg. 20334, Ex. 22. No justification is given for measuring the impact only for those employers with 3 workers, since the Colorado Wool Growers Association's 2010 study (cited in the NPRM at 80 Fed. Reg. 20309 for an unrelated issue but ignored here) showed that its members used an average of 5 workers.<sup>10</sup> Across the entire Western portion of the U.S. the average number of workers per operation is at least 4, but even the extremely limited estimate used by DOL gives a good sense of just how costly the Rule will be. The 19.5% and 24.1% figures do not include the single largest additional financial burden of the Rule, the wage increases. The American Sheep Industry Association (ASI) estimates that labor costs make up 24% of the total operating costs for sheep ranchers. It is slightly disappointing but not ultimately surprising that the NPRM does not include a similar calculation of the percentage of total revenue that would be devoured by the new wage methodology. This is likely because the new costs and transfers proposed in the Rule will exceed total revenue for all or nearly all of the employers in this industry.

Despite having months and months to prepare the NPRM, DOL has failed to prepare a valid IRFA as required by the APA. Some of the costs of the Rule are unknowable today, given how radically the Rule proposes to change the longstanding practices of the special procedures program. Still, the Department should be expected to understand the harm that it proposes to inflict on small businesses before embarking on this course of action. To do otherwise is unwise and unlawful.

#### **Definition of "Open Range" and Limits on "Incidental" Work**

Together with the new wage methodology introduced in the NPRM and discussed below, the most devastating element of the proposed Rule is the definition of "open range" in 20 C.F.R. § 655.201 (proposed); 80 Fed. Reg. 20339. This goes to the core of

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<sup>9</sup> For example, the NPRM estimates the additional cost of the increased water requirements in the NPRM at \$1.0 million annually. 80 Fed. Reg. 20326-27. This estimate does not include the cost of purchasing additional trucks or water trailers (tens of thousands of dollars each), nor does it accurately estimate the average length of a trip from the ranch to a sheep or livestock camp. This estimate is extremely low and reflects the fundamental lack of understanding of the industry by the Department.

<sup>10</sup> Colorado Wool Growers Association, *The Real Wage Benefits Provided to H-2A Sheep Herders and the Economic Cost to Colorado Ranchers* (Mar. 5, 2010).

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the special procedures and acts as a gatekeeper over whether employers may use the Rule at all or be excluded from the H-2A program altogether. The Rule states that:

These procedures apply to job opportunities with the following unique characteristics:

- (1) The work activities involve the herding or production of livestock, as defined under § 655.201. Any additional job duties performed by the worker must be minor, sporadic, and incidental to the herding or production of livestock;
- (2) The work is performed on the open range requiring the use of mobile housing, as defined under § 655.201, for at least 50 percent of the workdays in the work contract period because the worker is not reasonably able to return to his or her place of residence or to employer-provided fixed site housing within the same day. Any additional work performed at a place other than the open range (e.g., an enclosed farm or ranch) that does not constitute the production of livestock must be minor, sporadic, and incidental to the herding or production of livestock; and
- (3) The work activities generally require the workers to be on call 24 hours per day, 7 days a week.

20 C.F.R. § 655.200(b) (proposed); 80 Fed. Reg. 20339. Proposed Section 201 contains definitions of the following terms:

*Herding.* Activities associated with the caring, controlling, feeding, gathering, moving, tending, and sorting of livestock on the open range.

*Livestock.* An animal species or species group such as sheep, cattle, goats, horses, or other domestic hooved animals. In the context of this subpart, livestock refers to those species raised on the open range.

*Minor, sporadic, and incidental work.* Work duties and activities that are closely and directly related to herding and the production of livestock and are performed on no more than 20 percent of the workdays spent at the ranch in a work contract period.

*Mobile housing.* Housing meeting the standards articulated under § 655.235 that can be moved from one area to another area on the open range.



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*Open range.* Unenclosed public or private land outside of cities and towns in which sheep, cattle, goats, horses, or other domestic hooved animals, by ownership, custom, license, lease, or permit, are allowed to graze and roam. Animals are not meaningfully enclosed where there are no fences or other barriers protecting them from predators or restricting their freedom of movement; rather a worker must actively herd the animals and direct their movement. Open range may include intermittent fencing or barriers to prevent or discourage animals from entering a particularly dangerous area. These types of barriers prevent access to dangers rather than containing the animals, and therefore supplement rather than replace the worker's efforts.

*Production of livestock.* The care or husbandry of livestock throughout one or more seasons during the year, including guarding and protecting livestock from predatory animals and poisonous plants; feeding, fattening, and watering livestock; examining livestock to detect diseases, illnesses, or other injuries; administering medical care to sick or injured livestock; applying vaccinations and spraying insecticides on the open range; and assisting with the breeding, birthing, raising, weaning, castration, branding, and general care of livestock.

20 C.F.R. § 655.201 (proposed); 80 Fed. Reg. 20339.

Understanding the need to distinguish when these "special procedures" would apply and when the general H-2A rules would apply, these definitions are inappropriately restrictive and are not a realistic reflection of the industry's labor needs. In a recent survey that Mountain Plains conducted of its members, asking them whether their ranch's operations using H-2A workers currently and for previous years would fit within the definitions quoted above. Of the 140 employer-members who responded, 45% of respondents indicated that their operation would *NOT* qualify as "open range" according to the definition in the NPRM. Of those respondents, 34% indicated that their operation would *NOT* qualify as "herding" according to the definition in the NPRM. This came as a shock to employers who have been using the H-2A special procedures program for many years and who now face the prospect of losing their workforce and, as a result, their family farm.

In place of those definitions, Commenters suggest the following:

***Grazing Livestock Production System.*** A livestock production system that is dependent on the sustainable 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, forage) and intangible inputs (sunshine

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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, assistance in loading and unloading animals into livestock trucks for movement.

This would address the need for a definition, make clear that feedlots and similar operations are not covered, and tie the definition to the critical component of the job, the grazing of livestock, rather than an arbitrary characterization of the housing, topography or landscape where the grazing is conducted, or where the herder's work is to be conducted. Likewise, where the term "herding" is used in Section 655.210 of the proposed Rule, Commenters suggest "herding and grazing production of livestock" to maintain consistency and more accurately describe the job to be performed.

*The Term "Open Range" is Antiquated and Should be Retired*

The NPRM does not suggest that there has been any confusion as to what work would be appropriately covered by the existing special procedures, nor does it communicate any concern that workers not engaged in "herding" or "production of livestock" as defined above are being improperly included in the special procedures. The most recent TEGL for sheepherders and goatherders, TEGL 32-10, made two passing references to "the open range" but did not restrict access to the program to a particular definition of that term. The most recent TEGL for those involved in grazing livestock, TEGL 15-06, Change 1, did reference the term "open range" but did not define that term.

The FLSA's exemption for this work applies to "any employee employed in agriculture ... if such employee is principally engaged in the range production of livestock." 29 U.S.C. § 213(a)(6)(E). The Wage & Hour Division (WHD) regulations interpreting this livestock production FLSA exemption (29 C.F.R. §§ 780.323 – 780.329) matches the NPRM's language on some issues (e.g., the definition of "livestock" in Section 780.328; the recognition that the job duties necessitate remaining with the herd and "make the computation of hours worked extremely difficult" in Section 780.329) but differs from the NPRM in certain critical areas. The Commenters respectfully assert that the existing WHD regulations are a better fit for the definition of the jobs that have been performed under the special procedures for decades than is the NPRM.

For example, the WHD regulations use the phrase "range" instead of "open range." Section 780.326 defines "range" as "land that produces native forage for animal



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consumption” and specifically states that the “range may be on private or Federal or State land, and need not be open.” Furthermore, any part of a ranch beyond the “ranchhouse, barns, sheds, pen, bunkhouse, cookhouse, and other buildings in the vicinity... would be the ‘range.’” Section 780.329(b). The WHD regulations make clear that the worker’s “primary duty must be the range production of livestock” but acknowledges that “[t]he fact that an employee generally returns to his place of residence at the end of each day would not affect the application of the exemption.” Section 780.329(a). The critical distinction between ordinary agricultural work and work “on the range” in the WHD regulations is that the work is sometimes “performed away from the ‘headquarters’” (the specific buildings listed above) (Section 780.329(b)), and consistent with the legislative history of the exemption, it “was not intended to apply to feed lots or to any area where the stock involved would be near headquarters” but rather to situations where the herd are grazing under the supervision and protection of the workers in question. Section 780.329(c). There are times when weather conditions require that the herd be brought to the ranch for periods of time, but that does not mean that the workers caring for them and herding them are not “principally engaged” in range production of sheep and livestock.

The NPRM uses (for the first time) the requirement that the herd be grazed on “[u]nenclosed public or private land outside of cities and towns” where they are “allowed to graze and roam.” 80 Fed. Reg. 20339. While that description might once have fit portions of the American West, it has no application to the present landscape. Stated simply, there is no such place. All of the land in the West (indeed, in the whole country) is owned either privately or by the Federal government or a State government. The “range” is less open every year. Fences line every highway and most roads throughout the West. Even within Federal lands, the U.S. Bureau of Land Management and USDA Forest Service have deployed fences to keep certain plant or animal species apart, to protect certain portions of that land, to keep grazing ungulates (wild or domesticated) away from rivers, streams or other riparian areas, or to restrict access for some other reason. These fences delineate boundaries and limit the access of people or certain larger wild animals, but generally do not restrict the movement of sheep. While there are still places in the West where one might not see a fence nearby, every parcel of land is bounded by fences at some point. Thus, the reference to “unenclosed” land is antiquated and would effectively eliminate this program.

#### *Temporary Fencing Has Been Used Since the Beginning of this Program*

The use of temporary fencing is an essential tool used by livestock production workers since before the beginning of the H-2A herder program and its predecessor programs, with DOL’s approval. Temporary fencing neither replaces workers nor diminishes the need for those workers. The NPRM mistakenly treats fencing as a substitute for these H-2A workers, apparently operating under a misperception that a herd can be led into a fenced area and left alone for the night or for longer periods of time. Nothing could be further from the truth. Temporary fencing is used to keep sheep away

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from certain plants (either those grown by another farmer that must be protected or those that are hazardous to sheep who must be protected from the plants) and to keep them from falling into ravines or drowning in rivers. The U.S. Fish & Wildlife Service expressly requires that sheep grazing on certain U.S. Forest Service allotments be kept in "night pens" (temporary enclosures using electric fences) for purposes of "detering bears and reducing grizzly bear/sheep conflicts." A ban on the use of temporary fencing by the Department of Labor directly contradicts explicit requirements by the Department of the Interior and the Department of Agriculture.

Temporary fences are erected, taken down, and moved with the herd to avoid over-grazing a particular area of land, as many as 12 times per week in some areas. Even with fences, herders are still required to move the herd from place to place, to keep members of the herd from straying off, to tend to the medical needs of the herd and to provide adequate water, minerals, and additional feed as required, but perhaps most critically, to guard the herd from predators. Herders must be able to care for the livestock and travel through rough terrain, possibly on horseback. They may also be needed to handle a rifle when the time comes. A hungry mountain lion, coyote, or wolf (or even certain domesticated dogs) will not let a fence stand between it and a lamb dinner. The use of fencing is a valuable tool for herders but nothing replaces the watchful eyes and ears of a trained herder. Banning the use of this fencing will not protect U.S. jobs, but will make the jobs of herders far more difficult, and will result in the death of more animals and possibly more motorists.

The NPRM specifically requests comments on whether the definition of "open range" should include a minimum acreage of the land on which the animals roam. The phrase "open range" should be removed from the Rule entirely, and there should definitely not be a bright-line definition of acreage. Very often, the employer and the worker would have no way of knowing the acreage of a given parcel of land, making the application process and compliance efforts essentially impossible. In a similar vein, the NPRM asks whether the "open range" definition should take into account barriers, fences or other enclosures on the same land and, if so, under what circumstances. For the same reasons articulated above, the phrase "open range" is 100 years out of date and should be replaced with the simpler "range" definition from the WHD regulations or, better still, with a focus on the actual labor to be performed rather than on the topography of the landscape where it is to be performed, referring instead to workers involved in the production of grazing livestock.

By tying the work to "grazing," the Rule would more than adequately avoid the potential scenario of applications for H-2A workers on feedlots. The WHD regulations recognize this and the distinction drawn between work on a feedlot and grazing operations remains viable and relevant. Commenters strongly urge the Department to reconsider its proposed definition in order to align the Rule with the WHD regulations and with the reality of the modern Western landscape.



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*The 50% and 20% Rules Are Arbitrary and Unworkable*

As quoted above, the WHD regulation regarding work “on the range” explicitly includes range work spent herding, tending to, and caring for grazing livestock, even where the “employee generally returns to his place of residence at the end of each day.” Section 780.329(a). The NPRM requires, instead, that workers must use mobile housing “for at least 50 percent of the workdays in the work contract period because the worker is not reasonably able to return to his or her place of residence or to employer-provided fixed site housing within the same day.” 20 C.F.R. § 655.200(b)(2) (proposed); 80 Fed. Reg. 20339. Under this proposed Rule, a sheepherder spending 182 days each year in a camp but the remaining time in a bunkhouse during lambing, docking, or castrating season would not be eligible under the Rule but would not be eligible under the regular H-2A provisions, either, since even 1 day is spent away from fixed-site employment and housing. This would be an absurd outcome.

The better approach would be to follow the existing DOL regulations in the WHD context, which look to the “primary duty” of the employee (Section 780.329(a)) or whether the employee is “principally engaged” in the range production of livestock, including all of the duties associated with that work (Section 780.325(a)). As the WHD regulations state:

To determine whether an employee is “principally engaged” in the range production of livestock, one must consider the nature of his duties and responsibilities. To qualify for this exemption the primary duty and responsibility of a range employee must be to take care of the animals actively or to stand by in readiness for that purpose. A determination of whether an employee has range production of livestock as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the range production duties is a useful guide in determining whether this is the primary duty of the employee. In the ordinary case it will be considered that the primary duty means the major part, or over 50 percent, of the employee's time.

Section 780.325(a). Moreover, an employee spending more than 50% of his or her time during the year on the range in the production of livestock would be exempt “even though the employee may perform some activities not directly related to the range production of livestock, such as putting up hay or constructing dams or digging irrigation ditches.” Section 780.325(b). That definition includes a more holistic and flexible approach to the definition – maintaining the general rule that the worker is “principally engaged” or has a “primary duty” or spends the majority of his or her time out on the range, but recognizing that other work has historically been connected to that work and must be included in the definition of the job.



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The arbitrary and artificial 50% and 20% limits proposed in the NPRM are unworkable and treat work in the production of grazing livestock as a series of discrete tasks rather than the collection of work performed in service to the livestock and their needs. The NPRM makes no attempt to explain how the 20% “incidental activity” test would help U.S. workers.<sup>11</sup> Nor does the NPRM offer any explanation of how H-2A foreign workers are being harmed by not having this 20% limit in place. What is the policy goal that this rule achieves? Without any effort to articulate a benefit to U.S. or foreign workers, the NPRM simply imposes this limit that will: (1) make it impossible for many current H-2A program users to utilize the H-2A program at all; and (2) impose tremendous recordkeeping and “HR” burdens on family farms to follow their workers and record every activity in which they engage. The work performed by these employees is often performed far from the ranch and to expect workers or ranchers to track their activities like a lawyer billing for his or her time would be impossible. Moreover, what possible benefit could result from attempting to do so? These “bright-line” limits on how and when this work should be performed demonstrate how little the Department understands this work and would be absolutely unworkable in reality.

#### *Responses to NPRM Questions About the Work to be Performed*

The NPRM solicits specific comments on a number of questions as to the season in which the work is performed, the nature of the job duties on the range vs. at the ranch, and the time period and location where such work is performed.<sup>12</sup> The general response is that the work is performed on an “as the need arises” basis, and there is no single description of a worker’s typical day. The work is defined first and foremost by the needs of the animals in the herder’s care. During lambing, kidding, and calving season, the days are longer and the work is focused on the healthy birthing of new animals. Those duties occur at certain times of the year according to the natural cycles of the seasons and the animals. In parts of the West, employers use fixed structures (known as “sheds”) to keep livestock and their offspring safe and healthy during the birthing process. Other ranches perform birthing in open-air pastures. The amount of time spent assisting with this phase depends on the natural conditions of the male and female livestock.

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<sup>11</sup> Of all the complaints raised by the *Mendoza* plaintiffs, none of them related to the amount of “incidental activity” that was included in the job. The job of a herder includes all of the duties related to caring for and herding the grazing animals, and there is no black-and-white distinction between what is primary and what is “incidental” work.

<sup>12</sup> Commenters note, as an aside, that the answers to these questions have not changed dramatically over the past 60+ years of this program and that, if the Department of Labor had been willing to follow through on its repeated promises of accepting stakeholder input and engaging with the industry, it would have all of these answers already.



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Responding to health emergencies experienced by the animals can occur at any time of the day or night, as can responding to threats from predators. The time spent in a particular grazing area before moving to another is dictated by the amount and type of forage available. Different plants grow at different rates and are consumed by the herd at different rates. The NPRM seeks specific comment on a number of issues related to the season and time spent by H-2A workers on particular tasks, and the Commenters offer the following brief responses to those requests.

With respect to the 10-month limitation for “livestock” occupations compared with the longstanding 12-month limit for sheep and goat work, the Commenters strongly urge the Department to keep those existing limits in place in the Rule. Switching the sheep and goat job orders to a 10-month limit would not fully meet the needs of those industries and would put herders and herds in jeopardy if workers were required to switch in or out during the middle of the grazing season. All of these animals require year-round care, and the 10-month limit for livestock other than sheep and goats should be extended to match the 12-month limit for workers caring for those animals.

Regarding the differing functions for sheep and goat herders in a particular region, the key distinguishing factor in any region and at any given time of year is the weather. These occupations are subject to both the expected changes in weather throughout the year as well as the unpredictable weather conditions that can change in a matter of minutes. In warmer weather, herders must transport and provide additional water to the herd, while in winter months, they must be careful of snow and ensure that the herd has sufficient food. In various climates, the work will depend on the particular reproductive cycle of the animals. The work is ongoing and while variable, it is impossible to establish definitive “seasons” due to entirely too many variables beyond the control of the employer or the herder.

The NPRM asks for the length of time within which employees are on the “open range” as opposed to being at the ranch. As discussed at some length above, the by-gone notion of the “open range” is misinformed and misleading. The location of the work is not the determining factor in defining the occupation. The occupation is defined by the care and management of grazing livestock, with all of the tasks and duties that go with that responsibility. What is best for the health and safety of the herd will dictate where and when the herd must be (and where the herder must bring them). For some operations, weather may require a sheep producer to use a fixed structure (lambing shed) to keep livestock and newborn offspring safe and healthy during and immediately following the birthing phase of production. However, the length of time that a given worker may be assisting with the birthing phase would depend on the vagaries of the reproductive cycles of the particular sheep under his care.

The description of the occupation above is linked inextricably to the care and management of grazing livestock. The NPRM seeks further information about the duties

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typically performed by these workers. Again, the specific duties will vary from day to day or month to month, but are all tied to the needs of the herd. The job orders filed by the Commenters reflect a sizable list of potential job duties to ensure that the H-2A workers are not working "out of contract" and to advise potential applicants of the nature of the work that would be performed. The following language that the American Sheep Industry Association submitted to DOL in Fall 2014 is non-exhaustive, and specific to sheep and goat herding, but gives a general sense of the work performed by herders:

Attends sheep and/or goat flock grazing on the range or pasture. Herds flock and rounds up strays using trained dogs. Beds down flock near evening campsite. Guards flock from predatory animals and from eating poisonous plants. Drenches<sup>13</sup> sheep and/or goats. May examine animals for signs of illness and administer vaccines, medications and insecticides according to instructions. May assist in lambing, docking, and shearing. May perform other farm or ranch chores related to the production and husbandry of sheep and/or goats.

As for the question of during what time period each duty is performed, the only real answer is "as the need arises." There is simply no way to set a specific time for these duties. Even a fairly regular event like birthing will vary depending on the particular geographic location – lambing season comes to different places at different times.<sup>14</sup>

Above all else, weather is probably the single largest factor in determining what work must be done and where it may be performed. For example, wet and rainy weather may require that the herd be moved to the ranch to separate lambs for sale. In drier conditions, this can take place at facilities out on the range. The members of the two Commenter associations are spread across thousands of miles of the American West, with extreme differences in climate and topography. These differences help dictate whether lambing can be conducted in the open air on the range or must be done in sheds. Drought conditions in certain areas dictate how often a herd must be moved and where they would be able to graze, as can excessive snow or rain. The herder understands all of these various conditions and makes daily decisions as to where and when activities will take place based on the health and welfare of the herd entrusted to his care.

### Wage Methodology

The NPRM proposes an extreme departure from the wage methodology that has been in place since the beginning of this program decades ago. The result of this

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<sup>13</sup> A de-worming process to remove certain parasites.

<sup>14</sup> This is one of the reasons why it is critical for Western Range to preserve its ability to transfer workers between its employer members so that they can assist with the lambing season in California and then go help with lambing operations in Wyoming or Colorado that may occur at a different time.



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departure is tripling or quadrupling the wages that must be paid by employers. Abandoning the history of the program, cutting out the role of the state workforce agencies, and ignoring the unique characteristics of the herding industry, the NPRM proposes a one-size-fits-all wage methodology taken from crop agriculture.<sup>15</sup> Rather than continuing to honor the well-established wage methodology that looks to the wages actually earned in this occupation, the Department has pulled a wage out of thin air based on a survey of aggregated farmworker positions *except* herders. Those positions pay by the hour, and do not provide housing or food, making those rates of pay completely inapposite to the range production of livestock.

The rationale cited by the Department in the NPRM does not provide a reasoned explanation for the proposed change. Nor does the NPRM include the required analysis of alternative wage methodologies that would address the concern with the lack of survey respondents stated in the NPRM without imposing the non-herding Adverse Effect Wage Rate where it does not belong and does not work. The Commenters have provided two different alternative wage methodologies below, in addition to the proposal that was submitted to the Department in Fall 2014. Those proposals offer a better fit for this industry, solve the concern with survey responses, and even provide a future solution to prevent wage stagnation. The Department should adopt one of these alternative wage methodologies.

#### *Proposed Wage Methodology*

The Proposed Rule abandons the decades-old practice of state workforce agencies conducting surveys to determine the appropriate wages for workers involved in the production of grazing livestock under the H-2A program. 80 Fed. Reg. 20300, 20307. The reason offered for doing so is:

the dearth of information available to [DOL] through these surveys regarding the actual wages paid to U.S. workers. Often, and almost always more recently, the SWAs determine that there are no survey results or the survey does not return statistically valid results. Thus, for many years, the Department has been unable to determine a statistically valid prevailing wage rate each year in each State in which one is needed, requiring the OFLC Administrator to set the AEWR based on other data or to use the survey results from another adjoining area or State.

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<sup>15</sup> The NPRM seems to be infected by the Department's apparent decision to turn its back on decades of precedent and clear Congressional direction that range herding is to be treated differently from other agriculture and subject to different requirements. This history is included in the brief filed by Commenters with the District Court in the *Mendoza* litigation, attached hereto as Exhibit A.

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*Id.* The result of this lack of valid survey data in recent years is the perceived stagnation of wages, with the NPRM comparing the monthly wage rates from 1994, as taken from a 1993 memorandum from Barbara Ann Farmer, Administrator of the Office of Regional Management, and the wages in place in 2015. The NPRM notes that wages have not increased significantly during the period from 1994-2015 because new wage determinations rely on the previous year's determinations, and so forth.<sup>16</sup> *Id.*

The NPRM does not assert that the state surveys were invalid in 1994 or previous years, simply that the more recent surveys have not produced sufficient results from which to set a higher wage level. *Id.* For what it's worth, the validity of the 1994 survey results was not challenged in the *Mendoza* litigation by Public Citizen or Legal Services; those groups argued only that the current wage levels were inappropriately low. The use of the state surveys in the early years of the H-2A herder program was part of the larger recognition that this work is fundamentally different from crop agriculture for which the overwhelming majority of H-2A visa holders are employed. For example, workers "principally engaged in the range production of livestock" are explicitly exempt from the minimum wage and overtime requirements of Section 206 of the Fair Labor Standards Act. *See* 29 U.S.C. § 213(a)(6)(E).

In place of the longstanding program of a monthly salary based on state surveys, the NPRM proposes to use the data from the semi-annual Farm Labor Survey (FLS) conducted by the National Agricultural Statistics Service (NASS) of the USDA. 80 Fed. Reg. at 20308. The FLS provides wage averages for four types of workers: field workers, livestock workers (primarily dairy or poultry farms or feedlots, including graders, sorters, packers, and equipment operators), supervisors, and "other" workers not included in the first three categories. The NPRM proposes to aggregate states into 15 multi-state groupings, determine the average wage level from the FLS data for that grouping, and require that workers involved in the production of grazing livestock be paid that rate multiplied by 44 hours/week and 4.33 weeks per month.<sup>17</sup>

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<sup>16</sup> Wage rates for California and Oregon are the exception, since those states' herder wages are set by statute (Cal. Labor Code § 2695.2(a)) and judicial settlement (*Zapata v. Western Range Ass'n*, Civ. N. 92-10-25, 244L (Ore. 1994), respectively. As a result of these alternative methods, California's minimum salary is \$1,600.34 per month as of July 1, 2014, set to increase on January 1, 2016 to \$1,777.98. Oregon's court-ordered minimum salary is \$1,319.07 per month in 2014 and increases each year to reflect inflation and changes in the price of food, for which each methodology allows an employer credit.

<sup>17</sup> The NPRM acknowledges DOL's receipt of correspondence on this issue from Mountain Plains and from the American Sheep Industry Association. 80 Fed. Reg. 20309, nn. 17, 18, 20. The wage methodologies included in those documents, however, are not referenced in the NPRM and are not part of the Department's required consideration of alternatives to the proposed rule under the Regulatory Flexibility Act.



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*The Proposed Wage Methodology is Misguided*

The use of the generic “Adverse Effect Wage Rate” (AEWR) used for H-2A crop agriculture is inappropriate for use for H-2A workers involved in the production of grazing livestock. First, the NPRM concedes that there were no more than 18 “domestic workers performing shepherding” in FY 2014. 80 Fed. Reg. 20314. That number has been declining steadily in past years, according to the NPRM: 30 in FY 2012 and 26 in FY 2013, so the figure for FY 2016 could be even lower still. *Id.* The danger of any “adverse effect” on this minuscule domestic workforce is beyond negligible, particularly as compared to the larger agricultural community, for whom the AEWR is most often used. Second, the FLS data reflects the full amount of “take home” pay that the average farmworker receives. From that paycheck, however, that worker must make rent or mortgage payments, must purchase food at the grocery store, and must purchase his or her own work clothes. The remaining earnings, if any, can be used as disposable income on consumer goods or to go out to dinner or a concert or a bar on the weekend.

By contrast, grazing livestock production workers receive, 100% free of charge and with no credit to the employer, housing, food, and clothing, and spend most or all of their time in remote areas and therefore do not tend to frequent stores or restaurants or bars. Many H-2A herders have 100% of their monthly salary wired home to their families in their home country. The 2010 Colorado Wool Growers Report cited earlier found that the base salary of \$750/month produces an “actual wage” of \$1,638/month when living expenses were included. The wage proposals included below, under that same analysis, would yield “actual wages” of well over \$2,000/month.

*The Proposed Wage Methodology Will Destroy this Industry*

The result of this proposed methodology will be to nearly double the wages of H-2A workers in the first year and more than double, triple, or quadruple those wages by 2020 when the full weight of the wage increase is imposed on employers. The NPRM forecasts monthly wage rates between \$2,125 and \$3,244. 80 Fed. Reg. 20318, Ex. 6. The NPRM identifies no other wage methodology<sup>18</sup> as a potential solution to the concerns with the state surveys, and the only alternatives considered in the NPRM were whether to impose this massive additional wage burden on employers immediately, phased in over three years, or phased in over five years. As the least destructive option in the short-term, the five-year phase-in is the best of three terrible choices presented, but this is a false choice and ignores numerous alternatives that would achieve the Department’s “competing goals” under the INA “to provide an adequate labor supply and to protect the jobs of U.S. workers.” 80 Fed. Reg. at 20308. The wage methodology proposed in the NPRM neither provides an adequate labor supply nor protects the jobs of U.S. workers.

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<sup>18</sup> Again, despite Mountain Plains, Western Range, and ASI submitting specific alternatives months ago.



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Instead, the proposed wage methodology makes it absolutely impossible for U.S. ranchers to access an adequate labor supply by pricing that labor far beyond what could be paid in the current market. Even if the doubled or tripled wages would attract more workers (which they have not and will not, as discussed below), no employer could afford to pay those wages, making it impossible to use the H-2A program at all. Furthermore, the NPRM itself states that there are 18 or fewer domestic workers in this industry. *See supra*. The NPRM estimates the cost of the Rule to employers (including net costs and “transfers” of wage payments to workers) at more than \$50 million per year, on average for the next ten years based on the five-year phase-in plan. 80 Fed. Reg. 20329, Ex. 21. Once the new system is fully in place, the NPRM forecasts an annual cost of \$63.6 million per year. Even if there were still 18 U.S. workers by then (a highly unlikely scenario, given the decades-old trend), the Rule would cost employers more than \$3.5 million per year for each of those workers at that rate. That is not a “balanced” approach to resolving the Department’s perceived “competing goals” under the statute.

Given the market values for the meat and wool that ranchers are able to secure for their products, the absurd result outlined above will never come to pass. This is because all or nearly all of the employers of grazing livestock will be forced to sell off their herds for slaughter, sell their family ranches, and go out of business long before those full costs could be felt. A study by the University of Wyoming, submitted with these comments, compared historic market trends for lamb and wool for the past 20 years with the labor and operation costs for ranchers on a per-ewe basis.<sup>19</sup> Based on the current Wyoming herder minimum monthly salary of \$750, a rancher would need to have total receipts per ewe of at least \$97.85 just to cover operating costs.<sup>20</sup> Over the past 20 years, the market would have allowed the average Wyoming ranch to break even on these costs 85% of the time, resulting in a relatively stable population of employers. Under the wage rate for Wyoming set forth in the Rule, of \$2,402.96 for 2020 and subsequent years, a rancher would need to book a return of \$137.45 per ewe, something that has only happened 30% of the time during the past 20 years. Thus, for 14 years out of 20, the ranch would lose money as a direct result of the NPRM’s proposed wage methodology. Factoring in ownership costs lowers the odds for the ranch by creating annual losses in 11 years out of every 12 for the average ranch. That is an extinction scenario for employers; there is simply no way for any employer to sustain losses year in and year out for that long.

Specific examples highlight how destructive the proposed wage methodology will be. This is not a situation where employers are simply taking the standard stance against increasing wages and slightly reducing their marginal profit. Rather, the proposed rule

<sup>19</sup> As discussed above and in the Bronars Report, U.S. producers have no ability to raise their prices for meat and wool and remain remotely competitive in the world market.

<sup>20</sup> A higher return would be required to cover additional “ownership costs” such as purchasing the livestock, other overhead, and maintenance costs on housing, machinery, equipment, and vehicles.



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would completely erase any profit and force ranchers to operate at a loss almost immediately and for all years to come. For example, a rancher in Oregon, already paying wages well above those in other states, faces an increased wage bill of \$35,000 in 2015, climbing to \$66,000 by 2020. The average profit margin for the ranch has been \$25,000 for the past four years, making even the phased-in increase unmanageable with no relief in sight. In a survey of more than 200 Mountain Plains members, each of them stated that they would be forced to downsize their workforce and herd size immediately and most would be forced to sell off their operations within a few years.

*The Damaging Proposed Wages Will Not Attract U.S. Workers*

To the extent that the Rule is intended to increase wages in order to attract more U.S. workers into the occupation, that policy is misguided for several reasons. First, unlike some farmworker jobs in crop agriculture, for which no experience is required or a brief training session would suffice, the unique skills required of this job make it impossible for someone to walk off the street and begin working. The H-2A workers who comprise the current workforce have grown up doing this work, riding horses, tending herds, and living in the mountains. Virtually no U.S. workers can say the same.

Second, higher wages are no guarantee of more applicants. As a test for what a massive increase in wage rates would do, the Department need look no further than comparing the recruitment history of employers in Rocky Mountain states with a monthly pay rate of \$750 or \$800 with that of employers in California with a wage rate set by state law at \$1,600/month. Under the Department's theory that doubling or tripling wages would lead to more qualified, willing, and able U.S. applicants for those positions, the facts over the past 14 years since California changed its wage rules for herders simply do not support that conclusion.

In the past 4 years, dating back to March 2011, during which time the Rocky Mountain states and California have had the herder wage rates listed above, Western Range and Mountain Plains combined have received only a handful of applications from U.S. workers for more than 1,500 open positions each year. Of those applicants, an average of two or three per year have the minimum qualifications to perform the work required and are hired. During that entire 4-year time period, Mountain Plains has had a grand total of 18 applicants for approximately 400 "sheepherder" or "goat/sheepherder" positions in California, an average of 4 applications per year. Of those 18 prospective U.S. workers, 10 had no experience whatsoever and were not qualified for the work. The remaining 8 withdrew their applications because they were not interested in the job.

There are actually fewer applicants in California and fewer U.S. workers that take the jobs advertised there as compared to states like Wyoming or Colorado, regardless of the wage levels. Having a wage rate twice that found in most of the Mountain West for these positions has not led to an increase in U.S. workers coming forward to do this work

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in California, contrary to the arguments underlying the *Mendoza* plaintiffs' complaint or the Department's proposed wage increases. This is not a question of wage levels but one of lifestyle. Workers from Peru, Chile, Mexico, or Mongolia are familiar with this lifestyle and take work here so that their families and communities at home can have a much better life. Workers in the U.S. have, almost without exception, proven to be uninterested in this remote and rugged way of life, and year after year, they have left the occupation and taken 9-to-5 jobs in cities and towns.<sup>21</sup>

When California switched from a survey-based model to a much higher statutory rate, it forced livestock producers there to cut back on the size of their herds, hire fewer employees (U.S. and H-2A), and to ask their remaining workers to take on more responsibility in order for the ranch to survive. Under the NPRM's definition of the job for purposes of the Rule, workers will not be able to take on additional duties related to the production of livestock, despite the obvious economic pressures to do so. The one-two punch of the Rule will make each worker far more expensive but able to perform far less work.

If the Department wishes to increase wages for livestock production workers out of a perception that the survey-based rates in place for the past 20 years are inaccurate, the proposals identified below would address that concern. If, however, the Department aims to massively increase wages by a factor of 3x or more in the interest of bringing qualified, willing, and able U.S. workers "out of the woodwork" to take these jobs that have always been available, then that policy is misguided and directly contradicted by the reality and experience of this occupation.

To the extent that the Department is proposing to dramatically alter the longstanding rules governing this part of the H-2A program, the Commenters would propose that DOL re-visit these rules after they have been in place for a period of time, in order to determine whether the new Rule has achieved the Department's policy objectives of drawing more U.S. workers to this profession. If two or three years pass without a significant reversal of the decades-old (indeed, generations-old) trend of U.S. workers leaving or staying out of this occupation, then the Commenters would ask the Department to review the burdensome rules to be imposed and reconsider whether the balance required by the INA between providing a workforce and protecting U.S. workers has been properly struck or not.

#### *Alternative Wage Proposals*

For the reasons set forth above, the wage methodology proposed in the NPRM is grounded on poor logic and would destroy the livestock grazing industry in short order.

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<sup>21</sup> This is particularly true today, with high-paying jobs in the oil and gas sector throughout the West making it more difficult to fill agricultural jobs of any sort, let alone range herding jobs.



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The AEWB times 44 hours/week and 4.33 weeks/month model is unworkable, but Mountain Plains and Western Range take this opportunity to suggest alternatives. Mountain Plains, Western Range, and the American Sheep Industry Association submitted a wage proposal in October 2014 to the Department that was referenced but not analyzed in the NPRM, and we ask that the Department consider that proposal in addition to those 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 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. Allowing a partial or complete credit for the food provided would bring this part of the H-2A program in line with the rest of the program, while preserving the existing incentives to provide these workers with the best possible food.

#### *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

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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 Plains 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 state-conducted survey results from 1994 (\$800/month)<sup>22</sup> 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.

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<sup>22</sup> As noted in the NPRM at 80 Fed. Reg. 20307, the survey-based rates for that year for monthly rates of pay were actually \$650/month for three states, \$700/month for nine more, and \$750/month for the other. The Commenters offer the \$800/month figure as the base rate, recognizing that this is higher than any of those rates and higher than the \$772.53 average of the five historic and current wage rates identified in the NPRM. They do so in the spirit of cooperation and the interest of stable future wages. The Bronars Report also includes the ECI-adjusted 2015 wage levels for those lower survey-based 1994 salaries (\$1,040.59, \$1,120.64, and \$1,200.68, respectively), and the Commenters would welcome the use of any of those figures as well.



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The following table sets forth the resulting range of wages for the upcoming years, showing the 1.5% and 2.5% increase levels with an averaged 2.0% assumption for calculating the next year's high-low range.<sup>23</sup> 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 shorter and more level 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.

This proposal still constitutes a massive increase in wage costs for ranchers – hundreds of dollars per worker per month – but is at least potentially a burden that some ranchers can survive, unlike the AEWR approach proposed. As set forth in the University of Wyoming study discussed above, wages in this range will be difficult for ranchers to absorb and may put many out of business. Ranches still have no better than a 60% chance of breaking even in any given year, but it offers more years in the black than years in the red, and that may be enough to keep this industry alive. Wages under this methodology at least give the majority of ranchers a fighting chance to survive them and to preserve their family farms. The same is not true of the rates proposed in the Rule.

<sup>23</sup> The actual wage levels will obviously be slightly different, particularly in later years, depending on the actual ECI rates in the early years, but this offers a reasonable forecast of the range of wages in the next five years.



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This model also squarely addresses the concerns raised by the *Mendoza* plaintiffs. The only monthly salary proposed by the Plaintiffs in the *Mendoza* litigation came from lead plaintiff Reymundo Zacarias Mendoza, who submitted a sworn declaration stating that "I would be willing to work as a herder if the employer paid \$1,300 to \$1,500 per month."<sup>24</sup> This model meets that requirement. It also addresses the concern that DOL raised in the NPRM regarding wage levels: the nearly complete absence of U.S. workers in this occupation makes state surveys impossible and current wages are out-of-date and frozen in place as they rely on the valid 1994 surveys. By updating the 1994 wage rate to present dollars and setting a course for guaranteed future increases, this model solves that problem while retaining the program's roots in valid state surveys rather than abandoning the history of the program and looking to irrelevant and inaccurate outside data.

The proposal to base the herder salaries on FLS data fails to recognize that herders receive housing, meals, transportation, clothing, and utilities for free from their employers. The Bronars Report compares the disposable income of herders with that of other blue collar workers in various cities throughout the Mountain West, using the earning levels of workers moving freight, stock and materials by hand and data taken from the U.S. Department of Housing and Urban Development, USDA, and DOL's Bureau of Labor Statistics. The amount of "disposable income," *i.e.*, what is left in the worker's pocket after paying for rent, food, utilities, and transportation (which would be an H-2A herder's entire pay check), varies slightly, but is between \$308.01 in Flagstaff, Arizona and \$815.75 in Boise, Idaho, with the differences relating to income levels and fair market rental values. At either end of that range, the herder wages proposed above would be two to four times those levels, as compared to three to eight times those levels in the NPRM's proposed methodology. This does not account for the huge increase in spending power of these U.S. dollars in rural Peru, where the money will actually be spent, but even for the rare U.S. worker willing and able to do this job, the wage rates proposed by the Commenters would lead to a significant increase in his or her standard of living, as compared to similar jobs in this area.

#### *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

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<sup>24</sup> This statement appears at ¶ 11 of his Declaration, Doc. 26-1, filed in opposition to Intervenor-Defendants' Motion to Dismiss, and is dated January 27, 2012.



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\$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.<sup>25</sup> As recognized in the NPRM, the phase-in period would allow employers who have built their businesses around a starting wage level<sup>26</sup> 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 AEWB 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

<sup>25</sup> To the extent that the Department is concerned with "stagnation" at this new level, the use of the ECI "inflation track" agreed to by employers and the United Farm Workers in S. 744, as discussed in Proposal #2, could be used to address that concern.

<sup>26</sup> The special procedure wage rates for H-2A workers constitute a wage floor, but many of the H-2A workers have been returning to the same ranches for years or decades and are paid significantly higher amounts than this minimum requirement. Increasing the minimum will create pressure to increase those already higher wages as well.

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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 (which the D.C. Circuit believed the *Mendoza* plaintiffs to be), would take the job, then this proposal meets that test. As discussed above in Proposal #1, the Bronars Report demonstrates that the resulting level of disposable income for herders under this proposal would be several times higher than that earned by their non-herding counterparts in the Mountain West.

#### Other Specific Concerns with the Rule

If the definition of “open range” were corrected and one of the alternative wage methodologies outlined above were adopted, ranchers could live with most of the changes from the longstanding special procedures to the Rule, particularly the retention of the experience requirements and seasons for sheep and livestock production. Not all of those changes are realistic, however, and the Commenters wish to discuss some of those changes below.

#### *Contents of Job Orders*

Section 655.210 sets forth the contents of the H-2A job order for this occupation. The job qualifications continue over from the TEGLs and are essential for identifying and hiring workers who possess the requisite skills for this special work. It would be a disaster to send 1,000 head of sheep or cattle off to the range with a new worker, only to have that worker decide that he or she did not really enjoy the work as much as he thought he or she might or to find out that the worker did not know how to care for the animals’ needs or to protect them from harm.

The use of the phrase “on call for up to 24 hours per day, 7 days per week” is potentially misleading, and might be better phrased as being “available” for that period – making more clear that work is not performed during that entire period but, rather, sporadically and as needed.

As discussed above with respect to the definitions of the job from Section 655.201, the focus in Section 655.210 (b) on whether the work performed by herders is “closely and directly related to herding or the production of livestock” and the 20% hard cap on performing such work do not address any concerns with such work identified in the NPRM and would lead to confusion and substantial inefficiency. First, the 20% limit is worded such that “[w]ork that is closely and directly related to herding or the production of livestock must be performed on no more than 20 percent of the workdays spent at the ranch in a work contract period.” Section 655.210(b). The limit is not on the total workdays in the work contract period spent doing this work, but only on how the days spent at the ranch are used. Is the goal to have one day out of five spent at the ranch spent working and the other four resting, since work that is not “closely and directly”



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related to livestock production almost certainly falls outside the scope of the job order? Is some other purpose intended by this provision? This wording is confusing.

Second, the grazing production of livestock definition that already exists in the WHD regulations discussed above offers a less confusing and more workable approach to defining the job. Instead of arbitrary percentages and percentages within those percentage directing how the worker may spend a particular day, focusing on the larger picture of the “primary duties” or whether the worker is “principally engaged” in the grazing production of livestock makes more sense and would be better understood (and complied with) by employers.

The NPRM asks five related questions regarding keeping hourly records for work performed at the ranch and on the range: (1) is it reasonable to keep such records; (2) how could such records be maintained and submitted; (3) is it reasonable to keep daily records of work performed on the range; (4) how could those records be maintained and submitted; and (5) is there another recordkeeping method by which employers could assure DOL that employees are meeting the 50% and 20% requirements in the Rule? Mountain Plains and Western Range would respond to all five questions by referring to the two proposed alternative wage methodologies already discussed above, as well as their comments regarding the use of the WHD regulations’ model for describing the job rather than the 50%/20% requirements proposed in the NPRM. By making those two changes, it would be an unnecessary waste of time to track the workers’ hourly or daily activities. If such a recordkeeping requirement were imposed, the Commenters would contend that many of their members do not currently possess the human resources capacity to create or maintain such records and doing so would place an enormous and unreasonable burden on them. As these associations’ members are already the subject of frequent and exhaustive audits by the Department of Labor, the reference to “submitting” the records is also confusing. If the employer is required to attest in the job order that certain arbitrary percentage targets must be met, why would records be “submitted” and to whom?

### *Housing*

The NPRM proposes certain changes regarding mobile housing that require some clarification. In Section 655.210(c), the “employer must specify in the job order mobile housing will be provided.” For purposes of advising prospective job seekers of the availability of mobile housing, this makes sense. For some employers, however, this requirement would be inaccurate and misleading. While virtually all of the employers that would be covered by this Rule use the traditional means of mobile housing, there are a limited number of employers using remote fixed site bunkhouses for their livestock workers. In particular, some operations in Montana and Texas graze cattle over vast areas of land but maintain fixed wooden structures at points throughout that land and have employed H-2A workers under the special procedures for many years. Read



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together, Sections 655.200(b)(2) and 655.210(c) would require these employers to include incorrect statements in their job order and could potentially bar them from this program altogether.

The NPRM specifically asks whether, if a worker desires to live in a mobile housing unit while on the ranch, should that be allowed? The answer is, of course. It would be unreasonable and inhumane to mandate that a worker move out of the home that he has made in a mobile unit for the short time that work is performed at the ranch if the worker did not wish to do so. The related question asked in the NPRM is, if a worker prefers to live in fixed-site housing while on the ranch, should the employer be required to provide separate fixed housing? Again, if the worker prefers to continue living in the home that he has made, why should a separate housing structure be built or set aside simply to remain vacant. However, if the worker preferred to live in fixed housing while working at the ranch, then that would be a different question, but requiring an employer to maintain two sets of housing per worker is unreasonably burdensome.<sup>27</sup>

The NPRM proposes new restrictions on “sleeping facilities” in Section 655.235(l). This definition is unclear, however, since many of the mobile camps that have been in use for years include separate beds or bunks with a shared kitchen. Since workers must be available to assist the herd on a 24/7 basis and often trade shifts to ensure full coverage, it is somewhat rare that both members of a team would be sleeping in the camp at the same time. Requiring each worker to haul his own camp would be unrealistic and unnecessary, particularly during Winter months, as described above. The phrase “sleeping facility” is not defined and is confusing as to whether it means a bed or the entire camp structure? Instead, the Commenters propose replacing that subsection with the following language: “*Sleeping unit.* A separate sleeping unit must be provided for each person, except in a family arrangement. A sleeping unit is a comfortable bed, cot, or bunk with a clean mattress.” This definition would achieve the goal of preserving separate sleeping units for each worker, while providing clarity and efficiency with respect to the number of camps and kitchens required.

### *Water*

Employers already supply water to herders in the camps, hauling it in by truck or four-wheeler where possible, or on horseback when necessary.<sup>28</sup> During winter months,

<sup>27</sup> The NPRM also asks specifically about the cost of providing room on the ranch vs. on the range. The 2010 study by the Colorado Wool Growers Association, referenced earlier, estimated the monthly cost of providing housing on the range at \$425 (\$288 for rental value and \$137 for maintenance and utilities). No estimate for providing housing at the ranch was provided in that study, but similar fixed-site housing was estimated at \$350-\$450/month up to \$600/month in certain areas. This question may best be answered by way of individual comments.

<sup>28</sup> The NPRM requires employers to provide water with which workers can do their own laundry in the camp. Many employers will bring the workers’ dirty laundry back from the camp, wash it properly in a



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large tanks of water quickly turn to large blocks of ice. Under those conditions – as well as during warmer months when spending time in remote locations – there is abundant water at hand, from streams or rivers or by melting freshly fallen snow and hauling water to snowed-in camps can be difficult or impossible. While a survey of ranchers turns up no accounts of workers becoming sick from these longstanding practices, treating or filtering this water to local health standards can be affordably and safely achieved – often far more safely than having to haul the water over rugged trails. Providing the tablets or osmosis filters used by hikers and backpackers would cost pennies per day and have a proven track record of success. The exact method of achieving the requirement of potable water should best be left to the rancher and/or workers to assess what works best under the conditions in which they will be operating and what the worker's personal preference is for ease of use.

### *Food and Refrigeration*

Section 655.235(h)'s requirement of butane or propane refrigerators in the tents used in the Summer months is not feasible. This equipment cannot be packed onto horses to be carried over rough mountain trails. Other methods of food preservation and storage have been used successfully for years, but this new requirement will simply not work and should be eliminated.

The NPRM asks what constitutes a sufficient meal and what constitutes adequate food provision. These questions are related and can be addressed together here. The most common refrain heard from employers in preparing these comments is "my workers eat better than I do!" The physical demands of the job call for a protein-rich diet for the hearty men that perform this work, and that is precisely what these employers provide. There is no clear way to draw a line or set a standard for a "sufficient" or "adequate" meal. Setting an arbitrary calorie count or menu would violate the workers' choice of food and would be unnecessary. These workers ask for certain food items that are part of their traditional diet in their native country, and the employers purchase and deliver that food to them on the range. Each worker has his own preference for food, and a "one size fits all" approach to mandating a particular diet would violate those preferences and be a logistical nightmare for the Department and employers to enforce and comply with.

### *Communication Devices and Equipment*

The most recent TEGLs introduced the requirement of a cell phone, satellite phone, or two-way radio by which workers could communicate with the ranch in case of emergency. In the years since then, employers have adapted to the requirement. In

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machine, and bring the clean clothes back to the workers to exchange for dirty clothes. This system works better than trying to hand-wash clothes in the backcountry (particularly during colder months), and the NPRM should be updated to permit this practice to continue, requiring water for laundry only where the workers prefer to wash their own clothes.



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response to specific questions in the NPRM regarding contact between workers and the employer, the Commenters would state that employers have a strong interest in tracking the health and well-being of their employees, as well as the health and well-being of the herd – *in that order*. To that end, employers travel hundreds of miles to visit with their employees on the range, checking that their needs are met, delivering mail, food, and supplies, and conveying any instructions needed for moving the herd to another location. Having communication devices assists in this, but never takes the place of face-to-face communication. At the same time, however, mandating a specific interval of time between such meetings or calls is problematic, given the unpredictable nature of terrain, weather, and cellular telephone signals. Employers literally go to great lengths to maintain communication, and micromanaging that interaction is neither necessary nor feasible.

With respect to the NPRM's question about the tools, supplies, and equipment that are required to work safely and effectively, the best answer is that "it depends." The items suggested in the NPRM are among those used on the range, binoculars, firearm, boots, rain gear, an ATV or four-wheeler, and/or a horse, but this list should not be considered exhaustive nor mandatory. During different times of the year or in different parts of the West, some or all of these items would be strictly necessary while others would be entirely useless. Contrary to what Public Citizen and Legal Services are likely to claim, the employers in these two associations care deeply for their workers and provide them all of the tools needed to perform the job safely and effectively. Additional specific requirements will not increase job safety or efficiency but would simply provide a "gotcha" opportunity for ambitious plaintiffs' lawyers.

#### *Joint-Employer Status of Western Range*

The Rule does not specify (as the TEGLs and previous DOL guidance documents had previously) that Western Range may continue to operate as a joint employer for its members H-2A herders or maintain the ability to transfer workers between member employers as needed. The NPRM references the ability to file a "master application" and other provisions related to the filing of the application, but not specifically to the ability to transfer workers. This ability is already built in to the INA (8 U.S.C. § 1188(d)(2)), and does not necessarily require explicit regulatory permission to continue, but Western Range would take this opportunity to ask that the Department's Final Rule clarify that this longstanding arrangement (dating back to the earliest days of the foreign sheepherder program) is to continue under the new Rule. For example, in the most recent iteration of the special procedures, TEGL 32-10, the Department stated as follows:

Pursuant to 8 U.S.C. 1188(d)(2), the Department's certification granted to the association may be used for the certified job opportunities of any of its members and such workers may be transferred among its members to perform the services for which the certification was granted. Although a

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worker may be transferred from one member to another member, the association may not transfer workers to any non-member employer or employer-members not disclosed on the master job order.

76 Fed. Reg. 47260-61 (Aug. 4, 2011).

#### Transition Rule and Retroactivity

The District Court's schedule from *Mendoza* addresses *when* the Rule will take effect (December 1, 2015), but is silent as to *how* the Rule will take effect. The NPRM also does not articulate how the Rule will take effect. The concern of the Commenters is that the Department will apply the new substantive requirements of the Rule to the employment of H-2A workers approved by DOL prior to the December 1 effective date of the Rule. This retroactive effect of the Rule would violate longstanding legal principles. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-209 (1988) ("Retroactivity is not favored in the law."). The Rule should apply only to those applications for labor certifications filed on or after the effective date of the rule.

#### Conclusion

Mountain Plains and Western Range welcome the opportunity to provide comments with respect to the NPRM and trust that the Department of Labor will sincerely consider the comments included herein and change the proposed Rule to avoid the disastrous impact on this industry that the rule, as currently written, would have. With the changes suggested above, this program and this industry can remain a viable part of the American economy for generations to come. Getting this rule wrong – particularly the definition of the work and the wage methodology – will spell immediate extinction for a way of life that spans the past two centuries of this country's history and has come to define our image of the American West. The current Rule would be a death sentence for H-2A employers, and the multiplier effect of those employers on small businesses in rural communities would create a wave of ghost towns throughout the Mountain West. We urge you to take to heart the longstanding history of this industry and this program and to craft a rule that allows them to continue.

Very truly yours,



Erik Lehfelddt  
Chairman  
Mountain Plains Agricultural Services



Lane Jensen  
Chairman  
Western Range Association



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#### **Addendum – Western Range Association**

As an original participant in the H-2A shepherd program, Western Range Association feels compelled to speak on the proposed changes to the shepherd program on a historical and goal-driven level because this issue speaks to some of the core principles of who we are as an industry and as a nation.

For over 60 years, the shepherd program, not originally known as the H-2A shepherd program, was started by a group of tenacious, innovative, and forward thinking sheep men known as the California Range Association, later to become the Western Range Association. They were immigrants or sons of immigrants, embodied with a spirit of hard work and a sense of duty to family and country. They were driven by what some people called ambition, one-on-one relationships and goal-driven zeal that was evidenced by the way they lived.

They were complimented by a group of Congressmen who looked at them and their efforts not as a threat or annoyance but as a group of idea driven and nation building citizens looking for help. Congress viewed their request for help as an opportunity to create a guest worker program that had Congressional authority and administrative oversight of the former Immigration and Naturalization Service. There was a time when representatives from California Range Association and Western Range could pick up the phone and call high-level administrative representatives to discuss issues or problems with a degree of consensus that a workable and program-sustainable solution could be obtained.

This relationship resulted in a dialogue and joint effort to address problems and create solutions. It is because of that relationship that we even have a program to discuss today. There was a time when dialogue and discussion were solicited not mandated by the courts and, yes, even back then, herders used fencing. It also resulted in a program that was not a threat to domestic workers, but did the opposite and resulted in the net creation of jobs and growth. Local businesses, regional trucking companies, national meat companies, and national woolen mills were created and supported because men came to this country to herd sheep when no one else would.

The effort to sustain this program was not viewed as a threat to be diminished by making it so onerous that it could not longer function but as an endeavor worthy of promulgation.

These thoughts would be remiss without some reflections on the herders themselves. The relationship that exists between the employer and the herder is one of the closest that exists in the workplace. Employers buy herders groceries, send money home, take herders to the doctor, guarantee employment, supply a place to live, guarantee a wage rate, supply transportation, and even transfer herders to another employer when

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irreconcilable differences arise. This all results in herders sending money home to raise families, build homes, start businesses, buy property, put children and family members through college, and secure a retirement. The attestation to the success of the program is that many herders return, time after time, on renewed contracts. Before IRCA, in previous generations, the early program was so successful that some sheepherders were able to use their earnings to move to the U.S. to build businesses of their own.

These comments would also be remiss if the issue of noncompliant members in the sheep industry who choose to work outside the rules of the H-2A program was not addressed. Although they amount to a very small part of growers, they have become the subject of attention, being portrayed as representing the entire industry. Western Range, because of its status as a joint employer, monitors, investigates, sanctions, and in some cases debars members because of program violations. The status as a joint employer creates more liability and a more financially punitive exposure for Western Range but has been accepted by its members in order to preserve the integrity of the program.

This is an overview and background of where the H-2A sheepherder program came from and where it is today. The result has become a template for other groups to follow. The H-2A sheepherder program has had the net effect of creating jobs not taking them away. It represented and represents a group, which in conjunction with a willing and helpful DOL, helped create and mold a guest worker program that became an answer and example to others not only for addressing a need but also as a way for government and the private sector to work together to address a problem.

The program was viewed as a means to achieve the goal of maintaining the viability of the sheep industry which added to and was a part of what made us a great nation.

These comments are not only designed to be an appeal for prudence in rule making but also a reminder of the longstanding ideals and historical context that brought us to this point, encouraging us to proceed in this exercise in the same context and intent in which the H-2A sheepherder program was conceived and administered.

WRA is proud of who we are and grateful to the efforts of those all who preceded us, as well as the American Sheep Industry Association, Mountain Plains Agricultural Services, and stakeholders who join us now. Never before has such a concentrated effort been mounted to sustain the range production of sheep, goats and livestock as the one evidenced now, attesting to the paramount nature of our resolve to protect our livelihoods. We are mindful that over the years, with the help of Congress and DOL, we have been able to create and maintain a program which doesn't pose a threat to domestic workers but fills a need, creates domestic jobs and overcomes obstacles resulting in



Adele Gagliardi  
Administrator, Office of Policy Development and Research  
June 1, 2015  
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equitable solutions. We invite DOL to work with the sheep industry and continue that effort.

Western Range Association

# **EXHIBIT 17**

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

ABEL CANTARO CASTILLO on     )  
behalf of himself and         )  
those similarly situated,     )  
                                   )  
                          Plaintiff,     )  
                                   )  
                  vs.                     ) Case No.: 3:16-cv-  
                                   ) 00237-RCJ-CLB  
WESTERN RANGE ASSOCIATION,     )  
                                   )  
                          Defendant.     )  
                                   )

TELEPHONIC DEPOSITION OF TOM FILBIN

Taken at Eureka, Nevada

On Tuesday, August 24, 2021  
At 9:04 a.m.

Reported by: Margie L. Carlson  
C.C.R. No. 287

1 legal conclusion.

2 MS. REIF: I'm sorry, I may missed your  
3 answer.

4 Q. Are your herders expected to work  
5 seven days a week?

6 A. Depends on what we're doing. The sheep  
7 don't know one day from the other one they're  
8 lambing, you know.

9 Q. Right.

10 A. So there's times of the year that they  
11 would have to be available. There is other times of  
12 the year it's not demanded.

13 Q. But regardless of how demanding you may  
14 characterize the work to be, is it still accurate  
15 that your herders are required to work seven days a  
16 week?

17 A. I work seven days a week, 365.

18 MS. WINOGRAD: Asked and answered.

19 MS. REIF: I'm sorry, I didn't hear you.

20 A. I work seven days a week, 365.

21 MS. REIF: Understood.

22 A. I don't ask them to do anything that I  
23 wouldn't do myself.

24 THE COURT REPORTER: Pardon? Pardon?

25 THE WITNESS: I don't ask them to do

1 anything that I wouldn't do myself.

2 MS. REIF:

3 Q. Understood, and so both you and the  
4 herders work seven days a week?

5 A. We can. We don't necessarily do it.  
6 When necessary we take care of the animals. That's  
7 our job.

8 Q. Okay. And when the herders are out on  
9 the range with their band of sheep are they expected  
10 to stay with their herd seven days a week?

11 A. Stay with their herd what?

12 Q. Seven days a week.

13 A. Yeah, they're out there, yeah.

14 Q. Okay.

15 A. There is no place to go.

16 Q. Okay. If you go down to the fifth page  
17 of the pdf, which is Bates No. 8586, right at the  
18 top there it says hourly wage, and it says \$800. Is  
19 \$800 a month consistent with your recollection of  
20 what was paid to your herders in 2014?

21 A. What document is this?

22 Q. It's the same one. We're just on the  
23 fifth page of the pdf. It says wage rate at the top  
24 and then in bold it says \$800. Do you see that?

25 A. Block 17 is that the one?



1 Q. And do you check in with them on the  
2 cellphones?

3 A. Do I check in with them on the cellphone,  
4 is that your question?

5 Q. It is, yes.

6 A. Yeah, I do, and they check in --

7 Q. How often do you say you check in?

8 A. Sometimes I talk to them every day,  
9 sometimes every other day, just depends on the  
10 circumstance.

11 Q. Okay. And if there was some sort of an  
12 emergency are the herders expected to call you on  
13 the cellphone to alert you of that emergency?

14 A. It would be good if they did.

15 Q. Have you given them any instructions to  
16 that effect?

17 A. Yeah, told them whenever they need  
18 anything, whenever they need anything, call me and  
19 I'll do what I can to help.

20 Q. Great.

21 A. I'm on duty 24 hours a day too, ma'am.

22 Q. Got it. Do you communicate with the  
23 herders --

24 MS. WINOGRAD: I'm sorry, I didn't hear  
25 the rest of that. I'm sorry, I didn't hear the rest

1 of that answer.

2 Mr. Filbin, I'm sorry.

3 THE WITNESS: I don't know what you  
4 heard.

5 MS. WINOGRAD: Well, this is Ellen  
6 Winograd. I just didn't hear, you said something  
7 about 24 something, and I just didn't --

8 THE WITNESS: Yeah, well, I'm on call  
9 24 hours a day, too, and we're available to these  
10 men whenever they want. I carry this phone with me  
11 all the time. It's right beside my bed at night.

12 MS. REIF: That's great to hear.

13 Q. If the herders wish to go into town would  
14 they need to contact you for transportation to go  
15 into town?

16 A. It'd be a hell of a long walk if they  
17 didn't.

18 Q. So that's a yes then?

19 A. That's what you want, I don't care.

20 Q. Do your -- does that actually happen? Do  
21 herders contact you for transportation into town?

22 A. To go to town?

23 Q. Yes.

24 A. Well, usually they -- gee, I can't  
25 remember the last time one of 'em asked to go to

1 town, you know.

2 Q. Okay. That answers my question.

3 A. Yeah, I run errands for 'em. I do their  
4 banking. I buy their clothes. We bring their  
5 groceries. We bring their mail. We bring their  
6 phone cards, whatever they need. We try to  
7 accommodate them.

8 Q. Got it. And I see from Mr. Powers'  
9 declaration that herders are provided food and  
10 supplies every week by a camp tender. Just to  
11 check, a camp tender is not referring to you,  
12 correct? It's someone else?

13 A. No, I am the camp tender.

14 Q. Oh, you are, okay. I'm glad I checked.

15 So when you visit to provide supplies and  
16 food every week, how long do you typically stay at  
17 the camp site?

18 A. Depends on what time of day and where the  
19 herder is located, and if he's in a remote area and,  
20 you know, may not be to his camp for a period of  
21 time and I may have other things to do, I --  
22 sometimes I'm there for a few minutes. Sometimes  
23 I'm there for a couple hours. It just depends.

24 Q. Okay. And when you're there do you  
25 assist them with their duties at all?

1           A.     Yeah.

2                   MS. WINOGRAD:  Objection to the form of  
3     the question.  I don't know what majority means.

4                   MS. REIF:  Majority means 50 percent or  
5     more.

6           A.     More than half of them do have guns.

7                   MS. REIF:  Great, thank you.

8           Q.     Have you given them specific instructions  
9     about shooting predators and, you know, how to go  
10    about that?

11          A.     Yeah.  The instruction is kill them.

12          Q.     Okay.  And do they often kill predators?

13          A.     Not real often.  Because we have good  
14    guard dogs that we use the rifles or the guns  
15    minimal.  Sometimes they'll hear coyotes howling in  
16    the night, and they'll just step outside their camp  
17    and pop off a round to scare 'em away.

18          Q.     Okay.  And would that be like at any time  
19    of the day or night or are there particular times  
20    when they would be more likely to shoot a warning  
21    shot as you were describing?

22          A.     Well, when they're awake and they hear  
23    'em, yeah.

24          Q.     Okay.  Do you pay bounties for predators?

25          A.     No, not to the herders, no.

1 and we discussed what was the best way to go with  
2 the sheep, and we moved 'em away from the fire.

3 Q. Got it. And conversely have you ever had  
4 to call the herders and tell them that a wildfire  
5 has broken out near where they are and that they  
6 need to move the sheep?

7 A. I called them and asked them where their  
8 sheep were in proximity to the fire, and the report  
9 back at that particular time was that the sheep were  
10 in a safe place and everything was good.

11 Q. Okay, great.

12 A. And I also, I wanted to let you know we  
13 also notify the fire-fighting people that we have  
14 sheep in the area and please help us keep a lookout,  
15 you know.

16 Q. Sure, yes, got it.

17 And is it your expectation that the  
18 herder will stay at the camp every night with the  
19 sheep?

20 A. Yes.

21 Q. Got it, and I apologize if I've already  
22 asked this, but I just can't remember. The goal is,  
23 of course, that the herders will return at the end  
24 of the year with as many sheep as possible, correct?

25 A. Correct.



1           Q.    And the herders understand that  
2    expectation, correct?

3           A.    Correct.

4           MS. REIF:   Got it.

5           MS. WINOGRAD:   I was going to object,  
6    calls for speculation as to what they understand.

7           MS. REIF:

8           Q.    Have you had conversations with the  
9    herders explaining to them that that is the  
10   expectation?

11          A.    Yes.

12          MS. REIF:   Okay.   I believe that I am  
13   pretty much done.   I just want to take a ten-minute  
14   break and check my notes, and then we can hand it  
15   over to Ellen and Jerry.

16          We can go off the record.

17          MS. WINOGRAD:   Can we, okay, if you need  
18   the ten-minute break, that's fine, if there are more  
19   questions.   I'd like to move this along for  
20   Mr. Filbin if we could.

21          MS. REIF:   We can do a five-minute break.

22          MS. WINOGRAD:   That works.

23          MS. REIF:   Okay.

24          THE WITNESS:   Yup.

25          MS. REIF:   Back in five, thank you.

1 MS. WINOGRAD:

2 Q. Are there days in which they work fewer  
3 than seven hours a day?

4 A. Yes.

5 MS. REIF: Same objection.

6 MS. WINOGRAD:

7 Q. Whether they work seven hours a day or  
8 fewer, do they still get paid at the same rate of  
9 salary?

10 A. Yes, paid by the month.

11 Q. And in your 70 years of experience and  
12 your operations is it your understanding that being  
13 on call requires active working?

14 MS. REIF: Objection, form.

15 A. No, they are available should something  
16 arise. It's just like, you know, if your house  
17 would catch on fire do you go outside.

18 MS. WINOGRAD:

19 Q. And when you say available, during the  
20 times that they are available are they sometimes  
21 utilizing electronics?

22 MS. REIF: Objection, calls for  
23 speculation.

24 MS. WINOGRAD: I didn't hear the answer,  
25 I'm sorry.