

Statement of
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on the
Grazing Improvement Act of 2011 (S. 1229) (112th Congress)

before the
Subcommittee on Public Lands and Forests
Committee on Energy and Natural Resources
United States Senate

March 22, 2012

Organizations endorsing this testimony:

Animal Welfare Institute
Conservation Northwest
Great Old Broads for Wilderness
Los Padres Forest Watch
Natural Resources Defense Council
Oregon Wild
Sequoia ForestKeeper
Soda Mountain Wilderness Council
Taylor Outfitters
Western Nebraska Resources Council
Western Watersheds Project
Wild Utah Project

My name is Andy Kerr¹ and I testify today as an advisor to WildEarth Guardians,² an environmental conservation organization based in Santa Fe, New Mexico, with additional offices in Tucson, Arizona and Denver, Colorado. WildEarth Guardians works to protect and restore wildlife, wild places and wild rivers in the American West. I also consult for several other conservation organizations working to designate additional wilderness areas, wild and scenic rivers and national monuments on public land, conserve and restore Pacific Northwest old-growth forests, and conserve the greater sage-grouse and their habitat.

I thank the Chairman and the Ranking Member for inviting me to testify today.

S. 1129 would change federal public lands grazing policy in three major ways:

1. Double the length of a term-grazing permit on Forest Service and Bureau of Land Management lands from 10 to 20 years.

Congress has directed that the Forest Service and Bureau of Land Management revise land management plans not less than every 15 years. A term grazing permit should not be longer than the life of the plan upon which it is based. Moreover, environmental conditions change and public values for public land management evolve. The grazing permit renewal process is an opportunity for land management agencies to review how the permittee has done in fulfilling the terms and conditions of their permit and how the land, soil, water, wildlife and other resources are faring on the grazing allotment. It is also the time to ensure that the new grazing permit

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comports with the current land use plan and to consider alternatives to current management. Reducing the frequency of review reduces the oversight of the agency and the public, limits the ability of managers to adapt to changing conditions, and takes away opportunities to correct improper grazing management on 260 million acres of public land.

2. Waive or truncate long-established processes intended to protect and restore public land and resources.

The permit renewal process is the chance for the public to participate in public lands grazing management in accordance with the National Environmental Policy Act (NEPA), the Federal Lands Policy and Management Act (FLPMA) and National Forest Management Act (NFMA). S. 1129 would legislate new categorical exclusions under NEPA for grazing permits under which most would never be subject to any environmental review.

Council on Environmental Quality regulations already allows the use of categorical exclusions for decisions that have no environmental impact. If a federal action has no environmental impact, a categorical exclusion is appropriate. However, the grazing of livestock on public lands has environmental impact.³ NEPA requires the agencies to take a “hard look” at the activities it permits, and the impacts of livestock grazing should be subjected to this scrutiny. S.1129 would result in even fewer grazing permits receiving environmental review than do now.

3. Establish a special track for administrative review available only to grazing permittees and weight that process in favor of permittees and against the public interest.

S.1129 would establish two tracks for administrative review of agency decisions regarding grazing permits: one for the public and one for permittees. This is fundamentally unfair. The rules for administrative review should apply to all parties equally.

It also unfairly changes the current appeals process by automatically halting agency decisions until the agency can prove itself right rather than requiring the affected permittee to prove the decision wrong. It allows existing management to continue until appeals are resolved, effectively preventing necessary management changes while an appeal winds its way through the administrative process.

According to an attorney who advocates for public lands grazing interests:

*[S.1129] "changes" the current appeals system by requiring the BLM [and the Forest Service] to prove its decision is legally and scientifically correct; rather than forcing the permittee to prove why the decision is legally and scientifically wrong.*⁴

The jurisprudence that has developed on public land law—and administrative review of federal agency decisions—upholds agency deference in decisionmaking. Only if a court finds that an agency’s action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”⁵ will it remand a decision to the agency to reconsider its decision.

³ On public land across the West, millions of non-native livestock (including cattle, sheep, goats and horses) remove and trample vegetation, damage soil, spread invasive weeds, despoil water, deprive native wildlife of forage and shelter, accelerate desertification and even contribute to global warming. *See* Mark Salvo. 2009. *Western Wildlife Under Hoof: Public Lands Livestock Grazing Threatens Iconic Western Species*. WildEarth Guardians. Santa Fe, NM. Former Secretary of the Interior Bruce Babbitt has written that federal public lands livestock grazing “is the most damaging use of public land.” Bruce Babbitt, B. 2005. *CITIES IN THE WILDERNESS: A NEW VISION OF LAND USE IN AMERICA*. Island Press. Washington, DC: 148.

⁴ Karen Budd Falen. “Leveling the Playing Field: Support for the Grazing Improvement Act of 2011,” May 23, 2011. Available at www.klamathbasin-crisis.org/Grazing/grazingimprovmntactintro053111.htm.

⁵ Administrative Procedure Act of 1946, 5 U.S.C. §§ 701-708.

Switching the burden of proof from appellants to the agency would be a radical change for administrative and judicial review.

If Congress decides to legislate such a radical change to current law, it should apply to all parties engaged in public lands grazing management, not just federal grazing permittees.

The chief sponsor of S.1129 has articulated three basic arguments for this legislation:

1. *[E]xtreme environmentalists have hijacked the permitting process with endless lawsuits aimed at eliminating livestock from public lands.*⁶

Conservationists don't file litigation over federal grazing permits just because we are troubled with the massive environmental impacts of public lands grazing. We are, but we don't litigate unless there is evidence that the law has been violated. In most cases, federal judges have agreed with the conservation community. Congress should address federal agencies long history of flagrantly and routinely violating the law, rather than finding ways to protect a few poorly managed livestock operations from having to operate under the same rules that apply to others.

2. *These irresponsible tactics overwhelm permitting agencies and leave ranchers at risk of losing their grazing permits.*⁷

Federal agencies wouldn't be overwhelmed by public participation in grazing permit renewals if they would just follow the law. The framework of NEPA and the bases of NFMA and the FLPMA are that good information and good process will result in good decisions. What federal courts generally find in our litigation is not whether the decision was good or bad, but that it didn't use the best information or was produced using improper process. Congress could improve the decisionmaking process by appropriating more funds for it.

3. *[The] bill gives ranching communities the certainty and stability they desperately need.*⁸

Congress has tolerated a grazing fee based on an archaic formula that results in nearly free grazing on the federal public lands in the West.⁹ Congress spends at least six times as much to facilitate public lands grazing as permittees pay for the privilege.¹⁰

The public lands grazing industry faces major challenges on and off public lands that are not addressed by S.1129.

For one, increasingly more Americans are visiting their public lands and place a higher priority on wildlife, recreation, watershed and scenery than they do on the miniscule amount of the livestock forage it provides (less than 2% of the nation's forage supply comes from federal public lands).¹¹ Their preferred non-consumptive uses of public lands often conflict with livestock grazing, making the industry's instability a reflection of a cultural shift. Limiting public participation disenfranchises public lands users who value it for more than forage production.

⁶ Senator John Barrasso. "Barrasso Bill Helps Ranchers by Preserving Grazing Rights" (news release), May 27, 2011.

⁷ Senator John Barrasso. "Barrasso Bill Helps Ranchers by Preserving Grazing Rights" (news release), May 27, 2011.

⁸ Senator John Barrasso. "Barrasso Bill Helps Ranchers by Preserving Grazing Rights" (news release), May 27, 2011.

⁹ "BLM and Forest Service Announce 2012 Grazing Fee" (news release), January 31, 2012.

¹⁰ Government Accountability Office. 2005. Livestock grazing: federal expenditures and receipts vary, depending on the agency and the purpose of the fee charged. GAO-05-869. Government Accountability Office. Washington, DC.

¹¹ USDI-BLM, USDA-Forest Service. 1995. Rangeland Reform '94 *Draft* Environmental Impact Statement. USDI-BLM. Washington, DC.

Second, the forage is better on private lands. The average acre of private grazing land in the East is 78 times more productive as the average acre of BLM public land in the West.¹² Where grazing is measured in acres per cow rather than cows per acre—as on public lands—it's a marginal economic activity even when livestock prices are high. This phenomenon cannot be resolved by limiting public or environmental review of grazing permit decisions.

What often gets lost in the debate over the renewal of public lands grazing permits are the consequences of livestock grazing on native species, ecosystems and watersheds. Most grazing allotments in the West do not meet the federal standards for rangeland health. Most have water quality-limited streams listed under the Clean Water Act. Many are habitat for species listed under the Endangered Species Act. Streams are polluted and species are imperiled because of livestock grazing on public lands. And the federal taxpayers are paying for it.

For these and other reasons, the conservation community opposes S.1129.

Despite how some seek to portray conservationists, lawsuits are not our preferred method of engagement on public lands grazing. Instead, most of the conservation community strongly favors voluntary federal grazing permit retirement to resolve grazing conflicts. Permit retirement is ecologically imperative, economically rational, fiscally prudent, socially just and politically pragmatic.

With voluntary grazing permit retirement, ranchers choose if and when they want to retire their grazing permit. The conservation community would compensate ranchers to waive their permit, often at several times the fair market value. Ranchers could use their compensation to pay off debt, reconfigure their operations solely on private land, start new businesses or retire.

Recent Congresses have authorized voluntary grazing permit retirement on select public lands, including in the Cascade-Siskiyou National Monument in Oregon, Owyhee wilderness areas in Idaho, the California Desert Conservation Area, and areas in the West where domestic sheep grazing conflicts with native bighorn sheep recovery.

Ranchers across the West are interested in voluntary grazing permit retirement. The conservation community would rather be buying out grazing permits from willing sellers than constantly having to sue the Forest Service and Bureau of Land Management for flawed decisionmaking. But Congress hasn't given us the choice to use permit retirement except in very limited circumstances.

Extending voluntary federal grazing permit retirement to all public lands would be a win-win-win for public lands ranchers, other public lands users and taxpayers, as opposed to S.1129, which is surely a loser for public lands, healthy watersheds, and native wildlife.

¹² WildEarth Guardians. "Economic Contributions of Federal Public Lands Livestock Grazing" (factsheet). Available at www.sagebrushsea.org/pdf/factsheet_Grazing_Economic_Contributions.pdf.
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