Harry Kourlis Ranch

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COMMENTS TO U.S. DEPARTMENT OF LABOR PROPOSED REGULATIONS
RIN 1205-AB55

HARRY KOURLIS RANCH (Kourlis Ranch) comments to Part V, Department of Labor, Employment and Training Administration, 20 C.F.R. Part 655, Wage and Hour Division. "Temporary Agricultural Employment of H-2A Aliens in the United States: Modernizing the labor Certification Process and Enforcement; Proposed Rule," published February 13, 2008.

SUMMARY: Domestic production of food and fiber at an affordable cost while allowing for a reasonable return to support ranching and farming families is a matter of national priority. Doing so with legal employees who are appropriately cared for and who have an opportunity to support their own families as well is also important. Any rules must serve those dual goals.

Kourlis Ranch offers general comments first, and then specific comments addressed to particular provisions of the proposed rules in the second portion of this document.

GENERAL COMMENTS:

Kourlis Ranch is a sheep ranch, running approximately 3,000 mother ewes. The ranch has been hiring H-2A workers for over forty years, and over those forty years, has personally self-certified through the Department of Labor. Over those same forty years, the ranch has supported the families of its owners and employees as well as provided lamb and wool to the American consumer.

The proposed rules cite the fact that there is a critical need for legal workers in the United States agricultural industry in order to reduce dependency upon undocumented workers, but that the H-2A program is "woefully underutilized by agricultural employers" because it is "so plagued with problems…". Hence, the stated purpose of the rules is to render the H-2A program functional and more efficient so that more employers use it and more employees are legal. There is also a premise that American workers will be enticed to take more of these jobs if their competition consists of legal workers and if the working conditions are enhanced. Lastly, the proposed rules state that an additional goal is to enhance protections for the H-2A workers themselves. The goals are highly laudable; but many of the proposed rules actually undermine rather than serving them.

There are two realities that must be taken into account in order to craft rules that would, in fact, serve the stated goals. First, the agricultural industry in the United States is a low-margin industry. With few exceptions, the return on investment has been very small. Agriculture, and specifically livestock production, cannot afford any substantial increase in costs and, despite analysis to the contrary, some of these rules do represent substantial increases in costs. With increased costs will come escalating food prices OR failed businesses. It is common knowledge that agriculture continues to lose family farms and ranches and the number of individuals required to leave agriculture or, at the very least, to secure another job to augment their agricultural income, is on the rise – and now applies to larger and larger agricultural operations. Loading costs onto agriculture is not an option, without possible severe impact. Kourlis Ranch would be delighted to pay

higher wages if profits were to improve based on increased sales prices, but we cannot operate at a deficiency merely because of rules that place requirements on agricultural employers that would never be placed on commercial employers. If agriculture must pay a wage that is equivalent to minimum wage, without any deduction for housing and with an insufficient deduction for food, it represents discriminatory and punitive treatment. The failure to give credit for housing is particularly inappropriate given the mandates that prescribe precisely what that housing should be.

The Department has a mandate to focus its attention on the well-being of American workers. In order to perform that function with true vision, the Department must be mindful of the numbers of jobs that every agricultural entity impacts – directly and indirectly. Agricultural operations support rural economies in every respect – mechanics, retail stores, equipment manufacturers, feed stores, etc. Every operation that is forced out of business because of increased costs causes a serious ripple effect - - on DOMESTIC employment opportunities. Hence, as the Department is considering these rules and its other obligations, it must consider the central role that agriculture plays in our economy and in the stability of our nation and be wary of piling costs and mandates on an industry that can ill afford it.

Second, it is entirely unrealistic to assume that American workers would want these jobs if the jobs paid more or were more comfortable. Americans have been raised with television, computers, IPODS, movies, fast food and mass stimulation - - not in the tranquil, isolated life that goes with the range production of livestock where the employee's only companions are often the livestock themselves. Being able to recognize a ewe that is about to lamb, to anticipate forage needs, identify palatable forage, and to protect against predators is in no way intuitive to Americans who are raised in our culture – and it is not a skill that can be easily translated from our urban environments. An immigrant who accustomed to living on the range is far more amenable to ranch living circumstances than a domestic laborer who views it as a hardship. Whether we like it or not, domestic laborers are not interested in being sheepherders and livestock workers. Furthermore, in Northwestern Colorado, the labor market is hot and unemployment is

very, very low because of energy. High school drop-outs can get jobs in the energy industry at $45,000/year. Those individuals have no interest in working on a ranch whether the provisions of these rules are placed into effect or not.

There have already been increases in costs associated with hiring H-2A workers, such as travel, processing fees, and room and board costs. The impact of many of these rules as proposed would be to further increase costs of hiring H-2A workers. The impact would NOT be to convert more illegal workers to legal and entice more domestic workers onto the ranches.

So, given the goals as stated, how can they be met through rules revisions? As a threshold matter, to make the system more effective and usable, there MUST be discretion and flexibility in job duties assigned to H-2A workers. So long as the duties are intrinsically related to the primary job description – the production of livestock – they must be permissible. It is wholly impractical, if not impossible, to expect that a sheepherder will have no job responsibilities other than the direct, immediate care for a herd of sheep. A sheepherder must be expected to care for the livestock, provide supplemental rations, care for the horses and dogs that facilitate his work, focus on fencing, build corrals, maintain housing facilities, maintain equipment, identify and enhance water sources, drive equipment, irrigate and manage for forage. For example, while watching over his flock, a sheepherder could be expected to irrigate the fields into which the sheep would be moving, or do weed control so that his sheep do not spread weeds through the resource. Bifurcating the job would be akin to telling a lawyer that only a paralegal can file documents with the court or conduct depositions because a lawyer's function is only to do research and writing. The job consists of producing a quality product for the benefit of the client – and the job of sheepherder consists of producing wool and lamb for consumption and use, together with all of the pieces that go into that process. Under a restrictive job description, a sheepherder can execute his responsibilities poorly, but in a manner in compliance with the rules, and adversely affect the land resources or the well being of the livestock. That is an undesirable outcome for everyone concerned.

Next, the rules must impose accountability on both the employer and the employee – not just the employer. Of course, the system should be designed to eliminate bad employment practices and to create incentives for all employers to treat their employees appropriately. That is perfectly appropriate. However, the attestation procedures are very onerous. Requiring a participatory H-2A employer to attest to perfection will NOT motivate non participants (those who currently hire illegal workers) to utilize the program. Developing excessive restrictions by rule will in fact create an environment that penalizes those who are committed to improving the workplace and the program. Employers who are not able to reach the ambitious requirements of the rules may just step away, and not even do what they are doing today. The result would be a less favorable environment for the workers and for the industry.

The Department should work to raise the working conditions in the worst places, and to legalize illegal employees. These proposed rules raise the bar on all employers – even the ones who are trying to do their best – in a way that is counterproductive. It is fully appropriate to require employers to comply with the law, and to take actions to secure that compliance. It is NOT appropriate to require them, under penalty of perjury, to attest that they have complied with every applicable law. For example, the bank asked Kourlis Ranch to sign a security document securing a line of credit that guaranteed that there was no violation of environmental law on the ranch property. The discarding of oil out of a passing vehicle, or of a used battery is potentially a violation of environmental law. An employer has a duty to be vigilant, but not to guarantee the absence of a violation of any law – of which he may not even be aware. We live in far too complex a society for that, and no citizen is likely to guarantee that he or she is not violating any law applicable to his business – known or unknown. Furthermore, employees should be accountable, too. If the Department is going to hold employers to task for living up to their obligations, so too it must hold the employees to task. When employees skip out on their contractual obligations, the Department must come to the service of the employer just as it comes to the service of the employee when conditions are inappropriate.

By way of contrast, the Canadian government assists agricultural operations in recruiting qualified immigrant workers in their country of origin, in order to assure that the agricultural entities have the legal labor that they need. That program represents a partnership between the government and agriculture that values agriculture and creates an incentive for regulatory compliance.

Agricultural employers will run their businesses with documented workers if they have the realistic opportunity to do so. They, like everyone else, are trying to feed and clothe their own families within their chosen profession. Those employers who have hired illegal workers have done so because they felt they had no realistic option. These rules must live up to their stated goal of making it easier to meet H-2A requirements, and easier to use the H-2A process. If these rules do not allow for flexible job duties, provide an avenue to secure a workforce at a reasonable price, the Department may win a battle or two, but the American citizenry will lose the war. Either there will be an increase in food costs and/or more ranches will cease producing livestock and cease providing jobs in support industries - or there will be an increase in the hiring of illegal workers or both. It is that simple.

SPECIFIC COMMENTS:

Regulatory Flexibility Analysis: Kourlis Ranch disagrees with the statement that the rules do not substantively change existing obligations for employers and do not have a significant economic impact on a substantial number of small entities. There are currently special rules that apply to sheepherder housing because sheepherders live in mobile sheep camps and frequently move a few miles every 3 – 5 days. That circumstance limits what can be feasibly provided, such as running water. If, in fact, the Secretary were to revoke such rules [per 655.93(b) and (c)] and require OSHA housing compliance, the cost would be exorbitant. Additionally, depending upon how the AEWR wage calculation is calculated and applied, if livestock operators are forced to bear a significant increase in wage costs, it could mean the difference between the operation staying in business and going out of business, especially if the cost of room and board is not offset against the wage rate. From a cost/benefit analysis, the costs of such actions could be devastating – measured against the benefit of the possibility of luring some domestic workers into this field. Kourlis Ranch submits that the benefit is illusory and the costs are quite real.

Assessment of Federal Regulations and Policies on Families: Kourlis Ranch disagrees with the statement that these rules will have no negative impact on families. Many smaller agricultural operations are owned by families. If the costs associated with those operations increase, it could mean the difference between continuing to operate or not.

Executive Order 12630: Kourlis Ranch suggests that these rules could, indeed, have takings implications if their implementation results in current agricultural operations being forced out of business.

655.93 (b) and (c) appear to allow the Secretary to change or revoke the regulations applicable to sheepherders arbitrarily or without due process.

655.104(d)(iii)(D)(2) requires housing for workers principally engaged in the range production of livestock to meet the standards of DOL OSHA. In the absence of such standards, the housing is required to meet the guidelines issued by ETA.
Kourlis Ranch states that meeting OSHA requirements is both practically and economically not feasible for mobile sheep camps or mobile livestock worker housing. There have been exceptions to the rules in place and have been workable. Those exceptions need to be identified with particularity and endorsed in this rule. Furthermore, there needs to be flexibility in the inspection schedule. It is not always possible for the SWA to inspect housing on the time table identified in the rule. The important principle should be that the housing is inspected before the initial applicant's time of need and then be done annually thereafter but not be limited to the 60-75 day window, so as to assure efficiency of SWAs.

655.104(g) provides that employers may not attribute more than $9.52 per day to meals unless a higher charge is approved. That figure does not cover the costs of providing adequate food for a livestock worker and the procedures to obtain permission for a higher amount are cumbersome.

655.104(n) should create an obligation on the part of the Department to help employers locate and pursue remedies against employees who voluntarily abandon employment without returning to their home country.

655.105 lists some, but not all of the attestations required of an employer. Particularly when these attestations are coupled with the attestations in the proposed Department of Homeland Security rules, they are truly onerous and place even an employer who wants to comply with the rules in a difficult position. As to any attestations ultimately required of an employer, Kourlis Ranch requests that DHS and DOL create a form that lists all attestations and that further includes a "knowledge" component such that the employer is attesting that he is not knowingly violating a rule or regulation.

655.107 should include a provision that the Department will have an adequately staffed information service to answer employer questions and help employers comply with the process.

655.108 provides that the employer must prove an offered wage rate that is the highest of the adverse effect wage rate, the prevailing wage rate or the legal minimum wage. Kourlis Ranch agrees that the AEWR may produce a more specific and applicable wage rate for H-2A employees – PROVIDED that the job descriptions are appropriate and PROVIDED that the employer is entitled to credit for both room and board. To begin with, the OES farm worker, farm and ranch animal job description is an appropriate description for the primary job responsibilities of an H-2A worker that Kourlis Ranch would hire. However, there are secondary job responsibilities that attend to that job and that are seasonal in nature – such as checking or repairing a corral if the livestock need to be shipped, irrigating a field in order to grow forage to feed the livestock, shoeing a horse in order to have an animal to ride to gather the sheep, maintaining feeding equipment, etc. A narrow and restrictive view of "job duties" undermines the purpose of the H-2A program and its attractiveness for prospective employers. Kourlis Ranch suggests the insertion of the word "primary" in any rules dealing with job description, with the further clarification that "primary" means 66% of employment duties. Additionally, the employer should be entitled to a credit against the wage calculation for both room and board in order to make the salary truly representative. Furthermore, and MOST IMPORTANTLY, the DHS and DOL must coordinate all rules and procedures - including wage related regulations - to support the distinction between primary job duties and secondary job duties. An employer cannot be in violation of an attestation when an employee is performing his primary job as described, but with varying secondary components. The employee might be entitled to different pay, under AEWR, but nothing else.

655.117(a)(2) should include a finding that the employer "knowingly and willfully" violated the terms and conditions of the certification.

655.118(b) definition of substantial violation is overbroad. (1)(i) states that one or more acts that "are significantly injurious to the wages, benefits, or working conditions of 10 % of more of an employer's U.S. or H-2A workforce" could be defined as a substantial violation that would, in turn, lead to debarment. Particularly, for a small operation, this could mean that an employer's unintentional acts that impacted one employee's working conditions adversely could be deemed a significant injury.

CONCLUSION

If the rules are not changed to incorporate recommended changes as stated above, the Department will not achieve its desired goals. In fact, the proposed rules are more complex, more onerous and create more cost to employers than the existing rules. They will not encourage employers who now hire illegal employees to hire legal employees instead. Furthermore, at least with respect to sheepherders, the domestic labor market is not interested in these jobs and hence these rules will not benefit domestic workers. The

choice for most employers is not between H-2A workers and domestic workers. The choice is between legal workers and illegal workers. The rules push employers in the direction of illegal workers, rather than encouraging them to use the H-2A program.

Respectfully submitted,

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