

THE PIÑEROS: REVIEWING THE WELFARE OF WORKERS ON FEDERAL LANDS

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON NATIONAL PARKS, FORESTS
AND PUBLIC LANDS

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

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**OVERSIGHT HEARING ON “THE PIÑEROS:
REVIEWING THE WELFARE OF WORKERS
ON FEDERAL LANDS.”**

**Tuesday, September 16, 2008
U.S. House of Representatives
Subcommittee on National Parks, Forests and Public Lands
Committee on Natural Resources
Washington, D.C.**

The Subcommittee met, pursuant to call, at 10:01 a.m. in Room 1334, Longworth House Office Building, The Honorable Raúl M. Grijalva, [Chairman of the Subcommittee] presiding.

Present: Representatives Grijalva and Lamborn.

STATEMENT OF THE HONORABLE RAÚL M. GRIJALVA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. GRIJALVA. Thank you very much. The Subcommittee will come to order. The subject of this hearing is “The Piñeros: Reviewing the Welfare of Workers on Federal Lands.” Thank you very much, and let me thank the panelists in advance for their attendance and for their testimony and also indicate that your statements in full will be made part of the record.

If there is extraneous material as well that you would like to leave, that also will be made part of the record. Thank you. Today, the Subcommittee will be conducting an oversight hearing to review the role of the Forest Service and the Department of Labor in protecting the health and welfare of workers in our national forest system lands.

The topic is very important to me and a number of members of this Committee. Several of our colleagues asked the former chairman of the full committee to conduct an oversight hearing on this topic last Congress, but we received no response. I am pleased that we are finally taking a look at this important topic, and thank you and my colleagues and our witnesses for joining us today.

The name “piñeros” translates literally to “men of the pines” and refers generally to workers employed to perform important and often dangerous reforestation and thinning work in our national forest system lands. In many cases, piñeros are working in the United States through the H-2B guest worker program.

The series in the Sacramento Bee in 2005 painted an alarming picture of the conditions facing piñeros while performing this important work in our national forests. The series found documented

employer exploitation, government neglect, crowded work vans in which workers died in car accidents, and a lack of adequate training, protective gear and medical supplies—all this despite the fact that these workers are on Federal land fulfilling Federal responsibilities.

Some have described the work done by piñeros as one of the most hazardous occupations in the United States and one piñero was sadly quoted as saying it was like slavery. The Forest Service responded in early 2006 by releasing new contract requirements intended to address worker safety.

Yet, the Forest Service has never released an assessment of these efforts, making it difficult to determine what impact, if any, these new requirements have had on worker safety. Sadly, many have told us that nothing has changed. I look forward to receiving detailed information from the Forest Service today on the extent of their increased safety inspections, what the results of such inspections have been, and what more the agency needs to be doing.

This May, the Department of Labor submitted a report to Congress on enforcement efforts of contractors that employ piñeros. The report found a huge proportion of contractors in violation of labor and safety laws. Of the 40 contractors investigated, over 80 percent of the contractors were found in violation. This is truly alarming.

My strong concern here is that, rather than a few bad apples, we are dealing with a systemic problem. We are eager to learn from the Department what steps are being taken to punish existing violations and to prevent them from occurring in the future. I note the Department of Labor has proposed drastic changes to H-2A, temporary foreign agricultural worker program.

The proposal is to lower the wage rates and remove government oversight from the H-2A guest worker program, and that raises a number of concerns. Civil rights activist Cesar Chavez was once quoted as saying, “Our lives are dependent, for sustenance, on the sweat and sacrifice of campesinos.” I believe the same logic can be applied to piñeros.

Piñeros perform crucial work on the national forests, planting trees for reforestation and thinning our forests to prevent fire. The health of our national forests is dependent on the sweat and sacrifice of the piñeros. Ultimately, I believe we have a responsibility to ensure that piñeros are treated justly and fairly for the work that they do.

I look forward to hearing from our witnesses today. I would now at this point like to turn to Ranking Member Lamborn for any opening statements he may have. Sir?

[The prepared statement of Mr. Grijalva follows:]

**Statement of The Honorable Raúl M. Grijalva, Chairman,
Subcommittee on National Parks, Forests and Public Lands**

Today our Subcommittee will be conducting an oversight hearing to review the role of the Forest Service and the Department of Labor in protecting the health and welfare of workers on National Forest System lands.

This topic is very important to me and a number of Members of this Committee. Several of our colleagues asked former Chairman Pombo to conduct an oversight hearing on this topic last Congress but received no response. I am pleased that we are finally taking a look at this important topic, and thank my colleagues and our witnesses for joining us today.

The name “piñeros” translates literally to “men of the pines” and refers generally to workers employed to perform important and often dangerous reforestation and thinning work on our National Forest System lands. In many cases, piñeros are working in the United States through the H-2B guest worker program.

A series in the Sacramento Bee in 2005 painted an alarming picture of the conditions facing piñeros while performing this important work on our National Forests. The series found documented employer exploitation, government neglect, crowded work vans in which workers died in car accidents, and a lack adequate training, protective gear and medical supplies. All this, despite the fact that these workers are on Federal land fulfilling Federal responsibilities.

Some have described the work done by piñeros as one of the most hazardous occupations in the United States. And one piñero was sadly quoted as saying, “it was like slavery.”

The Forest Service responded in early 2006 by releasing new contract requirements intended to address worker safety. Yet, the Forest Service has never released an assessment of these efforts, making it difficult to determine what impact, if any, these new requirements have had on worker safety. Sadly, many have told us that nothing has changed. I look forward to receiving detailed information from the Forest Service today on the extent of their increased safety inspections, what the results of such inspections have been, and what more the Agency needs to be doing.

This May, the Department of Labor submitted a report to Congress on enforcement efforts of contractors that employ piñeros. That report found a huge proportion of contractors in violation of labor and safety laws. Of the 40 contractors investigated, over 80 percent of the contractors were found in violation. This is alarming. My strong concern here is that rather than a few bad apples, we are dealing with a systemic problem. We are eager to learn from the Department what steps are being taken to punish existing violations and to prevent them from occurring in the future.

I note that the Department of Labor has proposed drastic changes to the H-2A temporary foreign agricultural worker program; the proposal to lower the wage rates and remove government oversight from the H-2A guestworker program raises a number of concerns.

Civil rights activist Cesar Chavez was once quoted as saying “Our very lives are dependent, for sustenance, on the sweat and sacrifice of the campesinos.” I believe this same logic can be applied to the piñeros. Piñeros perform crucial work on our National Forests, planting trees for reforestation and thinning our forests to prevent catastrophic fire. The health of our National Forests is dependent on the sweat and sacrifice of the piñeros. And ultimately, I believe that we have a responsibility to ensure that piñeros are treated justly and fairly for the work they do.

I look forward to hearing from our witnesses today. I would now like to turn to Ranking Member Bishop for any opening statement he may have.

Mr. LAMBORN. Thank you, Mr. Chairman, but I will pass at this point. Thank you for having this hearing.

Mr. GRIJALVA. Thank you, Sir. Let me begin with our first panel. Gentlemen, thank you very much for being here. Mr. Hank Kashdan, Deputy Chief of Business Operations, Forest Service. Sir, your comments? Thank you.

**STATEMENT OF HANK KASHDAN, DEPUTY CHIEF OF
BUSINESS OPERATIONS, FOREST SERVICE**

Mr. KASHDAN. I appreciate the opportunity to appear before the Subcommittee today to talk about the welfare of forest workers on Federal lands. Let me be brief in my opening comments that summarize my testimony. Recognizing that the subject of this hearing is on those piñeros who are predominantly here under the H-2B guest worker program, let me just mention a little bit of information specific to that H-2B program.

We estimate that we have about 15,000 to 20,000 workers here in a given year that are involved as employees of contractors working on national forest land. Under direction of our former chief, Dale Bosworth, we bring to our contract administration of these

contracts three key values that we administer our contracts under: respectful treatment, safe and healthy work conditions, and fair wages and compensation, as required in the contract.

The bottom line of those values is that that is what we also expect and how we treat our own employees working for the Forest Service. It is a very high calling for us to administer with those values.

With that in mind, our posture relative to contract administration is that primary jurisdiction for H-2B workers resides with the Department of Homeland Security through its citizenship and immigration service and with the Department of Labor through employment and training administration, wage and hour division and occupational safety and health administration.

As contract administrators, we are usually the first interface and first contact with employees of contractors on national forest land. Our role is not to replace that role of the Department of Labor, state agencies or the Department of Homeland Security in the administration of laws within their jurisdiction. Our role is coordination with those agencies, oversight and reporting based on our observations in administering these contracts.

As an example of that, annually with the Department of Homeland Security we provide a list of relocation service contracts across the national forest system and we provide the Department of Labor with access to our contractor database. This exchange of information allows the Department of Labor and Department of Homeland Security to prioritize and schedule site visits and inspections to ensure oversight of reforestation contracts.

In addition to contract administration we are committed to working with interested parties, advocate groups, who operate on behalf of Los Piñeros. As an example, in January of 2007 we participated in a forum at the University of Oregon on working conditions for forest workers.

At that forum, Under Secretary Mark Gray and Director of Acquisitions Management Ron Hooper, who is with me today, presented changes that we were making in service contracts that provided for reporting of suspected violations of worker protection laws or immigration laws to other agencies. This type of exchange is an important part of our commitment to improve working conditions and regulatory compliance.

Now, specific to contract enforcement, to date there have been no debarments associated with any of the issues that I mentioned earlier. However, we have reported violations of wages, safety, health and H-2B status. We have had some undocumented workers apprehended off forest service contracts and as recently as the spring of this year we have terminated a contract due to the presence of undocumented workers.

Our director of acquisition management has set specific requirements to sample a portion of reforestation contracts each year and that requirement is then transferred on from regional directors of acquisition management.

Our contracts have been recently modified to include specific requirements that pertain to the Fair Labor Standards Act, Migrant and Seasonal Agricultural Worker Protection Act, McNamara-O'Hara Service Contract Act, and Occupational Safety and Health

Administration Act. The determination after our reporting these violations rests with the Department of Labor and Department of Homeland Security.

We have also improved our training. The Missoula Technology Development Center has developed a comprehensive online training module on safety and health for contracting officers, representatives and inspectors. I have a copy of that here. This module provides the latest health and safety requirements. It is available also to advocate groups, contractors and other members of the public.

So in conclusion, Mr. Chairman, the Forest Service will continue to work closely with the Department of Labor and the Department of Homeland Security, we will continue to dialogue with interested groups and we will hold true to some of those key values that we stated at the beginning: respectful treatment, safe and healthy working conditions, fair wages and compensation.

That concludes my comments, Mr. Chairman. I would be happy to answer any questions when you are ready.

Mr. GRIJALVA. Thank you very much, Sir.

[The prepared statement of Mr. Kashdan follows:]

**Statement of Hank Kashdan, Deputy Chief of Business Operations,
Forest Service, U.S. Department of Agriculture**

Mr. Chairman and Members of the Subcommittee thank you for the opportunity to testify before you today on the Forest Service's role in ensuring the health and safety of Los Piñeros as they carry out service contract work on National Forest System lands. The Forest Service is committed to the safety and health of visitors and workers in national forests and grasslands. We have and will continue to act quickly to address problems that may arise in the area of worker or visitor safety and health.

Reforestation contractors employ both U.S. workers and workers approved to enter the U.S. under certain Temporary Worker Programs. Los Piñeros or "men of the pines" is a term used typically to refer to reforestation workers who are in the United States under the H-2B Temporary Work Visa. There is a limit of 66,000 individuals per year who may enter the United States to work under this visa. Estimates for H-2B forestry workers range between 15,000 and 20,000. In contrast, the H-2A Temporary Work Visa is a separate category of temporary work visa specifically for agricultural workers. Forest Service reforestation contractors do not employ H-2A guest workers.

The primary jurisdiction and oversight for the H-2B Temporary Guest Worker Program is with the Department of Homeland Security (DHS) through its Citizenship and Immigration Services (USCIS). The Department of Labor (DoL) Employment and Training Administration (ETA), Wage and Hour Division (WHD), and Occupational Health and Safety Administration (OSHA), as well state agencies, also have roles in providing workplace protections for these workers. The Forest Service is involved when workers are employed by contracting firms performing service contract work on lands within the jurisdiction of the Forest Service whether such workers are H-2B temporary workers or U.S. workers.

Contractors, including reforestation contractors, must obtain a certification from the DoL declaring that qualified U.S. workers are not available for this type of work. The contracting firms must stipulate that the employment of temporary workers under the H-2B visas will neither adversely affect the wages nor the working conditions of similarly employed U.S. workers. Once the DoL has granted the contractor certification, the contractor then can petition the DHS for approval to employ guest workers.

Similar to U. S citizens, foreign guest workers are covered by a number of worker protection laws. Employers are required to pay at least prevailing wages for the labor in the area of the intended employment and to provide a safety and healthy workplace for their employees. H-2B workers may file complaints with local DoL WHD and OSHA to seek redress for complaints that they may file under worker protection laws.

Forest Service Responsibilities and Actions Taken

Since the March 2006 hearing before the Senate Committee on Energy and Natural Resources, Subcommittee on Public Lands and Forests, the Forest Service has played an increasing role in ensuring the health, safety and fair compensation for Los Piñeros. For foreign reforestation guest workers employed by service contractors to perform specified contractual work on National Forest System lands, the Forest Service is the agency with the most direct contact and contractual oversight. The day-to-day business practices of the Forest Service include mutual respect, fair compensation, and worker health and safety. These are our core values. We have taken, and continue to take, action to strengthen our agency role in ensuring work place compliance with Federal laws for this work activity. However, we are not replacing the role of the DoL, state agencies or DHS in the administration of laws within their respective jurisdictions.

The Forest Service and its employees who are involved with reforestation service contracts have received training to identify and report suspected violations and to take immediate action when imminent threats to health and safety exist. To this extent, the Forest Service has issued stop work orders and has reported suspected violations of applicable labor and safety laws to DoL or state agencies. Suspected violations of H-2B visa status are reported to DHS.

Since the March 2006 Senate hearing, the Forest Service Director of Acquisition Management (AQM) and the Director of Enforcement Policy, WHD, and the Deputy Director Enforcement Program, OSHA, have met repeatedly to coordinate the management and oversight of reforestation contracts for the National Forest System. These meetings have enhanced relationships and understanding of program oversight and awareness. Annually, DHS will receive a list of reforestation service contracts across the National Forest System and we have provided DoL with access to our contractor database. This access and list allows the DoL and DHS to prioritize and schedule site visits and inspections to ensure oversight of the reforestation contractors.

On January 31, 2007, the Department of Agriculture accepted an invitation from the Institute for a Sustainable Environment—Ecosystem Workforce Program at the University of Oregon to participate in a “Forum on Working Conditions for Forest Workers.” U.S. Department of Agriculture Under Secretary for Natural Resources and the Environment Mark Rey and Ronald Hooper, Forest Service Director of Acquisition Management, presented the changes in the service contracts that the Forest Service had implemented and the reporting of suspected violations of worker protection laws or immigration laws to other appropriate agencies. The USDA and FS involvement at the forum sponsored by the University of Oregon demonstrates our commitment to improve the working conditions and regulation compliance for reforestation and other service contract employees working in National Forest System lands, through our improved service contract provisions.

Currently, the Forest Service has increased the rigor and scope of contract inspection and monitoring to include all Forest Service employees visiting a project site. Our reporting suspected violations to other agencies has involved alleged violations in wages and benefits, safety and health and H-2B Visa status. All suspected violations of contract provisions have been reported to DoL since 2006. In addition, through routine enforcement patrols, the DHS Immigration and Customs Enforcement (ICE) has apprehended undocumented workers in the employ of a reforestation contractor. Confirmed violations are documented in a Forest Service database for consideration in future contract awards to the violating firm. However, to date, there have been no Forest Service recommendations to DoL for contractor debarment. In all cases, the Forest Service monitors to verify that the contractor has taken corrective actions.

Accountability is paramount in our management of reforestation service contracts. Internal control plans and reviews have been developed and implemented for monitoring reforestation contracts to ensure that there is agency compliance with DoL and DHS laws and regulations, and that violations, investigations and dispositions of complaints are tracked and recorded. Forest Service contracting officers, contracting officer’s representatives and contract inspectors are now trained to recognize problems, potential violations, and are empowered to immediately address the situation by requiring corrective action or issuing stop work orders. Service contracts prepared and offered by the Forest Service now contain specific provisions that fully describe the requirements of the Fair Labor Standards Act (FLSA), Migrant and Seasonal Agricultural Worker Protection Act (MPSA), McNamara-O’Hara Service Contract Act (SCA), and Occupational Safety and Health Act (OSH Act) standards as well as visa status requirements. Forest Service contract administrators are encouraged to observe, document and report to DoL and DHS suspected violations of applicable contract provisions that address workers compensation, safety,

and health, as well as visa status. The determination of a violation relative to any of the applicable Federal laws resides with DoL and DHS. The Forest Service has established a contractor database where violations of Federal law, as determined by DoL and DHS, are recorded. This establishes a contractor history based on specific contract provisions. If violations are sufficiently serious, or there is a robust history of violations, then this is a factor in determining future awards.

The Missoula Technology Development Center (MTDC) has developed a comprehensive on-line training module titled Safety & Health Training for Contracting Officer's Representatives and Inspectors. This module provides the latest health and safety requirements as prescribed by OSHA regulations at 29 CFR 1910 (General Industry) and 1926 (Construction) and is available for self-study for Forest Service employees involved in service contract oversight and monitoring. The program design is for either self-study or classroom type training and is available to the public, including contractors and advocates for workers rights. However, it is incumbent upon the service contracting firms to fulfill the requirement to understand and to train reforestation employees in the OSHA Regulations at 29 CFR 1910 and 1926.

The field and regional organizations of DoL and DHS provide training and compliance assistance, and current information, at yearly service contracting seminars for Forest Service employees who will prepare, award and administer the contracts. These seminars, while not contractor training sessions, do include private sector forestry service firms who are contemplating on bidding and securing a service contract, as well as for Forest Service employees.

The National Director of AQM requires the regional AQM directors for the Forest Service, to sample a percentage of reforestation contracts each year. The directors are ensuring that the direction of the Forest Service Chief is followed with respect to the reporting of suspected violations to DoL and DHS. This reporting is accomplished through established procedures and the points of contact in the respective agencies. The directors are responsible for ensuring that the remedy for confirmed violations is implemented. This is accomplished through a formal letter from the DoL and a formal acknowledgement of that letter of notification from the Forest Service.

Conclusion

Since the 2006 hearing, the Forest Service has reported to DoL suspected violations of provisions relative to the FLSA, MPSA, SCA, and OSHA standards, and reported to DHS suspected violations of H-2B Visa status. The Departments have investigated the Forest Service reports and provided findings of their investigations according to their procedure to the contractors and the Forest Service. Contractors, upon receiving the findings, have implemented corrective actions to ensure that violations are addressed and practices or behaviors modified. We can report that there have been no injuries to contract workers or deaths to contract workers on reforestation contracts, nor are we aware of any visa violations.

The Department of Agriculture and the Forest Service are committed to the health and safety for all visitors and workers in the National Forest System. That includes foreign guest workers. We will continue to closely coordinate with the oversight agencies in DoL and DHS who are responsible for administering this program to ensure foreign guest workers will have employment where their personal health and safety is ensured by both their employer and the Federal government.

This concludes my statement, I would be happy to answer any questions that you may have.

Mr. GRIJALVA. Let me now turn to Mr. Alex Passantino, Acting Administrator, Wage & Hour Division, U.S. Department of Labor. Welcome, Sir. I look forward to your testimony.

STATEMENT OF ALEXANDER PASSANTINO, ACTING ADMINISTRATOR, WAGE & HOUR DIVISION, U.S. DEPARTMENT OF LABOR

Mr. PASSANTINO. Thank you. Mr. Chairman, distinguished members of the Subcommittee, thank you for the opportunity to testify about the Department of Labor's role in protecting workers employed on tree planting and other service contracts. As the acting Administrator of the Employment Standards Administration's

Wage & Hour Division, I represent one of several agencies with a role in protecting these workers.

The Department's role also includes two other agencies, the Occupational Safety and Health Administration and the Employment and Training Administration. Representatives from each of those agencies join me here today. As my written testimony explains in more detail, the challenges of ensuring that the employment of workers on reforestation contracts complies with applicable legal protections are not new to Department of Labor.

On March 1, 2006, the Senate Committee on Energy and Natural Resources, Subcommittee on Public Lands and Forests, held a hearing on the roles of the various agencies in protecting foreign guest workers employed on tree planting and other service contracts on national forest system lands. As was explained during that hearing, reforestation investigations present our investigators with a host of challenges not commonly encountered in typical industries.

The work tends to occur in remote, sometimes extremely remote, locations. The contracts are generally of short duration and the workers are constantly on the move from work site to work site. As the work tends to be performed at hard to find locations and for only brief periods communication with the workers when first encountered is essential.

In addition, as you mentioned, many of the workers are working in the United States pursuant to the H-2B provisions of the Immigration and Nationality Act. These H-2B reforestation workers typically do not speak English and generally reside in remote locations with little, if any, access to community or government resources to assist them with work related problems.

As a result of these challenges, communication among the involved agencies is key to ensuring appropriate enforcement. As indicated at the March 2006 hearing, a number of measures have been put in place to improve the flow of information between Wage & Hour, OSHA and the Forest Service in an effort to improve working conditions.

As an initial matter, the Department of Labor has provided training to Forest Service contracting officers regarding the laws enforced by Department of Labor. Such training is critical to identifying and thus remedying potential labor law violations, particularly given the breadth of the issues covered by Department of Labor laws.

Among the laws enforced by the Department are those that provide for the payment of minimum wage and overtime that require certain covered farm labor contractors to comply with Federal and state safety and health housing standards, require farm labor contractors to ensure that certain vehicles are operated properly, driven by properly licensed drivers and meet applicable Federal and state safety standards.

Our laws also require farm labor contractors to obtain a certificate of registration from the Department, require Federal reforestation contractors to pay the prevailing wage and fringe benefits determined by the Department, require sanitary and adequately supplied toilets, an adequate and readily accessible supply of cool, po-

table drinking water and adequate and sanitary hand washing facilities.

Our laws also require that employers assess the workplace, determine what hazards are present, what personal protective equipment is required to protect against those hazards and ensure that the use of such equipment takes place, and training employees in safe work practices. Of course, our efforts on behalf of reforestation workers have not been limited to education of the Forest Service.

We have designated regional points of contact for the three organizations to facilitate communication, the Department created a one page, red flag checklist for Forest Service personnel to use as a guide to identify potential violations, the Forest Service has allowed the Department to access their contract database in order to facilitate our strategic planning, the Forest Service has agreed to check the MPSA registration status and investigation history of any contractor who wins a reforestation contract, and the Wage & Hour Division has developed fact sheets and reforestation workers rights cards which summarize the basic provisions of our Federal laws.

We have also held discussions with a number of advocacy groups. I, too, attended the field hearing in Eugene, Oregon, and have met personally with representatives of several of the groups here in Washington. As a result of our enhanced coordination and focus, since the March 2006 hearing the Wage & Hour Division has completed 62 investigations involving 56 reforestation contractors.

We have six additional investigations underway. Forty-one of the investigations disclosed violations of MPSA. The most frequent violation was failure to disclose the terms and conditions of employment, followed by failure to provide a proper wage statement, failure to make and keep records and failure to pay the wages owed when due.

Housing, safety and health violations were found in 10 investigations and transportation safety violations were uncovered in eight. We assessed over \$85,000 in civil money penalties and initiated action to revoke the farm labor contractor certificate of registration of one reforestation contractor.

Since March 2006, the Federal OSHA and state plan agencies have conducted 189 inspections of the forestry service's industry and those inspections have resulted in the issuance of 546 violations. For the upcoming fiscal year, Wage & Hour plans to continue to conduct target investigations in the reforestation industry, planning 80 such investigations in Fiscal Year 2009.

We will continue to provide farm labor contractor registration and investigation history to the Forest Service when requested. The agencies will continue to share information at all levels, but particularly at the regional levels where exchanging information provides the most meaning and assuring that workers are protected.

We have achieved significant results for workers and will continue to do so. We have developed multiple strategies, including direct enforcement compliance assistance and partnerships to address the challenges faced in protecting these workers. We look for-

ward to continuing to improve and build upon our relationship with the Forest Service.

The Department is committed to maintaining an effective enforcement present in the reforestation industry, both on private and public land.

Mr. Chairman, this concludes my prepared remarks. I will be happy to answer any questions that you or the members of the Committee may have. Thank you.

Mr. GRIJALVA. Thank you very much. We appreciate your testimony.

[The prepared statement of Mr. Passantino follows:]

Statement of Alexander J. Passantino, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor

Mr. Chairman and Distinguished Members of the Subcommittee:

Thank you for the opportunity to appear before you today as a member of this panel. You have invited us to testify on the role of the Department of Labor (DOL) in protecting workers, and in particular foreign guest workers, employed on tree planting and other service contracts (often called "reforestation contracts") on National Forest System Lands. The workers engaged in this work are typically referred to as "piñeros"—men of the pines.

As the Acting Administrator of the Employment Standards Administration's Wage and Hour Division (WHD), I represent one of several federal agencies that have a role with respect to these foreign guest workers. A complete picture of the DOL's role involves mentioning two other agencies within the Department—the Occupational Safety and Health Administration (OSHA) and the Employment and Training Administration (ETA). There are representatives from those agencies here with me today.

The challenges of ensuring that the employment of workers on reforestation contracts with applicable legal protections are many, but they are not new to the DOL. On March 1, 2006, Assistant Secretary for Employment Standards, Victoria A. Lipnic, testified along with Mark Rey, Under Secretary for Natural Resources and Environment, USDA, before the Senate Committee on Energy and Natural Resources' Subcommittee on Public Lands and Forests on the roles of the departments in protecting foreign guest workers employed on tree planting and other service contracts on National Forest System lands.

In May 2008, the Department provided a report to the House and Senate Committees on Appropriations that identified DOL's enforcement activities pertaining to those contractors that employ piñeros and who have violated Federal employment and/or safety standards. Since the March 2006 hearing, the WHD, OSHA, and the U.S. Forest Service (USFS) have worked closely together, and have established protocols for the exchange of information necessary to ensure that the workers engaged on USFS reforestation contracts are protected.

My testimony today will address the following:

- In general terms, the worker protections enforced by WHD and OSHA that are applicable to the employment of piñeros engaged in reforestation and other land management work;
- A general discussion of issues concerning reforestation workers who are H-2B temporary non-immigrants under the Immigration and Nationality Act, and the roles of the Department of Homeland Security (DHS) and the DOL ETA Office of Foreign Labor Certification (OFLC);
- The cooperative efforts among WHD, OSHA, and USFS to improve levels of compliance with labor laws on USFS reforestation contracts; and
- WHD and OSHA enforcement experience in reforestation since the March 2006, hearing before the U.S. Senate Committee on Energy and Natural Resources, Subcommittee on Public Lands and Forests.

OVERVIEW OF DEPARTMENT OF LABOR LAWS AND PROGRAMS APPLICABLE TO
REFORESTATION WORKERS

Wage And Hour Division Enforcement Responsibilities:

WHD administers and enforces the following laws that may pertain to reforestation workers including piñeros:

Fair Labor Standards Act (FLSA)

Generally, the FLSA applies to any employee who engages in interstate commerce or the production of goods for interstate commerce, or all employees of an enterprise which engages in interstate commerce or the production of goods for interstate commerce and grosses \$500,000 or more per year.

The FLSA (29 U.S.C. §§ 201 et seq.) requires covered reforestation contractors to:

- Pay nonexempt workers no less than the Federal minimum wage (currently \$6.55 per hour, rising to \$7.25 on July 24, 2009);
- Pay nonexempt workers time and one-half a worker's regular rate of pay for all hours actually worked over 40 in a seven-day work week;
- Limit the occupations and hours of employment for employees under 18 years of age in accordance with Federal youth employment regulations; and
- Maintain for each worker an accurate record of hours worked and wages paid.

Migrant and Seasonal Agricultural Worker Protection Act (MSPA)

The MSPA applies to any person who solicits, recruits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker. The MSPA applies to reforestation workers engaged in predominately manual work (e.g., tree-planting, brush-clearing, pre-commercial thinning, forest fire-fighting) if they otherwise meet the definition of a migrant or seasonal agricultural worker.

The MSPA (29 U.S.C. §§ 1801 et seq.) requires that covered contractors:

- Pay workers their wages when due and give workers itemized written statements of earnings for each pay period, including any amount deducted and the reason for the deduction;
- Comply with Federal and State safety and health housing standards, such as OSHA's Temporary Labor Camps standard, if the contractor owns or controls a facility or real property used for housing the reforestation workers. A written statement of the terms and conditions of occupancy must be posted at the housing site in a location where it can be seen or must otherwise be given to the workers;
- Ensure that vehicles used or caused to be used to transport the reforestation workers are properly insured, properly operated, driven by properly licensed drivers, and meet the applicable Federal and State safety standards;
- Inform the workers in writing about the terms and conditions of employment, including the work to be performed, wages to be paid, period of employment, and whether State workers' compensation or State unemployment insurance will be provided;
- Obtain a certificate of registration from DOL to operate as a farm labor contractor. In addition, specific authorization must be obtained for all housing provided (if owned or controlled by the farm labor contractor), each vehicle used to transport the reforestation workers, and each driver of each vehicle used to transport the reforestation workers. The contractors must carry proof of this registration and show it to workers and any other person with whom they deal as contractors;
- Display a poster that sets forth the rights and protections of the workers in a location where it can be seen at the job site; and
- Keep complete and accurate payroll records for all workers.

The McNamara-O'Hara Service Contract Act (SCA) and the Contract Work Hours and Safety Standards Act (CWHSSA)

The SCA (41 U.S.C. §§ 351-358) applies to Federal contracts for services in excess of \$2,500, including reforestation contracts entered into by USFS. CWHSSA (40 U.S.C. §§ 327-333) applies to Federal service contracts in excess of \$100,000. SCA requires reforestation contractors to:

- Pay the reforestation workers the wages and fringe benefits determined by DOL to be prevailing in the locality for the class of service worker being employed; and
- Notify the reforestation workers of the SCA prevailing wage and fringe benefit requirements applicable to their work.

The reforestation contractors may not require the workers to pay for the employers' business expenses, such as tools, equipment, or fuel, to the extent that such payments will reduce the employees' wages below the applicable SCA prevailing wage.

The CWHSSA requires an overtime payment of time and one-half the basic wage rate to workers on contracts subject to its provisions.

Occupational Safety and Health Act (OSH Act)—Field Sanitation Standard

OSHA administers the Occupational Safety and Health (OSH) Act (29 U.S.C. §§ 651 et seq.). Safety and health conditions in most private industries are regulated by OSHA or the States through an OSHA-approved State plan. By Secretary's Order 5-96 dated December 27, 1996, the authority for enforcing OSHA's Field Sanitation standard was re-delegated to WHD in all States in which Federal OSHA generally has authority, and in certain State-plan States.

With respect to reforestation, it is the policy of both OSHA and WHD that the field sanitation requirements apply to hand-labor operations in this industry (with 11 or more employees) without regard to whether the work is performed on private or public land. "Hand labor" includes hand-cultivation, hand-weeding, hand-planting, and hand-harvesting of vegetables, nuts, fruits, seedlings, or other crops, as well as the packing of produce in the field into containers. Except for hand-labor reforestation work, the term "hand labor" does not include forestry operations such as logging.

Therefore, covered reforestation contractors are required to provide:

- Sanitary and adequately-supplied toilets in proper ratio for crew size, and located within 1/4-mile walk of each employee's place of work in the field;
- An adequate and readily accessible supply of cool, potable drinking water; and
- Adequate and sanitary hand-washing facilities located in close proximity to toilet facilities.

Further, employers must notify each employee of the location of sanitation facilities and the importance of their use to minimize the hazards of heat-related illness and communicable disease. In addition, employers must provide sanitation facilities at no cost to employees and allow each employee reasonable use of the facilities during the workday.

Occupational Safety and Health Administration Enforcement Responsibilities:

As previously noted, the OSH Act is administered by OSHA. OSHA has standards that apply broadly across all industries, but has also promulgated standards that are applicable to specific industries and activities, such as logging operations, which are applicable to certain reforestation operations.

Several OSHA standards apply to reforestation work. For example, OSHA standards require that:

- Employers assess the workplace and determine what hazards are present, and what personal protective equipment is required to protect against those hazards (e.g., protective eyewear, protective footwear, head protection, cut-resistant leg protection when using chainsaws), and ensure the use of such equipment;
- Employers train employees in safe work practices when performing pre-commercial forest thinning operations, such as felling trees (e.g., use undercuts and back cuts, determine a clear retreat path), and ensure that such procedures are followed;
- Machines and vehicles are maintained in serviceable condition, inspected at the start of each work shift, and equipped with seat belts;
- First aid kits are present at each worksite where trees are planted or cut, at each active landing, and on each employee transport vehicle;
- Flammable liquids are handled and stored properly; and
- Employees are trained with regard to the hazards of the chemicals with which they work, and that Material Safety Data Sheets (MSDS) for those chemicals are available.

Whistleblower Statutes

In addition to administering workplace safety and health standards, OSHA is also responsible for the administration of a number of whistleblower statutes, including Section 11(c) of the OSH Act. Section 11(c) prohibits reprisals against employees who exercise their rights under the OSH Act. The administration of Section 11(c) is thus integral to OSHA's core mission.

IMMIGRATION ISSUES RELATED TO REFORESTATION WORK:

Characteristics of Reforestation Guest Workers

In 2007, reforestation contractors made application for more than 20,000 forestry and tree planter guest workers to be admitted as temporary nonimmigrants under the H-2B provisions of the Immigration and Nationality Act (INA).

The H-2B workers' presence in this country is dependent on the willingness of the sponsoring employer to continue their employment. When this employment ends, the workers must leave the country. Therefore some reforestation workers may be

reluctant to complain to DOL—or any other agency—about mistreatment or underpayment of wages by their employer.

The H-2B reforestation workers typically do not speak English. The workers typically reside in remote locations with little if any access to community or government resources to assist them with work-related problems.

Immigration and Nationality Act (INA)—Relevant Visa Category H-2B

DHS regulations implementing the Immigration and Nationality Act (8 U.S.C. §§ 1101 et seq.) require employers filing petitions for H-2B non-immigrant workers with the U.S. Citizenship and Immigration Services (USCIS) to include a labor certification from the Secretary of Labor that qualified U.S. workers could not be found to fill the job and that the non-immigrant workers' employment will not adversely affect the wages and working conditions of similarly employed U.S. workers. In the case of reforestation activities, employers must file an application for labor certification with the State Workforce Agency (SWA) serving the area of intended employment.

In each case, the SWA follows guidance from DOL to determine the prevailing wage rate for the occupation listed, to supervise and to guide the employer's recruitment of U.S. workers, and to ensure completion of other requirements of the H-2B program. The SWA forwards completed applications to DOL's ETA, which reviews the record in its entirety, including documentation from the state and the employer, to determine whether and when to issue a certification. The employer then uses ETA's certification in support of its petition with USCIS for guest workers.

The INA provides DHS with authority to impose certain sanctions when sponsoring employers have committed a substantial failure to meet any of the conditions of the H-2B petition or made a willful misrepresentation of a material fact in a petition. The INA does not provide DOL the authority to generally enforce elements of the H-2B program, including the wage rate identified on the employer's attestation for the H-2B workers. DOL may only enforce the payment of a specified wage rate if it is required under one of the laws for which DOL has enforcement authority, e.g., FLSA, SCA, or MSPA.

A Notice of Propose Rulemaking was published on May 22, 2008, in which ETA and WHD jointly proposed to modernize the procedures for the issuance of labor certifications issued in connection with H-2B non-immigrants, including procedures to enforce compliance with attestations made by sponsoring employers. As noted, the Congress has vested DHS with the statutory authority to enforce the H-2B program requirements and the DOL possesses no independent authority for such enforcement. Consequently, the proposed rule describes potential H-2B enforcement procedures DOL can institute upon the delegation of enforcement authority from DHS and the implementation of corresponding regulations.

COOPERATIVE EFFORTS AMONG AGENCIES

As indicated in Assistant Secretary Lipnic's March 2006 testimony before the Senate Subcommittee, a number of measures have been put into place, both before and subsequent to the hearing, to improve the flow of information between WHD, OSHA, and USFS in an effort to improve working conditions on reforestation contracts on public lands. As was explained at that hearing, WHD enforces the law through two means—directed enforcement activity and complaint-based investigations. A substantial amount of analysis goes into planning WHD's directed enforcement work. The preparation of the annual operational plan begins during the year before the start of the operational fiscal year, and the resource commitment is determined as far in advance as possible. Given the remote nature of the work in reforestation, the sooner WHD is aware of contracts that will be let by USFS, the better it can target its reforestation enforcement activities.

- WHD, OSHA, and USFS have designated regional points of contact for the three organizations to facilitate communication and for the USFS to use in a rapid response referral system in case of potential violations.
- USFS has included stronger contract provisions that provide for a minimum level of contractor safety awareness and that enhance the agency's ability to shut down a project or fire a contractor.
- WHD and OSHA created a one-page "Red Flag" checklist for USFS personnel to use as a guide to identify potential violations of fundamental wage, safety, and health requirements that USFS can address under its contract authority or by making a referral to WHD and/or OSHA, as appropriate.
- Region X OSHA provided several sessions of basic safety and health training to USFS contracting officers in their northwest regions to enable contracting officers to better know what to include in their labor contracts and what to mon-

itor. If a contractor was not living up to safety and/or health agreements in the contract, and if USFS could not get the needed correction, USFS would notify OSHA for initiation of an enforcement inspection.

- USFS provided the means for OSHA and WHD to access USFS contract information in order to facilitate strategic planning for investigations.
- USFS has agreed to check the MSPA registration status and investigation history of any contractor who wins a reforestation contract by contacting the WHD Regional Office with jurisdiction over the place of performance of the contract. WHD created a form to facilitate responses to these requests.
- In FY 2007, the WHD received and responded to 66 requests from USFS for information on the registration status and investigation history of contractors being awarded contracts. Currently there is one SCA investigation pending that was referred to WHD from USFS.
- WHD developed Fact Sheet #63, which summarizes the basic provisions of the Federal laws administered and enforced by the WHD that apply to reforestation workers. This Fact Sheet is available in English and Spanish on WHD's Web site at <http://www.dol.gov/esa/whd/regs/compliance/whdfs63.pdf> and <http://www.dol.gov/esa/whd/regs/compliance/whdfs63spanish.pdf>.
- WHD prepared English and Spanish Reforestation Workers' Rights cards that explain the fundamental provisions of the applicable laws to reforestation workers. These wallet-sized cards can be accessed from WHD's Web site and/or ordered by other agencies or outside organizations using the Quick Finder for Employees' Rights Cards on the WHD homepage at <http://www.dol.gov/esa/whd/mspa/index.htm> or directly at: <http://www.dol.gov/esa/whd/FLSAEmployeeCard/ReforestEnglish.pdf> and <http://www.dol.gov/esa/whd/FLSAEmployeeCard/ReforestSpanish.pdf>.

Also, ten education and outreach events were held during FY 2007, many of them put on jointly by the WHD, OSHA, and USFS. At four of these events, WHD provided training on investigations to USFS staff. WHD has also created a training package for use in training USFS personnel, reforestation contractors, and others.

COMMUNITY INVOLVEMENT

Dialogues have also been held with organizations such as the Forest Resource Association, Sustainable Northwest, the Ecosystem Workforce Program of the University of Oregon, and the Alliance of Forest Workers and Harvesters to allow them to share their concerns regarding enforcement and the conditions affecting reforestation workers. Meetings have taken place in Washington, D.C. in 2007 and 2008, and a field hearing/listening session took place at the University of Oregon in Eugene in January, 2007.

ENFORCEMENT EXPERIENCE

WHD Enforcement:

Since the March 2006 hearing, WHD has completed 62 investigations involving 56 reforestation contractors, and there are 6 investigations underway. Collectively, the 56 contractors investigated employed over 1,866 workers on site. The discussion below details the findings to date. (These figures are for all forest landownership, which includes, USFS, Bureau of Land Management, other Federal, State and private industry.)

The WHD seeks compliance through a combination of enforcement and compliance assistance. The WHD conducts investigations of employers based on either the receipt of a complaint alleging violations or by scheduling of directed (WHD-initiated) investigations. We receive very few complaints concerning reforestation workers and most of our enforcement activities are directed investigations based on planning that occurs in our Regional and District offices.

For the upcoming fiscal year, WHD plans to continue to conduct targeted investigations in the reforestation industry. WHD has designated enforcement officials in each of its regions to ensure effective enforcement and continued coordination with other agencies, and will continue to fully utilize information from the USFS contractor database to identify contractors for investigation. WHD will also continue to provide FLC registration and investigation history to USFS when requested. The agencies will continue to share information at all levels, but particularly at the regional levels where exchanging information provides the most meaning in assuring that workers are protected.

MSPA Investigations

Forty-one of the completed reforestation contractor investigations disclosed violations of the MSPA. The most frequently encountered violation was failure to disclose

the terms and conditions of employment, followed by failure to provide a proper wage statement, failure to make and keep records, and failure to pay the wages owed when due. Housing safety and health violations were found in 10 investigations, and transportation safety violations were uncovered in eight cases. As a consequence of the violations, over \$85,400 in civil money penalties were assessed. In addition, WHD initiated action to revoke the farm labor contractor certificate of registration of one reforestation contractor for violating requirements of the MSPA. The matter is currently pending before an Administrative Law Judge (ALJ).

FLSA Investigations

Seventeen of the employers investigated were found to have violated requirements of the FLSA. Two were found to have violated the Act's minimum wage requirements, 12 violated the overtime requirements, and 10 violated the Act's record-keeping requirements. A total of over \$173,250 in back-wages was found due to 490 workers.

SCA Investigations

Nineteen of the investigated employers were performing work on public land under contracts with the Federal government. Of the 19 employers investigated, 12 were found to have violated requirements of the SCA. Six employers were in violation of the SCA prevailing wage requirements and seven were in violation of the fringe benefit requirements. In addition, four were found to have violated the overtime requirements of CWHSSA. A total of over \$222,810 was found due to over 160 workers as a consequence of these violations.

Litigation

In December 2006, DOL's Regional Office of the Solicitor in Seattle resolved outstanding issues stemming from a 2004 investigation of Gonzalez Forestry of Centralia, Washington, by obtaining a default judgment against the firm. The 2004 investigation disclosed SCA, CWHSSA, and MSPA violations on pre-commercial thinning contracts that the firm had with the USFS in the Tongass National Forest in Alaska. The firm paid \$15,336 in CWHSSA overtime back wages and an additional \$7,756 in SCA minimum wages. The judgment orders a three-year debarment under the SCA for both Arturo Gonzalez and his wife, Angelia.

On March 23, 2007, an ALJ issued a favorable decision and order in an SCA debarment matter stemming from a 2004 investigation of reforestation contractor Progressive Environmental, LLC, and two of its principals, Bruce Campbell and Randy Humbert. The ALJ ruled that as a consequence of the violations of the required wage and fringe benefit requirements and the failure to keep adequate records, the firm, Mr. Campbell, and Mr. Humbert should be barred from receiving Federal contracts for a period of three years.

OSHA Enforcement:

OSH Safety and Health Investigations:

Since March 1, 2006, both Federal OSHA and the State plan agencies have conducted 189 inspections (including 57 Federal inspections and 132 State plan inspections) in the forestry services industry (Standard Industrial Classification (SIC) 0851). It is not possible to determine precisely how many of these inspections were of reforestation contractors, as that is only one of several activities that fall within SIC 0851. However, a fair number of these 189 inspections likely can be attributed to reforestation activities. Of these 189 inspections, 115 were programmed inspections, that is, inspections that were initiated by a strategic program rather than in response to a fatality, accident, complaint, or referral. The remaining 74 inspections were conducted pursuant to such responses.

The 189 inspections resulted in the issuance of 546 violations of OSHA standards. These violations identified serious hazards related to personal protective equipment, tree felling procedures, chemical hazard communication, fire extinguishers, powered industrial trucks, machine guarding, and electrical hazards, just to name a few.

A large amount of reforestation activity occurs in the northwestern states. OSHA's Seattle Regional office, which comprises Idaho, Washington, Oregon, and Alaska, receives email notifications from the USFS officials on contract awards for the states within that Region. Notifications for work in the state plan states are forwarded to designated points of contact in the OSHA departments. Notifications for contracts in Idaho are sent to the Boise Area Director (AD). The AD makes the determination

whether or not to conduct an inspection under a Silviculture¹ Local Emphasis Program (LEP), which was developed in 2006.

Litigation

There have been no ALJ or Occupational Safety and Health Review Commission decisions related to reforestation contractors since March 1, 2006.

CONCLUSION

Experience has shown that reforestation investigations present our investigators with a host of challenges above and beyond those commonly encountered in typical industries. The work tends to occur in remote, sometimes extremely remote, locations. The contracts are generally of short duration, and the workers are constantly on the move from worksite-to-worksite. As the work tends to be performed at hard to find locations and for only brief periods, communication with the workers when first encountered is essential.

As discussed above, we have developed multiple strategies to address the challenges faced in protecting these workers. DOL is committed to maintaining an effective enforcement presence in the reforestation industry—both on private and public land.

Mr. GRIJALVA. Let me, for both gentlemen, we will hear a resounding theme in the next panel that work conditions are virtually the same as they were in 2006. Given that, how do you respond to that and what is your reaction to that? Both.

Mr. KASHDAN. Well, Mr. Chairman, let me start by saying that our key emphasis is to have the resources available to conduct inspections continuously, routinely and to look for signs of violations that occur relative to the requirements of the contract, and when we see those, we report those. Our challenge is to make sure that we devote the limited resources we have to conducting those inspections.

That is one of the key priorities we have. So when we see them, we are reporting them. We feel that we have fairly good compliance with our contractors.

Mr. PASSANTINO. Mr. Chairman, our goal is to leverage our resources in the best way possible, and we do that in a variety of ways. As I mentioned, I guess the most important tool we have is investigations. We have targeted investigations in the reforestation industry around the country. We plan to do another 80 of them in Fiscal Year 2009.

In addition to the investigations, we conduct compliance assistance sessions with contractors, contracting officers. We view our relationship with the Forest Service as an opportunity to leverage those resources even further. You know, we can't train Forest Service contracting officers to be Wage & Hour investigators or OSHA compliance officers but we can help them identify the issues to refer to us, and that is what we have been trying to do.

So the more bodies that we have out there, the better we are able to determine whether there are violations taking place. In addition, when significant cases take place we issue press releases on those and hope that those press releases get picked up in the local press to make contractors aware that we are there and we are enforcing the law.

¹“Silviculture” is a branch of forestry dealing with the development and care of forests. Silviculture operations include, but are not limited to reseedling, tree planting, tree thinning, tree pruning and brush clearing.

Mr. GRIJALVA. Thank you. Mr. Kashdan, going back to the comment you just made, I note you in your testimony make a number of claims about rigorous inspection, monitoring, yet, you report no specific numbers. Have you documented your changed oversight in inspection efforts?

Mr. KASHDAN. Let me just be candid. In my preparing for this hearing and reviewing some of the previous commitments made to the questions for the record from prior hearings, I acknowledge that there are areas we have not done some of the things we should, such as a violations database that we would independently maintain.

We do report violations, we do confer with the Department of Labor in terms of making decisions about awards, we do seek the appropriate certifications, and, more importantly, we do document our on site inspections with the contractors. I think it is what is most important is that we maintain the priority toward those inspections.

So I would say that we have not done some of the things we said we would do with violations and I would like to maybe rather than actually pursue a standalone database see how we might enhance our statistical reporting with the Department of Labor.

Mr. GRIJALVA. If I may, Sir. That statistical reporting, that I am assuming would include how many inspections have been done yearly, any stop work orders that the Forest Service might have issued, how many violations have been reported to the Department of Labor or referred to the Department of Labor. Is that the kind of statistics you are talking about?

Mr. KASHDAN. Yes. I would say, Mr. Chairman, that those data sets, and maybe even additional ones as specific as the type of violations that we uncovered, we are documenting those in site visits and they do go into the contract files. Our breakdown has been in terms of what goes from the contract file into a database.

Mr. GRIJALVA. Yes. If I may, if you would on those three specific points, the stop orders, the number of violations reported to the Department of Labor, the number of inspections, if that could be treated as a request from the Committee to get some of those specific things back to us in writing, very much appreciate it.

The other complaint about the Forest Service policy of awarding contracts to the lowest bidder, that it favors those employers that are going to skirt some of the safety protections that you have been talking about. They don't have a terribly high standard of treatment for their workers. How do you address this problem?

You have the issue of the low bid, but you also have the issue that these are the areas where the violations are also the highest, many instances.

Mr. KASHDAN. Well, let me clarify. All of our contracting now is based on a best value basis. We do bring into account other factors. That includes other bidders that may have also been on the contract. That is not to say that the individual decision maker on awarding a contract doesn't have to balance the aspect of the contract bid and the expectation to produce a certain amount of targets against what is best value.

So in the case of our awards, we come back to on site monitoring and on site reporting of any violations that we see. Again, we in-

struct all of our contract inspectors to carry those core values of respect, safe and healthy working conditions and a fair wage compensation to their on site inspections.

Mr. GRIJALVA. Yes. I appreciate those core values, but my questions are how do you assure that those core values are being respected, and how do you document and quantify that those core values are being respected and taken into account by the contractor?

Mr. KASHDAN. Well, Mr. Chairman, basically we have a set of reviews that we conduct in any given year. For example, out of the Washington office we have conducted six program reviews of the agency within the agency on the administration of contracts that look at various aspects of frequency of inspection, quality of inspection, reporting of violations.

Those reviews are then carried forward by regional directors to deal directly with the contracting officer. So our key aspects are through our review and analysis procedure in terms of contracting procedures.

Mr. GRIJALVA. Yes, on that point. There will be a later panelist that will testify of 10 Forest Service thinning contractors, most expressed skepticism that anything had changed and only one thought the Forest Service had increased inspections. How do you respond to that?

Mr. KASHDAN. Mr. Chairman, let me take the latter part first, the aspect of being able to increase inspections. I would have to say, and I think as one of the later witnesses, Ms. Moseley, will note that there have been a variety of factors affecting the Forest Service's ability to put additional inspectors on the ground.

The most notable is the current aspect of our fire suppression funding which basically is taking a tremendous amount of our regular program funding and diverting it toward our wildfire suppression activities.

That has really hampered our ability to maintain inspections, much less increase, and that is some of our issue, is that in looking at administration, our key is to keep as much on site inspection as possible, possibly even at the expense of quality of recordkeeping and that kind of thing.

Mr. GRIJALVA. Yes. One other one, Sir, and then since nobody is clamoring to take my time, I am going to continue. Also, I note in your testimony, Mr. Kashdan, that there have been no Forest Service, and correct me if I am wrong, recommendations for contractor debarment. Just outline for me and the record, what would it take for a contractor to be debarred?

Mr. KASHDAN. Well, there have been no recommendations to debar. As I also noted, we have reported safety violations principally. In that area of contract violations, the ultimate decision to debar is going to be made in consultation with the Department of Labor. So in our consultation we haven't hit the point yet where it has been necessary to take a debarment action. Now, I did also note that we have terminated a contract.

Mr. GRIJALVA. OK, but is there a criteria where Contractor B would be debarred as a consequence of a list of things? Is that available?

Mr. KASHDAN. Well, again, we would have to talk with Department of Labor and Department of Homeland Security about criteria for debarment relative to safety and health violations, and so I think any action to debar would be something we would do in consultation with Department of Labor and Department of Homeland Security.

Mr. GRIJALVA. So between the three agencies there is potentially some criteria that as a consequence of the consultations would emerge that this Contractor B would be debarred? Please?

Mr. PASSANTINO. I guess there are a couple of things that we would look at. First, under the Service Contract Act for violations of the Service Contract Act. That is a debarable offense where we can make a recommendation that gets reported to GSA and they go on the debarred list for GSA.

There is also the opportunity under MPSA for us to put people on what is called the ineligible contractor list. You would look at the severity of the violation, you would look at the history, the willfulness of the violation and those sorts of things to determine whether to put someone on the ineligible contractor list, and then on the other side, for violations of the Service Contract Act, whether to recommend debarment. I am sorry.

Mr. GRIJALVA. So past pattern, past record would be an important element in that process?

Mr. PASSANTINO. You look at the prior history of the employer.

Mr. GRIJALVA. Yes. And for both of you gentlemen, part of the discussion, well, I guess part of what you were hinting at, is the issue of resources within the administration and the inspection of the contractors. Has your agency or the administration requested more funding for this area since the Sacramento Bee in 2005 article?

Mr. KASHDAN. On the Forest Service's behalf, our program budget requests have been, as I stated, dramatically restrained by our need to cover our wildland fire suppression and wildland fire readiness funding. So essentially, if you look at a budget pie, the amount that we have been requesting for fire suppression is taking up probably about half of that pie now as compared to what it was 10 to 12 years ago which would have been a sliver like this.

That differential is what is not going to these type of activities. So our requests have predominantly focused on fire suppression and we are trying as best we can to hold our own in the other areas.

Mr. GRIJALVA. You are aware that there is legislation pending now or in the very near future to create a revenue stream for the fire suppression activities so we are not robbing Peter to pay Paul. As a consequence of that, would there be efforts on your behalf to increase the resource allocation for this part of—

Mr. KASHDAN. Well, let me actually clarify, Mr. Grijalva. I appreciate you asking that. I think you are referring to the Flame Act. Let me use this as the pie. The Committee version of the Flame Act would have dealt with that differential, the House passed version would not. It would not have changed that circumstance. So I think that is an important thing to clarify in terms of the additional resources associated with making additional requests.

Mr. GRIJALVA. OK. Thank you. If I may, for the Department of Labor, Sir, in testimony before the Senate in 2006, Assistant Secretary Victoria Lim stated that there was an agency plan to investigate 50 percent of the contractors this season.

However, according to the Federal procurement data system, since that hearing there were approximately 486 contractors, yet your data shows investing only 19 contractors performing work on public land. This is about four percent from my calculation of the contractors, nowhere near the 50 percent the agency committed to. What happened?

Mr. PASSANTINO. Sorry. I didn't recall the 50 percent figure and we are checking on that. We have stepped up our resources in this issue, we have conducted additional investigations from where we were in 2006, and we again plan to do an additional 90 investigations in the reforestation industry in Fiscal Year 2009, so I am not entirely sure what the Assistant Secretary was discussing specifically in her testimony and we will take a look at that, but, you know, we are increasing our efforts in the area in the industry.

Mr. GRIJALVA. We would like you to submit that in writing to the Committee in response to that question, the 50 percent issue.

Mr. PASSANTINO. Sure.

Mr. GRIJALVA. Let me follow up. There is a few questions about the enforcement experience documented in your May 2008 report to Congress. Your report found, and you have mentioned this I think in part of your testimony, 63 percent of contractor working on Federal lands violated the Service Contract Act. Furthermore, 189 inspections produced 546 OSHA violations. You consider these numbers to be high?

Mr. PASSANTINO. I am not certain about the OSHA numbers. I am not part of OSHA. I don't know what they consider that to be. The 189 inspections were due to work and general Forest Service industry classification. They can't determine how many of them were in the reforestation sector so I am not sure on what the answer is on OSHA.

With respect to the Service Contract Act, you know, we found 16 in violation, 12 violated the Service Contract Act, which requires the payment of fringe benefits in addition to the prevailing wage. You know, inexperienced Service Contract Act contractors may not be fully familiar with the fringe benefit portion of that.

The other four were found to have violated overtime requirements of the Contract Work Hours and Safety Standards Act. Sixty percent, you know, obviously we would like to have a better compliance rate than that, but I don't view it as especially high.

Mr. GRIJALVA. Some of the workers have died as a consequence in car accidents. Has the Department considered mandating to the contractors vehicle identification, safety belts, those kinds of safety requirements as part of the contract?

Mr. PASSANTINO. Well, the Department of Labor isn't involved in the actual contract, but with respect to the transportation, we enforce all Federal and state safety requirements, so if a state requires seat belts, then that is part of complying with MPSA.

Now, Wage & Hour investigators don't have the ability to pull a van over but if we are conducting an investigation and inspection of a van of any transportation, any vehicle that is used to transport

these workers, we will do an inspection to make sure that it complies with all applicable safety standards.

Mr. GRIJALVA. And those would be?

Mr. PASSANTINO. There are Federal requirements, but also the state requirements. So if a state requires the use of seat belts, then that is part of complying with MPSA for that state.

Mr. GRIJALVA. Has the Department of Labor considered issuing a regulation on seat belts?

Mr. PASSANTINO. We have not looked at opening up the MPSA regulations but it is something that the agency probably ought to take a look at. It has been a while since anyone has looked at the MPSA regulations.

Mr. GRIJALVA. Thank you. Let me if I may, continuing with there seems to be a great deal of violations of workers' rights under the H-2A guest worker program and the H-2B program, but the Wage & Hour Division have been unable to keep up with the enforcement activities. The administration and much discussion seems to want to have hundreds of thousands of H-2A guest workers soon as part of the workforce in this nation.

What resources in general would you need to ensure that H-2A program requirements are enforced so that these workers, we are talking about the Piñeros now but there is an ever increasing discussion of a huge expansion of this program, so that workers are protected and those employers that follow the law are not undermined? What kind of resources are you going to need to keep up with that discussion about adding hundreds and thousands of workers to those two programs?

Mr. PASSANTINO. I guess the first thing is, just to be clear, the Piñeros are not under the H-2A program, they are under the H-2B program. The Department of Labor does not have enforcement authority at this time under the H-2B program. That resides with the Department of Homeland Security. So we don't enforce any of the wage provisions for H-2B, although we do enforce all of the other applicable Federal laws for H-2B workers.

Under the H-2A program, the President's budget request for the past several budgets has requested additional investigative resources. We don't have investigators who do H-2A investigations and different investigators who do FLSA investigations. All of our investigators are responsible for all of our laws. So when we request additional resources, we are requesting additional resources for the agency as a whole, and that has a result of increasing resources in particular areas.

Mr. GRIJALVA. Yes. And if I may now, if your colleague, Mr. Carlson, if you could comment? I have a followup question on that, and just your name and title. Thank you, Sir.

Mr. CARLSON. Thank you. It is William Carlson, Bill Carlson. I am the Administrator of the Office of Foreign Labor Certification within the Employment and Training Administration.

Mr. GRIJALVA. It is a general question, Sir. Not that general, but the administration has recently been proposing major changes in H-2A program. Some of those changes which are disturbing to me is cutting wage rates, removing the housing requirement, reducing recruitment of U.S. farm workers, minimizing government oversight over the program.

It appears to me that the purpose is to encourage the use of H-2A program to bring in cheap labor legally rather than bring in cheap labor illegally. But doesn't the H-2A statute specifically require that H-2A employers offer job terms that will not undermine the wages of legal U.S. workers?

Mr. CARLSON. That is a statutory responsibility of the Secretary of Labor under the INA that our office enforces across all the employment-based programs we administer. So we are looking for employers for their recruitment reports, whether it is a Piñeros where we reduce the number of workers requested by employers in agriculture, the number of workers that were referred to jobs.

Mr. GRIJALVA. Appreciate that. I don't have any other questions, I don't think anyone else does, so I appreciate your time and your testimony. Those particular questions that will be submitted in writing, very much appreciate it as soon as that can be returned back to the Committee. Thank you very much for your time.

Mr. PASSANTINO. Thank you.

Mr. KASHDAN. Thank you, Mr. Chairman.

Mr. GRIJALVA. Let me invite the next panel up, please. Thank you very much, and welcome. Looking forward to the testimony. Let me begin with Mr. Michael Dale, Executive Director, Northwest Workers' Justice Project. Welcome, Sir.

**STATEMENT OF MICHAEL DALE, EXECUTIVE DIRECTOR,
NORTHWEST WORKERS' JUSTICE PROJECT**

Mr. DALE. Thank you, Mr. Chair, and the many distinguished members of the Committee. My name is Michael Dale, I am the Director of the Northwest Worker Justice Project, which is a non-profit law firm that provides legal representation to low wage workers in the northwest. I have been involved with this issue for almost 30 years now, more than 30 years.

Formerly, I was the director of the migrant program in Oregon Legal Services and a good part of what we did was represent reforestation workers in the northwest. I wouldn't want our criticisms of the efforts of the agencies who just testified to send the message that we don't think that what they are doing is important and that we don't appreciate the efforts they have made.

Such as it has been, we do think that sustained, careful attention on these issues by these agencies will make a difference over the long run. I am not sure how much difference it has made yet, you will hear some of my colleagues testify about that, but notwithstanding, I think that sustained effort will make a difference, but it will take that.

These are intractable problems. It will take sustained efforts. I would just point out that the pattern has been there is an expose, a scurry of activity and then it sort of falls off the front pages and off the agenda of the land management and enforcement agencies. This has been sort of the pattern that we have seen in the past and my testimony outlines that a bit more.

We just hope that there will be continued focus on this, and we congratulate the Committee for holding this hearing in that regard. I want to focus on two or three things in the time that I have available. The primary one is I fear that we are about to take a giant

step backwards and that is with these new H-2B regulations that are being proposed.

These are regulations that will fundamentally change the structure of that program, and because of its importance in reforestation, change the nature of reforestation work.

There are more detailed criticisms that could be offered but I would just simply say that it turns the system from one in which an employer has to prove to the Department of Labor that it has recruited U.S. workers and there are no workers available to one in which the employer merely has to attest that they have done all these things and the visas are issued and then if anyone is caught, a violation will be, you know, sort of after the cow is out of the barn, the workers involved will not have a remedy.

This is a significant negative change. It also will eliminate the role of the states in administration of the program. Actually, the state workforce agencies in some states have really provided about the only oversight that we have actually seen effectively in the program and eliminating that role is ill-advised.

Finally, there is this question that Mr. Passantino referred to about the authority of the Department of Labor. We actually think that the Department of Labor has enforcement authority now. In comments we made to the Department of Labor in the regs we outlined that in more detail. If the Committee is interested, I could submit that afterwards for the record.

Leaving that question aside, we are proposing to change the regulations and change the enforcement mechanism on the basis that an agreement will be worked out between the Department of Homeland Security and the Department of Labor, but that agreement hasn't been worked out yet. It seems premature, and I think that we would be better served by holding off and going back to basics and reworking those proposed regulations.

The final thing I would like to talk about has to do with enforcement of the Fair Labor Standards Act, and particularly, enforcement of a provision that is recognized by the Eleventh Circuit in the case called Arriaga.

In the Arriaga case, basically what they said is that if you charge people fees in order to get a job and the fees are for the benefit of the employer really, that when the employer starts, in order for the minimum wage to actually be the minimum wage, you have to reimburse them for those fees.

One of the significant problems that forestry workers have is the huge fees that they pay to get into the country and then that holds them in indentured servitude in the country because they have to have some way to repay the debt that they have incurred. If those debts were paid off in the beginning when people first came here, it would make a big difference.

The Eleventh Circuit, and now four District Court cases in three different circuits, have all held that this principle, announced by the Eleventh Circuit in Arriaga, that you have to pay people and reimburse them for these fees, they have all come down the same way. Yet, inexplicably, the Department of Labor does not take this position in its enforcement and does not enforce the Arriaga principle. This would make a huge difference.

I see my time is up so I will be happy to respond to any questions you may have.

Mr. GRIJALVA. Thank you, Sir.

[The prepared statement of Mr. Dale follows:]

**Statement of D. Michael Dale, Executive Director,
Northwest Workers' Justice Project**

Mr. Chair, members of the Subcommittee. Thank you for the opportunity to speak with you today concerning the protection of reforestation workers on public lands. I spent twenty-five years as a migrant legal services lawyer, and directed the Oregon migrant program for most of that time. A key aspect of our work concerned the exploitation and abuse of workers on our national forests and BLM lands. Since its inception in 2003, the Northwest Workers' Justice Project has been providing legal assistance to reforestation workers in Oregon, Idaho and elsewhere who have been struggling to enforce their right to decent conditions and fair pay.

Although some progress has been made, I must say that, overall, the treatment of workers who replant, thin and maintain national forests has been shameful. I have represented workers who were not paid the required Service Contract Act rate, did not get paid overtime, were unlawfully charged exorbitant fees for recruitment, transportation, housing, food, and even for the chain saws needed for their work and the gasoline for the saws, or were not paid at all. My clients have slept in the cold of winter in the mountains in equipment trailers, or under a plastic tarp. Some were abandoned in the mountains without food or transportation by their employer. Saddest of all, I have represented the families of workers who died in vehicle accidents on icy mountain roads in unsafe vehicles.

Since an award-winning investigative report in the Sacramento Bee focused attention on these problems two years ago, the Forest Service, to its credit, has taken some initiatives to tighten oversight of the treatment of reforestation workers working on national forests. These steps may have been helpful, to the extent that those policy directives have been carried out on the ground. However, anecdotally, we continue to hear of poor and unsafe working conditions, underpayment of wages and unsafe housing and transportation practices. The history of several similar past initiatives teaches us that continued, sustained attention will be necessary to make significant improvements in the treatment of workers in the woods.

Every few years there have been similar public exposés. In 1980 the Salem Statesman-Journal ran a series describing the exploitation and abuse of reforestation workers on public lands. In response, the House Subcommittee on Forests of the Committee on Agriculture held hearings in May of 1980 that brought to light the plight of piñeros "living in an environment of slavery...held in remote mountain workplaces under threat of violence...or desertion." The Subcommittee heard of false representation about working conditions, improper wage payment, improper deductions from wages, and poor living conditions. Witnesses called upon the Forest Service and the Department of Labor to make regular inspections of wage records and living and working conditions, to require that written disclosure of terms be given to the workers, and to streamline procedures for collecting unpaid wages. The Forest Service and the Bureau of Land Management committed to require payment bonds, assure proper licensing of contractors, and to improve interagency cooperation and communication in order to remedy the situation.

In the early 1990s, there was a segment on Prime Time Live revealing nearly the same problems. The land management agencies again promised significant improvements in monitoring and communications. On September 10, 2002, 14 H-2B forestry workers were killed when the van in which their employer was transporting them to work toppled off a bridge in Maine. Again, there was an inquiry, and promises of reform.

Each of these episodes has inevitably been followed by a flurry of activity, with renewed statements of intent to do better. However, as the focus of public attention faded, so, sadly, did the focus of enforcement activity. The primary challenge facing the land management agencies at this point is to sustain and intensify the efforts to make decent treatment of workers as much a part of quality contractor performance as is the physical completion of contracted tasks. Anything less is likely to result in falling back into the pattern that we have experienced in the past.

Before making concrete recommendations, I would like to acknowledge some of the significant improvements that have occurred since the last examination of this issue by the Senate Subcommittee on Public Lands and Forests in March of 2006.

A very important improvement achieved by Congress at the end of last year was modification of the rider on the Legal Services Corporation appropriation to permit

programs funded by LSC to represent H-2B workers who were admitted for reforestation work. Already, we are beginning to see the effective representation of H-2B workers by legal services offices. It will take several years to rebuild the experience, expertise and outreach capacities that have atrophied since this type of representation was prohibited in 1996. Nonetheless, this change of law represents the best hope of achieving sustained enforcement attention with respect to the problems of reforestation workers on public lands.

We have begun seeing some evidence of the efforts of the Forest Service. The clear statement of enforcement priority coming from the highest levels of management has been helpful in creating a different organizational culture with respect to these issues, although continued reinforcement of this policy will be needed. Likewise, incorporation of changes to the contracting procedures is no doubt helping to raise awareness of labor standards throughout the industry.

This oversight hearing, itself, is evidence of the intent of Congress not to let the issue of fair treatment of workers on the national lands to once again fall into the shadows.

These steps alone are unlikely to be sufficient however. In this light, I propose the following:

The Secretary of Labor should issue a regulation requiring seat belts and identification for vehicles transporting forestry workers and other migrant and seasonal agricultural workers.

Motor vehicle accidents are the number one cause of fatal injuries among agricultural workers. These accidents have a common theme—they frequently involve exhausted drivers in overloaded, unsafe vans driving over long distances on foggy, icy, or windy mountain roads. In eight of the fourteen accidents reported in the Sacramento Bee series, “The Piñeros,” five or more workers lost their lives in a single accident.

Under the Migrant and Seasonal Agricultural Worker Protection Act, the Secretary of Labor is authorized to issue regulations to improve the safe transportation of migrant and seasonal agricultural workers. 29 U.S.C. § 1841. (The Migrant and Seasonal Agricultural Worker Protection Act protects reforestation workers.) The act authorizes the Secretary to make reasonable regulations, considering the numbers of workers transported, the distance over which they are transported, the type of vehicle involved and the type of roads over which they are transported. In order to protect the health, safety and lives of these workers, the secretary should amend these regulations.

Currently, federal law requires that vehicles meet a number of specific safety measures, including that there be a seat for each passenger. Nonetheless, these regulations do not require seat belts. Many forestry workers are killed in transportation accidents because they are ejected from the vehicle due to the lack of seat belts. A particularly tragic accident involving 13 workers in California led the legislature in that state to pass a law in 1999 requiring seat belts. Under the California program, all vehicles used to transport farm workers are required to be labeled that they are “Farm Labor” vehicles so that the State Highway Patrol can specifically inspect them for compliance with the seat belt and other safety provisions.

The Secretary’s regulations also leave a simple escape route for employers seeking to abdicate responsibility for the vans in which their workers are transported, by providing that transportation which is not “specifically directed or requested” by an agricultural employer is exempt. The California state “raitero” (driver) law is more specific in that it covers any vehicle used to transport workers “to render personal services in connection with the production of any farm products to, for, or under the direction of a third person.”

In testimony to the Senate Public Lands and Forests Subcommittee in 2006, we recommended that the Secretary of Labor utilize her authority to issue a regulation under the Migrant and Seasonal Agricultural Worker Protection Act, requiring that: 1) vehicles used to transport forestry and other migrant and seasonal agricultural workers be equipped with a seat belt for each passenger; and 2) be identified on the outside of the vehicle as a “Agricultural Labor” vehicle. No action has been taken in this respect; perhaps it will take more spectacular tragedies with significant loss of life to achieve this minimal standard.

The DOL should ensure that the H-2B program is used as intended—only when there is a shortage of U.S. workers.

Many of the employers who contract for work on the national forests use the H-2B program to bring temporary foreign laborers into the United States to do reforestation work. The H-2B program is abused in forestry in a number of ways that should be addressed by DOL. The program is supposed to be used to provide a way

to obtain needed workers for existing jobs where an employer can't find U.S. workers available at a time and place needed for a specific job. Many forestry contractors, though, apply for H-2B workers before they know what contracts they will have. The workers are recruited and brought here on speculation that contracts will be awarded. Then, it may turn out that expected work is not available. This leads to underemployment of the workers, and commonly, to use of the workers in other jobs which pay less than the forestry wage and which are not authorized work. Since forestry jobs are covered by the Migrant and Seasonal Agricultural Protection Act, forestry contractors are required to give recruited workers a disclosure statement describing the particular work and pay arrangements they are offering. H-2B procedures require contractors to attempt to recruit U.S. workers for the work for which foreign workers are sought prior to admission of the visa workers. DOL could require that forestry contractors supply a copy of their recruitment disclosure statement detailing promised work with their H-2B application to help ensure that the contractor actually has a specific need for workers.

DOL should adopt regulations imposing H-2A-like standards in the H-2B program.

DOL could take some additional steps to strengthen enforcement. When the H-2B program was created, DOL was supposed to develop regulations modeled after the H-2A regulations. This was never really done, and the result is a lack of standards for H-2B workers. DOL should fulfill this obligation now. For the most part, the H-2A regulations should be the model, with consideration for the special aspects of forestry. However, forestry workers should not be encompassed within the H-2A program, as this would destroy the protections that they have under the Migrant and Seasonal Workers Protection Act.

However, rather than strengthening its regulation of the H-2B program, the Employment Training Administration of the Department of Labor has instead proposed regulations that would significantly weaken the meager regulatory provisions. Instead of requiring employers to demonstrate that they have attempted to recruit U.S. workers and found them to be unavailable by obtaining a certification from the Department of Labor of a need for foreign workers, the proposed regulations would merely require that the employer attest that it has not been able to find available U.S. workers. This will lead to further abuse of the program, and a loss of job opportunities to U.S. workers. Under the current program, the principal gatekeepers for assuring eligibility to obtain H-2B workers have been the state employment services, at least in some states. The proposed regulations would federalize the application process, and virtually eliminate any role for the state agencies in administering the program. These proposed rules, and similar misguided proposals to gut protection of H-2A workers, should not be adopted by the Department.

DOL should enforce the Arriaga decision requiring that workers be reimbursed for fees they paid to obtain their H-2B visa.

A major source of the vulnerability of H-2B temporary foreign laborers stems from the huge recruitment fee they often pay in home countries in order to secure a job in the United States. These fees, sometimes amounting to thousands of dollars, are often paid with borrowed money secured by whatever of value the worker or his family has. If, on arriving in the United States, the job turns out to be very different than was represented, workers face a difficult dilemma. They can't lawfully quit and move to another job in the United States, as this violates their visa status. On the other hand, if they quit and return home, they have no way to repay the debt incurred for the recruitment fee.

U.S. federal courts have recognized that, under the Fair Labor Standards Act, employers must pay travel, visa, and passport expenses of H-2 temporary workers to the extent that they push a temporary foreign worker's wages unlawfully below the minimum wage. Beginning in 2002, the Eleventh Circuit held in *Arriaga v. Florida Pac. Farms*, 305 F.3d 1228, 1232 (11th Cir. 2002) that travel, visa, and immigration expenses are costs that H-2A workers have incurred primarily for the employer's benefit and that the employer must reimburse workers for these expenses. The Eleventh Circuit urged "[n]onimmigrant alien workers employed pursuant to this program are not coming from commutable distances; their employment necessitates that one-time transportation costs be paid by [the employer]." *Id.* at 1242. Moreover, the Court noted, by participating in the temporary foreign worker program, the employers "created the need for [] visa costs, which are not the type of expense they are permitted to pass on to the [workers]." *Id.* at 1244. Under *Arriaga*, H-2A employers must therefore reimburse workers at the beginning of their employment to the extent that such expenses reduce net wages for the first work week below the minimum wage. *Id.* at 1241.

The Eleventh Circuit's reasoning has resonated among federal courts across the country. In 2004, the Eastern District of North Carolina agreed with the Arriaga analysis in *De Luna-Guerrero v. N.C. Grower's Ass'n*, 338 F.Supp.2d 649, 665 (E.D.N.C. 2004). In *Recinos-Recinos v. Express Forestry, Inc.*, No. Civ.A. 05-1355, 2006 WL 197030 (E.D. La. 2006) the Eastern District of Louisiana found that "[t]he rationale employed by the Arriaga court is applicable to the H-2B program [because] Arriaga is an FLSA case which does not hinge on any differences between the H-2A and the H-2B guestworker programs." Accord, *Castellanos-Contreras v. Decatur Hotels, LLC.*, 488 F.Supp.2d 565, 571-72 (E.D. La. 2007); *Rivera v. Brickman*, No. 05-1518, 2008 WL 81570, at *4 (E.D. Pa. 2008); *Rosales v. Hispanic Employee Leasing Program, LLC*, No. 1:06-CV-877, 2008 WL 363479, at *1 (W.D. Mich. 2008).

Nonetheless, the Department of Labor does not generally follow the Arriaga decision in its enforcement activities with respect to forestry workers on public lands. It should do so.

DOL and the forestry agencies should hold repeat offenders responsible for their actions.

Both DOL and the forestry agencies need to be willing to take strong action against repeat offenders of labor standards. At one time, the Forest Service agreed to subject contract bids that were significantly below the agency's estimate to special scrutiny to assure that the lowest bidder is a responsible one. It is unclear if they still do this, but blatant abusers of workers are awarded contracts year after year. They should be debarred by the DOL, and should not be viewed as being capable of performing the contract by the contracting agencies. One of the contractors in the Piñero series who had been sued for holding workers in peonage was still defended by a Forest Service official as being a great contractor because he produced quality results for the Forest Service.

Further, the Forest Service and BLM need to take steps to change the culture of those agencies so that contract officers know that enforcing the service contract's labor protections is just as important as getting the work done. Training, evaluation and promotion should take this factor into equal consideration, and the agencies' expectations in this regard must be clearly and consistently communicated. The steps taken by the Forest Service are a good beginning, but the obligation of agency line staff to follow through must be reinforced over time.

Thank you for your consideration of these comments.

Mr. GRIJALVA. Ms. Cassandra Moseley, Ecosystem Workforce Program, University of Oregon. Welcome.

STATEMENT OF CASSANDRA MOSELEY, ECOSYSTEM WORKFORCE PROGRAM, UNIVERSITY OF OREGON

Ms. MOSELEY. Thank you. I am happy to be here, and thanks for the opportunity to speak today. I, like Michael, want to say that we really have heard some impressive changes from the Forest Service and the Department of Labor over the last couple of years. I think the question is are they really having an impact on the ground yet?

So what I wanted to do today is to offer some reflections about the impacts of these efforts and to suggest some further action because in fact what you will hear and what you have seen already in my written testimony is that the impact on the ground has been we haven't gone far enough as the contractors.

So in anticipation of this hearing we recently asked 10 Forest Service thinning contractors from Oregon, Washington and California about the issue of enforcement. Ten is clearly too many, if I put on my science hat, to draw any firm conclusions, but I think that nevertheless there are some interesting results from these interviews.

Nine of the 10 contractors were aware that the Forest Service and Department of Labor had said that they were going to step up enforcement efforts; however, only one had said that they had actu-

ally seen Forest Service increasing inspections, and only one other believed that the Department of Labor had substantially increased enforcement efforts, although interestingly, several had been notified by the Department of Labor that they might in fact come talk to their workers.

Many of them didn't know whether that had actually occurred. Going into these interviews we thought that if contractors believed that there were a lot of increased risks from investigation contract prices might be going up to reflect the increased labor costs that they may be facing. None of the contractors we spoke with however believed that labor law enforcement was affecting bid prices yet, which suggests a lack of some sort of systemic change.

Given what we heard earlier, the question is why aren't we seeing a sort of systemic impact yet? I think the answer lies in some of the reporting that we heard earlier. I am working here now from the May 2008 Department of Labor report. In that report, if you do the math, the agency found about 80 percent of the contractors they investigated in violation of MPSA, about 40 percent in violation of the Fair Labor Standards Act.

Among the Forest Service Contractors, two-thirds of Department of Labor investigations found the violations of the Service Contract Act. In my mind, that seems like a very high percentage. So given the frequency of these violations I was surprised to see that we haven't seen any shift in market prices.

I think the challenge lies in the small number of investigations they have undertaken. At the time of the May report they had investigated only 40 contractors and only 15 of those had been on national forests.

Like you said earlier, if you do the math, that is less than five percent of Forest Service thinning and tree planting contractors, and, as far as I can tell, none of the over 100 Bureau of Land Management contractors that were awarded contracts since the Senate hearing in 2006. In this context, it seems like it is still pretty unlikely that you would get caught, and so it is maybe not so surprising that prices haven't changed.

Another area that was identified as a challenge in the 2006 Senate hearing was the pressure created by output oriented targets that award national forests that lower unit costs. The Forest Service has adopted some new performance measures but those have mostly been by a physical rather than socioeconomic and so we haven't seen a lot of shift in that area.

As Mr. Kashdan said earlier, the forest budget situation has deteriorated significantly with fire suppression swallowing an ever increasing proportion of a shrinking pie. This places further pressure to the agency to lower costs rather than to focus attention on job quality.

Improving working conditions is a difficult task, and let me just offer some recommendations. First, I think the Department of Labor and the Forest Service need to continue to ramp up their inspection. For the Department of Labor, I would really like to see them partner much more and develop a partnership like they have with the Forest Service but with the Bureau of Land Management.

Because the Bureau of Land Management manages a lot of the same lands using the same kinds of contractors, I would like to see

the Forest Service much more visible in the field so that contractors realize that there is a real risk and that the staff readily identifies safety and wage and hour violations to the Department of Labor. This needs to be ramped up.

Finally, let me say that Congress and OMB really should bring to a halt the Forest Service's downsizing and outsourcing. Constant budget cutting, personnel reduction and reorganization is destroying the agency's capacity to undertake land management, appropriately oversee contracts and focus on job quality.

In my few seconds here at the end let me close with a quote that former Pacific Northwest Regional Forester Linda Goodman sent to her staff after she attended the worker forum at the University of Oregon in January of 2007. She wrote, "I am deeply moved by the forest workers who gave their personal testimony."

"From their heart, they told tales of being forced to sleep eight to a room, not being paid for work completed, the lack of any treatment of injuries and the indignities of being called names and verbal humiliation. As I sat there listening to their emotional pleas to make things right, I realized that this is all of our responsibility. It is our duty to ensure a safe and healthy workplace for all."

"We wouldn't treat our employers so poorly, and we cannot afford to let our contracted workforce be treated cruelly and inhumanely." Thank you for your time.

Mr. GRIJALVA. Thank you very much.

[The prepared statement of Ms. Moseley follows:]

**Statement of Cassandra Moseley, Ph.D., Ecosystem Workforce Program,
Institute for a Sustainable Environment, University of Oregon**

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify before you today. I am pleased to be able to contribute to this timely issue. The working conditions in our nation's forests affect not only the lives of workers and their families, but also the viability of small rural businesses and the integrity of forest ecosystems.

Today's hearing is particularly important because it offers an opportunity to examine the progress we are making towards improving the working conditions of forest workers. Through this hearing, we can hope to learn more about how conditions may be changing, identify remaining problems, and explore solutions to the challenges of creating high quality jobs for forest workers and economic opportunities for public land communities.

I am on the faculty of the University of Oregon, where I direct the Ecosystem Workforce Program in the Institute for a Sustainable Environment. Founded in 1994, the Ecosystem Workforce Program seeks to build ecological health, economic vitality, and democratic governance in rural forest communities in the American West. The Ecosystem Workforce Program supports these interconnected issues with applied research and policy education related to community-based forestry and federal forest management.

Over the past seven years, I have undertaken a number of studies about whether Forest Service and Bureau of Land Management (BLM) restoration contracting creates rural community benefit and about the working conditions of federal contract forest workers. As part of these studies, my collaborators and I have interviewed forest workers and contractors and analyzed federal contracting and state employment data. We have examined these issues in general terms, as well as under specific programs including the National Fire Plan, the Northwest Forest Plan, and stewardship contracting.

Although I appreciate the opportunity to share my research, ideally, you would be hearing directly from forest workers about current conditions. But, for many workers, the stakes are just too high. Workers who might consider coming would certainly lose pay for their time away from their all-too-short work season. They would likely be fired if they spoke out against their employer and, perhaps, blackballed from the industry entirely. Only citizens or legal permanent resident could even consider coming; guest workers and undocumented workers would risk depor-

tation. Even at the forum about working conditions held in Eugene in early 2007, which I will discuss later, one worker who had signed up to speak, crossed his name off of the list when he realized that his boss was in the audience.

I cannot begin to speak for either workers or contractors. Nevertheless, I can share some of the trends I have observed over the few years that might help shed some light on the challenging issue of creating quality jobs in the woods. In my testimony today, I will provide information related to the problem of working conditions for forest workers, offer my observations about how things may be changing, and finally suggest recommendations about how we might make further progress.

A Forest Restoration Workforce

Our nation's forests and watersheds have significant restoration and maintenance needs, including decaying forest roads, degraded stream and forest habitat, and overstocked stands in need of thinning to reduce wildfire risk and restore fire-adapted ecosystems. These needs present an opportunity to create green jobs—high-skill, high-quality jobs that benefit rural communities, small businesses, forest workers, and the environment. While there are many ways to think about job quality, in this context, we should think about a high-quality job as one that includes, (1) wages high enough support family, (2) respectful treatment, (3) a safe and healthy workplace, (4) stable, durable employment, (5) the ability to work close to home, and (6) skill standards and structured on-the-job training.

Contract Forest Work and Workers

Forest restoration work involves a wide variety of tasks, from maintaining forest roads, restoring streams to create fish habitat, and collecting native grass seed, to planting trees after logging or wildfires, and thinning overstocked stands to improve habitat and reduce fire hazard. The primary way that restoration work is performed on national forest and other federal forest lands is through service contracts and, increasingly, stewardship contracts. The federal government awards restoration contracts to businesses that, in turn, hire workers to undertake restoration and maintenance activities. Some of these contractors employ workers directly, while others use labor subcontractors or temporary agencies.¹

At issue today are forest workers who perform labor intensive activities such as planting trees, thinning overstocked stands, piling brush, and fighting fires. According to the Federal Procurement Data System, between January 1, 2006 and August 31, 2008, the Forest Service obligated \$133,517,404 to approximately 365 contractors for contract tree planting and thinning nationwide. The Bureau of Land Management obligated \$34,308,956 to about approximately 121 contractors. Workers performing these labor-intensive jobs come from a variety of ethnic backgrounds. Often, they are Hispanic and to a lesser extent, European American, Native American, and African American. Forest workers may be U.S. citizens, noncitizens with resident alien papers, H2-B guest workers, and those without permission to work. In the Southeastern U.S., contractors seem to make more use of H2-B workers, whereas contractors in the Pacific Northwest appear to rely more heavily on undocumented workers.²

Working Conditions

In 2005, Tom Knudson of the Sacramento Bee wrote a series about poor working conditions of contract forest workers working on federal lands. His series mirrored two earlier series, one in the Sacramento Bee in 1993 and the other in the Salem (Oregon) Statesman Journal in 1980.³ As a result of the 2005 Bee series, the Forest Service and the Department of Labor developed new strategies and commitments to increase enforcement existing labor and contract laws designed to protect workers. In 2006, the U.S. Senate held a hearing on the working conditions of forest workers. At the hearing, representatives of nongovernmental organizations reported poor working conditions, the challenges of creating rural community benefit from forest management contracting, and the difficulties that contractors who treat their workers well have in competing in the federal contracting market.

Those who testified, including myself, also identified a number of dynamics that lead to poor working conditions. They included:

- A lack of labor and contract law enforcement,
- Targets, performance measures, and budget allocation processes that reward national forests that accomplish work at the lowest cost,
- A culture of low bid contracting and below cost awards that create hypercompetitive contracting markets, and
- Unequal treatment for undocumented workers, which makes these workers vulnerable to exploitation and lowers jobs quality for all workers in the sector.

Over the past three decades, these pressures have created a system that rewards contractors who cut corners to offer the lowest prices. When contracts involve sig-

nificant physical labor, contractors' options for cutting costs lie primarily in increasing the speed at which people work and reducing wages. Strategies for cutting costs have included not paying overtime, paying below the required minimum wage, and paying some people under the table to reduce worker compensation and tax costs. At first blush, low-price contracting appears to save the government money. In reality, however, it costs the American taxpayer when poor quality work has to be redone, when taxes are underpaid, and when poorly paid workers have to apply for food stamps and other public assistance or seek medical care in emergency rooms without insurance.

Efforts to Improve Conditions

Increasing Enforcement

Over the past several years, efforts to improve working conditions have been primarily focused around increasing enforcement of labor laws. The Forest Service and the Department of Labor have coordinated enforcement efforts including creating a shared databases that notifies the Department of Labor whenever the Forest Service awards a contract that involved migrant or seasonal labor. Let me offer a few comments about what I understand to be the effects of these efforts.

In January 2007, after the first field season with the new enforcement efforts in place, the Forest Service, Department of Labor, and a number of nongovernmental organizations held a forum at the University of Oregon. The Forest Service and the Department of Labor reported their progress in enforcement. Workers and contractors, however, described ongoing challenges rather than significant improvements.

Former Pacific Northwest Regional Forester Linda Goodman attended the forum, and sent an email in February to her staff, sharing what she heard and her reactions:

...I was deeply moved by the forest workers who gave personal testimony about the working conditions they often face while under employment of Forest Service contractors. From their heart, they told tales of being forced to sleep eight to a room, not being paid for work completed, the lack of any treatment to injuries, drinking out of streams as no other water was provided to them, and the indignities of being called names and verbal humiliation. As I sat there listening to their emotional pleas to make things right, I realized this is all of our responsibility.

It is our duty to ensure a healthy and safe workplace for all—we wouldn't treat our employees so poorly, and we cannot afford to let our contracted workforce be treated cruelly and inhumanely. If you come across such behavior, report it to both a line officer and a contracting officer. I have no tolerance for anyone being treated disrespectfully.

In anticipation of today's hearing, I worked with a student at the University of Oregon to conduct a small series of telephone interviews with contractors from Oregon, Washington, and California. Ultimately, we asked ten Forest Service thinning contractors whether they knew about the new enforcement efforts and whether these efforts had impacted bid prices. Clearly, these interviews are too few to draw any firm conclusions. However, these conversations suggest some trends. First, nine of the ten contractors we interviewed were at least vaguely aware that the Forest Service and Department of Labor intended to step up enforcement. Although many of the contractors had received notification about increased Forest Service inspections or the possibility of DOL staff coming to talk to their workers, several expressed skepticism that anything had really changed. Only one thought that the Forest Service had increased inspections. Only one other believed that the DOL had substantial increased enforcement efforts. As a result, this contractor had taken steps to ensure that his company was compiling with all of the laws. Taken together, the interviewees seemed to suggest more change in DOL actions than in Forest Service actions.

We also asked contractors whether bid prices had increased as a byproduct of increased enforcement efforts. We hypothesized that if contractors believed that they were at risk from investigation, they might increase prices to ensure that they were covering all of their labor costs. This might lead to an overall increase in market prices. None of the contractors we spoke with believed that labor law enforcement was affecting bid prices. They either reported declining bid prices or increases in prices due to increasing fuel costs.

Taken in sum, then, it does appear that contractors have generally heard that the agencies planned to increase efforts and some of experienced this increase enforcement. But this enforcement has not created a systemic impact. The question is why. If we bring together the contractor interviews with the Department of Labor's May

2008 report to Congress, we can begin to piece together a likely explanation for the limited impact that the DOL and Forest Service seem to be having.

Before doing so, it is worth noting that I do not know of any Forest Service report documenting their efforts beyond what is identified in the May 2008 DOL report.

However, according to the May 2008 report, the Department of Labor found 80 percent of the contractors they investigated were in violation the Migrant and Seasonal Agricultural Worker Protection Act and 40 percent in violation of the Fair Labor Standards act. Similarly, OSHA found over 500 hundred of safety violations across 168 inspections. This suggests that safety and labor law violations are, in fact, rampant. Among Forest Service contractors, two-thirds of those they investigated were found to be in violation of the Service Contract Act.

Given the frequency of labor law violations and the likely costs to contractors from fixing these violations, we might be surprised to find that market prices do not seem to be increasing. However, the Department of Labor investigated only 40 contractors nationwide. Over half of the contractors were working on private land, while only 15 were working on national forests and apparently none on Bureau of Land Management or other public lands. During this same period, the Forest Service contracted with more than 300 contractors to perform thinning and tree planting contracts nationwide. The DOL investigated fewer than 5 percent of Forest Service thinning and tree planting contractors since January 2006 and none of the over 100 BLM contractors.

Although the Department of Labor has likely conducted more investigations in this sector than it has historically, the agency has only investigated a small percentage of contractors. With a small number of investigations, the likelihood of being caught or even knowing another firm who has been caught is small. In this context, it makes sense that contractors are reporting no change in the contracting market prices.

Given the high percentage of violations, it appears that there is a lot more work to be done in the area of enforcement alone. We probably also need to see increased publicity of the fact that the DOL is actually catching violators, so contractors know that there are risks to continuing to violate labor and safety laws.

Increasing Community Benefit and Reducing Low Bid Contracting

In addition to lack of labor and contract law enforcement, other issues identified at the 2006 Senate hearing included below cost awards and lack of consideration of community benefit when considering the best value to the government. In late 2006, the Forest Service asked me to conduct a review of whether the Forest Service was considering community benefit in their awards of thinning contracts in New Mexico, and whether there was a pattern of contracts awarded well below the government estimate for the work. I found that, in New Mexico, the Forest Service was more likely to award contracts below the government estimate than above it. However, it was difficult to tell if the Forest Service was awarding contracts well below cost, because the agency frequently did not document the ways in which they were calculating the government estimate for how much the work should cost to complete.

I also found that the Forest Service had not been considering community benefit outside of stewardship contracting in New Mexico. After the study was complete, however, the Forest Service acquisition management director issued field guidance to consider community benefit when awarding fire hazard reduction and watershed restoration contracts. I do not know of any further evaluation of whether the agency is more frequently considering local benefit as a result of this field guidance.

Changing Performance Measures

A third challenge identified at the 2006 Senate hearing was pressure created by output-oriented targets that reward national forests that can lower unit costs. Since 2005, the Forest Service had adopted a series of new performance measures in an effort to move beyond a singular focus on outputs such as volume harvested or acres treated. However, these performance measures have largely focused on biophysical outcomes rather than associated social and economic impacts. Moreover, the Forest Service budget situation has only deteriorated further, with fire suppression swallowing an ever-increasing proportion of a shrinking pie. This dynamic places further pressure on the agency to focus on low cost and consumed Forest Service staff time with constant reorganizations and downsizing, rather than focus on the task of land management, including the conditions of work.

Recommendations

The Department of Labor should be commended for their increased focus on this sector. Their efforts have revealed the huge problems and have begun to address them. Improving working conditions is difficult task, and we cannot hope to solve a three-decade old problem overnight. Despite progress towards improving labor law

and safety enforcement, there is additional work to be done if we are to build high quality jobs in the woods. There are several opportunities to make additional progress.

1. The Department of Labor and the Forest Service should further increase their inspection and investigation efforts. These inspection efforts should include a significant focus on thinning in addition to reforestation. The Forest Service is spending a lot of their budget on thinning, and labor law and safety violations are common in this area.
2. The Department of Labor should expand its enforcement efforts across multiple landowner types. Accordingly, it should work with the BLM to create a contract notification system and other information sharing techniques and increase its review of BLM contractors.
3. Congress and the Office and Management and Budget should bring to a halt the Forest Service's downsizing and outsourcing, which are destroying the agency's capacity to undertake land management, appropriately oversee contracts, and focus on job quality.
4. The Forest Service, in particular, but also the BLM, and Department of Labor should increase the visibility of their efforts by regularly publishing information about how they enforce labor laws, and the impacts of those efforts.
5. The Forest Service and BLM need to create performance measures that measure progress towards improving the quality of business and employment opportunities for public lands communities and workers.
6. As Congress considers additional funding and legislation to support green job development, whether for climate change, alternative energy development, or landscape restoration, it is critical that it support high quality green jobs. Green job development should not only be targeted at urban dwellers but also rural workers and businesses. Rural public lands communities and landscapes need high quality green jobs that stimulate the local economy and restore forests and watersheds.

Conclusions

The challenge of creating quality jobs among labor-intensive forest workers has plagued the industry for decades. There are some dynamics that seem to be improving—particularly increasing labor law and safety enforcement—but the few contractors we spoke to over the past several weeks have not seen systemic change. There are others dynamics such as unequal treatment for undocumented workers, budget constraints, targets, and a culture of low cost contracting which have received little attention. Making forest restoration jobs safe and profitable will require sustained attention of Congress, the federal land management agencies, the Department of Labor, and labor and community organizations.

Thank you for the opportunity to comment on the difficult challenges facing the federal land management agencies, forest workers, and rural communities in creating quality jobs restoring our nations' forests.

Endnotes

- ¹ Brinda Sarathy, "The Latinization of Forest Management Work in Southern Oregon: A Case from the Rogue Valley," *Journal of Forestry* 104, no. 7 (2006).
- ² Brinda Sarathy and Vanessa Casanova, "Guest Workers or Unauthorized Immigrants? The Case of Forest Workers in the United States," *Policy Sciences* 41, no. 2 (2008).
- ³ Chris Bowman and Maria Campopescio, "Shame in the Forest: U.S. Hires Undocumented Workers," *Sacramento Bee*, June 8 1993, Phil Manzano and Michael Walden, "Labor Exploitation Grows with Reforestation Industry" *Statesman Journal*, October 12 1980.

Mr. GRIJALVA. Ms. Denise Smith, Executive Director, Alliance of Forest Workers and Harvesters. Welcome.

STATEMENT OF DENISE SMITH, EXECUTIVE DIRECTOR, ALLIANCE OF FOREST WORKERS AND HARVESTERS

Ms. SMITH. Thank you very much, Chairman Grijalva and Subcommittee staffers, for holding this hearing and for giving attention to this important issue. I appreciate that these issues are on your minds as concern for the welfare of workers on public lands grows.

I am Denise Smith, the Executive Director of the Alliance of Forest Workers and Harvesters.

The Alliance is a multicultural grass roots organization promoting social, environmental and economic justice in the Pacific West. Our membership includes contract workers who work doing restoration, reforestation, firefighting and other forestry activities, both on public lands and private lands.

In 2001, Celia Headley, AFWH member, testified before the Senate on worker conditions. In 2005, Tom Knudson of the Sacramento Bee wrote a series of articles called the Piñeros which highlighted forest worker abuse on public lands. Also, the Senate held hearings on forest worker conditions after that which the Alliance provided written testimony for.

Following that, the chief of the Forest Service issued a letter to contracting officers to monitor and report workplace violations. This was important because up until then more attention was given to specifications on management treatment and little to no attention was given to worker conditions.

Enforcement of labor laws was said to be the responsibility of the Department of Labor and not the Forest Service. It makes sense that the Forest Service and the Bureau of Land Management monitor the workers' conditions because every contract on public lands has the contracting officer visit the site during the contract, yet, it has been two years since the letter was issued, and sadly, workers tell us really there have not been changes in their working conditions.

This past summer the Alliance did a study that showed workplace violations continue despite the Forest Service recordkeeping showing otherwise. The Forest Service said they were going to inspect 100 percent of all service contracts, yet, the Forest Service database shows only eight violations in the two years and none were health and safety violations.

Meanwhile, Department of Labor, OSHA, inspected 189 times and found 546 violations over the same two years. Last year Alliance of Forest Workers and Harvesters member Cecilia Headley also was allowed to observe two Forest Service and Department of Labor inspections on public lands.

While it is clear that the contracting officer and the Department of Labor investigators did a good job looking at wages, health and safety, we also learned that once the inspections were completed they were filed in each contractor's individual files if no violations were found which can only be accessed at the district or where the contract files are kept.

The Alliance recommends that the Forest Service and Department of Labor keep better records of inspection and violations and provide better updates in a central database with accurate information and reporting that Congress and others can access. We also recommend the Bureau of Land Management and the Department of Homeland Security be required to do the same.

Yet, the problems go deeper. Unfortunately, with pressure for public land managers to do more with less and the common practice of awarding contracts to the lowest bidder, we see that it is bad for the workers and bad for the land.

Contractors are forced to cut costs by not maintaining safe vehicles, often paying less than service contract wages, they push workers harder and harder with no breaks and they do not provide health and safety training and often don't even supply safety gear. The workers are pushed to exhaustion and accidents become more frequent.

The Alliance recommends instead of using price as the main criteria in awarding contracts, consider qualities such as the capacity of the workforce to do the quality work and the safety record of the contractor. It should also set an example of abusive contractors and have them debarred and not let them gain access to contracts on public lands. We want to see that.

All Alliance members, the workers tell us that forestry is not an unskilled job. Everything in forestry requires skill. Yet, forestry workers fall under the category of H-2B and companies can bring them in under that. H-2A workers currently have more protections than H-2B workers. H-2B forestry workers continue to be abused and marginalized on public lands.

We recommend Congress support reform to the H-2B program which will better protect workers. In closing, I would like to thank this Committee for allowing me to testify at this hearing on behalf of the people whose hands touch the land and who are most affected by the policies that the government creates and enforces.

I speak about not just workers rights, I speak about human rights as well. Thank you.

Mr. GRIJALVA. Thank you very much.

[The prepared statement of Ms. Smith follows:]

**Statement of Denise Smith, Executive Director,
Alliance of Forest Workers and Harvesters**

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify before you today. We at the Alliance of Forest Workers and Harvesters sincerely appreciate the ongoing attention the subcommittee is devoting to the health, safety, travel and working conditions to which workers are subject while working on public lands. We feel that addressing these conditions is crucial to the stewardship of public lands because, after all, it is workers' hands that touch the land. Taking action on these conditions is also crucial to the role of the United States as a world leader in justice, fairness and human rights.

The Alliance of Forest Workers and Harvesters (Alliance) is a multicultural, grassroots organization promoting social, environmental, and economic justice in the Pacific West. Our membership includes contract workers who implement land management activities on the ground through reforestation, restoration, fuels reduction, timber stand improvement, fire fighting, and other forestry activities. Many of our members have been working on public lands for a number of years, in some cases decades, and bring a wealth of experience and insight.

We have provided testimony to congressional committees before. On March 29, 2001, Alliance member Celia Headley testified to the Senate Subcommittee on Forests and Public Land Management at an oversight hearing on the National Fire Plan. On March 1, 2006 I provided written testimony to the Subcommittee on Public Lands and Forests, Senate Energy and Natural Resources Committee Oversight Hearing on Guest Workers on Public Lands and Forest Service Guidance. While some improvements have been made, I regret to report that much of what we said in 2001 and 2006 remains problematic today.

Poor U.S. Forest Service Records and Continued Workforce Abuse

After Tom Knudson published the Piñeros articles in the Sacramento Bee in November of 2005, then U.S. Forest Service Chief Dale Bosworth gave three specific directions to the agency's contract administrators: 1) to report possible violations of immigration law, OSHA regulations, and wage and benefit laws administered by the Department of Labor to the appropriate oversight agency; 2) to forbid contracted employees to work if they do not have appropriate safety apparel or equipment; and

3) to consider documented violations in evaluations of future bids for work on national forests.

Since then, the U.S. Forest Service (USFS) has taken a few steps to improve its oversight of health and safety conditions under its contracts. It has added provisions for compliance with the Fair Labor Standards Act (FLSA), the Migrant Seasonal Agricultural Worker Protection Act (MSPA), the Service Contract Act (SCA), and the Occupational Safety and Health Act (OSHA) into service contracts. It has invited Department of Labor (DOL) Wage and Hour Division employees to participate in training sessions during USFS contractor trainings, and it has begun providing DOL Wage and Hour Division state-level offices with information on all contracts being performed on national forest lands. While we applaud these new practices, they are only first, small steps. Much more needs to be done.

In June, the Alliance began studying the oversight of service contracts the responsible federal agencies, particularly the USFS, practice on public lands. We searched the online databases of contract inspections of the DOL's Wage and Hour Division, OSHA, the USFS and the General Services administration. We contacted personnel at DOL WHD, Cal/OSHA, and the USFS to inquire about data that was not available online, and we conducted interviews with a few key agency employees. We also approached the Bureau of Land Management, but officials there did not respond to our many requests for information.

We found that the records of inspections the agencies keep differ wildly, and are not coordinated. Forest Service officials claim that 100% of all contracts are now inspected, but they can provide no records of these inspections. Alliance member Celia Headley experienced the lack of organization of records first hand when she accompanied U.S. Forest Service and DOL inspectors on two site inspections in October of 2007. The Forest Service inspectors wrote reports and filed them in the contract files in the local ranger district office. There is no central database for compiling information on inspection results. This means that the data agency officials need to determine what is happening out in the woods is in thousands of files across hundreds of ranger districts.

In addition, Forest Service inspections seem to miss important details. For the period from 2006 to 2008, Forest Service records show only 8 workplace violations. None of these are violations of safety regulations. Rather, most of them involve catering, construction, and immigration infractions. Two were for wage violations. In contrast, OSHA's online database reveals 174 violations in 256 inspections during this same time period. The most common safety violations included missing required first aid kit equipment such as stretchers and blankets, no provision of written driving directions to the worksite for all employees, employees lacking current first aid training, missing hazardous chemical information, failure to provide safety and health programs, and lack of personal protective equipment.

The Department of Labor's report to Congress in May of 2008 shows even more violations of OSHA standards than the number reported online. The report states that 518 violations were issued for "serious hazards related to personal protective equipment, tree felling procedures, chemical hazard communication, fire extinguishers, powered industrial trucks, machine guarding, and electrical hazards, just to name a few." The report also furnishes results of the 44 Wage and Hour Division inspections conducted since the March 2006, Senate hearings. Thirty-two of the employers investigated had violated MSPA, 16 had violated FLSA and 10 (out of the 15 that held contracts for work on public lands) had violated SCA.

Our conversations with forest workers parallel the findings in official reports and online databases. Alliance members tell us that they have not seen any significant improvements in working conditions during the past two years. The "crummies" (vans for transporting workers) are not safer, the pressure to work faster has not lightened, water and lunch breaks are often denied and there are no new safety measures in place. In short, work conditions are still the same.

In summary available evidence clearly reveals that violations are rampant. Yet U.S. Forest Service records show very few.

Policies and Practices that Lead to Abuse of Workers

The problems go deeper than inadequate inspections and enforcement of applicable laws, however. The root causes of the problem lie in standard U.S. Forest Service practices, as well as in the H2-B Guest Worker Program.

Need For Best Value Contracting

The common Forest Service practices of awarding contracts to the lowest bidder and pressuring contractors to complete jobs within a certain timeframe also create conditions conducive to worker abuse. Contractors who underbid inevitably cut corners. This means deferring maintenance on vans used to transport workers, paying

less than the contract minimum wage, declaring only a smaller number of workers on the books than are actually employed to avoid worker's compensation, unemployment and other tax payments, withholding pay altogether, and other such cost-cutting measures. In addition, unrealistic expectations about the time needed to complete a job lead to driving workers to the point of exhaustion. These are the conditions under which accidents occur.

Low bid contracting is not only bad for workers; it is bad for the land. Work performed under these contracts is often of poor quality, and needs to be redone. Thus, in trying to save money in the short run, the government spends more money in the long run.

H2-B Guest Worker Program

H2-B and undocumented workers continue to be the most marginalized and exploited. Unlike H2-A visas, H2-B visas currently do not provide protections to workers. This, together with the conditions under which many H2-B visa holders arrive in the United States (with house and truck deeds held by recruiters, in debt for paying "coyotes" to get them to the U.S. border, not being informed of their rights, working in remote areas with little access to, and information about, other opportunities), makes the workers vulnerable to abuse because they do not have recourse to legal protections, and live in fear of losing their jobs. This means that U.S. immigration policy contributes directly to the creation of a workforce that has no power for collective bargaining. This drives wages down, and creates working conditions which American workers will not tolerate.

We fear that the recent proposed changes to the H2-B guest worker program will only exacerbate the problem. These changes weaken the wage certification process, weaken accountability in the labor recruitment process, and are vague in their specifications of the process for auditing employers. In addition, they fail to address worker abuse and unsafe work conditions.

Recommendations

As remedies to the current situation we recommend the following:

A) Monitoring and Enforcement

- 1) Increase Forest Service and Bureau of Land Management monitoring of service contracts on public lands, and assure reporting of results to the Department of Labor Wage and Hour Division and OSHA.
- 2) Follow through with enforcement of the relevant laws when violations are found.

B) Record Keeping and Reporting

- 1) Improve accountability of the agencies by creating a central database for recording the results of inspections and make this database easily accessible to the public. This database should include the date of every inspection conducted, the name of the contractor inspected, where the inspection took place, what questions were asked, and what was found.
- 2) Create a reporting system for the agencies to report regularly to the Secretaries and to Congress.

C) Advance Best Value Criteria

- 1) Strengthen the use of best value contracting for work on public lands. Rather than using price (i.e. low bid) as the main criterion in awarding contracts, consider other qualities of the bid, such as the capacity of the workforce to do quality work and the safety record of the contractor.
- 2) Increase personnel and training for procurement so that agency officials are able to meet land stewardship and community well being objectives.

D) Reform H2-B Guest Worker Program

- 1) Reform the H2-B guest worker program so that it includes safety protections for workers.

Mr. GRIJALVA. Just, if I may, you brought it up, Ms. Moseley, in your testimony, the Bureau of Land Management was not invited to testify today because they told the Subcommittee they do not employ these workers. In your experience or any of the panelists experience, is that accurate statement?

Ms. MOSELEY. I do not think that is an accurate statement, at least in Oregon. The Bureau of Land Management and the Forest

Service manage adjacent lands in the State of Oregon. They employ some of the same contractors. I went to the Federal Procurement Data Service.

Excuse me, they changed their name, the Federal Procurement Data Center, I believe it is called, which is an online site of all the Federal contracts issued, and I looked at the Bureau of Land Management thinning and tree planting contracts and I found about \$35 million worth of tree planting and thinning contracts over the last couple of years.

Those are the kinds of contracts we would expect to see migrant and seasonal workers on. I think given the fire hazard reduction program that the Bureau of Land Management is undergoing, I think it is incredibly unlikely that they are not employing migrant, seasonal workers.

Mr. GRIJALVA. Anyone else?

Mr. DALE. I would concur based on 30 years of experience. We have represented probably as many Bureau of Land Management contract workers as Forest Service workers in the State of Oregon.

Ms. SMITH. I guess I would add that for us, the Alliance, the workers, it is not just about H-2B workers, it is about all workers. That these health and safety violations, these violations are happening to all workers, not just H-2B workers.

Mr. GRIJALVA. I think also beginning with Mr. Dale, but you mentioned the H-2A and the proposed regulations that are being talked about in the administration are being proposed by the administration. You mentioned how misguided these would be and should not be adopted. I would like to offer you or any of the other panelists additional comments that you might have on that specific topic, the regulations that are being proposed.

Mr. DALE. The fundamental problem with the regulations starts with an analysis of whether the Department of Labor has power to enforce protections and proceeds from the notion that they do not, although they might get some limited grant of authority if they someday work out an agreement with the Department of Homeland Security.

In fact, all of the protections that are now accepted as part of the H-2A program were developed by the Department of Labor under almost precisely the same arrangement with respect to grant of authority from what was then the Immigration and Naturalization Service.

That included, you know, the 50 percent rule that U.S. workers would be hired through 50 percent of the contract period, it includes providing free housing, reimbursing for travel expenses, all of those things that are part of the H-2A program.

Now our part of the statute were originally developed by regulation by the Department of Labor under precisely the same sort of delegation of authority that exists to the Department of Labor now so that rather than adopting regulations that provide some affirmative protections, instead these regulations sort of want to sweep the problem out the door by saying we are no longer going to try to see whether an employer qualifies to get workers, we are going to ask them to attest that they do and if we find out afterwards that they didn't based upon inspection, then we are going to really, really be mean to them.

Meanwhile, the workers are abused, U.S. workers don't get the jobs to which they are entitled and there is really not any way to unscramble that omelet. There may be some way to punish the contractor. I frankly doubt that that happens just because of the enforcement history that we have seen in the past. So it is a big step backwards.

The other thing that I mentioned in passing in my comments is that the agencies that seem to be genuinely concerned about following the program strictures, at least to which they exist in trying to protect U.S. workers and so forth, have been state workforce agencies at least in some states where they have taken that mission to heart.

They are the key contact point for employers and actually help the employers do what they are supposed to do. Their role in the administration of the program is completely eliminated except for one thing. The one thing was they would be required to do I-9 checks on any workers they sent to an H-2B job and to do an I-9 certification.

Now, under the Immigration Reform and Control Act of 1986, this was a power that they were given, but they were also given the option of whether to do it or not do it. Most state agencies feel that it is a tremendous administrative burden and that, in fact, it will discourage valid U.S. worker job referrals to be referred out on those H-2B jobs. So that is a problem.

There are other problems. One of the reasons that more U.S. workers aren't found is recruitment under the H-2B program happens way, way before the date of need. In temporary work, you know, you don't necessarily know what you are going to be doing in the 120 days, or whether you will be available or not, or whether that is a good job for you.

The effect of the regulations actually would be to make the recruitment even earlier than it is currently. So for all kinds of reasons we recommend that these regulations just sort of be thrown out and let us start all over again. We do need the development of regulations in the H-2B area.

I mean, one of the problems that we have is that when the H-2B program was created after the Immigration Reform and Control Act, the Department of Labor was supposed to develop the regulations and didn't do it.

So we do need the development of regulations, but we need them to be developed in the spirit of the law, which is: 1] you protect U.S. wages and working conditions; and 2] you treat workers that are brought here to do the work of America in a way that is decent and fair. We need regulations that are developed in that light.

If the Committee is interested, I will forward, there were regulation comments that were developed by a group of organizations like ours.

Mr. GRIJALVA. That would be made part of the record. Thank you. Ms. Smith, you mentioned, I brought it up as well in some of the questions, the low bid contracting. What suggestions do you have to address this problem, either for the Forest Service?

Ms. SMITH. Well, in the past you used to be able to go online and see how many people bid on which contract and so then you could see what the prices were and what things were going for, and that

doesn't happen anymore. So that would be one suggestion, to make it available so that people can see what is actually going on out there.

Another suggestion would be that the price of the contract—I mean, I know the Forest Service testified earlier that they don't go with low bid anymore, but we are just not seeing that, so perhaps some follow-up from the Forest Service, a report to Congress showing what it is that they have changed that makes it so that they can prove that low bid isn't happening anymore.

You know, the workers are out there, they need the training, they are out there doing this really hard work, and that needs to be a part of the value of what happens. You want to add anything, Cass?

Mr. GRIJALVA. Let me just ask a general question. The follow-up to this hearing will be to look at relief, to look at some safeguards legislatively as we go forward. I wanted to ask the panel your thoughts on that process as we move forward. Legislative relief or initiatives that you feel would begin to deal with the question that is before us today and, as someone said, a responsibility we all have to these workers. It is open to anyone.

Mr. DALE. Mr. Chairman, one of the things that I would suggest is that the Fair Labor Standards Act be made explicit that the conclusion of the Eleventh Circuit and other Federal Courts that when folks are required to pay hundreds or sometimes thousands of dollars in order to get a job in terms of visa fees, and travel costs, and that sort of thing, that those costs are to be reimbursed at the beginning.

One might also look at the protections that H-2A workers are offered that are now part of the legislation. Forestry is a little different. I am not sure that every one is appropriate, but looking at that, it would be a guide to what would be effective.

Some control of foreign recruiters and clear responsibility of those who use foreign recruiters, I mean, because they are beyond the reach enforcement-wise of U.S. law. Some responsibility for those who use foreign recruiters for the representations that they have made would be helpful.

Mr. GRIJALVA. Any other?

Mr. DALE. Representative Miller actually has a bill that addresses much of that.

Ms. MOSELEY. I guess I was really struck reading the Department of Labor May 2008 report with its level of detail and specificity. I realize that they had in there appropriations language of their committee. The committee that provided their appropriations language had put that in there to request as an explicit report. I thought that was a helpful move. Maybe the Forest Service could use some nudging in that direction as well.

In the area of best value contracting, I think that it has been helpful—like the Forest Service testified, the Forest Service does use formally the function of best value contracting in their everyday business practices but they have a lot of opportunity to weigh a variety of price and nonprice factors as they need to for the particular context in which they are operating.

They need flexibility in that, but I think there may be some opportunities to work on the language that they have had in their ap-

appropriations annually about the opportunity to consider a benefit to the local community when they are awarding those contracts. Maybe that needs to become more permanent or it needs some maybe increased visibility in their law.

I think given the success with the agencies having the stewardship contracting, I think there is an opportunity in that arena to encourage that sort of contract mechanism which seems to be building a lot of collaboration and a lot of opportunities, both to create local benefit and to get restoration work done. Those are the three things that occur to me right now.

Mr. GRIJALVA. Thank you.

Ms. SMITH. I guess I would add that, like I said, forestry workers consider their work to be skilled labor, and so to have them be considered H-2B workers without protections doesn't make sense to them. Because the injuries that happen out there in the woods—it is just really dangerous out there and so it is really important perhaps that we look at how we classify forestry work.

Then another piece would be government accountability. Letting us really see. I mean, for years, since 2001, they have been saying things are going to change, things are going to change, we are stepped up enforcement, and yet, the workers are saying we are not seeing any changes out here. So I don't think it is just up to the Department of Labor and the Forest Service, I think it is also up to the Bureau of Land Management and Department of Homeland Security.

It would be great that we could follow what changes are happening, what they really see is happening on the ground and be able to hold them accountable for what is going on.

Mr. DALE. Mr. Chair, if I might have another bite at the apple. You sit here and think about, other ideas come to mind. One of the problems that we have in enforcement here is that to the extent you rely on inspection, it is always going to be sort of spotty and that what you really need is the ability of workers to enforce their own rights.

Now, the Congress took a significant step forward in the appropriations for Legal Services Corporation in winter for the first time since 1996 permitting—Legal Services Corporation funded Legal Services Organization to represent H-2B workers. However, there are other problems that exist. Just a few: An H-2B worker who leaves his work after a few days is out of status and illegally in the country.

Yet, oftentimes it takes longer than that to resolve any legal claims that they may have. If they go back home, it is extraordinarily difficult, and becoming more difficult all the time, to get somebody back into the country to be able to testify at a legal proceeding or to give their deposition and so forth.

I think a productive area for legislation would be examining the problems of this transnational administration of justice to make it easier for these workers to enforce their own rights.

Mr. GRIJALVA. Thank you. Let me thank the panelists before I wrap up and adjourn. This issue, I said at the beginning that it is a great concern, and to some extent, personal. My dad came to this country as a bracero. Having grown up hearing those stories and

what he had to go through, part of the shared responsibility is to try to prevent that from happening to other people.

There is resource issues here that the agency brought up that I think are important, have to be dealt with. If progress is being made it is not as rapidly as many of us would want, but there is an effort going on there and it is being hindered by the lack of resource and attention. That is obviously something that needs to be addressed.

I think the interagency cooperation, and communication and agreements, the Forest Service, Department of Labor, Homeland Security, Bureau of Land Management, those need to be strengthened I believe because we can't continue to pass the buck in responsibility about who is doing what part when we are dealing with the same group of workers.

As we build on Mr. Miller's legislation, I want to thank you for your input, and you are welcome to continue to provide us with that input as we go forward. This is an important issue. It is not only about our public lands, but I don't think any of us regardless of political affiliation wants to in this nation create a subclass, second class group of workers that work in this nation.

We are entitled to protections and this is what this hearing was about. I appreciate very much your time. The meeting is adjourned. [Whereupon, at 11:17 a.m., the Subcommittee was adjourned.]

