NORTHWEST WORKERS' JUSTICE PROJECT
917 SW Oak, Suite 426, Portland, Oregon 97205 • (503) 525-8454 • www.nwjp.org

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

Oversight hearing: "The Piñeros: Reviewing the Welfare of Workers on Federal Lands"
Subcommittee on National Parks, Forests and Public Lands
Committee on Natural Resources
September 15, 2008

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 pineros "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 Pineros," 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 US 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 US 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 US 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 US 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 US workers. This will lead to further abuse of the program, and a loss of job opportunities to US 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 Pinero 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.