

**STATEMENT OF
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U.S. DEPARTMENT OF LABOR
BEFORE THE
COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON NATIONAL PARKS, FORESTS AND PUBLIC LANDS
U.S. HOUSE OF REPRESENTATIVES**

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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 “*pineros*” – 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 complies 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 pineros 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 *pineros* 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 *pineros*:

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 monitor. 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.

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.