

Statutory and Regulatory Background

The H-2A program, as such, dates to the Immigration Reform and Control Act of 1986 (IRCA). Prior to IRCA, there was a temporary non-immigrant agricultural worker program included in the H-2 program established by the Immigration and Naturalization Act of 1952 (INA). Before the INA, other programs had been in place to provide for foreign agricultural workers, including open range sheepherding.

The Department of Labor issued comprehensive regulations for the H-2A program in 1987, after the passage of IRCA. The 1987 Rules¹ authorized the OFLC Administrator to promulgate “special procedures” for certain occupations, based on the unique characteristics of those industries. The Department issued a new set of H-2A regulations in 2008, replacing the 1987 Rules.² The 2008 Rules were subsequently replaced by the 2010 Rules, which retain much of the original substance of the earlier 1987 Rules including, as relevant here, the special procedures provisions.³

The 2010 Rules explicitly authorize the OFLC Administrator to “establish, continue, revise or revoke” special procedures in order “[t]o provide for a limited degree of flexibility in carrying out the Secretary’s responsibilities under the Immigration and Nationality Act (INA), while not deviating from statutory requirements.” 29 C.F.R. § 655.102. The 2010 regulations reference by name the “special procedures currently in effect for the handling of applications for sheepherders in the Western States (and adaption of such procedures to occupations in the range production of other livestock), and for custom combine harvesting crews.” *Id.* The regulations further provide that “[p]rior to making determinations under this section, the OFLC Administrator may consult with affected employer and worker representatives.” *Id.* For decades, this sort of stakeholder input has been a cornerstone of the special procedures system. The H-2A Special Procedures Coalition offers this letter as part of that stakeholder consultation.

Mountain Plains Agricultural Services

Mountain Plains Agricultural Service was created in 1988, as employers engaged in open range production of livestock sought more certainty for their workforce following the enactment of the Immigration Reform and Control Act of 1986. Mountain Plains has approximately 280 members who operate in 16 states, primarily in the Rocky Mountains. Mountain Plains acts as an “agent” on behalf of its employer members who use the H-2A visa program. Mountain Plains does not file a “master” application for H-2A workers; each member employer is a single employer.

Mountain Plains’ members use several of the H-2A special procedures. In 2014, Mountain Plains filed applications for 15 goat/sheepherder employers (49 workers), 6 goatherder employers (27 workers), 162 sheepherder employers (734 workers), 107 open

¹ 54 Fed. Reg. 20496 (June 1, 1987).

² 73 Fed. Reg. 77110 (Dec. 18, 2008).

³ 75 Fed. Reg. 6884 (Feb. 12, 2010).

range livestock worker employers (235 workers), 4 sheep shearer and wool grader employers (30 workers). Of these more than 1,000 positions for which employers needed workers, exactly 2 U.S. workers applied – one was not interested in the job and the other was hired but quit before completing his contract. Individuals who have the skills to care for animals and themselves that want to work in solitary situations for long periods of time are extremely rare.

Roughly half of the nation's sheep and 40% of the beef cows in the Western United States spend at least part of the year on the open range. Open range consists of a combination of both privately-owned and federally-owned public land for which livestock producers pay annual grazing fees. Through the grazing of sheep and cattle, these producers manage more than 250 million acres of public land.

The workers responsible for the successful grazing of livestock on the open range are the herders who tend the flocks of sheep and herds of cows and goats. Their duties including guiding the livestock to food and water, protecting the animals in severe weather, guarding against predators, and assisting with the birthing process and care of young livestock during lambing and calving season. Without herders, producers would not be able to maintain their herds, forcing them to drastically downsize their herds and keeping them from managing public lands. Increased regulation of public lands, a growth in the populations of natural predators (including coyotes, mountain lions, and wolves), and uncertain weather patterns (from droughts to blizzards) have placed additional demands on herders in recent years.

Mountain Plains' livestock producers have significant impacts on their local communities and throughout the U.S. economy at large. This takes the form of both "upstream" and "downstream" contributions: purchasing food, fuel, and equipment for herders on the "upstream" side, and providing employment for wool, leather, and meat processors on the "downstream" side. Every dollar generated by beef-cattle producers yields \$2.40 to \$3.17 for other businesses in states like Colorado, Oklahoma, Texas, and Wyoming, and every herder job in the livestock industry produces 15 to 25 more jobs, directly or indirectly, in these rural local economies.

Livestock producers have not had a meaningful source of domestic labor for open range herding work for decades. Well before the Training & Employment Guidance Letters at issue in the *Mendoza* litigation, this industry had been relying on foreign herders for more than 50 years. Congress and the Department of Labor have made a specific policy choice to facilitate the entry of foreign workers to provide labor for range livestock operations. More specifically, Mountain Plains' members rely on H-2A workers under the special procedures currently in place – procedures which, as described below, allow for the 24/7 nature of the work, non-fixed-site housing, and payment of a monthly salary because workers spend weeks at a time away from cities or banks, much less a payroll office. Without the existing special procedures regime, the open range production of livestock will be critically damaged.

Western Range Association

Western Range Association was first incorporated in 1953, but the roots of open range sheepherding in the Mountain West date back well to the early 20th Century and before. In the 60-plus years since its incorporation, Western Range has grown to include 216 members in 11 western states. Western Range files “master” applications for H-2A sheepherders, who transfer between WRA members as the seasonal need for workers requires.

Western Range’s sheepherders tend large flocks, often on public lands, in rugged high altitude terrain, hauling water for the sheep, keeping them from going astray, and protecting the flock from constant threats from predators like coyotes, mountain lions, and wolves. During lambing season, the sheepherders help in the birthing process, and at all times, the herders provide for the health and medical needs of the sheep in the wilderness.

Dating back to World War II, sheep producers found it first difficult and later impossible to find United States workers able and willing to perform the difficult work of open range sheepherding. In recent years, the number of U.S. born sheepherders has essentially dropped to zero. For example, in 2012, WRA’s members sought to hire nearly 1,000 sheepherders. Out of that number, only 22 U.S. workers even applied, and only 2 met the qualifications and were hired. Of the “U.S.” workers applying, most are foreign born former H-2A workers who have married U.S. spouses and adjusted immigration status. The remote and demanding nature of this work makes it unattractive to U.S. workers. Without the sheepherders hired from Peru, Mexico, Chile, and Bolivia, the generations’ old industry of open range sheep production would disappear forever in the United States.

As it is, sheep producers in America are already facing an unforgiving future – producers face both rising input costs (feed, water, transportation, etc.) and a price-taking market in which more than half of the U.S. lamb supply and most of the U.S. wool supply is provided by China, Australia, and New Zealand. Prolonged droughts only compound these problems, and large, well-established sheep operations are going out of business every year. Where U.S. herds included more than 56 million head of sheep at the beginning of World War II, that number is about to drop below 4 million and declines each year.

Put bluntly, without the H-2A special procedures for open range sheepherding, many of Western Range’s members would be forced to liquidate their herds and close their family businesses. That could devastate local economies in the Mountain West. The estimated value of direct production by sheep under the care of H-2A workers is \$275 million, with revenue created in indirect “upstream” and “downstream” businesses valued at more than \$665 million. Beyond the loss of this lifestyle and businesses passed on through generations, the bottom line loss to the economy would be nearly \$1 billion.