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Chairman Lummis, Ranking Member Lawrence and members of the Subcommittee, thank you for the invitation to testify today. I appreciate the opportunity to discuss the effect of Executive Order 13658 on ventures, such as outfitters and guides, operating on Federal lands.

On February 12, 2014, President Barack Obama signed Executive Order 13658, Establishing a Minimum Wage for Contractors (the Executive Order or the Order). The Order requires certain parties that contract with the Federal Government to pay covered workers no less than a $10.10 hourly wage. The Order obligated the Department to issue regulations to implement its requirements. The Department accordingly proposed regulations to implement the Executive Order on June 17, 2014, and—after carefully considering the comments—published final regulations on October 7, 2014.

As Secretary Perez said upon the issuance of the final rule, "No one who works full time in America should have to raise their family in poverty, and if you serve meals to our troops for a living, then you shouldn't have to go on food stamps in order to serve a meal to your family at home. By raising the minimum wage for workers on Federal contracts, we're rewarding a hard day's work with fair pay. This action will also benefit taxpayers. Boosting wages lowers turnover and increases morale, and will lead to higher productivity."

The final rule provides guidance and sets standards for employers concerning what contracts are covered and which of their workers are covered. The rule also establishes obligations that contractors must fulfill to comply with the minimum wage provisions of the Executive Order, including record-keeping requirements. It provides guidance about where to find the required rate of pay for all workers, including tipped employees and workers with disabilities. Additionally, the rule establishes an enforcement process that should be familiar to most government contractors and will protect the right of workers to receive the new $10.10 minimum wage.

The Department conducted a robust outreach effort during the drafting of the rule, including conducting a variety of listening sessions with private associations and other groups. The Department has continued to provide additional outreach since issuance of the final rule, producing a number of fact sheets, Q & A's, webinars and other guidance to help contractors understand and implement the rule's requirements. This outreach has not been limited to public stakeholders. The Department conducted numerous conference calls with agency General Counsels and procurement officials, among others. Since the Department issued its final rule, certain Federal agencies with covered non-procurement contracts have, consistent with Section

4(b) of the Executive Order, developed additional guidance concerning application of the Executive Order to particular agency agreements that apply to particular stakeholders. The Department has been advising these Federal agencies, including the United States Forest Service (FS) as it develops additional guidance relating to its special use authorizations and other agency-specific agreements. The guidance the Department has provided has been based, in part, on information provided to federal agencies by individual stakeholders. Because federal agencies have a wealth of experience working with stakeholders on particular contracts, the Department would recommend stakeholders continue to consult with their agency partners regarding specific questions.

Before I discuss the particular topic at issue before this subcommittee, I should begin by discussing some of the general principles laid out in the Department's final rule.

General Application of the Executive Order

The Order applies to four categories of contracts, provided such agreements qualify as "new contracts" under the Order and its implementing regulations. Even if a contract satisfies these criteria, the Order only covers individuals working on or in connection with the contract if those individuals' wages are governed by the Fair Labor Standards Act (FLSA), Service Contract Act (SCA), or Davis-Bacon Act (DBA).

First, Executive Order 13658 explicitly applies to four categories of contractual agreements: procurement contacts for construction covered by the DBA; service contracts covered by the SCA; concessions contracts, including any concessions contract excluded from the SCA by the Department of Labor's regulations at 29 CFR 4.133(b); and contracts with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

The Department understands this fourth category pertaining to new contracts in connection with Federal lands to be the most relevant category for this hearing. The final rule interprets this broad fourth category as generally including leases of Federal property, including space and facilities, and licenses to use and occupy such property entered into by the Federal Government for the purpose of offering services to the Federal Government, its personnel, or the general public. For example, a lease of space in a Federal building from a Federal agency to a business to operate a coffee shop to serve Federal employees and/or the general public is covered by the Executive Order. This category of contracts also encompasses special use permits and similar instruments that constitute contracts or contract-like instruments in connection with Federal property or lands that relate to offering services to the general public.

Second, the Order applies only to "new contracts" as defined consistent with Section 8 of the Order. The implementing regulations define a "new contract" as one that results from a solicitation issued on or after January 1, 2015, or that is awarded outside the solicitation process on or after January 1, 2015. The term "new contract" includes replacements for expiring contracts, but it does not include the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government that was established prior to January 1, 2015.

It is important to note that under the rule as proposed, existing contracts would have qualified as "new contracts" if extended, renewed, or modified in any way except for administrative changes as a result of bilateral negotiations on or after January 1, 2015. However, the Department amended its definition of "new contract" to respond, in part, to comments received from stakeholders, including the FS and America Outdoors Association (AOA), an organization representing outfitters and guides.[1] Under the Department's final rule, existing contracts that are amended qualify as "new contracts" if the amendment constitutes a modification that is outside the scope of the contract.

Finally, as pointed out in the Department's final rule, coverage of a contract does not automatically extend coverage to all workers performing on that contract. In order for the minimum wage protections of the Executive Order to extend to a particular worker performing work on or in connection with a covered contract, that worker's wages must be governed by the FLSA, SCA, or DBA.

Application of the Executive Order to Outfitters and Guides

The Department received comments on the Notice of Proposed Rulemaking relating to outfitters and guides primarily from the AOA and O.A.R.S. Companies, Inc. (O.A.R.S.).

The AOA and O.A.R.S. sought clarification as to whether the Executive Order applies to special use permits issued by the FS, commercial use authorizations (CUAs) issued by the National Park Service (NPS), and outfitter and guide permits issued by the Bureau of Land Management (BLM) and the United States Fish and Wildlife Service (USFWS). The AOA and O.A.R.S. also raised concerns about increased costs that would be incurred by outfitters and guides in connection with implementation of the Order.

Coverage of Special Use Permits under the Executive Order

Consistent with the Executive Order, which provides that its minimum wage requirement applies broadly both to traditional contracts and "contract-like instruments," the Department defined contracts and contract-like instruments to include all contracts and any subcontracts of any subordinate tier, whether negotiated or advertised, including but not limited to lease agreements, licenses, and permits. The particular instruments addressed by the AOA and O.A.R.S. typically authorize the use of Federal land in exchange for the payment of fees to the Federal Government. These instruments create obligations that are enforceable or otherwise recognizable at law and therefore would constitute contracts for purposes of the Executive Order.

As previously mentioned, simply determining that a contract exists does not mean that workers are covered. In order for the minimum wage protections of the Executive Order to extend to a particular worker performing work on or in connection with a contract, (1) the contract must qualify as one of the specifically enumerated types of contracts described in the Executive Order;

[1] For comments submitted to the proposed rule, please see http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=WHD-2014-0001

(2) the worker's wages must be governed by the FLSA, SCA, or DBA; and (3) the contract must qualify as a "new contract" under the Executive Order and the Department's final rule.

As the Department noted in its final rule, "…FS special use permits generally are SCA-covered contracts, unless a permit holder can invoke the SCA exemption for certain concessions contracts contained in 29 CFR 4.133(b)." Moreover, as noted above, the fourth category of covered contracts enumerated in the Executive Order – "contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public" – broadly encompasses a wide range of contracts involving the use of public lands to provide services, including special use permits and related instruments. Thus, even where a particular contract is exempt from coverage under the SCA, workers performing on or in connection with the contract nonetheless may be entitled to the Executive Order minimum wage if the contract falls within this fourth category of covered contracts, and if the wages of workers on the contract are governed by the FLSA.

Specifically, the Department considered the information provided by the AOA and O.A.R.S. and determined that even if their contracts with the Federal government were outside of the scope of the SCA, the contracts fell within the fourth category of covered contracts because they constituted contracts in connection with Federal property or lands and related to offering services for the general public, and because the wages of the workers on these contracts were likely covered by the FLSA:

> The FLSA generally governs the wages of employees of holders of CUAs issued by the NPS and permits issued by the FS, BLM and USFWS, at least to the extent such instruments are not covered by the SCA. 29 U.S.C. 213(a)(3) exempts employees of certain amusement and recreational establishments from the minimum wage and overtime provisions of the FLSA, but, as the AOA acknowledged, that provision "does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture." See 29 U.S.C. 213(a)(3). As explained above, the Department has concluded that the holders of CUAs issued by the NPS, and permits issued by the FS, BLM and USFWS, are operating under a contract with the Secretary of the Interior or the Secretary of Agriculture. Thus, the exemption from the FLSA's minimum wage requirement will normally not apply and the FLSA will usually govern the wages of the employees of such holders for purposes of the Executive Order (unless, as noted, the SCA applies to such contracts)."

79 Fed. Reg. 60652, 60656 (Oct. 7, 2014).

Significantly, however, the Executive Order minimum wage requirements apply, as noted, only to "new contracts," which are defined in the Department's regulations as contracts that result from solicitations issued on or after January 1, 2015, or contracts that are awarded outside the solicitation process on or after January 1, 2015. Because of this important limitation on application of the Executive Order, contracting agencies and contractors entering into "new

contracts" on or after January 1, 2015, will be aware of Executive Order 13658 and can take into account any potential economic impact of the Order on projected labor costs.

Similarly, because the Executive Order minimum wage applies only to "new contracts," wage increases will not affect contractors that are mid-way through performance of a contract that was entered into before January 1, 2015. We have found that assertions that contractors may be adversely affected by the Executive Order often overlook not only the benefits of the Executive Order, but also the fact that the Executive Order applies only prospectively to new contracts with the Federal government, thereby enabling contractors to evaluate and address any potential economic impact of the Order on projected labor costs before the new contract is executed and as they plan for performance on that contract.

Costs and Benefits Associated with Raising the Minimum Wage

In addition to questions of coverage, AOA and other commenters raised concerns about potential additional costs generated by the increase of the minimum wage for outfitters and guides, among others. These commenters argued that the outfitting and guiding permits create a relationship that, unlike procurement contracts, does not contain a mechanism by which the holder of the instrument can "pass on" costs related to operation of the Executive Order to contracting agencies.

The Department carefully considered these comments and thoroughly addressed them in its final rule. *See, e.g.*, 79 Fed. Reg. 60652, 60655-57 (Oct. 7, 2014). In particular, the Department declined to create an exemption from the Executive Order for outfitters and guides, as well as for other stakeholders who made similar arguments. The Department believes several factors will substantially offset any potential negative economic effects of the Order. As reflected in the Executive Order itself, as well as in the Department's final rule, the Executive Order can be expected to benefit workers, contractors, and the government through reduced absenteeism and turnover in the workplace, improved employee morale and productivity, reduced supervisory costs, and increased quality of services provided to the Federal Government and the general public, which in turn would draw an increased number of customers and generate higher sales. Moreover, because the Executive Order applies only to new contracts, contracting agencies and contractors will be aware of Executive Order 13658 and can take into account any potential economic impact of the Order on projected labor costs before the new contract is executed and as they plan for performance under that new contract.

Conclusion

Thank you again for inviting me to testify on application of the $10.10 minimum wage to outfitters and guides working on Federal lands. The Department continues to work with contracting agencies to provide assistance to their stakeholders and to answer remaining questions regarding coverage and other issues arising under the Executive Order and the Department's final rule. We invite the AOA and others to provide us, as well as our counterparts at the Departments of Agriculture and the Interior, with additional information they believe may

assist those agencies in the development of additional guidance. We will do our part to provide them with guidance. We welcome that exchange and look forward to continuing the dialogue.