



# EQUAL ACCESS TO JUSTICE ACT

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## EXECUTIVE SUMMARY

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Strata completed this report to show the history and evolution of the Equal Access to Justice Act (EAJA). The law was designed to allow those with limited resources to engage in the legal process when government agencies violate their own rules. In other words, EAJA reimburses various groups for litigation costs when those groups lack the resources to take on the government. If the government is found to have violated its own policy, the government will pay the litigation costs to the plaintiffs.

The act has recently become an increasingly important part of environmentalists' strategy. Some groups can engage in litigation with nearly zero cost for suits regarding National Environmental Policy Act, Clean Water Act, Endangered Species Act, and others. These environmental groups argue that their litigation is the kind of public interest litigation that the act was designed for. Others think that some environmental groups are just throwing frivolous lawsuits at the courts at no cost to themselves.

This report is divided into several sections. It begins with the historical context of the law, and then explores its current problems. The report continues with the law's financial information of the law and the current political discussions around the law. The majority of the report explores several case studies of environmental groups who are taking advantage of EAJA.

## BACKGROUND

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### ORIGINAL INTENTION

The Equal Access to Justice Act (EAJA) was originally intended “to make sure that a party cannot be harassed by unjustifiable government activity solely because of the prohibitive expense of attorneys’ fees” and “to protect the small business community from governmental overreach” (Baier, 2012, p. 2). In other words, EAJA was meant to give ordinary, non-wealthy citizens a means to access the judicial system if he does not have the financial means to do so on his own. The original legislators who drafted the law thought that fee shifting established under EAJA would decrease excessive government regulations on small businesses (Finley, 1998, pp. 247-249). When the bill passed Congress in 1980, it was meant to have narrow qualifications for parties to receive compensation after prevailing in a suit against the government. The original intention of EAJA was to extend fee shifting to parties that had been injured, were in imminent threat of injury, or were likely to suffer irreparable harm. In the legislation process, language that limited the powers of EAJA was taken out, creating a loophole that allowed environmental groups to repeatedly sue government agencies and recover millions of dollars in legal fees (Baier, 2012, p. 29). EAJA is not unique in its purpose. Some environmental laws, such as the Endangered Species Act and the Clean Air Act, have fee-shifting statutes as well. Groups that abuse EAJA for attorney reimbursements are also able to receive attorney reimbursements through these other laws as well.

## HISTORY

Because of the 1970s oil crisis, the Carter Administration began to deregulate oil price controls, beginning an era of general deregulation in the federal government. As this deregulation movement gained momentum in the late 1970s and through the 1980s, some members of Congress focused on enabling private citizens and small businesses to challenge regulatory agencies. In other words, Congress began to prioritize the protection of small businesses and individuals from the reach of an overzealous regulatory state.

Senator Pete Domenici (R-NM) introduced the first EAJA-like bill on December 15, 1977. Senator Gaylord Nelson (D-WI) made the following statement in support of Domenici's bill:

*In case after case, a federal bureaucratic blitzkrieg has rolled over innocent victims, causing unjustified damage to large numbers of business enterprises and individuals. ... The need for this legislation highlights a basic dilemma which the U.S. faces along with the other industrial democracies. Can we have a powerful national government to enforce the laws which protect public health and safety and preserve competition in the marketplace, while avoiding a government which is so powerful, intrusive and arbitrary that it poses a menace to individual and economic freedom?*

The 1977 bill did not pass, but Domenici reintroduced EAJA legislation on January 31, 1979. In a public statement, he elaborated why EAJA was necessary: "Individuals and small businesses are in far too many cases forced to knuckle under to regulations... because they cannot afford the adjudication process." Senator Dennis DeConcini (D-AZ) was an original co-sponsor of the legislation and had similar justifications for why EAJA was essential: "Through the device of fee shifting, this legislation will improve our citizens' access to courts and administrative proceedings. It will encourage them to vindicate their rights and not to acquiesce in a ruling or sanction which they believe arbitrary, misguided or unfair." DeConcini thought that taking fee awards from the budgets of agencies served as a "quantitative measure of whether an agency is engaging in excessive unreasonable regulation" (Baier, 2012, p. 21).

On July 31, 1979, Domenici's bill passed the Senate by a vote of ninety-four to three and was passed onto the House of Representatives. The counterpart House bill was introduced in September 1979 by Representative Morris Udall (D-AZ) and a similar bill, H.R. 6429, was introduced in February 1980 by Representative Joseph McDade (R-PA). These two House bills stipulated that in order to qualify for attorneys' fees and litigation reimbursements, a party must have a direct and personal interest in the action of the government, have suffered an injury, or have a likelihood of suffering irreparable harm. Both EAJA versions in the House and the Senate passed their respective houses, but because the House and Senate versions of the bill were not identical, a Congressional Conference Committee convened to discuss reconciliation. The joint Conference Committee of the House and Senate approved the final version of the EAJA bill on October 1, 1980, which was then sent to President Carter for his signature. On October 21, 1980, EAJA became law (Baier, 2012, pp. 21-22).

President Carter issued this statement after he signed EAJA into law:

*[The] legislation provides small businesses with “equal access to justice” – another high priority of the White House Conference on Small Business. Many small businesses have learned from bitter experience that when an unfair action is brought against it by a government agency it may be cheaper and easier to pay a fine than to fight for vindication. This new law will change that. ... Some of the proposals previously advanced were too broad in their application and too expensive, but this legislation strikes a fair balance between the government’s obligation to enforce the law and the need to encourage business people with limited resources to resist unreasonable government conduct.*

The law was originally passed as a sunset bill to expire in three years. Congress considered EAJA to be an experimental bill, so it was given a short life in order to evaluate how the law would be used. Because it was experimental, Congress held five hearings and five committee reports between its original enactment and its permanent reenactment in 1985. Congress’ main concern was the price tag that would be associated with EAJA. In 1979 the Congressional Budget Office projected that EAJA would cost over \$100 million during its experimental three-year period.

Because of the sunset provision, reauthorization became necessary. On October 11, 1984 Congress voted to permanently set EAJA into law. However, the bill was vetoed by President Ronald Reagan because the Department of Justice desired technical changes in the reauthorization bill. After Congress addressed the president’s concerns, Reagan signed the permanent version of EAJA into law on August 8, 1985 (Baier, 2012, pp. 23-24).

After the permanent enactment of the law, Domenici restated the intention of EAJA:

*[T]he essential concept of the Equal Access to Justice Act is that when a small business or individual citizen prevails in litigation with the Federal Government, that was initiated by the Federal Government, then that individual or business entity should be reimbursed for his or her attorney’s fees and costs if the government’s position was not substantially justified. ... We must eliminate the possibility of... Pyrrhic victories. ... Equal justice is not available when one cannot afford to fight.*

Two of the most substantial revisions happened in 1992 and 1995; in 1992 Congress applied the provisions of EAJA to proceedings before the Court of Appeals for Veterans Claims, and in 1995 Congress stopped the reporting and tracking of EAJA payments (Baier, 2012, pp. 24-25).

## INITIAL PROJECTIONS OF COST

The Department of Justice (DOJ) projected the cost of EAJA much higher than it actually turned out to be. The first DOJ estimates in 1980 predicted the legislation's cost to the government to be as much as \$250 million per year. The Congressional Budget Office (CBO) projected a much lower cost than the DOJ at about \$108 million in 1980, and \$137 million by 1982 (Baier, 2012, p. 22).

Members of Congress were concerned with the potential costs of EAJA when they were initially debating whether to pass the bill. Despite the CBO's substantial overestimation of the cost of EAJA, in 1985 the CBO projected that the annual cost of EAJA would be \$3 million in 1986, and then grow to \$7 million by 1990. The Administrative Conference of the United States and the Administrative Office of the United States Courts tracked EAJA's cost and its number of applications, including both agency and court cases that occurred during fiscal years 1982-1984. The list below shows the actual costs and numbers of EAJA applications in the early years of the act.


- ◇ 1982
  - ◇ 133 total applications
  - ◇ 13 granted
  - ◇ \$676,692 total EAJA awarded
  - ◇ \$52,053 awarded on average
- ◇ 1983
  - ◇ 121 total applications
  - ◇ 60 granted
  - ◇ \$1,727,556 total EAJA awarded
  - ◇ \$28,793 awarded on average
- ◇ 1984
  - ◇ 423 total applications
  - ◇ 170 granted
  - ◇ \$1,370,240 total EAJA awarded
  - ◇ \$8,060 awarded on average (Baier, 2012, p. 23).

## 501(C)(3) EXEMPTIONS

Before the initial passage of EAJA in 1980, politicians rigorously discussed what kind of parties would qualify for EAJA awards. Although the original House version of EAJA stipulated that a party must have a direct and personal interest in the proceedings to qualify for an EAJA award, the Conference Committee's reconciliation of the Senate and House bills deleted that stipulation. The Committee on Small Business wanted to make sure EAJA would not be used to "provide funds for interveners, friends of the court, or others who have not been injured." In the final version of the original law, however, the standards for personal or direct injury were not included; without these qualifying standards, environmental groups have been able to use this loophole to their advantage (Baier, 2012, p. 29).

In the original version of EAJA, individuals who had a net worth greater than \$1 million were disqualified from using the act to recover legal fees. Businesses worth more than \$5 million were also disqualified. When Congress reauthorized the law in 1985, it increased net worth limits to \$2 million for individuals and \$7 million for organizations (Baier, 2012, p. 30).

Despite the net worth provisions, the Congressional Conference Committee made a "technical change" during the reconciliation of the original House and Senate bills that allowed non-profit 501(c)(3) organizations to use EAJA without regard to the net-worth



limitations that applied to private individuals and businesses. In the years leading up to the original passage of the law, politicians engaged in some discussion on the role of 501(c)(3) organizations in the EAJA process, but the provision providing for a 501(c)(3) exemption did not appear in any hearing, report, or legislative draft until September 26, 1980. EAJA ultimately became a law in October 1980. No report issued by the reconciliation meetings gave any explanation or reason for the 501(c)(3) exemption.

In the early stages of drafting for the original EAJA bill, some politicians debated on whether 501(c)(3) organizations should be allowed to qualify for fee shifting under acts like EAJA. During that time, Senator Mac Mathias (D-MD) believed that “public interest” groups were necessary within EAJA “to ensure their effective participation” as part of America’s democratic process. In other words, 501(c)(3) organizations and public interest law firms represented the public in agency and regulatory deliberations when others could not. Senator Edward Kennedy, who advocated for EAJA, stated, “As you know, there have been comments made that this is sort of a public service relief bill for lawyers. And it is very important that we disprove that at the very outset.” Other politicians saw “public interest” groups as nothing more than “special interest” groups in disguise, only representing narrow views. Most of the debate in Congress revolved around the question whether non-profit organizations should be excluded from access to EAJA or if they should be included but have the same net worth limitation of \$5 million that businesses do. No recorded testimony from any politician shows support for exempting non-profits from net-worth restrictions. The exemption, however, inexplicably appeared in the final law of the reconciliation conferences in 1980 (Baier, 2012, pp. 29-32).

## FEDERAL REPORTS ELIMINATION AND SUNSET ACT OF 1995

In 1995 Congress decided the reporting provision in EAJA was unnecessary and added unreasonably to the cost of the act. Through the Federal Reports Elimination and Sunset Act of 1995, Congress eliminated the reporting provision. The reason that some in Congress thought the reporting provision was unnecessary was based on the fact that from 1981 to 1995, the total payouts from EAJA remained at a few million dollars a year. After the reporting provision was abolished, 501(c)(3) groups began to take advantage of the fact that no one would know how much money the groups made by suing agencies. The lack of centralized reports meant that no one could accurately measure if the EAJA activity rate was increasing, decreasing, or staying the same. At this same time, courts began calculating EAJA fees from a “reasonable” fee for a private attorney, not from the actual costs of representation. Many courts did not object if attorneys’ fees for environmental litigants exceeded what the courts themselves were paying their in-house counsel (Baier, 2012, p. 43).

## MECHANICS OF EAJA

A prevailing party in litigation related to EAJA has thirty days to file a petition with the government to be reimbursed for fees under EAJA. The petition must include an itemized list of fees requested as well as a statement alleging that the government was not substantially justified in their position. This allegation does not need to be supported in any way. The burden of proof on the issue lies with the government (Baier, 2012, p. 33). These fees are then paid by the agency’s own funds, unless the “attorney’s fees would

constitute a heavy financial blow to the agency,” which means they are then paid by the Judgment Fund. The Judgment Fund is an indefinite appropriation that was created by Congress in 1956 to pay judgments entered against the U.S. (Chu & Yeh, 2013).

In order to be eligible to receive EAJA fees, the party must meet several requirements. The most significant requirement is it must be the “prevailing party” in the outcome of the proceeding. Congress construed the vague term “prevailing party” to mean prevailing on less than all the issues in a case. (Baier, 2012, p. 28). The U.S. Supreme Court definitively interpreted the meaning of “prevailing party” in 2011. In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, the Supreme Court said that a prevailing party must cause a “judicially sanctioned change in the legal relationship of the parties.” In theory, this ruling should have reduced the number of EAJA fees given to environmental organizations in out-of-court settlements, but it has not. However, plaintiffs can become a prevailing party if they enter a settlement agreement under a court’s consent decree.

As already mentioned, the party must not possess a net worth of more than \$7 million for organizations or \$2 million for individuals. Exceptions of the \$7 million cap include 501(c)(3) organizations, 501(a) tax-exempt organizations, and cooperative associations (Finley, 1998, p. 251). In any case, organizations must not have more than 500 employees to be eligible (Baier, 2012, p. 34).

There are three types of fee-shifting statutes under which parties qualifies for EAJA:

1. Any fees that would previously have been available under common law or any statutes that specifically allow such an award.
2. According to the Equal Access to Justice Act, permits that “a court shall award to a prevailing party other than the United States fees and other expenses...incurred by that party in any civil action (other than cases sounding in tort)...unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.”
3. EAJA allows for repayment of fees of a prevailing party in any administrative agency adversary adjudication, provided that the court again finds the government actions are not substantially justified (Finley, 1998, p. 250).

## ELIGIBILITY FOR FEE-SHIFTING

1. The party must incur legal expenses.
2. The party must prevail in the litigation underlying the party’s petition for fees.
3. The prevailing party must allege that the government’s position in the underlying litigation was not substantially justified.
4. With limited exceptions, the prevailing party must possess a net worth of less than \$7 million if the petitioning party is a business or less than \$2 million if the petitioning party is an individual.
5. 501(c)(3) organizations can use EAJA without regard to the net-worth (Finley, 1998, p. 251).



6. Organizations must have less than 500 employees (Baier, 2012, p. 34).

## TYPES OF FEE-SHIFTING

1. 28 U.S.C section 2412(d)- “Courts must award attorneys’ fees to any party that prevails in a civil action (other than one sounding in tort) against the US in which the government’s position lacked substantial justification.”
2. 5 U.S.C. section 504- “This section sanctions legal expenses for a prevailing party in any administrative agency adversary adjudication. Recovery fees under this section require that the government’s position in the underlying litigation lacked substantial justification.” (Finley, 1998, p. 251)
3. EAJA compensates “fees and other expenses,” including “the reasonable expenses of expert witnesses, [and] the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court [or agency] to be necessary for the preparation of the party’s case” (Baier, 2012, p. 34).
4. Fee awards may be denied or reduced “to the extent that the [prevailing party] during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy” or if “special circumstances make an award unjust” (Baier, 2012, p. 35).

## PROBLEMS WITH EAJA

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### MIXED ELIGIBILITY

Mixed eligibility is a circumstance when eligible and ineligible parties file a case together. Mixed eligibility issues arise when an EAJA-ineligible co-plaintiff or co-defendant funds the underlying litigation of an eligible party. In order to qualify for an award of EAJA funds, a party must satisfy several eligibility requirements, including the funding caps for businesses and individuals. If a party meets these requirements, EAJA mandates that a court must award attorneys’ fees to that party. When multiple parties join together to litigate against the government, some courts have refused to grant an EAJA award to otherwise eligible parties in certain mixed eligibility situations.

The courts have differing opinions on the legality of mixed eligibility under EAJA. The Sixth Circuit’s opinion states that an EAJA award is unsuitable because it would go against Congress’s purposes for enacting EAJA. In contrast, the Fifth and Ninth Circuits believe that co-litigation should not affect the petitioning party’s EAJA eligibility.

The Fifth Circuit released an opinion showing the ridiculous nature of mixed eligibility in the case *Texas Food Industry Assn. v. United States Department of Agriculture*. Texas Food is a trade association that only has a net worth of \$3.3 million and is therefore eligible for EAJA awards. The corporations that are parties to that trade association are multi-billion dollar corporations. The mixed eligibility loophole allows these wealthy corporations to take advantage of EAJA by collecting attorneys’ fees under the provisions of the act when they work together in a separate association that meets the net worth requirements. It goes against the original intention of EAJA to allow ineligible businesses, such as the corporations in Texas Food, to use their EAJA-eligible trade associations as a

means to avoid the cost of litigation against the federal government. If EAJA's trade association loophole is to be corrected, Congress will have to amend EAJA so that EAJA-ineligible businesses are disqualified from using their trade associations (Finley, 1998, pp. 245-247).

Some courts have used EAJA's "special circumstances" clause to prudently address the mixed eligibility problem. In *Louisiana ex rel. Guste v. Lee*, the State of Louisiana and five environmental groups successfully sued the United States Army Corps of Engineers for violating the National Environmental Policy Act. The federal government argued that the State of Louisiana's strong financial position and presence in the litigation created a special circumstance, which meant that Louisiana was obligated to bear the cost of the litigation. The Fifth Circuit agreed with the federal government's position. The Fifth Circuit stated that an EAJA-eligible party cannot take a "free ride through the judicial process" at the federal government's expense if an associated EAJA-ineligible party is able to prosecute at their own expense (Finley, 1998, pp. 255-256).

## NO CLEAR FEE CAP


EAJA puts a cap of \$125 an hour on attorneys' fees unless the court determines an increase is justified due to increase in cost of living or a "special factor," as the law states. The Supreme Court determined "special factors" to be attorneys with distinctive knowledge or specialized skills pertaining to the litigation in question (Baier, 2012, p. 37). This special factor clause is used routinely to justify amounts well over the \$125 cap. In most environmental cases, environmental lawyers are seen as specialists and thus paid upwards of \$300 per hour (Baier, 2012, p. 41). Budd-Falen found the average EAJA reimbursement in Endangered Species Act cases was \$490.73 per hour, and got as high as \$775 per hour. Some courts are blatantly ignoring the statutory cap and redefining the "special factor" clause. The market value for private lawyers determines most fees when most of the layers working for these non-profits would make much less for their in-house work (Baier, 2012, p. 41).

## LACK OF REPORTING AND RECORDKEEPING

One of the most fundamental problems with EAJA is its lack of reporting mandates. In a *New York Times* article, the Congressional Western Caucus wrote, "Ever since Congress lifted reporting requirements for EAJA payments in 1995, the public has been left in the dark about how much money groups have received under the act and for which cases." A recent study to analyze EAJA payments made by the Forest Service found substantial differences in the data provided by the Forest Service and the Department of Justice. The significant lack of data is a cause of concern for many interested parties (Tibbitts, 2013, p. 377).

## UNWARRANTED LITIGATION ADVANTAGE

Another unintended consequence of the EAJA is unwarranted litigation by large organizations. Many of these organizations are 501(c)(3) non-profits, which means they are not subject to the \$7 million net-worth cap.



Since there are no net-worth caps on 501(c)(3) organizations, these groups have taken advantage of EAJA and exploited the law. 501(c)(3) groups can sue the government on technically correct procedural grounds and (depending on how ‘prevailing party’ is applied) win EAJA fees for the litigation. (Baier, 2012, p. 42). If that process does not cost anything, these organization often repeat it and effectively paralyze agencies from ever taking action. In addition, when the groups receive fee reimbursements that are much higher than their actual cost, they could begin to profit from their continuous litigation (Baier, 2012, p. 42).

In the span from September 1, 2009, to August 31, 2010, cases marked as “closed” by the PACER system showed that EAJA payments to twenty environmental groups alone had at least equaled \$5.8 million in that period. Most of those awards were directed against the Department of Interior, specifically the U.S. Fish and Wildlife Service and the Bureau of Reclamation. This payout is much larger than the total payout to every agency in every other year from 1982-1994 with the only exception being several Social Security cases in 1994 (Baier, 2012, p. 49).

## NUMBERS

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The Government Accountability Office (GAO) conducted a study of overall EAJA costs, including awards, personnel costs, and administrative costs. The Department of Justice’s (DOJ) Environment and Natural Resources Division defended a total of 2,500 environmental cases (155 per year) from 1995-2010 filed against the EPA. The DOJ spent \$43 million to defend those EPA cases, or \$3.3 million on average annually from 1998-2010. The attorneys’ fee awards paid by the DOJ totaled roughly \$1.8 million. On a smaller scale, for every \$1.00 paid out in fee awards, the DOJ alone spent \$1.83 in personnel and administrative costs (Baier, 2012, p. 50). A study on cases marked as “closed” by the PACER system in the span from September 2009 to August 31, 2010, found that EAJA reimbursements to environmental litigants at least equaled \$5.8 million. Most of the reimbursements were directed against the Department of Interior, specifically FWS and Bureau of Reclamation. A study by Michael J. Mortimer and Robert W. Malmshemer of litigation against the Forest Service from 1999 to 2005 found that the Forest Service had paid at least \$6,137,583 in that time (Baier, 2012, p. 49).

Even with these figures, the exact cost of EAJA to taxpayers is unknown. “According to a Fox News report, the General Accounting Office (GAO) tracked 525 legal fee reimbursements that totaled \$44.4 million from 2001 through 2010, but found that only 10 of 75 agencies within the U.S. Department of Agriculture and Department of Interior could provide data on cases and attorney fee reimbursements” (Eatherton, 2012).

## SIGNIFICANT COURT CASES:

- ◇ *Commissioner, INS v. Jean*: “The Court ruled that the U.S. government could not avoid paying for attorneys’ fees incurred in a successful fee application following a case that otherwise qualified for EAJA” (Baier, 2012, p. 26).

- ◇ *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*: Parties filing a lawsuit were not a catalyst for government action who could recover attorneys' fees as a prevailing party. In other words, for there to be a "prevailing party," there must be a "judicially sanctioned change in the legal relationship of the parties." Theoretically, this would have decreased environmental abuse, but parties are instead using settlement agreements to get their attorneys' fees (Baier, 2012, pp. 28-29).

## EAJA HOURLY RATE CAP

Initially, the cap for hourly lawyer fees was set at \$125 an hour. From the start, this was intended to increase according to increases in cost of living. As such, here is what the Ninth Circuit Court has listed as their rates each year since 2001:

- ◇ 2001: \$142.18
- ◇ 2002: \$144.43
- ◇ 2003: \$147.72
- ◇ 2004: \$151.65
- ◇ 2005: \$156.79
- ◇ 2006: \$161.85
- ◇ 2007: \$166.46
- ◇ 2008: \$172.85
- ◇ 2009: \$172.24
- ◇ 2010: \$175.06
- ◇ 2011: \$180.59
- ◇ 2012: \$184.32
- ◇ 2013: \$187.02
- ◇ First half of 2014: \$189.78 (Statutory Maximum Rates, 2014)

This fee will be awarded "unless the court determines that ... a special factor ... justifies a higher fee." Many environmental groups will argue that specialized environmental lawyers are necessary and will receive a higher hourly fee (Baier, 2012, p. 34). Karen Budd-Falen found that environmental lawyers are getting reimbursed at rates as high as \$750 an hour (Budd-Falen, 2013).

## PRIVATE AND GOVERNMENT REPORTS

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Below are highlights of from a few previous studies of EAJA and the way that environmental groups have abused it. The list below is not exhaustive. It showcases the main points found in these studies.

### BUDD-FALEN REPORT

- ◇ The report reviews all federal district court complaints over a series of years for environmental groups:
  - ◇ 35% of complaints are filed only based on a missed procedural step under the National Environmental Policy Act

- ◇ 29% of complaints are filed only based on missed timelines under the Endangered Species Act
- ◇ 11% of complaints are filed because of a failure to complete the process for considering an action under “section 7” of the Endangered Species Act
- ◇ The report reviews 400 court cases filed by Western Watersheds Project, WildEarth Guardians, or the Center for Biological Diversity
- ◇ 89% of the federal district court complaints filed by [Western Watersheds Project] directly attack livestock grazing by claiming a violation of a NEPA procedure and then seeking to stop (temporarily or permanently) a rancher’s use of the lands because the federal government violated the NEPA process.
- ◇ 22% of WildEarth Guardians court cases and 18% of Center for Biological Diversity’s court cases oppose natural resource producing power plants, energy production, and mining.
- ◇ 46% of the cases filed by WildEarth Guardians, 30% of the cases filed by Center for Biological Diversity, and 25% of the cases filed by Western Watersheds Project are ONLY to force the federal government to comply with Endangered Species Act timeframes.
- ◇ Attorney fees range from \$500 to \$750 per hour (Budd-Falen, 2013).

## MORTIMER AND MALMSHEIMER US FOREST SERVICE REPORT

- ◇ U.S. Council on Environmental Quality found that U.S. Forest Service is the most common federal agency defendant in National Environmental Policy Act litigation.
- ◇ Knudson found that during the 1990s, 434 environmental cases were brought against the federal government and the government paid out more than \$35.1 million in attorney fees.
- ◇ According to U.S. Forest Service Records, EAJA fees were awarded in 149 instances from 1999 to 2005 resulting in the agency paying more than \$6 million in fees.
- ◇ The U.S. Forest Service records listed a fee recipient for 120 of the 149 EAJA awards the agency reported.
  - ◇ 69.2% of the 120 recipients were environmental organizations
  - ◇ More than two-thirds (\$3.2 million) of EAJA fees were paid to these organizations
- ◇ All the litigants awarded fees in more than one case were environmental groups
- ◇ Organizations involved in more than one EAJA case collectively reported net assets in 2005 of more than \$88 million and annual revenues of more than \$116 million
- ◇ Number of times the organization was a plaintiff in a EAJA suit from 1999 to 2006:
  - ◇ Center for Biological Diversity (6) net assets-\$2,347,991; revenues \$3,477,044
  - ◇ Earthjustice (3) net assets: \$28,261,755; revenues: \$21,086,300
  - ◇ Forest Guardians (8)
  - ◇ Heartwood (7)
  - ◇ Idaho Sporting Congress (8)
  - ◇ League of Wilderness defenders (4)
  - ◇ Native Ecosystems Council (7)
  - ◇ Oregon Natural Resources Council (5) net assets: \$1,181,477; revenues: \$1,214,995

- ◇ Sierra Club/ Sierra Club Legal Defense Fund (12) net assets- \$54,604,888; revenues- \$85,183,765
- ◇ The Ecology Center (9) net assets: \$1,166,694; revenues: \$3,158,765 (Malmsheimer & Mortimer, 2011).


## U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS REPORT

- ◇ Senator James Inhofe (R-OK), Ranking Member of the Senate Committee on Environment and Public Works, and Senator David Vitter (R-LA), a member of the EPW Committee requested a GAO report on EAJA reimbursements.
- ◇ The report is very limited due to lack of information from federal agencies during the requested time period from 1995-2010.
- ◇ The report finds that environmental groups profited more than any other plaintiff under EAJA.
  - ◇ Earthjustice received \$4,655,425 or 32% of all attorneys' fees paid to EPA litigants.
  - ◇ Sierra Club received \$966,687.34
  - ◇ Natural Resources Defense Council received \$252,004.87
- ◇ The three groups received 41% of all attorneys' fees awarded to EPA litigants.
- ◇ DOJ spent at least \$43 million in taxpayer money defending the EPA in court from 1998-2010.
- ◇ The Department of Treasury does record data on payments made from its Judgment Fund, an account within the Treasury Department authorized under the Equal Access to Justice Act for rewarding attorneys' fees to successful plaintiffs, but does not publish them.
- ◇ Most of the attorneys' fees paid to environmental organizations were paid under the Clean Air Act, followed by the Clean Water Act (Brown & Dempsey, 2011).

## EAJA FINANCIAL INFORMATION

Information regarding EAJA payouts is variable and incomplete for a number of reasons. When EAJA was passed in 1980, payments as a result of the act were tracked by two annual reports. The first report was compiled by the Chairman of the Administrative Conference of the United States (ACUS) and detailed any administratively awarded payments. The second report was the responsibility of the Director of the Administrative Office of the U.S. Courts. The director's report included any essential information that was needed to evaluate the effect and extent of EAJA "including the number, nature, and amounts of awards; claims involved; and any other relevant information" (Government Accountability Office, 2011, p. 11). This responsibility was later transferred to the Attorney General in 1992.

Senator John McCain (R-AZ) introduced the Federal Reports Elimination and Sunset Act of 1995 to save the government anywhere from \$5 to \$10 million by eliminating or modifying hundreds of required reports (U.S. Congress, 1995, pp. S6513-S6515). The annual EAJA report from the Attorney General was among the reports that were immediately eliminated. Later that year Congress passed the Treasury, Postal Service, and



General Government Appropriations Act, which defunded the ACUS, effectively eliminating all EAJA reports and tracking.

Though it would seem suspicious that both reports were eliminated in the same session of Congress, it appears that both measures were simply taken to save money. According to Senator Carl Levin(D-MI), a cosponsor of the Federal Reports Elimination Act, the process of selecting what reports were eliminated was a long and thorough process that included recommendations from government agencies as well as review by and additional recommendations from the relevant senate committees (U.S. Congress, 1995, pp. S6513-S6515).

Even when EAJA reimbursements were being tracked prior to 1995, reports were often inadequate. The GAO submitted a report on EAJA use in 1998 that stated, “From its inception in fiscal year 1982 through fiscal year 1994 (the last year central reporting of government-wide data was required), more than 6,200 applicants were awarded about \$34 million under EAJA’s administrative and judicial processes for reimbursement of attorneys’ fees and related expenses.” The report admits that these numbers could not be verified because “some agencies’ initial record-keeping practices were lax and most kept track only of fees paid” (Government Accountability Office, 1998, pp. 2-3). According to the report, many agency officials during this time were concerned about the completeness and accuracy of the data, but these worries never resulted in any action before the reports were eliminated. After 1995, any kind of EAJA data is scarce and difficult to find.

A report in the *Journal of Forestry* examined the costs of EAJA on the U.S. Forest Service between 1999 and 2005. The data was requested via the Freedom of Information Act from the Department of Justice, since they defend the Forest Service, and from the Forest Service directly. The data revealed that about \$6 million had been rewarded to various plaintiffs. The problem with this amount is that the data provided by the two agencies and data from the Secretary of Agriculture varied considerably.

**TABLE 2: COMPARISON OF THE US FOREST SERVICE EQUAL ACCESS TO JUSTICE FEES, BY YEAR (MANSHEIMER & MORTIMER, 2011)**

Year	EAJA Payment (\$)		Secretary of agriculture response to the US Senate Committee on Energy and Natural Resources' request (\$)
	US Forest Service FOIA data	DOJ FOIA data	
<b>1999</b>	794,774	498,406	814,774
<b>2000</b>	232,348	240,710	602,698
<b>2001</b>	999,938	457,535	581,567
<b>2002</b>	626,741	704,230	1,077,441
<b>2003</b>	794,414	586,649	1,236,668
<b>2004</b>	1,412,804	571,676	1,557,804
<b>2005</b>	1,276,564	467,427	1,131,578
<b>Total</b>	6,137,583	3,526,632	7,002,530

Source: Data provided by the US Forest Service, DOJ, and Congressional Research Service

The table above shows the inconsistencies between the DOJ's numbers and the Forest Service's numbers. It also compares data provided by the Secretary of Agriculture. The secretary's total amount is nearly double the amount the DOJ provided. None of the three sources have consistent figures, even on a year-to-year basis. These significant differences very clearly show how inaccurately EAJA payments are being tracked.

In addition, the reports do not state who receives the funds. Of the 149 awards, the Forest Service listed recipients on 120 (about 80%) of them. Many times this recipient was just an attorney or law firm and the report did not specify who they represented.

Of the 120 cases that had a recipient listed, 83 (69.2%) were environmental organizations that accounted for \$3.2 million (more than two-thirds) of the total amount given out (Malmsheimer & Mortimer, 2011, pp. 352-354).

Lawmakers prompted the GAO to conduct a study in 2012 that analyzed attorney fee payments from the Judgment Fund, the primary source for EAJA and other reimbursements, from fiscal year 2001 to 2010. The GAO found that over the 9-year period, the Treasury made 525 reimbursements for a total of \$44.4 million (Government Accountability Office, 2012, p. 28). This includes EAJA fees, as well as payouts from other fee shifting statutes. It is not possible to determine how much of the \$44 million is purely EAJA funds from the report.

For this study, the GAO requested data from 33 USDA and 42 Interior agencies. The GAO requested any information regarding attorney fee reimbursements including case name, party name, claim amount, date of the award or payment, payment amount, and statutes under which the cases were brought (Government Accountability Office, 2012, p. 3). Sixty-five of the agencies contacted did not track or could not readily provide any information. The remaining 10 agencies had tracking methods in place or were able to compile information from various data sources. The extent to which these agencies had attorney fee information varied greatly. With no standard recording procedure, it is



difficult to determine if any of the information provided is accurate (Government Accountability Office, 2012, p. 5).

## CURRENT POLITICAL ATTEMPTS TO REMEDY EAJA PROBLEMS

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Barely after EAJA had been enacted, efforts arose to address the shortcomings of the law. Early in 1981, the House Small Business Committee was upset at the 501(c)(3) exemptions and at the removal of the requirement of “direct and personal” injury in order to recover EAJA fees. The Committee tried to amend EAJA to fit its original intent by taking out restrictions on 501(c)(3) organizations and make eligibility include a loss of \$500. The amendment passed in the House, but failed in the Senate (Baier, 2012, p. 55).

The next major effort to amend EAJA was the Access to Justice Act of 1992. This bill was introduced in both the House and Senate where it was referred to committees, but it never made it past the committee process. The 1992 bill would have removed the “special factor” exception from the statutory cap on hourly rates and set the “cost of living” exception by tying it to the Consumer Price Index for All Urban Consumers (Baier, 2012, p. 58).

Beginning in 2003 and continuing through 2006, reform legislation for all of EAJA proceeded through Congress. This legislation, called the Equal Access to Justice Reform Act, was intended to create reporting mechanisms. The law also sought to fix the problems with the reimbursement-payment system, particularly that payments were often made out of the Judgment Fund instead of agencies’ own budgets, as originally intended. This bill sought to raise the net worth cap of organizations to \$10 million, compensating for inflation on the original \$7 million cap. Ultimately, Congress did not pass this bill (Baier, 2012, pp. 61-64).

Several members of Congress have recently become more vocal against the problems regarding the lack of record keeping and the incentive to litigate frivolously under EAJA. On the forefront of this movement is Representative Cynthia Lummis of Wyoming’s at-large district.

In 2013 Lummis stated:

*The Equal Access to Justice Act was a good idea when it passed Congress more than three decades ago. It remains a good idea today so long as it is operating as Congress intended. Requiring agencies to keep track of what they pay attorneys will help Congress determine if EAJA is working well, or not (D’Amico, 2013a).*

Lummis and Democratic Representative Steve Cohen (D-Tenn) sponsored H.R. 2919 Open Book to Equal Access to Justice Act to address record keeping for EAJA payouts. She also sponsored H.R. 3037 Government Litigations Savings Act to place payout limits on awards made under EAJA. Both bills were introduced to Congress in August 2013. The Open Book to Equal Access to Justice Act was drafted to amend EAJA and the federal judicial code to require the Chairman of the Administrative Conference of the United States to annually report the amount of fees and other expenses awarded under

EAJA to Congress. The Open Book to Equal Access to Justice Act would require that these reports include the number, nature, and amount of the awards; the claims involved in the controversy; and any other relevant information that may aid Congress in evaluating the scope and impact of such awards. The bill also stipulates that these records be made available to the public online (Congressional Research Service, 2014).

In other words, the Open Book on Equal Access to Justice Act would require every federal agency to begin tracking EAJA payments again. This bill stipulates that the Administrative Conference of the United States (ACUS) must compile EAJA payment data. ACUS, which was reestablished in 2009, must submit an annual report to Congress and publish an online searchable database allowing public access to how much has been paid under EAJA stipulations, from which agencies, and where taxpayer dollars are going (D'Amico, 2013a).


Cohen said:

*Americans have a right to know what their government is doing and their government has a duty to be as transparent as possible. Without adequate reporting, citizen's rights cannot be fully protected and the government risks failing in its duty to its people. I look forward to working with Representative Lummis to reopen the government's books to help ensure that all Americans have access to this information (D'Amico, 2013a).*

Other co-sponsors for this bill include Rep. Joe Garcia (D-FL), Rep. Doug Collins (R-GA), Rep. Steve Daines (R-MT), Rep. Kurt Schrader (D-OR), Rep. Collin C. Peterson (D-MN), and Rep. Rob Bishop (R-UT). This bill passed the House of Representatives without amendment on May 6, 2014 (Congressional Research Service, 2014). The co-sponsorship of this bill and the passage in the House indicate that there is strong bipartisan support. The bill will continue in the committee process in the Senate and possibly reach a floor vote.

Lummis's other bill is called the Government Litigations Savings Act (GLSA), which would revise the fees and other expenses under EAJA for parties in proceedings and court cases against the federal government. This law would restrict the fees and other expenses awarded under EAJA to prevailing parties with a direct and personal interest in an adjudication, including medical costs, property damage, determination of benefits, unpaid disbursements, and other expenses of adjudication, or because of a policy interest. The law would require the reduction or denial of an award if the party during the course of the proceedings engaged in conduct which unduly or unreasonably protracted the final resolution of the matter in controversy. This law would also increase the cap on attorney fees awarded under EAJA to \$200 per hour and eliminate the cost-of-living and special factor considerations for allowing an increase in the hourly rate for such fees. GLSA would also eliminate the net worth exemption that determines eligibility for fees and expenses under EAJA for tax-exempt organizations and cooperative associations under the Agricultural Marketing Act (Congressional Research Service, 2013).

Seventeen House members have joined Lummis in cosponsoring GLSA. These legislators hope to limit access to taxpayer-funded reimbursements for lawsuits against the federal government under EAJA. Because large, wealthy non-profit groups have heavily



used EAJA for reimbursements to fund repeated, procedural lawsuits against the federal government, the GLSA will protect access to reimbursement for individuals like veterans and seniors, while also discontinuing reimbursements for any group or business with a net worth over \$7 million. Another main goal of the bill is to make sure that taxpayer-funded reimbursements go only to citizens pursuing litigation on their own direct and personal interests. These direct and personal interests may include correcting a financial or medical benefit (D'Amico, 2013b).

After she introduced GLSA to Congress, Lummis said:

*Yesterday I introduced a bipartisan bill that will bring back transparency to a program that has been without oversight for nearly 18 years. That is a very important step. However, it is not the only step. Many independent studies published by Universities like Virginia Tech and Notre Dame, and investigations by the Government Accountability Office and other legal counsels prove that litigious environmental groups use EAJA to fund repeated procedural lawsuits. Whether those lawsuits result in a \$1 or \$1 million reimbursement, it is contrary to Congressional intent. EAJA was written for the little guy to fight a once-in-a-lifetime substantive lawsuit (D'Amico, 2013b).*

Senator Barrasso of Wyoming is also a strong advocate for transparency and record keeping for EAJA. In April 2013, Barrasso harshly critiqued the current state of EAJA and submitted an article written by Ken Hamilton, Executive Vice President of the Wyoming Farm Bureau, to the Congressional Record. Barrasso cites Hamilton's article where it mentions one recent case of several environmental groups suing the Fish and Wildlife Service over wolf delisting efforts. The federal government quickly approved a November 2012 claim for \$380,000 in attorney fees to those environmental groups. Barrasso asserts that the Justice Department has handed over \$380,000 to their political allies (Barrasso, 2013).

Barrasso expounded on Hamilton's wolf delisting example that illustrates the apparent favoritism in the Justice Department. Hamilton stated, "Meanwhile back at the ranch, the Wyoming Wolf Coalition through its attorney Harriet Hageman, has asked the Federal Government for their fees under EAJA. These fees, one-tenth of the environmental claim, have been argued over by the same Federal Government since April of 2011." Since 2011, the Justice Department has been actively arguing over an EAJA claim of approximately \$36,000 to a group that supported wolf delisting when the same Justice Department agreed to send \$380,000 to environmental groups opposed to the delisting of wolves (Barrasso, 2013).

Senator Barrasso agrees with Hamilton's conclusion that "the Equal Access to Justice Act is being applied less than equally by the Federal Government. It appears that if they agree with you they will send you a check, but if they do not they will send you an attorney's response denying you your money." Barrasso is adamant that the current administration should not be playing favorites by rewarding their political friends with taxpayer dollars. Senator Barrasso plans to continue fighting for real transparency regarding which groups are receiving EAJA payments, why they are receiving them, and how much money is being given away (Barrasso, 2013).

The political battle over EAJA has led to finger pointing and accusations from both the politicians seeking to make EAJA more transparent and the environmental organizations that are seeking to use the act to receive litigation compensation. In an interview with Casper Star-Tribune, Lummis said, “EAJA was later co-opted by large environmental groups so their litigation shops could get reimbursed for filing expansive litigation on environmental issues.” In the past Lummis identified the environmentalist group WildEarth Guardians as an organization that abused EAJA. WildEarth Guardians’ climate and energy program director Jeremy Nichols said in an email that transparency is a great idea, but he does not believe environmental groups are abusing the law. Nichols said that environmentalists sue to make sure the nation’s laws are enforced. Nichols also said, “Rep. Lummis should stop chasing conspiracy theories about environmental groups using EAJA to get rich and direct it toward solving real problems, like the fact that Wyoming -- the Equality State -- is still the worst state as far as gender pay inequality.” Nichols was alluding to a report by U.S. Bureau of Labor Statistics showing the median salary for women in Wyoming is the worst in the nation (Hancock, 2014).

Like Lummis, Barrasso is not immune from name calling and finger pointing. In 2011 Barrasso's office said a study by the Cheyenne-based Budd-Falen Law Offices found 12 environmental groups that filed more than 3,300 lawsuits in the past decade. Mike Senatore, vice president of conservation law at Defenders of Wildlife, asserts that many groups would lose the ability to challenge unfair governmental practices without the ability to recover their costs. Senatore said, "The Lummis-Barrasso bill is a clear attempt to silence those citizens, small businesses and nonprofit organizations that don't have the financial resources to take action on their own, and by specifically targeting environmental groups, the members of Congress who support this bill have shown their complete disregard for protecting America's wildlife heritage and natural resources for future generations" (Wyoming AP, 2011).

Thirty-seven livestock groups, including the Wyoming Stock Growers Association, have signed a letter in support of the bill. Jim Magagna, executive vice president for Wyoming Stock Growers, said changes to the act will cause environmental groups to be more selective before filing lawsuits. Magagna also said that many of Wyoming’s ranchers and farmers are caught up in federal lawsuits as "interveners" when interest groups pursue litigation to remove grazing or other uses from public lands. Magagna made it clear that he does not want EAJA destroyed, but wants more accountability: "The important point is that this is not an attack on the Equal Access to Justice Act. It is just an attempt to prevent abuses of the law" (Wyoming AP, June 6, 2011).

Defenders of Wildlife has spoken out against the Government Litigation Savings Act, asserting that the law would make it harder for private citizens, small businesses, and nonprofit organizations to file suit against the federal government. Mike Senatore further explained their justification for keeping EAJA as it is:

*The Equal Access to Justice Act, which was signed into law by President Reagan, helps provide a level playing field regardless of politics or ideology so that all Americans can ask courts to ensure that their government is accountable and that it obeys laws that protect people, property, and our environment. The Supreme Court unanimously recognized that the ‘specific purpose of the EAJA is to*

*eliminate for the average person the financial disincentive to challenge unreasonable governmental actions.*

*Litigation is time-consuming and typically a last resort. When we take legal action against the federal government, we do so in the public interest with the full backing of hundreds of thousands of Americans who support the cause. Furthermore, we only recover those costs when we prevail in court, meaning a judge agrees that the law has been violated. Without the ability to recover those costs, the American people would lose their ability to challenge the federal government when it violates the law and fails to fulfill its duties, guaranteeing that only the wealthiest corporations and special interest groups will have access to justice (Lummis, Barrasso Introduce Bill, 2011).*

Kieran Suckling, executive director of the Center for Biological Diversity, has a similar opinion as Senatore. Suckling said that environmental groups collect only a small portion of overall fees under EAJA. He said his own group receives less than an average of 0.5 percent of its annual \$8 million revenue from those attorney fees recovered. “No one’s getting rich by making the government follow the law,” Suckling said in the written statement. “Republicans are using this bill as a back-door attack on environmental laws they don’t like. The end result will be restricting citizen access to the court system and a federal government that’s less accountable to the people” (Eatherton, 2012).

## CASE STUDIES

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### THE SIERRA CLUB

#### OVERVIEW AND HISTORY

Since its founding in 1892, the Sierra Club has increasingly become a leader in environmental activism. Traditionally, the Sierra Club focused on preservation of lands—particularly national parks—and protection of wildlife species. Recently, the organization’s focus has shifted towards ending the use of “dirty energy” or fossil fuels and replacing it with green energy.

In 1960, the Sierra Club responded to accusations of lobbying—an activity that 501(c)(3) organizations are forbidden from participating in—by converting to 501(c)(4) status. At the same time, they created a 501(c)(3) called the Sierra Club Foundation. This enabled the Sierra Club to continue lobbying, while the Sierra Club Foundation reaped the benefits of a charity organization (History, 2014). While technically the two groups are separate, they work in tandem with each other. The Sierra Club Foundation’s primary role is to raise money through charitable donations and then disperse it through grants. While the Sierra Club Foundation donates money to other organizations, 80% of the Sierra Club’s funding comes from the Sierra Club Foundation (FAQs, 2014). Meanwhile, “The Sierra Club is the vehicle through which the Foundation generally fulfills its charitable mission” (The Sierra Club and The Sierra Club Foundation, 2012). Essentially, the Sierra Club is only able to accomplish its goals through the funding of the Sierra Club Foundation, and the Sierra Club Foundation is only able to achieve its goals through the machine of the Sierra Club. One of the Sierra Club Foundation’s secondary roles is litigation. Because the Foundation heads the Sierra Club’s litigation, they are able to qualify for EAJA as a

501(c)(3) while the Sierra Club is able to carry on their lobbying program as a 501(c)(4) (Gift Planning, 2014).

Occasionally the Sierra Club Foundation is listed as the plaintiff in a lawsuit, but most often it is simply the Sierra Club. Sometimes the Sierra Club is listed as the plaintiff and is still awarded attorney fees, which means we can assume that the Sierra Club Foundation's 501(c)(3) status applies in these situations. Since the two organizations are so deeply intertwined with each other—nearly identical in everything except boards of directors and tax status—the name “Sierra Club” will often refer to both the Sierra Club and the Sierra Club Foundation for the purposes of this paper.

As a central figure in environmental activism, the Sierra Club has become a leader in environmental litigation. Even before EAJA, the Sierra Club' set an example of environmental litigation for other environmental groups. Now, the Sierra Club has extended its influence, defining the use of EAJA among environmental organizations.

Two facts about the scope of the Sierra Club's EAJA abuse are necessary to understand. The first is the extent of the organization's litigation. Karen Budd-Falen, a Wyoming lawyer who has brought a lot of focus to EAJA, found that between 1989 and 2009 the Sierra Club filed 983 suits. (Budd-Falen, 2009, p. 2). EAJA money awarded from those suits will be explained more later, but for now we will focus on the Sierra Club's volume of litigations. The second is how far away the Sierra Club is from the intended group of EAJA users. In the Sierra Club Foundation's 2012 tax return, they reported \$79.6 million in net assets (Internal Revenue Service, 2012(a)). This is more than eleven times the size allowed by EAJA for for-profit organizations. The 501(c)(4) Sierra Club's own net worth was unavailable without requesting it directly from the organization or the IRS itself. Regardless, because the Sierra Club Foundation is a 501(c)(3), its worth bears no impact in whether or not it qualifies for EAJA.

While the Sierra Club is one of the most active environmental litigants, they do not necessarily broadcast their legal activity. For public relations, the Sierra Club emphasizes and advertises its rallies—building up its grassroots appearance—and the results of its efforts. For example, Sierra Club may boast that it shut down a coal plant but never mention how it impacted the coal plant's closure. Linking this kind of litigation to EAJA is even more complicated with the lack of mandatory centralized reporting. As such, this case study attempts to make fluent a story that is broken and scattered.

The relationship between EAJA and the Sierra Club is complex, but certain trends are evident. In this study, four aspects should become clear: first, the ways the Sierra Club has defined environmental litigation; second, a few select instances where there is indisputable connections between EAJA funds and Sierra Club litigation; third, general information about the Sierra Club and its reception of EAJA funds; fourth, the current goals and movements within the Sierra Club, and the implications of these trends for its future use of EAJA.

## SIERRA CLUB V. MORTON

Although EAJA had not been passed at the time, the Supreme Court's 1972 decision in *Sierra Club v. Morton* defined environmental litigation since.

In this landmark case, the Sierra Club filed a lawsuit against Secretary of the Interior Rogers Morton over plans by Walt Disney Enterprises, Inc. to build a complex of hotels, restaurants, ski lifts, trails, and other attractions on 80 acres of the Mineral King Valley in the Sierra Nevada Mountains (*Sierra Club v. Morton*, 1972, 405 U.S. 729). The court ruled that the Sierra Club had not experienced and would not experience any "irreparable injury" from Disney's plan (*Sierra Club v. Morton*, 1972, 405 U.S. 731). Potter Stewart, who delivered the Court's opinion, wrote, "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured" (*Sierra Club v. Morton*, 1972, 405 U.S. 735).

Interestingly, this case that the Sierra Club lost has since defined their litigation strategy. The Supreme Court ruled against them, saying the judicial system is not designed to promote any organization's opinions. Still, the end implication has set the stage for environmental litigation ever since. This case set a precedent that organizations need only show that one or more of its members has been personally affected. If a single member of the party can prove injury, the complaint is held valid, and the lawsuit can proceed. Any environmental litigation since *Sierra Club v. Morton* has clung to this doctrine as it gives them the ability to sue over just about any issue, so long as they can find one person in the affected area who will join onto the lawsuit.

## EAJA CASES

As previously discussed, Congress debated developing a fee-shifting statute throughout the 1970s. In the deliberations, John T.C. Low, who sits on the legal advisory board of the Southeastern Legal Foundation, warned about the potential for large non-profit organizations to abuse the bill that later became EAJA. His organization, as a public interest law firm, was in support of the concept of the bill, he said, but very opposed to the bill as it was then written. "This bill has to us a number of disturbing factors. It is a new bill. It is a new concept, not in the sense there has not been public funding before, but in the scope of the funding" (Committee on Government Operations, 1976, 56). He went on to suggest that reimbursing legal fees would allow narrow interest groups to take advantage of the system and present what he referred to as "exotic" opinions, all while being compensated by the government. He mentioned the Sierra Club was one of three organizations that came to his mind as groups that could create issues (Committee on Government Operations, 1976, 60).

The following cases are examples of lawsuits in which the exotic opinions Low feared were funded by EAJA, often redefining EAJA as they did so.

## SIERRA CLUB V. U.S. ARMY CORPS OF ENGINEERS

The Sierra Club joined with a number of other plaintiffs in 1982 to challenge the approval of the Westway highway project in New York City. They asserted that it violated the National Environmental Protection Act. (Cohen, 2014). This project would construct a six-lane highway, primarily in a tunnel through the Hudson River landfill (The Westway Project, 1981).

In 1984, the district court heard arguments concerning the award of attorney fees to the plaintiffs. The district court ruled that EAJA did not apply in this situation because one of the plaintiffs was worth more than \$1 million—the net worth cap at the time. In 1985, the plaintiffs challenged the district court’s decision. The appellate courts overruled the district courts, deciding that fees should be awarded proportional to the number of eligible plaintiffs; in this case eleven out of twelve plaintiffs were eligible, so eleven-twelfths of the award was given.

Thomas J. Meskill, the judge who authored the appeals court’s opinion, dissented from his two colleagues, saying, “The EAJA was passed for a specific purpose; to ensure that parties would not be prevented from contesting government action simply because they could not afford to litigate the matter. ... When a group of twelve plaintiffs, one of whom has a net worth of over \$1 million, join together, congressional concern about access to the courts is not implicated. Indeed, it seems incongruous to hold that if the ineligible plaintiff alone challenged Westway, fees could not be awarded under the EAJA, but because the ineligible plaintiff was joined by less wealthy friends, fees may be awarded” (Sierra Club v. U.S. Army Corps of Engineers, 1985, 776 F.2D 393-394).

Notwithstanding this dissent, the court’s ruling stands as a precedent. Groups can partner with wealthy parties and still receive reimbursements for their portion of fees. While other lawsuits and controversy later surrounded the construction of the Westway project (Cohen, 2014), it is this 1985 ruling that helped define EAJA.

## SIERRA CLUB V. MARSH

In the series of cases from 1985 to 1991, the Sierra Club sued over the State of Maine’s plan to construct a sea port and causeway on the undeveloped Sears Island. The Sierra Club argued that the state had violated the National Environmental Policy Act which “requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions” (Environmental Protection Agency, 2014). In 1986 the court officially ruled the reimbursement of \$38,092.03 for the first round of lawsuits and \$19,585.31 for the second. There were at least seven other lawsuits filed concerning the same facility and causeway that were eventually heard by the courts (Sierra Club v. Marsh, 1986, 16 ELR 20982).



## COMMONWEALTH OF MASSACHUSETTS V. ENVIRONMENTAL PROTECTION AGENCY

In *Massachusetts v. EPA*, multiple states, cities, and organizations joined the Commonwealth of Massachusetts to file suit against the EPA for what they viewed as inaction in controlling and regulating greenhouse gas emissions. Among the environmental organizations joining on the suit were the Natural Resources Defense Council, the Center for Biological Diversity, Greenpeace, and the Sierra Club (*Massachusetts v. EPA*, 2007, 549 U.S. 1). The case has a history from 1999 until the Supreme Court ruled in favor of Massachusetts and its partners in 2007 (Barnes & Eilperin, 2007).

The case rested on two primary questions. First, does the EPA have authority to regulate greenhouse gas emissions? Second, if it does have that authority, are the reasons provided by the EPA for their inaction sufficient under the Clean Air Act? (*Massachusetts v. EPA*, 2007, 549 U.S. 2). In a 5-4 decision, the high court ruled the EPA does have this authority and yet had not supplied reasonable explanations for not regulating, instead calling its reasoning a “laundry list” (*Massachusetts v. EPA*, 2007, 549 U.S. 31).

In an opinion focusing largely on the impact greenhouse gasses have on global warming and the government’s response to it, Justice John Paul Stevens stated that since Massachusetts has no ability to form emissions agreements with other states or with foreign nations, it is the federal government’s obligation to do so, and that obligation has been delegated by Congress to the EPA. As such, the EPA is responsible to protect Massachusetts’ “quasi-sovereign interests” (*Massachusetts v. EPA*, 2007, 549 U.S. 16-17).

“While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming,” Stevens wrote, “it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it” (*Massachusetts v. EPA*, 2007, 549 U.S. 22). He added that the court has “no difficulty reconciling” Congress’ efforts against global warming with the Clean Air Act’s requirement that the EPA regulate “any air pollutant” deemed harmful (*Massachusetts v. EPA*, 2007, 549 U.S. 27).

While various other reasons were given, the eventual outcome of this case was that the EPA was required to work more directly on greenhouse gas emission regulation, a key victory for the environmental groups joining the plaintiffs. Concerning this ruling, House Energy and Commerce Committee Chairman John D. Dingell (D-Mich) saying, “While I still believe Congress did not intend for the Clean Air Act to regulate greenhouse gases, the Supreme Court has made its decision and the matter is now settled” (Barnes & Eilperin, 2007).

The victory included EAJA awards following the Supreme Court ruling. Earthjustice was paid \$92,637. Natural Resources Defense Council was awarded \$54,002. The Sierra Club topped both, receiving \$93,205 in lawyer fees. Other awards from the same case include \$127,555 to the Commonwealth of Massachusetts, \$100,000 to the environmental lawyer Lisa Heinzerling, \$111,277 to the State of California Air Resources Board, and \$81,438 to the International Center for Technology Assessment (Government Accountability Office, 2011, p. 42).

## MOVING BEYOND FOSSIL FUELS

The Moving Beyond Fossil Fuels campaign has embodied the Sierra Club's goals in recent years. Separated into three parts, the ultimate goal is to phase out what the club deems as dirty energy. One of the biggest issues with EAJA is its lack of transparency; as such, tying recent cases to EAJA extremely difficult. However, EAJA incentivizes federal lawsuits, and the three sections of this movement show Sierra Club's plans for activism and litigation. After some discussion on the Sierra Club's current goals will be a deeper examination of some specific numbers and what is known about EAJA and the Sierra Club's litigation policies.

### BEYOND COAL

Michael Brune, Sierra Club executive director, said, "Our top priority is our Beyond Coal campaign, to clean up and close down coal plants and replace them with clean energy" (Parenti, 2010). As part of this Beyond Coal operation, the Sierra Club set a goal to retire one third of the nation's coals plants by 2020 (Beyond Coal: About Us, 2014). Since 2010, they claim to have already retired 168 plants (Beyond Coal: Victories, 2014). Through litigation—often ending in settlements—the Sierra Club has dedicated themselves to retiring plants as well as block plans to create more coal-burning power plants.

In 2007, the Sierra Club won a lawsuit against employees of the University of Wisconsin over some coal-burning projects being conducted at the university. This case implied that John Wiley, Chancellor of the University of Wisconsin-Madison, and Michael Morgan, Secretary of the Department of Administration, could be deemed as "operators" of the projects even without being directly involved with any of them (Sierra Club v. Morgan, 2007, 07-C-251-S, pp. 19-20). In 2013, the Sierra Club sued the Burlington Northern Santa Fe Railway Company for transporting coal via railway over waterways which it says will lead to contamination of the water because of coal chunks and dust (Gullo, 2013). Also in 2013, the Sierra Club filed a lawsuit against DTE Energy concerning four coal burning power plants in Michigan which the club claims is responsible for more than 1,400 violations of the Clean Air Act (Sands, 2013).

### BEYOND OIL

The next aspect of the Sierra Club's Moving Beyond Fossil Fuels is the Beyond Oil campaign. The primary goals of this campaign involve fighting the growth of infrastructure surrounding oil development and use. "We have effectively lobbied federal agencies, organized grassroots pressure, and litigated to stop extreme oil drilling, mining, pipelines, and refineries," the Beyond Oil website boasts (Beyond Oil: Dirty Fuels, 2014).

These efforts came together and climaxed in opposition to the Keystone XL Pipeline, which would bring Canadian tar sands from Alberta into the United States. (About The Project, 2014). Action against the pipeline involved letters to government leaders (Nicholas, 2014) and reports complaining about the State Department's environmental impact report about the pipeline (Layden, 2013). These suits include demanding the U.S. Army Corps of Engineers publicize its review of the pipeline (Rosenblatt, 2014) and



seeking injunctions that would stop TransCanada from moving forward with their project (Construction of Keystone, 2013).

The Sierra Club has also targeted different refineries and facilities with lawsuits, including the Baytown facility 25 miles outside of Houston, Texas. Baytown, owned and operated by ExxonMobil, is the second largest refinery in the U.S., but in 2010 Environment Texas and the Sierra Club sued Baytown over Clean Air Act violations (U.S. Energy Information Administration, 2014). Baytown officials defended themselves against the charge of over 2,500 infractions, claiming to have decreased total emissions by 58% since 2001 and pointing to the \$1.3 billion the company had invested into making the plant more environmentally friendly. Neil Carman, the clean air program director for the Texas chapter of the Sierra Club, said they were unsatisfied and expected either a “landmark settlement case” that would change the American oil industry or they would take ExxonMobil to court (ICIS News 2010). ExxonMobil failed to have the case dropped, and the case was brought to court in early 2014 (ICIS News 2013). By this point, the Sierra Club and Environment Texas had settled similar cases with Shell, Chevron, and ConocoPhillips (Osborne, 2014).

## BEYOND GAS

The third aspect of Moving Beyond Fossil Fuels targets natural gas. Many environmental groups advocate natural gas as a reasonable bridge between oil and coal to renewable energy. The Sierra Club, though, became very resistant to natural gas, especially hydraulic fracturing, or “fracking,” in 2010 when Brune took over as executive director.

Beyond Gas appears to be lower on the priority list than oil or coal, but the Sierra Club has worked primarily through legislative efforts to limit the impact of fracking. Litigation has played some role, although mainly in state courts. Still, in 2013, the Sierra Club and the Center for Biological Diversity won a lawsuit temporarily blocking fracking in Monterey County, California (Hennessey, 2013). As stated, there have also been numerous lawsuits in state and local courts relating to fracking, although EAJA played no role in these lawsuits.

*Time* sparked controversy in 2012 when it reported that in a period of three years, the Sierra Club had received over \$25 million in donations from the natural gas industry, primarily from the CEO of Chesapeake Energy, Aubrey McClendon, to support the Beyond Coal campaign. Before Brune, the Sierra Club was among those groups advocating the use of natural gas in the transition away from coal at exactly the time of these donations. Brune did say that the Sierra Club has ceased receiving money from these funders since he took over (Walsh, 2012).

## GENERAL EAJA AND SIERRA CLUB FIGURES

Because of both the enormity of the Sierra Club’s litigation efforts and the implications of the 1995 Federal Reports Elimination and Sunset Act, it is impossible to give an accounting of each time this \$79 million organization has received taxpayer support for its lawsuits.

However, it is worth briefly covering some of the awards that *are* known. In 2011, the Government Accountability Office prepared a report of lawyer fees paid out of the Judgment Fund and other EAJA payments coming from lawsuits against the EPA from 2002-2010.

The GAO emphasized some of its own limitations in the report, saying, “Currently, no aggregated data on such environmental litigation or associated costs are reported by federal agencies. ... [The Justice] department’s decentralized data management systems make it difficult and costly to gather data across divisions” (Government Accountability Office, 2011, p. 2). The GAO continues, “For both Justice databases, we assessed the data and found them to be sufficiently complete and accurate for the purposes of this report. When certain case information was found missing or incorrect in some of the data fields, we did additional research on these cases using the federal courts’ electronic records database and corrected the data” (Government Accountability Office, 2011, p. 4).


One of the most striking figures pertaining to the Sierra Club is the \$155,000 payment to Reed Zars, an environmental lawyer who worked with the Sierra Club and Our Children’s Earth Foundation in their lawsuit against the EPA in 2004. The Sierra Club and the Mid-Atlantic Environmental Law Center were paid \$169,000 in a 2008 lawsuit against the EPA. In the 55 trials listed by the GAO that can be directly and specifically linked to the Sierra Club and the EPA, \$2,390,328 was given to cover lawyer fees and court costs. Although not directly related to the Sierra Club, Earthjustice is one of the leading environmental law firms, has been awarded \$1,458,358 in the 2002-2010 time period, including a single award for \$496,375.61.

In addition to the GAO report, Budd-Falen has done significant independent research in EAJA and found that between 1989 and 2009, the Sierra Club filed 983 suits against the federal government (Budd-Falen, 2009, p. 2). In a different report, Budd-Falen showed that from 2000 to 2009 the Sierra Club requested fees in 194 cases and was awarded more than \$19 million. We cannot know the exact amount because in two of the cases where they were awarded lawyer fees, the amount awarded remains totally unknown. An average of nearly \$98,000 of taxpayer money went to the Sierra Club in every case in which they were awarded fees. Perhaps even more disturbing, 64 of these awards were given without any court ruling on the merits of the case; one of these awards without proved merit was more than \$1 million dollars; another was half as much (Rexius, 2014, Personal Contact).

## CONCLUSION

EAJA was designed to help the little man stand up against the government. The Sierra Club, worth more than eleven times the EAJA net worth cap for businesses, cannot be deemed the little man. Even more, *Sierra Club v. Army Corp of Engineers* made it so they can partner with others who are not eligible EAJA. Ultimately, the Sierra Club Foundation, partnered with the Sierra Club, has been a poster child for wealthy 501(3)(c) organizations abusing EAJA.

The Sierra Club represents the problems from the elimination of reporting standards after the Sunset Act. The GAO—responsible for keeping the government accountable—is unable to gather complete information pertaining to EAJA. For other organizations such



as the Western Watersheds Project, which will be covered in depth later, litigation results are openly and proudly displayed to the public. While the Sierra Club claims to be the nation's leader in environmental litigation, they still do not emphasize their lawsuits in many of their publications. As EAJA currently stands, organizations like the Sierra Club are not held accountable for their use of litigation or their use of EAJA reimbursements.

In the end, the Sierra Club's influence in environmental litigation under EAJA is far greater than the amount of tax money used to pay their lawyers' salaries. As the largest environmental organization, they serve as a model for other organizations. They set a precedent through both court opinions and serve as a leader for the environmental activism community. Unfortunately, the Sierra Club is abusing EAJA, and other organizations are following suit.

## NATURAL RESOURCES DEFENSE COUNCIL

### A BRIEF BACKGROUND OF THE NATURAL RESOURCES DEFENSE COUNCIL

Founded in 1970, the Natural Resources Defense Council (NRDC) has been a litigation-focused environmentalist group from the beginning. They began as a group of environmentally conscious New York attorneys and Yale law students. NRDC has grown to become one of the largest and most influential environmentalist groups in the world. Their purpose "is to safeguard the Earth: its people, its plants and animals and the natural systems on which all life depends" (About Us, 2014).

The NRDC has grown rapidly since its inception in 1970. Their latest statistics list membership at 1.4 million members. They also have "the courtroom clout and expertise of more than 350 lawyers, scientists, and other professionals." In 2012, they claimed revenues of \$98,701,707 (Natural Resources Defense Council, 2014). In 2013, their revenues grew to \$123,255,679 and they held over \$200 million in net assets (About Us, 2014). Figures from 2009 show that their president alone received \$432,959 in compensation, with many of their executives falling not far below that (Budd-Falen, 2009, p. 3).

### NRDC AND THEIR INVOLVEMENT WITH EAJA

EAJA protects the Natural Resources Defense Council as a 501(c)(3) organizations, no matter its size. Therefore, despite hundred-million dollar revenues, the NRDC qualifies for fee reimbursements through EAJA.

Due to the lack of transparency regarding EAJA payouts, locating facts regarding the NRDC for this case study has proven extremely difficult and time consuming. Locating payout information on lawsuits under EAJA is a daunting challenge. The hardest part is pin-pointing where money for settlements is coming from. For example, in 2011 the NRDC was awarded attorney fees of \$4,390,776 (NRDC Financial Report, 2011). However, breaking that number down case by case is nearly impossible due to a lack of record keeping caused by the Sunset Act of 1995.

Thanks to the GAO report "Environmental Litigation," which was mentioned earlier, we can study the NRDC and their dealings with at least one government agency. The NRDC

was involved in no less than fifteen cases against the EPA between 2003 and 2010. Payouts to the plaintiffs in those fifteen cases totaled \$3,097,474.91. Of that \$3,097,474.91, the NRDC is listed as having directly received \$966,687.34. They, along with Earthjustice and the Sierra Club, collected 41% of all attorney's fees awarded to EPA litigants (Government Accountability Office, 2011).

Multiple people in Congress have weighed in on issues regarding the GAO's report. Rep. Cynthia Lummis (R-Wyo.) stated that the report "adds one more layer to a growing pile of evidence that proves the fleecing of Americans by some big, so-called environmentalist groups." Sen. David Vitter (R-La.) is quoted as saying that "Taxpayers have been on the hook for years while 'Big Green' trial lawyers have raked in millions of dollars.....we're not even sure how bad the problem really is" (Hurley, 2011). This report only highlights cases brought against the EPA and fails to cover the countless other government agencies which have been sued since EAJA was enacted.

## NOTABLE CASES INVOLVING NRDC AND EAJA


### NATURAL RESOURCES DEFENSE COUNCIL V. WINTER

Since the 1990s, the NRDC has focused on fighting the use of underwater sonar to protect marine animals from its harmful effects. They have actively opposed the Navy's use of sonar in training exercises, making several attempts to convince the Navy to re-think the way they train their soldiers. These attempts peaked in the early 2000's when the NRDC brought two lawsuits against the Navy almost simultaneously. Titled NRDC, Inc. v. Winter (referred to here as Winter I) and NRDC v. Winter (referred to here as Winter II), the two lawsuits cited near identical claims.

The NRDC first filed suit in 2006 (Winter I), attempting to halt naval training exercises off the coast of Hawaii designated by the acronym RIMPAC, or Rim of the Pacific. The NRDC claimed that the Navy's use of mid-frequency active sonar violated the National Environmental Policy Act, the Marine Mammal Protection Act, and the Endangered Species Act. The NRDC also requested a temporary restraining order (TRO). The TRO would prevent the Navy from holding training exercises until a settlement was reached, thereby curbing any damage done to marine life in the area.

The federal district court granted the TRO, which the Navy immediately appealed. While the RIMPAC TRO was on appeal, the parties entered a settlement. The Navy agreed to set aside a budget for research and implement measures to mitigate sonar use. In return, the TRO was lifted and training could resume.

Winter I's companion case, Winter II, is a nearly identical piece of litigation. It was brought forth around the same time, in the same court, by all the same plaintiffs but one, alleging the Navy's violation of all the same acts. The major difference is that the NRDC sued the Navy to stop training exercises off the coast of Southern California as opposed to RIMPAC. Winter II was ultimately heard in front of the Supreme Court who ruled in favor of the Navy in the interest of the country's safety (Natural Resources Defense Council v. Winter, Settlement, 2008, 05-cv-07513-FMC, pp. 3-5).



While Winter II was still in court, and after Winter I was dismissed, the NRDC filed a motion pursuant to EAJA and was eventually awarded fees totaling \$437,584.24 for their work in Winter I. Those fees included an increased hourly rate above the statutory cap of \$125 per hour because the district court determined that “the council brought distinctive skills unavailable at the statutory rate.” However, the Navy appealed the decision on three counts: the enhancement of attorney’s fees, the limited success of the court case, and the award of attorney’s fees for hours spent preparing the appeal of the TRO. In the Ninth Circuit Court of Appeals, the court ruled that the fees should be revised, stating “we affirm the district court’s findings with regard to the success of Plaintiffs and the right of the district court to rule on the Plaintiffs’ application for attorney fees on the appeal of the TRO. However, we VACATE the district court’s order and REMAND for further fact finding and fee determinations consistent with this opinion” (Natural Resources Defense Council v. Winter, 2008, CV-06-04131-FMC, p. 12968). In a settlement of fees in 2008, the Navy eventually paid \$1.1 million total to the plaintiff’s in the case, the NRDC receiving a large portion of that payout (Natural Resources Defense Council v. Winter, Settlement, 2008, 05-cv-07513-FMC, p. 13).

### **NATURAL RESOURCES DEFENSE COUNCIL V. SALAZAR**

In 2005, the Natural Resources Defense Council, in conjunction with Earthjustice attorneys, sued the Department of the Interior (DOI) and the Fish and Wildlife Services (FWS). They brought forth claims that a biological opinion submitted the year before by the FWS was “arbitrary and capricious.” The opinion dealt with the impact of two state water projects—the Central Valley Project and the State Water Project—on a threatened delta smelt in California.

The litigation process lasted for six years, after which a court order was issued forcing FWS to submit a revised, improved biological opinion. The victory was small, but the same cannot be said for the payout. The NRDC motioned for attorney fees far above the \$125 statute, claiming that the Earthjustice lawyers possessed “special expertise in environmental litigation.” The total amount awarded by the court, pursuant to EAJA, was \$1,906,500. The amount of this single reimbursement is larger than all reimbursements from both the Interior and Agriculture Departments in the entire thirteen years of reporting for both agency and court cases. It is also more than most total yearly payouts seen under EAJA from 1982-1994 (Baier, 2012, p. 44).

### **PACIFIC COAST FEDERATION OF FISHERMEN’S ASSOCIATIONS/INSTITUTE FOR FISHERIES RESOURCES V. GUTIERREZ**

In an almost identical case in 2006, the Pacific Coast Federation sued the DOI and FWS as well as the Department of Commerce. They claimed that the biological opinions about three salmonid species submitted in 2005 regarding the exact same projects were deficient (the Central Valley Project and the State Water Project). The Pacific Coast Federation used the same attorneys for this litigation as were used in the NRDC v. Salazar case. Again, citing “special expertise in environmental litigation,” the plaintiffs moved for increased rates on their EAJA payouts and were awarded a staggering \$2,193,550 for their work on an almost identical piece of litigation as NRDC v. Salazar (Baier, 2012, p. 45).

## CONCLUSION

In short, the good intentions that brought EAJA into law are being overshadowed by the gross misuse of EAJA by the Natural Resources Defense Council. Despite their financial stability and resources, they profit every year by suing the government and laying claim to fees proffered through an act created to protect “the little guy.”

## WILDEARTH GUARDIANS


### WILDEARTH GUARDIANS HISTORY AND BACKGROUND

WildEarth Guardians was originally founded as Forest Guardians in 1989 with the intent to fight a logging project at New Mexico’s Elk Mountain. As the Guardians grew, they saw other threats to the environment and proceeded to expand their protection. As well as fighting logging projects, the Guardians felt that cattle grazing was a threat to the Southwest’s waterways and launched a campaign to win public land leases from ranchers. The organization obtained leases, which allowed them to remove cattle and non-native invasive plants and restore native trees. When the drought of 1996 dried up 60 miles of the Rio Grande, killing off thousands of silvery minnows, a new effort was made push for water policy reform. In 2001, though they had been working to protect endangered species for years, the organization established an official endangered species program. The Forest Guardians continued to expand in 2007 when they started their climate and energy program, spurred on by oil and gas development on public lands. Forest Guardians became WildEarth Guardians in 2008 when the organization merged with Sinapu, a Colorado-based carnivore protection non-profit. 2013 marked a huge year for WildEarth as they merged with two additional organizations: Wildlands CPR from Missoula, Montana, and the Utah Environmental Coalition (WildEarth Guardians: History).

## ENDANGERED SPECIES ACT

President Richard Nixon signed the Endangered Species Act (ESA) into law in 1973. The intent of the law, as determined by the Supreme Court, is “...to halt and reverse the trend toward species extinction—whatever the cost” (Tennessee Valley Authority v. Hill, 1978, 437 U.S. 153). The act protects species that can be classified as either endangered or threatened. According to the U.S. Fish and Wildlife Service, “‘Endangered’ means a species is in danger of extinction throughout all or a significant portion of its range. ‘Threatened’ means a species is likely to become endangered within the foreseeable future” (U.S. Fish and Wildlife Service, July 15, 2013). According to the Endangered Species Act, the listing of a species can be accomplished in one of two ways. The Fish and Wildlife Service or the National Marine Fisheries Service administer the ESA and can list a candidate directly, or an individual or organization may submit a petition for a species to be listed. In order to be considered for listing, a candidate must meet one of the following criteria: a present or threatened destruction, modification, or curtailment of its habitat or range; an over utilization for commercial, recreational, scientific, or educational purposes; a decline of a species due to disease or predation; an inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence.





If the species qualifies, the two federal agencies then evaluate the petition to determine whether or not the information presented by the petition shows the species is in peril. If the petition does not present enough significant information, it is immediately denied. If it does, a screening period of 90 days begins (this only applies to organizations or persons that submitted a petition). A status review begins and the species threat is assessed and given a warranted, not warranted, or warranted but precluded result.

A warranted result means the agency has 12 months from the date of petition to propose the species be listed as threatened or endangered. Not warranted means the petition is denied. Warranted but precluded means that the petition on hold and defers it indefinitely until a warranted or not warranted result is determined. Within another year, the agencies make a final decision for that particular species.

WildEarth Guardians has taken advantage of this strict 12-month window by filing large petitions of 600 or more species at once. When the Fish and Wildlife Service fails to submit a report for all of the species within a year, the Guardians then sue the government for a failure to take action (WildEarth Guardians Seeks Federal Protection, 2008).

## WEG VS FISH AND WILDLIFE SERVICE

WildEarth Guardians' original strategy to protect species involved filing single, in-depth petitions for single animals or a group of similar animals to be listed as endangered (WildEarth Guardians: History). Under this strategy, the Fish and Wildlife Service (FWS) had ample time to research and make an informed decision on the appropriate course of action. But, WEG did not see the success rates that they felt like they needed, especially under the Bush Administration, so in 2007 they changed their strategy (WildEarth Guardians: History; Eilperin, 2011).

The United States federally protects 1,351 species under the ESA (Eilperin, 2011). In 2007, WEG filed for an additional 681 species to be listed as protected, a nearly 50% increase in protected species. Within 90 days, the FWS must determine if a petitioned species warrants further investigation to determine if protection is necessary (Woody, 2011). If the FWS does not meet that deadline, the petitioning organization can sue the FWS. Ninety days is an insufficient time to respond appropriately to the tidal wave of species that the WEG petitioned for, but under the strict timeline requirements of the ESA, the FWS could not fulfill its legal responsibilities. The FWS tried to respond to each petition within the time constraints, but the agency could not. Suits from WEG followed (Woody, 2011; Eilperin, 2011).

If the FWS determines that the listing of a petitioned species may be warranted, they must conduct a scientific investigation to confirm whether it is truly endangered or not within 12 months (Woody, 2011). The FWS did not have the resources and could not respond appropriately to the incredible volume of petitions filed by WEG. Gary Frazer, the Assistant Director of the Endangered Species Program for the FWS, said, "These megapetitions are putting us in a difficult spot, and they're basically going to shut down our ability to list any candidates for the foreseeable future. If all our resources are used

responding to petitions, we don't have resources to put species on the endangered species list. It's not a happy situation" (Woody, 2011).

WEG and its partner, the Center for Biological Diversity, sue the FWS for not meeting the ESA's 90 day or 12 month deadlines under the Administrative Procedure Act which allows a party to "compel an agency into action" (5 U.S. Code § 706 – Scope of review). The FWS bears an enormous cost of litigation fees, and to meet those costs the budget of the FWS increased by 11 percent from 2011 to 2012 and by 28 percent from 2009 to 2012. Daniel Rohlf, associate professor at Lewis and Clark School in Portland, Oregon, says, "...the budgets for Fish and Wildlife Service have not even been close to keeping up with the demands on the agency" (Woody, 2011).

The "megapetitions", as Frazer puts it, are immobilizing the FWS. The WEG claims that this is their best strategy. They state their position as, "We want to compel the Fish and Wildlife Service to look at the full extent of the extinction crisis in the United States. We would like a system where the Service is actively looking for species that merit protection rather than the current system where groups like ours have to drive this process" (Woody, 2011).

The results, however, seem contrary to the goal of WEG. In 2010, the FWS spent the majority of their \$21 million budget on litigation and responding to petitions (Eilperin, 2011). How can we expect the FWS to defend species when they spend most of their money defending themselves in court? Even the peers of WEG see their actions as unhelpful. Bob Irvin, senior vice president for conservation programs at Defenders of Wildlife in Washington said "It is undoubtedly the case that the resources and the staffing for the Fish and Wildlife Service are inadequate. The question is, is tying the service in knots the best way to save the web of life?" (Woody, 2011).

Both WEG and The Center for Biological Diversity are multimillion-dollar nonprofits with a substantial portion of their income from grants from the government. The government gives these organizations taxpayer money, which they use to sue the government. In many cases, fees are partially or fully reimbursed to them upon winning a case under EAJA. In fact, in 2009 the Center for Biological Diversity raised \$7.5 million dollars, \$1.7 million of which was labeled as "legal returns." In 2010, they received \$6,635,167 from EAJA funds, which is a phenomenal return considering their total revenue in 2013 was just shy of \$10 million (Budd-Falen, Karen, 2009). In 2010 WEG requested legal fees be paid under EAJA in 101 cases and they received over \$1 million which is a refund of 60 percent of their expenses for that year (WildEarth Guardians, Budd-Falen, Karen, 2009).

It seems that EAJA has created a system where groups like WEG jump much too eagerly into legal battles and are rewarded for it. These groups want to see species protected, but the results show that they are backlogging the system, and the money shows that they are getting paid to do so.



## WESTERN WATERSHEDS PROJECT ORGANIZATION

Western Watersheds Project (WWP) emphasizes environmental activism in the public lands throughout the Western United States. A favorite target of the WWP legal team has been ranching on BLM and other public lands, citing violations of the Endangered Species Act, the Clean Water Act, and the National Environmental Policy Act.

The WWP is unique from other nonprofit activist groups covered in this. One notable aspect is how young and relatively small the organization is. Founded in 1993, the WWP only has 1,400 members (About WWP, 2014) and in 2012 had net assets of only \$858,990 (Internal Revenue Service, 2012(b)). Contrast that with the hundred-year-old Sierra Club and their \$79 million net worth. Another important distinction is their attitude towards litigation. The Sierra Club does not openly boast of their litigation, but the WWP is very vocal about their legal work. An entire section on the “About WWP” page of their website is devoted to courtroom victories, with numerous links detailing individual lawsuits (About WWP, 2014). Their website goes as far as boasting, “No other conservation group has such an ambitious public lands grazing litigation program” (Lucas, 2007).

When EAJA was passed, it was designed to enable individuals and small organizations the ability to stand against government abuse. As such, there were maximum net worth caps for both individuals and for small businesses. A special exception was made for 501(c)(3) non-profit organizations. This exception makes it possible for the Sierra Club to manipulate the system and receive lawyer fees despite being more than ten times the size of an eligible business. WWP, though, fits well within the \$7 million limit, even if it were for-profit. The issue is WWP could not fund their legal program without EAJA, and as such they have filed a very disproportionate number of lawsuits. These lawsuits are regularly over frivolous and procedural issues.

As in most other cases, the direct connection between individual cases and EAJA is nearly impossible to draw. There is no central reporting, so unless lawyer fees are mentioned specifically in the court opinion, they are entirely elusive. However, some statistics on the WWP’s use of EAJA money *are* known, especially in a general sense. There is also plenty of information about their litigation. Bearing in mind their financial limitations, the numerical data we have about WWP’s reception of EAJA reimbursements make clear that fee-shifting statutes like EAJA are what have kept WWP up and suing. This case study examines multiple lawsuits where the WWP stood as the plaintiff as well as available EAJA connections.

### 2014 LAWSUITS

The purpose of the list below is to show the frequency of WWP’s federal lawsuits by covering a number of suits in 2014 alone rather than focusing on the merits or lack thereof in each case.

In July 2014, WWP sued the U.S. Forest Service and Clint Kyhl, the Forest Supervisor of Bridger-Teton National Forest, for their decision to issue a permit to the Wyoming Game and Fish Department that allowed the Game and Fish Department to perform winter feeding for elk on public forest lands. The lawsuit claims the permit violates a list of laws and asks that the court stop the Forest Service from allowing the feeding to occur. It also requests the court to “award petitioner reasonable fees, costs, and expenses, including attorney’s fees, associated with this litigation” (Western Watersheds Project v. United States Forest Service, Petition, 2014, p. 4).

In June 2014, WWP sued the Governor of Idaho and the Director of the Idaho Department of Fish and Game for allowing trapping in an area known to be home to the Canada Lynx, a threatened species according to the ESA. This trapping program resulted in the incidental trapping of at least three lynx, one of which was killed while the other two were released. The lawsuit reads, “In Idaho, there is no open season for lynx. In Idaho, trapping is allowed for animals such as bobcat, beaver, muskrat, mink, marten, otter, and wolves. In Idaho, animals such as bobcat, beaver, muskrat, mink, marten, otter, and wolves inhabit lynx habitat. In Idaho, trapping is not disallowed in occupied lynx habitat, lynx critical habitat, and habitat for lynx in the state” (Western Watersheds Project v. Otter, Complaint, 2014, 1:14-cv-00258-BLW, p. 8). WWP requested that the courts declare the defendants to be in violation of the ESA and order that trapping laws be revised to protect the lynx. Further, they asked that the court “award plaintiffs their costs and expenses of litigation, including reasonable attorney’s fees pursuant to 16 U.S.C. § 1540(g), or any other provision.” The code referenced specifically is from the ESA, but “any other provision” could potentially include EAJA (Western Watersheds Project v. Otter, Complaint, 2014, 1:14-cv-00258-BLW, p. 11).

Also in June 2014, WWP joined with other environmental groups in suing the Fish and Wildlife Service (FWS) over the Sheep Experiment Station in Montana. Earlier in the year, the FWS published a biological opinion stating that the station, run by the Department of Agriculture, had no evident impact on local grizzly bears. The plaintiffs claim to have evidence obtained through a Freedom of Information Act request that says grizzly bears interacted with the station more than the FWS’s biological opinion (BiOp) had suggested, potentially including the death of one bear (Cole, 2014).

In March 2014, WWP joined with a unique set of plaintiffs. Alongside other environmental groups and other organizations such as the American Civil Liberties Union, WWP filed a lawsuit against Idaho’s so-called “Ag-Gag” law. This law, which was signed by Idaho’s governor earlier the same year, criminalized hidden filming of agricultural facilities (Statesman Staff, 2014).

In January 2014, Jeff Gould, Chief of the Wildlife Bureau of the Idaho Department of Fish and Game, agreed to cease wolf population control plans conducted in the Middle Fork Management Zone of central Idaho. He reported that nine wolves had been killed since the program started the month before (Maughan v. Vilsack, Declaration, 2014, 4:14-cv-00007-EJL). This came after WWP and its co-plaintiffs filed for an emergency injunction to stop the program from proceeding the week previous. In this request, they said the program was going to cause irreparable harm and therefore needed to be halted while other legal proceedings occurred (Maughan v. Vilsack, Emergency Motion, 2014).

## LANDMARK AND OTHER SIGNIFICANT LAWSUITS

The previous section shows the frequency of WWP's litigation rather than necessarily emphasizing the importance of each case. This section will delve deeper into the impacts of some specific lawsuits.

*Western Watersheds Project v. Lane* was settled in 2009 after about two years of legal battles. Early in the case, WWP requested and was approved to have the case heard by Judge B. Lynn Winmill who has been a favorite of WWP. After a few amendments to the original suit, the parties eventually drafted and signed a settlement agreement (Budd-Falen, 2009, p. 1) which “permanently discontinu[e]” categorical exclusions to renew term grazing permits (*Western Watersheds Project v. Lane*, 2009, 07-cv-394-BLW, p. 2). As Karen Budd-Falen pointed out, there were no interveners in this lawsuit, meaning no one from the ranching community was there to defend the ranchers' perspective. It was only the BLM and WWP. Budd-Falen also emphasized that while the lawsuit focused on NEPA violations, it is clear that WWP's goal with the lawsuit was the same as their goal in general: to rid public lands of cattle grazing. So while the interests of WWP's targets were not even represented, the BLM settled the case and moved on (Budd-Falen, 2009, p. 2). On top of that, WWP's lawyers were then paid \$43,000 through EAJA (*Western Watersheds Project v. Lane*, 2009, No. 07-cv-394-BLW, p. 3).

One of the major focuses of WWP's environmental litigation is over simple procedural issues rather than the environment itself. In a 2009 lawsuit, WWP desired to have mountain whitefish residing in the Big Lost River be listed as either threatened or endangered. In order to do this, however, it had to be listed as its own subspecies or even species, which is exactly what WWP's petition requested. FWS went through the process and found that the Big Lost River whitefish was not distinct enough to be listed as a different subspecies (*Western Watersheds Project v. Kempthorne*, 2009, CV07-409-S-EJL, p. 2). However, in the process of writing their 90-Day Finding in response to WWP's petition, FWS contacted a third party expert for advice on the Big Lost River whitefish, something not allowed according to ESA legislation (*Western Watersheds Project v. Kempthorne*, 2009, CV07-409-S-EJL, p. 10). When WWP took FWS and Secretary of the Interior Kempthorne to court over this, the judge offering the opinion stated, “The Court has not and does not second guess the Service's conclusions reached in the 90-Day Finding. However, the Service has already considered extraneous material and that bell cannot be unrung.” As such, the court ruled, “The only solution is to now proceed with the ESA process” and open the discussion up to the public while requiring FWS to publish a 12-month Finding (*Western Watersheds Project v. Kempthorne*, 2009, CV07-409-S-EJL, p. 16-17).

Another route WWP often takes in their lawsuits is demanding administrative action in a way that puts a halt on ranching and cattle grazing. In 2013, WWP settled with FWS, NOAA Fisheries, and the U.S. Forest Service, among others, requiring a new BiOp examining the effects of cattle grazing in the Camas Creek area. WWP holds that grazing is harmful to bull trout, Chinook salmon, and steelhead, particularly because cattle walk through the fish egg habitat (Score One for Native Fish!, 2014). The settlement not only

mandated further research and halted any grazing until new BiOps are published, but also awarded WWP with \$105,000 in attorneys' fees and court costs. (*Western Watersheds Project v. U.S Fish and Wildlife Service*, Judgment, 2013, 4:12-cv-00197-BLW, p. 5-6).

One of WWP's most important landmark cases resulted in 800,000 acres of public BLM land in Idaho being closed off from livestock. WWP challenged BLM policies in the Jarbridge Resource Area, particularly concerning cattle grazing, saying the cattle were responsible for a steep decline in sage grouse population in the area. Winmill, the judge hearing the case, sided with WWP, despite studies cited by BLM suggesting that the condition of the area being discussed was actually improving. With Winmill's decision, all livestock had to be removed from the Jarbridge Resource Area until the BLM had prepared a comprehensive environmental impact statement (EIS) (*Western Watersheds Project v. Bennett*, 2005, 392 F.Supp.2d 1217-1230). The Associated Press spoke with Lloyd Knight of the Idaho Cattle Association soon after the decision and reported that "ranchers were scrambling" to find other ways of feeding their livestock (*Ranchers Told to Move*, 2005).

On multiple occasions, WWP has filed lawsuits that affected all 160,000,000 acres of BLM land and the members of the public who use them. Among the most notable of these was a lawsuit that was finalized in 2011 when the Supreme Court denied a request from the Public Lands Council to reconsider the appeals court's decision to effectively reverse the Bush Administration's changes to BLM grazing regulations after a legal battle going back to 2006 (*U.S. Supreme Court Ends Bush-Era Grazing Regulations*, 2011).

In September 2011, Judge Winmill again ruled in favor of WWP in their lawsuit against Ken Salazar, the Secretary of the Interior. The case began with a challenge of sixteen BLM resource management plans and their environmental impact statements. To streamline the court procedures, the BLM and WWP agreed to first go over two "test cases": Pinedale, WY and Craters of the Moon, ID. WWP targeted the Wyoming location specifically concerning its plans for natural gas and oil development. Although the Pinedale Anticline is the third largest natural gas reserve in the country, Winmill ruled that there was too large of a threat to sage grouse populations in the area. Likewise, he ruled that grazing policies in Craters of the Moon were also detrimental to sage grouse habitat. Todd Tucci, one of the attorneys for the plaintiffs, called this a "groundbreaking victory," emphasizing that it was more than just a battle over procedures (Taylor, 2011).

## LITIGATION AND EAJA

WWP emphasizes the West, particularly Idaho where it is headquartered. As such, the vast majority of their lawsuits have gone through the Federal District Court in Idaho. They seem to have also selected their favorite judge, B. Lynn Winmill, who was briefly referenced earlier.

In an opinion piece, Patrick Dorinson (2009) wrote, "In the last 10 years in one Federal District Court in Boise, Idaho, Western Watersheds Project has received \$1,150,528.00 of your tax dollars for their jihad against the ranchers and sheep men. They have a found

judge in that particular court who has been particularly accommodating to them and who seems to have his thumb on the scales of justice in their favor.”

Range Magazine elaborated on the same subject, “Specifically, the Falens report that WWP filed 91 lawsuits, including 31 federal appellate cases from 2000 to 2009, and they specifically dug into 19 cases in federal judge B. Lynn Winmill’s court in Boise. Of those, WWP collected in only eight decisions won on merit, plus six that were settled, pulling down at least \$999,190 in Equal Access to Justice Act loot.” The author then adds that the Falens found that WWP didn’t need to list these reimbursements as income on their taxes because they would have the money given directly to their attorneys. As such, in 2010 and 2011, they were able to list “other income” from these reimbursements as zero (Skinner, 2013, p. 41).

As Dorinson noted, WWP was awarded \$1,150,528 in lawyer fees from 2000-2009. This was only awarded from the Idaho District Court, where they filed 45 lawsuits and requested lawyer fees in 26 instances (Rexius, 2014, Personal Contact).

Interestingly, Skinner reports that WWP in recent years has spent between \$400,000 and \$600,000 “monitoring,” or deliberately seeking actions which could be litigated against (2013, p. 43). Largely in response to this monitoring, in June 2014, fifteen landowners filed a lawsuit against WWP for trespassing (Wyoming landowners file trespass lawsuit, 2014). The lawsuit lists about two dozen instances where WWP employees or volunteers trespassed on private property, including two instances where the GPS coordinates provided by the WWP as the source of water samples prove WWP staff trespassed (Dixon, 2014). Karen Budd-Falen, who is representing the plaintiffs in this suit, explained, “Landowners are not comfortable having an extreme, biased organization that has not demonstrated the professional qualifications to collect credible data, trespassing their lands” (Wyoming landowners file trespass lawsuit, 2014).

## OWYHEE 68

Tim Lequerica is a full time rancher living in Southeastern Oregon. His ancestors were Basque immigrants who moved to the United States in the early 1900s, and his family has worked in the livestock industry ever since their arrival in the Owyhee River area not long after. Tim Lequerica continued the family tradition, but in 1998 environmental groups threatened his lifestyle.

His 320-acre ranch in Malheur County, Oregon, is completely surrounded by BLM land. His company, Lequerica Brothers, holds a permit to graze 444 cattle on the BLM Saddle Butte Allotment from November 1 to February 15 (Lequerica). Lequerica used the Owyhee River to give water to his thirsty cattle, which his family had been doing so for over eighty years. In 1984 Congress named the Owyhee River as a Wild and Scenic River. Fortunately though, Congress recognized Lequerica as a good steward to the land and allowed him to continue using the Owyhee to sustain his herd (Lequerica).

In 1998 however, the Oregon Natural Desert Association (ONDA) and the Western Watersheds Project (WWP) caught a BLM paperwork error pertaining to the Owyhee river area and used this to sue the BLM to refile the paperwork that reviews the grazing

practices on the Saddle Butte allotment (National Cattlemen's Beef Association). ONDA and WWP also sued the BLM on the grounds that the BLM “fail[ed] to protect streams, fish, sage grouse, and other Owyhee resources” by allowing ranchers to use the Owyhee to water their cattle (The Saga of Grazing Reform, 2014; Western Watersheds Project, online message #44). In the end, the WWP and ONDA won their case, and Lequerica had to stop watering his cattle at the Owyhee where he and his family had grazed and watered their cattle for nearly a century (National Cattlemen’s Beef Association).


Even though Lequerica and other ranchers lost their right to direct access to the Owyhee, they came up with a solution where they would pump water from the river and avoid having cattle damage the ecosystem, which the BLM approved (Lequerica). In the end, Lequerica wound up paying over \$42,000 of his own money in legal fees fighting to protect his business. The WWP and ONDA, however, had their legal fees, totaling \$128,000, *voluntarily* paid for under EAJA (Lequerica).

Lequerica’s experience directly contradicts the intent of EAJA, where the larger, more financially capable interest groups received refunds while the small business owners bore the cost of the legal fees. In fact, Laquerica’s own tax money paid for the legal fees of the people who tried to put them out of business (Western Watersheds Annual Report 1998; Oregon Natural Desert Association 2011 Annual Report, 2011). Lequerica summarized his own experience, saying, “My tax money paid for every part of the litigation. I paid my personal attorneys to represent me; my tax dollars paid the federal government who failed to do all the paperwork correctly; and my tax dollars paid the WWP and ONDA to sue the federal government” (Lequerica).

Tim Lequerica is not alone though. The Idaho Federal Court has awarded WWP over \$746,000 by 2009 in EAJA returns (Putnam, 2009). Ranchers and attorneys alike accuse the WWP and similar organizations of cherry-picking cases that will bring in money from EAJA. U.S. Attorney Mark Haws said, “I’m not going to point fingers at WWP, but there are organizations out there that are just sitting there scrutinizing, watching every decision an agency makes waiting for that ‘low hanging fruit’ to jump on— just to get fees” (Putnam, 2009). Many ranchers feel that they are getting treated unfairly because, in most cases, they have to pay out of pocket to fight litigation by non-profit interest groups that are often funded by grants from the government and then receive reimbursements through EAJA. It is a lose-lose situation for ranchers. Ted Higley, a rancher in Malta, Idaho, summed up ranchers’ frustration by saying, “It’s atrocious, as a private operator I can’t gather that kind of money to fight anything like that. If they’re going to fight personal causes it should be with their personal money, not government money” (Putnam, 2009).

Two other ranchers in Owyhee county, Tim Lowry and Paul Nettleton, also faced crippling legal fees after the BLM attempted to claim the water rights to their ranches which had been established and utilized by the ranch, long before the BLM was founded (Fundraiser Underway, 2008). A ten year legal battle ensued for these rights before the ranchers finally won. EAJA was intended “to make sure that a party cannot be harassed by unjustifiable government activity solely because of the prohibitive expense of attorneys’ fees” and “to protect the small business community from governmental overreach.” These ranchers, however, were not granted a single penny from the act and were straddled with a \$1.5 million bill to pay (Baier, 2012, p. 2; Fundraiser Underway, 2008).





Ranchers, it seems, are often tangled in battle with those who gain from EAJA the most, but do not receive any sort of parallel treatment. In many cases EAJA is not providing support for those it was intended, and is actually providing this support to benefit the ideologies of well-funded environmental groups and probably more importantly their lawyers

## SUE AND SETTLE

One particularly noxious use of EAJA by environmental organizations is “sue and settle” suits. Environmental organizations files suits against (but also in tandem with) the EPA, for the purpose of strong-arming state governments into desired regulatory action. These suits allow EPA’s discretionary duties to become court-ordered and legally binding, stripping states of shared authority, and shifting any regulatory blame from the EPA to the courts. The environmental activist attorneys involved in these suits are often paid via EAJA payouts, as well as through other more specific fee-shifting statutes.

“Sue and settle” is a process through which an external organization sues a government agency, and, rather than going on with the typical litigation process, the two parties form a settlement agreement. They then file it with the court as a “consent decree,” which grants the agreement the full legal force of an ordinary court judgment. However, the Environmental Protection Agency has conspired with major environmental organizations to craft lawsuits in which environmental organizations such as the Sierra Club, Natural Resource Defense Council, or the WildEarth Guardians, among others, sue the EPA. These lawsuits are potentially filed via the agency’s revolving door, through which environmental groups’ employees end up working for the EPA and vice versa (Samuelsohn, 2009). The EPA then enters a consent decree with the suing party and files it with the court, sometimes the same day as the filing of the complaint (*Defenders of Wildlife v. Perciasepe*, 2013, 1:10-cv-01915). The judicial proceedings for these consent decrees are quick, legally binding, and often shut out interested and affected parties. The entire process effectively reduces the public visibility of the regulatory change and minimizes the risk of state or private party intervention in the expansion of regulation (Butler & Harris, 2014).

For example, after New Mexico missed an initial deadline set by the EPA for each state to submit a Regional Haze State Implementation Plan, WildEarth Guardians sued the EPA, alleging that the agency had failed in its duty to either sign off on a State Implementation Plan or assign a Federal Implementation plan pursuant to the Regional Haze Rule, which regulates air visibility and health quality. The resulting consent decree bound the EPA to action no later than August 5, 2011. The EPA then suggested its Federal Implementation Plan on January 5, 2011, well before the consent decree’s deadline. New Mexico issued a revised State Implementation Plan on July 5, 2011, still a whole month before the consent decree’s deadline. However, the EPA refused to consider New Mexico’s revised plan, because the agency claimed they could not “consider it and meet the consent decree deadline” (Federal Register, 2011). In this way, the EPA was able to remove New Mexico from having any authority over a statutorily state-centric decision process.

While most of today’s “sue and settle” cases are targeted towards the Clean Air Act, which includes fee-shifting statutes even more available than EAJA, almost all other

administrative environmental laws, including the regulatory monolith National Environmental Policy Act, are open to consent decree fee-shifting exploitation under EAJA (*Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 2001, 532 U.S. 598). Consent decrees are not necessarily cheaper than traditional lawsuits either. In one 2002 case, the Northwest Environmental Advocates, Center for Marine Conservation, and San Francisco Baykeeper were paid \$88,901.69 following a consent decree in the 9<sup>th</sup> Circuit (*Northwest Environment Advocates v. Environmental Protection Agency*, 2003, 340 F.3d 853). Some consent decrees do not bother to name a specific dollar amount. In a consent decree resulting from *Coal River Mountain Watch v. Kempthorne*, the federal defendants, including the directors of both the Department of the Interior and Environmental Protection Agency, agreed to pay “reasonable ... fees and costs to the Coal River Plaintiffs and NPCA” pursuant to the Endangered Species Act, Surface Mining Control and Reclamation Act, and/or the Equal Access to Justice Act, and failed to name a single relevant law’s fee schedule or define a reasonable amount (*Agreement to Settle*, 2010).

The EPA has found a court workaround to Congress, and is colluding with environmental activist organizations to utilize fee-shifting statutes, including EAJA, to facilitate these court workarounds. As long as environmental groups have access to free litigation, there is little to no risk in EPA-activist cooperation in the steady withering of environmental federalism.

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