Western Legacy Alliance

House Judiciary Committee Subcommittee
Courts, Commercial and Administrative Law

Hearing regarding:

H.R.-1996- Government Litigation Savings Act

October 11, 2011

Testimony for Western Legacy Alliance will be presented by:

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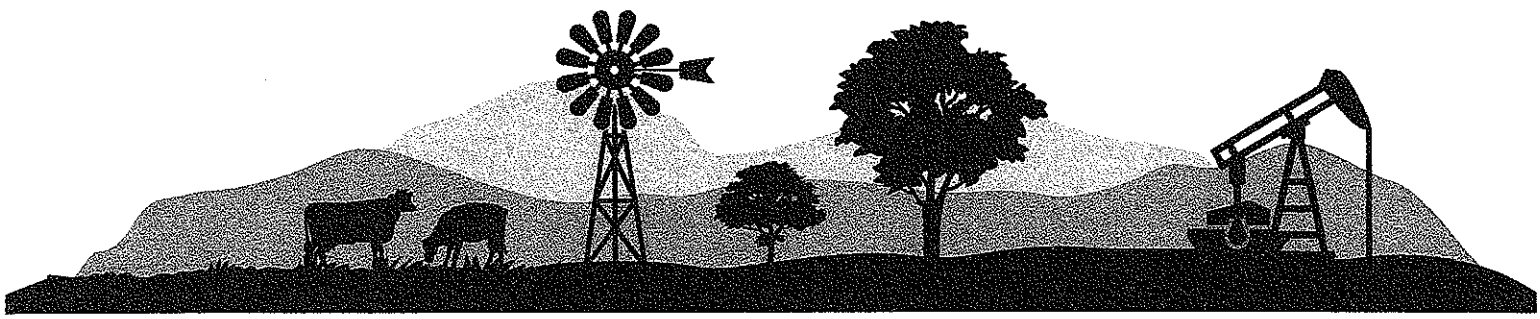
Jennifer R Ellis



Subcommittee on Courts, Commercial and Administrative Law

House of Representatives Committee on the Judiciary

October 11, 2011

Western Legacy Alliance (WLA) would like to thank the Chairman, and the members of the Subcommittee, for this opportunity. Please consider this the written submission of testimony regarding the Government Litigation Savings Act (GLSA) presented on behalf of the membership and board of directors of the WLA. We feel the reforms proposed in GLSA are necessary to stop ongoing abuse of well-intended legislation.

The Western Legacy Alliance sprang out of a need to bring modern, targeted research and public relations to natural resource conflicts on federally-managed lands. A volunteer, grass-roots organization housed in Moreland, Idaho, WLA has been in place since 2007, with membership and support ranging from across the nation. Our mission was the preservation of economically viable access to federally-managed natural resources which are integral to so many rural communities, primarily in the Intermountain West. We advocate for the ongoing multiple-use of Public Lands, as well as for private property rights relative to natural resources, representing farmers, ranchers, sheep producers, sportsmen, recreationists, dairymen and other similarly aligned groups. As our effort has evolved, we hope to empower agencies, state and local governments, and those private individuals who rely so crucially on access to Federally-managed natural resources, by bringing our unprecedented research to bear on the culture of litigation which currently paralyses responsible management in all those areas where Federal regulations apply.

WLA initiated the first serious discussions within the Western Caucus regarding the potential abuse of the Equal Access to Justice Act (EAJA) and other attorney-fee-shifting statutes in 2009. Our legal research unearthed broad and ongoing trends in the use of EAJA claims in the area of natural resources-related litigation, yet brought forth more questions than answers regarding the basis for implementation of EAJA settlements. Most surprisingly, WLA found that there has been no accounting for these awards since 1995. We have continued to fund research which reveals a need for the restructuring of EAJA, research which would result in the introduction of the Open EAJA Act of 2010, and in the Government Litigation Savings Act now before you.

Western Legacy Alliance strongly urges the Committee to move this vital legislation forward. Please consider the following rationale for our support.

Government Litigation Savings Act – Section 2: A (1) Eligibility Parties-Attorneys Fees

This section Adds "who has a direct personal or monetary interest in the adjudication, including because of personal injury, property damage or unpaid agency disbursements" as a requirement for the reimbursement of attorneys fees

We believe that the EAJA was created to protect individuals and small businesses from an overzealous application of law by federal agencies. According to testimony offered by members of the House of Representatives in support of EAJA, the purpose of the bill was to "equal the playing field" when American citizens had to file litigation against the federal government. For example, Congresswoman Chisholm (D-NY) testified that the bill encouraged an "affirmative action approach" to bring in those who had been "locked out of the decision making process by virtue of their income, their race, their economic scale or their educational limitations." Senator Edward Kennedy (D-MA) testified that the bill would ensure that federal agencies followed the will of Congress. Representative Joseph McDade (R-PA) stated that the bill would help to improve a citizen's perception of his relationships with the federal government because it would require federal agencies to justify their actions and to compensate the individual or small business owner when the government is wrong. Clearly, the intent of EAJA was to curb unreasonable and excessive regulations, not to be a tool for adding regulatory burden on small businesses and individuals.

However, as EAJA has evolved, it has become a mechanism by which some special interest groups, usually 501c(3) Non Profit's, have been able to force, and to fund, the implementation of their political and social agendas with regards to environmental, natural resource, and public land management. These groups use unending obstructionist litigation, mainly targeting the unwieldy statutory requirements for establishing Federal policies and actions, rather than the science and methods informing those policies, to hold up necessary and economically productive projects. In cases in which these groups prevail, or as a condition of mutually negotiated settlement in many other cases, they are awarded, under the auspices of EAJA, court costs and attorneys fees, thus funding their next round of litigation. The practical effect of this EAJA established pot of "free" funds for litigation has been to create a litigious phenomenon which takes the management of natural resources away from Congress and the Federal Agencies who are rightfully empowered to implement congressional directive, and thus enabling "legislation from the bench", at taxpayers' expense.

This problem becomes particularly apparent when one considers the sheer volume of litigation against the procedural time frames in the Endangered Species Act ("ESA") or the National Environmental Policy Act ("NEPA"). Neither the time frames in the ESA or the process in NEPA require the federal agencies to reach a particular substantive result; however, litigation over these Acts is filed en masse even though the only action the Court can take is to require the agency to make the decision over again. Thus, the above language is necessary to curb the onslaught of non-substantive appeals and lawsuits filed by special interest groups, and to bring the bill back to its original Congressional intent.

For example, under the ESA, Department of the Interior's Fish and Wildlife Service ("FWS") or the National Oceanic and Atmospheric Administration - Fisheries Division ("NOAA") are required to make a finding on every petition to list a potential threatened or endangered species within 90 days of filing. If such a scientific finding by the federal agencies is not made and published in the Federal Register within that 90 days, the petitioner can file litigation to force such a finding be made. The federal court can require that the federal agency publish its finding—but the court cannot determine if the species should be listed as threatened or endangered by the federal agency. However, even though no substantive finding related to the status of the petitioned species can be made by the court, the petitioner can

nonetheless receive payment of attorney's fees simply because the federal agency missed a time deadline. Clearly this example does not fit with the idea that the payment of attorney's fees was to "equal the playing field" and provide relief to those who had been "locked out of the decision making process by virtue of their income, their race, their economic scale or their educational limitations."

During a previous discussion of EAJA in the Judiciary committee a remarkably insightful comment was made: "EAJA will end up encouraging those with the least financial interest in the outcome to litigate for their own interests and will encourage insubstantial claims." That is exactly what has happened, as is evident by the routine awarding of attorneys fees to non-profit groups who have sued only on the basis of missed deadlines or other processes, rather than on the basis of substance or merits.

(B) In subsection (b) 1:

"Striking $125 an hour and replacing with $175 per hour"

A: "inserting- shall reduce the amount to be awarded, or deny an award, commensurate with pro bono hours and related fees and expenses"

We realize that $125 an hour is indeed low in today's economy to retain an attorney. Social Security benefits plaintiffs, for whom the law was designed, are usually left owing their attorney's after the EAJA award. When small businesses or individuals hire an attorney, money actually changes hands, bills are sent to the client and bills are paid by the client, thus the need for attorney's fees EAJA reimbursement. However, many special interest groups never actually pay a bill as they use "pro-bono environmental law firms" who do not charge them other than minuscule hard cost recovery i.e.: copies, filing fees etc. For example, based upon the IRS 990s for one bro-bono special interest law firm in Boise, Idaho called Advocates for the West, over 60% of its total revenue came from payment of attorneys fees from the federal government . During 2009, PACER court documents for attorneys for Advocates for the West requested $300 per hour for supervising attorneys in the pro-bono firm.

A related problem is that the IRS 990 forms do not match with either (1) the actual documents that are filed in the various court cases or (2) the federal government reaches a "confidential" or sealed settlement agreement on attorney's fees. For example, upon reviewing 40 sampling cases filed in the Federal District Court for the District of Idaho for this same special interest group the actual hourly rate for the attorney's fees was listed only three times. No itemized bills were submitted as part of the court record in these cases, making it impossible to know if the work and hours compensated by EAJA were relevant to the case at hand or were ever performed at all. Likewise, the check disbursements from the Department of Treasury were nonsensical. The pro bono law firm was paid 14 times, the principle partner in the pro bono law firm was paid 4 times and the actual plaintiff paid 2 times. In the above cases the EAJA fees were only litigated once, meaning that only one case had judicial oversight, the others were done in stipulated settlements with no judicial oversight.

Limitation of Award, Section 504

It is WLA's contention that without a limitation on awards to an entity within a calendar year or a monetary cap there is no practical way to bring the attorney-fees-shifting statutes of EAJA back into line

with their Congressional intent. By encouraging frivolous, non-substantive cases to be recompensed by EAJA it encourages multiple filings to realize the "bet on the come" mind set.

For example: If a small group files one lawsuit or appeal a year it has a significant chance that case will not produce revenue. If a group files multiple cases during a year the chances of a settlement or win increase exponentially. According to federal court data bases, in 2009, this same special interest group discussed above filed over 18 federal district court cases and with its "campaign partners" – other non-profit special interests groups who receive attorneys fees from the federal government, filed over 100 cases in 2009 alone. When combined with the ability to convince judges of "special circumstances" thus exceeding the hourly cap, it would only take one case in ten filings to guarantee a financial windfall.

Another example: One 501c3 special interest group filed petitions to review well over 400 species under the Endangered Species Act. Each and every one of those petitions must be answered by FWS within the 90 day window. Each species for which a 90 day finding by FWS is not ultimately submitted is eligible for EAJA recompense to the filing party.

By Congress taking the initiative to solidify the number of cases allowed per year and the amount of recompense allowed in a calendar year it would force groups with multiple-filing intentions to prioritize and de-prioritize the cases they actually file, thus relieving the courts of the more trivial filings. The positive effect of this action, in terms of lost time by federal agency staff, and the subsequent taxpayer saving, would be as significant as the caps themselves.

In further research into mass filings and massive EAJA payments, WLA found some very disturbing inconsistencies in the implementation of the Act, illustrative of our charge of systematic abuse of EAJA in the area of Federal natural resource management. As an example, in a California case involving a proven wrongful death claim against the Federal government, one plaintiff fought for ten years to be awarded $450,000 EAJA compensation for legal fees. By contrast, in a case involving a mere procedural challenge to the Department of Agriculture's regulations for developing land use plans, a case that involved no evidentiary hearing, no discovery, and lasted only 14 months provided the special interest plaintiffs with $ 421,358 in compensation, with their pro-bono attorneys requesting as much as $625 per hour. In another instance, involving litigation over endangered salmon, a 10 page brief netted the filing groups $1,000,000 in EAJA and Judgment Fund fees.

4) Reporting in Agency adjudications:

In early 2009 WLA began asking the pertinent government agencies to provide us with the documentation of attorney fee EAJA awards assessed to their agency. What followed was an astonishing lesson in "passing of the buck". It was absolutely not an intentional non-disclosure by the agencies, but as we found, a complete lack of direction to keep track of several accounting items:

1. EAJA reimbursements from the agency to the prevailing plaintiff
2. Time spent by the agency to provide FOIA's to the plaintiff for research to file the case
3. Attorney time from agency

4. Attorney time from the US attorney's office

5. Attorney time from the Department of the Interior

6. Agency staff time spent preparing case research

7. Agency staff time spent in court

WLA personally encountered the following scenario:

WLA contacted Bureau of Land Management ("BLM") regarding EAJA disbursement for the previous calendar year. We were informed that BLM did not keep track of these payments the US Attorney's offices for the State the cases were filed in kept that information. We contacted the US Attorney's office and were informed that the Department of Justice ("DOJ") housed that information. DOJ informed us that the Department of Treasury, who issued the checks or electronic transfers, kept track of that information. A FOIA request to Department of Treasury was met with the opinion of the FOIA officer that BLM housed that information, not Department of Treasury. So you see the complete circle referenced in the above paragraph.

On January 21, 2009 President Obama issued "Openness in Government", a presidential directive to his agencies. In it he stated that "transparency promotes accountability". Perfectly said and if implemented in the manner called for within the GLSA that exactly will happen.

3: Adjustment of Attorney's Fees

WLA believes that the ability to adjust EAJA caps yearly, based on the Consumer Price index is the most realistic way of balancing the attorney fee issue. Veterans, Social Security benefits claimants and individuals, must have the ability to file a case against the government and be assured that an attorney will indeed take their case based on the knowledge that a fair EAJA recompense will be forthcoming in the event they prevail against the government.

4: Reporting

Reporting and accountability go hand in hand. In order for Congress to be assured of EAJA doing the job the law was intended for these reporting requirements are absolutely necessary.

WLA found in upwards of 1/3 of the EAJA cases the dollar amounts awarded were in sealed documents. Parties names were withheld as were the EAJA awards. It would be WLA's philosophy that any taxpayer dollars spent from the EAJA were absolutely public knowledge.

With the implementation of this reporting measure, Congress will have the ability to truly evaluate the equality of the law, any inequities within judicial districts, and inherent repeat players that could be intent on gaming the system, and which agencies appear to be on the receiving end of the filings. Another crucial part of the reporting would be the ability of the agencies to file true budget requests to Congress. If, for example, the BLM has no idea of how much they paid for EAJA disbursements in a calendar year, how can they possibly submit an accurate budget to the appropriations committee?

Section 3-GAO study

The GAO study is indeed a lynch-pin for the GLSA. In order for Congress to evaluate the success or failure of this program historic data must be gathered. When reporting requirements were dropped we believe that the ATM card type use of the EAJA began. Without proof positive of this phenomenon, rhetoric and supposition will rule over the debate regarding reform. This critical component will lend undeniable proof for substantive and equitable reforms of EAJA.

Summary:

In three years of single issue research done by WLA one disturbing development superimposes itself above the others, foreseen in theory, and now proven in events of the past year. The certain threat of long and costly litigation against almost any and all projects and actions taking place on Federal lands has become a tool for de facto extortion. The ability of large 501c3 special interest groups to file, and fund, reams of lawsuits (our incomplete sampling show well over 2200 in the last 10 years) has resulted in a very untenable situation for individuals and companies dependent upon economic access to Federal lands. Obstructionist groups with a history of effective litigation have earned amount of "litigation clout", which these groups can then use to "extort" money from companies or individuals attempting to complete projects necessary for the energy development and other productive uses of the American people. El Paso Gas Corporation, in order to complete its Ruby Pipeline Project, a natural gas pipeline spanning parts of Wyoming, Utah, Nevada, and Oregon, paid out tens of millions of dollars to various groups for their "cooperation". Baldly put, these particular obstructionist groups "sell" their promise not to litigate against the Federal planning portion of projects of entities which can "donate" enough money toward the furthering of their extremist goals. This only increases the costs to consumers across the country, as the energy companies that fall victim to this type of extortion are forced to recoup their expenses by increasing the cost for their products. Other Federal land users, like ranchers, for example, are price takers, not price makers, and have no means of recouping the money they have lost at being forced to protect their interests in such suits. The cost to the consumers will nonetheless be seen in the long term increase in the price of ranch produced products due to decreased production. Surely it was never the intent of Congress that EAJA would become an avenue for amassing "litigation clout," and the power to coerce money out of one industry or user group for use against another user group!

It is clear that EAJA was meant to have only a negative monetary impact on the government, with no peripheral damage to third parties. This is absolutely no longer the case. Although the suits filed are indeed only against the government agencies, third parties are drawn in to attempt to protect their

livelihoods. Ranchers, for example, must hire attorneys to attempt intervention or file amicus briefs that cost anywhere from $20,000 for an amicus to $100,000 for a full intervention. While the 9th Circuit as abandoned the "only federal defendant" rule and allowed full intervention by third parties with a direct interest in the case, this only allows at its best, a partial involvement on the merits phase of the case and a seat at the table in the remedies phase. Some of our members have incurred the $100,000 attorney bills with no way of recompense and no way of guarantee that all will not be lost when the government settles with the plaintiff. In actuality, many of our members have funded this system in three ways, their tax dollars in EAJA, their personal monies in attorney fees and more tax dollars for the government's defense of the suit. This is truly an inequitable situation and flies in the face of the intent of EAJA allowing monetary damage only to the government.

We assert there is a meaningful and significant disparity to be found in the numbers of suits filed against the government- regarding policy decisions- by all special interest groups. In the course of 9 years the research shows "industry policy challenges" at 70 filings. In the same 9 year period "environmental policy challenges" are counted at over 2200 filings, suits or petitions.

In the end, as we offer our support of the Government Litigation Savings Act, we would also like to point out to the Judiciary Committee that the special interest groups who have been using this law as a way to force their political views on agencies and natural resource users are also the same groups who refuse to participate in collaborative conservation agreements. In the West, many species of flora and fauna have been petitioned for listing under the ESA. USFWS, State Game and Fish Agencies, and stakeholders from all walks of life have come to the table year after year to attempt reasonable conservation without ruining livelihoods and local economies. Many of these aforementioned groups will never sit at the collaborative conservation table to assist in developing a conservation plan, preferring instead to immediately attack that plan in court. We submit that the collection of EAJA fees appears to be their primary purpose. A sampling of pro bono environmental law firms actual attorney fees compensation, as documented in their form 990 returns , indicates over $61,000,000 has been paid in nine years. We do not believe one dollar of that 61 million has been returned to any kind of on-the-ground conservation practices.

Thank you for your time and attention in this vital issue.

Sincerely,

Jennifer R Ellis

Western Legacy Alliance Board of Directors

Presented by:

Jennifer Ellis

Chairman- Western Legacy Alliance