

BUDD-FALEN LAW OFFICES

L.L.C.

ATTORNEYS FOR THE WEST

KAREN BUDD-FALEN

BRANDON L. JENSEN¹

KATHRYN BRACK MORROW^{1,2}

¹ ALSO LICENSED IN COLORADO

² ALSO LICENSED IN NEW MEXICO

300 EAST 18TH STREET • POST OFFICE BOX 346

CHEYENNE, WYOMING 82003-0346

TELEPHONE: 307/632-5105

TELEFAX: 307/637-3891

WWW.BUDDFALEN.COM

FRANKLIN J. FALEN^{3,4}

LAURA C. ROWE

JOSHUA TOLIN¹

³ ALSO LICENSED IN NEBRASKA

⁴ ALSO LICENSED IN SOUTH DAKOTA

MEMORANDUM

TO: INTERESTED PARTIES

**FROM: KAREN BUDD FALEN
BUDD-FALEN LAW OFFICES, LLC**

DATE: NOVEMBER 29, 2011

RE: RESPONSE TO OPPOSITION

Attached please find a recent article by a “north coast environmentalist” regurgitating the press releases of the Center for Biological Diversity as well as a letter from the opponents of the reform of the Equal Access to Justice Act. We are now starting to see these fear tactics show up in blogs across the Country.

Additionally attached is a response to this rhetoric. Please feel free to use this information to respond to the mis-information being put forth by the opponents of the Governmental Litigation Savings Act H.B. 1996 (“GSLA”) and to encourage your Congressman to move this Act forward. As many of you know, the GSLA has passed the House Judiciary Committee and we now need a push to get this passed by the entire House of Representatives.

Should you have any questions, please do not hesitate to contact me.

[Share](#) [Report Abuse](#) [Next Blog»](#)[Create Blog](#) [Sign In](#)

Jefferson Journal

A Capital Press blog featuring news and views (mostly) related to agriculture in rural Northern California.

Friday, November 11, 2011

Pace: Don't fall for 'misleading' data

Well-known north coast environmentalist Felice Pace offers some advice for Western newspapers (presumably including ours) when it comes to proposed changes in the Equal Access to Justice Act.

In a recent e-mail to editors and reporters, Pace included this "fact sheet" refuting what he calls "myths" circulated by Wyoming attorney Karen Budd-Falen and other proponents of a reform bill in Congress.

Myths and Facts about the Equal Access to Justice Act (EAJA)

The Equal Access to Justice Act is one of the country's most important laws for preserving citizens' ability to hold the government accountable. Signed into law by President Ronald Reagan, the Act allows court fees to be awarded to citizens and nonprofits that win lawsuits challenging a government action and show that the government's position was not "substantially justified." EAJA has been integral to leveling the playing field for citizens and nonprofits that typically can't afford high-priced lawyers and lobbyists. Over the last three decades, EAJA has successfully allowed court access for a wide range of groups and interests, including those advocating for farmers, veterans, free speech, religious freedom and the environment.

Those opposing environmental protections have launched a campaign to demonize EAJA, claiming that environmental groups are getting rich by filing frivolous lawsuits and using fees collected under the Act to substantially fund their operations.

Myth: Environmental organizations are abusing EAJA.

Fact: Signed into law in 1981, EAJA makes it possible for everyday citizens, small businesses and nonprofit organizations to challenge arbitrary and unlawful government decisions. Environmental groups have been awarded attorney fees only when they have proven in court that the government wasn't following laws that protect endangered species, clean air, clean water, wildlife habitat or public health or in court-approved settlements. A study published in the

About Me



Tim Hearden

Capital Press' northern California field reporter since 2008, Tim Hearden is a more than 20-year veteran of community, government and now agriculture journalism. His main blog, the Jefferson Journal, invokes both the name and spirit of the mythical State of Jefferson, a huge expanse of rural Northern California and Southern Oregon that briefly sought its own statehood in the early 1940s. Folks in these parts still have an independent state of mind.

[View my complete profile](#)

My Capital Press stories

[Klamath dam comments deadline extended](#)

Capital Press (subscription)

By TIM HEARDEN YREKA, Calif. -- People now have until Dec. 30 to comment on the proposed removal of four dams from the Klamath River and related fisheries restoration efforts. The federal government extended the deadline for comments on the nearly \$1.1 ...

[Recall highlights divisions](#)

Capital Press (subscription)

By TIM HEARDEN YREKA, Calif. -- Divisions over how best to respond to state water regulators could cost one Siskiyou County supervisor her seat. Some constituents here are circulating petitions to recall Supervisor Marcia Armstrong because they think ...

[Battle lines drawn over Klamath bill](#)

Capital Press (subscription)

By TIM HEARDEN YREKA, Calif. - Backers of the nearly \$1.1 billion dam removal and fisheries restoration efforts in the Klamath Basin are pleased that a bill to move the project forward was introduced last week in Congress. "For us it's about time," ...

Journal of Forestry in 2011 found that barely half of attorney fee payments from EAJA cases involving the U.S. Forest Service went to environmental groups over a seven-year study period. (Others getting attorney fee awards were commodity groups, law firms, attorneys and individuals.) The study indicates that the Forest Service paid, on average, about \$32,000 per year to each of the prevailing environmental groups, a tiny fraction of the total incomes reported by these groups.

Myth: EAJA is only used by environmental organizations.
Fact: EAJA is used by citizens and groups across the political spectrum in a range of actions, including those aimed at protecting religious freedom, free speech, reverse discrimination, gun rights and the environment. The U.S. Government Accountability Office (GAO) in 2011 found that businesses and trade groups—not environmentalists—file the most lawsuits against the Environmental Protection Agency. Examining more than 2,000 cases filed against the EPA from 1995 to 2010, the GAO found that 48 percent were filed by corporate interests (25 percent by trade associations, 23 percent by private companies), while environmental groups filed only 30 percent (16 percent by local groups, 14 percent by national groups). States, municipalities, and regional governments and territories filed 12 percent. Individual citizens also rely on the Equal Access to Justice Act. In FY 2010, for example, 2,627 disabled veterans successfully used EAJA to recover their attorney fees in cases in which they successfully appealed a Department of Veterans Affairs decision denying them disability benefits. Without EAJA, these veterans would have had a difficult time securing representation against the VA lawyers, who are paid by the federal government. Public interest suits made possible by EAJA play an important role in protecting your rights no matter your political preference.

Myth: Those who collect fees under EAJA are trying to hide those fees from the public.
Fact: The original version of EAJA included several provisions providing public tracking of fee awards. Those tracking mechanisms, however, were eliminated by the Republican-led Congress in 1995. Some members of Congress have rightly called for more transparency in EAJA fee awards.

Myth: EAJA does not contain sufficient safeguards to prevent abuse and overuse.
Fact: EAJA sets a very high threshold for recovering attorneys' fees and costs. Winning the case is not enough. Under EAJA, a party may recover fees from the government only if the plaintiff is the prevailing party AND can prove that the government's position was not "substantially justified." 28 U.S.C. § 2412 (d)(1)(B). Because this is not an easy standard to satisfy, many plaintiffs do not recover attorney's fees even when they win their cases. Further, EAJA does not allow large businesses and certain other entities, which the Act defines as having a net worth of over \$7 million, to recover legal fees since they would have no trouble paying them on their own. EAJA levels the playing field by helping the "little guy."

[Skyrocketing watermaster fees shock irrigators](#)
 Capital Press (subscription)
 By TIM HEARDEN RED BLUFF, Calif. - Water rights holders along certain creeks and rivers in Northern California face skyrocketing fees for a service that polices how much water they use. State funding for the California Department of Water Resources' ...
 powered by Google

- Capital Press California page**
- Fresno professor works to grow a later, tastier grape
 - Klamath dam comments deadline extended
 - Recall highlights divisions
 - Legal aid group probed
 - Website addresses raw-milk risks

- Capital Press websites**
- AgAdsNow
 - California Ag Ads
 - Capital Press homepage
 - Capital Press on Twitter
 - CP YouTube Channel
 - FarmSeller
 - Recreation Properties

Other Capital Press blogs

[Blogriculture | A blog about agriculture in the West from capitalpress.com](#)
 Podcast: Farmers' share of turkey, giving thanks for the harvest and the yearlong forecast
 4 days ago

- FOXNews.com headlines**
- Docs Warn: Fix Medicare Cuts or Face Cuts in Care
 - Egyptians Head to the Polls In Landmark Elections
 - Shoppers Set Records Over Holiday Weekend
 - Mom, Boyfriend Charged After Boy Killed on Birthday

Myth: In some cases, EAJA allows plaintiffs to recover attorney's fees even when they lose their case.

Fact: In order to recover legal fees under EAJA, plaintiffs must prevail in their case. If plaintiffs lose, they must pay their legal fees out of their own pocket. There are NO exceptions to this rule.

Additionally, as noted above, even when plaintiffs prevail, they cannot always recover legal costs.

Myth: In passing EAJA, Congress intended to provide attorney's fees only to small businesses, veterans, and social security beneficiaries.

Fact: While EAJA certainly was enacted, in part, to help small businesses, veterans, and social security beneficiaries, it was also intended to codify the judicially-created "common benefit" theory of attorney's fees, which states that private parties litigating in order to vindicate public interests should be compensated. See H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. at 9. As the Senate explained when enacting EAJA: "in bringing legitimate actions under this section citizens [are] performing a public service and in such instances the courts should award costs of litigation to such a party."


Myth: Nonprofits are funding themselves primarily through fees obtained through EAJA.

Fact: Most nonprofit legal groups, including environmental organizations, fund themselves mainly through private donations and grants, with EAJA fees making up an extremely small percentage of their funds. Over the last nine years, for instance, the Center for Biological Diversity received less than one half of 1 percent of its total income from attorney fees recovered through the Act.

Sources:


- U.S. Government Accountability Office, Environmental Litigation: Cases against EPA and Associated Costs Over Time. Publication No. GAO-11-650). (August 2011).
- 28 U.S.C. § 2412(d)(2)(B)
- S. Rep. No 91-1196, 91st Cong., 2d Sess. 38 (1970).

For what it's worth.

Posted by Tim Hearden at 5:38 PM 

[Recommend this on Google](#)

1 comments:

 Balchick Frentik said...

It would be nice if you took the time to excise the superfluous carriage returns... Easier to read that way.

November 15, 2011 1:16 PM

Post a Comment

Obama-Backed Tax Cut May Lack GOP Support

Wall Street Journal News Feed

Stock Price Check powered by **ADVFH** !!!

Symbol

[A-Z Shares Search](#)

Monetize Your Website!

THE WALL STREET JOURNAL.

WSJ.com: What's News US

[U.S. Stocks Join Rally](#)

[Barney Frank to Retire From Congress](#)

[Europe's Leaders Pursue New Pact](#)

[OECD Urges ECB to Act on Debt](#)

[Belgium, Italy Pay Record Yields](#)

MarketWatch.com - Top Stories

Stock Price Check powered by **ADVFH** !!!

Symbol

[A-Z Shares Search](#)

Add Buddha Quotes

MarketWatch

MarketWatch.com - Top Stories

[MarketWatch First Take:](#)

[Thanksgiving is the new shopping holiday](#)

[Futures Movers: Oil tops \\$100 on stock surge, euro optimism](#)

[Bank reform author, Barney Frank, says...](#)

Business Week Top Stories

Access for All * Alliance for Justice * American Civil Liberties Union *
American Association for Justice * Center for Biological Diversity * Center for Food Safety
* Center for Law & Social Policy * Defenders of Wildlife * Earthjustice *
Endangered Species Coalition * Law Foundation of Silicon Valley * Oregon Wild
* People for the American Way * National Consumer Law Center® *
National Senior Citizens Law Center * National Employment Lawyers Association *
National Fair Housing Alliance * National Legal Aid & Defender Association *
National Health Law Program * Natural Resources Defense Council * Oceana *
Public Citizen * Rocky Mountain Wild * Sierra Club *
Western Environmental Law Center

RE: Opposition to the “Government Litigation Savings Act” (H.R. 1996)

November 16, 2011

Dear Representative,

The “Government Litigation Savings Act” (H.R. 1996) would prohibit those seeking to enforce important rights and interests – such as food safety, highway safety, pollution protection, etc. – from recovering attorney’s fees under the Equal Access to Justice Act (EAJA). In doing so, this bill would harm all Americans and could serve as a de facto bar to the courthouse door for low income citizens and other parties that do not have access to free legal counsel. **Thus, we ask that you oppose H.R. 1996.**

EAJA, which was signed into law by President Carter and permanently funded by President Reagan, awards costs of litigation and attorney’s fees when a citizen, non-profit organization, or small business wins a case involving the federal government and can show that the federal government’s position was not “substantially justified.” Because this is a difficult legal standard to achieve, even plaintiffs who win their cases cannot always recover legal fees. For three decades veterans, seniors, the disabled, small businesses, and non-profit groups from across the ideological spectrum have relied on EAJA to challenge illegal government actions.

H.R. 1996 would gut EAJA and make the federal government less accountable by hindering the public’s ability to challenge government abuses. When the government acts illegally, individuals and organizations should be able to enforce the law to protect the public without paying for representation from their own pockets. If H.R. 1996 became law, those who would otherwise challenge government abuses to benefit the rest of us would be deterred, leading to more foodborne illness, more dangerous highways, dirtier air and water, etc.

The right to challenge harmful actions by the federal government is as fundamental to our democracy as our right to vote and freedom of speech. Indeed, in our system of checks and balances, review by the courts is one of the most important ways to ensure government accountability. H.R. 1996 constitutes a sweeping attack on the ability of citizens from all ends of the political spectrum to prevent government abuse. **Again, we respectfully urge you to oppose this harmful bill.**

Sincerely,

Alan Houseman
Executive Director
Center for Law & Social Policy

Mary Beth Beetham
Director of Legislative Affairs
Defenders of Wildlife

Marty Hayden
Vice President, Policy and Legislation
Earthjustice

John Bowman
Director of Federal Relations
American Association for Justice

Nan Aron
President
Alliance for Justice

Andrew Kimbrell
Executive Director
Center for Food Safety

Steve Pedery
Conservation Director
Oregon Wild

Leda Huta
Executive Director
Endangered Species Coalition

Grant Costello
Executive Director
Western Environmental Law Center

John Buse
Legal Director
Center for Biological Diversity

Athan Manuel
Director, Lands Protection Program
Sierra Club

David Arkush
Director, Congress Watch
Public Citizen

Josh Pollock
Conservation Director
Rocky Mountain Wild

Laura W. Murphy
Director, Washington Legislative Office
American Civil Liberties Union

Felice Pace
Coordinator
Access for All

Scott Schlesinger
Legislative Director
Natural Resources Defense Council

Eric Gutierrez
Legislative and Policy Director
National Employment Lawyers Association

Marge Baker
Executive Vice President for Policy and Program Planning
People for the American Way

Shanna L. Smith
President & CEO
National Fair Housing Alliance

Corry Westbrook
Federal Policy Director
Oceana

Jane Perkins
Legal Director
National Health Law Program

James Zahradka
Supervising Attorney
Law Foundation of Silicon Valley

Don Saunders
Director of Civil Legal Services
National Legal Aid & Defender Association

Lauren K. Saunders
Managing Attorney
National Consumer Law Center® (on behalf of its low income clients)

Gerald A. McIntyre
Directing Attorney
National Senior Citizens Law Center

BUDD-FALEN LAW OFFICES

L.L.C.

ATTORNEYS FOR THE WEST

KAREN BUDD-FALEN
BRANDON L. JENSEN ¹
KATHRYN BRACK MORROW ^{1,2}

300 EAST 18TH STREET • POST OFFICE BOX 346
CHEYENNE, WYOMING 82003-0346
TELEPHONE: 307/632-5105
TELEFAX: 307/637-3891
WWW.BUDDFALEN.COM

FRANKLIN J. FALEN ^{3,4}
LAURA C. ROWE
JOSHUA TOLIN ¹
³ ALSO LICENSED IN NEBRASKA
⁴ ALSO LICENSED IN SOUTH DAKOTA

¹ ALSO LICENSED IN COLORADO
² ALSO LICENSED IN NEW MEXICO

MEMORANDUM

FROM: KAREN BUDD FALEN
BUDD-FALEN LAW OFFICES, LLC

DATE: NOVEMBER 29, 2011

RE: RESPONSE TO OPPOSITION: GOVERNMENTAL LITIGATION
SAVINGS ACT

Isn't it interesting how even the possibility of requiring transparency regarding the spending of taxpayer money can send a "north coast environmentalist" and other environmental groups into sheer panic? See e.g., "Pace: Don't Fall for 'Misleading' Data"; see also Letter dated November 16, 2011 sent to Members of the U.S. House of Representatives in Opposition to the Governmental Litigation Savings Act (H.R. 1996).

Forget the benefits of the public knowing where their tax dollars are going at a time when America is broke. Forget the benefits of ensuring that social security recipients, veterans, small businesses and others who truly need America's tax dollars for assistance receive what they are due, rather than spending tax dollars on already well-funded and expanding radical groups whose goals are to shut down rural business, communities and property rights through legal procedural maneuvering. Forget protecting families

or individuals who really need protecting. It is time to return the Equal Access to Justice Act ("EAJA") to its original Congressional intent through passage of the Governmental Litigation Savings Act ("GLSA"). It is time to respond to the myths.

The original purpose of the Equal Access to Justice Act was 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. 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." Representative Joseph McDade (R-PA) stated that the bill

would help to improve citizens' perceptions 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. The intent of EAJA was to curb unreasonable and excessive bureaucratic application of regulations, not add to regulatory burden on small businesses and individuals. However, that is not what the opposition to the GSLA is saying. Here is a response:

"Myth: Environmental organizations are abusing EAJA."

Although some claim that environmental groups recover attorney's fees "only" when they have proven that the federal government "wasn't following laws," that is not what the facts show. Consider the data from the federal court created docket sheets included on the PACER federal court database for all federal district courts in 19 states and the District of Columbia. In 21 percent of the cases, filed by 14 environmental groups where attorney's fees were paid, there was NO court decision at all, let alone a decision that the federal government was violating the law. See e.g., Center for Biological Diversity v. Norton, Docket No. 05-341 (D. Az. 2005). An even greater percentage of these cases only dealt with whether the federal government had failed to comply with a regulatory procedure or statutory deadline, and not whether there was any actual harm to the environment or whether a species should or should not be listed. For example, if the federal government fails to respond to a petition to list a species

within the 90-day time frame required by statute, an environmental group can sue and almost always receives attorney's fees. See, e.g., WildEarth Guardians v. Kempthorne, Docket No. 08-443 (D.D.C. 2008). In these cases, the court is not ruling that the species is in fact threatened or endangered; the court only rules that a deadline was not met, yet the environmental plaintiff receives attorney's fees. Is that really protecting the environment?

Additionally critics mis-cite a study in the Journal of Forestry published in 2011 by claiming that (1) "barely half of attorney fee payments from EAJA cases involving the U.S. Forest Service went to environmental groups," (2) other groups receive attorneys fees from the Forest Service, and (3) the "Forest Service paid, on average, about \$32,000 per year to each of the prevailing environmental groups, a tiny fraction of the total income reported by these groups."

Obviously these folks did not actually read the Journal study. Instead, they seem to blindly follow the statements of the Center for Biological Diversity's ("CBD") July 22, 2011 Press Release that attempts to skew the study's findings. First, the Journal of Forestry study actually states that "more than two-thirds (\$3.2 million dollars) of EAJA fees were paid to these [environmental] organizations" just in Forest Service cases. Mortimer and Malmsheimer, 2011, at 354. The study also found that 69.4 % of the EAJA recipients against the Forest Service were environmental organizations. See Table 6, Mortimer and Malmsheimer, 2011. Is 69.4% "barely half" as claimed in the CBD press release?

Second, according to the journal article, from 1999 to 2005, environmental groups received 83 EAJA awards while commodity groups received 6. Id. While I guess it is correct to state that other groups receive attorney's fees, I can see why the opposition do not give actual figures for their assertions. Finally, these opponents use some very creative math on the claim regarding the "average annual payment" for environmental group fees. Because the journal study admittedly lacked certain data, the journal's authors never came close to breaching the subject of average annual payments because they could not base a finding upon their data.

There are other items in the journal study that opponents do not bring up, such as the \$1 million difference between the data provided by the Forest Service and the same data provided by the Department of Justice for the same year. Even greater is the \$2.6 million difference between the Justice Department and Forest Service data over seven years.

Nor do these groups look at the individual awards of attorney's fees to an individual environmental group in a single case, such as the 2010 award to the Citizens for a Better Forestry and Defenders of Wildlife of \$421,358.94 for a single case against the U.S. Forest Service. See Citizens for a Better Forestry v. U.S. Department of Agriculture, Docket No. 08-1927 (N.D. Ca. 2010). The award authorized an hourly payment of \$625.00 for one of the Defenders of Wildlife's attorneys. Over \$400,000 is a significant amount of taxpayer money paying for a single

case whose merits lasted only 14 months.

Rather, opponents would rather create a myth that "pro bono" legal representation would be hampered by the important reforms in the GLSA. However, that is false as well. The courts, including the United States Court of Appeals for Veteran Claims, have recognized that under EAJA, attorneys who take a case of a pro bono basis can recover attorneys fees. See e.g., Molden v. Peake, 22 Vet.App. 177 (2008); Bice v. United States, 84 Fed.Cl. 173 (2008) (representation by pro bono legal clinic). The GLSA will do nothing to change those rulings.

"Myth: EAJA is only used by environmental organizations."

No one has ever claimed that environmental groups are the only ones who use the EAJA to "recover" attorney's fees, but they certainly seem to reap the highest awards and file the most cases. Although some opponents cite to a 2011 GAO report to claim that "businesses and trade groups . . . file the most lawsuits against the Environmental Protection Agency [EPA]", what these same groups fail to show is that one litigant, EarthJustice (formerly the Sierra Club Legal Defense Fund), received \$4,655,425.60 or 32 percent of all attorney's fees paid to EPA litigants according to the GAO report. When combined with two other litigants - the Sierra Club (\$966,687.34) and the Natural Resources Defense Council (\$252,004.87) - these three groups received 41 percent of all the attorney's fees awarded to EPA litigants. In addition to attorney's fees awarded, the

GAO found that the Department of Justice spent at least \$43 million in taxpayer dollars defending EPA from 1998 to 2010.

With regard to the example offered by opponents that in 2010, 2,627 disabled vets were able to successfully recover attorney's fees, no one has ever argued that these American service men and women and their families should not be eligible for EAJA fee awards. But the opponents provide NO citation for the number of successful recoveries and NO comparison to the number and fees awarded to veterans versus the number of cases and fees awarded to environmental groups. Again, using the federal court PACER National Index case locator, since approximately 2000 to the present, 232 federal court cases were filed against the U.S. Department of Veterans Affairs by all plaintiffs. In comparison, using the same search question in the same federal court database, just the Center for Biological Diversity ("CBD") alone, from 2000 to the present filed 541 cases; the Defenders of Wildlife filed 259 cases and the Sierra Club filed 1,137 cases. Again, no one is arguing that veterans or social security beneficiaries should not be able to take advantage of EAJA for reimbursement of attorney's fees; but just looking at the number of cases filed and comparing apples to apples, one wonders who is taking advantage of EAJA.

There is also a claim that passage of the GSLA would "make the federal government less accountable by hindering the public's ability to challenge the government's abuses." However, EAJA has never provided a

cause of action against the federal government, thus the ability of veterans, small businesses, social security recipients, and others who seek to challenge federal agency action remains exactly the same as it is now. Every single method of litigating against the federal government remains available and the "court house door" remains open to all who seek a redress for their grievances.

"Myth: Those who collect fees under EAJA are trying to hide those fees from the public."

Since we seem to agree that attorney's fees payments should be tracked, I think that environmental groups should publically endorse, in writing, the bills offered in Congress to publically account for attorney's fees payments, whether under the Judgment Fund or EAJA. So far, no endorsement is forthcoming.

Second, according to a review of attorney's fee awards in 579 cases filed by 14 environmental groups in the federal district courts in 19 states and the District of Columbia, 10.5 percent (55 cases) showed that attorney's fees were paid, but the amount of the payment was not disclosed to the public. All awards of taxpayer money should be available for public review, not just some of them.

"Myth: EAJA does not contain sufficient safeguards to prevent abuse and overuse."

While it may be easy to quote the original standards in EAJA, the review of current settlement agreements and court awards to environmental groups

brings compliance with those original standards into question. For example, in reviewing those same 579 attorney fee awards, 272 awards were agreed to by the Justice Department when there was NO final decision by a judge or a ruling on the merits of the case. In other words, despite the EAJA requirements of a “prevailing party” and a finding that the government’s position was not “substantially justified,” in 21 percent of the fee awards granted to environmental groups, there was NO decision that the environmental group prevailed and NO decision that the government’s position was not substantially justified. Therefore, the “safeguards” currently in place simply do not work in all cases.

With regard to the claim that EAJA is only for “the little guy” and individuals whose net worth is under \$7 million, that only applies to “for profit” businesses or individuals. Thus, non-profit environmental groups are not confined by the net worth cap in EAJA. According to the IRS 990s that have to be completed yearly for each non-profit organization, in 2009, the net assets of the CBD were \$8,153,780; and in the same year, the net assets for the Defenders of Wildlife were \$23,675,323. These groups are not “little guys” for whom EAJA attorney fees was intended.

“Myth: In some cases, EAJA allows plaintiffs to recover attorney’s fees even when they lose their case.”

First, as stated above, in 64% of the settlement agreements reviewed, no one “won” the case yet, attorney’s fees were paid to the environmental groups.

Second, consider the case of WildEarth Guardians v. U.S. Forest Service, Docket No. 07-1043-JB (N.M. 2010). In that case, litigated in the U.S. District Court for the District of New Mexico, the WildEarth Guardians lost on all counts and claims before the federal district judge. The WildEarth Guardians appealed the case to the Tenth Circuit Court of Appeals, and even though there was NO ruling by a court on the merits overturning the federal district judge’s written decision, the WildEarth Guardians and the Forest Service jointly petitioned the federal district court to allow the Justice Department to voluntarily settle the case, including a payment of attorney’s fees. The WildEarth Guardians lost their case; the Justice Department settled and paid attorney’s fees.

“Myth: In passing EAJA, Congress intended to provide attorneys fees to only small businesses.”

Critics also agree that allowing reimbursement of attorney’s fees simply “codifies the judicially-created ‘common benefit’ theory.” But the question is: is litigation over, for example, the failure of the federal government to meet a statutorily required deadline, a true “common benefit”? And who is to say that these self-appointed minority groups are really vindicating the public interests by complaining about time frames? Many beneficiaries of attorney’s fees from the American taxpayers are the same ones who believe that mollusks, flies, mice, lizards, and plants are more important than hospitals, schools, earning a living, providing safe and affordable food to

America and the world and becoming energy self-sufficient.

But even if you subscribe to the theory that bugs and worms are more important than veterans and social security recipients, you can't deny that environmental group litigation is exponentially increasing. While environmental groups claim that environmental litigation is only weakly correlated with presidential administrations, see Center for Biological Diversity Press Release, August 31, 2011, that is not borne out by looking at actual court filings. Again looking at the PACER National Index case locator, during the last two years of the Bush administration, 1/2006 to 12/2007, seven environmental groups, the CBD, Sierra Club, WildEarth Guardians, Western Watersheds Project, National Wildlife Federation, Humane Society of the United States and the Environmental Defense Fund filed a total of 253 cases. In contrast, these same seven groups filed 525 cases during the first two years of the Obama administration (1/2008 to 12/2010). I would argue that the doubling litigation filed in a democratic administration over a republican administration is more than a "weak correlation."

"Myth: Nonprofits are funding themselves primarily through fees obtained through EAJA."

Although it is easy to say the words, the IRS tax documents tell a different story; in fact, law firms "specializing" in environmental group litigation are making substantial amounts of their money from "reimbursement of attorney's fees." According to the 2009

IRS form 990 for Advocates for the West, 61% of its total revenues come from attorney fee recovery from the federal government; for that same year, the Arizona Center for Law and the Public Interest received 58% of its revenue from attorney's fee awards against the government, and 12% for EarthJustice. There is nowhere in the Congressional record that indicates that entire law firms should be built to sue the federal government.

The GSLA, despite the opposition's rhetoric, is needed to return the Equal Access to Justice Act to its original Congressional intent. Veterans, social security recipients, individuals, and small businesses absolutely need EAJA when they tackle the federal government. These are truly the "David's" who are fighting the federal "Goliath." EAJA reform, as proposed in Congress through the Governmental Litigation Savings Act, DOES NOT impact these important and deserving plaintiffs. However, it also benefits ALL Americans to make the payments of American tax dollars transparent and to stop the abuse of a well-intended federal law. These are the facts about the operation of EAJA and why its reform is vital to the Country. I hope you encourage your elected representatives to move this bill through Congress.

-END-