

Budd-Falen Law Offices, L.L.C.

Karen Budd-Falen ¹
Franklin J. Falen ¹
Brandon L. Jensen ^{1,2}
Kathryn Brack Morrow ^{1,2,3}

300 East 18th Street
Post Office Box 346
Cheyenne, Wyoming 82003-0346
Telephone 307/632-5105
Telefax 307/637-3891
main@buddfalen.com
www.buddfalen.com

¹admitted in Wyoming
²admitted in Colorado
³admitted in New Mexico

Memorandum

To: Interested Parties

From: Karen Budd-Falen
Budd-Falen Law Offices, L.L.C.

Date: September 15, 2009

Re: Environmental Litigation Gravy Train

Below please find a press release/Letter to the Editor regarding the amount of litigation filed by environmental organizations and the amount of attorneys fees these groups have received from the federal government for these cases. I am sure that you will be as shocked by these numbers as I have been.

Consider these facts:

- Between 2000 and 2009, Western Watersheds Project (“WWP”) filed at least 91 lawsuits in the federal district courts and at least 31 appeals in the federal appellate courts;
- Between 2000 and 2009, Forest Guardians (now known as WildEarth Guardians) filed at least 180 lawsuits in the federal district courts and at least 61 appeals in the federal appellate courts;
- Between 2000 and 2009, Center for Biological Diversity (“CBD”) filed at least 409 lawsuits in the federal district courts and at least 165 appeals in the federal appellate courts.
- In addition, over the last 15 years, the Wilderness Society has filed 149 federal court lawsuits, the Idaho Conservation League has filed 69 federal court lawsuits, the Oregon Natural Desert Association has filed 58 lawsuits, the Southern Utah Wilderness Association has filed 88 lawsuits and the National Wildlife Federation has filed 427 lawsuits.
- In total, the eight environmental groups listed above have filed at least 1596 federal court cases against the federal government.

- Every one of the groups listed above are tax exempt, non-profit organizations. Every one of those groups listed above receives attorney fees for suing the federal government from the federal government.
- These statistics do not include cases filed in the administrative courts, such as BLM administrative permit appeals before the Office of Hearings and Appeals or Forest Service administrative appeals. These statistics only include federal district court cases.

On the other end, these same environmental groups are receiving **billions of federal tax payer dollars** in attorney fees for settling or “winning” cases against the federal government. Accurate statistics have not been kept by the Justice Department or the federal agencies, thus there is no accounting for the total amount of tax dollars paid, however, we were able to uncover these facts:

There are two major sources for attorney fees that can be paid to plaintiffs that “prevail” in litigation either by winning a case on the merits or by the Justice Department agreeing that the group “prevailed” in a settlement by achieving the purpose of the litigation. One source of funding is called the “Judgment Fund.” The Judgment Fund is a Congressional line-item appropriation and is used for Endangered Species Act cases, Clean Water Act cases, and with other statutes that directly allow a plaintiff to recover attorney fees. There is no central data base for tracking the payment of these fees, thus neither the taxpayers, members of Congress nor the federal government knows the total amount of taxpayer dollars spent from the Judgment Fund on individual cases. The only information regarding these fees that is available is:

- In fiscal year 2003, the federal government made 10,595 individual payments from the Judgment Fund to federal court plaintiffs for a price tag of \$1,081,328,420.00.
- In 2004, the federal government made 8,161 payments from the Judgment Fund for \$800,450,029.00.
- In 2005, 7,794 payments were made from the Judgment Fund for a total of \$1,074,131,007.00.
- In 2006, the federal government made 8,736 payments from the Judgment Fund for \$697,968,132.00.
- In only the first half of fiscal year 2007, the federal government made 6,595 payments from the Judgment Fund for \$1,062,387,142.00.
- In total, \$4,716,264,730.00 (that is billion with a “b”) in total payments were paid in taxpayer dollars from the Judgment Fund from 2003 through July 2007 for

attorney fees and costs in cases against the federal government.

The second major source of payments to “winning” litigants against the federal government is the Equal Access to Justice Act (“EAJA”). EAJA funds are taken from the “losing” federal agencies’ budget. Thus, for example, the attorneys fees paid under EAJA come from the “losing” BLM office’s budget. That is money that could be used for range monitoring, NEPA compliance, timber projects, archeology and cultural clearances and other agency programs. Within the federal government, there is no central data system or tracking of these payments from the agency’s budgets. The only statistics we were able to compile are as follows:

- Between 2003 to 2005, Region 1 of the Forest Service (Montana, North Dakota, northern Idaho) paid \$383,094 in EAJA fees.
- Between 2003 to 2005, Region 2 of the Forest Service (Wyoming, South Dakota, Colorado, Nebraska, Oklahoma) paid \$97,750 in EAJA fees.
- Between 2003 to 2005, Region 3 of the Forest Service (Arizona, New Mexico) paid \$261,289.85 in EAJA fees.
- Between 2003 to 2005, Region 4 of the Forest Service (southern Idaho, Utah, Nevada) paid \$297,705 in EAJA fees.
- Between 2003 to 2005, Region 5 (California) of the Forest Service paid \$357, 023 in EAJA fees.
- Between 2003 to 2005, Region 6 (Washington state, Oregon) of the Forest Service paid \$282,302 in EAJA fees.
- Out of the 44 total cases in which the Forest Service paid EAJA fees between 2003 and 2005, nine plaintiffs were NOT environmental groups and 35 payments went to environmental group plaintiffs.

We also tried to track the fees paid to environmental groups in certain federal courts. For example, in the Federal District Court for the District of Idaho, over the last ten years, WWP received a total of \$999,190 in tax dollars for “reimbursement” for attorney fees and costs. Of the total cases filed by WWP in the Federal Court in Idaho, 19 were before Judge Winmill; eight of those cases resulted in a decision on the merits with WWP prevailing and with the total attorney fees being awarded of \$746,184; six of the cases were settled by the federal government with a total attorney fees still being awarded of \$118,000. WWP won one case but attorney fees were not paid. WWP lost six cases. There were two cases in which the documents indicated that the federal government agreed to pay attorney fees, but the payment amount was kept confidential from the public.

In my opinion, there are a lot of things wrong with this picture. The federal government is spending billions in tax payer dollars without any accounting of where the money is going or to whom it is going. There is no oversight in spending this money, especially the money that is coming out of agency budgets that should be funding on the ground programs to protect public lands, national forests, ranchers, recreationists, wildlife and other land uses. Nonprofit, tax exempt groups are making billions of dollars in funding; the majority of that funding is not going into programs to protect people, wildlife, plants, and animals, but to fund more law suits. Ranchers and other citizens are being forced to expend millions of their own money to intervene or participate in these lawsuits to protect their way of life when they have no chance of the same attorney fee recovery if they prevail. In fact, they are paying for both sides of the case—for their defense of their ranch and for the attorney fees for environmental groups receive to sue the federal government to get them off their land. There are also numerous cases where the federal government agrees to pay attorney fees, but the amount paid is hidden from public view. Somewhere this has to stop and the government has to be held accountable for the money its spending.