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MEMORANDUM

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

DATE: OCTOBER 22, 2009

**RE: WESTERN LEGACY ALLIANCE RESEARCH REGARDING
FEDERAL GOVERNMENT FUNDING OF ENVIRONMENTAL
LITIGATION AGAINST THE FEDERAL GOVERNMENT**

Since the passage of the Paperwork Reduction Act of 1995, the federal government does not account for the payment of attorney fees and costs to environmental groups suing federal agencies. Just scratching the surface in researching these payments for Western Legacy Alliance, the federal government “pays” “non-profit, public interest” environmental groups to litigate issues under the Endangered Species Act, roadless legislation, federal land grazing permits, Clean Water Act TMDLs, BMPs and non-source point pollution, Clean Air Act standards and others. For example:

- 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. These cases include challenges to the reauthorization of BLM and Forest Service term grazing permits, alleged livestock grazing “take” of bull trout and other fish species, ESA cases for failure to list grass species, sage grouse, pygmy rabbits, the Big Lost Mountain whitefish and others, FOIA challenges for failure to waive photocopy fees for mass document requests, etc. In the Idaho Federal District Court, WWP has been awarded (or settled) over \$1,150,528.00 in attorneys fees payments from the federal government.
- 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. Twelve of the cases have been filed in the Washington State Eastern and Western Federal District Courts. These cases include ESA challenges for failure to list the killer whale, a butterfly species, the woodland caribou and the giant Palouse earthworm; challenges against the EPA’s ESA section 7 consultation with regard to certain pesticide and fungicide use on farm crops; a

challenge to soft wood trade agreement between U.S. and Canada; challenges for violations of the Clean Water Act, specifically to protect ocean waters from acidification, and others. Of the 12 cases filed, four are still pending and no attorneys fees were paid in two cases. The total amount of attorneys fees paid for the six remaining cases was \$941,332.00.

- Cases against the federal government related to roadless inclusion and management have also reaped attorneys fees. For example, one case challenged the procedures by which the Department of Agriculture (“DOA”) implemented its rule allowing states to petition the Forest Service for roadless designations. The challenge was not to whether the substance of the regulation was correct but to whether the DOA had followed the process in the National Environmental Policy Act and the ESA Section 7 consultation process. The District Court ruled in favor of the environmental groups and the DOA appealed to the Ninth Circuit. The Ninth Circuit Court also ruled in favor of the environmental groups. The environmental groups had to file one brief in this appeal. The groups are now asking the federal government for attorney fees of \$189,412.50 for filing a single brief. The request includes attorney hours for five attorneys with the highest fee of \$600 per hour. The majority of the hourly fee request was for \$500 per hour. The environmental groups have also stated that they will separately ask for attorneys fees from the district court case.
- A “for-profit” business with a net worth over \$7,000,000 is not eligible for an award of attorneys fees from the federal government. A non-profit organization, regardless of its net worth, is eligible for attorneys fees.
- In addition to collecting money from the federal government, the Clean Air Act and the Clean Water Act allow environmental groups to sue, and if they win, to collect attorney fees from private business for Clean Water Act or Clean Air Act violations, in addition to any fines, penalties or mitigation imposed against the business by the federal government.

Should you have any questions, please do not hesitate to contact the Western Legacy Alliance at 208-681-6004 or me.