MEMORANDUM

DATE: November 2, 2005

FROM: Karen Budd Falen

RE: Environmental Organization's use of NEPA to Eliminate Land Use and Obtain Attorneys Fees Under the EAJA

QUESTION PRESENTED: To what extent do environmental organizations attempt to use the National Environmental Policy Act ("NEPA") to reduce or eliminate the use of natural resources on public lands and obtain costs and attorneys fees pursuant to the Equal Access to Justice Act?

ANSWER: Together with the Endangered Species Act ("ESA"), the NEPA appears to the primary vehicle which environmental organizations use to eliminate the use of natural resources on public lands, and EAJA fees are often obtained in the process.

I. METHODOLOGY AND LIMITATIONS

To accurately evaluate the frequency and impact of NEPA claims, one must examine the dockets and pleadings for every environmental case filed in a given federal district court for a given period of time. The complaints, orders, judgments, stipulations, and motions for costs and attorneys fees must be evaluated to ascertain the nature of the case, the natural resource use at stake, the outcome, and the award of costs and attorneys fees.

There are two principal methods by which this information may be obtained. First, district courts may be physically visited and case files individually reviewed. Second, there is a great deal of information available electronically via the internet. I am aware of two principal services where this information is available, WESTLAW and PACER. WESTLAW is a commercial data service which provides data bases for all published federal decisions and many non-published federal decisions for all federal courts. The advantage of WESTLAW is the speed and power of its search engine. The disadvantage is that only published decisions and arbitrarily selected non-published decisions are available. This excludes most court orders and decisions. Pleadings, such as complaints and motions, are unavailable.

PACER is an acronym for "Public Access to Court Electronic Records." PACER is a public service, but it is not free. Unlike WESTLAW, PACER does not have a powerful search engine allowing the user to search for specific contents in specific documents. PACER includes the dockets and many of the court filings for every environmental case filed in recent history in most federal courts. However, the court documents available on PACER are limited to those filed electronically. Since most federal courts have only within recent years required, encouraged or allowed electronic filing, the pool of documents available is generally limited to recent years and cases. Thus, while PACER has much more case information than WESTLAW, it is not comprehensive.

For the purpose of this memorandum, I utilized both WESTLAW and PACER. Due to time constraints, I limited my evaluation to big-picture background information, coupled with detailed information for a four year time period in one federal district court. However, I believe that the results from this small, preliminary evaluation may be representative of those found nation-wide, should a comprehensive study be done.

II. RESULTS AND DISCUSSION

Using WESTLAW, I conducted a preliminary evaluation of the prevalence of NEPA in environmental litigation. I used the "ALLFEDS" database, which includes cases from all federal courts nation-wide. From January 1, 2000 to the present, a total of 999 cases were published on WESTLAW which contained the acronym "NEPA" or the phrase "National Environmental Policy Act." Repeating the search with no date restriction resulted in a total of 3902 cases. While this search provides only a rough estimate of the frequency and magnitude of NEPA use, it is illustrative of the prevalence of NEPA in environmental litigation. Since WESTLAW includes only published decisions, the use of NEPA in litigation is much greater than the results from my WESTLAW search would indicate.

I then conducted a detailed evaluation of every environmental case filed in the Oregon Federal District Court for a four year period of time. PACER sorts cases according to type, lumping all "environmental" cases into the same category.

According to PACER, there were a total of 148 "environmental" cases filed in the Oregon Federal District Court from 2002 through October 28, 2005. Due to a lack of electronic documents available on PACER, I was unable to ascertain the nature of 8 of these cases, leaving a total of 140 which I was able to evaluate.

Of those 140 cases, only 28 were <u>not</u> filed by environmental organizations, meaning 80% of all "environmental" cases were filed by environmental organizations[1]. Of these112 cases (140 cases - 28 cases), 63 cases (53%) included at least one NEPA claim, but often included other environmental statutes as well, such as the Federal Land Policy and Management Act and the ESA. Of the remaining 49 cases, 39 included or were primarily ESA claims. The remaining ten cases involved a variety of statutes, but the majority were claims brought under the CWA. Thus, overall, the NEPA appeared to be the most popular and widely used statute used by environmental organizations as a tool to eliminate natural resource use, equaled or followed closely by the ESA.

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[1] The remaining 20% of cases were filed by governments, for example Clean Water Act ("CWA") enforcement cases, by industry, for example mining, logging or development interests suing to enforce environmental laws, and by private parties, such as company A suing company B over hazardous waste issues.

I then specifically evaluated the 63 NEPA cases filed between January, 2002 and October, 2005. By far, logging was the primary natural resource use which environmental organizations in Oregon sought to reduce or eliminate. Specifically, 49 of 63 NEPA cases (78%) sought to temporarily or permanently reduce or eliminate logging on public lands. Interestingly, most timber sales at issue were salvage sales of trees which had already been damaged to destroyed by fire or disease. This fact would appear to indicate that environmental organizations oppose all logging, regardless of the reasonableness of circumstances. The remaining cases involved the reduction or elimination of grazing (5 cases), recreation or access (5 cases), hunting (3 cases) and mining (1 case).

Another interesting fact was that in most cases, the environmental organization sought to eliminate the resource use over a very large tract of public land. In nearly all cases where the environmental organization prevailed, the court issued an injunction temporarily or permanently reducing or eliminating the resource use. Even in many cases where the environmental organization did not ultimately prevail, the resource use was still enjoined by court pending the outcome of litigation. In most cases, private parties, such a logging companies and ranches, were harmed in the process.

Of the 63 NEPA cases that have been filed in Oregon over the last approximately three years, 32 have been resolved. In 11 cases (34%), the environmental organization lost and the case is closed. In 21 cases (33%), the environmental organization won at least part of its case. Of those 21 cases, 13 cases (41%) were "settled" by the federal agency prior to the court issuing a ruling. Thus, of the 32 cases resolved, the environmental organization has received a favorable court ruling only 8 times (25%). However, counting the "settled" cases, environmental organizations have prevailed 66% of the time.

Of the 21 NEPA cases which were either won or were settled, I was unable to ascertain whether or not attorney fees were paid in four cases due to the unavailability of documents online. In three of those cases, the case was settled, but the settlement document was unavailable. In one case, the government settled and agreed to pay fees, but the settlement document was unavailable. In a different case, the court ruled in favor of the plaintiff, and later ruled on the plaintiffs application for costs and fees, but the court's order was unavailable. In yet another case, the case was settled and the plaintiff was given the right to apply for attorneys fees under the Equal Access to Justice Act ("EAJA"), but has not yet done so. This leaves a total of six cases where I was unable to ascertain to what extent fees were paid or will be paid, if at all.

Of the 15 cases I was able to ascertain, only four cases (27%) did not result in the payment of costs and attorneys fees. In one case, the plaintiff won but did not apply, in two cases the plaintiff settled and agreed to bear its own costs, and in one case the court denied the request. This leaves 11 cases where costs and attorneys fees were paid. In nine cases, the federal agency stipulated to costs and fees, for a total of approximately $ 283,000. In the other two cases, the court awarded a total of approximately $168,000. All total, $451,000 was paid for attorneys fees and costs.

I observed several trends with respect to NEPA EAJA claims. First, the environmental

organization nearly always received attorneys fees when they were sought. In the Oregon example, they sought fees 14 times and received them 11 times, nearly 79% of the time. Second, the award of fees was primarily a result of settlement with the federal agency and/or Justice Department, as opposed to proving to the satisfaction of the court that the agency was not "substantially justified" in its litigation position as required by the EAJA. The data strongly suggests that federal agencies are very willing to "settle" cases with environmental groups, both substantively and with respect to attorneys fees. In the Oregon example, the federal agency "settled" the substantive case 41% of the time, and "settled" the attorneys fees award 82% of the time. Finally, I observed that in many cases, the environmental organization has done little actual work prior to the agency "settling" the case. In some instances, the organization had done nothing more than file a complaint before the agency capitulated and agreed to pay attorneys fees.

The agencies' propensity to "settle" attorneys fees may be due in part to many courts' willingness to grant environmental organization's costs and fees regardless of the circumstances. The average "settled" award was $31,000, while the average court award was $84,000. A case I found on WESTLAW is illustrative. See Wilderness Society v. Babbitt, 5 F.3d. 383 (9th Cir. 1993). In 1989, the Fish and Wildlife Service ("FWS") began evaluating the impacts of a grazing on the Hart Mountain Wildlife Refuge in Oregon, in light of an ongoing drought. These efforts included monitoring, research, and public scoping. The FWS also began urging the ranchers to voluntarily eliminate grazing due to the drought, which the ranchers did beginning in 1991. Despite the fact that the FWS was dealing with the problem and the ranchers had voluntarily eliminated grazing, the Wilderness Society, represented by the Sierra Club Legal Defense Fund, sued the FWS for failing to comply with the NEPA. Six months later, the magistrate judge recommended dismissal of the case as unripe, due to the FWS's ongoing efforts. However, before the district court could rule on the motion to dismiss, the FWS entered into a settlement with the Wilderness Society, agreeing to complete NEPA documentation prior to issuing any more grazing permits (even though grazing was not occurring), which the FWS was already doing. The Plaintiffs then requested nearly $52,000 in attorneys fees under the EAJA. The district court denied the request, holding that the Plaintiffs did not prevail, because the FWS was already moving toward compliance with NEPA, and because the FWS's reasonable steps were substantially justified. In a two to one decision, the Ninth Circuit reversed, holding that the FWS was substantially unjustified because it should have completely eliminated grazing in 1989, at the first hint of a problem and prior to scientific analysis, that Plaintiffs prevailed by forcing the FWS to speed up its efforts, and awarded the Plaintiffs their costs and attorneys fees.

III. PRIMARY OREGON ENVIRONMENTAL LITIGANTS AND THEIR ATTORNEYS

Perhaps the most interesting aspect of the above research is "who" is bringing the litigation and the attorneys employed. With regard to legal counsel, a substantial amount is done by the Lewis and Clark College of Law's Pacific Environmental Advocacy Center ("P.E.A.C."). P.E.A.C. grants college credit to law students who assist with briefing and litigation for a client list such as Oregon Natural Desert Association, Forest Guardians, National Wildlife Federation, Great Lakes United, Audubon Society and other environmental organizations. Although P.E.A.C. is supported by the Lewis and Clark Law School, including

payment of professions, P.E.A.C. requests and in granted attorney fees and costs. For more information, see http://law.lclark.edu.org/peac

IV. SUMMARY

The Oregon data, while limited, illustrates a number of important trends. First, environmental organizations file a great number of cases seeking to reduce or eliminate natural resource use on public lands. In a less than four year time period, environmental organizations filed at least 112 such cases in one federal court alone, 80% of all cases filed involving environmental issues. Extrapolating this figure out among all courts, then the number of cases rises to hundreds and perhaps thousands of cases filed every year.

Second, environmental organizations have opposed all human uses of public land and its resources. While Oregon cases were heavily skewed against logging, including "salvage" logging from trees already destroyed by fire and disease, environmental organizations brought cases seeking to reduce or eliminate all major uses of public land resources, including logging, mining, recreation, grazing, access, trails, hunting and fishing. Collectively, environmental organizations appear to be opposed any public land use other than strict preservation.

Third, with the possible exception of the ESA, the NEPA appears to be the favorite federal statute used by environmental organizations to reduce or eliminate natural resource use on public lands. Over one-half of all cases filed by environmental organizations included at least one NEPA claim[2].

Fourth, the majority of NEPA cases end up being "settled" by the federal agency, whereby the agency agrees to reduce or eliminate a resource use pending additional NEPA analysis, and then agrees to pay the environmental organizations' costs and attorneys fees. In many cases, the environmental organization is paid to do little more than file a complaint. When the courts do decide the case on the merits, environmental organizations lose as much or more than they win, but seem to be favored when it comes to an award of costs and attorneys fees. As illustrated by the Wilderness Society case, federal agencies are often willing to settle cases, and courts are willing to award costs and attorneys fees, even when the agency has followed the letter of the law.

In summary, the NEPA is currently being used as a major tool to reduce or eliminate the use of public lands. While the NEPA is a "procedural" statute, which cannot substantively prevent an agency from any particular course of action, the NEPA is used to enjoin land use for years pending litigation and compliance. Through delays, costs, and repeated litigation, environmental organizations are often successful in damaging agencies and private parties to the point where the land use in question is, in a practical sense, eliminated by this merely "procedural" statute. Finally, the use of NEPA to eliminate land use appears to be self sustaining, in that environmental organizations are generally compensated for successful or more

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[2] This trend is even more frustrating since NEPA is a procedural statute, not dictating any particular result. However, it is obviously being used for a result against use on federal lands.

often “settled” litigation, which can then be used to file the next lawsuit.