Testimony of Caroline Lobdell

before the

Subcommittee on Oversight & Investigations

of the House Committee on Natural Resources

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Good morning Chairman Labrador, Ranking Member McEachin, and members of the Subcommittee. I am Caroline Lobdell the Executive Director of the Western Resources Legal Center (WRLC). WRLC is a nonprofit organization that provides clinical education at Lewis and Clark Law School in Portland, Oregon for those students interested in resource use such as livestock grazing, timber harvest, mining, and oil and gas exploration and production. My remarks are based on my experience as an educator and litigator and do not represent the position of the Law School. Today I will address three topics: Concerns over recovery of attorney's fees under the Equal Access to Justice Act (EAJA); The marginalization of resource users as limited intervenors that want to help defend the Department's resource use decisions in court; And steps that the Department of Interior can take to avoid litigation and streamline the challenges to its resource projects so that projects benefiting natural resources and rural communities are not delayed for years by its own appeals process.

Equal Access to Justice Act Reforms

EAJA is a taxpayer funded meal ticket for environmental groups to collect attorney's fees at enhanced rates even if the non-profit's net assets exceed the $2 million limit that precludes attorney's fees recovery for individuals. EAJA is an incentive to sue the Department of Interior and other agencies and is a funding source for expansion of the staff and offices of groups that want to halt environmentally and economically beneficial natural resource projects. The taxpayers lose all around. They pay plaintiffs and they lose revenue from the projects that are halted.

Congress should consider three reforms that will bring some sanity to stop the EAJA gravy train for plaintiff groups. First, a nonprofit should be subject to the same net worth limit that precludes recovery for other plaintiffs. If the nonprofit's net assets exceed $2 million, then there should be no recovery of attorney's fees. Second, there should be no enhanced rates for environmental litigation. Decades ago environmental law was considered a specialty area with few lawyers practicing in the field and the courts concluded that enhanced rates were justified for environmental plaintiffs. However, today almost every law school has an environmental law clinic. A multitude of newly minted lawyers challenge BLM, Fish and Wildlife Service, and other Department of Interior actions to get experience straight out of law school and hope for a big EAJA payday. Environmental law simply is no longer a specialty justifying enhanced rates. We have seen cases where law students used on the cases are awarded rates of $150 an hour and they are not even admitted to practice law. Third, a plaintiff should not be considered a "prevailing party" entitled to EAJA fees if it only obtains a favorable ruling on a few claims. A plaintiff should be required to prevail on all, or at least half, of its claims before it can recover under EAJA.

Level the Litigation Playing Field for Those Who Support Department of Interior Decisions

State and local governments, potential purchasers of timber sales and grazing allotments, and existing contract and permit holders are allies of the Department of Interior to defend lawsuits filed to halt resource projects. These third parties can help demonstrate to the court the adverse economic impacts and negative environmental consequences from halting a resource project. Unfortunately, there is no legislation that provides a right for a state or local government, contractor, or permit holder to intervene in a lawsuit that seeks to halt a Departmental project. For example, on the Point Reyes National Seashore north of San Francisco, families engaged in ranching and dairying moved to intervene in a lawsuit that challenges the Park Service over delayed revision of the Seashore's General Management Plan and the authorizations of long-term leases for the ranches. These multi-generational ranch and dairy families were land stewards before the National Seashore was created. The Park Service acquired these private lands under threat of condemnation. Congress recognizes the importance of the ranches and provided for continuation of ranching and dairying in the pastoral zone of the Seashore. These families have been caring for the land and provide locally grown, organic, and grass-fed cattle, sheep, and dairy products and are a major part of the agricultural base of Marin County. The ranchers and Marin County moved to intervene in a lawsuit. The court, at the urging of plaintiffs, limited the ranchers' and County's participation to the point where they are not considered full parties to the settlement negotiations. Secretary Ken Salazar directed that ten- year ranching leases be issued, but the Park Service has capitulated to plaintiffs and only provided one year leases. The short- term leases make it hard for the ranchers to justify investments in water distribution, pond improvements, and range rejuvenation that will benefit wildlife and water quality.

Finally, when the government loses a case, the Ninth Circuit has held that intervenors have no right to appeal if the government does not appeal. So, bad legal precedent is established by one sided settlements. Furthermore, when the Department is prevented by the Solicitor General from appealing an adverse decision, which an intervenor cannot appeal, because of bad Ninth Circuit law.

Actions Within the Control of the Department of Interior to Avoid Litigation and Streamline Administrative Review

Finally, there are at least two actions that the Department of Interior can implement to avoid litigation and streamline the challenges to resource projects. First, Department of Interior agencies need to build flexibility into their Resource Management Plans when the plans are amended and revised. Plaintiffs love to plumb the depths of voluminous Management Plans to find inflexible standards and required procedures to serve as a foundation for lawsuits to stop agency projects. Every use of the word "shall" in a management plan lifts a plaintiff lawyer's heart and provides another arrow to shoot down a resource project. Not surprisingly, courts have held that an agency must follow the nondiscretionary mandates in its management plan. A plan full of nondiscretionary standards defeats an agency's ability to engage in adaptive management during a given year and over the life of the plan. For example, a provision in a plan that BLM "shall retain 500 pounds of residual dry matter per acre" after the grazing season does not

account for the annual variation in weather or site conditions that could allow greater forge utilization while maintaining the health of the range.

Second, the Department of Interior's administrative review process is vastly more cumbersome and lengthy than the administrative review of the Forest Service and the Department of Agriculture. The Forest Service has an objection process that provides one level of administrative challenge to a resource project such as a timber sale. In stark contrast, the Department in Interior has a three-level review process. A protest before the Bureau of Land Management, then an appeal to the Department of Interior Office of Hearings and Appeals administrative law judge, and then another appeal to a three-judge panel of the Interior Board of Land Appeals (IBLA). IBLA itself is not a creature of statute but is one of two Boards in the Office of Hearings and Appeals that the Secretary of Interior created in 1970. The Secretary has the power to shape and modify the administrative appeals process and define which decisions are subject to administrative appeal and whether there is one level of challenge instead of three. For example, under the Department of Interior Manual there is no appeal of a biological opinion issued by the Fish and Wildlife Service. Certain decisions could have one level of protest just like Forest Service decisions. For example, I represent Carolyn and Manuel Manuz from Clifton, Arizona, who are seeking to build a solar powered well. There is no reason for three levels of review of the decision to drill a modest well on the Twin C Grazing Allotment in Arizona far from any surface water source, that will benefit wildlife and cattle with a new water source, and reduce water withdrawals from a well on the Gila River. Decisions to maintain the status quo, such as renewal of a grazing permit at the same level of livestock use, are another class of decisions that could be subject to only one level of administrative challenge.

Thank you for this opportunity to testify, and I am happy to answer any questions.