U.S. House Natural Resources Committee, Subcommittee on Oversight and Investigations
Hearing on "The Profit Engine Driving Environmental Nonprofits"
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Main Points:

- Federal laws authorizing reimbursement of attorney's fees are a significant departure from the American rule that each party to a case should bear its own costs. But they aim to address a real problem: The expense of litigation can be a significant barrier to even righteous lawsuits challenging government action.
- However, many federal fee-shifting provisions are implemented in a way that goes far beyond cost-recovery to provide a large subsidy to litigation—a subsidy so large that environmental groups have chosen litigation even in the face of cheaper, more effective tools and numerous large groups have formed with litigation as their only or primary tool for pursuing environmental improvement.
- It's highly doubtful that Congress intended this result when it passed these laws. It should consider how to reform them to better calibrate attorney's fees to real-world litigation costs and the benefits achieved through litigation—without infringing the right to challenge illegal government action.

Introduction

Chairman Gosar, Ranking Member Dexter, and members of the subcommittee, thank you for the invitation to testify on the role of attorney's fees in driving environmental litigation and shaping incentives for environmental groups to favor litigation over other, cheaper, more effective tools. While I believe that the right to challenge illegal government actions is essential to a free society and the rule of law, and that fee-shifting can help to remove litigation costs as a barrier to righteous cases, I am concerned that several fee-shifting laws have moved beyond cost-recovery into outright subsidy for litigation.

I've included as part of my testimony an article about a recent case—the Benson Ridge tract case—that exemplifies the problems that result from such a large subsidy for litigation.[1] The Benson Ridge tract was a state trust land parcel in the Elliot State Forest given to Oregon by the federal government to fund public education.[2] But conflict over timber harvesting of old-growth forest changed the parcel from an asset for education into a liability.[3] To satisfy its fiduciary duty, the state put the parcel up for sale and specifically solicited bids from conservation groups interested in conserving the parcel's old-growth forest, wildlife habitat, and recreation opportunities.[4]

But no conservation bids came in and the forest was sold to a timber company for $2,000 an acre.[5] Instead of purchasing and permanently conserving the old growth forest, several environmental groups instead chose to sue the new owner over its need for a federal permit to log the forest.[6] While they won their case, the conservation benefits of that suit were far less than could have been achieved by purchasing the land. And, paradoxically, the groups reported spending substantially more on the case than it would have cost to purchase the land outright.[7]

From a conservation perspective, this is an outrageous result. But it makes sense once you account for the profit the groups made on the litigation. For at least one of the attorneys in the case, the groups' profit margin was at least 700%. It's highly doubtful that when Congress passed these laws it envisioned attorney's fees being awarded where a plaintiff achieved only a nominal victory and in amounts that greatly exceed the actual costs of the case. Fortunately, Congress can address this problem, without infringing on the right to challenge illegal government action.

The Property and Environment Research Center

PERC is the national leader in market solutions for conservation, with over 40 years of research and a network of respected scholars and practitioners. Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana. Through research, law and policy, and innovative applied conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. PERC

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[1] *See* Jonathan Wood, *Forest Fight: When litigation pays better than conservation*, PERC Reports (2024). Rather than restating the content of that article herein, a copy has been provided and details of the case are referenced throughout.

[2] *See* Oregon Dept. of State Lands, *Elliott State Forest: An Asset of the Common School Fund* (2014).

[3] *See id.*

[4] *See* OregonToday.net, *State Completes Elliott State Forest Land Sales* (June 13, 2014).

[5] *See* Zach Urness, *Elliott State Forest Sale closes amid controversy*, Oregonian (June 12, 2014).

[6] *See Cascadia Wildlands v. Scott Timber Co.*, 105 F.4th 1144, 1149–50 (9th Cir. 2024)

[7] *See* Mot. for Costs and Attorney's Fees, *Cascadia Wildlands v. Scott Timber Co.*, No. 16-cv-1710 (D. Or. filed July 12, 2022).

and its scholars have long criticized excessive reliance on political and litigious environmentalism, which have high transaction costs, are prone to rent-seeking, and can create perverse incentives that undermine conservation.[8]

Why pay attorney's fees to prevailing parties?

Traditionally, parties in a lawsuit bear their own costs, regardless of which side prevails. This is known as the "American rule," and differs from the British approach of the losing party covering the costs of the prevailing party.[9]

Congress has set aside this rule to allow fee-shifting in cases where a party prevails against the government, and sometimes private parties. The Endangered Species Act, for instance, authorizes "citizen suits" through which virtually anyone can enforce the statute against the federal government, states, or private parties.[10] Congress also provided that the prevailing party in an ESA can demand that the losing side pay its costs, including attorney's fees."[11]

Courts can award attorney's fees under the Endangered Species Act whenever they deem it "appropriate."[12] In practice, fees are awarded whenever a party "substantially prevails" and achieves some benefit through the litigation.[13] In theory, either side of a lawsuit could seek attorney's fees under this provision. But the vast majority of fee awards are to plaintiffs and courts have adopted heightened standards for defendants seeking fees.[14]

In practice, "substantially prevails" can be a low standard. A partial win at some step in the litigation can be enough, if it can be traced to a change in the defendant's behavior.[15] Courts have even found that plaintiffs may be able to recover attorney's fees even when they lose a case in every respect, if they can show that the risk of litigation caused the defendant to change

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[8] *See, e.g.,* Terry L. Anderson & Donald R. Leal, *Free Market Versus Political Environmentalism*, 15 Harv. J. L. & Pub. Pol'y 297 (1992). *See generally* *A Different Shade of Green*, PERC Reports (Regan, ed. 2020).

[9] *See* Dept. of Justice, Civil Res. Man. § 220 (Attorney's Fees).

[10] 16 U.S.C. § 1540(g).

[11] 16 U.S.C. § 1540(g)(4).

[12] *Id.*

[13] *See* Office of Legal Council Op., *Payment of Attorney's Fees in Litigation Involving Successful Challenges to Federal Agency Action Arising Under the Administrative Procedure Act and the Citizen-Suit Provisions of the Endangered Species Act* (Nov. 27, 2000).

[14] *See* Statement of Jonathan D. Brightbill, Dep. Asst. Attorney General, Hearing on "Restoring Balance to Environmental Litigation" Before the Committee on Oversight and Government Reform (Sept. 27, 2018). For example, a court has ordered plaintiffs' attorneys to pay the fees of a defendant because the "case was groundless and unreasonable from its inception" and the attorneys had engaged in unethical conduct to keep the case going. *See* Mem. Op., *Animal Welfare Inst. v. Feld Entertainment, Inc.*, No. 03-cv-2006 (Mar. 29, 2013). *See also Wildearth Guardians v. Kirkpatrick,* No. 12-118 (D.N.M. Sept. 11, 2015).

[15] *See* Paul Weiland, *Plaintiffs Claim Victory in Sharp Park Case Despite Mixed Record of Success*, Endangered Species Law & Policy (July 3, 2013) (discussing the "catalyst theory" for attorney's fees under the ESA).

course.[16] This encourages procedural litigation, as opposed to substantive challenges, because it is easier to show that a defendant missed a step or took a step in response to the case than to show a substantive error or violation.[17]

Thus, it is common for substantial attorney's fees to be awarded in environmental cases, even where their only real world effect is delay and the challenged substantive decision is ultimately affirmed. *Cottonwood Environmental Law Center v. U.S. Fish and Wildlife Service*, for instance, delayed for years a forest restoration project designed to protect Bozeman, Montana's drinking water supply while the Forest Service was forced to perform a redundant and unnecessary environmental analysis.[18] At the end of it, the project proceeded without change, except for the delay, but the small litigation group that brought the case was rewarded with $800,000 in attorney's fees (an amount several times its annual budget).

And no consideration is given to the reasonableness of the litigation. In the Benson Ridge Tract case, for instance, courts gave no consideration to the fact that the litigants declined an opportunity to purchase the land and permanently conserve its old growth forest. Nor did it consider that this option would not only have been a better conservation outcome but would also have been cheaper. Reasonableness of the attorney's fees is determined without regard to the significance of the victory or the alternatives to litigation—even though any private party bearing their own costs would obviously consider these factors.

Cost - mitigation → Subsidy

At first blush, it might seem like this arrangement shouldn't encourage litigation that much. Groups still bear the costs of cases that they lose and are merely made whole for those that they win. Except in the rare situation where victory and attorney's fees are assured, the expected costs of a lawsuit should still be positive. But that's not how it works in practice.

When courts award fees, they do not look at the actual amounts paid to the attorneys in the case. Instead, the party seeking attorney's fees proposes a hypothetical hourly rate for each attorney and then multiplies that rate by the number of hours each attorney reported working

[16] *See Friends of Animals v. Salazar*, 670 F.Supp.2d 7, 14–15 (D.D.C. 2009) (holding that an animal-rights group may be eligible for attorney's fees even though its case was dismissed entirely).
[17] The Supreme Court has recently suggested that parties bringing mere procedural claims should have to show that the error was so great that it calls the ultimate substantive decision into doubt. But this conflicts with the traditional approach of lower courts, which presume that minor procedural or analytical errors merit vacatur of a decision.
[18] *See* Jonathan Wood, *"Cottonwood" Delays Urgently Needed Forest Restoration* (2023) (Testimony to Federal Lands Subcommittee describing the *Cottonwood* case and its consequences).

on the case. This is known as the “lodestar” method.[19] For nonprofits, this creates a large profit opportunity, by paying their attorneys modest nonprofit rates while demanding reimbursement at inflated, private practice rates. There are even cases where parties have asked that rates be set based on the court's prior attorney’s fees award rather than market evidence because the former is significantly higher.[20]

The environmental groups that brought the Benson Ridge Tract case, for instance, assert hourly rates ranging from $140 an hour (for the work of a law student intern) to $650 an hour (for an attorney with 30 years experience).[21] Perhaps it should go without saying that few environmental nonprofits pay their interns anything close to $140 an hour, a rate which translates to more than $250,000 a year. Indeed, few senior nonprofit attorneys are paid at such levels. Based on public information, one of the senior attorneys on the case makes less than $125,000, which would roughly translate to $60 an hour.[22] In the attorney’s fees motion, however, the group reported $515 an hour as the reasonable rate for his time—a 700% profit margin for the organization compared to his actual salary.[23]

None of this is meant to criticize the particular organizations and attorneys involved in that case. They are simply responding to the incentives that policy creates. While PERC has never accepted attorney’s fees—or any government money for that matter—I have sought attorney’s fees prior to my time at PERC, using hourly rates that my actual pay paled in comparison to. Rather than criticism of any party or lawyer, my point is that attorney’s fees are calculated in ways to not simply make litigious groups whole but lavishly reward them for bringing cases that achieve even only a modicum of success.

Defendants are also discouraged from fighting attorney’s fees, including proposed hourly rates. If attorney’s fees are contested, courts may award fees for the litigation over attorney’s fees, a concept known as “fees on fees.”[24] Unless a plaintiffs’ attorneys’ fee demand is wildly unrealistic, it will rarely be economically worthwhile to pay one’s own attorneys and the other side’s attorneys to litigate the issue.

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[19] *See* Brightbill, *supra* n.14, at 3.

[20] In the Benson Ridge Tract case, for instance, the plaintiffs offered two ways of calculating hourly rates: one based on the 75th percentile of attorney salaries for a given level of experience and one based on prior court awards. The latter resulted in estimates 20-30% higher than the former and was the method plaintiffs based their demand on. *See* Mot. for Costs and Attorney’s Fees, *Cascadia Wildlands v. Scott Timber Co.*, No. 16-cv-1710 (D. Or. filed July 12, 2022).

[21] *Id.*

[22] https://projects.propublica.org/nonprofits/organizations/273943866/202522659349300117/full

[23] *See* Mot. for Costs and Attorney’s Fees, *Cascadia Wildlands v. Scott Timber Co.*, No. 16-cv-1710 (D. Or. filed July 12, 2022).

[24] *See* Brightbill, *supra* n.14, at 7.

Since 2019, federal agencies have reported on the attorneys' fees they've paid under the Equal Access to Justice Act, which is similar to the Endangered Species Act but slightly less favorable to plaintiffs.[25] Many environmental cases implicate both the ESA attorneys' fee provision and EAJA's. In cases implicating both statutes, federal policy strongly favors allocating fees under the ESA rather than EAJA, since the latter has a cap on fees and the payment comes out of the agency's budget rather than a general fund.[26] What this means is that EAJA fees are likely to be significantly less than fees awarded under the ESA.[27] Yet, in just the last few years, federal agencies have paid more than $20 million in attorneys' fees, almost all of it to just a few organizations. Nearly 20% of these funds have been paid out in cases brought by two of the groups behind the Benson Ridge Tract case.

Conclusion

The Endangered Species Act has famously been described as demanding species protection "whatever the cost."[28] We might think of the law's attorneys' fees provision as favoring litigation whatever the opportunity cost. Under it, little or no consideration is given to the extent to which a lawsuit produces real-world benefit, whether that benefit is commensurate with the amount of attorneys' fees demanded (not to mention the litigation costs incurred by the other side), or the alternative ways a group could have achieved the same or more conservation benefit. The result is a heavy thumb on the scale in favor of litigation, so heavy that it can induce groups to favor litigation even in the face of a cost-effective way to secure a bigger conservation win. It may even explain why litigation is a central tool for so many groups founded since these laws were enacted, rather than on-the-ground conservation work. It is difficult to imagine that Congress meant to create such a large inducement for environmentally and economically inefficient outcomes.

[25] *See* Admin. Conf. of the U.S., *EAJA Awards Database*.

[26] *See* Office of Legal Counsel, *supra* n. 13, at 7.

[27] *See id.* EAJA also sets a presumptive cap on the hourly rate that can be used to determine attorneys' fees. *See* 28 U.S.C. § 2412 (d)(2)(A) (capping fees at $125 an hour). The ESA has no similar provision.

[28] *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). While still used rhetorically, Congress has amended the law several times since 1978 to make it more cost-sensitive.