Testimony of the Honorable Cynthia M. Lummis
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On H.R. 1996, "The Government Litigation Savings Act"
Before the House Natural Resources Committee Hearing on
"Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools"
June 19, 2012

Thank you Mr. Chairman for this opportunity to speak with you today.

After listening with great interest to your committee discuss litigation as part of your hearing on the Endangered Species Act a few months ago, and especially now after the Senator from Alabama has delivered forceful remarks on the need to update and modernize the Endangered Species Act, I thought it important to share with you what I have learned on tax-payer funded litigation.

Understanding the types of litigation and the source of tax-payer funds for each is a critical first step to fixing any problems associated with litigation.

So with your indulgence, I want to use my time to help set the stage for your important deliberations today.

Title 16, Section 1540(g) of the United States Code is the law that authorizes so-called "citizen suits" in the Endangered Species Act. Suits filed pursuant to this section of the law are awarded fees and expenses through the Judgment Fund – a permanently appropriated bottomless pot of money established for the purpose of paying judgments in suits against the federal government.

These citizen suits, and the decisions about when, and how much tax-payers should be on the hook to pay for them fall squarely in this committee's lap.

It is critical that you take up this issue, because I strongly believe that the court is not the right venue for ensuring successful species conservation. But regardless of what you decide to do or not do about ESA authorized litigation, the fact remains that Congress has clearly spoken about what types of litigation are appropriate under the Endangered Species Act.

That is a very important distinction that separates ESA litigation from the Equal Access to Justice Act – or EAJA, as it's affectionately known.

At its core, EAJA is a social safety net program – not an environmental one. It is designed to reimburse individuals or small businesses the cost of attorneys for suing the federal government when **no other law provides for that**.

The Congressional Record on the bill's development and passage is crystal clear. Congress intended that EAJA serve as a way to help veterans, retirees and small businesses combat the federal government in court when they felt they had been personally wronged. Unfortunately, the law throws up difficult roadblocks for these legitimate users to recoup their costs.

Scholarly journals from Virginia Tech and Notre Dame, reports from the Government Accountability Office, and reviews of tax records and open court documents all show that despite Congress' clear intent, EAJA has been used to reimburse groups for environmental lawsuits – and no one is keeping track.

Contrary to lawsuits filed pursuant to the Endangered Species Act itself, EAJA reimbursed lawsuits that touch on ESA decisions are not related to actual violations of that law.

Let me say that in a different way because this is a critical point. In every single EAJA related case, litigious environmental groups are paid not because they have found an environmental violation, but because they dispute the paperwork or procedure by which the government reached a decision the environmental group opposed.

In essence, these groups use EAJA as a tax-payer funded, backdoor approach to protesting agency decisions, and altering the ESA's operation without ever having to prove a violation of the ESA itself.

Litigious environmental groups like to say that EAJA reimbursements are a small part of their budget. If that is true then they won't miss the subsidy when it's gone, but either way that weak argument entirely misses the point.

Environmental laws exist for environmentalists; EAJA is for seniors and veterans in need.

Because EAJA payments are supposed to come from agency budgets, every single dollar paid to support procedural grievances is a dollar not spent on actual species recovery. We have lost sight of that, and we have let litigious environmental groups exploit our lack of vigilance.

Those of us who live in the west will likely always deal with a higher volume of environmental litigation; it is a fact of life. The trick is getting the incentives right.

We need to push court battles toward legitimate environmental violations instead of spending tax-payer dollars to support rope-a-dope procedural protests when a group is simply dissatisfied with an outcome.

That is why my bill, the Government Litigation Savings Act, is so important in tandem with your hearing today.

If my bill becomes law, the litigious environmentalists can still litigate over procedures and paperwork, they simply cannot expect the tax-payer to pay them to do it any longer. Instead, they can only be reimbursed for substantive suits they win under the terms laid out for them in the Endangered Species Act.

While I may not always agree with the outcome of an open and public process for species conservation, I prefer that process any day of the week to the very private and privileged decision-making process of the courts.

In the Federalist #78, Alexander Hamilton wrote that the judicial branch is the weakest branch of the federal government; saying that the court has “no influence over either the sword or the purse.”

Mr. Hamilton could never have envisioned what is now the norm. In the realm of species conservation, the court is much more than an equal partner with congress and the executive; it is the driving force behind the purse, and the policy.

I commend you for taking up this issue, and I urge you to work with your counterparts at the Judiciary Committee to advance the Government Litigation Savings Act. I am eager to hear the discussion today on ways we can properly manage litigation for the benefit of species recovery.

I yield back.