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## PENDLEY: Green groups exploit law for financial gain Citizens suffer while environmentalists make bank

By William Perry Pendley - The Washington Times  
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Last month, Karen Budd-Falen, a Cheyenne, Wyo., lawyer, presented her findings on the Equal Access to Justice Act (EAJA) to the 100th Anniversary Conference of the Rocky Mountain Coal Mining Institute in Vail, Colo. After spending years researching court documents — the federal government keeps no records of EAJA disbursements — Ms. Budd-Falen found that environmental groups have amassed hundreds of millions of dollars in EAJA awards.

The EAJA was written for nobler purposes, which was to allow Americans forced to litigate against the federal government to be paid their attorneys' fees and expenses if they prevailed and if the government's legal position was not "substantially justified." There is a cap on the hourly fees for which recovery is permitted, which, according to Ms. Budd-Falen, has not limited fees paid to environmental groups, and an eligibility restriction based on net worth (\$2 million for individuals and \$7 million for entities), which specifically excepts tax-exempt (environmental) groups. The use of the EAJA by environmental groups is unique in two other ways, one not intended by Congress, the other not anticipated. Environmental groups recover fees for suing over noninjurious, technical violations of federal law, whereas most other EAJA applicants sue to vindicate constitutional or statutory rights. Finally, while environmental groups are paid quickly — federal lawyers rarely challenge their EAJA demands, and the groups often file open-and-shut cases, such as missed deadlines — private litigants are paid only after years, if ever.

Take John Shuler of Dupuyer, Mont., who killed a grizzly bear in self-defense — as allowed under the Endangered Species Act — but was prosecuted by the federal government for nearly a decade. Mr. Shuler prevailed only after his attorneys expended \$225,000; however, federal courts denied his EAJA application, holding that the federal government's position in his case was "substantially justified." The courts did so despite the risible factual and legal arguments of federal attorneys: 1) Mr. Shuler did not act in self-defense despite the fact that the bear charged and fell mortally



wounded 20 feet from him; 2) By leaving his house. Mr. Shuler unlawfully placed himself in the "zone of imminent danger"; 3) Mr. Shuler's dog, Boone, by going on point, provoked the bear and thus "escalated" the conflict; and 4) bears are entitled to a higher standard of self-defense because they are not capable of sapient thought.

Or take Donald Eno, a disabled veteran on fixed income seeking to eke out a living as a miner on his gold and travertine claim in the Plumas National Forest in Northern California. In 1996, the U.S. Forest Service took legal action to drive Mr. Eno off his extremely valuable claim. The government asserted, for example, that any mining would interfere with cultural myths allegedly important to some Maidu Indians. In fact, one Forest Service attorney met with the Maidu, unsuccessfully urging them to so assert. In December 2003, after years of pre-hearing preparation, testimony and post-hearing briefs, an administrative law judge ruled in favor of Mr. Eno. The federal government appealed, but in February 2007, Mr. Eno once again prevailed. Although federal attorneys did not appeal, they challenged Mr. Eno's EAJA claim for nearly \$200,000, a battle that remains in federal court after more than five years.

Or take Stanley K. Mann, a professor, lawyer and alternative-energy entrepreneur whose extremely valuable geothermal wells were seized illegally by federal officials. Beginning in April 1998, Mr. Mann fought to recover payment for what had been taken from him; in April 2009, Mr. Mann was awarded nearly \$1 million. Despite his clear victory, the years invested in it and the absence of any justification for the government's illegal actions, federal attorneys contested his nearly \$300,000 EAJA claim. Nearly three years later, Mr. Mann awaits a ruling.

Rep. Cynthia M. Lummis, Wyoming Republican, has introduced legislation to restore the EAJA to its original intent, but passage of her bill is unlikely in the days that remain in the 112th Congress. Meanwhile, environmental groups are on the way to the bank with their huge awards while private citizens sit empty-handed at the courthouse door.

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