

Subcommittee on Oversight and Investigations

Raúl R. Labrador, Chairman

Hearing Memorandum

June 26, 2017

To: All Subcommittee on Oversight and Investigations Members

From: Majority Staff, Subcommittee on Oversight and Investigations (x5-7107)

Hearing: Oversight hearing entitled “*Examining Policy Impacts of Excessive Litigation Against the Department of the Interior*”

The House Committee on Natural Resources, Subcommittee on Oversight and Investigations will hold an oversight hearing entitled, “*Examining Policy Impacts of Excessive Litigation Against the Department of the Interior*” on **Wednesday, June 28th at 10:00 a.m. in Room 1324 of the Longworth House Office Building.**

Policy Overview:

- This hearing will examine litigation against the Department of the Interior (DOI) generated by the agency’s policymaking and regulatory activities, and specifically, will highlight how litigation, including the threat of litigation, influences agency policymaking, shifts its priorities, and redirects time and resources from the agency’s core mission.
- While individuals have and should have the right to petition their government, incentives such as favorable settlements and attorney’s fee awards generate excessive amounts of litigation, encourage repeat plaintiffs, and feed a cycle of lawsuits that burden the agency.
- A lack of publicly available information regarding litigation against DOI and related payments prevents citizens from understanding the role that litigation plays in shaping the policies that affect their livelihoods and tracking how taxpayer dollars are used.
- In addition to expanding knowledge about the role that the DOI and its Office of the Solicitor (SOL), the hearing will explore possible process improvements to allow the agency to better manage the volume of suits against it.

Invited Witnesses (in alphabetical order):

Mr. Mark Barron
Partner
BakerHostetler
Denver, Colorado

Mr. Daniel Jorjani
Principal Deputy Solicitor
Office of the Solicitor
U.S. Department of the Interior
Washington, District of Columbia

Ms. Caroline Lobdell
Executive Director and Supervising Attorney
Western Resources Legal Center
Portland, Oregon

Ms. Lois Schiffer
Former General Counsel
National Oceanic and Atmospheric Administration
Washington, District of Columbia

Background:

Litigation Against the Department of Interior

Causes of Action

The DOI and its subagencies confront litigation that is generated at all stages of the federal decision-making process. These actions are generally brought under a variety of statutes and causes of action,¹ including challenges over land management policies, water use decisions, and handling of tribal in-trust assets. Like other federal entities, DOI is also subject to litigation unrelated to its policymaking activities, such as contract claims, tort allegations, and employment matters.² This hearing, however, will focus on litigation related to the DOI's primary mission and resource management activities.

The Office of the Solicitor for the Department of the Interior and the U.S. Department of Justice

Both the Department of Justice (DOJ) and the Office of the Solicitor (SOL) within DOI play critical roles in handling litigation brought against DOI. The SOL provides legal advice and representation to DOI in administrative matters.³ Some of the responsibilities of the SOL include providing assistance drafting and reviewing regulations, contracts, agreements, other legal documents, and legislation.⁴ Additionally, the SOL manages DOI's Ethics Office and oversees its Freedom of Information Act appeals.⁵ In litigation, attorneys from the SOL also

¹ ENDANGERED SPECIES ACT CONG. WORKING GROUP, 113TH CONG., REPORTS, FINDINGS AND RECOMMENDATIONS 7 (2014), available at https://naturalresources.house.gov/uploadedfiles/esa_working_group_final_report_and_recommendations_02_04_14.pdf; U.S. DEP'T OF THE INTERIOR, OFFICE OF THE SOLICITOR, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION: FISCAL YEAR 2018 6 (2017), available at https://www.doi.gov/sites/doi.gov/files/uploads/fy2018_sol_budget_justification.pdf.

² See U.S. DEP'T OF THE INTERIOR, *supra* note 1, at 2.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

represent DOI in administrative hearings.⁶ However, pursuant to federal law,⁷ in judicial proceedings in which DOI is a plaintiff or defendant, DOJ attorneys serve as legal representation for the agency.⁸ Notwithstanding DOJ's formal representation, the SOL still plays an important role in the litigation process, providing assistance to DOJ by developing litigation strategy, producing needed documents, preparing witnesses for testimony, and lending any subject matter required expertise.⁹ In its budget justification for Fiscal Year (FY) 2018, the SOL noted that it expects an increase in its litigation workload against the DOI, particularly in connection with water resource conflicts and energy development.¹⁰

Within DOJ, the Environment and Natural Resources Division (ENRD) represents DOI and other federal agencies in environmental and natural resources litigation.¹¹ Individual U.S. Attorney's offices also receive cases from the ENRD.¹² While ENRD also enforces environmental laws, defending lawsuits against the government comprise half of ENRD's workload.¹³

Consequences of Litigation

This hearing will assess the impact that litigation has on DOI and its bureaus as well as the people it serves. Litigation wields the power to affect countless people and to force an agency to reshuffle its priorities. For example, in 2011, as part of a "mega-settlement" with two environmental groups, the U.S. Fish and Wildlife Service (FWS) agreed to review over 250 species as well as actions impacting 1,053 species for potential listing as endangered or threatened under the Endangered Species Act (ESA).¹⁴ Subsequently, the FWS had to devote nearly all of its petition and listing activity budget to complying with these agreements.¹⁵ In 2012, the FWS' own FY 2013 budget request acknowledged it was devoting 86 full time employees to comply with court orders or settlement agreements resulting from litigation.¹⁶

On November 17, 2016, Bureau of Land Management cancelled numerous oil and gas leases by issuing a Record of Decision that included a 2014 settlement agreement.¹⁷ That

⁶ *Id.*

⁷ 5 U.S.C. § 3106 (2015).

⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-417R, USDA AND INTERIOR ATTORNEY FEES 1-2 (2012), available at <http://www.gao.gov/assets/600/590084.pdf>.

⁹ See U.S. DEP'T OF THE INTERIOR, *supra* note 1, at 3.

¹⁰ See *id.* at 2-3, 6-7.

¹¹ U.S. DEP'T OF JUSTICE, ENV'T AND NATURAL RES. DIV., FISCAL YEAR 2018 PERFORMANCE BUDGET: CONGRESSIONAL JUSTIFICATION 2 (2017), available at <https://www.justice.gov/file/968711/download>.

¹² Briefing from Office of Solicitor, U.S. Dep't of Interior, to Majority Staff of Subcomm. on Oversight and Investigations of the H. Comm. on Natural Res. (June 15, 2017).

¹³ U.S. DEP'T OF JUSTICE, *supra* note 11, at 3-4.

¹⁴ See ENDANGERED SPECIES ACT CONG. WORKING GROUP, *supra* note 1, at 7-8.

¹⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-304, ENVIRONMENTAL LITIGATION: INFORMATION ON ENDANGERED SPECIES ACT DEADLINE SUITS 5 (2017), available at <http://www.gao.gov/assets/690/683058.pdf>.

¹⁶ *Spending for the National Oceanic and Atmospheric Administration, the Council on Environmental Quality, the Office of Insular Affairs, the U.S. Fish and Wildlife Service and the President's Fiscal Year 2014 Budget Request for these Agencies: Oversight Hearing Before the H. Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs of the H. Comm. on Natural Resources, 113th Cong. (2013) (question for the record response of Dan Ashe, U.S. Fish and Wildlife Service). See also Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group, 113th Cong. (2013) (written testimony of Matthew Hite, U.S. Chamber of Commerce, at 4).*

¹⁷ Scott Streever & Jennifer Yanchin, *Jewell Defends Nixing Colorado Leases; Industry Decries Gloating*, E & E NEWS (Nov. 17, 2016), available at <https://www.eenews.net/eenewspm/stories/1060045964/search?keyword=roan>.

settlement resulted from six years of litigation, initiated in 2008 when environmental groups challenged the leases.¹⁸ The costs included not only negatively impacted energy development and job growth, but also the Bureau of Land Management's agreement to pay those plaintiffs \$400,000 in attorney's fees and costs.¹⁹

Unfortunately, litigious groups also employ litigation as a tool to obstruct policies and actions they simply do not like. For example, the Center for Biological Diversity's (CBD) website boasts a "Trump Lawsuit Tracker," proudly displaying a count of suits the organization has initiated against the current Administration on a variety of issues.²⁰ CBD characterizes this as part of their attempt to "resist Trump in every way possible."²¹

Payments

Litigation Payments

As a party to litigation, sometimes DOI enters into settlements or receives adverse decisions that require payments to another party.²² For example, over the past few years, the United States settled claims in excess of \$3.3 billion with over 100 Indian tribes alleging federal mismanagement of tribal in-trust assets.²³ In addition to such payments, and as discussed in greater detail below, the federal government may also pay the attorney's fees and court costs of an opposing plaintiff under certain circumstances. Payments resulting from litigation against federal agencies, including attorney's fees, may come from that agency's appropriations or from the Department of the Treasury's Judgement Fund.²⁴ In 1956, Congress created the Judgement Fund, a permanent, indefinite appropriation, to serve as a source of payments for monetary awards against the United States, where another source was not already provided.²⁵

Attorney's Fees

Traditionally, in the United States, parties to litigation must pay their own court costs and attorney's fees.²⁶ However, there are a number of statutory exceptions, often referred to as "fee-shifting statutes" that enable a prevailing party to collect attorney's fees from the losing party,

¹⁸ See Bureau of Land Mgmt., U.S. Dep't of Interior, Roan Plateau Timeline, available at https://eplanning.blm.gov/epl-front-office/projects/lup/65892/79870/92626/Roan_Timeline_1-25-13.pdf; Streeter & Yanchin, *supra* note 17.

¹⁹ Dennis Webb, *Deal Cancels 17 Leases on Top of Roan West of Rifle*, DAILY SENTINEL (Nov. 21, 2014), available at <http://www.gjsentinel.com/news/articles/deal-cancels-17-leases-on-top-of-roan-west-of-rifl>.

²⁰ Trump Lawsuit Tracker, CTR. FOR BIOLOGICAL DIVERSITY http://www.biologicaldiversity.org/campaigns/trump_lawsuits/index.html (last visited June 22, 2017).

²¹ *Id.*

²² See, e.g., U.S. DEP'T OF THE INTERIOR, AGENCY FINANCIAL REPORT: FISCAL YEAR 2016 103, available at https://www.doi.gov/sites/doi.gov/files/uploads/doi_fy_2016_afr.pdf.

²³ Letter from Rep. Louie Gohmert, Chairman, Subcomm. on Oversight and Investigations of the H. Comm. on Natural Res., to Sally Jewell, U.S. Sec'y of the Interior (Dec. 7, 2016) (on file with author). See also Press Release, U.S. Dep't of Justice, Attorney General Loretta E. Lynch and Secretary of the Interior Sally Jewell to Announce Settlements of Tribal Trust Accounting and Management Lawsuits (Sept. 26, 2016), available at <https://www.justice.gov/opa/pr/attorney-general-loretta-e-lynch-and-secretary-interior-sally-jewell-announce-settlements>.

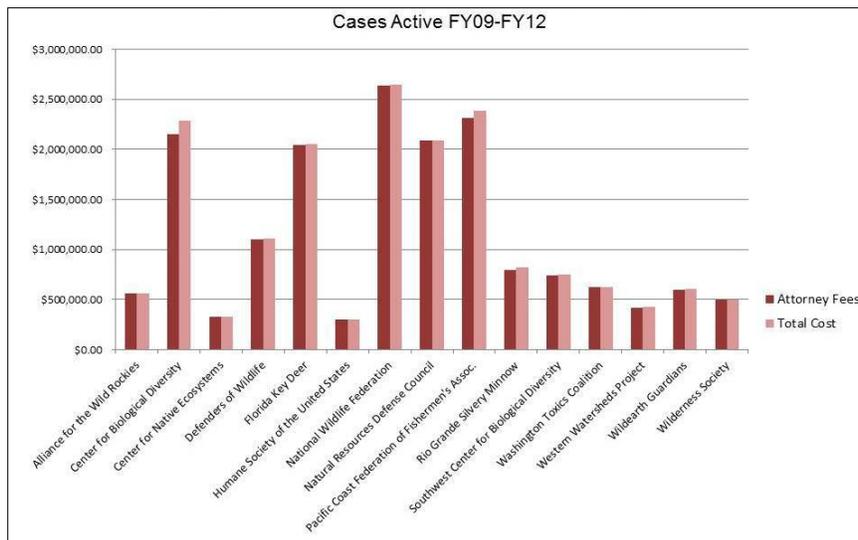
²⁴ See VIVIAN S. CHU & BRIAN T. YEH, THE JUDGMENT FUND: HISTORY, ADMINISTRATION, AND COMMON USAGE 1 (2013) (explaining that the Judgment Fund cannot be used when a specific appropriation exists); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 8, at 7 (outlining when agency appropriations or the Judgment Fund are used to pay an award of attorney's fees).

²⁵ 31 U.S.C. § 1304(a) (2015).

²⁶ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 8, at 7.

and many apply to the federal government.²⁷ When no other fee-shifting statute applies, parties may potentially collect attorney’s fees and litigation costs in actions against the federal government under the Equal Access to Justice Act (EAJA).

Enacted in 1980, EAJA authorizes that the following costs be awarded in litigation against the government: (1) reasonable attorney’s fees and expenses of a prevailing party to the same extent any other party would be liable, where a statutory or common law exception allows a fee award for a prevailing party;²⁸ (2) attorney’s fees and expenses of a prevailing party, unless a court finds that the federal government’s position was substantially justified, or that special circumstances make the award unjust;²⁹ and (3) attorney’s fees and expenses of a prevailing party in adversarial adjudications, unless a court finds that the federal government’s position was substantially justified, or that special circumstances make the award unjust.³⁰



Federal Expenditures for Judgment Fund ESA Attorney’s Fees and Costs Awarded to Organizations, FY 2009-2012. Source: U.S. Department of Justice

While fee-shifting statutes may have originated from good intentions, concerns persist that litigants, not originally contemplated by Congress, have exploited them in recent years.³¹ The statute was intended to compensate small businesses and individuals, who would otherwise find challenging government actions to be cost-prohibitive, and to account for the disparity in resources between the federal government and

individuals.³² While individuals with a net worth greater than \$2 million and businesses and other organizations with a net worth greater than \$7 million are ineligible for awards under EAJA, no cap applies to non-profit organizations.³³ EAJA also imposes a cap on attorney’s fees rates of \$125 per hour unless a “special factor” justifies a higher fee.³⁴ However, the statute does not delineate what constitutes a “special factor” and some environmental law attorneys avoid EAJA’s \$125 fee cap by arguing that their expertise is “specialized” and therefore should not be subject to the cap.³⁵

²⁷ See *id.*

²⁸ 28 U.S.C. § 2412(b) (2015).

²⁹ 28 U.S.C. § 2412(d)(1)(A) (2015).

³⁰ 5 U.S.C. § 504 (2015).

³¹ See, e.g., ENDANGERED SPECIES ACT CONG. WORKING GROUP, *supra* note 1, at 29-32 (describing exorbitant attorney’s fees awarded to large organizations).

³² See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 8, at 7.

³³ 28 U.S.C. § 2412(d)(2)(B). Under the statute, businesses with over 500 employees also fail to qualify for these payments. *Id.*

³⁴ 28 U.S.C. § 2412(d)(2)(A)(ii) (2015).

³⁵ See ENDANGERED SPECIES ACT CONG. WORKING GROUP, *supra* note 1, at 32.

Recordkeeping

Neither DOI nor DOJ recordkeeping provides much insight into the cost, both in time and resources that litigation against DOI imposes. The long-standing lack of transparency regarding litigation against federal agencies has generated persistent concern.³⁶ Much of the information concerning this topic lacks important details. In addition to leaving the public uninformed, this also impedes the agency's capabilities to analyze trends and review information regarding litigation. For example, the SOL does not have a unified case tracking system, and this information is scattered throughout its various divisions.³⁷

As is the case with information about the litigation itself, records of payments resulting from litigation and settlements fail to paint a complete picture. In 2012, the Government Accountability Office reviewed DOI's failure to keep records regarding attorney's fees paid as a result of litigation with the Department.³⁸ In 1995, Congress enacted the Federal Reports Elimination and Sunset Act which, among other things, eliminated the reporting requirement for EAJA.³⁹ The reporting requirement consisted of two annual reports to Congress, one on administratively awarded payments issued by the Chairman of the Administrative Conference of the United States and the other on court-awarded payments from the Director of the Administrative Office of the U.S. Courts, until that responsibility was transferred to the Attorney General in 1992. In an attempt to restore transparency, the House Appropriations Committee ordered DOI in a committee report to include certain information concerning EAJA payments and payments related to Endangered Species Act litigation in its annual budget submission.⁴⁰ Later DOI appropriations reports have included similar provisions.⁴¹ While DOI has published this information in recent budget justifications,⁴² concerns regarding transparency and ease of access to information pertaining to EAJA payments persist. For example, the House of Representatives passed the Open Book on Equal Access to Justice Act of 2017, by a voice vote on February 27, 2017.⁴³ This legislation, among other things, orders the Chairman of the Administrative Conference of the United States to create a searchable online database of EAJA payments, including a description of the claims of the case and the basis for which a court found that the agency action being challenged was not substantially justified.⁴⁴

Congress has also expressed its concern with the lack of transparency regarding payments made from the Judgment Fund.⁴⁵ In response to the House Appropriations Committee's

³⁶ See, e.g., ENDANGERED SPECIES ACT CONG. WORKING GROUP, *supra* note 1, at 61; HERITAGE FOUNDATION, ENVIRONMENTAL POLICY GUIDE: 167 RECOMMENDATIONS FOR ENVIRONMENTAL POLICY REFORM 24, 33 (Robert Gordon & Diane Katz, eds., 2015), available at http://thf_media.s3.amazonaws.com/2015/pdf/EnvironmentalPolicyGuide.pdf; U.S. CHAMBER OF COMMERCE, A REPORT ON SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS 11-12 (2013), available at <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf>.

³⁷ See Briefing from the Office of the Solicitor, *supra* note 12.

³⁸ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 8, at 5.

³⁹ See *id.* at 3 & n.13 (citing Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104-66, §§ 1091, 3003, 109 Stat. 707, 722, 734).

⁴⁰ H.R. REP. NO. 112-151, at 8-9 (2011). This directive also included the Environmental Protection Agency and U.S. Forest Service.

⁴¹ See e.g., H.R. REP. NO. 114-632, at 6 (2016).

⁴² See U.S. DEP'T OF THE INTERIOR, *supra* note 1, at 40-43.

⁴³ 163 Cong. Rec. 1336 (2017).

⁴⁴ See Open Book on Equal Access to Justice Act of 2017, H.R. 1033, 115th Cong. (2017).

⁴⁵ See, e.g., *Oversight of the Judgment Fund: Iran, Big Settlements, and the Lack of Transparency: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 21 (2016) (statement of Paul L.

directions in its report accompanying the Financial Services and General Government Appropriations Act of 2012, the Financial Management Service at the Department of the Treasury began posting online reports of payments made from the Judgement Fund.⁴⁶ However, the most recent report posted online dates to 2015, and omits important information regarding the names of award recipients and attorneys.⁴⁷ Other third-party reviews have also voiced concerns about missing and inconsistent information from the Judgement Fund's online database.⁴⁸

Figley, Professor, Associate Director of Legal Rhetoric, Washington College of Law) (proposing independent audits of the Judgment Fund).

⁴⁶ *Id.* at 15 & n.130.

⁴⁷ See Bureau of Fiscal Serv., Dep't of the Treasury Judgment Fund: Congressional Report, <https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/congress-reports.htm> (last visited June 20, 2017). See also *Hearing*, *supra* note 45, at 6 (statement of Paul Figley).

⁴⁸ See *Hearing*, *supra* note 45, at 6 (statement of Paul Figley); Michael Bastasch & Ethan Barton, *Feds Hand Over Nearly \$50 million in Environmental Lawsuits*, DAILY CALLER (Aug. 9, 2016, 11:11PM), <http://dailycaller.com/2016/08/09/feds-hand-over-nearly-50-million-in-environmental-lawsuits/>.