

Testimony of Professor Daniel J. Rohlf
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Oversight Hearing before the
Committee on Natural Resources
U.S. House of Representatives

On *“Taxpayer-Funded Litigation: Benefitting Lawyers and
Harming Species, Jobs and Schools.”*

1324 Longworth House Office Building, 10 A.M. June 19, 2012

Thank you Chairman Hastings, Ranking Member Markey; I appreciate your invitation to speak to the Committee today.

I am a Professor of Law at Lewis and Clark Law School in Portland, Oregon. I am also the co-founder of the Pacific Environmental Advocacy Center (PEAC), Lewis and Clark’s environmental law clinic. PEAC provides free legal representation to organizations and citizen groups that work to clean up pollution of our air and water and protect our nation’s wildlife. Most of our clients are small local non-profit groups. For example, our clinic pursues actions to protect water quality on behalf of the Northwest Environmental Defense Center, an organization run by volunteer Lewis and Clark Law School students and alums. With the help of PEAC’s attorneys, between 2004 and 2006 NEDC clean water enforcement actions collected more water pollution fines in Oregon than the entire staff of the state’s Department of Environmental Quality. Spurred by press reports of this disparity, Oregon DEQ has finally begun to issue more substantial fines to polluters. As a result, Oregon’s water is cleaner, which in turn has benefited salmon and steelhead as well as the people of Oregon. PEAC and NEDC’s work is made possible in part by the availability of fee awards to successful plaintiffs. These are precisely the results Congress intended when it provided for attorney fee awards for successful litigants in environmental cases.

My work at PEAC and Lewis and Clark focuses primarily on federal litigation on behalf of public interest organizations that involves the federal Endangered Species Act (ESA). For over two decades, I have taught law school courses on wildlife law, authored one book and numerous articles on the ESA. During this time, I have worked with law students in our environmental law clinic to litigate many ESA cases, including matters dealing with salmon conservation in the Columbia River Basin, grizzly bear recovery in the northern Rocky Mountains, and protection of fairy shrimp in southern California.

As do my clinical colleagues at Lewis and Clark, I draw a clear distinction between my academic and clinical work. In my classes, my goal is to simply provide an accurate picture of how the law works – I leave my personal views outside the academic classroom. On the other hand, as we stress as part of our clinic’s legal ethics instruction, PEAC staff attorneys and student clerks have an obligation to represent zealously the interests of our clients, which include many environmental organizations. However, Lewis and Clark also offers opportunities for students interested in gaining real-world experience by representing ranchers, farmers, and miners. Many Lewis and Clark students thus receive law school credit through their litigation work with the Western Resources Law Center, an organization co-founded by the law school’s former dean. WRLC’s staff attorney is also an adjunct law professor at Lewis and Clark. Without WRLC, many of family and small-scale ranchers, farmers, and miners would not be able to have their interests represented in court, just as many citizen groups and non-profit environmental organizations could not retain expert attorneys without PEAC.

As the title of this hearing suggests, tax-payer funded attorney fee awards do benefit lawyers, though in different ways than this Committee meant to imply. Fee awards help our clinic provide hands-on legal training for students who will be the future elected officials, attorneys, managers, and others working to resolve society’s many environmental challenges. Lewis and Clark graduates who participate in PEAC now work at U.S. Department of Justice and federal agencies, state and local government, law firms, and non-profit organizations. One of PEAC’s recent alums worked as a fellow with the staff of this Committee, so it is not a stretch to say that this very body gained an employee with invaluable real-world experience in environmental law as a result of the hands-on experience made possible by PEAC and the attorneys fees that help fund our clinic. Attorney fee awards when it prevails in litigation also help the Western Resources Law Center to provide its students with valuable experience in environmental law.

Even with the availability of fee awards, working for an environmental non-profit organization does not make for a lucrative career. The annual salaries of PEAC staff attorneys are far less than first-year associates in Washington, D.C. law firms. Many of our graduates fortunate enough to land highly sought-after positions with public interest organizations must rely in part on the law school’s Loan Repayment Assistance Program to meet their monthly student loan payments. From over two decades experience, I can assure you that it is not a paycheck but rather strong personal convictions and a desire to benefit society – to make our water and air cleaner and to save species from extinction – serve as the motivations for PEAC students and staff attorneys. I see the same sorts of commitments to public service and financial sacrifices in attorneys I work with throughout the environmental community.

Litigation does not harm species, jobs, or schools; indeed, quite the opposite is true. Through my work with PEAC, I have worked for more than 20 years on litigation challenging federal agencies’ operation of hydroelectric dams in the Columbia and Snake Rivers, a major reason that many salmon and steelhead runs are on the lists of endangered and threatened species. When I first became involved in salmon conservation efforts, one could literally count on one hand the

number of returning Snake River sockeye. However, I'm happy to say that today "Lonely Larry" – the nickname for the single Snake River sockeye salmon that made it to Idaho's Redfish Lake in the early 1990s – has given way to hundreds of sockeye that now follow their ancient migration from the ocean to the mountains. The picture is also now much brighter for many other Columbia Basin runs.

Courts' enforcement of Endangered Species Act protections for salmon has been a major factor in increasing salmon survival. One of the first ESA lawsuits to improve salmon survival was brought not by environmentalists, but by the State of Idaho. In his ruling on that case in 1994, Judge Malcolm Marsh concluded that federal hydro managers had "focused their attention on what the establishment is capable of handling with minimal disruption," and emphasized that in order to restore salmon in the Columbia Basin "the situation literally cries out for a major overhaul."¹

Unfortunately, that overhaul is still not complete. Scientists have repeatedly pointed out relatively modest modifications to dam operations could significantly improve salmon survival. However, these changes to the status quo have often met with stiff resistance. PEAC and Earthjustice, representing a broad coalition of environmental groups, sport and commercial fishermen, and local businesses, have followed in Idaho's footsteps to enforce the ESA's protections for salmon in court. Indian tribes and the state of Oregon have collaborated in these legal efforts. Both district courts and the Ninth Circuit Court of Appeals have found repeatedly that dam managers have failed to live up to the ESA's requirements for increasing salmon survival. These legal victories have compelled the National Marine Fisheries Service to improve its plans for salmon recovery, and have spurred wide investment in habitat restoration that will not only benefit salmon and steelhead, but will help restore aquatic ecosystems throughout the Columbia Basin. As new recovery plans are written, the courts have ordered more spill over the dams to increase survival of baby salmon on their way to the sea.

Fee awards from successful litigation have enabled PEAC and Earthjustice to devote the huge amounts of time and effort necessary to enforce the requirements of the ESA and complete the overhaul of dam operations envisioned by Judge Marsh nearly two decades ago. Data from many sources show that these awards have been a very sound investment in terms of both the environmental and economic well-being of the Northwest. Court-ordered spill has increased the survival of out-migrating salmon by as much as 95 percent, stabilizing many declining populations. Since much of growth in salmon numbers consists of hatchery fish available for harvest, this increase in salmon populations is delivering benefits to river and coastal communities by protecting and creating jobs in the salmon economy. Recreational fishing for salmon and steelhead in the Columbia-Snake River Basin currently generates approximately \$562 million per year for fishers businesses, and communities, with commercial fishing adding

¹ *Idaho Dept of Fish and Game v. NMFS*, 850 F.Supp. 886, 900 (D. Ore. 1994).

\$60 million more. When excellent ocean conditions allowed Idaho to open a salmon fishing season in 2001 – at that time a very rare occurrence – independent economists calculated that economic activity in the state increased by \$90 million; the fishing season accounted for nearly a quarter of the annual sales of businesses in one small town on the Snake River. A 2009 study estimated that recreational fishers spend over \$900 for each chinook salmon they land, a figure that I can say is entirely accurate from my many fishing trips with my father-in-law.²

As the title of this hearing suggests, one of PEAC's successful cases was in fact designed to harm species – specifically the invasive species that represent a huge threat to native wildlife, plants, and crops, and which inflict significant damage on the national economy. Over a decade ago, a PEAC student aware of the dangers posed by invasive species grew angry that the very law designed to prevent such damage was unable to do so. At the time, regulations implementing the Clean Water Act exempted from the law the discharge of ballast water from ships. These discharges are one of the primary causes of introductions of invasive aquatic species into the waters of the United States. Invasive species, which often out-compete and displace native and endangered species, have become a huge environmental and economic disaster. For example, over half of the fish and most of the bottom-dwelling creatures living in San Francisco Bay are not native, making the Bay the world's most invaded body of water. Invasive species are now the second-leading cause of species becoming endangered, behind only habitat destruction. But what is truly staggering is the price tag for efforts to control invasive species and mitigate the damage they cause to crops, infrastructure, and businesses. The federal government, states, and private industry incur over \$140 *billion* in costs each year stemming from damage caused by – as well as efforts to control – invasive species. Water intake pipes and hydroelectric turbines clogged with invasive mussels, fishing communities devastated by loss of commercial species to competition from invaders, entire ecological systems facing an uncertain future – the harms caused by invasive species are very real and very expensive.

After the EPA refused PEAC's petition to close the Clean Water Act's regulatory loophole for ballast water, PEAC was forced to sue the agency. The Ninth Circuit Court of Appeals sided with PEAC's clients, and today EPA and the Coast Guard are implementing a general permit regulating ballast water discharges from ships that advances efforts to eliminate introductions of invasive species throughout the United States. PEAC's work has thus helped to make our waters cleaner, slowed the spread of invasive species, reduced the risk of extinction of countless aquatic species, and prevented significant economic damage to local economies. The long fight legal to gain these protections would not have been possible without the attorney fees that our clinic received for its successful work.

² *Potential Economic Contributions of Spring and Summer Chinook Had SAFE For Salmon Been In Effect*, Southwick Associates, Inc. April 24, 2009 pg 27, Appendix C.

Overall, investment in implementing the ESA – including attorney fee payments for successful citizen enforcement of the statute – provides the American public with significant environmental and economic returns.

The ESA has proven to be very effective at halting and reversing imperiled species' decline toward extinction – at least those species that make it through the listing process and on to the list of threatened or endangered species. According to the U.S. Fish and Wildlife Service, 99% of the species on the ESA's protected lists have been saved from extinction.³ Given the complex and challenging threats facing many species, recovery can take many years. However, a peer-reviewed study concluded that the longer a species has been listed, the more likely it is to be improving.⁴ Perhaps not surprisingly, another study found that species' chances of recovery also went up with increased spending for recovery measures, but it also noted that current levels of appropriations for recovery measure are only about one-fifth of the level needed to do the job.⁵ Therefore, the single most effective step that can be taken to recover threatened and endangered species – and thereby increase the pace of delistings – is to support more funding for recovery efforts.

Protecting endangered and threatened species and the ecosystems upon which they depend provides critical ecosystem services that all creatures depend upon – including us. Functioning ecosystems supply us with cold clean water, purify our air and remove wastes from rivers and streams, pollinate our crops, provide sources of medicine and raw materials, and give an increasingly crowded world open space and places to recreate and enjoy wildlife.

The dollar value of biodiversity and the ecosystem services it provides is immense. For example, hunting, fishing, and wildlife watching together account for \$120 billion in annual revenue, equivalent to the 7th largest corporation in America.⁶ As the Fourth Circuit Court of Appeals noted, the reintroduction and protection of red wolves was constitutional under the Commerce Clause because red wolf recovery had the potential to increase local receipts from wildlife-related tourism by up to \$183 million annually in North Carolina, and by up to \$354 million per

³ U.S. Fish and Wildlife Serv., Endangered Species Program, *Why Save Endangered Species*, at 4 (2005).

⁴ M. Taylor, K. Suckling, and J. Rachlinski, *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55.4 *BioScience*, 360, 366 (2005).

⁵ Miller JK, Scott JM, Miller CR, Waits, *The Endangered Species Act: Dollars and Sense?* 52 *BioScience* 163-168 (2002).

⁶ U.S. Fish and Wildlife Serv., Div. of Econ., Rep. 2006-1, *Wildlife Watching in the U.S.: The Economic Impacts on National and State Economies in 2006*, at 3 (2008).

year in Great Smokey National Park.⁷ Similarly, a recent estimate put the value of healthy salmon runs in the Sacramento River system at \$5.7 billion, representing 94,000 jobs.⁸

As you have noted Mr. Chairman, and I suspect nearly all of us would agree, Congress has an obligation to the American public to ensure that the Executive branch's policies and actions fully implement the laws enacted by the people's representatives. When it passed the Endangered Species Act, Congress recognized that the vast scope and complexity of protecting species across the country from extinction made it important to enlist citizens in ensuring effective enforcement of the law. In light of the enormous environmental as well as financial payoffs from endangered species protection and recovery, the federal government's investment in attorney fee awards for successful citizen enforcement of the ESA is extremely modest.

Finally, it is important to remember that these fee awards are only available when plaintiffs are able to prove that the Executive branch substantially violated the law to the extent that a judge considers an agency's actions to be "arbitrary and capricious." One of my recent cases – ironically involved bald eagles, our nation's symbol of truth and justice – involved high-level FWS managers overruling the findings of the agency's endangered species biologists for political purposes. Disregarding the ESA's express requirement that decisions about species listings be based solely on the best science available, FWS' Washington, D.C. office issued what a local FWS biologist characterized as "marching orders" to turn down a petition to list the isolated population of eagles in Arizona's Sonora Desert – despite recommendations to the contrary from the agency's local experts.⁹ This prompted another agency scientist to comment that "[w]e've been given an answer now we need to find an analysis that works." This is obviously not the way science is done. The court ruled that FWS had acted unlawfully, finding its actions to "exemplify an arbitrary and capricious agency action." It awarded PEAC attorney fees for its role in reversing the agency's arbitrary decision.

This case provides two important lessons. First, it is vital to have outside watchdogs to make sure that federal agencies are following the law and taking the steps needed to protect imperiled species. Second, it would have been simple for FWS to avoid paying PEAC's attorney fees – and avoid litigation altogether – if the agency had simply complied with the ESA in the first instance.

The attorneys and students at PEAC do not do the work we do because it lucrative (which it isn't); we do it because it is vitally important. I have spent countless nights my office with my students hurriedly finishing briefs before a filing deadline, long after all the other faculty and

⁷ *Gibbs v. Babbitt*, 214 F.3d 483, 493 (4th Cir. 2000).

⁸ American Sportfishing Association press release, August 7, 2009 (citing information developed by Southwick Associates, and economic research firm).

⁹ *Center for Biological Diversity v. Kempthorne*, 2008 WL 659822 at 11 (D. Ariz. 2008).

students left the law school campus for the day. All the PEAC staff and students often work on cases for many hours a day, sometimes to the detriment of their other classes, because they believe that stopping pollution and protecting our wildlife are the most important things they do. I'm proud of the work we've done and continue to do. It has helped recover species, and it has made our air and water cleaner. Our nation's wildlife represents one of our country's greatest natural assets, and biodiversity is a continuing source of economic prosperity. The small investment of providing fees to groups like PEAC to help enforce the law has helped to ensure that these treasures will continue to exist for generations to come.