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MEMORANDUM

FROM: KAREN BUDD-FALEN
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DATE: NOVEMBER 29, 2010

RE: PROPOSED EAJA AND JUDGMENT FUND REFORM

The purpose of this memorandum is to outline the six areas that I believe need legislative reform to stop the abuse of attorney fee-shifting statutes.

A. For-Profit versus Non-Profit

Under EAJA, a for-profit entity or person with a net worth over $7,000,000 is ineligible to recover attorney fees for litigation against the federal government. However, an entity that has been determined to be "non-profit" is not bound by this restriction. Thus, even though tax documents show a great many environmental and animal rights groups are worth far in excess of $7,000,000, these groups can receive attorney fees. For example:

1. The IRS 2007 non-profit tax return for the Sierra Club showed its net worth to be $56,527,055. Yet the Sierra Club, because it is classified as a "non-profit" organization, receives attorneys fees from the federal government in environmental cases.

2. IRS forms for nonprofit groups can be misleading in terms of worth. There needs to be a better system of accounting of worth for attorney fee purposes. Consider what some of the executives of some of the "non-profit" groups are making.

Organization	Position	Salary	Retirement Plan/Deferred Compensation	Total
Environmental Defense Fund, Inc.	President	$446,072.00	$50,102.00	$496,174.00
World Wildlife Fund	President	$439,327.00	$47,067.00	$486,394.00
Natural Resources Defense Council	President	$357,651.00	$75,308.00	$432,959.00
Environmental Defense Fund, Inc.	Executive Director	$323,801.00	$41,972.00	$365.773.00
Environmental Defense Fund, Inc.	VP West Coast	$325,559.00	$35,313.00	$360,872.00
Nature Conservancy	Acting President	$318,507.00	$30,866.00	$349,373.00
National Wildlife Federation	President	$309,579.00	$35,425.00	$345,004.00
Pew Center on Global Climate Change	President	$311,500.00	$23,599.00	$335,099.00
Defenders of Wildlife	President	$254,947.00	$57,949.00	$312,896.00
The Wilderness Society	President	$289,750.00	$18,715.00	$308,465.00

B. Consent Decrees and Sealed Court Documents

Another problem is the lack of public records for a significant dollar amount of attorneys fees that are paid. In many cases, the amount of attorneys fees paid to environmental and animal rights groups are contained in sealed court documents or consent decrees, meaning that the public has no way to know how much taxpayer money is awarded to these groups. For example, in the District of Columbia, the Center for Biological Diversity reached an attorney fees settlement in 32 cases, but in five of those cases, the amount of taxpayer money given to the groups is not included in a public document. The dollar amount of all attorney fee awards under both the Judgment Fund and EAJA should be public information.

C. Getting Paid to Go Away

A related problem is the number of cases that are paid to "go away." Under the Judgment Fund and EAJA, attorneys fees are only to be paid to the "winning litigant." The courts have held that the plaintiffs had to substantially prevail in the litigation. That means that the plaintiff is supposed to achieve the litigation's goal. However, in approximately 21% of the cases we studied, the federal government just paid the attorney fees without a court ever determining that there was a "winner" or that the plaintiff substantially prevailed in the litigation. In other words, the environmental group would file a complaint and the government would pay their attorney fees.

D. Taxpayer dollars are funding both sides of the litigation equation unequally

A fourth problem is that taxpayers are funding all sides of the litigation, without the opportunity to also receive fee-shifting benefits. For example, in one case in Idaho, ranchers spent thousands of dollars in conservation efforts with attorneys and range experts over 12 years to protect the slick-spot pepper grass, a plant that grows about 5 inches tall. Western Watersheds Project ("WWP") filed three different suits against the federal government over the plant, not because the landowners' conservation efforts were failing, but because the federal government failed to meet the timelines to review the status of the plant under the Endangered Species Act ("ESA"). The federal government did in fact fail to meet the timelines, so WWP won the cases and were paid over $200,000 in attorney fees. So in this case, like so many others, the ranchers paid for both sides—they paid for conserving the plant and their tax dollars paid WWP to sue to list the plant under the ESA. In other examples, often times an environmental group will sue over a permit or license and the holder of that permit or license will have to intervene in the litigation to protect their interest. Even in cases where the permit holder succeeds to protect and defend their permit, they cannot receive attorneys fees; if fee-shifting is going to occur, it should equally apply to private intervenors who substantially prevail in the litigation.

E. Attorneys Fee Rates

The rates that environmental non-profit public attorneys also charge is far outside the statutory requirements under EAJA. Under that statute, attorney fee hourly rates are capped at $125.00 per hour. However, this standard is not followed. For example, Earthjustice Legal Foundation (a public interest, non-profit legal foundation) and Western Environmental Law Center (also public interest, non-profit legal foundation) jointly received an attorney fees settlement of $500,000.00 for a single lawsuit lasting 15 months. There were 7 attorneys representing 12 non-profit public interest organizations who charged between $650.00 per hour and $300.00 per hour.

F. Payment for Procedure Not Substance

Finally, I recommend reform related to the substantive requirements for the payment of attorney fees. As stated above, attorney fees can be shifted in those cases where the environmental or animal rights group "substantively prevails." However, in the vast majority of cases, attorney fees are being paid, not because the substance of the federal agency's decision was wrong, but because of procedural failures, like taking 91 days to make a decision versus the statutory 90 days. In fact EAJA requires that to qualify for attorneys fees, the agency not only lose the case, but that the substantive and factual position that the agency took in the case was not "substantially justified." In the initial passage of EAJA, Congress meant to set a bar so that only those cases where the federal agencies acted completely outside the bounds of reason would be eligible for fees. However, the way that the federal government treats both EAJA and the Judgment Fund requests is that no matter the reason for "winning," the group gets its fees paid. Thus, Congress needs to clarify the circumstances where attorneys fees can be shifted so that the statutes are not a money-making proposition for litigation groups, but to simply put the parties back in their original position and only in those cases where the federal government is not substantially justified in its position.

Should you have any questions, please do not hesitate to contact me.