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Field Hearing Testimony – Regulatory Burdens Placed on Livestock Industry
Committee on Oversight and Government Reform
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Evanston, Wyoming

My name is Karen Budd-Falen. I grew up as a fifth generation rancher and have an ownership interest in a family owned ranch west of Big Piney, Wyoming. I am also an attorney specializing in environmental litigation to protect working rural communities and private property rights. I represent the citizens, local businesses, rural counties and communities who may not necessarily be the defendants in litigation between radical environmental groups and the federal government, but who absolutely feel the heavy consequences of endless litigation. Additionally, my clients are faced, every day, with a more demanding federal bureaucracy who is trying to regulate them out of business. Adding insult to injury, my clients, friends and family not only have to live with the excessive regulatory burdens but also have to pay the litigation fees to feed the litigation machine.

I would argue that the biggest problem that not only the ranching industry in the West, but all of the agriculture industries across the Nation, faces is "mission creep." Mission creep is the expansion of a project or mission beyond its original goals. Mission creep is usually considered undesirable due to the dangerous path of each success breeding more ambitious attempts, only stopping when a final, often catastrophic, failure occurs. The term was originally applied exclusively to military operations, but has recently been applied to many different fields. The phrase first appeared in articles concerning the United Nations peacekeeping mission during the Somali Civil War in the Washington Post on April 15, 1993, and in the New York Times on October 10, 1993. As the examples below show, federal bureaucracy "mission creep" absolutely applies to administrative regulatory burdens today.

I. REGULATORY BURDENS BY ADMINISTRATIVE RULE/EXECUTIVE ORDER/SECRETARIAL ORDER/MOU

Every grade-school child in the U.S. is taught that Congress makes the laws and the Executive Branch implements the laws that Congress passes. Certainly the Executive Branch has the authority to make "necessary rules and regulations" which implements congressional statutes. However in the last six years, we have gone from a Nation of voting members of Congress passing laws, to non-elected bureaucrats using the power of Executive Orders, Secretarial Orders, policies and Memorandums of Understanding ("MOUs") between themselves to make law. Often these Executive Orders and Secretarial Orders merely cite to themselves or to other agency rules or decree as legal authority rather that going back to any type of congressional statutory authority.

By way of one example, consider President Obama's American Great Outdoors Initiative. Many of today's regulatory burdens can be traced back to that document, created solely by a Presidential Executive Order. The Initiative was established by Presidential Proclamation on April 16, 2010, citing no statutory authority other than the President's power to prepare

Executive Orders. The "public input" for the document was only college campus listening sessions. There was no opportunity for local government input and no public comment. The final report contains 100 pages and recommendations that significantly enhance the regulatory burdens on the people who feed and clothe this Nation through Secretarial Orders, MOUs and agency guidelines. Painfully, even though Congress has held hearings and attempted to assert some oversight over some of these proclamations, and even though many of these orders are not supported by statutory authority, rather than yielding to the power of Congress, often the federal agencies claim to have withdrawn or "paused" the edict, only to resurrect it again under another name. Consider the following examples:

A. Interior Secretarial Order 3310 – Wildlands Policy.

Based upon much furor and outcry from the Congress and the public, the Wildlands Policy and Secretarial Order were withdrawn on June 11, 2011. However, the Wildlands Policy was replaced in Bureau of Land Management ("BLM") manuals and handbooks that contain a requirement that as part of its land use planning process, the BLM inventory and manage "lands with wilderness characteristics" to protect its roadless and untrammeled value. These manual and handbook sections were never open for public comments or Congressional review. Thus, although the "Wildlands" Secretarial Order may have been withdrawn in name, the policy and requirements live on and are being implemented today.

B. Interior Secretarial Order 3321 – National Blueways.

As this Committee will recall, Secretarial Order 3321 created the 7.2 million acre Connecticut River Blueway and the 17.8 million acre White River Blueway. Although the White River Blueway was subsequently withdrawn, and Secretarial Order 3321 was put "on pause" on July 17, 2013, the program still continues through a Memorandum of Understanding ("MOU") among the Departments of Interior, Agriculture, Corps of Engineers and NOAA. Dated December, 2012 the federal partners as they term themselves agreed to a holistic management approach to landscape and watershed-scale conservation projects, including watersheds and coastal ecosystems.

C. Interior Secretarial Order 3323 – Landscapes of National Significance.

Dated September 12, 2012, Secretarial Order 3323 creates 20 "Landscapes of National Significance," 28 "Landscapes of Regional Significance," 58 "Rivers and Water Trails," and 19 "Great Urban Parks and Wildlife Areas." That is 125 on-the-ground designations with no public input and no statutory authority.

D. Interior Secretarial Order 3289 – Landscape Conservation Cooperatives ("LCCs).

LCCs are also a creation of a Secretarial Order, which has not had any benefit of public input or oversight. According to the Secretarial Order, LCCs are a way to address sea rise, including acquisition of upland habitat and the creation of wetlands, invest in new wildlife corridors, and reduce the carbon foot print. And while the goals of LCCs are laudable, LCCs are now being implemented by the U.S. Fish and Wildlife Service ("FWS") through a Memorandum

entitled FWS Ecological Services Workload Prioritization Memorandum dated May 20, 2014, **which elevates LCCs above the statutory mission of that agency**. According to the FWS Memorandum, the agency has determined that it will elevate the implementation of LCCs above its statutory requirements of species listing and critical habitat designation. See Exhibit 1. With this "reprioritization" the FWS admits that it will not be able to meet the statutory time frames of the ESA – the subject of immense litigation to date – including the issuance of section 7 consultation biological opinions which ALL industries must have to get a permit for a project involving a federal agency (including farm loans, crop insurance, FEMA flood insurance and all federal permits). The FWS will only put resources toward "litigation driven" recovery plans. Although called for by statute, the 2014 FWS Workload Prioritization memo states that the agency will not "carry out the following activities: uplisting rules, downlisting rules, post-delisting monitoring plans, petition responses, Candidate Notice of Reviews, non-MDL findings and proposed rules, or recovery plan revisions. Five-year reviews will not be done, although abbreviated reviews may be completed if sufficient resources are available."

II. REGULATORY BURDENS UNDER THE ENDANGERED SPECIES ACT

I strongly doubt that the Congress that passed the Endangered Species Act ("ESA") in 1969 would recognize the Act today. The original purposes of the Act were simple and clear: Preserve threatened and endangered species and the habitats upon which they live. As I have discussed with the House of Representatives Resources Committee in the past, the goal of the ESA was to find a way to protect species and then get them off the threatened or endangered species list; the goal was not to control land use. However, a way to control land use is exactly what the ESA has become. Consider the following examples:

A. Species Listing Criteria

Although the ESA was written in terms of preventing the "extinction" of animal species, under current interpretations, the FWS and the courts have determined that extinction does not have to be necessarily imminent or inevitable for a species to be placed on the list. Rather, it seems that the FWS (and National Marine Fisheries Service) (collectively "FWS") now considers whether there is a "threat" to the species that may make extinction a possibility sometime in the future. Specifically, to list a species, the FWS considers "threats" to include (a) present threats, (b) future threats and (c) cumulative threats. Species can also be listed because of concerns with "climate change." Additionally, even if numbers of species are increasing or stable, if the FWS perceives a loss in habitat, species can be listed.

The nature of the listed species has also significantly changed. Some of the original species on the list were bald eagles, American alligator, California condor, grizzly Bear, Florida panther, numerous bird species in Hawaii, whooping crane and others. As of August 2, 2015, there are now 1567 U.S. plant and animal species on the list, and 673 species listed in foreign counties. In contrast, 59 species have been delisted, only 30 of which were recovered. The rest of the delistings were due to species extinction, or errors in counting or taxonomic classification.

B. Changes in Criteria for Critical Habitat Designation

I would argue that another regulatory threat to the agricultural and other industries and private property rights is the significant regulatory changes to the definition and designation of critical habitat. Until the last three years, critical habitat was statutorily and regulatory defined as land areas that were **"currently occupied"** by listed species containing **"essential" "primary constituent elements"** ("PCE") for breeding, shelter and feeding. Additionally, the FWS was required to consider economic impacts as a way to (1) notify public of the costs of the program and (2) limit areas of critical habitat designation because if economic costs were too high, so long as the limitation of critical habitat did not cause species extinction, not all occupied land was designated as critical.

That was until October 30, 2013, when the FWS published a new regulation in the *Federal Register* that invalidated a case that representatives of a livestock-trade association, the New Mexico Cattle Growers Association ("NMCGA") had won before the Tenth Circuit Court of Appeals. According to the NMCGA decision, ALL economic considerations, including those co-extensive with species listing, had to be analyzed prior to a critical habitat designation. Under the new regulations however, the consideration of economic impacts has been relegated to a very minor role because now those economic costs associated only with critical habitat designation are considered. Thus, once a species is listed, if there is a proposed economic cost that could be assigned to either the listing of the species or the designation of critical habitat, that cost is not included in the critical habitat economic analysis. Of course, the FWS is the agency that determines if a proposed economic cost is one that is assigned to EITHER listing or both listing and critical habitat designation (which is not considered part of the critical habitat economic analysis) OR if the cost is attributable solely to the critical habitat designation. I would argue that this shift in analysis results in hiding the significant costs of the ESA from the American public.

Additionally, on May 12, 2014, the FWS expanded the types of lands that could be included as "critical habitat' to include areas that are currently unoccupied and may currently lack the PCEs as critical habitat. Given the recent Administration guidance regarding the consideration and analysis related to "climate change," the proposed rules would allow the designation of currently unoccupied habitat that does not contain the primary constituent elements for the species survival now, based on an analysis that the PCEs may "someday" develop on the property based on climate change or other models. Once property is designated as critical habitat, even if the species is not present or the property does not contain one of the PCEs, "take" in the form of adverse modification is prohibited.

Another example of the federal bureaucracy using the power of the ESA to regulate land use is the recent FWS decision to designate man-made structures as critical habitat. On March 20, 2012, the FWS published a final rule designating critical habitat for the Chiricahua leopard frog ("CLF"). See 77 Fed. Reg. 16324 (Mar. 20, 2012). This critical habitat designation includes 10,346 acres of land in Arizona and New Mexico, including man-made "livestock tanks" as critical habitat. A "livestock tank" is defined as "an existing or future impoundment in an ephemeral drainage or upland site constructed primarily as a watering site for livestock." See id. at 16338. Where stock tanks are designated, the critical habitat extends for "20 ft. beyond the

high water line or to the boundary of the riparian and upland vegetation edge, whichever is greatest." See id. at 17348. The critical habitat designation notes that "sites as small as 6.0-ft. diameter steel troughs can serve as important breeding sites." See id. at 16341. Further, it notes that "some of the most robust extant breeding populations are in earthen livestock watering tanks." See id.

This critical habitat designation states that actions that could constitute "adverse modification" of the critical habitat area include "excessive sedimentation from livestock grazing," "livestock grazing that results in waters heavily polluted by feces," and "actions that would alter the water quantity or permanence of a breeding site or dispersal corridor." See id. at 16363. The rule also notes that conservation efforts could affect the ability of livestock producers to "drain[] stock tanks" and that livestock grazing could hinder conservation efforts due to "damage to shoreline habitat, disease transmission, and changes to water quality due to intense livestock use." See id. at 16365. Despite these statements, the rule notes that "no significant economic impacts are likely to result from the designation of critical habitat." See id.

There are several reasons for concern with the designation of privately created and developed structures as critical habitat. In this case, these stock tanks were developed by ranchers for the benefit of their grazing operations. Many of these stock tanks contain privately owned water put to beneficial use. This is concerning because it could lead to questions as to what maintenance the livestock producer is allowed – and on the other hand, required – to perform. For instance, in at least one critical habitat unit under this rule, "special management is required . . . because periodic drought dries most of the aquatic sites completely or to small pools, which limits population growth potential." See id. at 16353. If that is the case and the rancher is forced to move his livestock from the allotment, will the livestock producer be required to maintain the water level in his stock tank anyway? In another place, the rule discusses that a drop in temperature can cause mortality to the frog and that the pH level of the water is important to the CLF survival. See id. at 16342. Will the livestock producer be required to maintain the water at a specific temperature, and at a particular chemical level? If the water level drops, the water freezes, or the pH balance is not at optimum levels, will this be considered take? Additionally, there are times when a livestock producer choses to NOT graze cattle on his allotment because of environmental or economic reasons. In those cases, will the rancher be forced to bear the costs of maintaining these improvements that he is not using? I would argue that the ESA drafters never envisioned man-made structures as critical habitat, particularly given the prohibitions on "adverse modification" and take.

C. Incidental Take Permit "Surrogate Policy" Changes

On May 11, 2015, the FWS issued a final rule announcing a change in how it uses surrogates as part of an Incidental Take Statement ("ITS"). Although the FWS rule acknowledges that Congress prefers the expression of the impacts of "take" in terms of a numerical limitation with respect to individuals of the listed species, the FWS determined that the use of surrogates can be more practical and "meaningful." Thus, the FWS amended its regulations at 50 C.F.R. §42.114(i)(l)(i) to determine that surrogates may be used to express the amount or extent of anticipated take, provided the biological opinion or the incidental take statement: (1) describes the causal link between the surrogate and take of the listed species; (2) describes why it is not practical to express the amount of anticipated

take or to monitor take-related impacts in terms of individuals of the listed species; and (3) sets a standard for determining when the amount or extent of the taking has been exceeded.

There are numerous concerns with the new "surrogates" rule. First, the ESA does not use the term "surrogate" anywhere within its requirements. The ESA was adopted to protect species and their habitats, not something that the FWS believes should substitute for a listed species.

Second, is the new definition of a "surrogate." A surrogate is not just a similar species; rather a surrogate can be habitat, "ecological conditions," or similar affected species. Although the rule requires that the ITS must contain an explanation of the "causal link" between the surrogate and the take of the species, this "causal link" appears to be a very low bar to establish a linkage between a proposed surrogate and the listed species. If a surrogate is established by the FWS, any take of that surrogate will have the same force as if take occurred to the species itself.

Third is the "reasonable certainty" standard. Prior to this new rule, the Circuit Courts were not unanimous in their determination whether a "take" of a species will occur. Specifically, under the prior rules, the FWS was to issue an ITS "if such taking may occur." The new rule amends the regulations at 40 C.F.R. § 402.14(g)(7) to clarify that the standard for issuance of an incidental take statement is when there is "reasonable certainty" that take will occur. In contrast, the Ninth Circuit believed there was a low bar requiring the issuance of an incidental take statement; stating one is required even where take is unlikely. *See* Public Employees for Environmental Responsibility v. Beaudreu F. Supp. 2d 2014 WL 985394 (D.D.C. 2014). The new "reasonable certainty" standard governs whether an agency must formulate an incidental take statement. The reasonable certainty standard "does not require a guarantee that a take will result, rather, only that the Services establish a rational basis for a finding of take." The Service is required to apply their professional judgment while relying on the best available scientific and commercial data. The problem is that under the FWS requirement, the courts will completely defer to agency expertise, making the challenge to the need of an ITS by the regulated industry nearly impossible.

III. ATTORNEYS' FEES SHIFTING UPDATE

As I have discussed with this Committee before, I believe that the statistics support the contention that a significant amount of today's regulatory burdens comes from litigation by radical environmental groups, paid for by the American taxpayers in the form of "attorney fee reimbursement" pursuant to the Equal Access to Justice Act and moneys from the Judgment Fund. The original purpose of the Equal Access to Justice Act ("EAJA") of 1980 was to protect individuals and small businesses from an overzealous application of law by federal agencies. According to testimony offered by members of the House of Representatives in support of EAJA in 1980, the purpose of the bill was to "equal the playing field" when American citizens had to file litigation against the federal government. For example, Congresswoman Chisholm (D-NY) testified that the bill encouraged an "affirmative action approach" to bring in those who had been "locked out of the decision making process by virtue of their income, their race, their economic scale or their educational limitations." Representative Joseph McDade (R-PA) stated that the bill would help to improve citizen's perceptions of his relationships with the federal government because it would require federal agencies to justify their actions and to compensate the individual or small business owner when the government is wrong. The intent of EAJA was to curb

unreasonable and excessive bureaucratic application of regulations, not add to regulatory burden on small businesses and individuals. With regard to environmental litigation, EAJA is used to "reimburse" attorneys' fees in cases involving the National Environmental Policy Act, Wild Horse and Burro Act and other acts where sovereign immunity is waived by the Administrative Procedures Act.

Generally, there are four important statutorily required caveats required by the EAJA: (1) EAJA funds are taken from the "losing" federal agencies' budget; (2) EAJA is only supposed to apply to those cases in which (a) the plaintiff won the litigation and (b) if the federal government's position was not substantially justified; (3) EAJA statutorily caps the attorney fees payment at $125/per hour; and (4) winning litigants are also not supposed to be eligible for EAJA funds if their net worth is over $7 million.

The Judgment Fund was created in 1956 as a means of providing a "permanent appropriations" to pay judgments against the United States that did not contain a specific funding source. Prior to 1956, most judgments against the United States could not be paid from existing appropriations, but required specific Congressional appropriations for payment. By doing so, Congress was able to review each judgment and the costs involved. The Judgment Fund was created to eliminate the procedural burdens involved in getting an appropriation from Congress to pay a particular judgment. It was also intended to result in prompter payments, reducing the amount of interest (where allowed by law) that accrued against the United States between the issuance and payment of an award. Importantly in 1961, Congress modified the law to allow the Judgment Fund to be used to pay compromise settlements of actual or imminent litigation entered into by the Attorney General.

The law creating the Judgment Fund has been codified at 31 U.S.C. § 1304. Since the Judgment Fund is a permanent, indefinite appropriation, the Judgment Fund has no fiscal year limitations, and there is no need for Congress to appropriate funds to it, annually or otherwise. Disbursements from the Judgment Fund are not attributed to or accounted for by the agencies whose activities give rise to the payments. In the absence of a specific statutory requirement, the agency responsible for the claim is not required to reimburse the Judgment Fund.

Since 1995, there has been no accounting or transparency of how the American tax money is being paid to environmental groups to sue the federal government based upon the Paperwork Reduction Act for either EAJA or the Judgment Fund. Based upon this failure, on August 2, 2015, I completed a research project using the PACER the federal court data base which lists every case filed in every federal court in the U.S. Applying the search criteria of all filed cases of certain named environmental groups from 2012 to the present, the following facts were revealed:

Environmental Group	WildEarth Guardians ("WEG")	Western Watersheds Project ("WWP")	Center for Biological Diversity ("CBD")	Sierra Club[1]
2013 assets and revenues	Assets - $3,113,076 Revenues - $3,043,253	Assets - $523,549 Revenues - $619,686	Assets - $13,756,773 Revenues - $9,368,271	Assets - $63,404,147 Revenues - $98,154,894
Number of cases filed from 2002 to 8/2015	65	39	155	215
Known attorneys' fees collected from 1/2012 to 8/1/2015	$1,122,605[2]	$2,827,933	$2,851,652	$2,477,933[3,4]
Attorneys' fees granted via court decision	1	0	1	1
Attorneys' fees granted via settlement agreement	23	16	43[5]	17
No. of cases in which attorneys' fees paid but amount not publically revealed	2	3[6]	8	15

I would argue to this Committee that the attorneys' fees data above is shocking and is an abuse of the premise under which the EAJA and the Judgment Fund were passed. While in the scheme of the National Debt, the amounts paid to these groups is small, in the scheme of the ranchers, farmers, the regulated industries and private property owners whose livelihoods are being challenged by groups whose political goal is to eliminate use of the federal lands, the fees are staggering. Considering that these fees are being paid by the very people these groups seek to eliminate, it is time for reform.

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[1] The Sierra Club is not eligible for attorneys' fees reimbursement pursuant to EAJA. The Judgment Fund however does not contain any "net worth" cap. However, in most cases, the Sierra Club will be only one of several Plaintiffs and although each Plaintiff uses the same attorneys based upon the other organizations, attorneys' fees reimbursement is paid to attorneys representing the Sierra Club.

[2] WEG also received an award of attorneys' fees payments for University of Denver College of Law clinic program payments of $225,000. The hourly rate requested for the students work was $130/hour to $135/hour. The court reduced the hourly rate to $125/hour based upon EAJA's statutory rate cap. Supervising attorneys were paid at the higher rate. In this case, in addition to a fee payment to the University of Denver, WEG also received a direct payment of attorneys' fees on $100,000. See Exhibit 2.

[3] Only includes fees paid from 8/1/2015 to 1/2013.

[4] In those cases in which attorney hourly fees were noted, Sierra Club attorneys requested $415/hour.

[5] In a separate case, the maximum attorney fee rates requested was $750/hour. Although the law firm and the lead attorney handling the case reside in Washington D.C., the rates requested were based upon "established San Francisco California rates." See Exhibit 3. Interestingly, in other cases, this same firm has "only" requested fee reimbursement of $415/hour.

[6] WWP is requesting attorneys' fees in one case although the Court noted that WWP was successful on only one out of eight claims. See Exhibit 4.

IV. PROPOSED REFORMS

Although there is a great deal of news coverage about needed reforms, it sometimes seems as if there is little action. While I commend this Committee and the House of Representatives for its work, I would beg you not to rest on your laurels while the ranchers, farmers, energy producers, loggers and private property owners across this Nation are threatened with regulatory burdens and oppressive litigation every day. Although I applaud your efforts in conjunction with this Field Hearing and in bringing "Congress to the people," I would ask that you forcefully return our message to your colleagues in Washington that small businesses, landowners, rural communities and counties are on the brink of economic disaster and cultural genocide. While there are many reforms that should be considered, as a representative of so many of the job creators and the economic and cultural backbone of rural America, I would ask you to consider the following:

A. National Jobs and Community Stability Act

The National Environmental Policy Act ("NEPA") requires that federal agencies consider the effects of agency decisions on the environment. NEPA is not a substantive statute mandating that environmental considerations be elevated over all other considerations, but it does require that the agencies make informed decisions and that the general public be able to evaluate the impacts of a proposed decision on the environment and make a reasoned choice among alternatives.

However, the same consideration is never given to job creation or loss, economic stability or local social or community impacts. NEPA only requires that economic and social impacts be considered if there is an adverse environmental impact. Additionally, there is no waiver of sovereign immunity required to litigate against the federal government if there are only adverse economic impacts.

To remedy this iniquity, in 2011, I reviewed proposed legislation that would attempt to "balance" jobs and the environment. In my opinion, this legislation would be difficult to pass and would not achieve the desired results of providing a path to allow litigation regarding the failure to consider job creation/loss or local social stability in federal agency decisions. First, I do not support weakening the environmental consideration given by federal decision-makers as part of their decision making process. Second, my concern with supporting any legislation with a "balancing test" is that the courts will almost always defer to the "agency expertise" in determining the proper balance. Thus, even if we can get into court to argue that the agency failed to "balance" the proper factors, the federal courts will only look to see if a consideration of all the factors occurred, not whether a proper balance was achieved.

Instead, I would recommend that a statute be passed that simply requires that federal agencies consider and document "the impacts of federal agency decision-making on local customs, cultures and economic and community stability, including job/employment creation or loss within the locally impacted area." This language mirrors the requirements of NEPA regarding consideration and documentation of environmental impacts. Like NEPA, the "National Jobs and Community Stability Policy Act" would be a procedural statute, the purpose

of which would be to require that the agencies make informed decisions and that the agency decision-maker and the general public be able to evaluate the impacts of a proposed decision on job creation or loss, economic considerations and local customs and cultures and then make a reasoned choice among alternatives.

There are several reasons that I would argue that this would be a much better approach than to require "agency balancing" of environmental considerations with economic considerations. First, I believe that with the current political climate of consideration for the economy, once the economic impacts and community impacts of a decision are revealed to the public, we can get the public support for job creation and social protection. Additionally, it will be significantly easier for "our side" to litigate over the failure of the federal agencies to follow the process to consider job creation/loss and economic and community stability than it will be to litigate whether the proper "balance" occurred. Finally, focusing on the consideration of local community stability and job creation/loss would be a way for local governments to be more engaged in the federal agency decision making process without running into issues of federalism. I have attached some proposed bill language as Exhibit 5.

B. Federal Employee Accountability Act

In 2007, the United States Supreme Court reversed decisions by the Wyoming Federal District Court and Tenth Circuit Court of Appeals by holding that a private property owner could not avail himself of a Bivens common law cause of action to protect his private property rights from "taking" by intimidation and harassment from federal employees. Neither the Justices voting to affirm nor reverse the lower courts' decisions seemed to question that there had been some degree of harassment and intimidation against private property owner Frank Robbins because Mr. Robbins would not surrender an easement across his private property to the federal government, without due process and just compensation. However, the Justices writing for the Court's majority, as well as the two concurring Justices, did not believe that the Court should expand its 40-plus year old precedent in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), to the Fifth Amendment property protections.

At its simplest, the Supreme Court in Bivens allowed a type of Civil Rights Act "Section 1983" claim to lie against federal officials. The Civil Rights Act of 1871 prohibits governmental employees, "acting under the color of state law," from proximately causing the depravation of certain constitutionally guaranteed rights. **The Civil Rights Act however only applies to state or local officials**. While the majority opinion seemed to recognize that Congress had never created a "step by step" remedial scheme to remedy harassment from federal agency officials, the majority believe that each alleged form of harassment had to be considered individually, despite the recognition that:

> It is one thing to be threatened with the loss of grazing rights, or to be prosecuted, or to have one's lodge broken into, but something else to be subjected to this in combination over a period of six years by a series of public officials bent on making life difficult. Agency appeals, lawsuits and criminal defense take money, and endless battling depleted the spirit along with the purse. The whole here is greater than the sum of its parts.

551 U.S. at 555.

The majority was concerned that allowing a common law cause of action to protect private property owners from federal officials' harassment and intimidation would "open the floodgates of ligation" against federal officials. The majority also determined that "legitimate zeal of [federal officials] on the public's behalf in situations where hard bargaining is to be expected," was not harassment.

Despite these findings, the Court's Justices recognized that Congress could correct this deficiency. In this regard, the majority opinion, written by Justice Souter, with Justice Roberts and Justice Kennedy, stated:

> We think accordingly that any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation. "Congress is in a far better position than a court to evaluate the impact of a new species of litigation" against those who act on the public's behalf. And Congress can tailor the remedy to the problem perceived, thus lessening the risk of a rising tide of suits threatening legitimate initiative on the part of Government's employees.

551 U.S. at 562. Citations omitted.

Finally, the dissenting opinion, written by Justice Ginsberg with Justice Stevens would have extended a Bivens common law cause of action to Robbins. They perceived the question in the Robbins case to be "Does the Fifth Amendment provide an effective check on federal officers who abuse their regulatory powers by harassing and punishing property owners who refuse to surrender their property to the United States without fair compensation? The answer should be a resounding 'Yes.'" 551 U.S. at 569.

In addition to placing the creation of a cause of action in the hands of Congress, the Court's dissenting opinion also suggested a similar statute containing enough checks to bar every complaint of wrong from reaching the courts. As stated by Justice Ginsberg, "Sexual harassment jurisprudence is a helpful guide. Title VII, the Court has held, does not provide a remedy for every epithet or offensive remark." After citing several cases limiting the situations in which a suit for sexual harassment could be brought, she concluded:

> Adopting a similar standard to Fifth Amendment retaliation claims would "lesse[n] the risk of raising a tide of suits threatening initiative on the part of Government's employees." Discrete episodes of hard bargaining that might be viewed as oppressive would not entitle a litigant to relief. But where a plaintiff could prove a pattern of severe and pervasive harassment in duration and degree well beyond the ordinary rough-and-tumble one expects in strenuous negotiations, a Bivens suits would provide a remedy. Robbins would have no trouble meeting that standard.

551 U.S. at 582. Internal citations omitted.

Based upon this Supreme Court opinion, other private property owners who believe that they are being harassed and intimidated because they refuse to turn over their private property outside the mandates of the Fifth Amendment have no forum in which they can vindicate their claims. That is not to say that every action by a federal employee should give rise to a judicial cause of action, but there are cases where the harassment and intimidation is so severe that "it is damages, or nothing." However, without the intervention of Congress, now it is nothing.

Given the Supreme Court's suggestions, I have reviewed Title VII of the Civil Rights Act of 1964 and its interpreting cases and have narrowed a list of suggested considerations that could be used in drafting legislation that would allow this type of a cause of action. Using this existing law as a pattern, I would propose the following language:

> *The attempted taking of private property or private property rights by means of federal or state governmental employee harassment or intimidation, under color of law, is hereby declared to be a violation of Civil Rights Act. Harassment or intimidation against the owners of private property or private property rights constitutes such violation when (1) a property owner's relinquishment of his property or property rights is made explicitly or implicitly a term or condition of receipt of a permit or license from a governmental agency, (2) submission to or rejection of such conduct by a property owner is used as the basis for the grant of or conditions included in a permit or license, or (3) the conduct of the governmental employee has the purpose or effect of unreasonably interfering with an individual's private property or private property rights. An attempted taking of private property or property rights under this section can be composed of a series of separate acts that collectively constitutes a significant deprivation of the ownership or use of private property or property rights. In determining whether the activities of a governmental employee are actionable under this section, consideration can be given to the frequency of the discriminatory conduct, harassment or intimidation, its severity, and whether such governmental action interferes with the ownership, use or legitimate investment backed expectations of the property owner.*

Thank you for the opportunity to testify at this hearing.

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Pacific Southwest Region
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In Response Reply To:
FWS/R8/AES

MAY 20 2014

Memorandum

To: Regional Director, Pacific Southwest Region
Sacramento, California

From: Assistant Regional Director, Ecological Services

Subject: Ecological Services Workload Prioritization */s/ Michael Fris*

Consecutive years of reduced funding for the Ecological Services Program have had a meaningful impact in Region 8. Workload associated with sections 4, 7, and 10 of the Endangered Species Act (ESA) is greater than our resources can address. To compound this problem, we anticipate the demand for ESA permitting, listing, and recovery work will increase in the coming years as the housing market improves, natural resource needs increase, and listing petitions rise. We expect this increase in workload to occur while renewable energy permitting remains a high priority for the Administration and Department of Interior. Given decreased staff resources and budgets, it behooves us to craft a strategy for prioritizing workload. Ultimately, we need a long-term strategy which may entail shifting resources throughout our region to ensure that staffing is commensurate with our priority assignments. As we formulate this long-term strategy, this memorandum will guide deployment of our resources in the short term.

Regionally, our top priorities include Department of Interior initiatives, preservation of health and human safety, and workload required to meet our legal mandates. Our highest priorities also include continued implementation of Landscape Conservation Cooperatives and the surrogate species concept. Specific priorities encompass Tribal trust responsibilities, Klamath water operations projects (including the hydroelectric settlement agreement), the Desert Renewable Energy Conservation Plan, the Bay-Delta Conservation Plan, the Central Valley Project Operations and Criteria Plan, issues of national security, projects related to flood prevention, projects related to fire risk reduction, and communicating with the public through external affairs. While these priorities comprise our regional focus, they do not provide the fine-scale sideboards to determine how offices should prioritize projects, and they do not all apply to each office within Region 8. Thus, each office will need to prioritize its own workload within their specific geographic priorities, and using surrogate species as the measure of success.

Among the remaining workload, we will focus on projects with a high conservation benefit. Whenever possible, we will place the highest priority on projects where big conservation gains can be achieved with relatively little effort through the solid work of our partners. When conservation value and programmatic priority are equal, projects will enter a queue to be addressed on a first-come, first-served basis. Streamlined, programmatic approaches (landscape scale) will be prioritized ahead of individual projects.

EXHIBIT 1

Action agencies and applicants can reduce permit processing timeframes by producing well-prepared biological assessments and habitat conservation plans. For priority projects we cannot accomplish due to budget shortfalls, reimbursable dollars may enable us to hire temporary or term employees to work on the project from start to finish. Reimbursable dollars should only be accepted when a project would otherwise be a priority, but would go unfunded due to budget shortfalls.

Based on limited staff resources, we anticipate that we will not be able to meet regulatory timeframes with some degree of frequency. This includes ESA section 7 timeframes for issuing biological opinions (135 days) and timeframes for issuing ESA section 4 findings (e.g., 90-day findings and 12-month findings). Finally, there are a number of items we simply won't be able to do. These items are discussed below, by Ecological Services Program.

Section 7 and Section 10

Our primary focus will continue to be Departmental and agency priorities, as well as projects where we foresee having the biggest conservation benefit. Departmental and agency priority projects include the DRECP, high-profile renewable energy projects, Klamath, BDCP, and OCAP as well as projects necessary for health and human safety or national security and those for which we have court-ordered or settlement obligations. Among section 10 projects, we will prioritize those regional HCP development efforts for which we think the applicants are committed to expeditiously completing the plan and which are most promising in terms of positive conservation outcomes. Our section 7 priorities will focus on those projects that are designed with species conservation in mind and projects where we can achieve the greatest conservation outcome for the resources expended in working on the project. We will pursue programmatic consultations if there are expected long-term conservation and workload benefits.

To focus our efforts and attention on priorities, we foresee rarely or not doing Safe Harbor Agreements, general technical assistance, and CCAAs and CCAs. We will step away from the lead role on most intra-Service consultations for non-Ecological Services programs. Those programs have been delegated the authority to complete their own section 7 consultations; we are committed to providing those programs with the tools they need to support their own determinations.

As the economic recovery continues, we anticipate that HCP and consultation workload associated with urban development will increase. We must be prepared to prioritize projects. We will not be able to complete all projects in a timely manner. Sometimes our partners have assisted with funding, which helps us complete these requests in a more timely manner (streamlined MOU with FS, agreements with Caltrans and the Corps). To enable Federal land management agencies to reduce the risk of catastrophic wildfire, we will continue to engage these partners on fire-related consultations. We have recently reaffirmed our commitment to the Streamlined Consultation process in the Northwest Forest Plan area, and will continue to seek consensus and efficiencies in these consultations.

Listing and Recovery

Our primary (and perhaps only) focus will be on meeting court-ordered and settlement deadlines for findings, including findings for reclassifications. We will also put resources toward completing litigation-driven recovery plans, and for other recovery plans we will continue to implement our work activity guidance for FY13-FY17, ensuring that the pace of plan development is commensurate with staffing levels. Recovery implementation will be focused on critically imperiled species and will be primarily in the form of Service staff working with partners to identify and fund recovery actions.

With few exceptions, we do not plan to carry out the following activities: uplisting rules, downlisting rules, post-delisting monitoring plans, petition responses, CNORs, non-MDL findings and proposed rules , or recovery plan revisions. Five-year reviews will not be done, although abbreviated reviews may be completed if sufficient resources are available.

Contaminants

Our main priority will be maintaining spill response planning and preparedness capabilities with our field offices as well as our Federal and State partners. Another priority will be to ensure new case development and support in our Natural Resource Damage Assessment & Restoration (NRDAR) program. For restoration activities of our on-going existing NRDAR cases, implementation and support will continue as these funds are non-appropriated and derived from settlements.

With the exception of our current On-Refuge Investigation program activities, all contaminant investigation activities are no longer being implemented (unless funding/support is provided to us from our partners or stakeholders). In addition, technical assistance provided on contaminant issues to other Service Programs (i.e., Consultation, Recovery, Listing, Refuges, Fisheries, etc.) will be significantly reduced. Some technical assistance may be provided on a case-by-case basis for high-priority issues, and in such cases cost-sharing with the requesting program will be sought. . Specific Service issues that will be affected include:

- Clean Water Act regulatory reviews (water quality standards, TMDLs, etc.)
- Listing support reviews (five-factor analyses, 90-day reviews, delisting, etc.)
- Mining-related NEPA reviews
- Pre-acquisition Environmental Site Assessments (Level II and Level III)
- Recovery support reviews (recovery plans, 5-year reviews, etc.)
- Refuge Pesticide Use Proposal reviews
- Refuge Cleanup reviews (EECAs, PASIs, etc.)

Conservation Planning Assistance

We will continue to focus our efforts on Departmental and agency priorities, including the Secretarial Determination for the Klamath settlement agreement, and water operations associated with the Klamath hydroelectric facilities and the Central Valley Project Improvement Act. Our

field offices have been and will continue to rely on reimbursable funding from our Federal partners for work on Fish and Wildlife Coordination Act reports. It is imperative that these funds be sufficient to fully support staff, and we will prioritize projects based on the amount of funds, Departmental and agency priorities, and conservation benefit. We will continue work on FERC reviews insofar as the available funding allows, which will likely entail stepping away from involvement with some FERC projects (except Klamath).

We will not or rarely be reviewing and commenting on other agencies NEPA documents, unless we have agreed to be a Cooperating or Participating agency. Our involvement with Bald and Golden Eagle Act permitting will be minimal, and will largely depend on the priority given to individual projects.

cc:
R8 All ES Project Leaders

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 09-cv-01272-WJM

ROCKY MOUNTAIN WILD, a Colorado non-profit corporation, and
WILDEARTH GUARDIANS, a New Mexico non-profit corporation,

Petitioners,

v.

TOM VILSACK, in his official capacity as the Secretary of Agriculture,
TOM TIDWELL, in his official capacity as the Chief Forester of the U.S. Forest Service,
THOMAS MALECEK, in his official capacity as District Ranger for the Rio Grande National Forest, and
UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture,

Respondents.

ORDER GRANTING ATTORNEYS' FEES PURSUANT TO 28 U.S.C. § 2412(d)(1)

This matter is before the Court on Petitioners Rocky Mountain Wild and WildEarth Guardians' (collectively "Petitioners") Motion for Attorneys' Fees ("Motion"). (ECF No. 73.) Respondent U.S. Forest Service, the Secretary of Agriculture, the Chief Forrester of the U.S. Forest Service, and the District Ranger of the Rio Grande National Forest (collectively "Respondents") oppose the Motions and have filed a Response (ECF No. 78). Petitioners have filed a Reply (ECF No. 78).

For the reasons set forth below, the Court grants in part Petitioners' Motion pursuant to 28 U.S.C. § 2412(d)(1).

I. BACKGROUND

This case originally arises from a challenge to the U.S. Forest Service's approval of the Handkerchief Mesa Timber Project, which authorized logging in certain areas of the Rio Grande National Forest in southwestern Colorado. (ECF No. 1). Petitioners filed a Petition for Review of Agency Action against Respondents on June 1, 2009. (*Id.*)

On February 9, 2012, this Court issued an Order invalidating the Forest Service's Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI"),holding that these documents violated the National Forest Management Act ("NFMA") and the National Environmental Policy Act ("NEPA"). (ECF No. 53 at 22). Respondents filed a Notice of Appeal in April 2012, but voluntarily dismissed the appeal on September 18, 2012. (ECF No. 57; ECF No. 63).

Petitioner's now moves the Court for Attorney's Fees pursuant to 28 U.S.C. § 2412(d)(1). (ECF No. 53.)

II. LEGAL STANDARD

The Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 directs a court to award reasonable attorney fees to a prevailing party "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C.A. § 2412(d)(1)(A).

Even after the requirements of the EAJA are met, the party seeking fees must demonstrate that its request is reasonable. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). If a court ultimately determines that a party is entitled to an EAJA award, the court must then determine the reasonable number of hours spent on the litigation, and

multiply this figure by a reasonable hourly rate. *Hensley*, 461 U.S. at 433; *see also Malloy v. Monahan*, 73 F.3d 1012, 1017 (10th Cir. 1996). A district court is obligated to exclude "hours not 'reasonably expended' from the calculation"—including hours "that are excessive, redundant, or otherwise unnecessary." *Id.*

III. ANALYSIS

A. Petitioners Are Entitled to an Award of Fees Under the EAJA

The EAJA permits eligible prevailing parties to recover "fees and other expenses incurred by the party" involved in litigation with a federal agency. *Richlin Sec. Servics Co. v. Chertoff*, 553 U.S. 571, 573-574 (2008). To be eligible for an award of fees: (i) the party must be "prevailing"; (ii) the Government's position must not have been "substantially justified"; and (iii) "special circumstances" making an award unjust may not exist; and (iv) the fee request must be made within 30 days of entry of final judgment, supported by an itemized statement. *See Commissioner of the I.N.S. v. Jean*, 496 U.S. 154, 158 (1990). In addition, the party requesting fees must meet the net-worth eligibility criteria set forth in 28 U.S.C. § 2412(d)(1)(D)(2)(B).

1. Petitioners Prevail on the Merits

A party is "prevailing" for EAJA purposes where that party has succeeded on any significant issue in litigation and achieved benefit from bringing suit. *See Shalala v. Shaefer*, 509 U.S. 292, 302 (1993). Here, Petitioner satisfies the first requirement because of its success on the merits in this case—specifically, on February 9, 2012, this Court issued an Order invalidating the Forest Service's EA and FONSI, finding that these documents violated the NFMA and NEPA. (ECF No. 53 at 22). Because Petitioners received the relief they requested, they are prevailing parties within the

meaning of the EAJA. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001).

2. Respondents' position must not have been "substantially justified"

Since Petitioners are prevailing parties eligible for a fee award, Respondents' position must not have been 'substantially justified' in their litigation position. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). *See* 28 U.S.C. § 2412(d)(1)(A).[1] A position is substantially justified "if a reasonable person would think it correct, that is, if it has a reasonable basis in law and fact." *Id.* at 566 n.2. *Hackett v. Barnhart*, 475 F.3d 1166, 1174 (10th Cir. 2007) (fees "generally *should* be awarded where the government's underlying action was unreasonable'); *see also San Luis Valley Ecosystem Counsel v. U.S. Forest Serv.*, 2009 WL 792257, at *2 (D. Colo. Mar. 23, 2009) (stating that "the burden is on the [government] to demonstrate that its position . . . was "justified to a degree that would satisfy a reasonable person," and that it "had a reasonable basis in law and fact").

Respondents contend that they reasonably believed it had properly analyzed, under the NFMA and NEPA, whether it complied with two forest plan standards regarding soil compaction and forest regeneration. (ECF No. 78 at 4.) The Court

[1] A fee applicant need only allege that the government's position lacked substantial justification, and no court has ever suggested that anyone but the government bears the burden on the issue of substantial justification. *See* 28 U.S.C. § 2412(d)(1)(B) (detailing the requirements of a fees motion and stating that "[t]he party shall also allege that the position of the United States was not substantially justified"). The Court finds that Petitioners have done this, and so the burden then lies with Respondents to prove that their position was "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce* 487 U.S. at 565. *See San Luis Valley Ecosystem*, 2009 WL 792257, at *2 (stating that "the burden is on the [government] to demonstrate that its position . . . was "justified to a degree that would satisfy a reasonable person," and that it "had a reasonable basis in law and fact").

disagrees. The reasons are four-fold.

First, the Court finds that Respondents' litigation position ran contrary to clear NFMA mandate. Specifically, NFMA requires that all uses of managed land be consistent with forest plans. 16 U.S.C. § 1604(I); see also *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 785 (10th Cir. 2006). The applicable plan here—the Rio Grande National Forest Land and Resource Management Plan ("Forest Plan")—incorporated the Region 2 Soil Management Handbook's ("R2 Handbook") requirement that detrimentally compacted land in a managed area be limited to 15% of any land unit. (ECF No 77 at 3.)

In light of the NFMA's mandate, the Court sides with Petitioner's argument because Respondents' decision, not to conduct soil-compaction analysis of *all* land units before approving the project, lacked legal merit. There was little (if any) justification for not including data on *all* areas. To the extent that Respondents relied on *Lands Council v. McNair* in making the decision to approve the logging despite the lack of soil-compaction analysis for all areas, such reliance was misguided. *See* 537 F.3d 981, 991-92 (10th Cir. 2008). The law was clear at the time Respondents approved the project that all units of a project area must undergo some sort of environmental analysis. No legal justification existed at the time to support a different result.

Second, the Court agrees with Petitioners that Respondents' position—*i.e.*, that the EA adequately laid out a mitigation plan to reclaim compacted soils to comply with NFMA, was unreasonable. (ECF No 77 at 5.) Although the EA mentions use of a winged subsoiler to return soil-compaction levels to below 15%, as the Court found, the

EA did not contain "a sufficiently detailed plan for actually using the subsoiler" because the EA only "briefly state[d] its basic plan." (ECF No. 53, at 13-14.) Indeed, the Court identified as "the fundamental problem" with the EA, "its *cursory* discussion of the reclamation activities." (*Id.* at 13.) (*emphasis added.*) The Court ultimately concluded that "such undetailed statements" were inadequate to demonstrate the efficacy of the agency's reclamation plan and found against Respondents on this issue. (*Id.* at 14.) (*emphasis added.*) The Court's identification of a laundry list of unanswered questions regarding the use of the winged subsoiler underscores the EA's deficient discussion.[2] (*Id.*)

Third, the EA provided an inadequate basis to ensure that the project area would be *restocked* within five years after harvest, as required by NFMA and the Forest Plan. (ECF No. 53, at 17-18); *see* 16 U.S.C. § 1604(g)(3)(E)(ii) (requiring Forest Service to "insure that timber will be harvested from National Forest System land only where... there is assurance that such lands can be adequately restocked within five years after harvest"). Specifically, Respondents did not adequately assess the impacts of the spruce budworm infestation on regeneration. (ECF No. 53, at 19.) The Court found Respondents' arguments on this issue to be "*unavailing.*" (*Id.*) (emphasis added.) The EA merely asserted that thinning of the forest by logging could "improve" regeneration; but, as the Court found, such "vague statements" did not indicate that the regeneration requirement would be met. (*Id.*) This further reinforces the view that,

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[2] Respondents also contend that there was existing case law to provide cover for their non-compliance with the NFMA *et al.* But, as Petitioners' rightly point out, that case law was distinct from issues in the present suit, and provides no reasonable basis for the purposes of the defeating Petitioners' Motion.

inter alia, Respondents had no reasonable basis in fact or law to pursue the litigation it did. *Hackett* 475 F.3d at 1174 (stating that fees should be awarded where the government's underlying action was unreasonable "even if the government advanced a reasonable litigation position").

Fourth, the Court agrees with Petitioner's position that Respondents' argument suffered generally from an over-reliance on the view that the Court should defer to the agency's expertise. (ECF No. 77 at 10.) Rather than explain how the EA and FONSI conformed to the relevant statutes, Respondents repeatedly emphasized the "high degree of deference" that ought to be accorded to an agency's determination.[3] (*See* ECF No. 26, at 8-9, 15-16, 20.) Respondents' attempt to shield their actions with appeals to deference underscores the weakness of their position both factually and legally. This, again, does not demonstrate substantial justification of Respondents' litigation position. The Court finds as much.[4]

Accordingly, because of the above reasons, the Court finds that Respondents' litigation position was not substantially justified to advance the litigation. This requirement has been met. *Pierce*, 487 U.S. at 565; *see* 28 U.S.C. § 2412(d)(1)(A).

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[3] While a reviewing court's role may be narrow, especially where an agency is interpreting scientific data, the agency must still "examine[] the relevant data and articulate[] a satisfactory explanation for its decision, including a rational connection between the facts found and the decision made." *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006). In other words, a court cannot defer when there is no analysis to defer to, and a court cannot accept at face value an agency's unsupported conclusions.

[4] The Court notes that the reasons above supporting Petitioners' position are just a cross-section of the many cogent arguments made by Petitioner's Motion. (ECF No. 77 at 3-10.) The case on the merits was lengthy and complex. For the purposes of brevity, the Court will not address Petitioners' remaining arguments but will incorporate same into this Order with respect to the substantially justified issue.

3. Special Circumstances

With respect to the third requirement, a federal court should deny fees under EAJA where "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). While "[t]here is a dearth of case law interpreting the 'special circumstances' exception of the EAJA," *Murkeldove v. Astrue*, 635 F.3d 784, 794-95, (5th Cir. 2011), it has been interpreted to "'explicitly direct[] a court to apply traditional equitable principles in ruling upon an application for counsel fees.'" *United States v. 27.09 Acres of Land Situated in the Town of Harrison*, 43 F.3d 769, 772 (2d Cir. 1994); *see Murkeldove*, 635 F.3d at 795 (stating "[the 'special circumstances' provision] gives courts discretion to deny awards where equitable considerations dictate an award should not be made'").

While the parties cite no Tenth Circuit authority on the third requirement, the Court views *Harrison,* 43 F.3d 769, as persuasive, and illustrates the types of factors that constitute special circumstances under the EAJA. In that case, the district court found that the fees sought were expended during a "discrete early phase of the litigation" during which the Association achieved nothing but its own intervention, and that the Association's efforts in the later, productive phase of the litigation were "marginal, duplicative and unnecessary" and are *not* recoverable under EAJA. *Id.* The Second Circuit affirmed. *Harrison,* 43 F.3d at 770-71; see 28 U.S.C. § 2412(d)(1)(A).

As demonstrated in *Harrison*, the facts relevant to the third requirement must be "special" to meet the statutory test. The Court finds that the third requirement should be read narrowly because, (1) if the meaning of the term, special, is given too broad a meaning, it would subsume the purpose of the EAJA that allows for attorney's fees where a plaintiff prevails on the merits. Indeed the first requirement ("prevailing party")

would be swallowed by the third requirement ("special circumstances") if the latter were given too broad a construction. *Cf. Shalala*, 509 U.S. at 302; and, (2) by reading the third requirement narrowly, the EAJA analysis does not overlap too deeply into the discretionary analysis of reasonableness under *Hensley* analysis. 461 U.S. at 435. [5]

Here, the Court finds that the special circumstances requirement is not met. First, the Court finds that Respondents do not draw enough similarities between the facts of *Harrison* with the instant case. Indeed, Respondents fail to point to any 'special' circumstance of that nature so to deny attorney's fees. This cuts against Respondents' reliance on that case.

Second, Respondents fail to appreciate that Petitioners prevailed on the merits. They were successful on both the NFMA and NEPA claims—and obtained full relief. To then deny Petitioners the right to attorneys' fees when the EAJA expressly provides for it could lead to results where attorneys' fees would never be granted when a party prevailed. This defeats the purpose of the statute. *Cf. Harrison,* 43 F.3d at 774 (stating whether the plaintiff was unsuccessful on any claim comports with the general case law regarding attorney's fee awards, and is "particularly appropriate where a court is balancing the equities under the "special circumstances" section of the statute.")

Third, the Court rejects Respondents contention that Petitioners made no good

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[5] In *Harrison,* 43 F.3d at 772, and in looking to the equities, examined Supreme Court cases that address the reasonableness of attorneys' fees, citing *See Hensley*, 461 U.S. at 433. Notwithstanding the partial overlap, the Court notes that the EAJA inquiry, and the reasonableness inquiry, are typically considered separate analyses. While there is some degree of overlap, it is important to remember that *had* Respondents been successful on the EAJA's third factor, the Court would *not* have considered the reasonableness of the attorneys' fees. Indeed, such analysis would have been foreclosed. The Court finds the opposite to be true as outlined in the reasoning above.

faith effort to eliminate unnecessary or duplicative fees.[6] In making this argument, Respondents fail to credit the statement in Mr. Harris' declaration explaining that he "removed hours spent on activities, mainly education, that are not directly attributable to [Petitioners'] successful prosecution of this action." (*See* Harris Decl. ¶ 13.) Petitioners' documentation also informs the Court as to the qualifications and role of each individual for whom fees are sought. (*Id.* ¶¶ 10-12.) This is not demonstrative of bad faith, and does not trigger the special circumstances exception.

In sum, Petitioners are entitled to an award of reasonable attorneys' fees because: (1) they are "prevailing parties" in this action; (2) the government's position was not substantially justified; and (3) there are no special circumstances that would make an award unjust. 28 U.S.C. § 2412(d)(1)(A) (2006). Accordingly, the Court must next address whether the fees requested by Petitioners are reasonable.[7]

B. Reasonableness of the Fees: Petitioners are Entitled to an Award of Discounted Fees

The starting point for calculating reasonable attorney's fees is determining the reasonable hourly rate multiplied by the number of hours reasonably expended.[8]

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[6] The Court notes that Respondents rely on *Williams*, 113 F.3d at 1301, regarding the good faith requirement (prong (1), but they fail to address to address prong 2 — *i.e.* whether Petitioners failed to reduce time on unsuccessful claims. Respondents lack of arguments on this point reinforces the result against them on the special circumstances point.

[7] Note the parties did not dispute the fourth requirement—*i.e.*, that the fee request must be made within 30 days of entry of final judgment, supported by an itemized statement. *See Commissioner of the I.N.S.* 496 U.S. at 158.

[8] Typically, however, the "American Rule" provides that "the prevailing litigant is ordinarily not entitled to reasonable attorney's fees." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

Hensley, 461 U.S. at 433; *Malloy*, 73 F.3d at 1017-18.[9] Assessment of attorney's fees is a discretionary one; ever more so given the district court's understanding of the litigation and the "desirability of avoiding frequent appellate review of what are essentially factual matters." *Hensley,* 461 U.S. at 433. Importantly, as here, a district court "need not identify and justify every hour allowed or disallowed" with respect to legal services rendered. *Malloy*, 73 F.3d at 1018. Doing so would only run counter to the "Supreme Court's warning that a request for attorney's fees should not result in. . . major litigation."[10] *Id.*

1. The Hourly Rates

a. Law Students

Hotly disputed in this case are the hourly rates for work performed by law students at the Environmental Law Clinic of University of Denver, Sturm College of Law. Petitioners request hourly rates of $130 for 2008-2010 and $135 for 2010-2011 for work performed by law students involved in this case. A table in Petitioners' Motion provides a breakdown of the relevant students' hours in the relevant year. (ECF No. 73 at 4.)

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[9] "Where a plaintiff has obtained excellent results, his attorney should recover a full compensatory fee." *Hensley*, 461 U.S. at 433. Indeed, in some cases of "exceptional success, an enhanced award may be justified." *Id.* For reasons that are discussed below, this case does not fall into the exceptional category, but the result, in the Court's view, is not too far away given that much of the work was achieved by law students under the supervision of clinical professors. But, because much of the work was done by law students, the rate of hours and the number of hours expended must be reduced.

[10] Notwithstanding this, the Court does note that the matter involved complex issues regarding the environmental assessments going to both soil compaction and regeneration. Thus the arguments, going to the threshold issue of whether Respondents' action was substantially justified, has been addressed at some length preceding the costs issue.

Under the EAJA hourly rates "shall not be awarded in excess of $125 per hour unless the court determined that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). It is Petitioners' burden to prove the rates being sought. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984) (identifying that burden is on the fee applicant to prove the requested hourly rates are reasonable); *LeRoy v. City of Houston*, 906 F.2d 1068, 1079 (5th Cir.1990).

Here, Petitioners' seek to exceed the statutory rate ($125 per hour) for work from law students at the clinic. While the Court has reviewed the impressive post-graduation credentials of the law students involved in this matter, the relevance of their post-graduation credentials must be balanced against their (1) level of experience at the time they commenced the litigation itself, and (2) the experience garnered during same. Further, and while Mr Harris' declaration states that he spoke with other attorneys practicing in the Denver Metro area, indicating that the rates were reasonable (ECF No. 73 at 1), the Court finds that to obtain a rate above $125 per hour requires heightened specificity to make good the claim that law students are working above the standard EAJA rate (*i.e.* at $130-135 per hour). *See Lippoldt v. Cole*, 468 F.3d 1204, 1225 (10th Cir. 2006) (stating that where there is little or no evidence of local hourly rates for law students, "a district judge may consider his or her own knowledge of prevailing market rates as well as other *indicia* of a reasonable market rate")

In determining a reasonable rate in this case, the Court finds that law students' efforts—under the supervision of qualified lawyers—were commendable. This goes towards justifying a substantial rate towards that of $125 per hour. Some law students

dedicated over 250 hours on this matter. (ECF No. 73 at 4.) For these students, the Court infers that this would have heightened their efficiency as the more time they spent on the matter, particularly as matter got more complex. This warrants a higher hourly rate. On the flip-side, it follows that students who worked less than 250 hours would not have reached the same level of efficiency as those who worked above this threshold. (*Id.*) This warrants heavier discounting of their rate. But the Court need not parse these differences with a fine-tooth comb.[11] Rather, and in the Court's discretion, a rate reduction to $118 per hour seems sensible to spread across all law students—particularly given the complex legal issues and administrative record in suit. Indeed, it is the complexity of the matter, in the totality, that reflects the modest reduction in the law student hourly rate as requested.[12]

b. Attorney rate

With respect to the attorneys who oversaw the success of this matter, the Court reduces their rates downward across each to $175 per hour. In the Court's view, this minor discount is reflective of more reasonable fees for the purposes of the analysis notwithstanding the base rate of $125 per hour, plus costs of living adjustments as permitted under 28 U.S.C. § 2412(d)(2)(A). Importantly, the Plaintiff's requested rate is supported by evidence proffered by Mr. Harris regarding CPI-U for the Denver-Boulder Metropolitan area. (ECF No. 73-3, Ex. H.) The Court finds such evidence persuasive. Mr. Harris also notes that he was involved in comparable litigation to this case, where

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[11] *See*, *Fox v. Vice*, --- U.S. -----, 131 S.Ct. 2205, 2217(2011) (stating that trial courts need not, and indeed should not, "become green-eyeshade accountants".)

[12] The Court notes that the $118 per hour rate applies across all of the students.

the attorneys (including Mr. Harris himself) were awarded rates between $270-410. *Friends of Animals v. Salazar*, 696 F.Supp.2d 16, 20 (D.D.C.2010). While Plaintiff does not seek rates of this magnitude, the rates do reflect the upper end that may be awarded in EAJA cases, which contrasts with the modest rate increase in this case.

2. Reasonable Hours of Law Student and Attorneys' Time

The general rule, therefore, is that hours are compensable under EAJA so long as they are "reasonably expended" and necessary or useful for prosecution of the case. *See Blum*, 465 U.S. at 901; *Hensley*, 461 U.S. at 434; *Commissioner v. Jean*, 496 U.S. at 161 (district court's task in determining fees under EAJA is the same as that described in *Hensley*, a civil rights case).[13] Thus, to determine the reasonable number of hours spent on the litigation, the applicant must exercise the same "billing judgment" as would be proper in setting fees for a paying client. *Hensely* 461 U.S. 424, 433-4; *Malloy*, 73 F.3d at 1018. Importantly, "hours that are *not* properly billed to one's client are also not properly billed to one's adversary pursuant to statutory authority." *Hensley*, 461 U.S. 424, 433-4 (*quoting Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (*en banc*)). Counsel must, therefore, make a good faith effort to exclude hours that are "excessive, redundant or otherwise unnecessary." *Id.*

Moreover, a district court "should approach the reasonableness inquiry much as

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[13] A district court must determine whether a petitioner has met its burden to establish that the hours spent in representation were "reasonably expended." *See Blum*, 465 U.S. at 901; *Hensley*, 461 U.S. at 437; see also 28 U.S.C. § 2412(d)(2)(A). Factors to consider in determining a reasonable award are: (1) whether the tasks being billed "would normally be billed to a paying client," (2) the number of hours spent on each task, (3) "the complexity of the case," (4) "the number of reasonable strategies pursued," and (5) "potential duplication of services" by multiple lawyers. *Ramos v. Lamm*, 713 F.2d 546, 553-54 (10th Cir. 1983). The Court notes that while it may have not expressly addressed each of these factors, it has considered them in totality.

a senior partner in a private law firm would review reports of subordinate attorneys when billing clients." *Rodman v. Astrue*, 2012 WL 95209 (D. Colo. Jan. 12, 2012) (quotation marks omitted). However, "unlike a law clerk in a law firm, which must justify its bills to its clients, there is no similar economic restraint for law student research in a law school clinical setting." *See Nkihtaqmikon v. Bureau of Indian Affairs*, 723 F. Supp. 2d 272, 282 (1st Cir. 2010).[14]

Here, Respondents contend that Petitioners' time was excessive as a whole because it required 1156.5 hours of student time and approximately 235 hours of attorney time. (ECF No. 78 at 14.) Respondents contend that because Petitioners spent nearly three times Respondents' hours, the number of hours expended by Petitioners should be significantly reduced. But this argument misses the mark. It fails to address the simple point that it was Petitioners who were ultimately successful in this action. Without such acknowledgment, Respondents fail to appreciate that one of the contributing reasons why Petitioners were successful was because they expended more hours than Respondents in preparing for this detailed and complex case. Hard work does reap rewards. This case is no exception.

a. Discounting of Specific Entries

Notwithstanding the above, the Court does find that some discounting of the requested time is warranted. Specifically, Respondents' brief provides a summary of certain fee entries that the Court considers excessive. (ECF No. 78 at 17-18.) Although the Court does not address all of the pertinent entries, the following examples

[14] The Court finds some currency in this proposition, and views the number of law student hours through this lens.

are illustrative of the need to discount the fees that Petitioners ultimately seek:

- Approximately 195 hours for numerous people to review the Administrative Record (*i.e.*, again over one month of full time attorney work) for which they seek fees amounting to approximately $28,500. (*Id.* at 17.)
- Over 200 hours to prepare for and attend oral argument, including seven separate moot oral arguments that were quadruple billed by two attorneys and two students, for which they seek fees amounting to approximately $30,700. (*Id.* at 18)
- Approximately 85 hours which appears to be related to acquainting new students with the case due to the transition of students onto and off of the case consistent with the academic calendar. (*Id.*)
- Approximately 250 hours sought for intra-clinic meetings. (*Id.*)

The above work amounts to 730 hours. The Court finds the expenditure of this amount of time to be excessive, even in light of the commendable results that Petitioners achieved. The Court also finds it is "impractical to excise the particular offending billing entries", and will deduct these hours as a proportion of the student hours in the whole. *See San Luis Valley Ecosystem*, 2009 WL 792257, at *8 (*citing Ramos,* 713 F.2d at 553-54). Accordingly, the Court will reduce the amount of time it will compensate Petitioners for above law student work (730 hours) proportionally by 25%.

This means that 182.5 hours are deducted from the original student hour total

(1156.5 hours),[15] leaving a total of 974 law student hours. *Ramos*, 713 F.2d at 553-54.

b. Reduction of Settlement Hours

Respondents contend that the Court must also discount the time expended on *any* unsuccessful settlement negotiations. Specifically, Respondents contend that Petitioners are not entitled to fees for time spent on unsuccessful settlement negotiations. *Cobell v.Norton*, 407 F. Supp. 2d 140, 156 (D.D.C. 2005) ("Petitioners' settlement efforts did not bear fruit; they cannot be compensated for that time"). Petitioners claim approximately 95 hours on the settlement efforts. (ECF No. 78 at 20.) Respondents contend that all such hours should be excluded.

But while *Cobell* is persuasive authority, the Court rejects any construction of the rule that is couched in absolute terms—*i.e.*, a petitioner "cannot be compensated" *at all* for unsuccessful settlements. This absolute rule does not square with the discretionary nature of assessing reasonable costs under *Hensely* 461 U.S. at 434. Indeed, it would tend to discourage the pursuit of settlements on the part of petitioners knowing that such time may not be awarded fees under the EAJA. *See Martinez v. United States*, 94 Fed. Cl. 176, 188 (Fed. Cl. 2010) (stating "a categorical rule against awarding fees expended during settlement would discourage the pursuit of settlements on the part of plaintiffs.") Given that such an approach would poorly serve the public interest of promoting the voluntary resolution of disputes, to the extent *Cobell* can be read to categorically preclude the award of a reasonable amount of fees expended in the pursuit of good faith—but ultimately unsuccessful—settlement efforts, this Court

[15] *See* ECF No. 73 at 5 (providing a summary of the 1156.5 law student hours requested).

rejects that holding and will refuse to follow it.

In light of this, the Court finds that 25% of the hours that went towards settlement should deducted—*i.e.*, a total of 23.75 hours. These hours are split between the Attorneys (13.75 hours) and the law students (10 hours). Accordingly, for present purposes, the Court finds that a more reasonable expenditure of time on this matter is as follows:

- Attorney time: 221.45 hours.[16]
- Student time: 874 hours.

These figures are more reflective of what is reasonable in this case given the weighing of the complexity of the case against, *inter alia*, the duplicative work that exists in Petitioners' time sheets. *Malloy*, 73 F.3d at 1018 (stating that the Court need not "justify every hour allowed or disallowed").

3. Summary of Figures

In sum, the Court finds that a reasonable amount of time expended and rates are outlined below. Not only do these figures reflect reasonable hours spent, but the rates conform with the complexity and success achieved by Petitioners in this matter. The Court finds that the total fees in this case are calculated as follows:

- Multiplying the attorney rate ($175 per hour) by the number of hours expended (221.45) amounts to **$38,753.75**
- Multiplying the student rate ($118 per hour) by the number of hours expended (874 hours) amounts to **$103,132**

This amount to total **$141,885.75,** reflecting the reasonable attorney's fees that

[16] *See* ECF No. 73 at 4 (providing a summary of the 235.2 attorney hours requested).

are awarded in this matter.

IV. CONCLUSION

For the foregoing reasons, it is ORDERED that Petitioners' Motion for Attorney's Fees (ECF. No. 73) is GRANTED IN PART. Petitioners are awarded a total amount of **$141,885.75** in attorney's fees. The Motion is DENIED in all other respects.

Dated this 26th day of June, 2013.

BY THE COURT:

William J. Martínez
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILD EQUITY INSTITUTE, *et al.*,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,

Defendants.

No. C 11-00958 SI

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

On May 10, 2013, the Court heard argument on plaintiffs' motion for an award of attorneys' fees and costs. Having carefully considered the arguments of counsel and the papers submitted, the Court GRANTS IN PART plaintiffs' motion, and awards $385,809 in attorneys' fees and costs, for the reasons set forth below.

BACKGROUND

On March 2, 2011, plaintiffs, a collection of non-profit conservation groups, filed suit against the City and County of San Francisco and its officials for violation of the Endangered Species Act (the "ESA"), 16 U.S.C. §§ 1531-1544. Plaintiffs alleged that defendants' operations and activities at Sharp Park Golf Course have caused the "taking" (i.e., killing, wounding, harming, or harassing) of the threatened Californian red-legged frog (the "Frog") and the endangered San Francisco garter snake (the "Snake"). Complaint at 1. The complaint alleged that "[b]y taking these species without obtaining an Incidental Take Permit ('ITP') pursuant to Section 10 of the ESA, 16 U.S.C. § 1539(a)(1)(B), the City is violating the ESA and the United States Fish and Wildlife Service's ('FWS') implementing regulations." *Id.* Initially, defendants denied that they were causing any take of the Frogs or Snakes at Sharp Park. *See* Docket No. 15, ¶¶ 10, 12, 14.

On September 23, 2011, plaintiffs filed a motion for a preliminary injunction, presenting evidence of ongoing take of the Frogs and Snakes. Docket No. 53. In response, defendants continued to deny take of the Frogs or Snakes. Docket No. 63, at 10-18. They also asserted that if there was take, it was covered under existing authorization from the FWS. The FWS had issued Biological Opinions authorizing take during two construction projects, but there was no authorization for take during the regular operations and maintenance of Sharp Park. *Id.* at 16-17.

Following the Court's denial of plaintiffs' motion for a preliminary injunction on November 29, 2011, defendants initiated formal Section 7 consultation with the FWS. *See* Docket No. 91. In March 2012, the parties filed cross-motions for summary judgment. The Court denied both parties' motions, and issued a stay of the case pending the outcome of the FWS consultation. Docket No. 141.

On October 2, 2012, the FWS issued its final Biological Opinion and Incidental Take Statement (the "BiOp" and the "ITS"). Docket No. 146. The ITS states that the FWS anticipates that, as a result of the construction activities and golf course maintenance operations, all Frogs, all Snakes, and 130 Frog egg masses will be subject to incidental take, and two Frogs and one Snake will be killed each year. In the "Terms and Conditions" section, the ITS stated that "to be exempt from the prohibitions of Section 9 of the Act, the [Army] Corps and the City shall ensure compliance with the following terms and conditions . . . . These terms and conditions are nondiscretionary." *Id.* at 41. The ITS outlines 31 requirements that San Francisco and the Army Corps must follow; if they fail to comply, "the protective coverage of section 7(o)(2) may lapse." *Id.* at 39, 41-45.

On December 6, 2012, the Court granted defendants' motion to dismiss, finding that the issuance of the BiOp and ITS rendered plaintiffs' claims moot. Docket No. 153. Plaintiffs appealed that order.

LEGAL STANDARD

The Endangered Species Act ("ESA") provides that in a citizen suit, a court "may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court *determines such award is appropriate*." 16 U.S.C. § 1540(g)(4) (emphasis added). This language "was meant to expand the class of parties eligible for fee awards from prevailing parties to partially prevailing parties – parties achieving *some success*, even if not major success." *Ruckelshaus v. Sierra Club*, 463

U.S. 680, 688 (1983) (emphasis in original).

Under the ESA, when parties achieve their desired results because the lawsuit brought about a voluntary change, courts should apply the "catalyst theory" to determine if an award of fees and costs is "appropriate." *Assn of Cal. Water Agencies v. Evans*, 386 F.3d 879, 884-85 (9th Cir. 2004).[1] The catalyst theory has a two part test: (1) whether there is a causal relationship between the desired outcome and the suit, and (2) whether the outcome is required by law or merely gratuitous. *Id.* at 886 (quoting *Greater L.A. Council on Deafness v. Cmty. Television*, 813 F.2d 217, 219 (9th Cir.1987)).

DISCUSSION

I. Entitlement to Fees and Costs

A. Desired Outcome and Causal Relationship

Plaintiffs argue that they are entitled to attorneys' fees and costs under the catalyst theory. The first part of the two-part test is whether there is a causal relationship between the desired outcome and the suit. Plaintiffs argue that the very outcome that they desired – that defendants cease taking the Frogs and Snakes without authorization from the FWS – occurred because defendants began the application process for the BiOp as a result of pressure from plaintiffs' lawsuit.

Defendants make two main rebuttals. First, they argue that plaintiffs' main goal was actually to enjoin defendants from operating Sharp Park as a golf course, not to effectuate the ESA through a BiOp and ITS. They point to statements made by plaintiff Wild Equity, and to the fact that plaintiffs are appealing the Court's dismissal, as proof that the true litigation objective was to prohibit golf at Sharp Park. *See* San Francisco's Opp'n 10-12.

However, to determine plaintiffs' litigation objective, the Court looks to the complaint, not to other statements of a single plaintiff. *See Idaho Watersheds Project v. Jones*, 253 F. App'x 684, 686

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[1] *Evans* held that "although *Buckhannon* [*Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001)] does preclude use of the catalyst theory for suits brought under statutes providing for fee shifting for a 'prevailing party,' the decision does not preclude use of the catalyst theory for suits brought under statutes like the ESA, which allow the court to award costs of litigation 'whenever the court determines such award is appropriate.'" *Ass'n of California Water Agencies v. Evans*, 386 F.3d 879, 885 (9th Cir. 2004)

(9th Cir. 2007). Here, the complaint alleges: "[b]y taking these species without obtaining an Incidental Take Permit ('ITP') pursuant to Section 10 of the ESA,16 U.S.C. § 1539(a)(1)(B), the City is violating the ESA and the United States Fish and Wildlife Service's ('FWS') implementing regulations." Therefore, the Court finds that plaintiffs' litigation goal was the halt defendants' taking of the Frogs and Snakes without first obtaining authorization pursuant to the ESA.

The Court also finds that this objective was met. The BiOp and ITS found, as plaintiffs had alleged and defendants had denied, that incidental take of the Frogs and Snakes was occurring due to golf course operations. The ITS authorized the incidental take, so long as defendants complied with the list of requirements it set forth. Additionally, it is not relevant that the take authorized under the ESA was pursuant to Section 7, as opposed to Section 10; there is little material difference between an ITP and an ITS, and plaintiffs are only required to achieve *some success*, not perfect success.

Second, defendants argue that they acted independently, and that plaintiffs' lawsuit was not the cause of their BiOp application. Defendants had previously sought authorization on an emergency basis for the removal of Frog egg masses. However, in March 2011, the FWS told defendants that the agency would no longer continue to grant authorization on an "emergency" basis. Defendants claim that they independently sought authorization when the FWS recommended that defendants seek a BiOp under Section 7.

However, it was not until after the preliminary injunction motion that defendants sought take authorization, almost a year after the FWS encouraged them to. Moreover, the authorization was for take pursuant to the pumping and golf course activities, as opposed to authorization just for moving Frog egg masses. *See* Docket No. 91. The timing and scope of the authorization indicate that plaintiffs' lawsuit was at least a substantial causative factor. Finally, an August 2012 letter from defendants to the FWS requested that the agency "ensure we have the final [BiOp] by September 7th" because "it is extremely important to be able to dispose of the litigation at long last." Supp. Platter Decl., Ex. E. This indicates that a motivating force behind defendants' pursuit of the BiOp was to dispose of plaintiffs' lawsuit.

Because defendants generally will be reluctant to concede that a lawsuit suit caused their change in behavior, courts must look for clues, such as the chronology of events. *See Klamath Siskiyou*

Wildlands Ctr. v. Babbitt, 105 F. Supp. 2d 1132, 1135-36 (D. Or. 2000); *see also Wilderness Soc. v. Babbitt*, 5 F.3d 383, 386 (9th Cir. 1993). Here, the chronology and scope of the authorization, the continued denial, and defendants' own words demonstrate that plaintiffs' lawsuit was a material factor in causing defendants to seek authorization from the FWS for take occurring from the regular activities at Sharp Park.

B. Outcome Required By Law

The second part of the catalyst theory is whether the outcome is a gratuitous action by defendants or is required by law. As explained in the BiOp, under the ESA, "taking that is incidental and not intended as part of the agency action is not considered to be prohibited taking under the Act *provided that such taking is in compliance* with this Incidental Take Statement." BiOp 39 (emphasis added). The ITS outlines 31 requirements or sub-requirements that defendants must follow; if they fail to comply, "the protective coverage of section 7(o)(2) may lapse." *Id.* at 39, 41-45. Thus, as the Court found in its Dismissal Order, the ITS legally binds defendants, and is self-effectuating. *See* Docket No. 153.

Even if defendants previously were voluntarily undertaking all 31 requirements (which plaintiffs argue they were not), the ITS creates a legal requirement to continue these actions or they will be subject to FWS enforcement measures. Thus, defendants' actions to mitigate take of the Frogs and Snakes are no longer gratuitous. They are now legally required by the ITS. Therefore, the Court finds that the outcome is required by law, and the second requirement of the catalyst theory is met.

Accordingly, the Court finds that an award of attorneys' fees and costs to plaintiffs is appropriate.

II. Amount of Fees and Costs

A district court begins its calculation of fees by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). The resulting number is frequently called the "lodestar" amount. *City of Riverside v. Rivera*, 477 U.S. 561, 568 (1986). "It is plaintiffs' burden to 'document the appropriate hours expended in the litigation by submitting evidence in support of those hours worked.'" *Lucas v. White*, 63 F. Supp. 2d 1046, 1057

(N.D. Cal. 1999) (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992)). The appropriate number of hours includes all time "reasonably expended in pursuit of the ultimate result achieved, in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter." *Hensley*, 461 U.S. at 431. Fee applicants, and the Court, should exclude hours that are "excessive, redundant, or otherwise unnecessary." *Id.* at 434.

The party opposing the fee application "has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits." *Gates v. Rowland*, 39 F.3d 1439, 1449 (9th Cir. 1994). "Conclusory and unsubstantiated objections are not sufficient to warrant a reduction in fees." *Lucas*, 63 F. Supp. 2d at 1057-58.

A. Plaintiffs' Requested Attorneys' Fees

Plaintiffs' requested recovery for attorneys's fees can be broken down as follows:

Eric Glitzenstein (32 years experience): 282.75 hours at $750 per hour
Howard Crystal (20 years experience): 844 hours at $700 per hour
Brent Plater (13 years experience): 857.7 hours at $550 per hour
Shawna Casabier (3 years experience): 47.15 hours at $295 per hour
Kelli Shields (1 year experience): 217 hours at $250 per hour
Paralegals: 691 hours at $160 per hour

The sum total for attorneys' fees amounts to $1,451,556, but, "to account for any billing discrepancies," plaintiffs are reducing that request by 10%, to $1,306,400. Pls.' Mot. at 25 (citing *South Yuba River Citizens League v. NMFS*, No. S-06-2845 LKK, 2012 WL 1038131, at *2 (E.D. Cal. Mar. 27, 2012)).

Defendants argue that plaintiffs' billing rates should be substantially reduced, and the compensable hours should be diminished because of extensive prefiling activity, non-compensable time spent in lobbying and advocacy activities, duplicative and inefficient efforts, non-compensable time spent on administrative and secretarial tasks, time spent on unsuccessful and unreasonable endeavors, unnecessary travel time, and continued litigation after issuance of the BiOp.

A district court "is not required to set forth an hour-by-hour analysis of the fee request. Rather, . . . the district court has the authority to make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure as a practical means of trimming the fat from a fee

application." *Gates v. Deukmejian*, 987 F.2d 1392, 1399 (9th Cir. 1992) (citations and quotations omitted).

The Court finds that an across-the-board adjustment in this case is appropriate. First, although the Court has found that they gained their desired outcome, plaintiffs did not prevail on a *single* substantive motion before the Court. The Court denied their motion for preliminary injunction. Both parties filed cross motions for summary judgment, and the Court denied both motions. Then finally, defendants filed a motion to dismiss the case, which plaintiffs opposed but which the Court granted. Although the Court cannot determine with precision which of the hours spent were duplicative or unnecessary to achieving plaintiff's goal, the fact that plaintiffs lost every single motion leads the Court to believe that a large majority of the time spent was "excessive, redundant, or otherwise unnecessary," and therefore should not be compensated.

Second, plaintiffs failed to satisfactorily explain why Glitzenstein and Crystal, at $700 an hour or greater, spent so much time on this case. Most of the issues in this case were not complex. Yet the Washington, D.C. attorneys account for half of the attorney hours spent on this case. In contrast, the two junior associates, at less than $300 per hour, accounted for less than 12% of the attorney hours in this case; this grossly inefficient allocation of resources seems unwarranted by this simple ESA action. Plaintiffs fail to justify this excess.

Finally, as the Supreme Court explained, "[t]he product of reasonable hours times a reasonable rate does not end the inquiry. . . . [The court must ask] did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Hensley*, 461 U.S. at 434. The Court finds that the answer to that question requires significantly decreasing the fee award. Although the Court finds that plaintiffs' lawsuit spurred defendants into obtaining the necessary authorization for their take of the Frogs and Snakes, little else has substantively changed in the management of Sharp Park. Defendants' current mitigation efforts are now required by law, instead of voluntary, but only a few new restrictions have been added. At oral argument, plaintiffs conceded that defendants' FWS authorization would likely have happened eventually, but plaintiffs' suit caused it to happen sooner. Thus, when looking at the larger picture, little seems to have been gained by plaintiffs, except this extra time. Moreover, plaintiffs do not seem satisfied with the outcome of the suit. Plaintiffs

are appealing the Court's order dismissing the case. At oral argument, plaintiffs indicated that they were also considering challenging the BiOp. For all of these reasons, the Court finds a substantial downward adjustment is appropriate.

Accordingly, plaintiffs' initial requested amount of $1,306,400 for attorneys' fees shall be reduced by three-quarters, to $326,600.

B. Plaintiffs' Requested Costs

Additionally, plaintiffs request $59,409 in costs. Defendants make three objections to plaintiffs' requested $59,409 in costs. First, they argue that the Court should disallow travel-related expenses, like hotels and airfare. They argue that plaintiffs have not justified why local counsel, instead of counsel based in Washington, D.C., could not have been procured. In response, plaintiffs submitted a supplemental declaration, which described the search for counsel in this case beginning with local counsel, and only finding counsel with the requisite expertise and experience in Washington, D.C. *See* Second Decl. of Brent Plater ¶ 7. Additionally, plaintiffs describe the use of local counsel when possible to ameliorate travel costs. The Court finds that travel expenses are recoverable.

Second, defendants object to a $200 fee incurred for a cancelled deposition. Plaintiffs have withdrawn their request for this deposition fee.

Third, defendants object to the recovery of expert witness fees for two expert witnesses, because those witnesses stated they would not bill for all or part of their time on the case, and plaintiffs failed to provide invoices for these witnesses. In response, plaintiffs submitted the invoices from its expert witnesses. *See id.*, Exs. G-K. The Court is satisfied with these invoices, and finds that the award for expert fees is appropriate. The Court also finds that plaintiffs provided ample support for all other costs.

Accordingly, the Court finds an award of $59,209 in costs is appropriate (the originally requested $59,409 minus the $200 cancellation fee).

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CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART plaintiffs' motion for attorneys' fees and costs and awards $385,809. The order resolves Docket No. 164.

IT IS SO ORDERED.

Dated: July 1, 2013

SUSAN ILLSTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Western Watersheds Project, *et al.*,

Plaintiffs,

v.

U.S. Forest Service,

Defendants,

and

Arizona Cattle Growers' Association, *et al.*,

Defendant-Intervenors.

No. CV-11-08128-PCT-NVW

ORDER

Before the Court is the Joint Motion to Stay Briefing on Plaintiffs' Application for Attorneys' Fees and Costs (Doc. 72). The Motion seeks a stay of three months on Plaintiffs' "placeholder" Motion for Attorneys' Fees, Costs and Other Expenses (Doc. 71) while parties discuss settling that motion. Full briefing on the Motion is more likely to expedite resolution of the case than delay it. It will make concrete the contentions of the parties and the support for their positions. Serious questions of allocation arise, as Plaintiffs lost seven-eighths of their case and the Government did not appeal the one issue on which the Plaintiffs prevailed. If the parties are not able to settle the motion, the Court will rule on it expeditiously. The parties are encouraged to explore settlement at the same time. The Court will consider staying proceedings if advised that the parties have reached a settlement in a specific amount subject only to higher administrative approval,

EXHIBIT 4

but not just for negotiations.

IT IS THEREFORE ORDERED that the Joint Motion to Stay Briefing on Plaintiffs' Application for Attorneys' Fees and Costs (Doc. 72) is denied.

IT IS FURTHER ORDERED that Plaintiffs file the full support for their Motion for Attorneys' Fees, Costs and Other Expenses by August 14, 2015. A response and a reply may be filed within the times permitted by the Local Rules.

Dated this 23rd day of July, 2015.

Neil V. Wake
United States District Judge

The National Jobs and Community Stability Policy Act of 2015

An Act to establish a National policy for the consideration and documentation of the impacts of federal agency decision-making on local customs, cultures and economic and community stability, including governmental and private job/employment creation or loss within the locally impacted area, and to provide the Council on Environmental Quality rule-making authority to carry out the purposes of this Act, and to require annual reports to Congress for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Jobs and Community Stability Policy Act of 2015."

I. PURPOSE

The purposes of this Act are: To declare a national policy which will encourage and facilitate the consideration of local customs, cultures and economic and community stability, including job/employment creation or loss in federal agency decision-making processes; to promote efforts which will encourage and facilitate State and local governments to assist in identifying those decisions or potential decisions which may have local customs, cultures and economic or community stability, including job/employment impacts; to require the consideration and mitigation of such impacts at the local level; to enrich the understanding of the connection between ecological systems and natural resources and local customs, cultures and economic or community stability including private, state and federal job/employment creation or loss.

II. CONGRESSIONAL DECLARATION OF THE JOBS AND NATIONAL COMMUNITY STABILITY POLICY

A. The Congress, recognizing that there is a strong and undeniable link between the natural environment and local customs, cultures and community or economic stability declares that it is the continuing policy of the Federal Government, in cooperation, consultation and coordination with State and local governments, and other concerned public and private organizations, to equally document and evaluate the impacts of federal decision-making processes on locally impacted customs, cultures and economic or community stability, including governmental and private job/employment creation or loss in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the requirements of present and future generations of Americans for stable communities, job creation and maintenance and a healthy and productive environment.

B. In order to carry out the policies set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means,

consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources including the consideration and documentation of the impacts of such plans, functions, and programs on the local customs and cultures of the citizens as well as the community and economic stability including governmental and private job creation or loss of the local area.

III. PROCESS FOR ACHIEVING THIS NATIONAL POLICY

The Congress authorizes and directs that, in addition to compliance with the provisions in the National Environmental Policy Act of 1969, as amended, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall --

A. Utilize a systematic, interdisciplinary approach which will insure the integrated use of the social and economic sciences in federal decision-making which may have an impact on local customs, cultures and community or economic stability including governmental and private job/employment creation or loss;

B. Identify and develop methods and procedures, in consultation with the Council on Environmental Quality which will insure that presently unquantified customs, cultures, and community or economic stability values may be given appropriate consideration in decision-making along with environmental impacts under the National Environmental Policy Act;

C. Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

1. The impacts of the proposed Federal action on local customs, cultures and community or economic stability including governmental and private job/employment creation or loss,

2. Any adverse effects to the local customs, cultures and community or economic stability impacts, including governmental and private job/employment loss which cannot be avoided should the proposal be implemented,

3. Alternatives to the proposed action,

4. The relationship between (a) local short-term and long-term uses of man's environment, (b) the maintenance and enhancement of long-term productivity and (c) the impacts to local customs, cultures and community or economic stability including short and long term, governmental and private job/employment creation or loss, and

5. Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

6. Appropriate alternatives to recommended courses of action for any proposal which involves unresolved conflicts concerning alternatives uses of available resources with local customs, cultures and community or economic stability.

D. Prior to making any detailed statement, the responsible Federal official shall consult, cooperate and coordinate with and obtain the comments of (1) any Federal agency which has jurisdiction by law or special expertise with respect to any impact involved and (2) any State and/or local government which may have special expertise or which may be impacted by such proposed decision. Copies of such statements and the comments and views of the appropriate Federal, State, and local governments whose choose to respond, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes.

E. Any detailed statement required under subparagraph (C) for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

1. The State agency or official has statewide jurisdiction and has the responsibility for such action,

2. The responsible Federal official furnishes guidance and participates in such preparation,

3. The responsible Federal official independently evaluates such statement prior to its approval and adoption, and

4. After January 1, 2016, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

5. The procedures in this section shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of

statements prepared by State agencies with less than statewide jurisdiction.

F. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 2015, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

G. Nothing in this statute shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal, State or local governmental agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal, State or local governmental agency.

H. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

VI. AUTHORIZATION TO THE COUNCIL OF ENVIRONMENTAL QUALITY AND ENVIRONMENTAL QUALITY REPORT

A. The Council of Environmental Quality shall prepare rules and regulations applicable to all federal agencies to implement the policies and procedures in this Act, specifically to include requirements detailing cooperation, consultation and coordination with State and local governments as required in Section III(2)D. above.

B. The President, through the Council of Environmental Quality and the Office of Environmental Quality, shall transmit to the Congress annually beginning July 1, 2015, a report in conjunction with the Environmental Quality Report under the National Environmental Policy Act which shall set forth (1) the status of compliance of all federal agencies, Departments and offices with the requirements of this Act, (2) the current and foreseeable trends with regard to the impacts of federal decision-making processes on local customs, cultures, and community or economic stability including governmental and private job/employment creation or loss and (3) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation to further implement the purposes of this Act.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: Karen Budd-Falen

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2012. Include the source and amount of each grant or contract.

I have not recieved any grants or contracts from any branch or entity of the Federal government.

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

I am testifying on behalf of myself.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2012, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

N/A

I certify that the above information is true and correct.
Signature: Karen Budd-Falen Date: 8/4/15

KAREN BUDD-FALEN

300 East 18th Street • Cheyenne, Wyoming 82001 • (307)632-5105

PROFESSIONAL EXPERIENCE

BUDD-FALEN LAW OFFICES, L.L.C., CHEYENNE, WYOMING.
Attorney at Law, 6/92 to Present
Co-Owner of a multi-attorney law firm specializing in federal lands, endangered species, clean water and natural resources law. Attorneys in my firm represent both local governments and private individuals to protect private rights and community stability on private and federal lands.

DRAY, MADISON AND THOMSON, CHEYENNE, WYOMING
Attorney at Law, 3/89 to 6/92
Senior associate in general practice law firm, specializing in federal lands, endangered species, natural resources, administrative law and general land use planning. Assisted clients in all phases of federal administrative appeals, litigation and negotiation.

MOUNTAIN STATES LEGAL FOUNDATION, DENVER, COLORADO
Attorney at Law, 8/87 to 12/88
Staff attorney for public interest foundation specializing in natural resources, environmental, public land, and administrative law. Extensive public speaking, agency testimony, client contact and oral advocacy involved. Represented clients with interests in grazing, timber, and oil and gas.

WYOMING STATE HOUSE OF REPRESENTATIVES, CHEYENNE, WYOMING
Intern, 1/85 to 3/85; 1/87 to 3/87; and 1/89 to 3/89
Drafted legislation and amendments for four House standing committees with jurisdiction over agriculture, wildlife, recreation, transportation and tourism issues. Wrote press releases, speeches and position statements.

SOLICITOR'S OFFICE, BRANCH OF WATER AND POWER, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.
Law Clerk, 5/86 to 8/86
Provided technical, legal and political advice on Bureau of Reclamation law as applied in specific situations. Wrote legal and factual case descriptions for the U.S. Department of Justice to use in defending Interior suits.

ASSISTANT SECRETARY, LAND AND MINERALS MANAGEMENT, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.
Special Assistant, 2/82 to 8/84
Provided technical and political expertise on federal land and wilderness issues. Designed and managed three bureau-wide task management computer systems. Advised the Secretary on appointments to national and local advisory boards. Communicated with congressional committees.

EDUCATION

UNIVERSITY OF WYOMING COLLEGE OF LAW, LARAMIE, WYOMING
Juris Doctor, May, 1987

UNIVERSITY OF WYOMING, LARAMIE, WYOMING
Bachelor of Arts, Journalism/Political Science, May, 1982

PROFESSIONAL QUALIFICATIONS

- Admitted to Practice - State of Wyoming, U.S. District Court for the District of Wyoming, 1987; Supreme Court State of Wyoming, 1987; U.S. Court of Appeals for the Tenth Circuit, 1990; U.S. Court of Federal Claims, 1990; Court of Appeals for the Federal Circuit, 1995; U.S. Court of Appeals for the Ninth Circuit, 1998; Supreme Court of the United States, 1999;U.S. District Court for the District of Nebraska, 2003; U.S. District Court for the District of Columbia, 2004; U.S. Court of Appeals for the Seventh Circuit, 2004; U.S. Court of Appeals for the D.C. Circuit, 2006; U.S. Court of Appeals for the Eighth Circuit, 2007.

PROFESSIONAL HONORS

- Honorary Chapter Degree - Frontier Chapter Future Farmers of America, 2011, 2012, 2013.
- Individual of the Year - Arizona and New Mexico Coalition of Counties for Stable Economic Growth, 2011.
- Bud Eppers Memorial Award - New Mexico Public Lands Council, 2005.
- "Always There Helping" – New Mexico Cattle Growers Association, 2003.
- Wyoming Agriculture Hall of Fame - Wyoming Livestock Journal, 2001.
- Founding Fathers Award – Arizona and New Mexico Coalition of Counties for Stable Economic Growth, 1999.
- Who's Who: 20 For the Future -- *Newsweek*, September 30, 1991.

PUBLICATIONS AND CONGRESSIONAL TESTIMONY

- *Oversight Hearing on "A Washington, D.C. Based Bureaucratic Invention with Potential Water Conservation and Property Rights Impacts: The National Blueways Order,"* U.S. House of Representative Committee on Natural Resources, Washington D.C., July 17, 2013.
- *Oversight Hearing on"Threats, Intimidation and Bullying by Federal Land Managing Agencies"* Subcommittee on Public Lands and Environmental Regulation, Washington D.C., October 29, 2013.
- *Oversight Hearing on "The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts,"* U.S. House of Representative Committee on Natural Resources, Washington D.C., 2011.
- Select Committee on Federal Natural Resource Management, Wyoming State Legislature, Douglas Wyoming, 2011.
- *Task Force on Improving the National Environmental Policy Act*, U.S. House of Representatives Committee on Resources, Field Hearing, Rio Rancho, New Mexico, 2005.
- *Oversight Hearing on the Endangered Species Act's Impact in New Mexico*, Committee on Resources, Clovis ,New Mexico, 1998.
- *Oversight Hearing on Livestock Grazing Policies on National Forests*, Committee on Resources, Subcommittee on Forest and Forest Health, Washington D.C., 1997.
- *Protecting Community Stability and Local Economics: Opportunities for Local Government Influence in Federal Decision and Policy-Making Processes,* Rowman and Littlefield, 1996.
- *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights,* Idaho Law Review, 1993-1994.

AT-LARGE APPOINTMENTS AND ACTIVITIES

- Wyoming Water Development Commission; Four-year term appointment by Wyoming Governor and Confirmation by Wyoming State Senate, 2012.
- Board of Directors; Wyoming Natural Resources Foundation, 2012.
- Coach, Future Farmers of America Agriculture Issues Career Development Event, National Champions 2010; 2012.