The Equal Access to Justice Act and US Forest Service Land Management: Incentives to Litigate?

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ABSTRACT

The Equal Access to Justice Act (EAJA) provides for attorneys fees and court costs to be awarded to parties prevailing in litigation against US federal agencies. We examined EAJA awards paid by the US Forest Service from 1999 to 2005, finding more than $6 million awarded to various plaintiffs. Awards were most commonly paid to environmental litigants, although all categories of litigant stakeholders made use of the law. Although it remains uncertain whether EAJA provides an incentive to sue the US Forest Service in any specific instance, because litigation against the US Forest Service generally has a low probability of success, EAJA one-way fee shifting does alter litigation risks among potential plaintiffs. Frequent EAJA claimants often possess considerable financial resources calling into question how the purposes of the law have evolved in the last 20 years.

Keywords: national forest, litigation, fees, interest groups, courts

"Paying litigants to sue certainly encourages legal action" (Thomas 2000, p. 9). This quote by former chief of the US Forest Service, Jack Ward Thomas, expresses concerns that the Equal Access to Justice Act (EAJA; codified at 28 USC §2412 and 5 USC §5045) may be an incentive for litigation against the US Forest Service and other federal land-management agencies. The EAJA is a fee-shifting statute that allows litigants to recover attorney fees and other legal expenses (such as court filing fees) from the federal government when they successfully sue an administrative agency.

Numerous scholars have described the increasing use of litigation as a tool to influence US Forest Service land-management decisions. Jones and Taylor (1995) completed the first study, examining cases decided between 1971 and 1993. They found that the frequency of US Forest Service lawsuits increased during these 20 years and concluded that litigation was used as a tool to effect change within the agency. Malmsheimer et al. (2004) examined all published federal Court of Appeals cases from 1970 through 2001 in which the US Forest Service was a defendant. They found that the number of lawsuits involving the agency had increased since 1970 and that "judicial review of national forest management is intensifying" (Malmsheimer et al. 2004, p. 20). In the most recent and thorough examination of US Forest Service litigation, Keele et al. (2006) examined the final outcome of all cases, both published and unpublished, initiated from 1989 through 2002 in which the US Forest Service was a defendant, again finding that litigation directed against the agency had generally increased. Others have confirmed these observations (Mortimer 2002, Broussard and Whitaker 2009). For example, the Council on Environmental Quality's (2009) records indicate that the US Forest Service is the most common federal agency defendant in National Environmental Policy Act litigation. These studies suggest that litigation has become an integral aspect of US Forest Service decisionmaking and land management: "The legal environment is as important to national forest . . . management as the ecological and economic environments" (Malmsheimer et al. 2004, p. 25). The payment of attorney fees is an important component of this legal environment.

The US legal system operates under what is known as the American rule, which provides that each party in a lawsuit must bear its own legal expenses (Sisk 1993). This differs from the English rule under which the losing party pays the winner's legal costs. Fee-shifting statutes in the United States are a relatively rare exception to the American rule, providing for the recovery of legal expenses in a manner similar to the English

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rule. Although some criticize the economic incentives created by fee-shifting statues and citizen suit provisions (Benson 2006, Greve 1990), others believe that subsidizing litigation against land-management agencies through the EAJA is a socially valuable use of public resources (Nie 2008). In either case, it is indisputable that citizen suits are an important aspect of modern public natural resource management.

The EAJA is a one-way fee-shifting statute that specifically allows parties who bring successful lawsuits against federal land-management agencies to recover their costs, such as attorney fees and filing costs, directly from the agencies' budgets. The EAJA was originally intended to (1) make the federal justice system more accessible to parties defending themselves against what Congress perceived as unreasonable government action, (2) provide an incentive for citizens to contest excessive government regulation, (3) supply additional compensation for citizens who were injured by government actions, and (4) deter overreaching regulation by federal agencies (Hogfoss 1985, Sullivan 1984, Mezey and Olson 1993, Sisk 1993). By providing attorney and other fees, the Act removed some of the economic obstacles citizens face when contesting government regulation. Table 1 lists EAJA process and eligibility requirements. Although it was recognized, at the dawn of environmental public interest litigation, that a bevy of institutional obstacles existed preventing access to the federal court system (Large 1972), the EAJA was not established with that particular set of litigants in mind. It has, however, over the last 20 years evolved to address a broader class of litigant stakeholder.

Although little empirical research has been conducted regarding the EAJA's impact on land-management agencies, the law's role in potentially spurring litigation has been a topic of press and congressional investigation and speculation for nearly 10 years. Pulitzer Prize winning reporter Knudson's 2001 series in the *Sacramento Bee* entitled "Environment, Inc." presented a high-profile discussion of the environmental movement's reliance on litigation and attorney fees. In the series, Knudson focused primarily on litigation directed against the US Fish and Wildlife Service's administration of the Endangered Species Act. Knudson (2001) found that during the 1990s, 434 environmental cases were brought against the federal government and the government paid out more than $31.5 million in attorney fees. In 2006, Senator Jeff Bingaman (D-NM) requested agency information on the amount of EAJA fees paid out by the US Forest Service from 1999 through 2005. An editorial on US Forest Service litigation in *The Missoulian* [1] concluded that the EAJA "has become a self-funding mechanism for environmental groups fundamentally opposed to prevailing national forest management direction" (Missoulian 2007). Most recently, a Wyoming attorney and former Department of Interior employee claimed that the government paid environmental law firms more than $1.6 million between 2003 and 2005 for litigation involving national forests in six US Forest Service regions [2] (Budd-Falen 2009). Despite persistent interest and allegations surrounding the EAJA and US Forest Service litigation, no comprehensive empirical study and analysis (with the exception of the response to Senator Bingaman's request) has systematically examined the issue.

Table 1. The Equal Access to Justice Act fee recovery requirements (28 USC §2412(d)(2)(B) and 5 USC §504(b)(1)(B)).

Process requirements (Plaintiff must meet all)
Plaintiff must have incurred legal expenses.
Plaintiff must have prevailed in some aspect of the case.
Plaintiff must submit an application for a fee award to the court within 30 days of the final judgment.
Plaintiff must allege that the government's position was not "substantially justified."
Eligibility requirements (Plaintiff must meet one)
Individuals with a net worth of $2 million or less.
Businesses with no more than 500 employees and a net worth of $7 million or less.
Charitable or other tax-exempt 501(c)(3) organizations with no more than 500 employees.
Agricultural cooperative associations with no more than 500 employees.
Other partnerships, corporations, associations, units of local government, or organizations with a net worth of not more than $7 million and no more than 500 employees.

The effects of a particular fee-shifting policy are highly dependent on contextual variables. Characteristics of the adversaries, the relative value of the fee awards to the parties, and the parties' respective views of the strength of their cases make empirical examinations inherently challenging (Rowe 1984). This should not be surprising, because work to date has noted the complexity and uncertainty in predicting the potential effects of fee arrangements on litigation behavior as well as the unsettled state of understanding of these effects (Kritzer 2002). This study attempts to quantify and contribute to an understanding of the role of one-way fee shifting in US Forest Service litigation.

Methods

Since EAJA payment figures are not generally publicly available, we used the Freedom of Information Act (FOIA) [3] to compile EAJA payment data from the US Forest Service and the US Department of Justice (DOJ). We asked DOJ for payment information because it defends the US Forest Service in the federal court system and we believed its EAJA payment records would supplement US Forest Service records. Written FOIA requests were made to the US Forest Service on Oct. 3, 2006 and to the DOJ on Oct. 11, 2006. We received responses from the US Forest Service on Nov. 27, 2006 and from the DOJ on Apr. 11, 2007. We requested a list of all EAJA fees paid by the US Forest Service from 1990 to 2005, including the amount of EAJA fees paid, litigants' names, court decision dates, and judicial decision citations. We also requested copies of all documents containing any information regarding the payment of EAJA fees during this time.

Results

The US Forest Service and DOJ supplied differing information to our FOIA requests. The US Forest Service provided records from 1999 through 2005. The DOJ provided US Forest Service–based EAJA records from 1989 through 2006—including data from 1989 to 1998 that the US Forest Service was unable to provide. As Table 2 indicates, EAJA fee records differ considerably. For example, in 2006 the secretary of agriculture provided the US Senate Committee on Energy and Natural Resources with information about EAJA fees paid by the US Forest Service (Senate Hearing 2006). As Table 2 reflects, there is nearly a $1 million difference between the data provided in the 2006 by the secretary and the records we obtained from the US Forest Service, and the secretary's response is nearly double the total amount DOJ records indicate were paid. The EAJA has no agency re-

cordkeeping or reporting requirements, and the inconsistencies we found in the agency's and DOJ's records substantiate ongoing congressional concerns that EAJA payments are being inadequately tracked by federal agencies (Western Congressional Caucus 2009). These concerns have manifested as proposed bipartisan legislation in the prior sessions of Congress. [4]

The DOJ provided EAJA award records for 17 years (1989 through 2006)—10 more years than the US Forest Service. These records indicate that during this time the US Forest Service paid more than $6 million dollars in EAJA payments. Focusing on the overlapping years (1999 through 2006), the US Forest Service data differed considerably from the DOJ records—US Forest Service records indicated it paid an *additional* $2.5 million in this 6-year period (see Table 2).

Table 2. Comparison of the US Forest Service Equal Access to Justice Act (EAJA) fees, by year.

Year	EAJA payments ($)		Secretary of agriculture response to the US Senate Committee on Energy and Natural Resources' request ($)
	US Forest Service FOIA data	DOJ FOIA data	
1999	794,774	498,406	814,774
2000	232,348	240,710	602,698
2001	999,938	457,535	581,567
2002	626,741	704,230	1,077,441
2003	794,414	586,649	1,236,668
2004	1,412,804	571,676	1,557,804
2005	1,276,564	467,427	1,131,578
Total	6,137,583	3,526,632	7,002,530

FOIA, Freedom of Information Act
Source: Data provided by the US Forest Service, DOJ, and Congressional Research Service.

Table 3. US Forest Service's Equal Access to Justice Act (EAJA) award payments by year from 1999 to 2005.

Year	EAJA payments ($)	No. of cases/payments	Average payment ($)
1999	794,774	21	37,846
2000	232,348	12	19,362
2001	999,938	29	34,481
2002	626,741	9	69,638
2003	794,414	23	34,540
2004	1,412,804	29	48,717
2005	1,276,564	26	49,099
Total	6,137,583	149	41,192

Source: Data provided by the US Forest Service.

Payments

US Forest Service records indicated that EAJA fees were awarded in 149 instances from 1999 to 2005, resulting in the agency paying more than $6 million in fees during this 7-year period (Table 3). [5] To put these numbers in context, between 1982 and 1994 all federal agencies reported court EAJA decisions awarding $29.6 million, with an average award size of $5,250 (US Government Accountability Office [GAO] 1998). The number of cases per year in which the agency paid fees ranged from 9 cases in 2002 to 29 cases in both 2001 and 2004, with an average annual number of cases of 21. Total fee awards per year ranged from $232,348 in 2000 to $1,412,804 in 2004, with annual awards averaging $876,798. The average award per case during the 7 years was $41,192, although 18 payments exceeded $100,000 (Table 4). It is unclear whether average annual fees are increasing.

Payment Location and Recipients

We used the information from the US Forest Service records to understand where the cases supporting EAJA payments were located. These records also allowed us to learn the types and names of plaintiffs receiving EAJA fees.

We categorized the responses to our FOIA request by US Forest Service region (Figure 1). Payments per region ranged from $114,310 in Region 9 (Eastern Region) to $1,408,140 in Region 1 (Northern Region; Table 5). The number of cases ranged from four in Region 9 to 30 in Region 1. It is important to note that Region 2 did not provide data for 1999 and 2000 and that Region 8 did not provide data for 2005. This suggests that our results underestimate the number of fees paid and their total amount.

The US Forest Service records were also used to categorize the litigants receiving EAJA fee awards. We organized the fee recipients into five categories:

- Attorney/Law Firm. Fee recipients who could be easily identified as an attorney or a law firm. [6]
- Commodity Interests. Fee recipients involved in commodity production, such as ranching and grazing operations, timber companies, and mining organizations.
- Environmental Organizations. Fee recipients whose stated organizational goal was to protect some aspect of the environment.
- Individuals. Fee recipients who were individuals and not readily identifiable as attorneys (but who may include attorneys).
- Other. Fee recipients, such as Native American tribes, who could not be classified into another category

The US Forest Service records listed a fee recipient for 120 of the 149 EAJA awards the agency reported (Table 6). Eighty-three (69.2%) of these 120 recipients were environmental organizations, and more than two-thirds ($3.2 million dollars) of EAJA fees were paid to these organizations. The agency records did not allow us to determine whom attorneys or law firms represented. Thus, the number and percentage of fee recipients in the other four categories may vary from the results presented in Table 6.

Table 4. Frequency of US Forest Service Equal Access to Justice Act awards from 1999 through 2005, by dollar amount.

Award/payment amount	Frequency (no. of payments)
Less than $500	3
$501–1,000	0
$1,001–5,000	28
$5,001–10,000	16
$10,001–20,000	21
$20,001–30,000	20
$30,001–50,000	23
$50,001–75,000	14
$75,001–100,000	6
$100,001–150,000	12
$150,001–200,000	3
$200,001–300,000	3
Over $300,000	0

Source: Data provided by the US Forest Service.

The US Forest Service data allowed us to determine the litigants that repeatedly received EAJA awards. All the litigants awarded fees in more than one case were environmental groups (Table 7). Nine of these 14 groups are listed by Gambino Portuese et al. (2009) in their list of 12 most frequent parties opposing the US Forest Service in land-management cases from 1989 to 2005. In fact, The Wilderness Society is the only "high frequency party"—parties Gambino Portuese et al. (2009) found averaged two or more cases per year—that was not involved in more than one of the EAJA cases. This raises questions, which our data can not conclusively answer: do these groups litigate more because their legal costs are reimbursed, and/or do they request EAJA fees so often because they litigate often? A lack of risk to plaintiffs operating under one-way fee shifting, like the EAJA, where the plaintiff bears no possibility of having to pay the agency defendant's legal costs can theoretically favor litigation, particularly over less expensive conflict settlement options (Rowe 1984, Gambino Portuese et al. 2009).

Discussion

The challenge in analyzing our results is that we are left with perhaps more questions than with which we began. Although we can contribute to the empirical understanding of fee shifting and land-management litigation, we can not resolve the entirety of questions surrounding EAJA with any degree of certainty.

In terms of what our study can definitively tell us, we know this much. We can establish that the US Forest Service faces a formidable litigation environment and that the number of lawsuits is increasing. We found that lawsuits against the agency are accompanied by requests for legal fees under the EAJA and that the agency has paid out approximately $6 million over a 7-year period—although we acknowledge that this dollar total is imprecise. This is a relatively small percentage of the US Forest Service's annual budget, [7] and that is not surprising because only a small percentage of the thousands of projects proposed by the US Forest Service are ultimately litigated. We also found that the most common US Forest Service EAJA fee recipients, environmental groups, are also the organizations that file the most lawsuits against the agency (Gambino Portuese et al. 2009). Finally, although not homogenous, most of these frequent environmental litigants possess substantial financial resources (Table 8).

By using the example of national forest litigation and of the litigants from our study, we can also establish that current use of EAJA by these plaintiffs diverges from the law's initial purpose on its passage nearly 30 years ago. As discussed earlier, the congres-

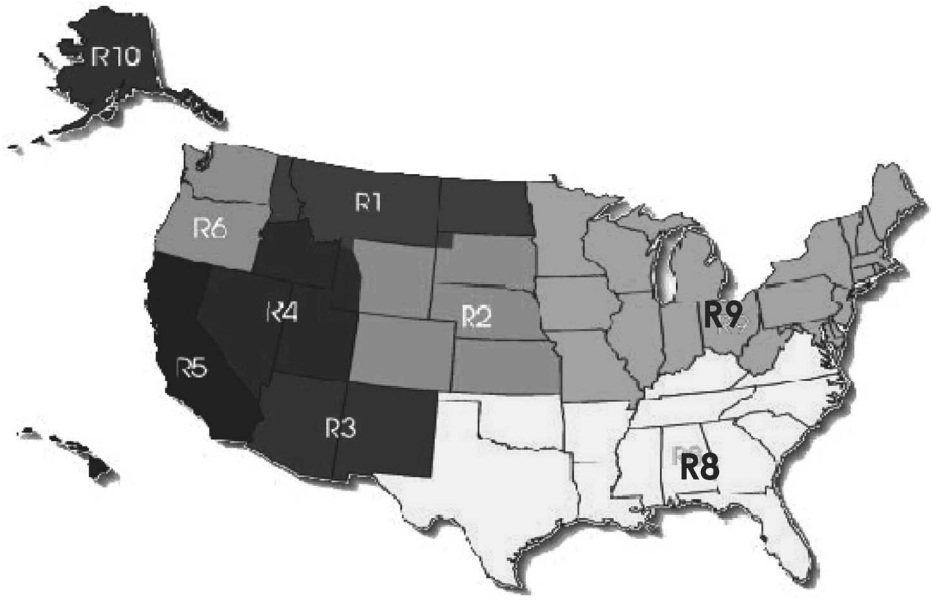

Figure 1. Boundaries of the US Forest Service regions (map was provided courtesy of US Forest Service). Note that there is no Region 7.

Table 5. US Forest Service Equal Access to Justice Act (EAJA) awards by region from 1999 through 2005.

Region[a]	EAJA payments ($)	No. of cases/payments
1	1,408,140	30
2[b]	360,776	19
3	632,908	21
4	698,645	20
5	999,239	13
6	850,584	22
8[c]	347,943	5
9	114,310	4
10	406,350	5
WO	318,689	10
Total	6,137,584	149

[a] There is no Region 7.
[b] Region 2 did not provide 1999–2000 data.
[c] Region 8 did not provide 2005 data.
WO, Washington Office.
Source: Data provided by the US Forest Service.

Table 6. Number and dollar amount of US Forest Service Equal Access to Justice Act (EAJA) award payments from 1999 through 2005, by type of fee recipient (percentages may not equal 100% because of rounding).

Type of fee recipient	No. of EAJA awards received	Dollar amount of EAJA awards ($)	Percent of EAJA award dollars (%)
Environmental	83	3,219,447	69.4
Commodity	6	400,932	8.6
Attorney/law firm	9	308,627	6.7
Individuals (may include attorneys)	11	426,124	9.2
Other	11	286,286	6.2

Source: Data provided by the US Forest Service.

Table 7. Organizations listed as a plaintiff in more than one lawsuit against the US Forest Service that resulted in an Equal Access to Justice Act (EAJA) payments from 1999 through 2006, by number of times listed.

Organization name	No. of times listed as plaintiff in EAJA suit
American Wildlands	6
Center for Biological Diversity	6
Earthjustice	3
Forest Guardians	8
Heartwood (includes Kentucky Heartwood)	7
Idaho Sporting Congress	8
Kettle Range Conservation Group	4
Klamath Siskiyou Wildlands Center	2
League of Wilderness Defenders	4
Native Ecosystems Council	7
Oregon Natural Resources Council	5
Sierra Club/Sierra Club Legal Defense Fund	12
Swan View Coalition	4
The Ecology Center	9
Total	85

Source: Data provided by the US Forest Service.

sional intent behind the EAJA appears focused. The overarching theme behind the statute's passage was the prevention of "excessive government" regulation. The three goals of the EAJA were to "(1) encourage parties that are the subject of unreasonable federal government action to seek reimbursement for attorney's fees and other costs, (2) restrain overzealous regulators, and (3) ensure that the government pays for the costs of refining and formulating public policy" (GAO 1998, p. 8). Bill sponsor Senator Pete V. Domenici stated that the EAJA's purpose was "to redress the balance between the government acting in its discretionary capacity and the individual" (House Hearing 1980). The EAJA was intended to allow plaintiffs access to the legal system to challenge excessive regulation by the federal government, particularly where such regulations caused economic harm to members of the public. Although agencies such as the Environmental Protection Agency (EPA) typically engage in public regulation, land-management agencies, such as the US Forest Service, do not. Legal actions directed against land-management agencies are rarely brought by individuals or small businesses contesting excessive government regulation. Rather, litigation against the US Forest Service usually challenges discretionary land-management decisions. [8] Congress was informed that EAJA could be used in lawsuits contesting agency decisions. For example, during EAJA's legislative hearings federal agencies, including the EPA, warned Congress of the bill's potential to encourage excessive interference with agency decision-making (Mezey and Olson 1993). Whether Congress disregarded or underestimated these concerns is difficult to discern; however, recent events, such as the Western Congressional Caucus members' (Western Congressional Caucus 2009) and Idaho Senate Delegation's (2009) letters to DOJ, indicate that some legislators believe EAJA may not be addressing its original purposes. Congress's intention when it enacted EAJA was to address the resource disparity between private litigants and the government—the ultimate "repeat player" (see Galanter 1974). However, our findings suggest EAJA's legal eligibility requirements may not be restricting its use to groups with limited financial resources. For example, we found the organizations involved in more than one EAJA case collectively reported net assets in 2005 of more than $88 million and annual revenues of more than $116 million (Table 8).

We can also draw some informed conclusions from both the fee-shifting literature and from our findings. We recognize immediately that the behavior of any particular litigant is highly context specific and the effects of fee-shifting legislation such as EAJA are difficult to predict. Additionally, the rationale to litigate is multivariate; Armstrong (2008), e.g., lists nine plausible reasons why a party would choose litigation over alternative dispute resolution. That said, the literature is consistent in suggesting that fee shifting reduces the risk of choosing litigation for would-be plaintiffs (e.g., Rowe 1984). Litigation under the American Rule is an inherently risky conflict resolution alternative because failure to prevail can be financially costly to the parties. It is even more risky under a fee-shifting arrangement, such as the English Rule, wherein the loser pays the winners' legal expenses. This risk is shared symmetrically only if *both* parties are potentially liable for prevailing opponent's legal costs—known as two-way fee shifting—something EAJA does not require. If the US Forest Service prevails, the losing plaintiffs are *not* required to pay the government's legal fees and costs associated with defending the action. In turn, this may reduce the perceived risk of commencing litigation (Rowe 1984). Kagan (2001) suggests that the number of lawsuits brought to trial is a function of how plaintiffs perceive the "stakes" in those lawsuits. That is to say, the likelihood of success and the expected value of winning lawsuits are related directly to the number of lawsuits. Exposure to unfavorable rulings, the costs of bringing the lawsuit, and the threat of having to pay other party's legal costs all contribute to the decision to litigate. However, EAJA influences this decision process by providing for *partial* fee shifting.

Additionally, because lawsuits against the US Forest Service are unlikely to succeed in general, these suits could subsequently be classified as low-probability litigation. [9] It has been noted that "plaintiffs in . . . low-probability litigation . . . are likely to be risk seeking" (Guthrie 2000 p. 187), and more likely to prefer judicial outcomes to negotiated settlement options. Partial fee shifting's distortion of lawsuit risk presumably encourages both repeat plaintiffs and an increasing number of lawsuits. Our EAJA litigation findings—that frequent US Forest Service litigators are also frequent EAJA claimants—provide evidence of this, although as we have noted several times this relationship is not well defined or understood. The potential to avoid paying their own fees (and never having to pay their opponent's fees) means that EAJA-eligible plaintiffs do not face the same risks as do typical defendants under the American Rule (Rowe 1984). Frequent US Forest Service plaintiffs as rational, self-interested litigators would likely have some sensitivity to the monetary costs of lawsuits (Fein 1984, Greve 1990, Adler 1996, Barnett and Terrell 2001). The financial risk asymmetry created by EAJA would not be lost on such plaintiffs. Other factors must be considered as well: Malmsheimer et al. (2004, p. 24)

hypothesized that groups secure other benefits from litigation ". . . such as publicity and delay of US Forest Service action . . ." and Juni (2002, p. 93–94) likewise noted that "environmental groups' donations may suffer if [they use a nonlitigation] . . . approach [that can be] viewed as less 'splashy.'" Alternatively, it has been suggested that litigation is actually an effective means to facilitate cooperative bargaining and agreements between plaintiffs and agency defendants (Coglianese 1996). Regardless of the specific set of motivations facing a particular plaintiff—and on which we can only ponder—one-way fee shifting under the EAJA decreases the potential financial risk associated with national forest litigation.

Finally, there are various questions about which we can only speculate. We have previously mentioned the riddle of whether more frequent litigants naturally make more frequent EAJA requests for legal fees or whether more frequent EAJA awards facilitate more frequent litigation. This we can not answer. Likewise, we can not address whether the EAJA has incentivized any particular lawsuit. Nor can we quantify the role that EAJA fees might play in the overall operating budgets of potential plaintiffs—thereby framing EAJA's relative potential as an incentive—because we do not have access to these organizational finances. What little information we do have access to (Internal Revenue Service Form 990s) is inconsistent and lacking in detail among the various plaintiffs in this study. Likewise, we can not conclude that in the absence of the EAJA the number of lawsuits against the US Forest Service would subside. Finally, we can not make any claims to how paying $6 million in legal fees has affected the US Forest Service, apart from noting that, generally, the specter of lawsuits does affect agency perceptions and behaviors (Mortimer et al. 2011). In keeping with what prior scholarship has noted (see Kritzer 2002), there are formidable empirical challenges to making concrete claims on the effect of fee shifting, and it is no less the case in this instance.

Conclusion

The increasing use of litigation as a tool to influence federal public land-management agency decisions remains controversial and politically charged. Our investigation of EAJA's interaction with the US Forest Service suggests several findings important to future policy discussions and to understanding the relationships among the litigants:

1. The EAJA creates a litigation risk asymmetry that may cause stakeholders dissatisfied with US Forest Service land-management decisions to embrace litigation. Enabling this behavior through one-way fee shifting is, of course, a public policy decision, but statutory reform of any perceived inequities or undesirability associated with EAJA and one-way fee shifting would necessarily require plaintiffs to face some ". . . real prospect of out-of-pocket loss" (Guthrie 2000, p. 211).
2. There remains insufficient evidence to conclude that the EAJA is a driver for any particular plaintiff to challenge any particular US Forest Service project. Decisions to litigate are likely driven by multiple factors and policymakers should realize that EAJA reform might not eliminate or reduce US Forest Service land-management litigation. For example, some organizations' raison d'être is to initiate "public interest litigation." Even if EAJA were completely repealed, these organizations would likely continue to sue land-management agencies. Also, some national forest management decisions are so offensive to some stakeholders that litigation is probably inevitable. Additionally, as Gambino-Portuese et al. (2009, p. 22, emphasis in original) noted, "the vast majority of parties (74.4%) are only involved in one lawsuit. These are groups and individuals whose interest is in a specific US Forest Service project or activity and who use litigation to try to change *that particular* . . . land management decision." It is doubtful that these "one-timers" take EAJA's distortion of litigation risk into account when they make litigation decisions. Most importantly, many organizations have found that litigation provides an effective policy forum. It is often a more effective and less costly alternative to (1) the resources required to effect policy changes in administrative and legislative branches or (2) participate in collaborative public land-management efforts.
3. The original intent of the EAJA has drifted with its use in national forest management litigation. In our study, most EAJA payments were made to environmental interest groups with widely varying financial capabilities. We note that many are quite well financed and therefore not the class of plaintiffs for which the law was designed to provide access to the expensive federal litigation system. The increasing capabilities and sophistication of such public interest litigants, their relative financial resources, and the social desirability of an evolution in the usage of the EAJA might be

Table 8. Description and 2005 financial summary of the organizations listed as a plaintiff in more than one lawsuit against the US Forest Service, which resulted in Equal Access to Justice Act award payments from 1999 through 2006, by number of times listed.

Organization name	Net assets ($)	Revenues ($)
American Wildlands	438,600	521,833
Center for Biological Diversity	2,347,991	3,477,044
Earthjustice	28,261,755	21,086,300
Forest Guardians	511,326	764,626
Heartwood	86,539	159,435
Idaho Sporting Congress	31,657	60,428
Kettle Range Conservation Group	Tax extension filed	
Klamath Siskiyou Wildlands Center	73,199	350,684
League of Wilderness Defenders	16,171	82,996
Native Ecosystems Council	Information not available on Guidestar	
Oregon Natural Resources Council (now Oregon Wild)[a]	1,181,477	1,214,995
Sierra Club[b]	54,604,888	85,183,435
Swan View Coalition	84,040	37,891
The Ecology Center	1,166,694	3,158,765
Total	88,804,337	116,098,442

[a] Guidestar data from 2004.
[b] Agency records repeatedly list the Sierra Club as an EAJA fee recipient. Because the Sierra Club is ineligible to receive fees as a 501(c)(4) organization, the court awards were most likely awarded to the Sierra Club Legal Defense Fund.
Source: Guidestar.org., n.d.

related topics of inquiry for future policy studies of fee shifting and the EAJA.

Endnotes

[1] A newspaper in one of the most litigious National Forest System Regions (see Keele et al. 2006).
[2] Regions 1–6.
[3] 5 USC §552.
[4] HR 4717, 111th Congress.
[5] One case, which resulted in a $75,000 payment, did not list a year of payment. We omitted that case from our inventory and subsequent analysis.
[6] It is important to note that the fee recipients in the attorney category represented clients that can be categorized into one of the other categories—all attorneys and law firms represented clients in these cases.
[7] For example, the FY 2009 US Forest Service budget for the National Forest System was $1.51 billion (USDA 2009).
[8] For example see Figure 5 of Keele et al. (2006), which illustrates the types of management activities most often challenged in US Forest Service land-management litigation.
[9] During a 20-year period from 1989 to 2009, plaintiffs suing the US Forest Service prevailed on the merits in only 19.3% of the cases (based on an analysis of the database described at Keele et al. 2006). Although the effects of any one suit may be extensive, for purposes of this article, we generally consider such litigation to have a low probability of success.

Literature Cited

ADLER, J.H. 1996. Rent seeking behind the green curtain. *Regulation* 4:26–34.

ARMSTRONG, P.M. 2008. Why we still litigate. *Pepp. Disp. Resol. Law J.* 8(3):379–384.

BARNETT, A.H., AND TERRELL, T.D. 2001. Economic observations on citizen-suit provisions of environmental litigation. *Duke Environ. Law Policy* 12(1):1–38.

BENSON, B.L. 2006. Unnatural bounty: Distorting the incentives of major environmental groups. *PERC Policy Series* (PS-37):29.

BROUSSARD, S.R., AND B.D. WHITAKER. 2009. The Magna Charta of environmental legislation: A historical look at 30 years of NEPA-Forest Service litigation. *For. Policy Econ.* 11: 148–154.

BUDD-FALEN, K. 2009. *September 15 Memorandum Re: Environmental litigation gravy train.* Available online at www.westernlegacyalliance.org/images/pdfs/September_15.pdf; last accessed Sept. 1, 2010.

COGLIANESE, C. 1996. Litigating within relationships: Disputes and disturbance in the regulatory process. *Law Soc. Rev.* 30(4):735–765.

COUNCIL ON ENVIRONMENTAL QUALITY (CEQ). 2009. *NEPAnet. NEPA litigation (online)*. Available online at www.nepa.gov/nepa/nepanet.htm; last accessed July 15, 2009.

FEIN, B. 1984. Citizen suit attorney fee shifting awards: A critical examination of government-subsidized litigation. *Law Contemp. Prob.* 47(1):211–232.

GALANTER, M. 1974. Why the "haves" come out ahead: Speculations on the limits of legal change. *Law Soc. Rev.* 9:95–160.

GAMBINO-PORTUESE, B., R.W. MALMSHEIMER, A. ANDERSON, D.W. FLOYD, AND D.M. KEELE. 2009. Litigants' characteristics and outcomes in Forest Service land management cases 1989 to 2005. *J. For.* 107(1):16–22.

GREVE, M.S. 1990. The private enforcement of environmental law. *Tulane Law Rev.* 65:339–394.

GUIDESTAR.ORG. n.d. *About us.* Available online at www.guidestar.org/; last accessed June 18, 2007.

GUTHRIE, C. 2000. Framing frivolous litigation: A psychological theory. *Univ. Chicago Law Rev.* 67(1):163–216.

HOGFOSS, R. 1985. The Equal Access to Justice Act and its effect on environmental litigation. *Environ. Law* 15(3):533–563.

HOUSE HEARING. 1980. *Hearing before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary on S. 265.* US House of Representatives, 96th Cong., 2nd Sess.

IDAHO SENATE DELEGATION. 2009. Available online at www.westernlegacyalliance.org/images/pdfs/november_9.pdf; last accessed Sept. 1, 2010.

JONES, E.S., AND C.P. TAYLOR. 1995. Litigating agency change: The impact of the courts and administrative appeals process on the Forest Service. *Polit. Stud. J.* 23(2):310–336.

JUNI, R.L. 2002. Public access to environmental dispute resolution processes: U.S. and U.K. trends towards a common approach. P. 87–103 in *Environmental dispute resolution: An anthology of practical solutions.* MacNaughton, A.L., and J.G. Martin (eds.). ABA Publishing, Chicago.

KAGAN, R.A. 2001. *Adversarial legalism: The American way of law.* Harvard University Press, Cambridge. 339 p.

KEELE, D.M., R.W. MALMSHEIMER, D.W. FLOYD, AND J.E. PEREZ. 2006. Forest Service land management litigation 1989–2002. *J. For.* 104(4):196–202.

KNUDSON, T. 2001. Litigation central: A flood of costly lawsuits raises questions about motive (third of five parts). *Sacramento Bee*, April 24.

KRENT, H.J. 1993. Fee shifting under the Equal Access to Justice Act-A qualified success. *Yale Law Policy Rev.* 11(2):458–508.

KRITZER, H.M. 2002. Lawyer fees and lawyer behavior in litigation: What does the empirical literature really say? *Texas Law Rev.* 80(7): 1943–1983.

LARGE, D.W. 1972. Is anybody listening? The problem of access in environmental litigation. *Wisconsin Law Rev.* 62(1):62–113.

MALMSHEIMER, R.W., D. KEELE, AND D.W. FLOYD. 2004. National forest litigation in the US Courts of Appeals. *J. For.* 102(2): 20–25.

MEZEY, S.G., AND S.M. OLSON. 1993. Fee shifting and public policy: The Equal Access to Justice Act. *Judicature* 77(131):13–20.

MORTIMER, M.J. 2002. The delegation of lawmaking authority to the U.S. Forest Service: Implications in the struggle for national forest management. *Admin. Law Rev.* 54(3):907–982.

MORTIMER, M.J., M.J. STERN, R.W. MALMSHEIMER, D.J. BLAHNA, L.K. CERVENY, AND D.N. SEESHOLTZ. 2011. Environmental and social risks: Defensive National Environmental Policy Act in the US Forest Service. *J. For.* 109(1):27–33.

NIE, M. 2008. The underappreciated role of regulatory enforcement in natural resource conservation. *Polit. Sci.* 41:139–164.

ROWE, T.D., JR. 1984. Predicting the effect of attorney fee shifting. *Law Contemp. Probs.* 47(1):139–171.

SENATE HEARING. 2006. *Hearing before the Committee on Energy and Natural Resources on Proposed Fiscal Year 2007 Budget Request for the Forest Service.* US Senate, 109th Cong., 2nd Sess.

SISK, G.C. 1993. A primer on awards of attorney's fees against the federal government. *Arizona State Law J.* 25(4):733–800.

SULLIVAN, J.J. 1984. The Equal Access to Justice Act in the Federal Courts. *Columbia Law Rev.* 84(4):1089–1117.

THE MISSOULIAN. 2007. Equal access to injustice, more like it. *The Missoulian*, March 19, Opinion page.

THOMAS, J.W. 2000. What now? From a former Chief of the Forest Service. P. 10–43 in *A vision for the U.S. Forest Service: Goals for its next century.* Sedjo, R.A. (ed.). Resources for the Future Press, Washington, DC.

USDA. 2009. *FY 2011 Budget Summary and Annual Performance Plan.* Available online www.obpa.usda.gov/budsum/FY11budsum.pdf; last accessed Jan. 17, 2011.

US GOVERNMENT ACCOUNTABILITY OFFICE (GAO). 1998. Equal Access to Justice Act: Its use in selected agencies. GAO/HEHS-98-58R, Washington, DC. 28 p.

WESTERN CONGRESSIONAL CAUCUS. 2009. Available online at www.westernlegacyalliance.org/images/pdfs/doj_eaja_final_letter_11_3_09.pdf; last accessed June 10, 2010.