

BUDD-FALEN LAW OFFICES

L.L.C.

ATTORNEYS FOR THE WEST

KAREN BUDD-FALEN
BRANDON L. JENSEN¹
KATHRYN BRACK MORROW^{1,2}

¹ ALSO LICENSED IN COLORADO
² ALSO LICENSED IN NEW MEXICO

300 EAST 18TH STREET • POST OFFICE BOX 346
CHEYENNE, WYOMING 82003-0346
TELEPHONE: 307/632-5105
TELEFAX: 307/637-3891
WWW.BUDDFALEN.COM

FRANKLIN J. FALEN³
LAURA C. ROWE
³ ALSO LICENSED IN NEBRASKA

MEMORANDUM

TO: INTERESTED PARTIES

FROM: KAREN BUDD-FALEN
BUDD-FALEN LAW OFFICES, LLC

DATE: JULY 21, 2011

RE: OP-ED; THE \$206,098,920 ENDANGERED SPECIES ACT
SETTLEMENT AGREEMENTS; IS ALL THAT PAPERWORK
WORTH IT?

The headlines question whether Congress and the President can make an agreement on raising the debt ceiling or will America stop paying military servicemen and social security recipients. I have a solution to the dilemma

On July 12, 2011, the Justice Department and the U.S. Fish and Wildlife Service (“FWS”) announced “an historic agreement” which will require the American taxpayers to pay \$206,098,920 to just process the paperwork deciding whether to include over 1000 plants, bugs, worms, and other assorted creatures on the Endangered Species list. None of this money goes to on-the-ground conservation; this taxpayer funding is just to process petitions filed by only two, out of dozens, of radical environmental groups who think newts and moths are more important than the elderly or our children. The average

social security beneficiary makes \$21,600 a year and a basic military recruit makes a little over \$15,000 per year. Our elected officials are contemplating not paying these Americans while the Justice Department is readily agreeing to spend an average of \$100,690 per individual species listing and \$345,000 per individual proposed critical habitat designation for over 1053 creatures. And to add insult to injury, the Justice Department has agreed that these two groups “prevailed” in the litigation and will pay their attorney fees in an amount that has not been disclosed. Has America lost its collective mind?

These two settlement agreements are the culmination of what is known as the Endangered Species Act (“ESA”) multi-district litigation. This case was formed in 2010 by combining 13 federal court cases filed by either the WildEarth Guardians (“WEG”) or the Center for

Biological Diversity (“CBD”) regarding 113 species. On May 10, 2011, the FWS announced its settlement agreement with the WEG with the promise that the agreement would help the FWS “prioritize its workload.” That settlement agreement was opposed by the CBD who wanted other species added to the list. The Justice Department obliged the requests of the CBD and on July 12, 2011 filed the second agreement, now pending before the District of Columbia Federal District Court, that would require the FWS to make 1201 decisions on proposed listing and critical habitat designations for 1053 species. The reason that these two numbers are different is because for some of the species, the FWS is committed to make more than one decision. The total cost to the American public for the FWS completing all this paperwork is \$206,098,920, all by FY 2016.

These settlement agreements are being touted by the FWS as a “catalyst to move past gridlock and acrimony” to enable the FWS to “be more effective in both getting species on the [endangered species] list and working with our partners to recover those species.” Really? How can that be, considering the requirements of the agreements and the state of the American budget? For example:

The settlement agreements only include two of the numerous radical environmental groups that have sued over the Endangered Species Act to force more species listings and critical habitat designations. This agreement does nothing to stop the National Wildlife Federation from filing more federal court litigation over species such as the Northern grey wolf; nor does it

include Western Watersheds Project’s litigation related to the sage grouse. The Sierra Club is not bound by this settlement agreement and neither is the Natural Resources Defense Council nor the Environmental Defense Fund. Between 2000 and 2010, 455 lawsuits were filed by environmental groups against the FWS alone. It is hard to move past “gridlock” when only two of the numerous groups causing the gridlock are willing to move out of the way (sort of).

The settlement agreements require the FWS to work on a very strict time schedule. At least 94 decisions have to be made by FY 2011 and 61 decisions are to be completed by the end of FY 2012. The entire list of 1205 decisions have to be made by FY 2016. According to a FWS *Federal Register* notice published November 10, 2010, it costs the agency and the taxpayer a median of \$39,276 per species just to make a “90 day finding” regarding whether the FWS should even continue with a scientific review; \$100,690 per species for the FWS to make a listing decision; \$345,000 for each proposed critical habitat designation and an additional \$305,000 for the FWS to make a final critical habitat designation. Multiplying the FWS’s own numbers by the actions for each species in the settlement agreements brings the cost of the settlement agreements to the American taxpayer to a grand total of \$206,098,920 — just to process the paperwork, that figure excludes the payment of attorney fees to the CBD and WEG. The amount of those payments has not been publically released.

What is even more distressing is that the settlement agreements go far outside the bounds of the original multi-district

litigation. The original litigation dealt with 133 species for which the Justice Department agreed that the FWS had failed to follow the procedural ESA requirements. In contrast, the settlement agreements expanded that number to include 1053 species; 940 of which were not part of a federal court complaint. How can the FWS with any conscience agree to this expansion?

Even more unconscionable is the way the FWS press release describes the settlement agreements. According to the FWS announcement, the settlement agreements and work plan “will enable the agency [FWS] to systematically, over a period of six years, review and address the needs of more than 250 candidate species to determine if they should be added” to the ESA list. But look at the list attached to the settlement agreements and read the settlement agreements themselves. The official species list that has to be considered contains 1053 species, which is 76% more than admitted by the FWS. While technically 1053 species is “more than” 250 candidate species, my children would not get away with that kind of creative factual accounting.

The bottom line analysis of the multi-district settlement agreements is this — the Justice Department and FWS agreed to two settlement agreements that represent an 89% increase over the number of species included in the original litigation; that commits the FWS to spend over \$206,000,000 over the next six years to do the paperwork on 1053 bugs, worms and grasses that two radical groups think are more important than humans in all 50 states; to add to an ESA list that already includes over 2000 species when only 10 have been removed from the list since it

was passed in 1969; and the Justice Department has agreed to pay the attorney fees to the two groups for suing in the first place. I would argue that \$206,098,920 plus added attorney fees payments would pay a lot of benefits to deserving Americans including those who are serving this Country. That is where my tax dollars should go.

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