

Mission		Press Releases	
Legal Cases		Legal Assistance	
<i>The Litigator</i>		<i>Summary Judgment</i>	
Action Update		Planned Giving	
MSLF Boards	MSLF Staff	Links	Home Page
Public Appearances	Contact Us	Contribute	



Each month, MSLF president and chief operating officer William Perry Pendley publishes his monthly column, *Summary Judgment*. A hard-hitting commentary on environmental, federal lands, natural resources, or private property rights issues, *Summary Judgment* is carried by newspapers, magazines, newsletters and other publications throughout the country. So topical are the issues addressed by *Summary Judgment* that they are often the focus of talk radio discussion for weeks after the column is sent out at the end of each month. *Summary Judgment* runs 650 words and may be reprinted so long as credit is given to William Perry Pendley and to Mountain States Legal Foundation. A glossy photograph of the author is available.



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## Latest Column:

### EQUAL ACCESS TO JUSTICE ACT—NEITHER EQUAL NOR JUST

by **William Perry Pendley**

August 1, 2012

Last month, Karen Budd-Falen, a Cheyenne, Wyoming attorney, presented her findings on the Equal Access to Justice Act (EAJA) to the 100th Anniversary Conference of the Rocky Mountain Coal Mining Institute in Vail, Colorado. After spending years researching court documents—the federal government keeps no records of EAJA disbursements—Ms. Budd-Falen found that environmental groups have amassed tens of millions of dollars in EAJA awards.

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(Jun 1, 2012)

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ENERGY STATES](#)

(May 1, 2012)

The EAJA was written for nobler purposes, however, which was to allow Americans forced to litigate against the federal government to be paid their attorneys' fees and expenses if they prevail and if the government's legal position is not "substantially justified." There is a cap on the hourly fees for which recovery is permitted, which according to Ms. Budd-Falen, has not limited fees paid to environmental groups, and an eligibility restriction based on net worth (\$2 million for individuals and \$7 million for entities), which specifically excepts tax-exempt (environmental) groups. The use of the EAJA by environmental groups is unique in two other ways, one not intended by Congress, the other not anticipated. Environmental groups recover fees for suing over non-injurious, technical violations of federal law, whereas most other EAJA applicants sue to vindicate constitutional or statutory rights. Finally, while environmental groups are paid quickly, private litigants are paid only after years, if ever.

Take John Shuler of Dupuyer, Montana, who killed a grizzly bear in self-defense—as allowed under the Endangered Species Act—but was prosecuted by the federal government for nearly a decade. Shuler prevailed only after his attorneys expended \$225,000; however, federal courts denied his EAJA application, holding that the federal government's position in his case was "substantially justified." The courts did so despite the risible factual and legal arguments of federal lawyers: 1) Shuler did not act in self-defense despite that the bear charged and fell mortally wounded 20 feet from him; 2) Shuler, by leaving his house, unlawfully placed himself in the "zone of imminent danger," 3) Shuler's dog "Boone," by going on point, provoked the bear and, thus, "escalated" the conflict; and 4) bears are entitled to a higher standard of self-defense because they are not capable of sapient thought.

Or take Donald Eno, a disabled veteran on fixed income, seeking to eek out a living as a miner on his gold and travertine claim in the Plumas National Forest in northern California. In 1996, the U.S. Forest Service took legal action to drive Mr. Eno off his extremely valuable claim. The government asserted, for example, that any mining would interfere with cultural myths allegedly important to some Maidu Indians; in fact, one Forest Service attorney met, unsuccessfully, with the Maidu urging them to so assert. In December 2003, after years of pre-hearing preparation, testimony, and post-hearing briefs, an administrative law judge ruled in favor of Mr. Eno. The

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federal government appealed, but in February 2007, Mr. Eno once again prevailed. Although federal lawyers did not appeal, they challenged Mr. Eno's EAJA claim for nearly \$200,000, a battle that, after more than five years, remains in federal court!

Or take Stanley K. Mann, a professor, lawyer, and alternative-energy entrepreneur, whose extremely valuable geothermal wells were seized illegally by federal officials. Beginning in April 1998, Mr. Mann fought to recover payment for what had been taken from him; in April 2009, Mr. Mann was awarded nearly \$1 million. Despite his clear victory, the years invested in it, and the absence of any justification for the government's illegal actions, federal lawyers contested his nearly \$300,000 EAJA claim. Nearly three years later, Mr. Mann awaits a ruling.

Representative Cynthia Lummis (R-WY) has introduced legislation to restore the EAJA to its original intent, but passage of her bill is unlikely in the days that remain in the 112th Congress. Meanwhile, environmental groups are on the way to the bank with their huge awards while private citizens sit empty handed at the courthouse door.

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TO FEDERAL COURT](#)

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EQUIVALENT?](#)

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NATIONWIDE FIGHT  
FOR GUN RIGHTS](#)

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THROWN ON  
PRESIDENTIAL HOT  
AIR](#)

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ATTACK RESPONSE:  
NONE DARE CALL IT  
THINKING](#)

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CAMPUSES, NOT  
ONLY OUTLAWS  
SHOULD HAVE GUNS](#)

(May 1, 2010)

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“ANSWERS” THE  
CENSUS](#)

(Apr 1, 2010)

[WITH HUMANS  
FACING FIRE  
DANGER, JUDGES](#)

[WORRY ABOUT ELK](#)  
(Mar 1, 2010)

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HIGHER EDUCATION,  
TO GET IT RIGHT ON  
RACE](#)  
(Feb 1, 2010)

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CHRISTMAS GIFT IN  
NORTHWESTERN  
PENNSYLVANIA](#)  
(Jan 1, 2010)

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ACCESS TO JUSTICE  
ACT"](#)  
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HEAL THYSELF AND  
REIN IN CONGRESS!](#)  
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DISSEMBLE](#)  
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THINK](#)  
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INTERVENTION](#)  
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