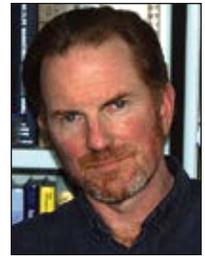


INSIDE THE EQUAL ACCESS TO JUSTICE ACT:

Environmental Litigation and the Crippling Battle over America's Lands, Endangered Species, and Critical Habitats

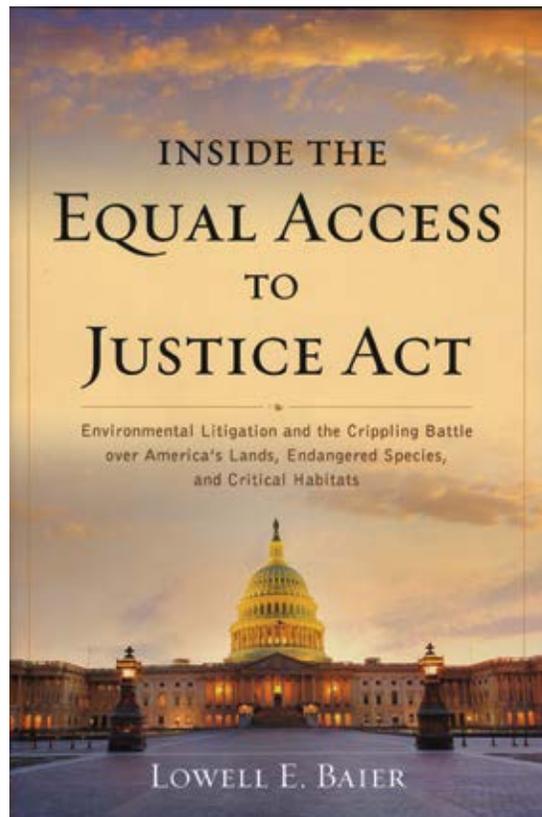
BOOK REVIEW



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Recently, a state fish and wildlife agency director asked me if I would introduce him to Lowell Baier, adding that Baier is “an intellectual giant.” The director’s descriptor is appropriate, as Baier has recently produced an intellectual *tour de force* with the publication of *Inside the Equal Access to Justice Act*. The focus of this book is the need to reform the Equal Access to Justice Act (EAJA) because of unintended provisions that incentivize and reward environmental litigants for filing suit against federal regulatory and land management agencies, and consequentially hinder proactive cooperative conservation efforts.

EAJA is a relatively obscure law. I suspect most Americans do not know it exists, nor what its intended purpose was when it was first introduced in Congress in 1975 and eventually signed into law in 1980. Baier, a seasoned lawyer, political scientist, historian, and one of America’s leading conservationists (including president emeritus of the Boone and Crockett Club), peels back layers of proverbial onion to reconstruct a fascinating story about how this law came into existence and the twist of fate that led to a seemingly minor provision being inserted that eventually opened the floodgates for environmental



Lowell E. Baier. Rowman & Littlefield, Lanham, Maryland. 2016. 648 pp. \$75.00 Hardback. ISBN 978-1-4422-5744-3.

litigation. Baier tells how the politics surrounding the 1980 presidential election resulted in Rep. Robert Kastenmeier, chairman of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, allowing this provision to get into the law. Baier, the consummate and thorough historian, went directly to the source and interviewed Kastenmeier before his death. The story that unfolds is on

one hand a tutorial on the process of lawmaking, and on the other a suspense thriller of political intrigue. Baier’s writing throughout is superb.

To tell this story, and hammer home the significance and urgency of the need for EAJA reform, Baier begins the book with the history of the growth of federal regulations in the United States. This sets the stage for the narrative describing the development of EAJA as a means for small

businesses and veterans—stakeholders without deep pockets—to be able to contest regulatory wrongdoings. Baier describes the implementation of EAJA and its successful, appropriate applications. His historical reconstruction is captivating.

Baier then chronicles the history of the development of private conservation organizations in the United States. He categorizes this into three eras: the first generation (1886-1936), second generation (1947-1970), and the third generation (1970-2000). Again, this is fascinating history with original and novel interpretation by Baier wherein he illustrates the very different approaches of the first and third generations. The first generation includes organizations such as the Boone and Crockett Club and the National Wildlife Federation whose political approaches can be described with terms such as collaboration, negotiation, and relationship-building. The third generation is characterized by groups such as the Center for Biological Diversity whose approach is litigation.

Baier devotes a chapter to the third generation, who he terms “Eco-Warriors.” He then goes into depth to describe the crisis beset by environmental litigation and how it has been spawned by the EAJA. He brilliantly

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demonstrates how EAJA enables major environmental groups to litigate Endangered Species Act procedural issues—repeat, procedural issues—forcing the U.S. Fish and Wildlife Service (FWS) into settlement whereby the environmental groups force the agenda while other stakeholders become excluded from the process. Baier details how the sheer volume of litigation sets up the FWS for procedural failure, and hinders its professional experts from being able to exercise their skills.

Baier analyzes several case studies of cooperative conservation efforts designed to muster the public-private conservation institution (a legacy of North American wildlife conservation) to take the necessary steps to preempt the need for Endangered Species Act listing. Also known as “pre-listing conservation,” Baier illustrates how these efforts achieve much greater conservation outcomes than litigation. This further illustrates the sharp dichotomy between mainstream conservationists, who strive to engage partners in conservation of

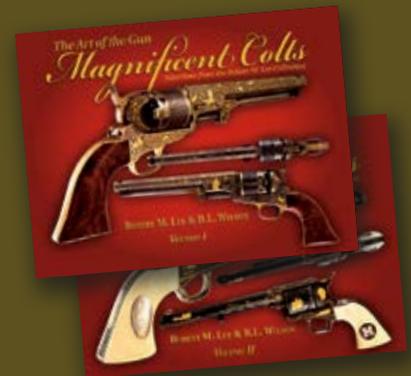
natural resources and livelihoods connected to the land, and the primary litigant groups, who want more species listed and kept on the list so that regulations prevail. The difference is upstream or proactive conservation with people being part of the solution versus downstream or reactive conservation where people are the problem.

The final two chapters of the book discuss abuses of EAJA and provide pragmatic recommendations for its reform. When I first saw this book, I was a bit intimidated by its girth, wondering how long it would take me to plod through it. Once I read the preface by Congressman John Dingle, Jr. (retired), and Baier's introductory chapter, I could hardly put the book down. Baier is a wonderful writer who can take complex legal and political subjects and weave a spellbinding story. This is a must read for serious conservationists and anyone who wishes to understand how the three branches of our government work. Baier's bottom line is that we need to reform EAJA so the professionals can do their job and we can capitalize on recent successes such as cooperative pre-listing conservation efforts for the greater sage grouse and New England cottontail.

In closing, I found a few passages within the 645 pages of this book where I did not agree with Baier's perspectives or opinions, although his objectivity and balance throughout is superb. I alluded to this in a recent conversation with Lowell, and I suspect it derives from different pathways we navigated throughout our respective careers. I commend him for this brilliant and timely work, and I look forward to further illuminating discussions on these and other conservation challenges with this intellectual giant. ■



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