



BOOK REVIEW

Inside the Equal Access to Justice Act: Environmental Litigation and the Crippling Battle over America's Lands, Endangered Species, and Critical Habitats.

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

Inside the Equal Access to Justice Act is authored by Lowell E. Baier, an attorney, political scientist, and historian whose conservation portfolio includes the J. N. "Ding" Darling Conservation Award from the National Wildlife Federation (2016), Citizen Conservationist Award from the Association of Fish and Wildlife Agencies (2013), Conservationist of the Year Award from *Outdoor Life* magazine (2010), and Conservationist of the Year Award from the National Fish and Wildlife Foundation (2008). In the book, Baier stresses 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, consequentially hindering pro-active, cooperative, conservation efforts. The book is the culmination of several years of legal research, case history analyses, and personal interviews with several key individuals from congress, conservation management agencies, and non-government organizations.

The EAJA is a relatively obscure law, so I suspect that most Americans do not know it exists, nor what its intended purpose was when it was first introduced in Congress in 1975; EAJA was signed into law in 1980. Baier traces the history of this legislation to reconstruct a 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 litigation. Baier details how the politics surrounding the 1980 Presidential election resulted in this provision getting into the law via Representative Robert Kastenmeier, Chairman of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice. Baier went directly to the source about the provision 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.

Chapter 1 outlines the history of the growth of federal regulations in the United States. Baier provides an overview of sovereign immunity, a legal doctrine that for practical purposes, states the United States government cannot be sued in its own court, and the American Rule that dictates each party in a lawsuit is responsible for paying its own attorney fees. Baier illustrates how the United States government can and has waived its sovereign immunity, and how legislation has allowed shifting of opposing attorney fees (fee shifting) to the government when it becomes the losing party in litigation under certain Acts. Baier traces the enactment of the Administrative Procedures Act as a consequence of expanded federal programs in the 20th

century and then chronicles the rise of public interest law, including environmental legislation. This section tells a powerful story about many legislative conservation achievements. I found one error in that he incorrectly refers to the Endangered Species Act of 1973 as an amendment to the 1966 Act. The 1966 Endangered Species Preservation Act, the 1969 Endangered Species Conservation Act, and the 1973 Endangered Species Act (ESA) are separate and distinct pieces of legislation, with the 2 former being eclipsed by the latter.

An introduction of federal regulations sets the stage for Chapter 2, describing the development of EAJA as a means for small businesses and veterans (i.e., stakeholders without deep pockets) to be able to contest alleged regulatory wrongdoings. The EAJA evolved from a Bill introduced in 1975 by Senator Edward Kennedy titled the Public Participation in Government Proceedings Act designed to make the government more responsive and responsible to private citizens. The economic crises of the 1970s, and increased regulation of small businesses by new federal agencies (e.g., Environmental Protection Agency, Occupational and Health Administration) prompted congress to focus and narrow the scope of what ultimately became the EAJA. Baier captivates by reconstructing the historical events, circumstances, backroom deals, and other intrigues that led to enactment.

Chapter 3 describes the implementation of EAJA and its amendment from 1981 to 1985. Chapter 4 outlines the successful application and expansion of the Act after 1985. Chapter 5 chronicles the history of the development of private conservation organizations in the United States, categorized into 3 eras: the First (1886–1936), Second (1947–1970), and Third Generation (1970–2000). Baier, through the lens of a political scientist, illustrates the very different approaches of the First and Third Generations. The First Generation includes collaborative and relationship-building organizations (e.g., Boone and Crockett Club, National Wildlife Federation), whereas the Third Generation is characterized by groups including the Center for Biological Diversity, whose approach tends toward litigation. In a section titled Anthropocentric Versus Biocentric Man, and Deep Ecology, Baier draws strict divisions between these 2 that many, if not most, wildlifers might find extreme, but he uses this to characterize the philosophical divergence at the extremes of these world-views, and illustrate why litigation, rather than collaboration, has become the tool of choice.

Chapter 6 is devoted to the Third Generation, which he terms Eco-Warriors. Baier then goes into depth in Chapter 7 to describe the crisis beset by environmental litigation, and how it has been spawned by the EAJA. He demonstrates how EAJA enables major environmental groups to litigate ESA procedural issues forcing the United States Fish and Wildlife Service (USFWS) into settlement whereby the environmental groups force the agenda, excluding other

stakeholders from the process. Baier details, with data showing the number of lawsuits and litigants over time, how the sheer volume of litigation sets the USFWS up for procedural failure, and hinders its professional experts from being able to exercise their skills. Using budget data and interviews with members of the USFWS Directorate, Baier illustrates how the litigation burden has affected on-the-ground conservation the agency could otherwise have achieved. Chapter 8 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 listing under the ESA. Also known as pre-listing conservation, Baier illustrates how these efforts achieve much greater conservation outcomes than litigation. Case studies include the black-tailed prairie dog (*Cynomys ludovicianus*), Westslope cutthroat trout (*Oncorhynchus clarki lewisi*), greater sage-grouse (*Centrocercus urophasianus*), lesser prairie chicken (*Tympanuchus pallidicinctus*), and dunes sagebrush lizard (*Sceloporus arenicolus*). Baier gives federal regulatory agencies such as the USFWS great credit for their efforts to implement cooperative conservation. Cooperative conservation is upstream or proactive conservation with people being part of the solution versus downstream or reactive conservation.

The final 2 chapters of the book discuss what Baier presents as abuses of EAJA, such as wealthy corporations being exempted from the net-worth cap, allowing them to get reimbursed for suing the government by the government;

Baier provides pragmatic recommendations for EAJA reform. Baier lists 10 legislative reform provisions, including restoring reporting so that the actual cost of EAJA to taxpayers can be accounted, and strengthening eligibility requirements to ensure that fee shifting is applied to those who truly are impecunious. The book's epilog (A New Beginning?) is a powerful statement in favor of pre-listing conservation, and an appeal to congress to implement reform.

When I first saw this book, I was a bit intimidated by its girth. Once I read the preface by Congressman John Dingle, Jr. (retired), and Baier's introductory chapter, I could hardly put the book down. Baier can navigate the reader through complex legal and political subjects and weave a spellbinding story. I found Baier's writing and objectivity superb, only disagreeing with Baier's perspectives or opinions in a few passages. *Inside the Equal Access to Justice Act* is a must read for serious conservationists and anyone who wishes to understand how the 3 branches of our government work. Baier's bottom line is that we need to reform EAJA so that the professionals can do their job and we can continue to capitalize on the recent success of cooperative pre-listing conservation efforts.

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