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Report accuses green group of ‘saturation litigation,’ serial lawsuits on public’s tab

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U.S. District Court, Denver

Staff / Colorado Public Advocate

WildEarth Guardians, an environmental group known for its aggressive court actions against public agencies in Colorado and other Western states, is drawing fire in a new report for filing

some 145 lawsuits since 2008—roughly one every week and a half—and tapping public dollars to help pay the legal bills.

The Santa Fe, N.M.-based organization touts itself on its website as “a force for nature,” but the extensive report calls WildEarth a “lawsuit-making machine” that engages in “saturation litigation” to hogtie a wide range of federal, state and local agencies. An obscure provision in federal law almost assures the group it will get reimbursed for its legal fees, which critics say lets WildEarth act as a perpetual-motion litigator.

The report, “[Monkey-Wrenching the Courts](#),” was released recently as part of a new initiative on environmental issues by the [Colorado arm of the advocacy group Americans for Prosperity](#).

Some of those bearing the brunt of WildEarth’s lawsuits characterize its actions as harassment and accuse the activist group of invoking procedural technicalities under federal law simply to hamstring defendants—a charge WildEarth denies—in pursuit of a more radical agenda than what appears in its court filings. That agenda, [according to the report](#), includes, “...evicting ranchers from public lands, stopping coal extraction ... pushing the (U.S. Environmental Protection Agency) to adopt ever more stringent and costly regulations, blocking drilling projects, fighting for the reintroduction of wolves and forcing the listing of hundreds of endangered species, sometimes in mass petitions.”

An official with WildEarth Guardians counters that if anything, industry groups sue federal agencies like the U.S. Environmental Protection Agency more often than does WildEarth; that his group is within its rights using the courts to demand accountability under environmental laws, and that WildEarth is thoughtful and cautious in choosing its legal actions.

“We make no apologies for what we do,” said Jeremy Nichols, climate and energy coordinator for WildEarth. “We’re holding the government accountable. There’s value in getting the government to respond to people.” He added, “I’m proud of our record.”

While federal bureaucracies like the U.S. Department of the Interior are the most prominent and frequent targets of the litigation detailed in the report, defendants also include the likes of rural, nonprofit, ratepayer-owned utilities and other small public entities in Colorado. WildEarth even has sued the tiny, municipally owned utility serving the eastern plains

community of Lamar as well as the high-country hamlet of Ward, population 150, near Boulder. Officials at some of those public agencies contend the legal costs, not to mention any possible court settlements, strain meager resources and ultimately fall upon local power users and taxpayers in struggling communities.



Small-town power: in the crosshairs?

“Every dollar spent on litigation has to be recovered through our rate base,” said Rick Rigel, general manager of the Arkansas River Power Authority, a state agency facing three lawsuits brought by WildEarth. The authority wholesales power to municipally owned utilities in six small communities in southeastern Colorado.

“We’re incurring significant litigation fees as a result of (the lawsuits),” Rigel said. “The public power model doesn’t have stockholders. Our funds are generated by rates.”

Rigel believes WildEarth has ulterior motives.

“They want to get coal-fired power plants shut down,” he said. His agency has been wrangling with WildEarth over allegations including that the authority’s coal-burning power plant didn’t secure the right kind of permit. Rigel says it turned out the EPA had changed its permitting rules after the power authority’s permit already had been granted, yet he said WildEarth wouldn’t back off.

Rigel said the group’s other two ongoing lawsuits against the authority are over excessive emissions by the power plant. He said his agency concedes the lapses but already has paid a quarter-million dollars in fines to the state and is working closely with state regulators on remediation. Still, he said, WildEarth won’t give up on its litigation, underscoring its real aim. After a recent negotiation session among the parties went nowhere, Rigel **told the Pueblo Chieftain**, “...it is clear that their lawsuit is intended to permanently shut the plant down regardless of whether it complies with its permit.”

WildEarth’s Nichols rejects the charge that his group’s litigation is intended to push a hidden agenda.

“People can read into our lawsuits whatever they want. Does our vision for the future include coal? No, of course not. Do we have an agenda? Yes,” Nichols said. Yet, he said, if WildEarth’s litigation against the power authority were only a pretext for that broader agenda, “we wouldn’t have a leg to stand on.”

“Litigation is an investment, and we’re making smart investments,” he said.

Nichols argued that WildEarth would be satisfied with compliance by the power authority and is not necessarily pushing for the shutdown of its power plant. However, he conceded the level of compliance his group expects—upgrading “a few types of emissions controls,” reducing mercury emissions, and “getting better monitoring in place”—could be a tall order.

“I’m not going to lie to you, it costs money. It could cost millions of dollars,” he said, adding, “If it costs money...that’s a cost of doing business.” He acknowledged that getting a not-for-profit, publicly owned state agency to absorb the cost without making ratepayers shoulder it is “trickier” than for an investor-own utility.

“It’s going to take some creative financing to make it all work,” he said. “I’m not going to beat around the bush.”

Critics charge WildEarth Guardians just doesn’t care about potential economic fallout from its litigation.

“They’re saying, ‘Let them eat cake,’ ” said Sean Paige, the Americans For Prosperity report’s Colorado Springs-based author. Paige works for the organization and is spearheading its new environmental-issues initiative called [Monkey-Wrenching America](#).

“These guys have a serious case of tunnel vision,” Paige said. “They’re obsessed with litigating their agenda, consequences be damned. Then again, maybe we only have ourselves to blame because we’re all paying them to sue us.”

According to the report, taxpayers aren’t just picking up the legal tab for their own public agencies’ attorney fees when WildEarth Guardians sues; the public often enough is footing the bill for WildEarth’s legal fees, too, when judges allow plaintiffs to recover them. That is especially likely, the report maintains, when groups like WildEarth take advantage of the federal Equal Access to Justice Act in their litigation. A provision in that law makes nonprofit

groups like WildEarth eligible for reimbursement of their legal fees in their lawsuits—regardless of their own ability to pay them.

Consequently, WildEarth collected over a quarter-million dollars in legal fees in 2009 and 2010, according to the report. While figures for 2011 aren't yet available, the report predicts, "last year and this year promise to be equally bountiful." The report concludes, groups like WildEarth, "are gaming the system to subsidize their legal activities."

That's also how some local government officials see it in Gunnison County, where WildEarth is active in blocking the expansion of the West Elk coal mine—a move that ultimately could lead to the mine's closure. Closing the mine, in turn, would cost the mountain county a significant share of its total tax revenue. One official said the practice of effectively paying activists to litigate has communities like his over a barrel.

"As long as the public at large is paying these groups every time for their expenses when they win a case, I don't see an answer," said Gunnison County Commission Chairman Phil Chamberland. "It seems like litigation is just a way of life. It's just a tool these people use to get their way and serve their agenda."

Nichols says don't blame WildEarth for the way the civil-justice system works.

"If we win, we get to recover fees," he said.

Legislation now pending in Congress would rein in the use of the Equal Access to Justice Act by groups like WildEarth Guardians. Co-sponsors of the bill include Colorado U.S. Reps. Mike Coffman, Doug Lamborn and Scott Tipton.

"The Equal Access to Justice Act should not be a cash cow for radical special-interest lawyers suing the taxpayers," Coffman said this week. "The Government Litigation Savings Act reduces the taxpayers' burden to pay for attorney's fees, increases oversight, and restores the original intent of the Equal Access to Justice Act."