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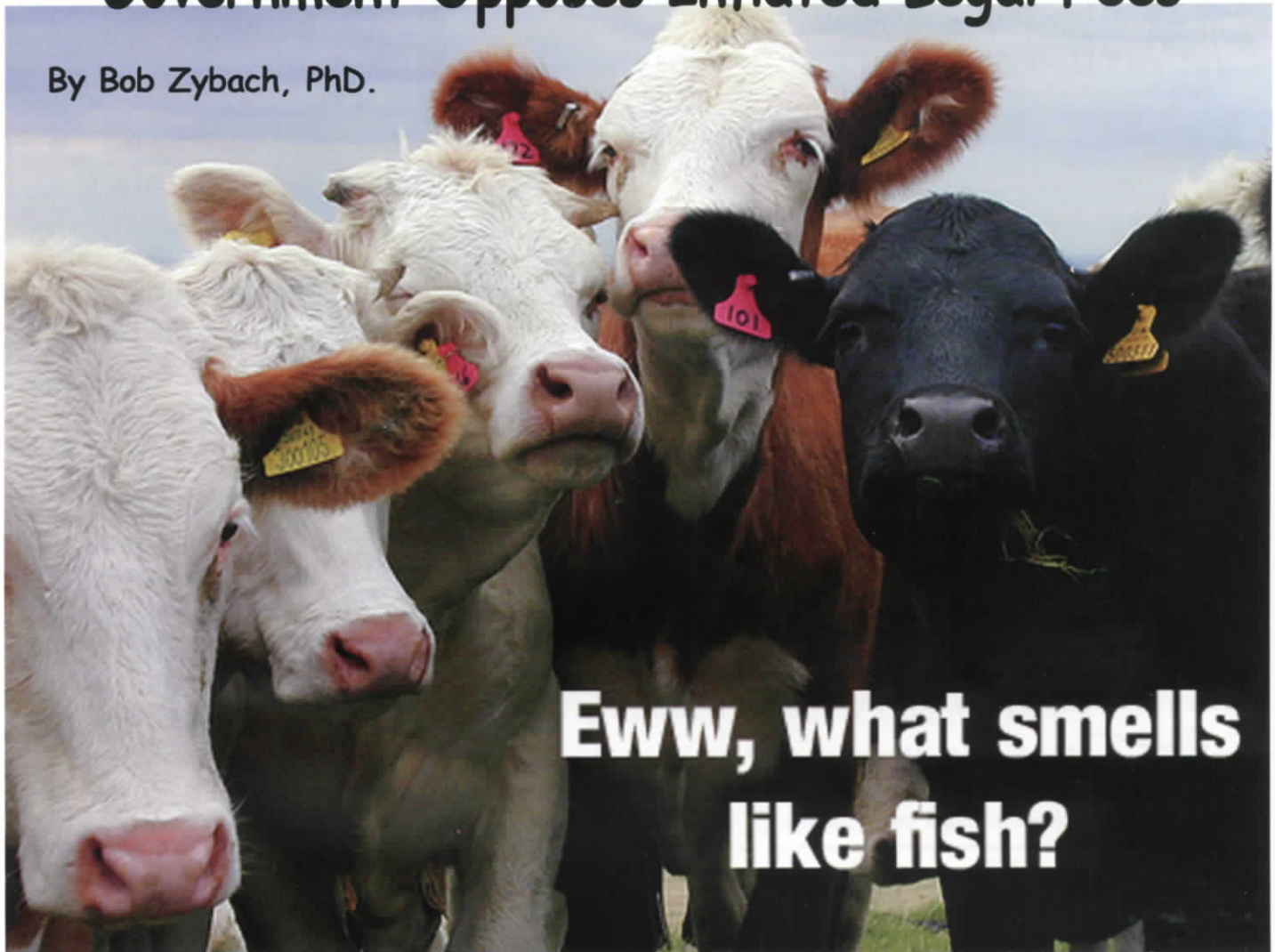


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Cows vs Fish

Government Opposes Inflated Legal Fees

By Bob Zybach, PhD.



Eww, what smells like fish?

Glory be to God for dappled things - For skies of couple-colour as a brinded cow; For rose-moles all in stipple upon trout that swim; Fresh-fire coal chestnut-falls; finches' wings; Landscape plotted and pieced - fold, fallow, and plough; And all trades, their gear and tackle and trim.

-- Gerard Manley Hopkins, 1877

This article is based on a series of posts following A New Century of Forest Planning's February 27, 2013 blog entry, "Feds oppose environmental group's request for \$1.4 million in legal fees": [HYPERLINK "http://ncfp.wordpress.com/2013/03/11/cow-vs-fish-part-3-the-science-behind-the-law/"](http://ncfp.wordpress.com/2013/03/11/cow-vs-fish-part-3-the-science-behind-the-law/) <http://ncfp.wordpress.com/2013/03/11/cow-vs-fish-part-3-the-science-behind-the-law/>

The blog posting, in turn, was based on a Febru-

ary 28, 2013 Salem Capital Press article by Mateusz Perkowski, regarding the Oregon Natural Desert Association (ONDA) challenge of cattle grazing in the Malheur National Forest, claiming the practice was harming threatened steelhead.

"The federal government is opposing an environmental group's request for nearly \$1.4 million in attorney fees stemming from a lawsuit over grazing in eastern Oregon. The request is "prodigious" and "excessive" because the environmentalists have exaggerated their victories and inflated the amount of time they spent on the lawsuit, according to the government."

By comparison, ranchers who had been involved in the litigation had already settled their claims with the government for \$120,000 in attorney fees and costs. Of greater interest: "a judge agreed that the federal gov-

ernment should have included them in the consultation process that determined how grazing affected protected species.” In other words, the actual experts in this dispute (experienced ranchers), were specifically excluded from participating in the discussion, yet were still requesting less than 10% of the legal fees being sought by the environmentalists!

Much of the resulting blog discussion focused on the disputed hours and rates by the prevailing attorneys, as indicated by the title of the post. A request to Wyoming attorney Karen Budd-Falen for more specific information in this matter resulted in being sent thirteen summary files with supporting documentation, which can be downloaded here:

HYPER-LINK "http://www.NW-MapsCo.com/Legal_Files/Cows_vs_Fish/" http://www.NWMapsCo.com/Legal_Files/Cows_vs_Fish/

The total of \$1.4 million in requested fees is summarized in file 66-1_Attach.pdf, showing hourly breakdowns of costs. Although the requested fees appear relatively modest (\$200 to \$300/hour) -- particularly when compared to the “enhanced” fees of northern California attorneys for similar actions, which can vary from \$700 to \$900/hour – Budd-Falen noted in a March 6, 2013 email:

“The legal answer is that the environmental groups are only supposed to be paid in proportion to their successful achievements in litigation. That is a completely ambiguous legal requirement. I have never seen a court or the Justice Department say that if group X prevails in 1 out of 5 causes of action, they get paid 1/5 of their fees and expenses -- it is just a negotiated number. There is no way to determine how much of that drafting and research time was spent on losing arguments versus winning arguments.”

In a related email, she also noted: “While the total payments may be “small” (at least compared to the National debt), look at the comparison between the Bush

administration and the Obama administration. For the same general number of payments made, Obama’s average payments are \$209,000 per case – compared with \$61,000 per case during the Bush years.”

My personal interest is in the purpose and scientific basis for these claims, which seem best summarized by the original plaintiff, Brent Fenty of the Oregon High Desert Museum (669_Declaration.pdf):

“... our main objective in filing these cases against



the U.S. Forest Service and National Marine Fisheries Service was to protect threatened steelhead trout and their critical stream and riparian habitat in the upper John Day River basin. This Court’s 2008 and 2009 preliminary injunction... made clear that the agencies must make steelhead protection their highest priority.”

And by the litigants’ attorney, Daniel Rohlf:

“I believe that ONDA achieved a direct and substantial benefit to the steelhead; that ONDA achieved its stated interests in obtaining federal court decisions reducing ongoing damage by livestock in key migratory, spawning and rearing habitat for threatened steelhead; and that ONDA served the public interest by waging a successful, nearly decade-long battle against two federal agencies charged with protecting the steelhead but whose management of key stream and riparian habitat throughout the Malheur National Forest had ceased to properly take into account the needs of the steelhead and the requirements of the law.”

These claims included about \$60,000 for “Expert Testimony” regarding the litigants’ claims that illegal cattle grazing was killing (“taking”) steelhead on the upper John Day River in eastern Oregon. Two scientists

for the plaintiffs were paid (or requested payment) for their Expert Testimony: \$26,800 to Forest Hydrologist Robert Beschta (662_Attach.pdf); and \$31,277 to Hydrologist Jonathan Rhodes (666-2_Attach.pdf) -- but the results of their findings did not seem to appear in the legal attachments, nor seem to be referenced by direct quotes in the text.

A cursory search of the literature only added more confusion: there appeared to be no baseline data available to determine whether upper John Day steelhead runs were becoming greater or lesser over time; statistics showed that Indian and recreational fisheries were killing thousands of fish in the river; I could find nothing regarding fish mortality related to cattle grazing; the "threatened" run was characterized as "completely wild"; surveys showed a significant portion of the runs to be hatchery-based, despite "no hatchery fish ever being released" in the John Day; etc. Of most importance was a seeming lack of documentation regarding "critical habitat" and any direct relationship to actual fish populations.

Too, it appeared the first "critical habitat" designations were made in 2005 (at least by BLM), which meant legal action on this regard must have been filed at nearly the same time as the designation was made. In other words, the initial filings seem to have nothing at all to do with actually saving steelhead populations, and everything to do with interpreting recently adopted regulatory language having to do with legal definitions of "critical habitat." The actual intent of the litigants seemed more clearly opposed to cattle grazing, and to be compensated for that opposition, rather than actually trying to save fish, as they stated.

For that reason, I attempted to locate, in order to post online and make publicly available, the Beschta and Rhodes reports, for which the \$60,000 was being requested. Thanks to the efforts of Melissa Rexius of Budd-Falen Law Offices in Wyoming, with an assist by Scott Horngren, an attorney with American Forest Resource Council in Oregon, those documents can now be found here: [HYPERLINK "http://www.NWMapsCo.com/Legal_Files/Cows_vs_Fish/Science/"](http://www.NWMapsCo.com/Legal_Files/Cows_vs_Fish/Science/) http://www.NWMapsCo.com/Legal_Files/Cows_vs_Fish/Science/

The Beschta files are based on his area of expertise, forest hydrology, and talk in terms of cattle grazing impacts on upland streams in regards to "fish habitat" but say little or nothing about fish (especially "threatened" steelhead) mortality. Instead, it is inferred that new regulations, the basis for the suit, were not being followed. The assumption seemed to be, and is stated as such, that there is a direct correlation between "habitat" and "threatened" fish survival, otherwise there would be no need for the regulations (some might call this

"circular reasoning"). Nothing about steelhead mortality being affected one way or the other by the existence of cattle in the area for the past 100+ years.

The Rhodes files (same link) were more interesting, especially file 452_Memo_re-Rhodes_20100312.pdf, which regards his qualifications as an "expert." Pages 2-3, for example, contain the claims: "... plaintiffs rely on the reports and testimony of Jonathan J. Rhodes ("Rhodes") and Christopher L. Christie ("Christie"). See, e.g., Dkt. No. 403. Over the course of this litigation, the parties have undergone extensive discovery including production of Rhodes' and Christie's notes and draft reports and have taken the depositions of both Christie and Rhodes. As a result, Intervenor has determined that neither Rhodes nor Christie is qualified to render the opinions described in their reports. It is clear from discovery that Rhodes and Christie have formed their opinions based on insufficient facts and data, unreliable methods, inadequate training and faulty reasoning. It also appears that neither Rhodes nor Christie based their written reports on the facts of this litigation; instead each obtained their data and tailored their reports at the direction of plaintiffs' attorneys."

". . . Nor is such testimony admissible as lay testimony. Much of this testimony is inadmissible because it is based on hearsay by unidentified persons not on personal knowledge, and on sheer speculation and conjecture."

At least Beschta had the good sense to let the regulators do the speculating and conjecturing for him, rather than confusing his own opinions with his actual findings! Rhodes lists his own qualifications here: file 36_Rhodes_20080331-1.pdf. Sadly, the scientists' hours and resulting charges seem just as inflated as the attorneys. Just not so many of them, nor at such high prices.

The bottom line to this discussion, as documented by referenced legal filings and sworn testimonies, is that if the plaintiffs were actually as concerned with saving fish as they say they are (and only their own statements seem to support this contention), then why aren't they going after fishermen instead of cattlemen? Or at least the wild horses and elk also grazing in the area in the upper John Day basin?

The caption at the beginning of this post is in reference to gaseous cattle that have been fed recommended fish oil supplements. Sometimes called the "smell test." Hopkins' quote is more to the point that there is plenty of room for both fish and cows -- and people -- on this planet. Litigation such as this is not needed for the reasons being stated, and those "reasons" (saving fish) are no more "scientific" than the opinions of anyone else.

