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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PENDLETON DIVISION

OREGON NATURAL DESERT ASS’N
et al.,

Plaintiffs,

v.

TOM TIDWELL, et al.,

Defendants,

v.

HARLEY & SHERRIE ALLEN, et al.,

Defendants-Intervenors.

Case No. 2:07-cv-1871-HA
[Related Case No. 3:03-cv-381-HA]
[Related Case No. 2:08-cv-151-HA]

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS’ GLOBAL MOTION
FOR ATTORNEY FEES AND COSTS**

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SUMMARY OF COURT DECISIONS¹

| CITATION | SHORT CITE | DOCKET NO. |
|--|-------------------------|----------------------|
| <i>Or. Natural Desert Ass'n v. U.S. Forest Serv.</i> , No. 3:03-cv381-HA, 2004 WL 1592606 (D. Or. July 15, 2004) | <i>ONDA v. USFS I</i> | 03-381 Dkt # 85 |
| <i>Or. Natural Desert Ass'n v. U.S. Forest Serv.</i> , No. 06-35689, 2006 WL 2711934 (9th Cir. Sept. 21, 2006) | <i>ONDA v. USFS II</i> | n/a |
| <i>Or. Natural Desert Ass'n v. Kimbell</i> , No. 2:07-cv-1871-SU, 2008 WL 4186913 (D. Or. Sept. 5, 2008) | <i>Kimbell I</i> | 07-1871 Dkt # 129 |
| <i>Or. Natural Desert Ass'n v. Kimbell</i> , 593 F. Supp. 2d 1217 (D. Or. 2009) | <i>Kimbell II</i> | 07-1871 Dkt # 147 |
| <i>Or. Natural Desert Ass'n v. Kimbell</i> , No. 2:07-cv-1871-HA, 2009 WL 1663037 (D. Or. June 15, 2009) | <i>Kimbell III</i> | 07-1871 Dkt # 301 |
| <i>Or. Natural Desert Ass'n v. Tidwell</i> , 716 F. Supp. 2d 982 (D. Or. 2010) | <i>Tidwell I</i> | 07-1871 Dkt # 497 |
| <i>Or. Natural Desert Ass'n v. Tidwell</i> , No. 2:07-cv-1871, 2010 WL 5464269 (D. Or. Dec. 30, 2010) | <i>Tidwell II</i> | 07-1871 Dkt # 521 |
| <i>Or. Natural Desert Ass'n v. Tidwell</i> , No. 2:07-cv-1871, Order Modifying Injunction (D. Or. Mar. 16, 2011) | <i>Tidwell III</i> | 07-1871 Dkt # 570 |
| <i>Or. Natural Desert Ass'n v. U.S. Forest Serv.</i> , No. 11-35331, (9th Cir. Aug. 28, 2012) | <i>ONDA v. USFS III</i> | n/a |

¹ For the convenience of the Court, ONDA provides this chronological summary of the Court's major decisions cited in the brief that follows, along with the short citation and location in the docket.

INTRODUCTION

Plaintiffs Oregon Natural Desert Association, Center for Biological Diversity, and Western Watersheds Project (collectively, “ONDA”) respectfully move the Court for an award of attorney fees, costs, and other expenses pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–43, and the Equal Access to Justice Act (“EAJA”), 28 U.S.C. §§ 2412 *et seq.* Now that the Court has issued a judgment (Dkt # 662) in ONDA’s favor, preceded by an order adopting the parties’ stipulation not to appeal the judgment (Dkt # 660), ONDA hereby moves the Court for a global award, per to this Court’s orders (Dkt ## 650, 652, 654, 663).²

As ONDA explained in the briefs filed in support of its Motion for Interim Attorney Fees and Costs (Dkt ## 611, 636), the plaintiffs have achieved significant success in this case challenging the U.S. Forest Service’s and National Marine Fisheries Service’s (“NMFS”) decisions related to management of livestock grazing in steelhead habitat on the Malheur National Forest. ONDA prevailed on summary judgment on claims under the ESA and the National Forest Management Act (“NFMA”), and won three injunctions, resulting in unprecedented protection for native steelhead in the John Day River basin.

ONDA seeks \$1,368,243.31 in attorney fees, costs, and expenses under the ESA and EAJA. This represents the \$884,623.26 that ONDA sought, through its interim petition as revised (*see* ONDA Interim Fees Reply (Dkt # 636), at 20) for the period through and including June 2009, plus an additional \$483,620.05 which ONDA now seeks for the period July 2009 to present (not including time in 2010–11 spent on preparing the interim petition and that was included in the interim request). The total requested does not double-count any of the fees and costs included in the interim petition. To avoid duplicative briefing, ONDA respectfully refers

² All docket citations (“Dkt”) are to the 07-1871 docket, unless otherwise specified.

the Court to the relevant background discussion, standards of review, and arguments set out in its opening interim fees brief, *see* Dkt # 611, at 2–5, 7–20, and responses to the agencies’ complaints with respect to entitlement and reasonableness, set out in ONDA’s interim fees reply brief. *See* Dkt # 636, at 5–20.

ARGUMENT

I. ONDA IS ENTITLED TO AN AWARD OF FEES, COSTS, AND OTHER EXPENSES.

ONDA is entitled to an award of attorney fees, costs, and other expenses pursuant to both the Endangered Species Act citizen suit provision and EAJA. This is because there are two categories of claims before the Court in the consolidated cases. The first category involves claims invoking the ESA citizen suit provision, while the second involves claims actionable pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706. Appendix I, *infra*, provides an updated chart summarizing the two categories of claims in ONDA’s Third Amended Complaint (Dkt # 341) in No. 07-1871-HA. Both of the claims in ONDA’s Fifth Amended Complaint (03-381 Dkt # 230) in No. 03-381-HA arose under the APA. Because ONDA has prevailed on claims arising under both categories, ONDA is entitled to an award under both the ESA and EAJA. As ONDA discussed in its prior briefing, the Department of Justice has stated that in situations like this, where attorney fee liability arises under both ESA citizen suit claims and under APA-EAJA claims, EAJA should be “subordinated” to the ESA fee-shifting provision. *See* ONDA Interim Fees Reply at 2.

A. ONDA is Entitled to a Fee Award Pursuant to the Endangered Species Act.

ONDA alleged that the Forest Service and/or NMFS violated the Endangered Species Act in a number of different ways, bringing four of its ESA claims (fourth, eighth, ninth, tenth) pursuant to the ESA citizen suit provision. The Court rejected the agencies’ theory that the Forest

Service had complied with the ESA by blindly proceeding with proposed grazing under the 2007–2011 BiOp:

Although the NMFS was not required to analyze the veracity of the representations made by the Forest Service, the Forest Service was not entitled to rely upon the resultingly flawed BiOp. The Forest Service may not make empty promises, secure a no jeopardy BiOp, and then go forward with the proposed action—absent the monitoring and enforcement promised—simply because a no jeopardy BiOp has issued. . . . The buck must stop somewhere.

Tidwell I, 716 F. Supp. 2d at 1004.

Here, in addition to obtaining preliminary injunctions in 2008 and 2009, ONDA also achieved success under the Endangered Species Act by winning on the merits and then obtaining a permanent injunction restricting livestock grazing in steelhead critical habitat. On June 4, 2010, the Court held that the Forest Service in its 2007 and 2008 grazing authorizations failed to insure against jeopardy to steelhead and adverse modification to steelhead critical habitat in violation of ESA § 7(a)(2). *Tidwell I*, 716 F. Supp. 2d at 1004. The Court also held that the Forest Service violated ESA § 9 by authorizing grazing in those years that resulted in take of steelhead, based on bank alteration exceedances above the Incidental Take Statement (“ITS”) limits for lawful take. *Id.* at 1005–06. In addition, the Court held that the Forest Service violated the ESA by failing to reinitiate consultation as required based on the 2007 and 2008 ITS exceedances, and violated NFMA by failing to monitor for and analyze compliance with the Forest Plan grazing strategy and habitat viability. *Id.* at 1006–08.

In late 2010, the parties filed briefs on remedy. Dkt ## 510, 515–17. ONDA proposed a permanent injunction on allotments where bank alteration exceeded ITS limits during 2007 and 2008. The other parties proposed no alternative remedy. *See Tidwell II*, 2010 WL 5464269, at *2. After grazing in 2010, the Forest Service identified seven pastures on six allotments where

grazing exceeded the ITS 10% bank damage limit. The Forest Service attached those monitoring results to its response brief on remedy. Dkt # 516.

On December 30, 2010, the Court entered a permanent injunction prohibiting livestock grazing on seven allotments where it identified that the bank alteration limits in the ITS for lawful take were exceeded during 2007 or 2008. *Tidwell II*, 2010 WL 5464269, at *7–*8.³ The Court imposed the permanent injunction until the Forest Service and NMFS completed a new, lawful biological opinion (“BiOp”), which the Court anticipated would issue prior to grazing in 2011. *Id.* at *7. The permanent injunction also continued the protective measures under which the Forest Service had managed these allotments during 2009 and 2010. *Id.* at *7–*8.

All parties moved for reconsideration. On March 16, 2011, the Court modified the permanent injunction, tailoring the injunction to bar grazing during 2011 on 25 pastures on five allotments—Mt. Vernon/John Day/Beech Creek, Murderers Creek, Lower Middle Fork, Slide Creek, and Upper Middle Fork. *Tidwell III*, at 9–10. These 25 off-limit pastures comprised about 148,000 acres of public land. Appeals to the Ninth Circuit of the modified permanent injunction by the agencies and permittees ultimately were dismissed. *See* Second Rohlf Decl. (filed herewith) ¶¶ 8–9; *see also ONDA v. USFS III*, No. 11-35331 (9th Cir. Aug. 28, 2012).

ONDA also succeeded in forcing reinitiation of formal consultation by both the Forest Service and NMFS, in requiring public disclosure and comment on the draft 2012–2016 BiOp, and in the resulting new BiOp containing unprecedented and stronger protections for listed steelhead. *See id.* ¶¶ 4, 14–15; *see also* Fenty Decl. (filed herewith) ¶¶ 2–5 (describing plaintiffs as having “achieved everything we set out to do when we filed this legal action”).

³ One of the allotments the Court enjoined—Hamilton/King—did not have a bank damage standard exceedance in 2010 and was removed from the injunction. *Tidwell III* at 9.

ONDA thus is entitled to an award of fees under the Endangered Species Act because it has achieved “some degree of success on the merits.” *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983); *see also LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1160 (9th Cir. 2000) (fees are “appropriate” under ESA where party “succeed[s] on any significant issue in the litigation which achieves some of the benefit it sought in bringing suit”) (internal citations, quotations, and brackets omitted). Because ONDA “obtained a substantial and direct benefit” that “had the effect of giving relief to the [plaintiff] and protecting the [listed species,]” it has prevailed for purposes of the ESA fee-shifting provision. *Ctr. for Biol. Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 805 (9th Cir. 2009). *See* Second Rohlff Decl. ¶¶ 3–16; Fenty Decl. ¶¶ 3–5.

The Court also should award ONDA attorney fees under the Endangered Species Act because ONDA “has substantially contributed to the goals of the statute.” *Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 229 F. Supp. 2d 993, 998 (N.D. Cal. 2002), *aff’d*, No. 02-17140, 2004 WL 1043118 (9th Cir. May 7, 2004) (quoting *Carson-Truckee Water Conservancy Dist. v. Sec’y of the Interior*, 748 F.2d 523, 525 (9th Cir. 1984)); *see* Second Rohlff Decl. ¶¶ 12–13, 16; Fenty Decl. ¶¶ 3–5. ONDA therefore is entitled to an award under the ESA.

B. ONDA is Entitled to an Award Pursuant to EAJA.

ONDA also prevailed on its Endangered Species Act claims (fourth and tenth) against the Forest Service brought pursuant to the APA⁴ and on its NFMA claims (first and second) in its Fifth Amended Complaint (03-381 Dkt # 230) in No. 3:03-cv-381-HA, and prevailed in the Ninth Circuit by defeating the agency’s jurisdictional challenge to the initial iteration of the

⁴ That is, ONDA prevailed on the Third Amended Complaint’s Fourth and Tenth Claims to the extent they were based on a challenge to the decisions the Forest Service made in 2007, 2008 and 2009. *See Kimbell II*, 593 F. Supp. 2d at 1219 (explaining which claims arose under APA versus ESA); *see also Tidwell I*, 716 F. Supp. 2d at 1006–08 (granting summary judgment). ONDA also prevailed on its NFMA claim on summary judgment. *Tidwell I*, 716 F. Supp. 2d at 1008.

consolidated cases. *ONDA v. USFS II*, 2006 WL 2711934, at *1. A party that prevails under a claim that arises under the APA may seek attorney fees, costs, and other expenses pursuant to EAJA. 28 U.S.C. § 2412(a)(1).

ONDA is eligible for an award of attorney fees, costs, and other expenses under EAJA because the plaintiffs are (1) “prevailing parties” (2) that incurred costs of litigation against the federal government, and (3) meet applicable size or net worth criteria. 28 U.S.C. § 2412(d)(1)(A) & (d)(2)(B); *see also* ONDA Interim Fees Memo. at 11–12. Again, ONDA prevailed by obtaining two preliminary injunctions, winning on the merits, and obtaining a permanent injunction, as described above. ONDA also satisfies the second and third criteria for eligibility. *See id.* at 12.

“Once a party’s eligibility has been proven, an award of fees under EAJA is mandatory unless the government’s position is substantially justified or special circumstances exist that make an award unjust.” *Love v. Reilly*, 924 F.2d 1492, 1495 (9th Cir. 1991) (citing 28 U.S.C. § 2412(d)(1)(A)). An agency bears the burden of proving that its position was substantially justified, *Or. Natural Res. Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995), and that any special circumstances exist that might make an award unjust. *Love*, 924 F.2d at 1495. Here, the Forest Service was not substantially justified in making repeated, annual decisions to authorize and manage grazing in steelhead critical habitat in violation of the law and cause irreparable injury to listed fish and their habitat. *See* ONDA Interim Fees Memo. at 13–14. The agencies cannot prove substantial justification under EAJA, and they concede that ESA § 11(g) contains no such defense. *See* ONDA Interim Fees Reply at 6. ONDA is unaware of any special circumstance that would make an award unjust in this case. *See* ONDA Interim Fees Memo. at 15.

II. REASONABLENESS OF FEES REQUESTED.

Because the Forest Service's position was not substantially justified as to the claims brought pursuant to the judicial review provisions of the APA, and because there is no analogous defense to an award of fees under the Endangered Species Act, the remaining issues in the context of this motion are ONDA's attorneys' reasonable rates and time, and ONDA's costs and expenses. In its earlier briefing, ONDA justified the reasonableness of its attorneys' 2001 through 2012 hourly rates. *See* ONDA Interim Fees Memo. at 15–17; ONDA Interim Fees Reply at 17–18. Federal defendants did not object to the rates in briefing the interim petition. Mr. Frost and Mr. Winter once again attest to ONDA's attorneys' distinctive knowledge and skills, that those skills were needed to prevail in this case, and that the rates charged by ONDA's counsel are within the range of reasonable hourly rates awarded to counsel of similar skill and experience in the Portland legal market. *See* Second Frost Decl. (filed herewith) ¶¶ 1–6; Second Winter Decl. (filed herewith) ¶¶ 2–7. The rates requested by ONDA are reasonable.

ONDA also explained in its earlier briefing why the amount of time it requested for its work up through June 2009 was reasonable. *See* ONDA Interim Fees Memo at 15–20; ONDA Interim Fees Reply at 6–17. This Court advised the agencies that “most of their objections to the pending [interim] fee request are not well taken” and that “new argument regarding excessive billing such as block billing and clerical tasks will not be considered with respect to those fees for which plaintiffs have already sought compensation.” Dkt ## 643, 650.

ONDA now also justifies the time it spent from July 2009 to present including time spent obtaining summary judgment on the merits, obtaining permanent injunctive relief, successfully defending against the agencies' and permittees' Ninth Circuit appeals, securing a no-appeal stipulation from the agencies and permittees, and finally securing a final judgment in its favor.

See Third Lacy Decl., Exh. F; Becker Decl., Exh. B; Second Ruether Decl., Exh. B (ONDA’s attorneys’ detailed, contemporaneously recorded time sheets, all filed herewith, showing their work for the period July 2009 to present—but excluding fee recovery time already documented through the interim petition papers).⁵ Those hours are presumptively reasonable. *Gates v. Gomez*, 60 F.3d 525, 534 (9th Cir. 1995).

In successfully accomplishing these tasks, ONDA’s attorneys expended reasonable hours engaged in normal and justified tasks in order to carefully prosecute a lawsuit against two government agencies that, with the considerable assistance of counsel for the intervenors, vigorously defended the agencies’ actions. See Second Frost Decl. ¶¶ 4–5; Second Winter Decl. ¶¶ 5–6. ONDA’s attorneys also omitted potentially non-compensable time and either eliminated or reduced clerical or administrative entries, as they did with their time sought through the interim petition. See Third Lacy Decl. ¶ 4; Becker Decl. ¶ 3; Second Ruether ¶ 3; Second Frost Decl. ¶¶ 4–5 & Second Winter Decl. ¶¶ 5–6 (ONDA’s attorneys exercised proper billing judgment and there was no duplication of effort amongst attorneys); see also *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (requiring good faith omissions).

III. REASONABLENESS OF COSTS AND OTHER EXPENSES REQUESTED.

The Endangered Species Act authorizes an “award [of the] costs of litigation (including reasonable attorney and expert witness fees).” 16 U.S.C. § 1540(g)(4). EAJA authorizes recovery of “costs” enumerated at 28 U.S.C. § 1920 (including copies and printing), *id.* § 2412(a)(1), and also “other expenses.” *Id.* § 2412(d)(1)(A). “Other expenses” include “expenses normally billed

⁵ ONDA’s attorneys also include with their requested hours their time spent preparing this global fee petition and associated materials, which is compensable. See *Thompson v. Gomez*, 45 F.3d 1365, 1368 (9th Cir. 1995).

to a client,” such as postage and attorney travel expenses. *Int’l Woodworkers, Local 3-98 v. Donovan*, 792 F.2d 762, 767 (9th Cir. 1986).

For the period July 1, 2009 to present, ONDA seeks \$1,570.20 for court fees, copying, postage and similar expenses, \$16,804.00 for the services of experts Dr. Robert Beschta and Jonathan Rhodes, \$3,250.00 for the services of consultants Christopher Christie and Bill Marlett, and \$1,776.00 for the services of two student law clerks. *See* Lacy Decl. ¶ 8 & Exh. G (summarizing and detailing these expenses). Dr. Beschta and hydrologist Jonathan Rhodes provided important expert declarations on the geomorphic, vegetative, and hydrologic response of the affected stream systems to the challenged livestock grazing. Mr. Christie provided important baseline field data describing ecological conditions and Forest Service compliance with grazing standards and was deposed by the defendants. Mr. Marlett, an experienced consultant with multiple decades of experience in tracking public land management in the John Day River basin, provided limited but important advice concerning potential settlement discussions and key political-legal strategic decisions following the case’s remand from the Ninth Circuit. Finally, as noted in the interim petition briefing, ONDA continued to save attorney hours by employing student law clerks. In short, ONDA’s requested litigation expenses are reasonable. *See* Second Frost Decl. ¶ 6; Second Winter Decl. ¶ 7 (each finding these requested costs reasonable and of the type routinely charged to clients); Second Rohlf Decl. (Dkt # 623) ¶¶ 18–20 (requested costs appropriate under ESA citizen suit provision).

CONCLUSION

For the foregoing reasons, ONDA respectfully requests the Court to enter an Order granting ONDA’s motion and awarding \$1,368,243.31, pursuant to the ESA, 16 U.S.C. § 1540(g)(4), and EAJA, 28 U.S.C. § 2412(d).

DATED this 20th day of December 2012.

Respectfully submitted,

s/ Peter M. Lacy

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Oregon Natural Desert Association

Of Attorneys for Plaintiffs

APPENDIX I

Claims in No. 2:07-cv-1871-HA

| First Category – Claims Arising Under ESA Citizen Suit Provision | Second Category – Claims Arising Under APA |
|---|---|
| | First Claim: NMFS violated ESA by arbitrary and capricious conclusion regarding destruction or adverse modification of critical habitat in 2007–2011 BiOp. |
| | Second Claim: NFMS violated ESA by arbitrary and capricious conclusion regarding jeopardy in 2007–2011 BiOp. |
| | Third Claim: NFMS violated ESA by arbitrary and capricious conclusions regarding destruction or adverse modification of critical habitat and jeopardy in steelhead concurrence letter. |
| Fourth Claim: USFS violated ESA § 7 duty to insure authorized grazing does not jeopardize continued existence of steelhead or result in destruction or adverse modification of critical habitat. | Fourth Claim: USFS violated ESA in 2007 grazing decisions. |
| | Fifth Claim: NMFS violated ESA by issuing Incidental Take Statement in 2007–2011 BiOp that failed to include appropriate terms and conditions. |
| | Sixth Claim: USFS violated NFMA in 2007 grazing decisions by failing to comply with relevant Forest Plan standards. |
| | Seventh Claim: USFS violated NFMA in 2007 grazing decisions by failing to comply with monitoring requirements for Management Indicator Species. |
| Eighth Claim: USFS violated ESA § 9 by allowing grazing that resulted in take of steelhead in violation of Incidental Take Statement in 2007–2011 BiOp. | |
| Ninth Claim: USFS violated ESA § 7 duty to insure against jeopardy and adverse modification of critical habitat by failure to reinitiate consultation. | |
| Tenth Claim: USFS violated ESA §7 duty to insure authorized grazing does not jeopardize continued existence of steelhead or result in destruction or adverse modification of critical habitat. | Tenth Claim: USFS violated ESA in 2008 and 2009 grazing decisions. |

Claims in No. 3:03-cv-381-HA

| First Category – Claims Arising Under ESA Citizen Suit Provision | Second Category – Claims Arising Under APA |
|---|---|
| | First Claim: USFS violated NFMA because the agency failed to comply with Malheur LRMP standards, including PACFISH. |
| | Second Claim: USFS violated NFMA because the agency failed to comply with NFMA’s regulations and the Malheur LRMP requirements to monitor population trends of Management Indicator Species. |