UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SOUTH YUBA RIVER CITIZENS LEAGUE and FRIENDS OF THE RIVER,

NO. CIV. S-06-2845 LKK/JFM

Plaintiffs,

v. O R D E R

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendants.

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Pending before the court is a motion for attorneys fees. ECF No. 407. Plaintiffs seek fees and costs for their work challenging a Biological Opinion issued by the National Marine Fisheries Service related to two dams on the South Yuba River operated by the Army Corps of Engineers. Plaintiffs seek fees under the Equal Access to Justice Act[1] and under the Endangered Species' Act. For

[1] As discussed below, the defendants concede that the fee request in this case is governed by the Endangered Species Act and

the reasons stated below, plaintiffs' motion is granted in part and denied in part.

I. Procedural Background

Plaintiffs filed the operative Sixth Amended Complaint on June 17, 2008. ECF No. 150. The complaint alleged eleven claims for relief. Of those, Claims 1 and 2, arising under the Administrative Procedures Act ("APA"), had previously been dismissed as moot by this court. See Sixth Amended Complaint 28:23-29:6. The remaining claims included five separate Freedom of Information Act claims (Claims 5, 7, 8, 10, and 11); Claim 6 against defendant Yuba County Water Agency, which was bifurcated from the instant action, ECF No. 165; Claim 3 for violation of the APA by issuing an inadequate BiOp; Claim 4 violation of the Endangered Species Act ("ESA") for "take" of listed fish species; and Claim 9 for violation of the APA for failing to promulgate protective regulations for Green Sturgeon.

The court entered summary judgment in favor of defendants on the Claim 8, a FOIA claim. ECF No. 151. The remaining four FOIA claims were dismissed pursuant to stipulated settlement approved by the court. ECF No. 170. The parties reached a settlement agreement as to attorney's fees and costs on all FOIA claims. ECF No. 182. In the settlement agreement, NMFS agreed to pay counsel for SYRCL $89,236 in attorney's fees and costs for the FOIA claims. The agreement provides that the payment fully satisfied any claim

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not the EAJA.

for FOIA attorneys fees by plaintiffs in thie case. Id.

Claim 9 was dismissed as moot after the NMFS promulgated a rule specifying the protection owed to Green Sturgeon. ECF No. 316.

Thus, the only claims adjudicated on the merits were Claims 3 and 4. With respect to Claim 3, plaintiffs successfully challenged the conclusions reached in a Biological Opinion issued by National Marine Fishery Service. In July 2010, this court held that government had acted arbitrarily and capriciously in issuing the Biological Opinion. ECF No. 316. In April 2011 the matter was remanded to the National Marine Fishery Service to prepare a new Biological Opinion consistent with the court's July Order by December 12, 2011. ECF No. 398. In July 2011, this court issued a further remedial order, adopting some of plaintiffs' requested interim injunctive measures. ECF No. 402.

With respect to Claim 4, the court granted summary judgment to defendants on the question of whether defendants were causing "take" of listed species without the protection of a valid Incidental Take Statement. See ECF No. 316 at 71. After further briefing, the court dismissed the remainder of Claim 4 as prudentially moot. ECF No. 343. Plaintiffs filed a motion for reconsideration of that order, which this court denied on February 13, 2012. ECF No. 462.

Plaintiffs' initial fee motion sought approximately $2.33 million in attorneys fees, $40,094 in expert costs, and $11,752.03 in other costs. Defendants sought to reduce the total award by 90%. The court ordered defendant to file an additional brief containing

objections to individual entries in plaintiff's billing records. Defendants did so by filing a brief objecting to $1.1 million in specific line items, but continuing to request a 90% reduction. Plaintiffs have filed a response brief.

II. Standard for a Motion for Fees under the Endangered Species Act.

The ESA's fee-shifting provision is a waiver of sovereign immunity. As such, it "must be strictly construed in the United State's favor." Ardestani v. INS, 502 U.S. 129, 137 (1991). It is the plaintiff's burden to show both that the hourly fee requested is reasonable, and that the number of hours spent is reasonable. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983).

Because the district court's "familiarity with the case allows it to distinguish reasonable from excessive fee requests," Moreno v. City of Sacramento, 534 F.3d 1106, 1116 (9th Cir. 2008), district courts have "a great deal of discretion in determining the reasonableness of the fee." In re Smith, 586 F.3d 1169, 1173-1174 (9th Cir. 2009). A district court judge may "impose a small reduction, no greater than 10 percent--a 'haircut'--based on its exercise of discretion and without a more specific explanation. Moreno, 534 F.3d at 1112.

In cases such as this one "where a voluminous fee application is filed, in exercising its billing judgment the district court is not required to set forth an hour-by-hour analysis of the fee request. It has been recognized that in such cases, the district court has the authority to make across-the-board percentage cuts

in the number of hours claimed as a practical means of trimming the fat from a fee application. However, irrespective of its obvious utility, the percentage or, 'meat-axe approach,' nonetheless has been criticized when employed in cases where the fee applications at issue involved substantial amounts of money and where district courts failed adequately to articulate their reasons for selecting specific percentage deductions." In re Smith, 586 at 1173-1174 (internal quotation marks and citation omitted).

III. Analysis

A. Whether Plaintiffs' request is governed by the ESA or EAJA.

Plaintiffs' fee request is pursuant to the Endangered Species Act citizen suit provision, 16 U.S.C. § 1540(g)(4), or in the alternative to the Equal Access to Justice Act. Under the EAJA, plantiffs would be entitled to fees upon a showing that (1) the party seeking fees is the prevailing party; (2) the government has not met its burden of showing that its positions were substantially justified or that special circumstances make an award unjust; and (3) the requested fees and costs are reasonable. United States v. Milner, 583 F.3d 1174, 1196 (9th Cir. 2009) (citing Perez-Arellano v. Smith, 279 F.3d 791, 793 (9th Cir. 2002)). The EAJA caps hourly rates at $150, with a cost of living adjustment. Under the ESA's citizen suit provision, a court may award fees when the plaintiffs have achieved some degree of success on the merits, and contributed substantially to the goals of the ESA. See, e.g., Home Builders Ass'n v. United States Fish & Wildlife Serv., 2007 U.S. Dist. LEXIS 94339 (E.D. Cal. 2007)(Shub). There is no statutory cap on fees

under the ESA. Instead, fees are calculated according to the lodestar.

In this case, plaintiffs argue, and defendants apparently concede, that plaintiffs' fee request is governed by the Endangered Species Act, rather than the EAJA. According to defendants, "while the [APA] claims against NMFS BiOP, standing alone, would be governed by the. . . EAJA, . . . the relief sought against the Corps is governed by the ESA citizen suit provision. . . Thus, for this opposition, Federal Defendants analyze this fee claim under the ESA citizen suit fee-shifting provisions." Defs.' Opp'n 3:29-27.

Under the Endangered Species' Act, a district court "may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." 16 U.S.C. § 1540(g)(4). Since "The attorney's fees provisions of the ESA and the Civil Rights Act of 1964 likewise have a common purpose," courts "apply to the ESA the civil rights standard for awarding fees to prevailing parties." Marbled Murrelet v. Babbitt, 182 F.3d 1091, 1095 (9th Cir.1999)(cert. denied 528 U.S. 1115 (2000)). Thus, an award of attorney's fees is appropriate when the plaintiffs have achieved some degree of success on the merits. Ruckelshaus v. Sierra Club, 463 U.S. 680, 684 (1983); Marbled Murrelet, 182 F. 3d at 1095 ("the Supreme Court has read a prevailing party requirement into the ESA").

Additionally, some district courts have required the plaintiff

to have contributed substantially to the goals of the ESA. See e.g., Home Builders Ass'n v. United States Fish & Wildlife Serv., 2007 U.S. Dist. LEXIS 94339 (E.D. Cal. 2007)(Shub) *affirmed by* Home Builders Ass'n of N. Cal. v. United States Fish & Wildlife Serv., 616 F.3d 983 (9th Cir. 2010). The "substantial contribution" requirement was set forth in Carson-Truckee Water Conservancy Dist. v. Sec'y of the Interior, 748 F.2d 523, 524 (9th Cir. 1984), which was later overruled on other grounds by Marbled Murrelet 182 F.3d 1091 at 1094-95 (9th Cir. 1999). The Ninth Circuit has not decided whether the Carson-Tucker substantial contribution requirement has been abandoned. See e.g., Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 103 Fed. Appx. 627, 629 (9th Cir. 2004)("We need not resolve this doctrinal dispute, because [the] motion for attorneys fees satisfied both standards."). In recent cases, the Ninth Circuit has omitted the "substantial contribution" requirement from its attorneys' fees analysis. In a case filed under the Clean Water Act,[2] the Ninth Circuit characterized the proper attorneys fees analysis to be applied by the district courts: ""First, the court must find that the fee applicant is a 'prevailing or substantially prevailing party.' Second, it must find that an award of attorney fees is 'appropriate.' An award of attorney fees may not be appropriate where 'special circumstances' are found." Resurrection Bay Conservation Alliance v. City of

[2] The Supreme Court has held that the attorneys fees provisions of the Clean Water Act and the ESA are identical and should be interpreted accordingly. Ruckelshaus v. Sierra Club, 463 U.S. 680, 691 (1983).

Seward, 640 F.3d 1087, 1091 (9th Cir. 2011)(internal citations omitted). Defendants concede that plaintiffs have met the requirements for fees under the ESA because plaintiffs have "achieved some success in this case. . . Thus, they are eligible for fees." Defs.' Opp'n 5:21-25. The remaining dispute, therefore, is over the amount of attorneys fees sought by plaintiffs.

Additionally, the Ninth Circuit has held that plaintiffs may recover under the "catalyst theory" in ESA cases. Ass'n of Cal. Water Agencies v. Evans, 386 F.3d 879, 885 (9th Cir. 2004). The catalyst theory allows attorneys fees to be awarded to a "plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief." Id. at 884.

Here, plaintiffs have prevailed on the merits of at least some of their claims, and achieved a remedial order requiring a new Biological Opinion and interim remedial measures to protect listed species during the remand period. The court therefore concludes that plaintiffs are entitled to fees under the Endangered Species Act.

B. The Fee Amount

Having established that plaintiffs meet the requirement to obtain some fees under the Endangered Species Act, the court now considers the amount of fees and costs that are reasonable. "The usual approach to evaluating the reasonableness of an attorney fee award requires application of the lodestar method and Kerr

factors." Resurrection Bay Conservation Alliance v. City of Seward, 640 F.3d 1087, 1095 (9th Cir. 2011). The lodestar calculation involves multiplying the number of hours reasonably expended on the litigation times a reasonably hourly rate. The so-called Kerr factors are:

> (1) the time and labor required,[3] (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent,[4] (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975).

i. Reasonableness of the Hours Expended

Plaintiffs claim to have spent approximately 5,800 hours of attorney time and 97 hours of paralegal time on the litigation in this case. Sproul Decl. ¶ 67, ECF No. 407-2.[5] Plaintiffs are entitled to fees spent on claims on which they prevailed, as well

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[3] This factor has been deemed duplicative of the "reasonable hours" component of the lodestar calculation.

[4] This factor has been deemed irrelevant by the Supreme Court. See City of Burlington v. Dague, 112 S.Ct. 2638 (1992).

[5] Plaintiffs do not seek recovery of attorneys fees for their FOIA claims, since the parties reached a settlement on those claims, including attorneys fees. Additionally, plaintiffs do not seek fees for time spend litigating Claim 6, which was bifurcated from the case at bar.

as on claims "related" to the prevailing claims. A district court may award fees for time spent on unsuccessful claims when a the claims for relief involve a "common core of facts or are based on related legal theories." Hensley v. Eckerhart, 461 U.S. 424, 434 (U.S. 1983). In such cases, the court "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." Id. Plaintiffs assert and defendants agree that "Plaintiff's claims and requested relief all arose out of the same factual basis–the challenged BiOp." Defs.' Opp'n 3. Looking at the result obtained by plaintiffs, the court agrees that Claims 1, 2, 3, 4, and 9 are related within the Hensley meaning, and plaintiffs may recover for work performed on these claims. As noted, plaintiffs do not seek to recover for time spent on their FOIA claims, nor on the claim against YWCA, which was bifurcated from this case.

With respect to Claim 9, plaintiffs are also entitled to attorneys fees under the catalyst theory. Claim 9 sought to compel the defendants to promulgate regulations to protect green sturgeon, as required by § 4(d) of the Endangered Species Act. The court ultimately dismissed this claim as moot, after the regulations were promulgated.

The court disagrees with plaintiffs, however, that all 5,800 hours billed for these claims are reasonable. While the "court is not required to set forth an hour-by-hour analysis of the fee

request," In re Smith, 586 at 1174, the court has identified some areas in which plaintiffs' submitted hours are unreasonable, warranting a reduction beyond the 10% "haircut." The court finds that plaintiffs' hours should be reduced by 20%.

Plaintiff has billed some time spent traveling at the full hourly rate. The court finds that it is reasonable to reduce hours billed for travel time by half. See e.g. Watkins v. Fordice, 7 F.3d 453, 459 (5th Cir. 1993)(affirming a reduction by half of the hourly rate for time billed for travel, where the Voting Rights Act provided for "reasonable fees" to be awarded to the prevailing party.). Plaintiffs' submitted timesheets do not separate travel time from time spent on another task. For example, on March 17, 2009, Orion billed 16 hours to "Attend and defend deposition of B. Cavallo; travel to and from Sacramento for same." The court cannot discern which portion of the 16 hours was spent traveling and therefore subject to a 50% reduction.

Defendants argue that they should not be made to pay attorneys fees for clerical tasks performed by attorneys. Courts may deem clerical costs to constitute overhead, and already included in the hourly rate. See, e.g., Martinez v. Thrifty Payless, Inc., No. 02-cv-745, ECF No. 68; FREVACH v. MULTNOMAH COUNTY, 2001 U.S. Dist. LEXIS 22255 (D. Or. 2001). Defendants have identified what they claim are 654 hours of clerical work billed at attorney rates, for a total of $219,276. However, upon review of the exhibits to defendant's supplemental brief, it appears to the court that some of the entries that defendant characterizes as

clerical time include time for which plaintiff could reasonably bill, though the court cannot discern precisely how much time that is.

Defendants object to time plaintiffs billed for phone calls and conferences with each other. Defendants contend that: "no reasonable client would pay for the numerous occasions in which three or more attorneys each billed time to discuss things like 'strategy,' or each other's legal research." Opp'n 9. Defendants assert that 964 such hours are billed, for a total of $425,975. Defendants claim that time spent in conference with multiple attorneys can be billed to one attorney only. Key Bank Nat'l Ass'n v. Van Noy, 598 F. Supp. 2d 1160, 1166 (D. Or. 2009), cited in defendants' opposition, is distinguished because in that case, the court concluded that one attorney could have performed all of the work on the case, and therefore that billing for multiple attorneys to conference about the case was unreasonable. Here, the court has made no such conclusion, and defendants have not argued for one. Although defendants have not identified specific conferences for which it was unreasonable to have multiple attorneys present, the court finds that plaintiffs' practice of billing for each attorney present at a conference supports the overall 20% fee reduction.

ii. Reasonableness of the Hourly Rates

a. The relevant legal community

Plaintiffs contend that they are entitled to hourly rates based on prevailing rates in San Francisco. "Generally, the relevant community is the forum in which the district court sits."

Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997). Rates from outside the forum may be used if local counsel was unwilling or unable to do the work because they "lack the degree of experience, expertise, or specialization required to handle properly the case." Gates v. Deukmejian, 987 F.2d 1392, 1405 (9th Cir. 1992). See also L.H. v. Schwarzenegger, 645 F. Supp. 2d 888 (E.D. Cal. 2009).

In this case, plaintiffs South Yuba Citizens League sent letters to seven law firms to solicit representation. Rainey Decl. 2, ECF No. 407-19. Environmental Associates, located in San Francisco, was the only organization willing to take the case on a fee-recovery basis. Id. Defendants argue that San Francisco rates may only apply if local counsel is unwilling *because* they lack the degree of experience, expertise or specialization, Opp'n. 19-20, and not unwilling because of the fee arrangement. The court finds this reading of Gates to be untenable, and contrary to the purpose of the fee-shift provision of the Endangered Species' Act. Under defendants' reading, it would be difficult for any plaintiffs who lack their own resources to retain counsel, especially in secondary markets where the availability of law firms willing to take cases on a contingency basis is limited. Moreover, Barjon emphasizes that in order to get out-of-forum rates, plaintiffs may show "proof of either unwillingness *or* inability due to lack of experience, expertise, or specialization." 132 F.3d at 501 (emphasis in the original). The court concludes that the lack of experience, expertise, or specialization requirement applies only to the inquiry of whether local firms are able to perform the work, and

not whether they are willing.

Based on the Rainey declaration, the court concludes that no Sacramento counsel were available to represent plaintiffs in this case, and that San Francisco rates apply.

Plaintiff's stated San Francisco rates are based on the Laffey Matrix, and range from $585 per hour for an attorney with 25 years of experience to $315 per hour for an attorney with four years of experience. Plaintiffs requested rates are supported by declarations from counsel that compare the rates with those of comparable attorneys in San Francisco. Plaintiffs have also submitted a declaration by Richard Pearl, an expert in court-awarded attorneys fees. See Exs. 1 and 2 to Sproul Decl., ECF No 407-3 and 407-4.

Plaintiffs have not, however, accounted for the fact that this litigation has spanned several years. The rates given by plaintiffs are based on the current experience level of each of the attorneys, and not on the experience level of the attorney at the time the work was performed. The court finds that this discrepancy contributes to the reasonableness of an overall 20% reduction in the fee amount.

IV. Conclusion

For the reasons stated herein, the court ORDERS as follows:

[1] Plaintiffs' motion, ECF No. 407 is GRANTED in part and DENIED in part.

[2] Plaintiffs are entitled to recover fees and costs in the amount of $1,875,951.20 from the federal

defendants. This reflects a 20% reduction in the loadstar amount requested by plaintiffs.

IT IS SO ORDERED.

DATED: March 26, 2012.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT