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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIANS FOR ALTERNATIVES)	
TO TOXICS, a non-profit)	2:10-cv-01477-GEB-CMK
corporation; WILDERNESS WATCH, a)	
non-profit corporation; THE)	
FRIENDS OF SILVER KING CREEK, a)	<u>ORDER</u> *
California non-profit)	
corporation; LAUREL AMES, an)	
individual and ANN MCCAMPBELL,)	
an individual,)	
)	
Plaintiffs,)	
)	
v.)	
)	
UNITED STATES FISH AND WILDLIFE)	
SERVICE; ALEXANDRA PITTS, in her)	
official capacity; UNITED STATES)	
FOREST SERVICE; JEANNE M.)	
HIGGINS, in her official)	
capacity,)	
)	
Defendants.)	
)	

Plaintiff Californians for Alternatives to Toxins ("CATT") moves for \$86,299.06 in attorneys' fees and costs under the Equal Access to Justice Act ("EAJA"), prescribed in 28 U.S.C. § 2412 *et seq.* ECF No. 74. A memorandum and order was filed on September 6, 2011, in which Plaintiff was granted summary judgment on its Wilderness Act of 1964 ("Wilderness Act") claim, and Defendant was granted summary judgment on Plaintiff's remaining claims. ECF No. 65. Judgment was entered on

* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 September 7, 2011. ECF No. 67 Defendants the United States Forest
2 Service ("USFS") and the United States Fish and Wildlife Service
3 ("USFSW") oppose the motion. The Court only reaches the substantial
4 justification issue involved in the motion, and for the reasons stated
5 below, Plaintiff's motion is DENIED.

6 FACTUAL BACKGROUND

7 The facts involved with this case are stated in Californians
8 for Alternatives to Toxics v. U.S. Fish & Wildlife Service ("CATT"),
9 814 F.Supp.2d 992 (E.D. Cal. Sept. 06, 2011), the earlier filed order
10 on the parties' cross-motions for summary judgment. Therefore, the
11 court recounts only those facts necessary to provide sufficient
12 context for the court's analysis.

13 Through this lawsuit, Plaintiff sought to set aside the
14 Defendants' decision authorizing the paiute cuthroat trout restoration
15 project (the "Project") in Silver King Creek. Defendants instituted
16 the Project in order to restore the paiute cutthroat trout ("PCT") to
17 its historic range in Silver King Creek, by eradicating non-native
18 trout with the pesticide rotenone and restocking the treated area with
19 pure PCT. Defendants selected an auger, powered by a gasoline-powered
20 generator, to distribute the potassium that would neutralize the
21 toxicity of the rotenone downstream.

22 Defendants assessed three alternative plans while developing
23 the project: the No Action Alternative ("Alternative One"); the
24 Proposed Action Alternative ("Alternative Two"); and the Combined
25 Physical Removal Alternative ("Alternative Three"). Alternative One
26 would have continued previous management of then existing PCT
27 populations in Silver King Creek, without introducing new populations
28 or efforts to eradicate non-native trout; Defendants concluded that

1 this alternative would not result in direct environmental benefits.
2 Alternative Two analyzed the Project at issue in this case, described
3 in the preceding paragraph. The analysis acknowledged that this
4 alternative could result in loss of individual macroinvertebrate
5 species, potentially including rare or as yet unidentified species
6 endemic to Silver King Creek. Alternative Three proposed using
7 non-chemical techniques (a combination of electrofishing, gill
8 netting, seining, and other physical methods) to remove non-native
9 trout from the Project area. Defendants estimated the electrofishing
10 component would take over ten years to complete, and the
11 electrofishing batteries would be recharged with small
12 gasoline-powered generators.

13 Defendants ultimately selected Alternative Two as "the most
14 effective method to remove non-native trout within the PCT historic
15 habitat." CATT, 814 F.Supp.2d at 1000. Defendants concluded that,
16 under the Wilderness Act, "the short term negative effects to the
17 'natural' wilderness character through introduction of chemical
18 pesticide were balanced by the improved long term natural conditions
19 of wilderness character through restoration of a native species." Id.
20 at 1021. Defendants state they enacted the Project in order to remove
21 the PCT from the Endangered Species Act's threatened species list.

22 PROCEDURAL HISTORY

23 Plaintiffs challenged the Project under the National
24 Environmental Policy Act ("NEPA"), the Wilderness Act, the Endangered
25 Species Act ("ESA"), the Federal Water Pollution Control Act ("Clean
26 Water Act"), the California Environmental Quality Act ("CEQA") and the
27 Administrative Procedures Act ("APA"), seeking both declaratory and
28 injunctive relief.

1 Plaintiffs filed a motion for summary judgment on April 3,
2 2011, in which they sought partial summary judgment in their favor on
3 their NEPA and Wilderness Act claims. On May 5, 2011, USFWS and USFS
4 filed an opposition and cross-moved for summary judgment on
5 Plaintiffs' other ESA, Clean Water Act and APA claims. Oral argument
6 was heard on the motions on August 11, 2011. Subsequently, the court
7 granted Defendants summary judgment on all Plaintiffs' claims except
8 for Plaintiffs' Wilderness Act claim; and granted Plaintiffs summary
9 judgment on that claim.

10 Defendants appealed the decision to the Ninth Circuit, ECF
11 No. 69, but later dismissed the appeal voluntarily. ECF No. 72.

12 STANDARD

13 Under the EAJA, a party litigating against the United States
14 may recover attorneys' fees where: "(1) the plaintiff is the
15 prevailing party; (2) the government has not met its burden of showing
16 that its positions were substantially justified or that special
17 circumstances make an award unjust; and (3) the requested attorney's
18 fees and costs are reasonable." Perez-Arellano v. Smith, 279 F.3d
19 791, 793 (9th Cir. 2002); 28 U.S.C. § 2412(d)(1)(A). The decision to
20 award attorneys' fees under the EAJA is within the sound discretion of
21 the district court. Pierce v. Underwood, 487 U.S. 553, 563 (1988).

22 DISCUSSION

23 As a prevailing party, Plaintiffs are entitled to attorneys'
24 fees "unless the court finds that the position of the United States
25 was substantially justified or that special circumstances make an
26 award unjust." 28 U.S.C. § 2412(d)(1)(A). The government's position
27 is substantially justified if it "ha[d] a reasonable basis both in law
28 and fact." Gutierrez v. Barnhart, 274 F.3d 1255, 1259 (9th Cir.

1 2001). Substantially justified means “‘justified in substance or in
2 the main’—that is, justified to a degree that could satisfy a
3 reasonable person.” Pierce, 487 U.S. at 565. Thus, the standard is
4 one of objective reasonableness.

5 In undertaking this reasonableness calculus, the court
6 considers: “first, whether the government was substantially justified
7 in taking its original action; and second, whether the government was
8 substantially justified in defending the validity of the action in
9 court.” Gutierrez, 274 F.3d at 1258 (citation omitted).

10 Plaintiff contends that Defendants had no reasonable basis
11 for implementing the project because, as the court held, the project
12 “violated the wilderness act by failing to (1) balance competing
13 values, (2) determine the most important value, and (3) justify the
14 decision to protect that value. CATT, 814 F.Supp.2d at 1019.
15 Essentially, the court held that, while the decision to reinstate the
16 PCT to its historical range would contribute to the overall wilderness
17 character, the manner in which Defendants chose to implement the
18 project—use of a gasoline-powered Auger—failed to take into account
19 the effect the project would have on other native species,
20 specifically invertebrates, such as stone flies.

21 Defendants argue they were substantially justified in both
22 implementing the project and in defending it in court. Defendants
23 point to the fact that, of the assorted claims Plaintiffs asserted,
24 under numerous statutes, Plaintiffs only prevailed on an obscure
25 portion of their Wilderness Act claim—that defendants did not make
26 the requisite showing that the use of the motorized vehicle was
27 “necessary to meet minimum requirements for the purpose of [the Act]
28

1 (including measures required in emergencies involving the health and
2 safety of persons within the area)."

3 16 U.S.C. § 1133(c).

4 Defendants were substantially justified in both implementing
5 the project and defending it in court. Although the court ultimately
6 ruled that implementation of the Project gave rise to a technical
7 violation of the Wilderness Act, it also found Plaintiffs' other
8 arguments unavailing.

9 For example, the court concluded that, contrary to
10 Plaintiffs' contention, "the USFS's decision here is persuasive
11 in showing that restoration of the PCT to its native habitat is
12 contained in the conservation goal of the Wilderness Act, in
13 accordance with the Mead standard." CATT, 814 F.Supp.2d at 1015.
14 The court also found unpersuasive Plaintiffs' "conten[tion] that
15 the Project's benefits to recreational fishing 'elevate
16 recreational activity over the long-term preservation of the
17 wilderness character of the land,' and render it entirely
18 contrary to the Act." Id. at 1016.

19 Ultimately, the court found that Defendants violated
20 the Wilderness Act since they failed to demonstrate why the
21 extent of the project was necessary, even though "the USFS
22 adequately reasoned that motorized equipment was necessary to
23 achieve conservation of PCT." Id. at 1018. Defendants opined
24 that the extent of the project was necessary to ensure that
25 restoration of the PCT was completed expeditiously. Although
26 Defendants endured an adverse ruling, it does not necessarily
27 follow that Defendants were not substantially justified. Indeed,
28 the court recognized that "the Wilderness Act requires a delicate

1 balancing between Congress' desire to maintain lands untouched by
2 humans and Congress' recognition that such an idealistic view is
3 subject to practical limitations." Id. at 1017 (quoting
4 Wilderness Watch v. U.S. Fish and Wildlife Service, 629 F.3d
5 1024, 1033 (9th Cir. 2010)). Defendants opined that the
6 practical nature of the selected alternative—the relative speed
7 at which the project could be completed—supported its validity.
8 Notwithstanding the court's disagreement with this opinion,
9 reasonable minds could disagree with how the statute should have
10 been interpreted in the situation. Therefore, Defendants'
11 administrative decision to select the project alternative they
12 opined to be the most practical in achieving their goal of
13 restoring the PCT was objectively reasonable, and thus, their
14 decision substantially justified.

15 In sum, the court finds that Defendants' decision
16 "ha[d] a reasonable basis both in law and fact." Gutierrez, 274
17 F.3d at 1259. First, Defendants were justified in defending the
18 action in court because: (1) as the court held, Defendants' goal
19 of reinstating the PCT to its historical position was valid under
20 the Wilderness Act; (2) Defendants correctly found that the
21 project was necessary; and (3) reasonable minds could disagree as
22 to whether the *extent* of the project was necessary. Second, the
23 government was justified in taking its original action because
24 the Project was a legitimate and expeditious means of restoring
25 PCT to its historical range. Therefore, Plaintiff's motion for
26 attorney's fees is denied on the grounds that Defendants'
27 implementation of the project and subsequent legal defense of the
28 same was substantially justified.

1 CONCLUSION

2 Based on the foregoing, Plaintiff's motion for attorneys'
3 fees is DENIED.

4 Dated: May 8, 2012

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7 GARLAND E. BURRELL, JR.
8 United States District Judge
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