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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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12 CITIZENS FOR BETTER FORESTRY, et al.,

13 Plaintiffs,

14 v.

15 U.S. DEPARTMENT OF AGRICULTURE, et
16 al.,

17 Defendants.
18 _____/

No. 08-01927 CW

ORDER GRANTING IN
PART PLAINTIFFS'
MOTIONS FOR
ATTORNEYS' FEES
AND COSTS
(Docket Nos. 88
and 119)

19 Plaintiffs Citizens for Better Forestry, et al. (collectively,
20 Citizens) and Plaintiffs Defenders of Wildlife, et al.
21 (collectively, Defenders) move separately for attorneys' fees,
22 costs and other expenses. Defendants United States Department of
23 Agriculture, et al. (collectively, USDA) oppose the motions. The
24 motions were taken under submission on the papers. Having
25 considered the papers submitted by the parties, the Court GRANTS in
26 part Citizens' and Defenders' motions.

27 BACKGROUND

28 In this consolidated action, Citizens and Defenders alleged

1 that the USDA violated the National Environmental Policy Act (NEPA)
2 and the Endangered Species Act (ESA) when it promulgated its April,
3 2008 revisions to the National Forest Management Act (NFMA) plan
4 development rule (2008 Rule).¹ See generally National Forest
5 System Land Management Planning, 73 Fed. Reg. 21,468 (Apr. 21,
6 2008). In its environmental impact statement (EIS) and biological
7 assessment (BA), the USDA concluded that the 2008 Rule would not
8 have a direct or indirect impact on the environment or on
9 threatened or endangered species. Plaintiffs alleged that the EIS
10 and BA were deficient because they simply repeated erroneous
11 findings similar to those the USDA had made concerning the 2005
12 revisions to the plan development rule.

13 The Court granted Plaintiffs' motion for summary judgment and
14 denied the USDA's cross-motion for the same. The Court determined
15 that Plaintiffs had standing to assert their claims and that the
16 recent Supreme Court decision in Summers v. Earth Island Institute,
17 129 S. Ct. 1142 (2009), did not require a contrary result. The
18 Court then concluded that the USDA violated NEPA because it failed
19 to consider the environmental effects of implementing the 2008
20 Rule. The USDA's argument that, because of its programmatic
21 nature, the 2008 Rule would have no effect on the environment was
22 unavailing because it had been rejected by the courts in Citizens
23 for Better Forestry v. United States Department of Agriculture
24 (Citizens I), 341 F.3d 961 (9th Cir. 2003), and Citizens for Better

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26 ¹ Citizens and Defenders filed their complaints on April 11,
27 2008 and May 6, 2008 respectively. The Court consolidated
28 Plaintiffs' action on August 27, 2008.

1 Forestry v. United States Department of Agriculture (Citizens II),
2 481 F. Supp. 2d 1059 (N.D. Cal. 2007). The Court also held that
3 the USDA violated the ESA's consultation requirement. The Court
4 vacated the 2008 Rule, enjoined the USDA from implementing it and
5 remanded it to the USDA for further proceedings. The USDA did not
6 appeal the Court's decision.

7 Citizens seeks an award of \$187,376.90 for attorneys' fees,
8 costs and other expenses. Defenders requests \$281,746.28 for the
9 same.

10 DISCUSSION

11 I. Entitlement to Attorneys' Fees

12 Plaintiffs assert that they are entitled to attorneys' fees
13 for their NEPA claim under the Equal Access to Justice Act (EAJA).
14 For their ESA claim, Plaintiffs seek fees under the citizen suit
15 provision of that statute.

16 A. EAJA

17 A party that prevails against the federal government under
18 NEPA may seek attorneys' fees under the EAJA. See Wilderness Soc.
19 v. Babbitt, 5 F.3d 383, 385 (9th Cir. 1993). The EAJA provides
20 that a court shall award attorneys' fees to an eligible party that
21 prevails in a civil suit against the United States, unless the
22 government's position "was substantially justified or . . . special
23 circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A);
24 see also Love v. Reilly, 924 F.2d 1492, 1494 (9th Cir. 1991). The
25 USDA does not dispute that Plaintiffs have met their burden to
26 demonstrate that they are prevailing parties eligible to recover
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1 fees under the EAJA.² However, the agency contends that its
2 position was substantially justified and, as a result, fee awards
3 under the EAJA are unwarranted.

4 "The government bears the burden of demonstrating substantial
5 justification." Gonzales v. Free Speech Coal., 408 F.3d 613, 618
6 (9th Cir. 2005). "The test for whether the government is
7 substantially justified is one of 'reasonableness.'" Id. at 618
8 (quoting League of Women Voters of Cal. v. FCC, 798 F.2d 1255, 1257
9 (9th Cir. 1986)). The government's position "'must have a
10 reasonable basis both in law and in fact.'" United States v.
11 \$100,348.00 in U.S. Currency, 354 F.3d 1110, 1124 (9th Cir. 2004)
12 (citing United States v. 2659 Roundhill Drive, 283 F.3d 1146, 1151
13 (9th Cir. 2002)). A court considers whether the government was
14 "substantially justified in taking its original action and in
15 defending the validity of the action in court." \$100,348.00, 354
16 F.3d at 1124; see also 28 U.S.C. § 2412(d)(1)(A)(2)(D) (defining
17 "position of the United States" to include "the action or failure
18 to act by the agency upon which the civil action is based"). "The
19 inquiry into the nature of the underlying government action will by
20 definition concern only the merits of that action. The inquiry
21 into the government's position at trial will encompass the first

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23 ² In a footnote, the USDA argues that Defenders' fee award
24 should be reduced because its attorneys also represented the Sierra
25 Club, which is not eligible to recover fees under the EAJA. The
26 USDA offers no authority requiring such a reduction, nor does it
27 show that the Sierra Club contributed significantly to attorneys'
fees and expenses. Further, Mr. Orr states that this case would
have been brought even if the Sierra Club did not participate, and
that its participation did not materially contribute to Plaintiffs'
success on the merits. Orr 2d Decl. ¶ 3. Thus, the Sierra Club's
ineligibility has no bearing on Defenders' fee award.

1 inquiry to the extent that the government chooses to defend the
2 merits of the challenged action." Kali v. Bowen, 854 F.2d 329, 332
3 (9th Cir. 1988).

4 The government's position must be "'justified to a degree that
5 could satisfy a reasonable person.'" Gonzales, 408 F.3d at 618
6 (quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988)). "Put
7 another way, substantially justified means there is a dispute over
8 which 'reasonable minds could differ.'" Gonzales, 408 F.3d at 618.

9 The USDA does not establish that its action or subsequent
10 defense thereof was substantially justified. The 2008 Rule, among
11 other things, eliminated a requirement concerning the viability of
12 existing species within a plan area. Despite this change, the USDA
13 insisted in the challenged EIS that the 2008 Rule would have no
14 effect on the environment because it was only programmatic in
15 nature and merely set out a process for developing and revising
16 land resource management plans. However, as noted above, the
17 courts in Citizens I and Citizens II rejected this argument,
18 holding that such changes to the planning rule may have an effect
19 on the environment. Because the EIS did not go any further and
20 failed to analyze the environmental impacts of implementing the
21 2008 Rule, as required by NEPA, the EIS was insufficient. It was
22 not reasonable for the USDA to base its EIS on a rejected legal
23 theory and then default on its statutory obligation to evaluate the
24 2008 Rule's effects on the environment. Similarly, it was not
25 reasonable for the USDA to defend this action by asserting the same
26 legal argument rejected by the Citizens I and Citizens II courts.
27 Notably, the USDA offers little in defense of its failure to comply
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1 with NEPA.

2 Instead, the USDA argues that Summers made this case "novel
3 and difficult," providing "objective indicia of the reasonableness"
4 of its position. Opp'n to Citizens' Mot. at 6-7. Although Summers
5 raised a question as to whether Plaintiffs had standing, it did not
6 shed light on whether the USDA's rulemaking complied with NEPA, let
7 alone offer any indication that the USDA's action was reasonable.
8 As noted above, the reasonableness inquiry is directed at the
9 merits of the government action precipitating the lawsuit and the
10 subsequent defense thereof. The analysis of a party's standing to
11 bring claims is separate from the merits of the claims themselves.
12 See Farrakhan v. Gregoire, 590 F.3d 989, 1001 (9th Cir. 2010).

13 The cases cited by the USDA do not support its position. In
14 most of these cases, novel legal questions were raised concerning
15 the merits of the government's actions. See, e.g., Dep't of Health
16 Svcs. v. Sec'y of Health & Human Svcs., 823 F.2d 323, 328 (9th Cir.
17 1987) (concluding fees were inappropriate because intervening Ninth
18 Circuit decision affected the government's case); Edwards v.
19 McMahon, 834 F.2d 796, 802-03 (9th Cir. 1987) (affirming denial of
20 fees when the government acted pursuant to its interpretation of a
21 statute, which was a "matter of first impression"). In
22 \$100,348.00, a case in which the Ninth Circuit affirmed the
23 district court's finding of substantial justification, the
24 government prevailed on every issue raised, except on that
25 concerning the plaintiff's Eighth Amendment standing, which raised
26 a "novel and close question of law." 354 F.3d at 1124. Also, the
27 plaintiff conceded that the government's action, which precipitated
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1 the lawsuit, was substantially justified. Id. \$100,348.00 is
2 therefore distinguishable from this case; Plaintiffs here prevailed
3 on every issue and they do not concede that the USDA's conduct was
4 substantially justified. As explained above, the new legal issue
5 raised by Summers did not go to the merits of their claims.

6 The USDA does not satisfy its burden to demonstrate that its
7 position was substantially justified. Because Plaintiffs are
8 eligible prevailing parties, they are entitled to attorneys' fees
9 under the EAJA.

10 B. ESA

11 Under the citizen suit provision of the ESA, a court "may
12 award costs of litigation (including reasonable attorney and expert
13 witness fees) to any party, whenever the court determines such
14 award is appropriate." 16 U.S.C. § 1540(g)(4). "This language
15 'was meant to expand the class of parties eligible for fee awards
16 from prevailing parties to partially prevailing parties -- parties
17 achieving some success, even if not major success.'" Ass'n of Cal.
18 Water Agencies v. Evans, 386 F.3d 879, 884 (9th Cir. 2004) (quoting
19 Ruckelshaus v. Sierra Club, 463 U.S. 680, 688 (1983)) (emphasis in
20 original).

21 The USDA acknowledges that Plaintiffs prevailed on their ESA
22 claim. Accordingly, they are entitled to attorneys' fees under the
23 ESA.

24 II. Reasonableness of Fees Requested

25 The USDA argues that Plaintiffs seek compensation for
26 excessive hourly rates and unreasonable numbers of hours. Below,
27 Plaintiffs' fee requests are summarized.

Attorney	Law Sch. Grad. Yr.	Claimed Billable Rate ³	Hours Claimed	Total Fees
Peter M. K. Frost (Citizens)	1990	\$450 (2008) \$475 (2009) \$172.24 (fee motion)	85 (2008) 127.7 (2009) 50 (fee motion) TOTAL: 262.7	\$107,519.50
Marc D. Fink (Citizens)	1995	\$400 (2008) \$425 (2009) \$172.24 (fee motion)	58.5 (2008) 68.6 (2009) 5.8 (fee motion) TOTAL: 132.9	\$53,553.99
Matt Kenna (Citizens)	1992	\$450	51.5	\$23,175.00
Trent W. Orr (Defenders)	1977	\$625 (2008) \$650 (2009) \$172.24 (fee motion)	202.9 (2008) 165.6 (2009) 93.7 (fee motion) TOTAL: 462.2	\$250,591.39
Sierra B. Weaver (Defenders)	2001	\$350 (2008) \$375 (2009) \$172.24 (fee motion)	26.8 (2008) 45.7 (2009) 8.7 (fee motion) TOTAL: 81.2	\$28,015.99

A. Hourly Rates in Excess of EAJA Base Rate

The USDA argues that Plaintiffs' NEPA claim does not warrant the award of hourly rates in excess of the maximum set by the EAJA. Even if enhanced rates are justified, the USDA asserts that they should nevertheless be reduced.

Under the EAJA, "attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved,

³ Plaintiffs seek compensation for differing billing rates, which vary based on whether the work addressed the merits or the current fee motions. With regard to merits work, Plaintiffs seek varied rates based on the year the work was completed.

1 justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). To reflect
2 changes in the cost of living, the Ninth Circuit has set the EAJA
3 maximum rate at \$172.24 for 2009 and \$172.85 for 2008. Statutory
4 Maximum Rates Under the Equal Access to Justice Act,
5 http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039 (last
6 visited June 10, 2010).

7 To show that a rate above the statutory maximum is warranted,
8 plaintiffs must satisfy three requirements: (1) the attorney for
9 whom the enhanced rate is sought "must possess distinctive
10 knowledge and skills developed through a practice specialty;"
11 (2) "those distinctive skills must be needed in the litigation;"
12 and (3) "those skills must not be available elsewhere at the
13 statutory rate." Love, 924 F.2d at 1496. "Environmental
14 litigation is an identifiable practice specialty that requires
15 distinctive knowledge." Id. The USDA does not dispute that the
16 attorneys in this case fulfill the first prong.

17 Plaintiffs demonstrate that their attorneys' expertise in
18 environmental law was required in this litigation. In the
19 environmental context, Plaintiffs needed to demonstrate a
20 procedural injury caused by the USDA's rulemaking. As noted above,
21 their standing was called into question by Summers, which the USDA
22 described as a "novel and difficult" issue. Opp'n to Citizens'
23 Mot. at 7. Summers and Citizens I, on which the Court's decision
24 rested, addressed standing in the environmental context, and
25 Plaintiffs were called upon to reconcile the two. Nevertheless,
26 the USDA contends that the attorneys' expertise was not required
27 because "knowledge and skill relating to jurisdictional issues are
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1 considered . . . 'general lawyerly knowledge and ability useful in
2 all litigation'" Opp'n to Citizens' Mot. at 10 (quoting
3 Pierce, 487 U.S. at 572). Although this principle may be true in
4 the abstract, it does not apply here. The USDA cannot argue, on
5 the one hand, that the standing question in this case was novel and
6 then later assert that the same issue only required a "basic
7 understanding of constitutional law." Opp'n to Citizens' Mot. at
8 10.

9 Plaintiffs also demonstrate that their NEPA claim required
10 their attorneys' environmental expertise. Their challenge to the
11 2008 Rule required an understanding of the agency's prior attempts
12 to revise the plan development rule, the potential environmental
13 effects that would arise from the USDA's revisions, the management
14 of the National Forest System and the congressional intent
15 underlying the NFMA. The USDA contends that the legal questions
16 raised by Plaintiffs' claims "turned on a philosophical
17 interpretation about the nature of the 2008 Rule's effects"
18 Opp'n to Citizens' Mot. at 11. Plaintiffs' showing at summary
19 judgment demonstrates that this case entailed more than just a
20 "philosophical" dispute. Accordingly, Plaintiffs justify the need
21 for their attorneys' specialized skills in environmental law.

22 Finally, Plaintiffs provide sufficient evidence that they
23 could not have retained attorneys with the requisite expertise at
24 the statutory rate. See, e.g., Anderson 2d Decl. ¶ 2; Bowers Decl.
25 ¶ 2; Fidel 2d Decl. ¶ 2; Graham Decl. ¶ 2; Greacen Decl. ¶ 2. The
26 USDA does not offer any evidence to rebut Plaintiffs' showing.
27 Nevertheless, the USDA asserts that Plaintiffs' declarations are
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1 insufficient because they do not detail their efforts to obtain
2 counsel at the base rate. However, the USDA does not cite any
3 authority requiring such a showing. The USDA then points to other
4 attorneys of similar experience who may have been available at
5 hourly rates below those charged by Plaintiffs' counsel. Although
6 this may be relevant to the reasonableness of the rates charged by
7 Plaintiffs' attorneys, it does not, on its own, demonstrate that
8 Plaintiffs could have obtained counsel at the EAJA base rate.
9 Indeed, these other attorneys' hourly rates exceeded the statutory
10 maximum, which supports Plaintiffs' position that qualified
11 attorneys were not available at the EAJA base rate.

12 Accordingly, for their NEPA claim, Plaintiffs are entitled to
13 recover attorneys' fees in excess of the EAJA statutory limit.

14 B. Reasonableness of Hourly Rates for Work on Plaintiffs'
15 Claims

16 Although Plaintiffs satisfy their burden to recover for hourly
17 rates above the EAJA maximum, they must nevertheless demonstrate
18 the reasonableness of the hourly rates charged. See, e.g.,
19 Nadarajah v. Holder, 569 F.3d 906, 910, 916 (9th Cir. 2009)
20 (addressing reasonableness of hourly rates for EAJA); 16 U.S.C.
21 § 1540(g)(4) (providing that fee awards under the ESA must be
22 reasonable). To do so, they must prove that the requested rates
23 are "'in line with those rates prevailing in the community for
24 similar services by lawyers of reasonably comparable skill,
25 experience and reputation.'" Nadarajah, 569 F.3d at 916 (quoting
26 Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984)) (editing marks
27 omitted). A party opposing a fee application has the burden to
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1 present rebuttal evidence that challenges the assertions of fact
2 and reasonableness made by the prevailing party. Nadarajah, 569
3 F.3d at 918 (citing Camacho v. Bridgeport Fin., Inc., 523 F.3d 973,
4 980 (9th Cir. 2008)).

5 With respect to all attorneys in this action, the USDA argues
6 that a flat hourly rate should apply to work on the merits
7 completed in 2008 and 2009. As indicated above, Plaintiffs seek
8 compensation for a \$25 increase in the 2008 hourly rate for work
9 completed in 2009.⁴ The USDA cites the Ninth Circuit's schedule of
10 maximum EAJA rates, in which work completed in 2009 is compensated
11 at an hourly rate marginally less than that for 2008. Indeed,
12 between 2008 and 2009, the consumer price index for all urban
13 consumers (CPI-U), which courts employ to calculate cost of living
14 increases for hourly rates, declined 0.4 percent. U.S. Dep't of
15 Labor, Bureau of Labor Statistics, Consumer Price Index Detailed
16 Report Tables Annual Averages 2009, available at
17 <http://www.bls.gov/cpi/cpid09av.pdf>. Plaintiffs offer no argument
18 or evidence to contradict the USDA's argument. Accordingly, the
19 Court finds a \$25 increase between 2008 and 2009 rates to be
20 unwarranted and will not award the higher rate.

21 The USDA also makes arguments particular to the rates charged
22 by each attorney, which are considered below.

23 1. Peter M. K. Frost

24 Citizens seeks \$450 per hour for the services of Peter M. K.
25 Frost. Mr. Frost states that he received his law degree from the

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27 ⁴ Plaintiffs request the EAJA base rate for their attorneys'
28 work on the fees and costs motions.

1 University of Oregon School of Law in 1990 and then served as a law
2 clerk for the Oregon Court of Appeals for two years thereafter.
3 Since then, he has worked as an attorney at several non-profit
4 public interest firms focusing on environmental law and has worked
5 in various capacities at Oregon law schools. Citizens provides
6 declarations by two attorneys, who state that Mr. Frost's requested
7 hourly rate for work on the merits of this case is reasonable.
8 Duggan Decl. ¶ 8; Folk Decl. ¶ 8. The Citizens II court awarded
9 fees based on an hourly rate of \$425 for work Mr. Frost completed
10 in that case in 2008. Citizens for Better Forestry v. U.S. Dep't
11 of Agriculture (Citizens II Fees), 2008 WL 5210945, at *5 (N.D.
12 Cal.).

13 The USDA argues that Mr. Frost's rate should be reduced
14 because the work he completed "would likely have been billed at a
15 junior associate rate rather than a partner rate by a private law
16 firm." Opp'n to Citizens' Mot. at 14. The agency, however,
17 provides no evidence to support its argument. Nor does the USDA
18 provide the rate at which private law firms bill work performed by
19 a junior associate. Moreover, Mr. Frost has worked in his field
20 for over a decade and has experience in environmental litigation.⁵
21 A reduction to a "junior associate rate" is not warranted.

22 Considering the evidence, the Court finds an hourly rate of
23 \$425 for Mr. Frost's work on the merits of this case to be
24 reasonable. Citizens does not justify the award of a rate higher
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26 ⁵ Indeed, the USDA later refers to Messrs. Frost, Fink, Kenna
27 and Orr as "partner-level attorneys." Opp'n to Defenders' Mot. at
28 19.

1 than that provided by the Citizens II court for work he performed
2 in 2008.

3 2. Marc D. Fink

4 Citizens seeks \$400 per hour for the work of Marc D. Fink.
5 Mr. Fink states that, in 1995, he received his law degree from
6 Northwestern School of Law of Lewis and Clark College. Between
7 graduating from law school and 1999, he worked as a solo
8 practitioner, representing various environmental organizations.
9 From 1999 to 2005, he served as a staff attorney for the Western
10 Environmental Law Center, a non-profit public interest law firm.
11 Thereafter, until 2007, Mr. Fink worked again as a solo
12 practitioner and served as a half-time staff attorney for Forest
13 Service Employees for Environmental Ethics. Since April, 2007, Mr.
14 Fink has worked as a senior attorney with the Center for Biological
15 Diversity, a non-profit organization. In addition to other
16 environmental cases, Mr. Fink worked on both Citizens I and
17 Citizens II. Citizens provides declarations from two attorneys,
18 who state that Mr. Fink's rates are reasonable. Graf Decl. ¶ 7;
19 Isherwood Decl. ¶ 6. The Citizens II court awarded fees based on
20 an hourly rate of \$350 for work Mr. Fink completed in that case in
21 2008. Citizens II Fees, 2008 WL 5210945, at *5.

22 Concerning Mr. Fink's rate, the USDA repeats the same
23 arguments it directed at Mr. Frost. These arguments are rejected
24 for the reasons stated above.

25 Considering the evidence, the Court finds an hourly rate of
26 \$350 for Mr. Fink's work on the merits of this case to be
27 reasonable. Citizens does not justify the award of a rate higher
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1 than that provided by the Citizens II court for work he performed
2 in 2008.

3 3. Matt Kenna

4 Citizens seeks \$450 per hour for the services of Matt Kenna.
5 Mr. Kenna states that he received his law degree from the
6 University of Oregon School of Law in 1992. Between 1992 and 2005,
7 he litigated public interest environmental issues while in private
8 practice. In 2005, he joined the Western Environmental Law Center,
9 for which he worked until October, 2009. He has litigated several
10 environmental cases, including Summers, in which he served as lead
11 counsel and argued before the United States Supreme Court.
12 Citizens provides one declaration from an attorney, who states that
13 Mr. Kenna's requested hourly rate for work on the merits of this
14 case is reasonable. Isherwood Decl. ¶ 6.

15 The USDA argues that Mr. Kenna's hourly rate is not reasonable
16 because his work was limited to issues concerning Plaintiffs'
17 standing and, as a result, his rate should not exceed the EAJA
18 maximum. This argument was rejected above. As an attorney who
19 argued before the Supreme Court in Summers, Mr. Kenna had
20 particular expertise in addressing the standing question in this
21 action.

22 Considering the evidence, the Court finds an hourly rate of
23 \$450 for Mr. Kenna's work on the merits of this case to be
24 reasonable.

25 4. Trent W. Orr

26 Defenders seeks \$625 per hour for the services of Trent W.
27 Orr. Mr. Orr states that he received his law degree from Harvard
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1 Law School in 1977. Since then, he has worked for and represented
2 various organizations, including the Natural Resources Defense
3 Council (NRDC) and Earthjustice. While at the NRDC, he spent a
4 significant amount of time working on issues related to the
5 management of the National Forest System. Mr. Orr also has served
6 as an adjunct professor at the University of California, Berkeley,
7 School of Law. The Citizens II court awarded fees based on an
8 hourly rate of \$500 for work Mr. Orr completed in that case.
9 Citizens II Fees, 2008 WL 5210945, at *5.

10 James Wheaton, an attorney who has served on the Executive
11 Committee of the State Bar of California's Environmental Section,
12 states that "a reasonable range for 2008-2009 for Mr. Orr's work
13 would be between \$600 and \$700 per hour in the San Francisco Bay
14 Area." Wheaton Decl. ¶ 14; see also Koehler Decl. ¶ 10 (stating
15 that \$625 is "at the lower end" of the prevailing market rates in
16 the Bay Area for lawyers of comparable experience). Michael Rubin,
17 a partner with a San Francisco-based private law firm, states that
18 his firm bills at an hourly rate of \$775 for the work of a partner
19 who specializes in environmental litigation. Rubin Decl. ¶ 9.

20 The USDA argues that, because the Citizens II court concluded
21 that a \$500 rate was reasonable for work Mr. Orr performed in 2008,
22 that rate should also apply here. The USDA's argument is based on
23 a faulty premise. The Citizens II court found a \$500 rate to be
24 reasonable for work performed by Mr. Orr over the course of his
25 participation in the case, which spanned from 2003 to 2007. See
26 Citizens II Fees, 2008 WL 5210945, at *5; Orr 2d Decl. ¶ 4. Thus,
27 the \$500 rate sheds some light into the prevailing market rate for
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1 those five years. It does not, however, define the appropriate
2 rate for 2008.

3 The USDA also argues that Mr. Orr should be compensated at the
4 "junior associate rate." This argument, which the Court rejected
5 above, applies with even less force to Mr. Orr, who has over thirty
6 years of litigation experience.

7 Considering the evidence, the Court finds an hourly rate of
8 \$625 for Mr. Orr's work on the merits of this case to be
9 reasonable.

10 5. Sierra B. Weaver

11 Defenders seeks \$350 per hour for the services of Sierra B.
12 Weaver. Ms. Weaver states that she earned her law degree from
13 Harvard Law School in 2001. From August, 2001 to September, 2003,
14 she worked at the Southern Environmental Law Center, dealing with
15 administrative and environmental law matters. She then took a
16 position with the Ocean Conservancy and worked on issues concerning
17 the implementation and enforcement of NEPA and the ESA, among other
18 statutes. In September, 2007, Ms. Weaver was hired by Defenders,
19 for which she currently works as a staff attorney. Defenders
20 provides declaration by two attorneys who state that Ms. Weaver's
21 hourly rate was reasonable. Koehler Decl. ¶ 10; Wheaton Decl.
22 ¶ 15.

23 The USDA argues that Ms. Weaver's work was limited to
24 "reviewing, analyzing, or editing the work performed by other
25 attorneys" and that at "no point did Ms. Weaver actually draft an
26 original portion of these documents." Opp'n to Defenders' Mot. at
27 11. The agency contends that she is not entitled to a rate above
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1 the EAJA maximum because her work was so limited and did not
2 require her "specialized skill in environmental law." Opp'n to
3 Defenders' Mot. at 11.

4 Even though Ms. Weaver may not have authored the pleadings or
5 motion papers in this action, it does not follow that her review of
6 and work on these documents did not require her particular
7 knowledge of environmental law. Ms. Weaver explains that her use
8 of the "Review/analyze" phrase on her time records, which the USDA
9 cites in its opposition, reflected work in which she was
10 "reviewing, commenting on, researching, editing, and refining
11 arguments in a document" of which she was not the author. Weaver
12 2d Decl. ¶ 3. It appears that Ms. Weaver, as an attorney
13 reviewing, editing and refining documents in an action involving
14 environmental law, applied her specialized knowledge of this field.
15 The USDA offers no evidence to rebut this reasonable inference and
16 Defenders' evidentiary showing.

17 Considering the evidence, the Court finds an hourly rate of
18 \$350 for Ms. Weaver's work on the merits of this case to be
19 reasonable.

20 C. Number of Hours Billed for Work on Plaintiffs' Claims

21 The USDA objects to the number of hours for which Plaintiffs
22 request payment, asserting that some of the hours billed were for
23 duplicative work or non-compensable clerical and administrative
24 tasks. The USDA also complains that Plaintiffs' attorneys engaged
25 in impermissible block-billing.

26 Plaintiffs proffer the declarations of their attorneys, most
27 of whom state that they exercised billing judgment and in good
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1 faith omitted time that was arguably non-compensable. Frost Decl.
2 ¶¶ 8-9; Kenna Decl. ¶ 7; Orr Decl. ¶¶ 20-22 (addressing hours
3 billed by him and Ms. Weaver). In addition, several other
4 attorneys reviewed the time records of Plaintiffs' counsel and
5 state that the hours billed reflect a reasonable expenditure of
6 time. Duggan Decl. ¶ 9 (Frost); Folk Decl. ¶ 9 (Frost); Isherwood
7 Decl. ¶ 5 (Fink and Kenna); Koehler Decl. ¶ 12 (Orr and Weaver).
8 In response to the USDA's objections, Plaintiffs' attorneys
9 reviewed their records again, provided additional detail and
10 omitted time where appropriate.

11 Courts should grant deference to the billing judgment of the
12 prevailing party's attorneys. Nadarajah, 569 F.3d at 922. "If
13 opposing counsel cannot come up with specific reasons for reducing
14 the fee request that the district court finds persuasive, it should
15 normally grant the award in full, or with no more than a [ten
16 percent reduction]." Moreno v. City of Sacramento, 534 F.3d 1106,
17 1112, 1116 (9th Cir. 2008); see also Nadarajah, 569 F.3d at 920.
18 As explained below, some of the objections raised by the USDA are
19 well-taken, although most are justified neither in law nor in fact.

20 1. Citizens

21 a. Work on Complaint

22 The USDA argues that the fourteen hours billed by Messrs.
23 Frost and Fink for work on the complaint was excessive,
24 particularly because many of the factual allegations contained in
25 Plaintiffs' operative complaint were similar to those contained in
26 the Citizens II pleading. However, Citizens revised its original
27 pleading twice, and the USDA offers no reason to believe that these
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1 revisions were unnecessary. Accordingly, the Court finds the
2 number of hours expended on the complaint to be reasonable.

3 b. Research

4 The USDA objects to the number of hours billed for research,
5 arguing that some of the topics examined by Messrs. Frost and Fink
6 are inconsistent with their claims that they are experienced
7 attorneys who deserve enhanced billing rates. The USDA also
8 complains that Messrs. Frost and Fink expended an excessive amount
9 of time researching Plaintiffs' standing, even though it
10 acknowledges that this raised a novel and difficult question. As
11 the opposing party, the USDA must provide argument or evidence to
12 persuade the Court that these hours were unnecessary; the agency
13 does not do so.

14 In the alternative, the USDA contends that the billing rates
15 for research should be "reduced to reflect the fact that such time
16 would not normally be billed to a private client at a high rate."
17 Opp'n to Citizens' Mot. at 18 n.11. However, the USDA fails to
18 offer any authority that requires a court to impose varied billing
19 rates for a single attorney that depend on the task completed.

20 The hours for research billed by Citizens' attorneys appear
21 reasonable and are awarded as requested.

22 c. Conferencing and Communication

23 The USDA challenges the hours billed by Messrs. Frost, Fink
24 and Kenna for conferences and communication among the three
25 attorneys, contending that the Court should disallow the hours
26 worked by Messrs. Fink and Kenna and bill the time only once at Mr.
27 Frost's rate. However, the USDA offers no authority or evidence to
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1 suggest that these attorneys' conferencing was excessive. Indeed,
2 the Ninth Circuit has suggested that, to demonstrate the
3 excessiveness of hours requested, an opposing party could present
4 evidence of how long its attorneys spent doing the same task. See,
5 e.g., Democratic Party of Wash. v. Reed, 388 F.3d 1281, 1287 (9th
6 Cir. 2004); Chalmers v. City of L.A., 796 F.2d 1205, 1214 (9th Cir.
7 1986). The USDA did not make such a proffer.

8 Having reviewed the time records, the Court finds the time
9 expended on these tasks reasonable.

10 d. Work Billed by Mr. Kenna

11 The USDA argues that Mr. Kenna was not necessary to this
12 action and that Citizens should not recover fees for any of the
13 hours he billed. The agency also complains that Mr. Kenna
14 duplicated Messrs. Frost and Fink's efforts "on the Summers issue,"
15 which was unnecessary. Opp'n to Citizens' Mot. at 20.

16 The USDA's objections are not well-taken. Citizens retained
17 Mr. Kenna after the USDA raised jurisdictional arguments in its
18 motion for summary judgment. Indeed, as the USDA acknowledges,
19 these issues were complicated by Summers, with which Mr. Kenna had
20 particular expertise as lead counsel in that case. Therefore, the
21 Court is not persuaded that hiring Mr. Kenna constituted
22 unnecessary overstaffing or that the hours he billed were
23 unreasonable.

24 e. Assistance for Oral Argument

25 The USDA challenges the billing of time spent by Messrs. Fink
26 and Kenna in preparing Mr. Frost for oral argument. The agency
27 also objects to time billed by Mr. Fink for attending the hearing
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1 on the parties' summary judgment motions.

2 Although only Mr. Frost argued on behalf of Citizens during
3 the hearing, this fact does not justify disallowing the time billed
4 by Messrs. Fink and Kenna. Attorneys may bill time spent preparing
5 another attorney for argument and attending the hearing itself,
6 even if they do not argue before the court. Democratic Party, 388
7 F.3d at 1286-87. Given the nature of this case, the assistance
8 provided by Messrs. Fink and Kenna was not unnecessarily
9 duplicative. Further, the USDA provides no evidence or argument
10 that Mr. Fink's presence at the hearing was not needed.
11 Accordingly, the numbers of hours billed for these activities are
12 compensated.

13 f. Mr. Frost's Work on Summary Judgment Motion

14 The USDA argues that, given his claimed level of expertise,
15 Mr. Frost should not have expended fifty hours on the summary
16 judgment briefs. The agency contends that Mr. Frost should have
17 been more efficient, particularly given the "relatively simple task
18 of preparing pleadings." Opp'n to Citizens' Mot. at 21. In
19 particular, the USDA objects to Mr. Frost's third reading of its
20 summary judgment brief.

21 These arguments do not offer a firm basis on which to second-
22 guess Mr. Frost's billing judgment. As the Ninth Circuit has
23 stated, "By and large, the court should defer to the winning
24 lawyer's professional judgment as to how much time he was required
25 to spend on the case; after all, he won, and might not have, had he
26 been more of a slacker." Moreno, 534 F.3d at 1112. Although the
27 USDA contends that Mr. Frost should have expended less time on the

1 matter, it offers no reason to believe that the amount of time
2 actually spent was not reasonable.

3 g. Clerical and Administrative Matters

4 The USDA objects to time billed for clerical and
5 administrative tasks. Such tasks, which include calendaring,
6 docketing and organizing documents, are not compensable legal work.
7 Nadarajah, 569 F.3d at 906; Davis v. City & County of S.F., 976
8 F.2d 1536, 1543 (9th Cir. 1992), vacated in part on other grounds
9 at 984 F.2d 345 (9th Cir. 1993).

10 Because they were billed for clerical tasks, the following
11 amounts are subtracted from Mr. Frost's total: 0.3 of an hour for
12 scheduling a conference call (3/24/2009), 0.1 of an hour for
13 refiling documents (4/6/2009), and 0.1 of an hour for filing
14 documents (5/28/2009). With regard to Mr. Fink, the following
15 amounts are disallowed: 0.1 of an hour for downloading documents
16 (3/28/2008), 0.1 of an hour for filing documents (7/23/2008), and
17 0.5 of an hour for organizing documents (3/30/2009). In sum, the
18 Court disallows 0.5 of an hour for Mr. Frost and 0.7 of an hour for
19 Mr. Fink.

20 h. Block Billing

21 The USDA identifies two entries, which it contends reflect
22 block billing. It cites a December 3, 2008 entry by Mr. Fink for
23 3.9 hours spent on "Edits and review - draft SJ brief; and related
24 emails and calls with Pete, Sierra and Trent." Fink 2d Decl., Ex.
25 A at 3. It also refers to 4.5 hours billed by Mr. Kenna on April
26 1, 2009 for "Prep Pete Frost for argument-read briefs, write memo."
27 Kenna Decl., Ex. A at 1.

1 Block billing is a time-keeping method where an attorney
2 enters the total daily time spent working on a case, rather than
3 itemizing the time spent on a specific task. Mendez v. County of
4 San Bernardino, 540 F.3d 1109, 1129 n.2 (9th Cir. 2008). It can be
5 appropriate to disallow recovery for up to twenty percent of the
6 hours that are block-billed. Welch v. Metro. Life Ins. Co., 480
7 F.3d 942, 948 (9th Cir. 2007).

8 The entries identified by the USDA do not constitute block
9 billing; they sufficiently specify the tasks for which the hours
10 were billed. In any event, the tasks billed in these entries do
11 not appear non-compensable or unreasonable. Thus, the reduction
12 sought by the USDA is not necessary.

13 2. Defenders

14 a. Work on Complaint

15 The USDA contends that the approximately forty hours billed by
16 Mr. Orr and Ms. Weaver for work on the complaint is excessive,
17 particularly when compared to the fourteen hours billed by Messrs.
18 Frost and Fink. In addition, the USDA points out that many of the
19 factual allegations contained in Defenders' operative complaint are
20 similar to those in the pleadings filed in the organization's
21 challenge to the 2005 Rule.

22 The Court is not convinced that it was necessary for Mr. Orr
23 and Ms. Weaver to expend more than two-and-one-half times the
24 number of hours spent by Citizens' attorneys. It is true that the
25 Citizens II court found fifty hours a reasonable amount of time for
26 work on the pleadings; however, this amount reflected a reduction
27 from the 220.6 hours claimed by Defenders in that action.

1 Moreover, it is not apparent that the complaint before the Citizens
2 II court had factual allegations made in an earlier pleading, as is
3 the case here. It is also notable that Defenders revised its
4 pleadings only once, whereas Messrs. Frost and Fink revised the
5 Citizens' complaint twice.

6 Although Defenders' operative complaint contains more
7 information than that of Citizens, which may have entailed more
8 work, the amount of time Messrs. Frost and Fink spent on Citizens'
9 complaint suggests that some of the hours claimed by Mr. Orr and
10 Ms. Weaver should be disallowed. Given that many of the
11 allegations were similar to those made in Defenders' earlier
12 complaint, the Court finds approximately twenty hours to be a
13 reasonable amount of time to draft Defenders' pleadings in this
14 case. Accordingly, the number of hours claimed by Mr. Orr and Ms.
15 Weaver for work on Defenders' pleadings is reduced by approximately
16 half; 18.1 and 1.9 hours of Mr. Orr's and Ms. Weaver's totals
17 respectively will be disallowed.

18 b. Case Management Plan and Sixty-Day Notice
19 Letter

20 The USDA objects to 8.0 hours spent by Mr. Orr on composing a
21 case management plan and to 18.4 hours he expended on drafting a
22 sixty-day notice letter. The agency, however, provides only a
23 conclusory argument that this time was unreasonable. Accordingly,
24 the amount of time claimed by Mr. Orr for these tasks will be
25 compensated.

26 c. Communication and Status Updates

27 The USDA contends that Mr. Orr and Ms. Weaver spent an
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1 "exorbitant" amount of time on communication and status updates.
2 Opp'n to Defenders' Mot. at 16. However, the USDA offers no
3 evidence or argument to rebut Defenders' showing or guide any
4 disallowance of the number of hours claimed by Mr. Orr or Ms.
5 Weaver. Therefore, the Court does not disallow any hours spent on
6 these tasks.

7 d. Excessive Hours on Substantive Briefs

8 The USDA argues that Defenders' attorneys devoted an
9 unreasonable number of hours of work to Plaintiffs' summary
10 judgment briefs. In particular, the USDA notes that Mr. Orr
11 expended approximately 136 hours of work on the briefs, in
12 comparison to Messrs. Frost, Fink and Kenna, who spent 80, 73 and
13 44 hours respectively.

14 The USDA repeats its argument that, because of their claimed
15 expertise in environmental law, Defenders' attorneys should have
16 been more efficient and spent less time on their work. However,
17 for comparative evidence, the USDA points only to the time records
18 of Citizens. Combined, Citizens' attorneys expended approximately
19 197 hours of work on the summary judgment briefs, whereas Mr. Orr
20 and Ms. Weaver spent 162.1 hours in total. This comparison does
21 not suggest that Defenders' attorneys billed an unreasonable amount
22 of time. Further, Mr. Orr states that he conducted the final edit
23 of all of Plaintiffs' briefs, which, in part, explains an
24 individual total greater than that of the other attorneys.

25 The Court is not persuaded that a disallowance of the time
26 claimed for these tasks is required.

1 e. Duplicative Communication

2 The USDA argues that Mr. Orr and Ms. Weaver billed an
3 excessive number of hours for conferences and communication. It
4 asserts that these tasks should be billed only once and at Mr.
5 Orr's rate. The Court rejects this argument for the reasons stated
6 above.

7 Having reviewed the time records, the Court finds the time Mr.
8 Orr and Ms. Weaver expended on these tasks to be reasonable.

9 f. Work Billed by Ms. Weaver

10 The USDA asserts that Ms. Weaver's work was duplicative and
11 unnecessary to this litigation. It notes that "four partner-level
12 attorneys" were already staffed on this case, which it argues
13 should have obviated the need for Ms. Weaver. Opp'n to Defenders'
14 Mot. at 19.

15 Although a significant portion of her work was limited to
16 reviewing and editing the work of the other attorneys, it is not
17 clear that Ms. Weaver's participation was unnecessary. Further,
18 the USDA's count of "partner-level attorneys" in this consolidated
19 case is misleading. Ms. Weaver was one of two attorneys
20 representing Defenders, and the USDA does not persuade the Court
21 that staffing by two attorneys was unreasonable. And because she
22 was Mr. Orr's sole co-counsel, it was not unnecessarily duplicative
23 for Ms. Weaver to assist in the preparation for and attend the
24 summary judgment hearing.

25 The USDA also complains about time billed by Ms. Weaver for
26 "post-judgment hours spent on matters not related to the
27 litigation." Opp'n to Defenders' Mot. at 20. In particular, the
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1 USDA objects to time billed for research and drafting internal
2 memoranda on which regulations would apply after the Court's
3 decision. After judgment entered, Ms. Weaver billed approximately
4 twelve hours on matters not related to Defenders' fee application.
5 Although it may be necessary to communicate to clients about the
6 effects of a court's order, work concerning future strategy --
7 unrelated to the specific case at issue -- should not be billed to
8 the losing party. Accordingly, the Court disallows 7.7 hours of
9 Ms. Weaver's total for work that does not appear necessary to this
10 litigation.

11 g. Clerical and Administrative Matters

12 The USDA complains that Mr. Orr and Ms. Weaver billed time for
13 non-legal tasks. In response, Defenders omitted eleven hours of
14 Mr. Orr's work.

15 After reviewing Mr. Orr's revised time records, the Court
16 makes two additional deductions: 0.2 of an hour for an email
17 exchange regarding "copies of the record for co-counsel"
18 (8/21/2008) and 0.1 of an hour downloading (1/11/2009). Because
19 Mr. Orr suggests that work on a "New Matter Form" was
20 administrative in nature, Orr 2d Decl. ¶ 5, 3.5 hours for work on
21 the same (3/12/2008 and 3/26/2008) are subtracted from Ms. Weaver's
22 total.

23 h. Block Billing

24 The USDA asserts that two of Mr. Orr's entries reflect
25 impermissible block billing. A review of these entries, however,
26 shows them to be sufficiently detailed. Moreover, none of the tasks
27 identified in these entries appears non-compensable or
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1 unreasonable. Accordingly, no disallowance is based on block
2 billing.

3 D. Fees for Work on Fee Applications

4 The USDA complains that Plaintiffs should not be compensated
5 for time expended on their fee applications because the fees
6 requested were unreasonably inflated. However, the fees Plaintiffs
7 requested were not reduced by amounts that suggest that their
8 initial demands were frivolous. Accordingly, Plaintiffs are
9 entitled to fees for their attorneys' work on the current motions.

10 The USDA complains about particular time entries by Messrs.
11 Frost and Fink. After a review of the time records, the Court
12 makes three deductions from Mr. Frost's total: 0.1 of an hour for
13 formatting time records (7/22/2009), 0.1 of an hour for filing
14 motions (9/24/2009), and 0.3 of an hour for emails concerning
15 scheduling (2/11/2010). From Mr. Fink's total, two deductions are
16 made: one hour for gathering, reviewing and calculating hours
17 (7/7/2009); and 0.2 of an hour for gathering costs (8/27/2009).

18 Although the USDA does not object to the billing for
19 Defenders' fee motion, the Court notes that Mr. Orr and Ms. Weaver
20 expended over twice the time spent by Messrs. Frost and Fink.
21 There is no apparent reason for this substantial difference. Both
22 Citizens and Defenders had two attorneys working on their fee
23 motions. And, unlike with the briefs on the merits, Mr. Orr did
24 not have editing responsibility over Plaintiffs' fee applications.
25 Taking into account the number of hours expended by Citizens'
26 attorneys, the Court concludes that fifty-four hours is a
27 reasonable amount of time for work on Defenders' fee motion. To

reflect this deduction of approximately forty-eight percent, 44.2 and 4.2 hours are subtracted from Mr. Orr's and Ms. Weaver's totals respectively.

The USDA agrees that the Ninth Circuit's 2009 EAJA base hourly rate of \$172.24 is appropriate for work on the fee motions. Accordingly, the Court awards fees at this rate.

III. Costs

The USDA does not challenge the amount of costs and other expenses Plaintiffs seek. Accordingly, for costs and other expenses, Citizens and Defenders are awarded \$3,128.40 and \$2,408.90 respectively.

IV. Summary

The tables below summarize Citizens' and Defenders' awards.

A. Citizens

Attorney	Hours Claimed	Hours Deducted by Court	Total Hours	Hourly Rate	Total
Frost					
merits	212.7	0.5	212.2	\$425.00	\$90,185.00
fees	50.0	0.5	49.5	\$172.24	\$8,525.88
Fink					
merits	127.1	0.7	126.4	\$350.00	\$44,240.00
fees	5.8	1.2	4.6	\$172.24	\$792.30
Kenna	51.5	0.0	51.5	\$450.00	\$23,175.00
Costs and Other Expenses					\$3,128.40
TOTAL AWARD					\$170,046.58

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B. Defenders

Attorney	Hours Claimed	Hours Deducted by Court	Total Hours	Hourly Rate	Total
Orr					
merits	368.5	18.4	350.1	\$625.00	\$218,812.50
fees	93.7	44.2	49.5	\$172.24	\$8,525.88
Weaver					
merits	72.5	13.1	59.4	\$350.00	\$20,790.00
fees	8.7	4.2	4.5	\$172.24	\$775.08
Costs and Other Expenses					\$2,408.90
TOTAL AWARD					\$251,312.36

CONCLUSION

For the foregoing reasons, the Court GRANTS in part Citizens' and Defenders' motions for attorneys' fees and costs. (Docket No. 88 and 119.) Citizens is awarded a total of \$170,046.58: \$157,600.00 for its attorneys' work on the merits, \$9,318.18 for their work on this motion and \$3,128.40 in costs and other expenses. Defenders is awarded a total of \$251,312.36: \$239,602.50 for its attorneys' work on the merits, \$9,300.96 for their work on this motion and \$2,408.90 in costs and other expenses. The USDA shall pay these amounts forthwith.

IT IS SO ORDERED.

Dated: August 13, 2010



CLAUDIA WILKEN
United States District Judge