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**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

SAM KUNAKNANA, *et al.*,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS, *et al.*,

Defendants,

CONOCOPHILLIPS ALASKA, INC., *et
al.*,

Intervenor-Defendants.

Case No. 3:13-cv-00044-SLG

**PLAINTIFFS' PETITION FOR
COSTS AND FEES**

Plaintiffs Sam Kunaknana *et al.* (collectively, “Plaintiffs”) respectfully submit this motion for attorney’s fees and costs pursuant to the Equal Access to Justice Act (“EAJA”). 28 U.S.C. § 2412(d)(2)(A); Fed. R. Civ. P. 54(d)(2)(A)–(B). This motion is supported by the declarations of Brian Litmans and Teresa B. Clemmer. Plaintiffs seek an award of \$124,602 in fees, plus \$4,272 in costs, reasonably and necessarily incurred in this matter.¹ Decl. of Brian Litmans at 9–10 ¶¶ 34, 38, 44.

Plaintiffs qualify for attorney’s fees under EAJA. EAJA requires five things: (1) that a plaintiff seeking fees qualify as a party for purposes of EAJA; (2) that there be no special circumstances warranting denial of fees; (3) that the plaintiff seek an award of fees and costs within thirty days of final judgment; (4) that the plaintiff qualify as the prevailing party; and (5) that the agency not be substantially justified in its position. *See* 28 U.S.C. § 2412(d).

The first three requirements need little discussion to establish they have been met. Plaintiffs are a “party” under EAJA because they are individuals whose net worth does not exceed \$2,000,000. *Id.* § 2412(d)(2)(B). There are no special circumstances that warrant a denial of fees. *Id.* § 2412(d)(1)(A). Plaintiffs have sought an award of fees and costs within thirty days of final judgment. *Id.* § 2412(d)(1)(B).²

¹ Plaintiffs are currently engaged in settlement negotiations with the U.S. Army Corps of Engineers (“Corps”) regarding the attorney’s fees in this case. Plaintiffs are simultaneously moving to stay briefing on this Petition for Costs and Fees pending the conclusion of ongoing settlement negotiations between the parties. Mot. to Stay Briefing on Pls.’ Pet. for Costs and Fees (attached). Plaintiffs are filing this Petition for Costs and Fees at this time to preserve their ability to seek attorney’s fees and costs should the parties’ settlement negotiations fail. Defendants acknowledge that, should settlement negotiations fail, Plaintiffs will resubmit their petition for costs and fees. *See* Unopposed Mot. to Stay Briefing on Pls.’ Pet. for Costs and Fees. Plaintiffs recognize that Defendants and Defendant-Intervenors reserve the right to challenge Plaintiffs’ eligibility for fees and costs, and any and all other parts of any documentation filed or subsequently filed to support this petition.

² EAJA requires that a motion for attorney’s fees and costs be filed “within thirty days of final judgment in the action.” 28 U.S.C. § 2412(d)(1)(B). A “final judgment” is one that is

cont. . .

Under the fourth requirement, plaintiffs were the prevailing party in the May 27, 2015 decision. Plaintiffs were successful on their National Environmental Policy Act (“NEPA”) claim. The Court held that the Corps violated NEPA and Administrative Procedure Act by failing to adequately explain its decision not to supplement the 2004 Alpine Satellites Environmental Impact Statement (“2004 EIS”). The Court determined that the Corps’ action was arbitrary and capricious when it determined that a Supplemental Environmental Impact Statement (“SEIS”) was unnecessary. Order Re Mots. for Summ. J., Doc. 175 at 47, 50, 56–58. This Court found that the Corps was arbitrary and capricious because it failed to provide a reasoned explanation “that addressed the changes to the CD-5 project since the [2004 EIS] and the new information the Corps relied upon in making its [Clean Water Act] determination.” *Id.* at 58.

The Court remanded the decision back to the Corps to “set forth a reasoned explanation as to whether or not the [2004 EIS] warrants supplementation to address the changes in the CD-5 project . . . and the new information relied upon by the Corps in its permitting decision.” Order Re Further Proceedings, Doc. 199 at 9. In response to this order, the Corps published a SIR explaining why it had concluded the project changes and new information did not warrant an SEIS. Doc. 212-1. Only then was the Court satisfied that the Corps met its NEPA obligations. Doc. 223.

The Supreme Court established that a prevailing party must achieve “a material alteration in the legal relationship of the parties” that is “judicially sanctioned.” *Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604–05 (2001). “If the plaintiff

“nonappealable.” 28 U.S.C. § 2412. Judgment was entered on May 29, 2015 and Plaintiffs had a 60-day period to appeal, which expired on July 28, 2015. Judgment, Doc. 224. At that point the District Court’s May 27, 2014 and May 26, 2015 orders became “nonappealable” and constituted the final judgment in this case, triggering the 30-day period for filing a motion for attorney’s fees under EAJA.

has succeeded on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit, the plaintiff has crossed the threshold to a fee award of some kind.” *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791–92 (1989).

The Court’s decision that the Corps’ determination was arbitrary and capricious and its order remanding back to the Corps to remedy its errors satisfies the judicial-sanction element of the *Buckhannon* test because it “require[d] the other party to do something it otherwise would not be required to do.” *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d 1027, 1031 (9th Cir. 2009). The Court’s order requiring that the Corps set forth a reasoned explanation achieved some of the benefit that the Plaintiffs sought. *See, e.g.*, Pls.’ Mem. in Supp. of Summ. J., Doc. 108 at 32, 34–35, 37, 45–46; Pls.’ Reply in Supp. of Mot. for Summ. J., Doc. 146 at 16, 22–23, 27, 32. The magnitude and form of the relief are irrelevant to establishing prevailing party status. *See Farrar v. Hobby*, 506 U.S. 103, 114 (1992); *Tex. State Teachers Ass’n*, 489 U.S. at 791–92; *Saint John’s Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1059 (9th Cir. 2009); *Stivers v. Pierce*, 71 F.3d 732, 751 (9th Cir. 1995). Plaintiffs in this case are therefore a prevailing party for purposes of the fourth requirement for fees under EAJA.

The fifth requirement for EAJA fees is that the agency not be substantially justified in its position. The Corps was not substantially justified. It failed to adequately explain its decision that an SEIS was not required. There is no justification for an agency to provide unsupported conclusions. The Court found the Corps’ explanation for its decision not to supplement was arbitrary. While the Corps provided further explanation on remand, the subsequent explanation does not excuse or justify the Corps’ initial failure to offer a reasoned analysis for its determination. Because the Corps was not substantially justified in failing to adequately explain

its decision in the first instance, the fifth element for EAJA fees is satisfied. Plaintiffs have met all five elements under EAJA and are entitled to their attorney’s fees and costs for work on the successful NEPA claim that resulted in the order remanding the matter back to the Corps for preparation of a SIR.

Plaintiffs’ fees and costs are based on a reasonable hourly rate for a reasonable amount of time for this claim. *See* Decl. of Brian Litmans at 3, 9–10 ¶¶ 10, 37–43. Plaintiffs expended over 1300 hours in the prosecution of this case through July 22, 2014. *Id.* at 10 ¶ 38. Plaintiffs only seek attorney’s fees for the time spent on the successful NEPA claim that led to the Court’s order remanding the matter back to the Corps — a total of 619 hours. *Id.* at 9–10 ¶¶ 38, 40–41. Plaintiffs have written off 682 hours of time and made an additional twenty percent reduction from our total recoverable fees. *Id.* at 9–10 ¶¶ 39, 41.

Plaintiffs seek reimbursement at the following hourly rates:

Valerie Brown.....	\$371 per hour
Victoria Clark.....	\$371 per hour
Brian Litmans.....	\$328 per hour
Suzanne Bostrom.....	\$215 per hour
Brook Brisson	\$215 per hour
Katie Strong.....	\$215 per hour
Michelle Sinnott.....	\$181 per hour
Interns	\$106 per hour

See id. at 4 ¶¶ 12–18. Plaintiffs’ costs are \$4,272. *Id.* at 10 ¶ 44.

For the foregoing reasons, and in light of all of the factors discussed herein, Plaintiffs respectfully request an award of fees in the amount of \$124,602 and \$4,272 in costs.

Respectfully submitted this 27th day of August, 2015.

s/ Brian Litmans
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CERTIFICATE OF SERVICE

I certify that on 27th of August, 2015, I caused a copy of the **PLAINTIFFS' PETITION FOR COSTS AND FEES** to be electronically filed with the Clerk of the Court for the U.S. District Court of Alaska using the CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case, all of whom are registered with the CM/ECF system.

s/ Brian Litmans
Attorney