IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TURTLE ISLAND RESTORATION NETWORK, ET AL., Plaintiffs, vs. UNITED STATES DEPARTMENT OF COMMERCE, ET AL., Defendant, and HAWAII LONGLINE ASSOCIATION, Defendant-Intervenor.	CIVIL NO. 12-00594 SOM-RLP FINDINGS AND RECOMMENDATION TO GRANT IN PART AND DENY IN PART PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

FINDINGS AND RECOMMENDATION TO GRANT IN PART AND DENY IN PART PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS[1]

Before the Court is Plaintiffs' Motion for Award of Attorneys' Fees and Costs, filed on October 22, 2018 ("Motion"). See ECF No. 86. Plaintiffs request an award of $526,566.50 for attorneys' fees and $9,135.03 for costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). Id. Defendants filed their Opposition on December 7, 2018. See ECF No. 91. Plaintiffs filed their Reply on December 20, 2018. ECF

[1] Within fourteen days after a party is served with a copy of the Findings and Recommendation, that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections in the United States District Court. A party must file any objections within the fourteen-day period allowed if that party wants to have appellate review of the Findings and Recommendation. If no objections are filed, no appellate review will be allowed.

No. 92. After careful consideration of the submissions of the parties and the relevant legal authority, the Court FINDS AND RECOMMENDS that Plaintiffs' Motion be GRANTED IN PART AND DENIED IN PART.

BACKGROUND

The Court recites only those background facts necessary to resolve the pending Motion. The full background details of this case are set forth in the prior opinions of the district court and the Ninth Circuit. See ECF Nos. 55, 70.

Plaintiffs Turtle Island Restoration Network and Center for Biological Diversity filed this action on November 2, 2012, against the United States Department of Commerce, National Marine Fisheries Service, Wilbur L. Ross, in his official capacity as Secretary of Commerce, United States Department of the Interior, Ryan Zinke, in his official capacity as Secretary of the Interior, and the United States Fish and Wildlife Service (collectively, the "Federal Defendants"). ECF No. 1.

Plaintiffs challenged four major agency decisions related to a Hawaii-based swordfish fishery: (1) the issuance of a special purpose permit for the incidental take of migratory birds; (2) a "no jeopardy" determination regarding the proposed fishery expansion's effect on the loggerhead sea turtle population; (3) a "no jeopardy" determination regarding the proposed fishery expansion's effect on the leatherback sea turtle

population; and (4) the consideration of the impact of global climate change in making the determinations at issue. See ECF No. 1.

The district court issued a sixty-five page opinion granting summary judgment in favor of the Federal Defendants on all claims on August 23, 2013, upholding the agency decisions at issue. ECF No. 55. Following Plaintiffs' appeal, the Ninth Circuit affirmed in part and reversed in part the district court's grant of summary judgment in favor of the Federal Defendants in a split decision on December 27, 2017. ECF No. 70. The Ninth Circuit reversed the grant of summary judgment in favor of the Federal Defendants on two issues: the special purpose permit and the "no jeopardy" determination regarding loggerhead sea turtles. Id. at 1-28. The Ninth Circuit affirmed the grant of summary judgment in favor of the Federal Defendants on the remaining two issues: the "no jeopardy" determination regarding leatherback sea turtles and the consideration of the impact of global climate change. Id. One circuit judge issued a lengthy dissent stating that he would affirm the agency's decisions in full. Id. at 28-55.

On remand, the parties entered into a Stipulated Settlement Agreement and reserved all claims related to attorneys' fees and costs. ECF No. 80. The present Motion followed.

ANALYSIS

Under the EAJA, a court shall award costs and attorneys' fees against the United States in certain circumstances. See 28 U.S.C. § 2412; W. Watersheds Project v. Bd. of Land Appeals, 624 F.3d 983, 985 (9th Cir. 2010). An award of costs is authorized by subsection 2412(a)(1). An award of attorneys' fees and non-taxable expenses is authorized by subsection 2412(b). However, subsection 2412(d)(1)(A) provides that the court shall not award fees and non-taxable expenses if the court finds "that the United States' position was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

1. Costs

Under Subsection 2412(a)(1), the Court may award the prevailing party costs against the United States to the extent those costs are allowed under 28 U.S.C. § 1920. See 28 U.S.C. § 2412(a)(1). Under Section 1920, the Court is authorized to tax the following costs:

> 1. Fees of the clerk and marshal;
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> 2. Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
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> 3. Fees and disbursements for printing and witnesses;
>
> 4. Fees for exemplification and copies of papers necessarily obtained for use in the case;

> 5. Docket fees under section 1923 of this title;
>
> 6. Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920.

Here, Plaintiffs request $9,135.03 in costs. ECF No. at 86-5. In their Reply, Plaintiffs withdraw their request for costs related to their appeal to the Ninth Circuit. See ECF No. 92 at 22 n.3. The Court addresses the remaining costs requested by Plaintiffs.

First, Plaintiffs request $350.00 for the filing fee in this action. See ECF No. 86-5, 86-6 at 1. Because these costs are taxable under Subsection 1920(1), the Court finds that Plaintiffs are entitled to $350.00 in filing costs.

Second, Plaintiffs request $202.57 for the summary judgment hearing transcript. See ECF No. 86-5, 86-6 at 4. Because these costs are taxable under Subsection 1920(2), the Court finds that Plaintiffs are entitled to $202.57 in transcript costs.

Third, Plaintiffs request copying costs, which are taxable under Subsection 1920(4). However, Local Rule 54.2(f)(4) requires that a party seeking an award of copying costs must "submit[] an affidavit describing the documents copied, the number of pages copied, the cost per page, and the use of or

intended purpose for the items copied." LR54.2(f)(4). From the invoices and summary provided by Plaintiffs, the Court is able to ascertain the required information for the copying costs of $42.55, $2.55, and $7.55. See ECF No. 86-5; ECF No. 86-6 at 28, 30, 32. However, Plaintiffs did not provide sufficient information regarding the remaining copying costs including the documents copied or the intended purposes for the items copied. Without such information, the Court cannot ascertain whether the copies were necessarily obtained for use in the case. Accordingly, the Court finds that Plaintiffs are entitled to $52.65 in copying costs.

The remaining costs requested by Plaintiffs are for non-taxable expenses. Namely, Plaintiffs request expenses related to research, expert fees, postage, and conference calls, which are not taxable under Section 1920. See 28 U.S.C. § 1920; LR54.2(f)(5); 28 U.S.C. § 2412(d)(1)(B) (providing that expert fees are to be considered part of non-taxable expenses). Because Plaintiffs' entitlement to these non-taxable expenses depends on the Court's analysis regarding fees, these non-taxable expenses are addressed below.

2. Attorneys' Fees and Non-Taxable Expenses

Under subsection 2412(d)(1)(A), a court "shall award" attorneys' fees to a "prevailing party other than the United States . . . unless the court finds that the position of the

United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Here, the Federal Defendants do not dispute that Plaintiffs prevailed on two of their claims and are the prevailing party. See ECF No. 91 at 11 n.2. However, the Federal Defendants argue that Plaintiffs' request for attorneys' fees and expenses should be denied because the government's position was substantially justified.

The government's position is substantially justified if it has a "reasonable basis in law and fact." Ratnam v. INS, 177 F.3d 742, 743 (9th Cir. 1999) (quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988)). The government is substantially justified if "its position meets the traditional reasonableness standard — that is justified in substance or in the main, or to a degree that could satisfy a reasonable person." Corbin v. Apfel, 149 F.3d 1051, 1052 (9th Cir. 1998) (internal quotations omitted). "That the government lost (on some issues) does not raise a presumption that its position was not substantially justified." Ibrahim v. U.S. Dep't of Homeland Security, -- F.3d -- (2019), 2019 WL 73988, at *15 (9th Cir. Jan. 2, 2019); Pierce, 487 U.S. at 569 (stating that the government "could take a position that is substantially justified, yet lose"). The Court must "consider whether the government's position 'as a whole' has 'a reasonable basis in both law and fact.'" Id. (citations

omitted). The court should "treat[ ] a case as an inclusive whole, rather than as atomized line items." Al–Harbi v. INS, 284 F.3d 1080, 1084–85 (9th Cir. 2002) (quotation omitted). The Federal Defendants bear the burden of showing that the government's position was substantially justified. See Ratnam, 177 F.3d at 743.

Based on the Court's review of the record in this action, the Court finds that the government's position at the agency level, before the district court, and on appeal had a reasonable basis in law and fact and was substantially justified.

The agency decisions at issue were reached after detailed analyses of varied, technical, and conflicting scientific information. See ECF No. 20 (Certified Administrative Record). "The government may avoid EAJA fees if it can prove that the regulation it violated was ambiguous, complex, or required exceptional analysis." Meinhold v. U.S. Dep't of Def., 123 F.3d 1275, 1278 (9th Cir. 1997), as amended, 131 F.3d 842 (9th Cir. 1997). As noted by the Federal Defendants, the agency consultation process at issue in this litigation has been described by the Ninth Circuit as "extraordinarily complex." See ECF No. 91 at 13 (citing Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, 273 F.3d 1229, 1245 (9th Cir. 2001)). Additionally, as noted by the Federal Defendants, the legality of the special purpose permit was an issue of first impression. ECF No. 91 at

15; see also Gutierrez v. Barnhart, 274 F.3d 1255, 1261 (9th Cir. 2001) ("Whether a litigated issue is one of first impression is properly considered as one factor in determining whether the government's litigation position is substantially justified).

Further, the Federal Defendants had sufficient facts and supportable legal arguments in order to prevail before the district court. See Meier v. Colvin, 727 F.3d 867, 873 (9th Cir. 2013) ("[I]t was proper for the district court to consider the government's success in the district court as part of the EAJA analysis."); see also Cascadia Wildlands v. Bureau of Land Mgmt., 987 F. Supp. 2d 1085, 1089–90 (D. Or. 2013) (citing United States v. Thouvenot, Wade & Moerschen, Inc., 596 F.3d 378, 382 (7th Cir. 2010) (stating "there is a presumption that a government case strong enough to survive both a motion to dismiss and a motion for summary judgment is substantially justified")). As evidenced by the district court's sixty-five page decision, the government's position on summary judgment was legally and factually supported. See ECF No. 55.

Finally, the split decision on appeal in this action supports the conclusion that the government's position had a reasonable basis in law and fact. The Ninth Circuit has held that a split decision on appeal is "an indicator of the reasonableness of the government's position." Gonzales v. Free Speech Coal., 408 F.3d 613, 619 (9th Cir. 2005); see also Bay

Area Peace Navy v. United States, 914 F.2d 1224, 1231 (9th Cir. 1990) (holding that "disagreement within [the Ninth Circuit] panel regarding the merits of the government's appeal further suggests that a finding of substantial justification is appropriate"); Garnica v. Astrue, 378 F. App'x 680, 682 (9th Cir. 2010) (considering the government's success before the district court and the split decision on appeal "highly relevant factors" in concluding that the government's position had a reasonable basis in law and fact and was substantially justified). As noted above, the dissenting circuit judge issued a reasoned analysis discussing the record evidence and the legal arguments that supported the two decisions that were ultimately reversed on appeal, which indicates the reasonableness of the government's position on appeal. See ECF No. 70 at 28-55.

Based on the Court review of the record as a whole, the Court FINDS that the government's position had a reasonable basis in law and fact and was substantially justified. Accordingly, the Court FINDS that Plaintiffs are not entitled to an award of attorneys' fees and non-taxable expenses under the EAJA. The Court RECOMMENDS that the district court DENY Plaintiffs' request for attorneys' fees and non-taxable expenses.

CONCLUSION

The Court FINDS and RECOMMENDS that Plaintiffs' Motion for Award of Attorneys' Fees and Costs be GRANTED IN PART AND

DENIED IN PART. The Court RECOMMENDS that the district court AWARD Plaintiffs $605.22 in costs and DENY Plaintiffs' request for attorneys' fees and non-taxable expenses.

IT IS SO FOUND AND RECOMMENDED.

DATED AT HONOLULU, HAWAII, JANUARY 10, 2019.

Richard L. Puglisi
United States Magistrate Judge

TURTLE ISLAND RESTORATION NETWORK, ET AL. V. UNITED STATES DEPARTMENT OF COMMERCE, ET AL.; CIVIL NO. 12-00594 SOM-RLP; FINDINGS AND RECOMMENDATION TO GRANT IN PART AND DENY IN PART PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS