**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW MEXICO**

MIDDLE RIO GRANDE CONSERVANCY DISTRICT,

Plaintiff,

v.

No. CIV 99-870, 99-872 and 99-1445M/RLP (Consolidated)

GALE NORTON, et al.,

Federal Defendants.

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STATE OF NEW MEXICO, *ex rel* the STATE ENGINEER, NEW MEXICO INTERSTATE STREAM COMMISSION, and the NEW MEXICO ATTORNEY GENERAL,

Plaintiffs,

v.

GALE NORTON, et al.,

Federal Defendants.

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FOREST GUARDIANS, et al.,

Plaintiffs,

v.

GALE NORTON, et. al.,

Federal Defendants.

**ORDER AWARDING ATTORNEYS' FEES**

This case comes up on a Joint Motion for Attorneys' Fees, Costs and Related Expenses filed by Plaintiffs Middle Rio Grande Conservancy District (MRGCD), the New Mexico Farm and Livestock Bureau, and the City of Socorro. Plaintiffs filed their action pursuant to the Endangered Species Act (ESA), the National Environmental Protection Act (NEPA) and the Administrative Procedures Act(APA), and after prevailing on the merits, Plaintiffs seek fees and costs pursuant to 16 U.S.C. sec.1540(g)(4) (the ESA).

After filing the present motion, Plaintiffs Farm and Livestock Bureau and the City of Socorro settled with Defendants, and only amounts due MRGCD remain at issue. MRGCD seeks $16,540 for attorneys it terms Chief Water Counsel, and for those it refers to as General Counsel, a law firm hired specifically to litigate this case, MRGCD requests $154,118 in fees, nearly $31,000 for experts, $17,500 for filing fee, costs and other expenses, and approximately $13,000 in New Mexico gross receipts tax. I have considered line-by-line all that MRGCD requests and find most of it acceptable in form and in substance, but deny the motion in part.

Defendants challenge all fees and costs incurred during the administrative process, reimbursement for expert consultants, attorney time spent with media, at Congressional hearings and at a water law conference, the New Mexico gross receipts tax and what Defendants consider excess hours for tasks such as drafting a complaint. I accept Defendants' position, at least in principle, on all of these issues except the first, and I have set out specific corrections and adjustments to be incorporated into a final fee and cost award. I leave counsel to make the deletions and adjustments determined by this order and to calculate a precise dollar amount due from Defendants to MRGCD.

Authority and Standards

A. Endangered Species Act

The ESA expressly encompasses an award of fees and costs after judgment.16 U.S.C. sec.1540(g)(4). The Act states in pertinent part: "The court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." Id. Generally, the amount awarded in attorneys' fees is based on a "lodestar" amount, the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Ramos v. Lamm, 713 F.2d 546, 557 (10th Cir.1983). As governed by Fed. R.Civ.P.54 and 28 U.S.C. sec.1920 and limited by the bounds of reasonableness, the amount appropriately awarded as costs and expenses is within the discretion of the trial court. Hensley v. Eckerhart, supra at 434; Crawford Fitting Co. v. J.T.Gibbons, Inc., 482 U.S. 437 (1987).

With regard to fees, "[t]he party seeking the award has the burden of persuading the Court that the hours expended and the rate sought are both reasonable." Laselle v. Public Service Company of Colorado, 988 F. Supp.1348, 1351 (D. Colo.1997); Lucero v. City of Trinidad, 815 F.2d 1384, 1385 (10th Cir.1987). "The reasonable hourly rate is calculated by examining the prevailing market rates of the relevant community." Blum v. Stenson, 465 U.S. 886, 895 (1984). In setting a rate of compensation, a trial court should consider what lawyers of comparable skill and experience practicing in the locality where the case occurs charge for their time. Ramos v. Lamm, supra at 555; Laselle v. Public Service Company of Colorado, supra. The complexity of the case, the special skills and experience of counsel, the quality of representation, and the results achieved are presumably fully reflected in the hourly rate and the number of hours worked, and

these do not serve as independent bases for increasing a basic fee award. Blum v. Stenson, supra at 901; Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986). "'When . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product *is presumed* to be the reasonable fee'" to which counsel is entitled." Id. at 564, quoting Blum v. Stenson, supra at 897.

While the "benchmark" for any award of attorneys' fees is reasonableness, the award authorized by the ESA is not restricted to fees and costs arising directly from the litigation stage of the controversy or only after a complaint has been filed. Id. at 562. Compensation for work outside "the context of traditional judicial litigation" is "well within the 'zone of discretion' afforded" a district court. Id. at 560-561. Addressing a provision for attorneys' fees contained in the Clean Air Act at 42 U.S.C. sec.7604(d), statutory language identical to the language used in the ESA, the Supreme Court held in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air that an award which includes fees and costs for administrative proceedings is appropriate when "the time spent pursuing optional administrative proceedings" is both "'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation." Supra at 561, quoting Webb v. Board of Education of Dyer County, 471 U.S. 234, 243 (1985). In addition, "[i]nterviews, consultation, preliminary research, and various additional tasks unrelated to the administrative appeal all can, and generally do, occur before work is commenced on the complaint." Laselle v. Public Service Company of Colorado, supra.

B. Equal Access to Justice Act

Attorney fees and costs in a NEPA or APA case are awarded to prevailing parties pursuant to the Equal Access to Justice Act (EAJA). 28 U.S.C. sec. 2412. The EAJA allows fees

to "a prevailing party other than the United States" unless "the position of the United States was "substantially justified." Id.; Pierce v. Underwood, 487 U.S. 552 (1988). "Substantially justified" is fairly interpreted as "reasonable in fact and in law." Id. "[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Hensley v. Eckerhart, supra.

"The EAJA provides that attorney's fees 'shall be based upon prevailing market rates for the kind and quality of the services furnished,'" but unless there exists a "special factor," the EAJA sets a limit on the hourly rate paid. 28 U.S.C. sec. 2412(d)(2)(A); Pierce v. Underwood, supra at 571. A "limited availability of qualified attorneys for the proceedings involved" or litigation which requires "some distinctive knowledge or specialized skill" have been considered "special factors," and in these instances an award pursuant to the EAJA may exceed the $125 per hour attorney fee rate. Id. at 572; Sec.2412(d)(2)(A). The quality of the work performed and the complexity of the case may also be relevant to the amount awarded. Blum v. Stenson, supra; Ramos v. Lamm, supra; In re Illinois Congressional District Reapportionment Cases, 704 F.2d 380 (7th Cir.1983).

C. Costs

Normally, costs are allowed to a prevailing party as a matter of course. Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 936 (10th Cir.1984), *cert. denied* 469 U.S. 853 (1984). It is widely accepted that what is appropriately included in an award of costs and related expenses should be guided by Fed.R.Civ.P. 54(d) and 28 U.S.C. sec.1920, and a court's discretion to go beyond what is set out sec.1920 is limited. Crawford Fitting Co. v. J.T.Gibbons,

Inc., supra. Thus, where the ESA at 16 U.S.C. sec.1540(g)(4) expressly authorizes reimbursement for "costs of litigation," but does not specify which costs are recoverable, the costs awarded should align generally with what is permitted pursuant to Rule 54(d) and sec.1920 and must accord, as well, with what is fair and reasonable under the circumstances. Hensley v. Eckerhart, supra at 434; Bee v. Greaves, 910 F.2d 686, 690 (10th Cir.1984), *cert. denied* 469 U.S. 1214 (1985).

An unopposed request for costs associated with obvious needs, such as telephone charges, should normally be awarded in full. Sierra Club v. Environmental Protection Agency, 769 F.2d 796 (D.C. Cir.1985). Receipts for amounts expended are not normally necessary. Alabama Power Co. v. Gorsuch, 672 F.2d 1 (D.C. Cir.1982). "Items that are normally itemized and billed in addition to the hourly rate should be included in fee allowances. . . ." Ramos v. Lamm, supra at 558. While a trial court has discretion to refuse certain costs, if it does so, it must state specific reasons. Delano v. Kitch, 663 F.2d 990 (10th Cir.1981), *cert. denied* 456 U.S. 946 (1982); Moe v. Avions Marcel, supra.

Determination of an Award

Without question, Plaintiff MRGCD has prevailed on the merits. I consider MRGCD as a prevailing party not only on ESA claims, but also on causes of action grounded in NEPA and the APA. Additionally, MRGCD has contributed substantially to judicial review and to implementation of the Endangered Species Act in accordance with its goals; and MRGCD is clearly entitled to attorneys' fees and costs pursuant both to the ESA and the EAJA. With regard to the latter, MRGCD has succeeded on the merits (a) against the government, (b) when the government's

position was neither reasonable nor justified. The Memorandum Opinion and Order which terminated this litigation expressly concludes that Defendants' actions were arbitrary and capricious and that the position taken by Defendants which precipitated the case was not substantially justified. This Memorandum Opinion concludes that Defendants' application of a "baseline approach" to assessing economic impact resulting from designation of critical habitat for the Rio Grande silvery minnow, together with the conclusion that no significant impact would result from the designation, Defendants' neglect of pertinent data and statutorily prescribed considerations when determining the designated critical habitat, and Defendants' failure to provide an environmental impact statement were each not reasonably supported in fact or in law.

Even though I consider MRGCD entitled to an award of fees and costs pursuant to both the ESA and the EAJA, I do not attempt to weight the claims or to apportion an award according to separate statutory grounds. First, I consider all of the MRGCD claims as essentially linked and all productive of a final result in the Plaintiffs' favor. Where claims are based on a common core of facts and integrally related, the Tenth Circuit has refused to permit reductions in attorney fee awards simply because the case results in both successful and unsuccessful claims. Tidwell v. Fort Howard Corp., 989 F.21d 406, 412-413 (10th Cir.1993). Secondly, whether or not a specific issue was discussed in the Memorandum Opinion which decided the case, none of the MRGCD claims can be viewed as frivolous. "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." Hensley, supra at 440; Spulak v. K Mart Corp., 894 F.2d 1150, 1160 (10th Cir.1990). Finally, attempting to allocate some of the attorney hours spent on this care to EAJA work is likely to accomplish nothing more than a minor reduction in the amount

of the award, and where most of the fees claimed are well-within EAJA limits, such an effort could serve little purpose. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." Hensley v. Eckerhart, supra at 435.

A. Reasonable Hourly Rates

Defendants in general do not contest the hourly rates sought by attorneys appearing on behalf of MRGCD. Likewise, I find the hourly rates charged by MRGCD counsel to be well within prevailing rates in Albuquerque and New Mexico markets and clearly justified by the competence and experience demanded of the case. In so finding, I note that counsel for MRGCD needed an understanding beyond environmental and water law. Counsel needed, in addition to several areas of the law, to be conversant in, if not hold a thorough understanding of stream morphology, river management, biology, history, other endangered species in the area, Indian water rights and interstate compacts committing the distribution of Rio Grande water. Thus, in order to direct this case toward a successful end, more than one well-experienced counsel of considerable skill was required.

I therefore find the hourly rates requested in MRGCD affidavits supported in fact; and I accept them as reasonable for purposes of calculating the amount due MRGCD in reimburse-ment for "costs of litigation." Specifically, I find $110-$125 an hour a reasonable fee for experienced attorney and $135 an hour reasonable for well-experienced and specialized counsel. I find $75 an hour reasonable for a supporting or inexperienced attorney and $55-$60 an hour reasonable for the work of a law clerk not admitted to the bar. I find $45 an hour reasonable for paralegal work.

I acknowledge that all of these hourly rates do not apply to attorneys and that the scope of what is included in the term "attorney fees," particularly as the term is used in the Clean Air Act

and the ESA, has not been defined in universally accepted terms. See, e.g.: Sierra Club v. Environmental Protection Agency, 769 F.2d 796, 811 (n.8) (D.C. Cir.1985). Nonetheless, I find the hourly rates requested and to be applied in this case are reasonably encompassed within the term "attorney fees" because all are components of providing legal services to MRGCD. The use of law clerks and paralegals is reasonable and reasonably a part of an attorney fee award because this normally helps to reduce the total paid in legal fees. This assistance serves to relieve the most costly attorneys from work which does not require any particular experience or expertise.

However, regarding this last point, I cannot find that the $25 hourly fee requested by MRGCD's General Counsel for a non-legal individual assigned to specific tasks related to this litigation either comes within the term "attorney fees" or is compensable pursuant to sec.1540(g). Outside exceptional circumstances not present here, non-legal help, whether secretarial, clerical or miscellaneous in nature, must be considered a normal expense of doing business. These charges need to be subtracted from the total amount claimed.

1. MRGCD's Chief Water Counsel

The motion and affidavits refer to MRGCD attorneys practicing as the Law & Resource Planning Associates as LRPA or as Chief Water Counsel. LRPA billed MRGCD from August 31, 1999 through final judgment in December of 2000; and LRPA now requests fees of $16,540. The last page of the affidavit documenting LRPA charges lists costs of $645, but all writing identifying these costs has been redacted. The affidavit will therefore be considered as supporting attorneys' fees only.

The invoices initially submitted to support the fees billed MRGCD and claimed in the motion are clarified by MRGCD's subsequent Reply. This clarification (at fn 1) indicates that in

addition to one attorney well-qualified specifically in water law and another experienced counsel, Christina Bruff DuMars, two associate or contract attorneys, two unlicensed law clerks and one paralegal also worked on the case for LRPA. With some corrections, these attorneys have charged within the range found reasonable, and with few exceptions, all of the LRPA entries included with the affidavit and the corresponding charges appear to be reimbursable.

The corrections to be made arise from inconsistent hourly rates for one associate attorney. Four entries, from June 13 to June 16, 2000, indicate work done by JCH (listed as an unlicensed law clerk) and are billed at $110 an hour. Entries for June 19 and 21 list JCH at $105 an hour. Earlier charges for JCH work are at the rate of $55 an hour, the allowed amount for an individual not licensed to practice or a new attorney without any experience in the practice of law. Neither the $105 nor $110 amount is reasonable for a recent graduate who has not been admitted to the bar and is without experience. The charges for these hours need to be recalculated.

2. MRGCD's General Counsel

General Counsel, or specifically the law firm of Sheehan, Sheehan & Stelzner, P.A., was hired by MRGCD specifically for this litigation. General Counsel requests $154,118 (revised from an initial request of $185,964) in attorneys' fees, approximately $13,000 in New Mexico gross receipts tax, approximately $17,500 in filing fee and other costs, and $30, 808 paid to two expert consultants. After reviewing all of these categories and amounts, I find that the award to General Counsel is subject to some reductions. After excluding certain hours from what is properly included in reimbursable fees and reducing the remainder by fifteen percent for excess hours, and excluding the gross receipts tax and expert consultant fees, I anticipate from a very rough calculation that the amount of an award to MRGCD for General Counsel will be in the area of

$125,000 in fees and $15,000 in costs.

B. Defendants' Protest of Specific Charges

In addition to attorney time spent participating in the administrative process, Defendants contest (1) $30,808 for expert consultants, (2) attorney time spent with the press, at Congressional hearings and attending a conference on water law, (3) reimbursement for gross receipts tax, and (4) excessive hours. On each of these issues with minor exception, I agree with Defendants that the amounts are not properly charged to Defendants either by reason of the ESA attorneys' fee provision or the EAJA.

1. Fees and Costs Incurred in the Administrative Process

I conclude that an award of fees and costs to MRGCD should encompass attorneys' fees incurred during the administrative process. The record developed by the United States Fish and Wildlife Service was from the outset the critical part of this case, and Plaintiff MRGCD was bound to participate as it was assembled. Given the inherent complexities of the situation and the history of the designation of critical habitat for the silvery minnow to that point, it must have been apparent to all sides that further litigation was extremely likely, regardless of what designation of critical habitat followed the administrative proceedings. Further, MRGCD prudently requests fees only from April 1999, the date when the United States Fish and Wildlife Service released its draft environmental assessment and its draft economic analysis for public comment, and "[t]he inevitably of review became vividly clear."

In maintaining that all pre-litigation participation in a public notice and comment rule-making is beyond reimbursement, Defendants neglect the precisely defined limits of judicial review after the administrative process was complete, and consequently, the crucial nature of the

administrative process in this instance. Plaintiffs filed suit on August 4, 1999. Defendants admit that once the case was filed, it proceeded directly to briefing on jurisdiction and standing, moved immediately to briefs on the merits, and afterward directly to the Memorandum Opinion and final order. Throughout the whole of the case, no discovery, evidentiary hearing or supplementing of the administrative record was either expected or allowed. Olenhouse v. Commodity Credit Corporation, 42 F.3d 1560 (10th Cir. 1994).

Thus, establishing the record became the definitive act. First, most of the issues to be raised were susceptible to judicial review only by means of the Administrative Procedures Act and strictly confined to review of the administrative record. Second, after the agency had reached its final decision, this administrative record was highly likely to remain unchanged, and a final determination was almost certainly to be confined to the record as it was established in administrative proceedings. Id. at 1574. In the highest likelihood, after Plaintiffs' suit challenging the agency's conclusions was filed, neither Plaintiffs nor Defendants would be able to develop or to introduce additional evidence. Id.

The Tenth Circuit explicitly terms the judicial review which follows administrative rule-making "an appeal." Id. The process of notice, comment and rule-making that Defendants want to extract as unnecessary to the preparation of this case in many regards constitutes the case itself; and legal work in conjunction with the administrative proceedings was not only directly related, but absolutely critical to the judicial review MRGCD intended to pursue. Further, MRGCD's participation in the rule-making process was integral to its pursuit of ESA goals and the purposes for which the ESA allows attorneys' fees and costs. "[W]here administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results

Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded." Sullivan v. Hudson, 490 U.S. 877, 888 (1989).

Characterization of the case as an appeal combined with the several limits imposed by such a classification separates this case from those to which Defendants refer and makes this case extraordinary when compared to the customary case filed in anticipation of trial. Accordingly, considering both the nature of an Olenhouse case and the goals of the ESA pursued by participation in the rule-making process tested by this lawsuit, I conclude that fees and costs beginning in April of 1999, when need for suit became clear, is authorized in the law and fully warranted.

2. Payment for Expert Consultants

MRGCD affidavits include payments to two expert consultants, one formerly Chair of the Economics Department at the University of New Mexico with a Ph.D. in economics and another owner of a New Mexico business and "a recognized expert in hydrology," who are both said by MRGCD to have been "used extensively during the public comment period and who have worked on this case at various times. . . ."

The billing from the Plaintiffs' hydrologist indicates services in April of 1999 which totaled $20, 973.00 in charges. The services provided are described in the expert's invoice as:

> City groundwater model revisions for showing effect on MRGCD structures. Comment on OSE guidelines evaluation, critical habitat proposal evaluation and report. Flow evaluation, memorandum on storage in reservoirs; reservoir operation rules. Letter on guidelines; meet on habitat, (4/5). Draft memorandum on habitat effects. Coordinate ISC, City, FWS. Meet with MRGCD, City, CHSMHill. Coordinate ISC, City experts. Critical habitat mapping for letter, report and public meeting. Figures and data for CH2MHill model review. Draft

> report on Supplemental Flow Requirement. Prepare statement for public hearing.

Services provided and billed by Plaintiffs' economist are itemized as:

> Initial review of RGSM materials @ 50% time. Meeting at MRGCD office, inclusive of travel. Review of materials @ 50% time. Phone conversation with John Utton. Reading and conceptualization @ 50% time. Meeting at MRGCD office, inclusive of travel. Preparation of scope of work @ 50% time. Review of economic literature @ 50% time. Initial drafting: analysis of USFWS cover letter @ 50% time. Drafting: analysis of ECONorthwest @ 50% time. Drafting: critique @ 50% time. Meeting at City, inclusive of travel and preparation @ 50% time. Drafting: critique. Conceptualization: numerical illustration. Drafting: numerical illustration. Editing draft. Meeting at city and editing. Preparation at Public Hearing. Public Hearing. Preparation of summary conclusions and editing of report. Editing of report. Final editing. Revision based upon comments and delivery.

This work was charged as 55 hours at $175 per hour. Adding New Mexico gross receipts tax of $589.53, the charge to MRGCD totals $10,214.53.

The law does not clearly permit the reimbursement requested. The ESA allows "costs of litigation (including a reasonable attorney and expert witness fees)." 16 U.S.C. sec.1540(g)(4). The EAJA allows "fees and other expenses in addition to any costs awarded." 28 U.S.C. sec. 2412(D)(2)(A). The terms used, however, have not been widely considered to include payments for expert fees unless the expert has been appointed by the court or has testified in court proceedings, even if the court has required a party to consult with an expert. Miller v. Cudahy Co., 858 F.2d 1449, 1461 (10th Cir.1988), *cert. denied* 492 U.S. 926 (1989); Murphy v. International Union of Operating Engineers, Local 18, 774 F.2d 114 (6th Cir.1985), *cert. denied* 475 U.S. 1017 (1986).

MRGCD contends that the law does or should go so far as to include payments to their experts as legitimate and necessary "costs of litigation." In addition to Olenhouse v. Commodity Credit Corporation, supra, MRGCD cites Davis County Solid Waste Management & Energy Recovery Special Serv.Dist. v. United States Environmental Protection Agency,169 F.3d 755, 757 (D.C. Cir.1999). Davis County is a Clean Air Act case where the issue of expert consultant fees was decided on the basis of statutory language identical to the ESA provision: "costs of litigation (including reasonable attorney and expert witness fees)." As in the present case, the petitioner in Davis County claimed it was entitled to reimbursement for a consultant as an "expert witness" because the consultant "analyzed the regulations and the docket and provided two technical affidavits about the impact the regulations would have on Davis County." Id. at 756.

The D.C. Circuit Court first referred to its ruling in Sierra Club v. Environmental Protection Agency, supra, which held that charges for technical consultants hired to help attorneys deal with "the technical nature of the subject matter," but who are neither attorneys nor appear in the case as witnesses, cannot be passed on to a defendant as costs. Id. at 811. The Court concluded that the Clean Air Act fee and cost provision authorized only "compensation for professional services of attorneys and expert witnesses," in the literal meaning of those terms, and did not include fees charged by one who was neither. Id. "We do not read section 307(f)'s waiver of sovereign immunity so broadly as to allow for fees in connection with the services of outside, nontestifying experts." Id. at 811.

Referring to this prior holding, the D.C. Circuit Court found an implication "that had expert testimony been provided to the court instead of review being based entirely on the administrative record, recovery might have been appropriate. This suggests that expert testimony

need not be given in a trial to fall within 42 U.S.C. sec.7607(f)." Davis County Solid Waste Management v. EPA, supra at 756. The Court then went a step beyond its ruling in Sierra Club and permitted some reimbursement to Davis County for its consultant. "To the extent that Rigo's charges reflect time necessary for the preparation of his affidavits, they are properly recoverable." Id. This is the sentence on which MRGCD now relies.

This is also the only sentence as far as I can determine which clearly supports MRGCD's position. Other than a ruling in the Ninth Circuit which provides no discussion of its decision to award consultant fees as costs and allocates more discretion to a trial court than the Supreme Court may since permit, Thornberry v. Delta Air Lines, Inc., 676 F.2d 1240, 1245 (9th Cir.1982), *vacated on other grounds* 461 U.S. 952 (1983), the statement MRGCD cites apparently comprises the totality of appellate court rulings which directly answer the question. Equally notable, I find no holding of the Tenth Circuit Court of Appeals which controls on the issue in this case.

Holdings and statements in Tenth Circuit case law pertaining to payment of expert witness fees consistently restrict the discretion of a trial court. See: Chapparal Resources, Inc. v. Monsanto Company, 849 F.2d 1286 (10th Cir.1988). These cases generally make no suggestion that expert consultants who do not testify present reimbursable expenses when fees and costs are shifted in favor of a prevailing party; and "costs" in the Tenth Circuit have not included expert consultant fees "unless the expert is appointed by the court." James v. Sears, Roebuck and Co., Inc., 21 F.3d 989, 995 (10th Cir.1994); Gray v. Phillips Petroleum Co., 971 F.2d 591 (10th Cir.1992). "Expert witness fees for witnesses that do not appear in court are not an allowable cost under Sec. 28 U.S.C.1920." Jones v. Unisys Corp., 54 F.3d 624 (10th Cir.1995).

Certainly, decisions from one circuit to another do not reflect a single direction, but the Tenth Circuit's position remains in the majority view. While the Third, Eighth and Ninth Circuits extend to district judges the "discretion--albeit sparingly--to award costs not specifically enumerated" by statute, the D.C., First, Second, Fourth, Fifth, Seventh, Tenth and Eleventh circuits generally refuse to award costs *unless* they are specifically enumerated by statute. Murphy v. International Union of Operating Engineers, supra at 133. The Tenth Circuit is thus to be counted among those jurisdictions where expenses incurred for an expert who does not appear in court, regardless of whether or not the expert was regarded as necessary to the prevailing party's case, are considered outside what is reimbursable as costs and beyond what can be awarded in the name of judicial discretion. Id. at 1460; Jones v. Unisys Corp., supra.

The decisions restricting judicial discretion in awarding costs irrespective of the source of the cost award more closely align with Supreme Court rulings to this point. The Supreme Court finds an umbrella definition of "costs" in 28 U.S.C. sec.1920 and holds, absent a statutory provision which explicitly provides a different or expanded definition, that sec.1920 strictly limits a trial court's discretion to define what costs constitute recoverable charges. Crawford Fitting Co. v. J.T.Gibbons, Inc., supra. at 441.

Similarly, the Supreme Court has also determined that the fee and cost provision of the Clean Air Act (again, identical to the ESA provision) was not intended by Congress to provide a radical departure from traditional fee and cost-shifting principles. Ruckelshaus v. Sierra Club, 463 U.S. 680, 693 (1983). For this reason, even though an award of costs and fees pursuant to the Clean Air Act is not restricted to "a prevailing party," the Supreme Court held that parties seeking an award pursuant to the Clean Air Act must have achieved a "modicum" of success in the

underlying litigation. Id. Together, these cases indicate that the Supreme Court sanctions the position of the several circuits which interpret very narrowly the terms used and the discretion permitted in setting fee and cost awards. Whether the D.C. circuit now leads the majority of circuits to the next logical step in the same direction, or merely has taken a step outside the prevailing view can be known only when the majority of circuits have occasion to rule. In the interim, it appears the Tenth Circuit will hold to its restrictive position.

The question in this case, then, if unanswered, at least remains straightforward: whether the ESA at sec.1540(g) means for the cost of "expert witnesses"to be reimbursable after judgment, even when the expert has not testified in court as a witness. The means of addressing the question in this case also appears straightforward. Following Tenth Circuit law to this point, the language of the statute is to be interpreted literally and narrowly, and discretion does not extend beyond what the statute expressly provides. Jones v. Unisys Corp., supra. "There must be an explicit statutory authorization before expert witness fees will be awarded." James v. Sears, Roebuck, supra, citing West Virginia Hosps., Inc. v. Casey, 499 U.S. 83, 86 (1991); Miller v. Cudahy Company, supra.

Does the pending motion include fees for a "witness?" MRGCD suggests in its Reply brief that at least one of its experts may have prepared an affidavit, or perhaps the note suggests only that *were* the expert to have prepared an affidavit, the costs of preparation would be recoverable. From this bare statement MRGCD apparently stands on the proposition that if any expenses incurred for an expert consultant who has not testified in court have been recovered, all of the expert fees in this case should be considered reimbursable. Defendants, on the other hand, argue that because its administrative rule-making procedures do not permit the use of expert

witnesses, under no circumstances should expert consultant fees be included in an award of fees and costs. I take the ground between. Considering the exceptional circumstances presented when a case is confined, as was this one, by the holding in Olenhouse v. Commodity Credit Corporation, supra, and considering Tenth Circuit cases on payment of witness fees, I conclude that *only if* one or both of the MRGCD experts prepared an affidavit is any amount of their billing recoverable pursuant to the ESA or the EAJA.

Again I base my determination on the limited role of a district court in a case which is restricted to review of an administrative record and governed by Olenhouse. In this situation, the record established administratively substitutes for the trial and afterwards must be regarded as utterly frozen. In most instances this precludes consideration of additional evidence, including expert opinions, but where additional evidence might be appropriate or necessary, an affidavit may serve as the sole means of formally presenting new factual matters to a district court. This situation is likely to constitute the vast majority of ESA cases, and it therefore makes little sense to me to preclude these circumstances entirely from the cost recovery provided by sec.1540(g). In nearly all cases restricted to review of an administrative record, the sole means of an expert witness presenting testimony to a district court will be by affidavit. Whether or not the court allows or considers such additional material, an affidavit constitutes the statement of a "witness" uniquely precluded from an appearance in the courtroom. In such an instance, I consider an expert consultant who prepares an affidavit for filing either as part of, as supplement to or as challenging the administrative record constitutes an expert witness for purposes of the reimbursement authorized by the ESA.

I consider this conclusion wholly in line with the purposes of sec.1540(g) and the ESA,

and I also see it within the confines of Tenth Circuit law as it stands to date. Cases such as Cleverock Energy Corporation v. Trepel, 609 F.2d 1358 (10th Cir.1979), which have ruled otherwise, have based their determinations solely on 28 U.S.C. sec.1920, without the additional wording of sec.1540(g). I conclude the latter is a specific authorization for reimbursement of an expert fee on condition that (a) the charge is strictly limited to time directly required for preparation of an affidavit, (b) the affidavit is filed in the administrative record or with the court, and (c) the status of the case as an administrative appeal does not permit the witness to present fact or opinion to the court in any other manner.

Having so decided, the question in this case is still not finally resolved. The materials provided in support of MRGCD's motion fail to clarify whether an expert for MRGCD prepared an affidavit, and if so, the materials fail to identify how much expert time was utilized directly in preparing it. This is akin to the situation in the Davis County case in which the D.C. Circuit found it "unclear from the itemized billing . . . precisely how much time" was directly attributable to affidavits, and the Court perused the billing information to find a suggestion. Supra at 756. In this instance, I refer the matter to counsel to specify, first, whether either expert prepared an affidavit, and if so, precisely how much time is to be allocated to its preparation. Time other than what is spent preparing an affidavit is not compensable. 16 U.S.C. sec. 1540(g)(4); James v. Sears, Roebuck, supra. Except for what might have been spent directly in the preparation of an affidavit, all remaining time charged by MRGCD experts, as in the Davis County case, was apparently spent on assessing the facts and summarizing the consequences of the challenged administrative decision, in advising Plaintiffs' counsel, and in planning strategy and policy positions."This advisory function appears to fall within the prohibition of Sierra Club." Id. Likewise, this advisory

function appears to fall outside both Tenth Circuit holdings and sec.1540(g).

3. Attorney Time with Media, at Congressional Hearings and at a Water Law Conference

Defendants object to MRGCD being reimbursed for attorneys' fees not directly related to its suit or to administrative proceedings. What Defendants regard as media contacts, however, is not readily apparent, and I find none. As to attendance at a water law conference and contacts with legislators, I agree the time should not be chargeable to Defendants. "Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." Ramos v. Lamm, supra at 553, quoting Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir.1980) (en banc).

In this instance, it appears from the billing records included in support of Plaintiffs' motion that the client was billed for counsel's attendance at the conference, as well as on May 25,1999, for discussion of "upcoming testimony on Senator Chafee's bill," April 5 for coordinating "efforts in preparation for next week's trip to Washington, D.C. to discuss ESA issues with our congressional delegation," and "memorandum to file," April 12, "discuss ESA/water rights project," and April 15, "Final preparation for meetings with U.S. Representative Joe Skeen . . Heather Wilson . . . U.S. Senator Pete Domenici to discuss multiple ESA issues." I surmise a client pays for this work because the work is directly related to furtherance of the client's affairs. Yet, that does not make the work necessary or pertinent to this lawsuit, and I suspect that more likely than not, the same efforts, conferences and contacts would have been undertaken and charged to the client whether or not the client was currently engaged in or anticipating litigation.

Similarly, while the subject of a water law conference may include information on the

status of Rio Grande water and other issues directly or tangentially related to MRGCD's suit, an educational conference must be viewed as pertinent to an attorney's general background in the subject matter and rarely can be regarded as so pertinent to a pending lawsuit as to be an activity in furtherance of the litigation itself. Only the latter should be chargeable to Defendants.

Therefore, I agree with Defendants that attendance at a water law conference, work on testimony before Congress, lobbying and legislative contacts and other like charges should not be reimbursable by reason of statutory fee-shifting intended to compensate for "costs of litigation." Other references to meetings, contacts or conference time that might be excluded from what is compensable attorney hours are sprinkled throughout the1999 billings. One of these appears to be a "workshop" dated December 4, 1999. If this was directly related to the case or the administrative process, it is not obvious. These several references appear very minor in comparison to the total hours which are obviously directly related to the case, but nevertheless they must be subtracted from the calculation of fees due MRGCD from Defendants. Before the parties stipulate to a final form of order setting an exact payment amount, MRGCD General Counsel need to comb its billings for these references and extract the time where it applies to the giving or receiving of information of an educational or lobbying nature.

4. Reimbursement for the New Mexico Gross Receipts Tax

New Mexico's gross receipts tax due the State from MRGCD counsel is ordinarily, or at least frequently, passed on to an attorney's client, and for this reason, the tax can be taken as a "cost" to MRGCD. See: Herrera v. First Northern Savings and Loan Assoc., 805 F.2d 896 (10th Cir.1986); Bee v. Greaves, supra. Yet, that fact does not completely or finally resolve whether it is appropriate to assess the tax against Defendants pursuant to Sec.1540(g), 28 U.S.C.1920 or 28

U.S.C. sec.2412. Whether or not an amount is ordinarily billed to the client separately from the fee charged is a repeated consideration in cases discussing fee and cost awards, but it is not the only consideration.

I see no substantial legal impediment to assessing the tax against Defendants. Even if the tax is ultimately paid by the United States, it would not be an unlawful taxing. United States v. New Mexico, 455 U.S. 909 (1981).

I also do not agree with Defendants on other points. First, Defendants contend that a statute permitting assessment of attorneys' fees and costs against the United States constitutes a waiver of sovereign immunity and must be strictly construed. Secondly, Defendants contend that state taxes cannot be charged to Defendants without express and specific authority. I conclude, however, that it is only the provision for attorney fees which must be strictly construed. Ruckelshaus v. Sierra Club, supra at 685. Citing Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 247 (1975), and the "American Rule" under which a prevailing litigant is not ordinarily entitled to collect attorney's fees, the Supreme Court states "[e]xcept to the extent it has waived its immunity, the Government is immune from claims for attorney's fees . . . .. Waivers of immunity must be strictly construed." Id. If a determination of costs is narrowly confined, it is for other reasons. Crawford Fitting Co. v. J.T.Gibbons, Inc., supra.

Thus, finding no prohibitions and little preference in the law, I have weighed the pros and cons of including the gross receipts tax as part of MRGCD's award. Largely on grounds of fairness and equity, I decline to do so. The tax is due to the State of New Mexico not from MRGCD, but from its attorneys and their law firms. Sec.7-9-1 NMSA 1978. "Plaintiffs are not required by law to pay this tax." Herrera v. First Northern Savings and Loan Assoc., supra at 902.

For its own reasons or perhaps by custom in the community, MRGCD has agreed that its counsel may pass on the tax and MRGCD will pay it. Yet, this makes MRGCD obligated gratuitously or by contract and not by law. Therefore, I see no obligation on Defendants' part to assume responsibility for the tax and no reason to impose MRGCD's freely granted or contracted obligations upon Defendants, particularly in the face of an already sizeable award in MRGCD's favor.

5. Allegations of Excessive Hours

Finally, the most contested factor in determining the pending motion is the number and type of hours reasonably compensated. To this end, I have examined line by line what MRGCD counsel have submitted in support of the requested fee award. Generally, I accept the affidavits as adequate in form. I find the records contemporaneously created and sufficient to evaluate the reasonableness of Plaintiffs' request. As a whole, the time records submitted express a clear and satisfactory indication of the nature of the task undertaken and the person to whom the work is attributed.

Defendants argue that counsel for MRGCD claims a patently unreasonable 157 hours for the Notice of Intent to sue and drafting a complaint, 357 hours for research, 250 hours for briefs on standing and jurisdiction, 390 hours for briefs on the merits and 150 hours of client contact and consultation with other attorneys. Defendants contend all hours claimed warrant an across-the-board reduction of fifty percent.

Rather than taking Defendants' approach, at least entirely, I have first examined individual entries, and as to some specific tasks, I have attempted to arrive at a total of hours absorbed. For example, I find that General Counsel claims approximately 34 hours of attorney research and

drafting time for a reply brief on the merits, and I find this not unreasonable. While I do not argue with Defendants' calculation of 390 hours for Plaintiffs' Joint Opening Brief, I count approximately 310 hours attributable to a brief on the merits. This may be unreasonable.

Looking at the time charged to Plaintiffs' brief on the merits, drafting of the complaint and the amended complaint and other separate tasks as billed, as well as the total time charged to the case, Defendants' argument that the claimed hours are excessive and unreasonable is initially appealing. However, as the D.C. Circuit noted in the Davis County case, I cannot be persuaded by Defendants' suggestion "that the number of billable hours listed . . . is excessive simply by virtue of that number." Davis County Solid Waste Management v. EPA, supra at 762. More importantly, I cannot ignore the fact that MRGCD obtained for itself and other Plaintiffs an excellent result which fully accords with the purpose of the ESA. Hensley v. Eckerhart, supra at 435. This circumstance, by itself, counters any initial tendency to begin wholesale reduction of attorney hours. Id.

First, I am aware of the several weeks required to review the briefs and administrative record and prepare the Memorandum Opinion which covered most, but not all, of the issues included in Plaintiffs' Amended Complaint and Joint Opening Brief. I therefore acknowledge at the outset that the administrative record in this case was cumbersome, difficult and redundant. Nevertheless, Plaintiffs' Joint Opening Brief cited extensively to the record, and these citations were both precise and exceedingly helpful in an understanding of the issues and the parties' contentions. In addition, data grounding arguments on both sides included stream morphology, biology, ecology, economics and more, some of it included in the record and some not.

The law involved in the case included developing aspects of environmental, endangered

species and water law, as well as administrative and constitutional law; and it was critical at all stages of the case to be well-versed in the most recent cases in the field. Plaintiffs' briefs and letters indicated an impressive professionalism and competence in each of the fields of law required to pursue their interests, and the briefs from a legal, as well as scientific perspective were well-done in all regards.

Further, I understand that MRGCD represents a wide diversity in stakeholders and must consider countless individual interests, and that many of MRGCD's constituencies had to be consulted, considered and informed at various stages of the litigation. After working with all the many sides of the issues presented by the case, sifting through and marshaling facts, finding law and organizing arguments, numerous parties working in conjunction with MRGCD or as parties in the consolidated cases had individual counsel who each had to add and edit arguments and approve or disapprove what was to be presented to the court.

Considering all of these factors, especially the size of the administrative record and the several complex issues presented by that record, I must consider the work of two attorneys over eight weeks in research, writing, editing and amending the Joint Opening Brief to be extended, studied and careful, but I cannot declare it patently unreasonable. To carve into this attorney time which is specifically described and adequately documented by contemporaneous records with the deep reduction Defendants suggest could only be arbitrary. I neither have nor can construct any kind of a yardstick which in hindsight would determine what research, drafting or review could have been eliminated or should have been completed in fewer hours.

"Billable hours in fee applications are susceptible to reduction for failure to allocate tasks efficiently to different attorneys based on experience." Id. at 760. Yet, neither can I fault MRGCD

counsel for their allocation of attorney expertise. I find use of the most expensive counsel and delegation of tasks to less experienced lawyers both prudent and reasonable. At the same time, I cannot deduct from MRGCD's award for use of a water law attorney; I cannot add or consider these hours for specialized counsel as if they were those of the General Counsel firm. In all general respects, then, I find the fee application sound.

Nevertheless, I have some concerns. With the several attorneys, law clerks and paralegals used, and most especially in the face of unusually high hours in nearly all respects, I must question whether some duplication of effort or redundant billing is not inevitable. There appears to be an exceptionally high number of attorneys and law clerks reviewing and summarizing new developments, corollary aspects and particularized research. There appears to be repeated instances of one attorney consulting with or reporting to another.

I have not attempted to verify all of Defendants' calculations. I take them only as general indications. In so doing, I assume that both MRGCD counsel and Defendants accept the term "research" as meaning not solely legal research, but also research into the administrative record. If the alleged 357 hours for research represents time for legal research, these hours are patently unreasonable in view of the time claimed for the brief. If the alleged 357 hours are for research into the administrative record, the hours are still excessive.

Other indications are also disturbing, particularly the 157 hours purportedly spent on drafting a complaint. Based on ordinary experience, this number is far in excess of what is usually necessary. From a common sense perspective, even given all admitted complexities, it seems fewer hours should have been required. The 390 hours for a brief on the merits may be considered sustainable, but only if these 390 hours *include* the necessary legal research. To see in

addition to these 390 hours another 357 hours for research, especially when the billing indicates charges for computerized research which is markedly efficient and ought to reduce research time dramatically, I must question whether an unreasonable amount of hours are claimed overall for research and drafting, general familiarity with legal and factual subject matter, and in general case management.

In addition, some of the time charged appears more appropriately relegated to another case. These are references in June 1999 to "motion to reconsider before Judge Conway;" "appeal of Fish and Wildlife decision, continue working on same;" "telephone call . . . re: issues in Catron County case as they relate to our appeal; review pleadings faxed by Lee;" telephone call . . . re: Willow Fly Catcher case." These all appear directed at the silvery minnow case which preceded this one and the appeal of that case and also to another environmental case in this district which challenged designation of critical habitat for the Southwestern Willow Flycatcher, an endangered bird. With regard to the latter, I note over 12 hours of attorney time charged for review of the district court decision, the docket, the pleadings and the briefs. I am very familiar with this district court decision, find it not particularly complex and do not find much more than reviewing the opinion and briefs in that case pertinent to this case. Certainly, no more than six hours for the Flycatcher case and none of the references to Judge Conway's case are directly pertinent to the present one.

Similarly, while MRGCD states that it is requesting reimbursement only from April of 1999, the billings included with the affidavit go back as far as February and March of 1999. If not already done, these also should be deducted from total hours.

As a whole, I accept the hours of client contact claimed because of the complexity of the

record and the issues and (for the sake of accuracy) the need to review a technical complaint, complex arguments and lengthy briefs with clients and their separate counsel. I also note that time charged to client contact and lawyers' consultations occurred over more than a year's period. With as many urgently interested parties and the several lawyers involved with each, I do not find time charged for client contact and consultations to be extraordinary.

C. Costs

In addition to all expert consultant time other than that spent directly in the preparation of affidavits filed in the administrative record or with the court and the New Mexico gross receipts tax, the costs as billed are acceptable, except for charges for computerized research. Costs for computer legal research "are not statutorily authorized" and discretion which permits computer research to be reimbursed as costs should be exercised "sparingly." Jones v. Unisys Corp., supra.

It is my understanding that judges in this district have routinely denied computer research as a cost to be passed on after a party has succeeded on the merits; and, largely because it has not yet been approved in the district as a whole, I have ordinarily denied such costs, as well. At the same time, I certainly recognize that computer research is an efficient means of accomplishing necessary tasks and that legal research by means of Lexis and Westlaw is the method preferred throughout this courthouse. In addition, I understand that this case presented a special circumstance. This case involved not only several distinct legal fields, but also an enormous amount of developing case law in each of these areas and identification and analysis of new law was required of all counsel. For this reason, I find use of computerized research to have been necessary and reasonable, and exercising discretion sparingly, I find that fifty percent of the costs of computer research should be reimbursable to MRGCD.

D. Establishing the Lodestar Figure
and Computing the Amount To Be Paid MRGCD

A reasonable number of hours multiplied by a reasonable hourly rate produces a "lodestar" figure, presumed to be reasonable. Blum v. Stenson, supra at 888; Hensley, supra at 433. While this order does not set a precise dollar figure due at this time to MRGCD, I have established the hourly rates to be allowed.

Subject to recalculation by counsel, I have also determined those hours which are not properly a part of the fee request and need to be subtracted from the total hours claimed. The hours to be redacted are (1) all hours prior to the date in April,1999, when the United States Fish and Wildlife Service released its draft environmental assessment and its draft economic analysis for public comment; (2) all hours spent with media, at congressional hearings, meetings with state and federal legislators and lobbying, all hours in preparation for these hearings, meetings and lobbying, and all hours spent at legal conferences or in similar educational pursuits, whether counsel was attending or participating; (3) all hours related to prior or other silvery minnow cases and all but six hours spent on the Southwestern Willow Flycatcher case; and (4) all hours attributed to non-legal support.

With these corrections made, all remaining hours billed by General Counsel should be reduced by fifteen percent. I find this reduction well-supported by indications of redundant efforts and, taking the fee request in its entirety, an exceptionally high and inherently suspect number of hours overall. Rather than attempt to categorize all hours billed and sort those which are reasonable in view of the assigned work from those which are considered excessive, I find that a reduction of fifteen percent is equitable as a fair balancing of the several factors which weigh for

and against MRGCD's fee request.

I expect that from what is set out in this order the parties without further clarification will be able to make the necessary corrections, deletions and deductions and produce a specific dollar amount due from Defendants to MRGCD. The parties should stipulate to an order which sets out the fees and the costs to be paid and present the order for my signature. Should the parties for any reason be unable to stipulate to an order, each side should set out its position by letter no later than 30 days from the date of this Order and I will resolve the controversy.

NOW, THEREFORE, IT IS ORDERED that Plaintiffs' Joint Motion for Attorneys' Fees, Costs and Related Expenses is granted in part, and denied in part, and

IT IS FURTHER ORDERED that within the next 30 days the parties prepare and present a stipulated order setting a dollar amount for costs and a dollar amount for attorneys' fees to be paid by Defendants to Plaintiff Middle Rio Grande Conservancy District.

SENIOR UNITED STATES JUDGE