

CORPORATE DISCLOSURE STATEMENT

Appellee Oregon Natural Desert Association is a non-profit corporation and has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF JURISDICTION

By notice of appeal dated September 28, 2006, ER 64,¹ Defendant-Appellants Carlos Gutierrez *et al.* (hereafter “Commerce”) appeal from the August 9, 2006 final order of the district court, ER 52, granting an award of attorney fees and costs in favor of Plaintiff-Appellee Oregon Natural Desert Association (“ONDA”). The district court originally had jurisdiction under 5 U.S.C. § 552(a)(4)(B) (Freedom of Information Act or “FOIA”) and 28 U.S.C. § 1331 (federal question) because this action was brought against the federal defendants for violations of the laws of the United States, including the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *as amended*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706. The district court had jurisdiction over ONDA’s attorney fees motion under 5 U.S.C. § 552(a)(4)(E) (FOIA attorney fee provision) and 28 U.S.C. § 2412(d)(1)(A) (Equal Access to Justice Act or “EAJA” attorney fee provision). This Court’s jurisdiction over the agency’s appeal rests on 28 U.S.C. § 1291.

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¹ In this brief, “ER” refers to Defendant-Appellants’ Excerpts of Record and “SER” refers to ONDA’s Supplemental Excerpts of Record.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. Whether the Department of Commerce has waived its attorney fee arguments based on mootness and appropriateness of relief because it did not timely appeal the District Court's April 24, 2006 final judgment resolving these issues.
- II. Whether the District Court properly granted attorney fees under the Freedom of Information Act attorney fees provision, in this FOIA case in which ONDA obtained declaratory and injunctive relief.
- III. Whether the record before this Court is sufficient to uphold the District Court's attorney fee award decision, in whole or in part, under the EAJA, should the Court decide that fees for one or more of ONDA's successful claims should have been awarded under EAJA instead of the FOIA.

STATEMENT OF THE CASE

The lawsuit underlying this appeal sought and achieved judicial relief concerning a pattern and practice of significant delays by the Department of Commerce in handling requests for public information under the Freedom of Information Act. 5 U.S.C. § 552, *as amended*. ONDA filed this action in February 2005 seeking to compel the National Oceanic and Atmospheric Administration, National Marine Fisheries Service ("NOAA Fisheries"), an agency situated within the Department of Commerce, to comply with the FOIA in handling several of

ONDA's requests under the Act, as well as challenging Commerce's regulations as not in compliance with the FOIA. ER 1–12 (First Amended Complaint). The requests, dated March 11, 2004 and January 7, 2005, involved time-sensitive information related to Section 7 consultations under the Endangered Species Act concerning the impacts of livestock grazing on threatened and endangered fish species. See Ore. Natural Desert Ass'n v. Gutierrez (“ONDA I”), 409 F.Supp.2d 1237 (D. Or. 2006) (describing initial statutory, factual, and procedural background of the litigation).²

In March 2005, several weeks after the Complaint was filed, NOAA Fisheries and other agencies possessing records responsive to ONDA's requests finally supplied the documents requested. See SER 1–13 (responses following initiation of action in district court); see also ONDA I, 409 F.Supp.2d at 1239–41 (summarizing key dates). On June 9, 2005, Commerce moved to dismiss the case, arguing that because it had produced all responsive documents, ONDA's claims were moot and ONDA was not entitled to any further relief. ER 70 (Dkt # 17). ONDA opposed Commerce's motion to dismiss and cross-moved for summary judgment, arguing the case was not moot because ONDA was entitled to declaratory relief on the pattern and practice of delay concerning ONDA's requests, and to declaratory and injunctive relief on its claims concerning

² The district court's Jan. 9, 2006 slip opinion is at ER 13.

Commerce's FOIA regulations. ER 70 (Dkt ## 19, 21); ONDA I, 409 F.Supp.2d at 1244–45.

During the district court litigation, ONDA achieved significant success in addressing what had become a pattern of agency conduct resulting in significant delays in handling ONDA's FOIA requests. On January 9, 2006, the district court denied Commerce's motion to dismiss the case as moot. ONDA I, 409 F.Supp.2d at 1244–45. Distinguishing the “one-time challenges to a failure to release documents” at issue in the cases Commerce cited in support of its mootness argument, the district court found that the agency had engaged in a “pattern and practice” of unlawful delays. Id. at 1245 (also concluding that “I cannot conclude that it is ‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.’”).

After rejecting Commerce's mootness argument, the district court then further ruled in ONDA's favor on its motion for summary judgment on Claims One and Two, holding that NOAA Fisheries failed to make timely determinations on ONDA's FOIA requests, resulting in improper withholdings in violation of FOIA and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706. ONDA I, 409 F.Supp.2d at 1248. The district court also determined Commerce's “referral” regulation at 15 C.F.R. § 4.5(b) was reasonable under controlling case law, granting summary judgment in defendants' favor on Claim Three, id. at 1250,

and ruled that the court required further information to decide ONDA's fourth claim challenging Commerce's "cut-off date" regulation at 15 C.F.R. § 4.5(a). Id. at 1252. On March 2, 2006, after additional briefing and evidence was presented to the court, it ruled in ONDA's favor on Claim Four, holding that Commerce's "cut-off regulation is not reasonable on its face and violates FOIA." Ore. Natural Desert Ass'n v. Gutierrez ("ONDA II"), 419 F.Supp.2d 1284, 1288 (D. Or. 2006).³

After ruling on the motion to dismiss and the merits of the claims, the district court requested further briefing on the appropriate relief to be ordered. ER 72 (Dkt # 39). The parties briefed the appropriate relief to be issued, ER 72 (Dkt ## 42, 43), and ONDA then succeeded, via a Judgment entered on April 24, 2006 (Dkt # 47), in securing declaratory relief under the FOIA and the APA, as well as injunctive relief ordering the Department of Commerce to no longer rely upon its cut-off date regulation, 15 C.F.R. § 4.5(a), which the district court had determined to be unlawful under the FOIA. ER 47–49 (Judgment). ONDA also succeeded in obtaining the balance of the agency records it sought under the two requests at issue, when the agency produced those records only after this action was initiated. See ONDA I, 409 F.Supp.2d at 1244–45 (noting agency's release of responsive records after suit was filed, and rejecting defendants' mootness argument). Commerce did not appeal the April 24, 2006 Judgment, nor any of the earlier

³ The district court's Mar. 2, 2006 slip opinion is at ER 40.

district court decisions subsumed in the judgment, including the denial of its motion to dismiss and the ruling in ONDA's favor on the merits. See ER 73–74 (district court docket sheet).

Following the district court's judgment, the parties made a good-faith effort to resolve the issue of fees and costs via several weeks of settlement discussions; however, they were not able to achieve settlement. Accordingly, ONDA moved the district court for an award of attorney fees and costs under the FOIA, 5 U.S.C. § 552(a)(4)(E), or, in the alternative, pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). ER 73 (Dkt # 53). On August 7, 2006, the district court issued an order awarding ONDA \$46,889.02 under the FOIA attorney fee provision. ER 74 (Dkt # 66); Ore. Natural Desert Ass'n v. Gutierrez ("ONDA III"), 442 F.Supp.2d 1096, 1103 (D. Or. 2006).⁴ Commerce appealed the district court's fee award order on September 28, 2006. ER 64.

STATEMENT OF THE RELEVANT FACTS

I. STATUTORY BACKGROUND

Congress enacted the FOIA to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NRLB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). The FOIA requires federal agencies to disclose

⁴The district court's Aug. 9, 2006 slip opinion is at ER 52.

information upon request unless the statute expressly exempts the information from disclosure. 5 U.S.C. § 552, *as amended*. Agencies must determine within twenty working-days after receipt of a request whether to comply with the request. *Id.* § 552(a)(6). A requester is entitled to receive all responsive documents in an agency's possession or control up to or near the date of the release of records. *See, e.g., Public Citizen v. Dept. of State*, 276 F.3d 634, 642 (D.C. Cir. 2002); *McGehee v. CIA*, 697 F.2d 1095, 1102–03 (D.C. Cir. 1982). When an agency has improperly withheld agency records from a requester, the FOIA instructs the courts to order the production of those documents. 5 U.S.C. § 552(a)(4)(B). The FOIA provides that the “court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.” *Id.* § 552(a)(4)(E).

II. FACTUAL BACKGROUND

At issue in this case are two requests ONDA submitted to NOAA Fisheries under the Freedom of Information Act, as well as two Department of Commerce regulations implementing the FOIA. On March 11, 2004, ONDA submitted a FOIA request that sought documents concerning the effects of livestock grazing on Upper Columbia River steelhead and Middle Columbia River steelhead for the years 2003 to present. The documents ONDA sought were related to the Section 7 consultation process under the Endangered Species Act, including biological

assessments, biological opinions, letters of concurrence, trip reports, monitoring information, and similar documents. See ONDA I, 409 F.Supp.2d at 1239 (factual background describing ONDA's requests).

Over the course of the next year, letters and responsive documents from NOAA Fisheries and other agencies to which NOAA had referred portions of ONDA's request, trickled in to ONDA sporadically. See id. at 1239–41 (describing chronology of requests and responses). On December 10, 2004, ONDA filed an administrative appeal with the Department of Commerce objecting to NOAA Fisheries' failure to produce responsive records in a timely manner. Id. at 1240.

On January 7, 2005, ONDA sent a second FOIA request to NOAA Fisheries, seeking the same information for the period March 2004 to the present. Id. ONDA explained it was necessary to file this second request because Commerce's date-of-receipt cut-off date regulation left months of responsive documents in the agency's possession that had originated between the time of ONDA's initial request and the time the agency finally completed its response to that request. Id. at 1241; see also SER 21–22 (declaration of ONDA's executive director, explaining same). ONDA's executive director explained that the lengthy delays ONDA had experienced in these and prior FOIA requests sent to NOAA Fisheries had resulted in a pattern of harm to ONDA:

[T]he lengthy delays in NOAA Fisheries' responses to FOIA requests impedes the organization's ability to accomplish its goals and mission.

According to Marlett, the information is of significantly lesser value if its receipt is delayed until the livestock have been turned out or the grazing season has concluded. Delayed responses during the off-season impede ONDA's ability to monitor the field and assess the success or failure of the grazing authorizations. Marlett states that the cut-off regulation forces ONDA to file the same FOIA request over and over to obtain documents that originate during the months between the request and the response.

Id. (citing Declaration of Bill Marlett).

On June 10, 2005, ONDA sent a third similar FOIA request to NOAA Fisheries, again seeking documents that had originated during the agency's processing of ONDA's second request. Id. at 1242; SER 24–26. Since that time, ONDA has continued to file similar FOIA requests with NOAA Fisheries seeking records that have originated between the time the agency completed processing of the previous request, and the present date. See SER 21 (declaration of ONDA's executive director, explaining that "ONDA will continue to request and use information regarding these resources and activities in the future"); SER 39 (Third Lacy Declaration, explaining that "the nature of my environmental practice for ONDA requires me to use the FOIA on a consistent basis in order to obtain government records ONDA needs to track agency decision-making processes, evaluate and prepare federal court litigation, and successfully litigate cases which further ONDA's mission").

Based on ONDA's victory in the district court—in particular, the Judgment issued April 24, 2006—the Department of Commerce on June 1, 2006 issued an

interim final rule to amend 15 C.F.R. § 4.5(a), the FOIA regulation concerning the cut-off date for responding to FOIA requests. 71 Fed. Reg. 31,073 (June 1, 2006).⁵ Commerce replaced its unlawful date-of-request regulation with a date-of-search regulation. *Id.* Commerce explained that its rulemaking was in response to the district court’s judgment and ruling in the present case that NOAA Fisheries “violated the Freedom of Information Act for failing to make a timely determination on an information request, which subsequently resulted in an improper withholding under the Act.” *Id.*

SUMMARY OF THE ARGUMENT

This appeal raises two discrete issues: first, whether Commerce failed to preserve its mootness argument and its objection to the relief granted being *ultra vires* and thereby waived its attorney fee argument; and second, whether the district court properly granted attorney fees under the FOIA attorney fees provision.

This appeal is most simply decided on the ground that Commerce has waived its attorney fee argument. Because Commerce did not appeal the final Judgment granting relief, nor the underlying decision denying Commerce’s motion to dismiss on mootness grounds, it has failed to preserve these objections on this appeal. Commerce only has appealed the district court’s attorney fee decision;

⁵ Attached as an Addendum to this brief.

thus, the issues of whether ONDA's claims were moot or whether the district court issued relief that was available under the FOIA are not properly before this Court.

Even if Commerce could properly make its mootness- and relief-based attorney fees argument, the argument still fails because the declaratory and injunctive relief issued in this case makes ONDA a "prevailing party" because it has obtained a court-ordered, enforceable judgment on the merits. Moreover, the district court correctly concluded that this is a "case under" the FOIA, recognizing that an agency's failure to comply with the FOIA's statutory time limits is, by itself, a violation of the FOIA and constitutes an "improper withholding." Because the courts have broad discretion to hear claims alleging a pattern and practice of unreasonable delay in responding to FOIA requests, and broad authority to fashion equitable relief to address violations of the FOIA's substantive requirements, the district court properly awarded the declaratory and injunctive relief achieved by ONDA in this case.

Finally, even if this Court decided that ONDA's award of attorney fees should have been made, in whole or in part, under EAJA rather than the FOIA, the record before this Court is sufficient to uphold the district court's attorney fee award decision under the EAJA. This is the case particularly because Commerce does not dispute the reasonableness of the rates sought or hours expended.

ARGUMENT

I. STANDARD OF REVIEW

Attorney fees awards are reviewed for an abuse of discretion. See Childress v. Darby Lumber, Inc., 357 F.3d 1000, 1011 (9th Cir. 2004). Supporting findings of fact are reviewed for clear error. See Native Village of Quinhagak v. United States, 307 F.3d 1075, 1079 (9th Cir. 2002); Fischel v. Equitable Life Assurance Soc’y, 307 F.3d 997, 1005 (9th Cir. 2002). Any element of legal analysis and statutory interpretation that figures into the district court’s decision whether to award fees is reviewed de novo. See Childress, 357 F.3d at 1011; Clausen v. M/V New Carissa, 339 F.3d 1049, 1061–62 (9th Cir. 2003) (reviewing de novo whether statute permits an award of fees); Native Village of Quinhagak, 307 F.3d at 1079 (reviewing de novo “statutory interpretation” underlying fee award). A court’s methodology in calculating a fee award is reviewed for an abuse of discretion. See Fischel, 307 F.3d at 1007 (lodestar method).

II. THE DEPARTMENT OF COMMERCE HAS WAIVED ITS ATTORNEY FEE ARGUMENT.

Commerce argues that the relief awarded by the district court is not available under the FOIA. Comm. Br. at 21 (citing 5 U.S.C. § 552(a)(4)(B)). According to Commerce, ONDA therefore is not a “prevailing party” under the FOIA because the district court issued relief outside of that authorized by the FOIA. Id. at 20–23.

In support of its argument that ONDA was not entitled to the relief granted by the district court, Commerce asserts that ONDA's First Claim⁶ was moot. Comm. Br. at 17 ("the FOIA claim was therefore moot"); Comm. Br. at 21 ("when a FOIA requester has already received the records to which he is entitled before the court has ruled, a FOIA claim is moot and there is no basis for any court-ordered relief under FOIA").

This Court should reject Commerce's arguments because Commerce did not timely appeal the final judgment granting relief, nor the underlying decision denying Commerce's motion to dismiss on mootness grounds. Therefore, Commerce failed to preserve its objection to the claims being moot and the relief granted being *ultra vires*—and thereby has waived its attorney fee argument. In other words, because Commerce did not appeal the district court's April 24, 2006 Judgment, and *only* appealed the court's August 9, 2006 order awarding attorney fees and costs to ONDA, the issues of whether the claims were moot or whether the district court issued relief that was available under the FOIA are not properly before this Court.

First, this Court does not have jurisdiction over Commerce's arguments with respect to mootness and the appropriateness of the relief granted in this matter, because Commerce did not timely appeal the April 24, 2006 Judgment, which

⁶ This is the only claim Commerce believes is a FOIA claim in this action. Comm. Br. at 17.

represents the final, appealable decision where those issues were decided by the district court. “[T]he taking of an appeal within the prescribed time is mandatory and jurisdictional.” Budinich v. Becton Dickinson and Co., 486 U.S. 196, 203 (1988) (citing Fed. R. App. P. 4(a)(1); United States v. Robinson, 361 U.S. 220, 229 (1960); Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1368–1370 (9th Cir. 1985)). Where an appeal is untimely, the Court of Appeals is “without jurisdiction to review the decision on the merits.” Id.

In Budinich, the Supreme Court held that a decision on the merits is a “final decision” for purposes of appeal under 28 U.S.C. § 1291 even when the recoverability or amount of attorney’s fees for the litigation remains to be determined. Id. at 199–202. The Court explained “that ‘[t]he considerations that determine finality are not abstractions but have reference to very real interests – not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system.’” Id. at 201 (quoting Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 69 (1948)).

This Court has rejected the argument that a failure to comply with Rule 4 is of no consequence because it does not mislead or prejudice the other party. Farley Transp. Co., 778 F.2d at 1369. This Court explained that “[a]dopting a purely ‘equitable’ approach to applying the rules would result in unpredictability and defeat the purpose of the rules, which is to promote the orderly resolution of

disputes and to discourage dilatory practices.” Here, Commerce chose not to appeal the April 24, 2006 Judgment within the 60 days required by Rule 4(a)(1)(B). As a result, Commerce cannot now collaterally attack the final Judgment through its appeal of the order granting attorney fees.

Moreover, a notice of appeal must “designate the judgment, order, or part thereof being appealed.” Fed. R. App. P. 3(c)(1)(B). Where, as here, “a party seeks to argue the merits of an order that does not appear on the face of the notice of appeal,” the Ninth Circuit considers two factors: (1) whether the intent to appeal a specific judgment can be fairly inferred; and (2) whether the appellee is prejudiced by the mistake. Shapiro v. Paradise Valley Unified School Dist., 374 F.3d 857, 863 (9th Cir. 2004) (quoting Lolli v. County of Orange, 351 F.3d 410, 414 (9th Cir. 2003)) (internal quotes omitted). Because Commerce *only* filed a notice of appeal as to the district court’s fee decision, ER 64–65, and not of the court’s final judgment on the merits or on the decision that the claims were not moot, the scope of the relief granted by the district court in the judgment is not properly before this Court.

The “intent to appeal a specific judgment can be fairly inferred where the failure to cite the specific judgment was *clearly an oversight or mistake*, or when such intent *makes sense in light of the circumstances*.” Shapiro, 374 F.3d at 863 (emphasis added; citing Lolli, 351 F.3d at 414). This Court has inferred such intent

primarily in situations where a party appeals after its post-judgment motion, such as a motion for reconsideration or a motion to alter or amend the judgment, is denied. See, e.g., Lolli, 351 F.3d at 414 (reviewing merits of summary judgment order where Lolli’s notice of appeal only listed denial of his motion for reconsideration).⁷

In Shapiro, this Court was presented with a situation where such intent could not be fairly inferred based on a clear oversight or mistake. The Shapiros had prevailed in the underlying action (concerning an Individuals with Disabilities Education Act claim), and the School District did not appeal the judgment. Shapiro, 374 F.3d at 864. Instead, the School District only appealed when the district court issued a subsequent order increasing the attorney fee award to the Shapiros. Id. Moreover, the District’s notice of appeal stated only that it was appealing “from the amended judgment entered in this action on September 3, 2002 regarding attorney fees.” Id. Based on those facts, this Court concluded it

⁷ See also Knievel v. ESPN, 393 F.3d 1068, 1071 n.2 (9th Cir. 2005) (reviewing order dismissing action where notice of appeal listed the order denying motion to alter or amend the judgment); United States v. Belgarde, 300 F.3d 1177, 1180 (9th Cir. 2002) (finding that the government intended to appeal both the dismissal of the indictment and the denial of its motion for reconsideration, where notice of appeal listed the order denying reconsideration); McCarthy v. Mayo, 827 F.2d 1310, 1313–14 (9th Cir. 1987) (reviewing a summary judgment order when the notice of appeal listed only the denial of motions under Rule 60(b) but that denial simply referred to the reasons given in the underlying order).

could not fairly infer that the District intended to appeal the earlier judgment on the merits. Id.

The situation here is analogous. Commerce did not file a Rule 59(e) motion to alter or amend the district court's April 24, 2006 judgment. See Fed. R. Civ. P. 59(e) (motion to alter or amend judgment shall be filed no later than 10 days after entry of judgment); Budinich, 486 U.S. at 200 (request for attorneys fees is not a Rule 59(e) motion). Nor did Commerce appeal the merits of the judgment or the district court's denial of Commerce's motion to dismiss, including the relief issued in the judgment. See ER 48–49 (Judgment, issuing declaratory and injunctive relief in ONDA's favor). Indeed, Commerce *only* filed a notice of appeal as to the district court's attorney fee decision. ER 64–65. Like the notice of appeal at issue in Shapiro, Commerce's notice here stated that it appealed “from the Opinion and Order on Plaintiff's Motion for Attorney Fees entered in this action on August 9, 2006.” ER 65.

Importantly, the district court specifically requested briefing from the parties on the proper relief to be ordered based on the court's rulings on the merits of ONDA's claims. On March 15, 2006, following the court's final ruling denying the motion to dismiss and holding for ONDA on the merits of three of its claims, the district court issued an order requiring the parties to file briefing on “their respective positions regarding declaratory and injunctive relief” by April 3, 2006.

ER 72 (Dkt # 39). There, Commerce made the exact same relief argument it makes now: that “[b]ecause plaintiff did not challenge the adequacy of the search for responsive documents or Commerce’s reliance upon FOIA exemptions to withhold responsive documents, [the district court] lacks jurisdiction under FOIA to order any further relief sought by plaintiff on Counts I and II.” See ER 72 (Dkt # 43); SER 29 (Commerce’s Proposed Order). Thus, this argument was squarely before, and was decided by, the district court when it issued its Judgment on April 24, 2006. Accordingly, because Commerce did not timely appeal the Judgment, and based on its notice of appeal of only the fee award, intent to appeal the issues decided in the April 24, 2006 Judgment cannot be “fairly inferred” from Commerce’s notice of appeal of only the court’s attorney fee decision. Shapiro, 374 F.3d at 864.⁸

The second factor this Court considers when a party seeks to argue the merits of an order that does not appear on the face of the notice of appeal, is prejudice to the appellee. See Shapiro, 374 F.3d at 863. This also weighs against Commerce here. In Shapiro, this Court explained that there was no prejudice to the

⁸ In fact, the only action Commerce did take in the months immediately following the Judgment was to amend its FOIA regulations based on the district court’s ruling. On June 1, 2006, five weeks after the Judgment was issued, Commerce amended its FOIA regulation concerning the cut-off date for responding to FOIA requests, explaining: “Pursuant to the court’s order, the Department amends paragraph 4.5(a) of 15 C.F.R. Part 4 to establish a new cut-off date for records that are to be considered in a FOIA request.” 71 Fed. Reg. 31,073 (June 1, 2006).

Shapiros where the School District “argued the [merits] issue in its opening brief”; the Shapiros had the “opportunity to respond to it in their answering brief”; and “both the amended judgment referred to by PVUSD and the order appealed from by the Shapiros pertain to attorney’s fees.” Id. at 864. See also, e.g., Simpson v. Lear Astronic Corp., 77 F.3d 1170, 1173 (9th Cir. 1996) (finding that the appellant intended to appeal both the award of sanctions and the amount of sanctions, even though the notice of appeal listed only the order setting the amount, because the notice of appeal and his opening brief gave the appellee adequate notice of his intent).

This case is different. Although Commerce does argue the merits of issues of mootness and relief in its opening brief, this is not a case where the judgment and the order appealed from pertain to the same issue. Shapiro, 374 F.3d at 864. The April 24, 2007 Judgment concerned the denial of the motion to dismiss, the merits of ONDA’s claims, and the scope of appropriate relief to be ordered based on the district court’s merits rulings. ER 47–49. The mootness and relief issues Commerce now complains of therefore were squarely settled in the Judgment. By contrast, the district court’s August 9, 2006 order concerned the completely separate issue of whether ONDA should be awarded reasonable attorney’s fees and costs based on ONDA’s fees motion. ONDA III, 442 F.Supp.2d at 1097.

Moreover, to allow Commerce to now re-litigate issues it declined to appeal would also prejudice ONDA because, by failing to appeal the merits of the district court's Judgment, Commerce has denied ONDA the opportunity to file a cross-appeal on the merits. If ONDA had been on notice that Commerce intended to appeal the district court's merits decision, ONDA may have cross-appealed as to the one claim it lost—Claim Three concerning Commerce's referral regulation. See ONDA I, 409 F.Supp.2d at 1250 (dismissing Claim Three and granting summary judgment in Commerce's favor concerning 15 C.F.R. § 4.5(b)). Likewise, if ONDA had been on notice that Commerce intended to appeal the district court's grant of relief, ONDA may have cross-appealed on that issue too. Before the district court, ONDA had also urged the court to order NOAA Fisheries to release additional responsive documents created throughout the litigation by the agency during the lengthy delays found by the court to be unlawful under the FOIA. See ONDA III, 442 F.Supp.2d at 1098 (noting same); ER 48–49 (Judgment, ordering declaratory and injunctive relief, but not including an order of an additional release of documents). However, satisfied with the significant success it had already achieved in the litigation, and based on Commerce's decision to *not appeal* the district court's Judgment, ONDA did not file a notice of appeal of the April 24, 2006 Judgment.

Thus, Commerce’s arguments concerning the relief issued by the district court in its judgment, and including Commerce’s renewed mootness arguments, are not properly before this Court. Accordingly, this Court should reject as waived Commerce’s attempt to bootstrap merits arguments into this appeal concerning only the reasonableness of the district court’s attorney fee award. And because Commerce makes no argument concerning the reasonableness of the hours expended or the rates sought, the Court should uphold Judge King’s attorney fee award decision.

III. THE RELIEF ORDERED BY THE DISTRICT COURT SATISFIES THE REQUIREMENTS OF BUCKHANNON.

Even if Commerce could properly make its mootness- and relief-based attorney fees argument, the argument still fails because the declaratory and injunctive relief issued in this case satisfies the requirements of Buckhannon Bd. & Care Home, Inc. v. West Va. Dep’t of Health & Human Res., 532 U.S. 598 (2001). In Buckhannon, the Supreme Court considered the attorney fee provisions of the Fair Housing Amendments Act, 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, which permit courts to award fees only to a “prevailing party.” Id. §§ 3613(c)(2), 12205. The Court ruled that for a litigant to be a “prevailing party,” there must have been a “judicially sanctioned change in the legal relationship of the parties.” Buckhannon, 532 U.S. at 605. According to the Court, this means “enforceable judgments on the merits and court-ordered

consent decrees[,]” or similar action bearing “the necessary judicial *imprimatur*” of a “material alteration of the legal relationship of the parties.” *Id.* at 604, 605 (italics in original).

Here, the district court issued a final judgment on the merits on April 24, 2006. ER 47–49. In relevant part, the Judgment reads:

On Claims One and Two, the Court declares that defendants violated the Freedom of Information Act, as applied to plaintiff’s March 11, 2004 and January 7, 2005 requests, by failing to make a timely determination, resulting in an improper withholding under the Act. . . .

On Claim Four, the Court declares that defendants violated the Freedom of Information Act through the use of the cut-off regulation, 15 C.F.R. § 4.5(a), which states: “Records responsive to a request shall include only those records within the department’s possession and control as of the date the proper component receives the request.” Defendants are enjoined from further use of the regulation employing this cut-off date.

ER 48–49. Thus, ONDA received declaratory relief on all three of its successful claims, and permanent injunctive relief on its successful Claim Four. A permanent injunction unmistakably satisfies Buckhannon’s requirement that there be an “enforceable judgment[] on the merits” that has materially altered the legal relationship of the parties. 532 U.S. at 604. See also Oil, Chem., & Atomic Workers Int’l Union v. Dep’t of Energy (“OCAW”), 288 F.3d 452, 456–57 (D.C. Cir. 2002) (party has “substantially prevailed” if it has “been awarded some relief by [a] court, either in a judgment on the merits or in a court-ordered consent

decree”). The declaratory relief issued in the district court’s judgment also satisfies Buckhannon.

Commerce argues declaratory relief is not the “material alteration of the legal relationship of the parties” which permits an award of attorney fees. Comm. Br. at 20, 24–27. Citing Richardson v. Continental Grain Co., 336 F.3d 1103 (9th Cir. 2003), Commerce argues that “bare declaratory relief does not confer ‘prevailing party’ status for purposes of fee-shifting statutes.” Comm. Br. at 24. Yet, this Court recognized in Richardson that declaratory relief *will* result in an award of fees if “it causes the defendant’s behavior to change for the benefit of the plaintiff.” 336 F.3d at 1106.

In this case, the district court recognized NOAA Fisheries’ pattern and practice of untimely FOIA responses for time-sensitive requests being submitted periodically by ONDA in order to track agency management of endangered species. See ONDA I, 409 F.Supp.2d at 1245, 1248 (rejecting Commerce’s argument that there was no pattern or practice of delay, and finding that defendants’ failures to make timely determinations on ONDA’s requests was an “improper withholding” under the FOIA). Aside from the two FOIA requests at issue in the litigation, the court had evidence before it of similar requests in the past, SER 14–19 (June 2003 and January 2004 requests), as well as subsequent requests filed during the pendency of the case. SER 24–26 (June 2005 request).

Even just one month prior to the district court's final Judgment, and despite the court's March 2, 2006 ruling, ONDA II, 419 F.Supp.2d at 1288 (holding cut-off regulation unreasonable on its face and in violation of FOIA), Commerce had persisted in using its unlawful cut-off date regulation. SER 35 (Commerce's determination on ONDA's appeal concerning processing of the June 10, 2005 FOIA request, applying the unlawful date-of-receipt cut-off regulation).

Following the district court's April 24, 2006 Judgment, however, the Department of Commerce issued an interim final rule to amend 15 C.F.R. § 4.5(a), the FOIA regulation concerning the cut-off date for responding to FOIA requests. 71 Fed. Reg. 31,073 (June 1, 2006) ("The Department takes this action pursuant to a court order that enjoins it from further use of its current regulations."). Commerce's rulemaking was directly in response to the district court's judgment and ruling that NOAA Fisheries "violated the Freedom of Information Act for failing to make a timely determination on an information request, which subsequently resulted in an improper withholding under the Act." Id. Thus, Commerce amended its cut-off date rule to change the unlawful date-of-request provision to a date-of-search cut-off date. Id.

Based on the district court's ruling, including the declaratory and injunctive relief issued by the court, and based on Commerce's amendment of its FOIA regulations in direct response to the district court's ruling, ONDA expects that

Commerce's responses to ONDA's FOIA requests will now be handled within the time limits set forth in the FOIA. See, e.g., SER 62–63 (¶¶ 15–17) (declaration by experienced FOIA litigator commenting on the significance of the results ONDA achieved in this litigation, including expectation of more timely processing).

Moreover, Commerce's revised cut-off regulation, calling now for a date-of-search rather than a date-of-request cut-off for processing FOIA requests, will address ONDA's complaint of having to continually re-submit identical requests to update responsive documents created during lengthy agency processing delays. See ONDA I, 409 F.Supp.2d at 1241 (explaining delays and their adverse effect on ONDA); SER 62–63. These changes are clear evidence that the court-ordered relief issued by the district court, in a judgment on the merits, resulted in a “material alteration” in the legal relationship between the parties. See Buckhannon, 532 U.S. at 605. This supports ONDA's entitlement to attorney fees.

IV. THE DISTRICT COURT PROPERLY GRANTED ATTORNEY FEES UNDER THE FOIA.

Commerce argues ONDA did not meet the statutory requirements for eligibility for attorney fees under the FOIA because “ONDA did not prevail on a claim authorized under the FOIA.” Comm. Br. at 16. Even if Commerce has not waived this argument, it fails because ONDA “substantially prevailed” in a “case under [the FOIA].” See 5 U.S.C. § 552(a)(4)(B). Commerce's argument ignores the plain language of the statute, reading words into it that simply are not there. It

also ignores long-established case law recognizing the courts' jurisdiction to hear claims concerning a pattern and practice of unreasonable delay in responding to FOIA requests, and the courts' broad equitable power to enforce the provisions of the FOIA. For these reasons, ONDA is eligible for attorney fees under the FOIA, and the district court therefore properly exercised its discretion to award such fees.

A. ONDA Is Eligible for Attorney Fees Under the FOIA.

The FOIA provides:

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in *any case under this section* in which the complainant has substantially prevailed.

5 U.S.C. § 552(a)(4)(E) (emphasis added). Each of ONDA's four claims targeted NOAA Fisheries' repeated delays in processing time-sensitive FOIA requests. See ONDA I, 409 F.Supp.2d at 1242 (summarizing claims); ONDA III, 442 F.Supp.2d at 1098 (again summarizing claims); ER 7–10 (claims for relief in Complaint). As the district court correctly observed:

ONDA received a declaratory judgment in its favor on Claims One (under FOIA) and Two (under the APA) and a permanent injunction in its favor on Claim Four (under FOIA). Although successful Claim Two was brought under the APA, I consider this action to be a FOIA case. The factual allegations are the same for the FOIA and APA claims. The substantive issues that ONDA challenged are FOIA statutory time limits and regulations specifying how defendants would respond to FOIA requests.

ONDA III, 442 F.Supp.2d at 1098.⁹ The fact that the district court also found FOIA violations that were actionable pursuant to the Administrative Procedure Act *in addition to* the FOIA, does not mean this is not a “case under” the FOIA. The bottom line, as the district court correctly concluded, is that when the Complaint is read as a whole this clearly was a FOIA action.

The district court’s conclusion is based on the plain language of the FOIA. The statute expressly refers to “any *case* under” the FOIA—not to “any *claim* under” the FOIA. See 5 U.S.C. § 552(a)(4)(E). Nothing in Section 552(a)(4)(B) or elsewhere in the Act requires that every claim in a FOIA case must be specifically articulated as an unlawful withholding claim. 5 U.S.C. § 552(a)(4)(B). In fact, the plain meaning of the statute simply and unmistakably indicates that a court may award attorney fees “in any case under this section” in which the complainant has substantially prevailed. Id. Nor is there anything in Section 552(a)(4)(B) to suggest

⁹ Commerce also is wrong when it asserts that Claim Four, concerning the department’s cut-off date regulation, was brought “under the APA” and therefore fees must be awarded under the APA. Comm. Br. at 17 n.7. That claim, titled “FOURTH CLAIM FOR RELIEF: Freedom of Information Act,” expressly alleged a violation of the FOIA, and also cited to the Department of Commerce’s FOIA regulations and FOIA case law interpreting the relevant statutory provisions. ER 10 (First Amended Complaint). It also requested relief under the FOIA, citing 5 U.S.C. § 552(a)(4)(B), which allows a court to order production of improperly withheld agency records. ER 10. The third claim also dealt with the FOIA deadline at 5 U.S.C. § 552(a)(6), targeted the Commerce FOIA regulation at 15 C.F.R. § 4.5(b), and requested relief under the FOIA, citing 5 U.S.C. § 552(a)(4)(B). ER 9. (That Claim Three was not expressly listed as a FOIA claim was an inadvertent omission in the Complaint.)

that whether an action is a “case under” the FOIA depends on the specific relief ordered by the district court. See id. The relief ordered by a district court goes to whether a party “substantially prevailed”—not to whether the action was a “case under” the FOIA.

Importantly, this Court owes no particular deference to an agency’s interpretation of the FOIA. Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309 (D.C. Cir. 2003) (“we emphasize that we owe no particular deference to the IRS’s interpretation of FOIA”) (citing Tax Analysts v. Comm’r, 117 F.3d 607, 613 (D.C. Cir. 1987) (court “will not defer to an agency’s view of FOIA’s meaning)); see also Lessner v. U.S. Dep’t of Comm., 827 F.2d 1333, 1335 (9th Cir. 1987) (rejecting Commerce’s argument that it was entitled to deference under Chevron , U.S.A., Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 843–45 (1984), stating “deference appears inappropriate in the FOIA context”).

B. An Agency’s Failure to Comply With FOIA’s Strict Time Limits is a Violation of the FOIA and Constitutes an “Improper Withholding” of Agency Documents.

In concluding that this was a “case under” the FOIA, the district court properly recognized, as it had in its opinion concerning Claims One, Two, and Three, that an agency’s failure to comply with the FOIA’s time limits is, by itself, a violation of the FOIA, and constitutes an improper withholding of the requested documents. See ONDA I, 409 F.Supp.2d at 1248 (finding “that defendants failed to

make a timely determination, resulting in an improper withholding under the Act”). The district court expressly adopted the holding in Gilmore v. U.S. Dept. of Energy, 33 F.Supp.2d 1184 (N.D. Cal. 1998), that “an untimely response is a violation of FOIA, regardless of the final outcome of the request.” 409 F.Supp.2d at 1248 (citing Gilmore, 33 F.Supp.2d at 1188 (ruling that untimely determination constituted an improper withholding in violation of FOIA, even though the documents were later correctly determined not to be subject to disclosure)). This further undermines Commerce’s argument that ONDA did not substantially prevail in a case under the FOIA.

In Gilmore, the Northern District of California engaged in a reasoned and scholarly analysis of the scope of the FOIA’s grant of jurisdiction to the district courts. Gilmore, 33 F.Supp.2d at 1186–88. As explained in Gilmore:

FOIA grants jurisdiction in the district courts to enjoin an agency from improperly withholding agency records. 5 U.S.C. § 552(a)(4)(B); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). “Judicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by § 552, if the agency has contravened all three components of this obligation.” *Id.* The Supreme Court has noted, albeit in dicta, that “[e]ven when an agency does not deny a FOIA request outright, the requesting party may still be able to claim ‘improper’ withholding by alleging that the agency has responded in an inadequate manner.” *United States Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 151 n. 12 [] (1989) (citations omitted) (referring to time limit violations for FOIA compliance as set forth in 5 U.S.C. § 552(a)(6)(C)).

Id. at 1186. Gilmore also observed that other courts, including the Ninth Circuit,

“have similarly recognized that the Court has jurisdiction to hear a claim alleging a pattern and practice of unreasonable delay in responding to FOIA requests, even where the plaintiff’s FOIA request had already been resolved.” Id. (citing Mayock v. Nelson, 938 F.2d 1006, 1006 (9th Cir. 1991); Payne Enter., Inc. v. United States, 837 F.2d 486, 491 (D.C. Cir. 1988)).

In other words, FOIA requesters have an enforceable substantive entitlement to have their requests acted upon as promptly as possible. The FOIA requires that when a person requests records from an agency, the agency “shall make the records *promptly* available.” 5 U.S.C. § 552(a)(3)(A) (emphasis added). The statute has strict time limits for making determinations on requests and on appeals. Id. § 552(a)(6)(A)(i), (ii) (setting 20 working day time limits for each). These time limits may be extended only under “unusual circumstances.” Id. § 552(a)(6)(B)(i). Where an agency fails to comply with the time limit either for an initial response or for the resolution of an appeal, a requester may treat that failure as a denial and seek judicial review without further exhaustion of administrative remedies. Id. § 552(a)(6)(C)(i). The agency must respond promptly to a complaint initiating a FOIA case. Id. § 552(a)(4)(C) (requiring answer within 30 days).

The courts have long recognized that the FOIA imposes substantive obligations on agencies to comply with requests in a timely manner. Courts may use their broad equitable powers to enforce those substantive requirements under

the FOIA and to give effect to their rulings in FOIA cases. According to this Court:

In utilizing its equitable powers to enforce the provisions of the FOIA, the district court may consider injunctive relief where appropriate. Moreover, where the district court finds a probability that alleged illegal conduct will recur in the future, an injunction may be framed to bar future violations that are likely to occur. United States v. An Article of Drug, 661 F.2d 742, 747 (9th Cir. 1981). Thus, the IRS' contention that the district court lacks authority to grant the requested injunctive relief is without merit.

Long v. U.S. Internal Revenue Serv. (“Long v. IRS I”), 693 F.2d 907, 909 (9th Cir. 1982), citing Renegotiation Bd. v. Bannerkraft Clothing Co., Inc., 415 U.S. 1, 19 (1974).

In Bannerkraft Clothing, the Supreme Court considered whether the FOIA's “provision for compelled production was intended to be the exclusive enforcement method” of the statute—in other words, the type of exclusive remedy Commerce's argument relies upon here. 415 U.S. at 18. Cf. Comm. Br. at 21 (arguing FOIA's “*only* authorized relief is an injunction or order to produce documents”) (emphasis in original). The Court held that Congress did *not* intend to limit the court's exercise of its inherent equitable powers where consistent with the FOIA, reasoning that

[t]he broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions; *the truism that Congress knows how to deprive a court of broad equitable powers when it chooses so to do*, [citations omitted]; and the fact that the Act, to a definite degree, makes the District Court the enforcement arm of the statute, 5 U.S.C. § 552(a)(3), persuade us that the . . . principle of a statutorily prescribed special and exclusive

remedy is not applicable to FOIA cases. *With the express vesting of equitable jurisdiction in the district court by § 522(a), there is little to suggest, despite the Act’s primary purpose, that Congress sought to limit the inherent powers of an equity court.*

Id. at 19 (emphasis added)¹⁰; see also Long v. IRS I, 693 F.2d at 909 (quoting same passage and referring to courts as “the enforcement arm of the FOIA”); Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. at 154 (“*Bannercraft, supra*, of course held that Congress intended federal district courts to retain traditional equitable jurisdiction in adjudicating FOIA actions”).¹¹

That is precisely the situation here, where the district court utilized its broad, equitable power to address a pattern and practice of FOIA violations. See ONDA I, 409 F.Supp.2d at 1245 (rejecting Commerce’s mootness argument stating, based on record of delays before the court, that “I cannot conclude that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur”) (internal quotes omitted). See also Long v. IRS I, 693 F.2d at 910

¹⁰ That Congress knows how to revoke judicial review in the FOIA also is clear, for example, from the FOIA provision expressly withdrawing jurisdiction for instances of denials of expedited processing when the agency has already responded by the time of court review. 5 U.S.C. § 552(a)(6)(E)(iv) (“A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.”).

¹¹ See also Carlson v. U.S. Postal Serv., 2005 WL 756583, at *4 (N.D. Cal. 2005); Carlson v. U.S. Postal Serv., 2005 WL 756573, at *8 (N.D. Cal. 2005); Gilmore, 33 F.Supp.2d at 1186; Mayock v. INS, 714 F.Supp. 1558, 1561–62 (N.D. Cal. 1989) (all quoting Long v. IRS for the proposition that injunctive relief is appropriate in FOIA cases).

(“unreasonable delays in disclosing non-exempt documents violate the intent and purpose of FOIA, and the courts have a duty to prevent these abuses”).

Under Gilmore’s analysis of Ninth Circuit and Supreme Court precedent, then, “even though Gilmore’s FOIA request was properly denied, Gilmore has an independent cause of action against the DOE for violating the FOIA by failing to respond to his request and others within the statutory time limits.” Gilmore, 33 F.Supp.2d at 1186. That court rejected the agency’s argument—the same type of argument Commerce makes here—that Mayock, Payne, and Long are distinguishable because in Gilmore the documents were not improperly withheld (or here, according to Commerce’s argument, the documents were finally provided in full after the litigation was commenced but before the district court issued a ruling). Id. at 1186–87; see Comm. Br. at 17. As observed in Gilmore, the Supreme Court considers an untimely response to a FOIA request to be *a separate injury* to the requesting party, even if the requested document could be properly withheld. Tax Analysts, 492 U.S. at 151 n.12; see Gilmore, 33 F.Supp.2d at 1187.

C. The Legislative History Further Supports the Courts’ Power to Enforce the Provisions of the FOIA.

Finally, the legislative history of the FOIA supports this view. As observed in Gilmore, “Congress has repeatedly stressed the need for timely compliance with the requirements of the FOIA.” Gilmore, 33 F.Supp.2d at 1187. When it added the 10-day time limit for responding to FOIA requests in 1974, Congress explained

that it was doing so “in order to contribute to the fuller and faster release of information, which is the basic objective of the Act.” See id. (quoting H. Rep. No. 876, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6267, 6267). Furthermore:

Information is often useful only if it is timely. Thus, excessive delay by the agency in its response is often tantamount to denial. It is the intent of this bill that the affected agencies be required to respond to inquiries and administrative appeals within specific time limits.

1974 U.S. Code Cong. & Admin. News, at 6271.

In its 1996 amendments to the FOIA, Congress continued to express serious concern over the slowness of agencies’ processing of FOIA requests: “[M]any agencies have failed to process FOIA requests within the deadlines required by law. These delays in responding to FOIA requests continue as one of the most significant FOIA problems.” H. Rep. No. 795, 104th Cong., 2d Sess., reprinted in 1996 U.S. Code Cong. & Admin. News 3448, 3456. The changes Congress made to the Act addressed “the single most frequent complaint about the operation of the FOIA: agency delays in responding to FOIA requests” and underscored “the requirement that agencies respond to requests in a timely manner.” Id. at 3466.

The district court in this case echoed Congress’s concern and intent, noting that “the lengthy delays in NOAA Fisheries’ responses to FOIA requests impedes [ONDA’s] ability to accomplish its goals and mission” and that “the information is of significantly lesser value if its receipt is delayed until the livestock have been

turned out or the grazing season has concluded.” ONDA I, 409 F.Supp.2d at 1241.

“Delayed responses during the off-season impede ONDA’s ability to monitor the field and assess the success or failure of the grazing authorizations.” Id. In short, “[t]here can be no doubt that Congress took these deadlines very seriously.”

Gilmore, 33 F.Supp.2d at 1187.

As Gilmore summarized, “All of this strongly suggests that an agency’s failure to comply with the FOIA’s time limits is, by itself, a violation of the FOIA, and is an improper withholding of the requested documents.” Gilmore, 33 F.Supp.2d at 1187. This is consistent with the view adopted by the D.C. Circuit more than twenty years ago, when it held that

a system adopted by an agency for dealing with documents of a particular kind constitutes ‘withholding’ of those documents if its net effect is significantly to impair the requester’s ability to obtain the records or significantly to increase the amount of time he must wait to obtain them.

McGehee, 697 F.2d at 1110; see also ONDA I, 409 F.Supp.2d at 1248–52 &

ONDA II, 419 F.Supp.2d at 1286–87 (discussing McGehee at length in analysis of claims concerning Commerce’s referral and cut-off date regulations). Moreover,

“[t]his is true regardless of whether the documents are ultimately determined not to be subject to disclosure[,]” Gilmore, 33 F.Supp.2d at 1187, or, as is the case here, if the documents are produced after litigation is initiated but before the district court can issue a ruling, but are representative of a pattern and practice of agency

delays that significantly impair a requester's interests under the FOIA. In other words, "unless an agency makes a timely determination that documents should or should not be disclosed . . . there is no compliance with the FOIA." *Id.* at 1188.

In short, the plain meaning of the words in the FOIA, the expressed and implied intent behind the statute, the legislative history of the statute, and long-established case law recognizing the courts' jurisdiction to hear claims concerning a pattern and practice of unreasonable delay in responding to FOIA requests, all indicate the district court properly concluded that this was a "case under" the FOIA. Accordingly, the district court properly analyzed ONDA's attorney fee petition, and awarded fees, under the FOIA's attorney fees provision.

V. IN THE ALTERNATIVE, THE DISTRICT COURT'S ATTORNEY FEE DECISION MAY BE UPHOLD UNDER THE EAJA.

Finally, even if this Court agreed with Commerce that the district court should not have awarded attorney fees under the FOIA, but rather should have done so, either in part or in whole, under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), this Court could uphold the district court's fee decision under EAJA. The record before this Court is sufficient to do so,¹² making unnecessary a remand to the district court. *See* Comm. Br. at 27 (seeking remand

¹² Pursuant to Circuit Rule 30-1.4(c)(ii), ONDA provides the relevant "declarations, exhibits or similar attachments submitted in support of" its attorney fee motion. SER 36-78. *See also* ER 73-74 (district court docket sheet showing fee motion briefing and other filings).

to district court to consider ONDA's fee motion under EAJA).

A. The District Court's Decision Supports an Award Under EAJA.

Even if ONDA's claims could not be brought under the substantive statute (the FOIA), ONDA has a right of review under the Administrative Procedure Act—and therefore a right to fees under EAJA. See, e.g., Pa. Dep't of Pub. Welfare v. United States, 1999 WL 1051963, at *2 (W.D. Pa. Oct. 12, 1999) (“APA review is available to enforce provisions of the FOIA for which the FOIA provides no express remedy”); Idaho Sporting Cong. v. Thomas, 137 F.3d 1145, 1153 (9th Cir. 1998) (holding that a federal agency's violation of a duty under the Clean Water Act, while not reviewable under that Act's citizen suit provision, was subject to review under the APA), citing Ore. Natural Resources Council v. U.S. Forest Serv., 834 F.2d 842, 848, 852 (9th Cir. 1987) (rejecting agency's argument that Clean Water Act citizen suit provision provided an “exclusive remedy”; plaintiff's claim therefore was reviewable pursuant to the APA).

The district court concluded that this was a “case under” the FOIA and therefore analyzed the fee request under the FOIA. ONDA III, 442 F.Supp.2d at 1098 (“I will analyze the fee request under FOIA and decline to address further the arguments made under EAJA.”). Importantly, though, the court granted summary judgment in ONDA's favor on its APA claim. ONDA I, 409 F.Supp.2d at 1248 (Claim Two). The fact that the district court treated the case as a unified whole in

addressing ONDA's fee petition does not preclude an independent basis for fee recovery under EAJA, because ONDA prevailed on its APA claim.

Indeed, when claims have common facts and are related legally, the fee award is not limited to time spent only on the prevailing claim. Thus, it is well-established, for example, that a plaintiff may obtain fees for partial success where that plaintiff has achieved excellent success on the merits and significant overall relief. Hensley v. Eckerhart, 461 U.S. 424, 440 (1983); see also Dang v. Cross, 422 F.3d 800, 812 (9th Cir. 2005). To determine fees in cases of partial success, the courts consider (1) whether the plaintiff failed to prevail on claims that were unrelated to the claims on which it succeeded, and (2) whether the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award. Watson v. County of Riverside, 300 F.3d 1092, 1096 (9th Cir. 2002) (citing Hensley, 461 U.S. at 434).

Claims are related if they “involve a common core of facts *or* are based on related legal theories.” Dang, 422 F.3d at 813 (citing Webb v. Sloan, 330 F.3d 1158, 1169 (9th Cir. 2003)) (emphasis in original). Time spent on related claims is compensable in its entirety, even if those claims are dismissed. Kelley v. Sears, Roebuck, & Co., 2004 WL 1824121, at *1–*2 (D. Or. 2004). The district court recognized that each of ONDA's claims was related to the others in this case. ONDA III, 442 F.Supp.2d at 1098 (observing that the “substantive issues” and the

“factual allegations are the same for the FOIA and APA claims”). Accordingly, ONDA is eligible for fees under the EAJA based on its successful Claim Two, the fact that APA relief was available for its claims, and on the declaratory and injunctive relief awarded by the district court in its Judgment.

B. “Eligibility” and “Entitlement” Under the FOIA and EAJA.

Even if the fact that ONDA prevailed on its APA claim did not provide an independent basis for fee recovery under EAJA, this Court may still uphold Judge King’s fee award decision under EAJA because a court’s analysis of eligibility and entitlement is similar under the FOIA and the EAJA. In other words, although the district court analyzed ONDA’s fee petition under the FOIA, in its opinion the court undertook an extremely detailed analysis of the same types of *eligibility* and *entitlement* factors necessary to support an award of attorney fees under any statutory fee-shifting provision, including under EAJA. ONDA III, 442 F.Supp.2d at 1098–99.

When analyzing a motion for attorney fees and costs under either the FOIA or the EAJA, the courts analyze similar eligibility and entitlement factors. See Long v. U.S. Internal Revenue Serv. (“Long v. IRS II”), 932 F.2d 1309, 1313 (9th Cir. 1991) (citing Church of Scientology v. U.S. Postal Serv., 700 F.2d 486, 492 (9th Cir. 1983)) (discussing fees under FOIA); Love v. Reilly, 924 F.2d 1492,

1494–95 (9th Cir. 1991) (discussing fees under EAJA).¹³

A complainant in a FOIA action is deemed to be *eligible* for fees if it has “substantially prevailed” on its claim(s). 5 U.S.C. § 552(a)(4)(E); Long v. IRS II, 932 F.2d at 1313. This means the plaintiff must show that: (1) the filing of the action was reasonably necessary to obtain the information; and (2) the filing of the action had a substantial causative effect on the ultimate receipt of the information. Id. (citing Scientology, 700 F.2d at 489). See also OCAW, 288 F.3d at 456–57 (party has “substantially prevailed” if it has “been awarded some relief by [a] court, either in a judgment on the merits or in a court-ordered consent decree”) (citing Buckhannon, 532 U.S. at 603 (internal quotations omitted)).

Similarly, to be eligible for an award of attorney fees under EAJA, the applicant must (1) be a “prevailing party,” (2) that “incurred” costs of litigation against the federal government, and (3) that meets applicable size or net worth criteria. 28 U.S.C. § 2412(d)(1)(A) & (d)(2)(B). A plaintiff prevails under EAJA if it “succeed[s] on any significant issue in litigation which achieves some of the

¹³ See also Rosenfeld v. United States, 859 F.2d 717, 724 (9th Cir. 1988) (comparing availability of interim fees under FOIA to analogous fee provisions, stating that “Congress intended § 552(a)(4)(E) to operate like comparable provisions elsewhere in the U.S. Code” and that “the legislative history of the FOIA demonstrates no congressional intent to construe its attorney’s fees provision differently from other such statutory provisions”); id. at 725 (rejecting government’s argument that FOIA’s waiver of sovereign immunity is narrower than other statutory fee provisions “because of the clear congressional intent that § 552(a)(4)(E) operate like comparable attorney’s fees provisions”).

benefit [it] sought in bringing suit.” Hensley, 461 U.S. at 433¹⁴; see also United States v. Real Prop. Known as 22249 Dolorosa St., 190 F.3d 977, 981 (9th Cir. 1999) (same).

If the applicant demonstrates it is eligible for a fee award, the court must then determine whether the applicant is entitled to fees. Under the FOIA, if the plaintiff demonstrates it is eligible for fees, the determination of *entitlement* is left to the discretion of the district court. Long v. IRS II, 932 F.2d at 1313 (citing Scientology, 700 F.2d at 492). In exercising this discretion, the district court considers four criteria: (1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff’s interest in the records sought; and (4) the reasonableness of the agency’s withholding. Id. (citing United Ass’n of Journeymen & Apprentices, Plumbing & Pipefitting Indus., Local 598 v. Dept. of the Army, 841 F.2d 1459, 1461 (9th Cir. 1988); Scientology, 700 F.2d at 492); Tax Analysts v. U.S. Dep’t of Justice, 965 F.2d 1092, 1093 (D.C. Cir. 1992). These four criteria are not exhaustive, and the court also may take into consideration “whatever factors it deems relevant in determining whether an award of attorney’s fees is appropriate.” Long v. IRS II, 932 F.2d at 1313 (quoting Exner

¹⁴ The standards established in Hensley are applicable to EAJA claims. Hensley, 461 U.S. at 433 n.7; Nat’l Wildlife Fed’n v. FERC, 870 F.2d 542, 544 n.1 (9th Cir. 1989) (“Hensley involved a fee award under 42 U.S.C. § 1988, but ‘prevailing party’ is defined in the same way under EAJA.”) (citing McQuiston v. Marsh, 707 F.2d 1082, 1085 (9th Cir. 1983)).

v. F.B.I., 443 F. Supp 1349, 1352 (S.D. Ca. 1978)) (internal quotes omitted).

Under EAJA, once a party's eligibility has been proven, "an award of fees under EAJA is mandatory unless the government's position is substantially justified or special circumstances exist that make an award unjust." Love v. Reilly, 924 F.2d at 1495 (citing 28 U.S.C. § 2412(d)(1)(A)). A finding that "*either* the government's underlying conduct *or* its litigation position was not substantially justified is sufficient to support an award of EAJA fees." Cervantez v. Sullivan, 739 F.Supp. 517, 521 (E.D. Cal. 1990) (emphasis added).

C. The Record Before this Court Shows ONDA was Both Eligible for and Entitled to Fees Under EAJA.

The record shows that ONDA was *eligible* for an award of fees under the EAJA. The district court concluded that ONDA was a substantially prevailing party under the FOIA (including by applying Buckhannon) and therefore eligible to be awarded attorney fees: "I held that defendants failed to make a timely determination, resulting in an improper withholding under FOIA. This is more than a procedural victory and satisfies *Buckhannon*." ONDA III, 442 F.Supp.2d at 1098. This finding, coupled with the declaratory and injunctive relief issued in the district court's judgment, shows that ONDA can also be considered a "prevailing party" under the EAJA, because ONDA has "succeed[ed] on [a] significant issue in litigation which achieves some of the benefit [it] sought in bringing suit." Hensley, 461 U.S. at 433. The record also shows that ONDA meets EAJA's size and net

worth criterion, 28 U.S.C. § 2412(d)(2)(B), based on the Second Declaration of Bill Marlett. See SER 72 (¶ 3).

The district court determined ONDA was *entitled* to an award of fees because ONDA’s “nonprofit public interest” “purpose epitomizes a public benefit from the disclosure.” ONDA III, 442 F.Supp.2d at 1099. The court also explained:

Moreover, I am not persuaded that defendants’ withholding of the records had a reasonable basis in law. I never did get a full explanation of why the process was so delayed. Thus in my discretion, I conclude that ONDA is entitled to attorney fees under FOIA.

Id. See also ONDA II, 419 F.Supp.2d at 1288 (declaring Commerce’s cut-off date regulation to be “not reasonable on its face”). These findings satisfy EAJA’s requirement that the government’s position was not “substantial justified” or that there were no “special circumstances” that would make an award unjust.” See Love v. Reilly, 924 F.2d at 1495 (citing 28 U.S.C. § 2412(d)(1)(A)).

D. Commerce Does Not Dispute the Reasonableness of ONDA’s Hours Sought and Rates Requested.

After passing the eligibility and entitlement hurdles, the court must, under both FOIA and EAJA, determine the *reasonableness* of the number of hours spent and the hourly fees claimed. See ONDA III, 442 F.Supp.2d at 1099. Commerce does not contest the reasonableness of either the hours expended or rates sought by ONDA. Comm. Br. at 15–27 (contesting only eligibility). In any event, the record before this Court supports the reasonableness of the fee award under either the

FOIA or EAJA.¹⁵ The district court examined in detail the reasonableness of ONDA's claim, making deductions or reductions where appropriate based on the record before it. Id. at 1099–1102.

EAJA provides that a court shall award “reasonable attorney fees.” 28 U.S.C. § 2412 (d)(2)(A). As with the FOIA, “[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” Hensley, 461 U.S. at 433; see also ONDA III, 442 F.Supp.2d at 1099. EAJA establishes a base rate of \$125 per hour. 28 U.S.C. § 2412(d)(2)(A). A court may increase the base rate if it “determines that an increase in the cost of living or a special factor . . . justifies a higher fee.” Id.; see also Ramon- Sepulveda v. INS, 863 F.2d 1458, 1462 (9th Cir. 1988) (prescribing method for calculating cost of living increases).

Here, the district court awarded fees based on the type of “specialized work” ONDA's attorneys perform in environmental and public interest litigation. ONDA III, 442 F.Supp.2d at 1102. Before the district court, ONDA explained that it was seeking the same rates for its attorneys, whether the fee petition was analyzed under the FOIA, under EAJA, or under a mix of the two statutes. ONDA explained

¹⁵ See, e.g., SER 36–40 (Third Lacy Declaration, in support of fee petition), 42–47 (ONDA's attorneys' timesheets), 48–52 (Parent Declaration, in support of fee petition), 53–70 (declarations of other attorneys in support of ONDA's fee petition), 74–78 (Fourth Lacy Declaration and updated timesheet, in support of fee petition).

that it sought reimbursement at enhanced rates for its attorneys' time because of the limited availability of qualified litigators for this type of proceeding, as well as their unique and specialized expertise in environmental litigation—one aspect of which requires them to consistently handle FOIA matters. See SER 51–52 (Parent Declaration), 39 (Third Lacy Declaration); ER 73 (Dkt # 54, ONDA Memorandum in Support of attorney fee motion). The district court rejected Commerce's argument that no more than \$160 was a reasonable rate for Peter Lacy's work in the case, concluding that "Lacy's rates are not excessive for this type of specialized work." ONDA III, 442 F.Supp.2d at 1102.

Finally, concerning the number of hours spent, the district court considered in turn Commerce's arguments concerning fees for partial success, fees for administrative work, time alleged to be "nonproductive, unnecessary, or excessive," alleged "overstaffing and duplication of effort," and fees-on-fees. See ONDA III, 442 F.Supp.2d at 1099–1102. In a careful and detailed analysis, the district court rejected each of Commerce's assertions of excessive hours, except for reducing fees by 15% to account for partial success and by reducing the award for a law student clerk's work from 50 to 25 hours. Id.; see also id. at 1103 (final calculation in conclusion of district court's opinion). The court's analysis of the reasonableness of the hours spent would have been the same under EAJA as it was under FOIA, because the exact same "three main [legal] issues" and the exact

“extremely complex” facts form the basis for that analysis. See id. at 1100. As a result, even if this Court determined that the district court should have awarded attorney fees under EAJA rather than the FOIA, this Court could, based on the record before it, uphold the district court’s fee decision under the EAJA.

CONCLUSION

For the foregoing reasons, ONDA respectfully requests this Court to affirm the district court’s judgment for Plaintiff-Appellee ONDA. ONDA also intends to seek attorney fees for this appeal pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), and/or Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*

Dated May 2, 2007

Respectfully submitted,

Peter M. Lacy (“Mac”) (OSB # 01322)
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Of Attorneys for Plaintiff-Appellee

STATEMENT OF RELATED CASES

ONDA knows of no related cases currently pending before this court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 11,498 words.

Date

Peter M. Lacy (“Mac”) (OSB # 01322)
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PROOF OF SERVICE

I, the undersigned, hereby certify that true and correct copies of Appellee's **ANSWERING BRIEF** and **SUPPLEMENTAL EXCERPTS OF RECORD** were transmitted via Federal Express on May 2, 2007 to the following parties:

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