No. 09-15176

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WINNEMUCCA INDIAN COLONY; SHARON WASSON; THOMAS WASSON; JUDY ROJO; ELVERINE CASTRO; PETER LISTER; STEPHEN ERICKSON; KIM TOWNSEND; VIRGINIA SANCHEZ; JACK MALOTTE; ARVILLA MASCARENAS; PATRICIA AXELROD;
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; ROBERT M. GATES, in his official capacity as Secretary, United States Department of Defense; THOMAS P. D'AGOSTINO, in his official capacity as Director, National Nuclear Security Administration; JAMES TEGNELIA, in his official capacity as Director, Defense Threat Reduction Agency;
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES COURT DISTRICT COURT
FOR THE DISTRICT OF NEVADA

FEDERAL APPELLEES' ANSWERING BRIEF

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STATEMENT OF JURISDICTION

Plaintiffs, the Winnemucca Indian Colony and a group of individual members of the Colony (collectively, "the Colony"), filed this lawsuit to challenge the Defense Threat Reduction Agency's ("DTRA") decision to conduct the "Divine Strake" test at a location known as the Nevada Test Site. The Colony's Second Amended Complaint alleged tribal rights under the Treaty of Ruby Valley and sought to enjoin the DTRA from conducting the Divine Strake test until it completed an Environmental Impact Statement pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* The district court had jurisdiction over the lawsuit under 28 U.S.C. § 1331.

On February 22, 2008, the district court granted the United States' Motion to Dismiss Plaintiffs' Second Amended Complaint. On March 21, 2008, the Colony filed a Motion to Declare Plaintiffs the Prevailing Parties and for Attorney's Fees and Costs, which the district court denied on December 5, 2008. On December 18, 2008, the Colony filed a timely notice of appeal from the denial of their motion for attorneys' fees. Fed. R. App. P. 4(a)(1)(B). This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

The Supreme Court has held that a "voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change" to make the plaintiff a "prevailing party" entitled to attorneys' fees. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 605 (2001). Here, the Colony challenged the DTRA's authorization of the Divine Strake test and the DTRA voluntarily cancelled the test. Did the district court correctly conclude that the Colony is not a "prevailing party"?

STATEMENT OF THE CASE

I. Nature of the Case

This appeal involves only attorneys' fees. The DTRA, an agency within the Department of Defense, proposed to conduct the Divine Strake test: a large-scale, open-air detonation at the Nevada Test Site. The Colony filed this lawsuit, but before any action on the merits, the DTRA voluntarily withdrew its decision to conduct the Divine Strake experiment and the district court granted the United States' motion to dismiss. The Colony moved for attorneys' fees pursuant to the Equal Access to Justice Act ("EAJA"), claiming that it qualified as a "prevailing party" because its lawsuit caused the government's cancellation of the Divine

Strake test. The district court denied the Colony's motion finding that the Colony did not receive any court-ordered relief and therefore is not a "prevailing party" within the meaning of EAJA. This appeal followed.

II. Background Facts and Procedural History

The proposed Divine Strake test was going to be an open-air explosion of 700 tons ammonium nitrate and fuel oil above a tunnel complex at the Nevada Test Site. SER 36. The Nevada Test Site, located in a remote area of southern Nevada, is administered by the U.S. Department of Energy's National Nuclear Security Administration and hosts the research, development, and testing of various Defense Department programs, like national security and counter terrorism tests. *Id.* at 36-37. The proposed Divine Strake test would have allowed the DTRA to try out a detonation technique that would help the U.S. military defeat "hardened and deeply buried targets" such as underground tunnels and bunkers that enemies employ for storage of munitions, command and control, wartime refuge for enemy leaders, and a host of other uses. *Id.* at 38.

The Colony challenged the DTRA's decision to conduct the Divine Strake test, claiming that it violated rights it has under the Treaty of Ruby Valley and NEPA. ER 18-34. The United States moved to stay the litigation to conduct further environmental review pursuant to NEPA. SER 16-21. The United States

explained that the National Nuclear Security Administration/Nevada Site Office – the lead agency for conducting the environmental reviews concerning the Divine Strake test pursuant to NEPA – had issued a decision withdrawing the Finding of No Significant Impact ("FONSI") and the authorization to conduct the test and was going to conduct further analysis. *See id.* at 22-25. The district court granted the motion to stay the litigation and monitored the agency's progress through a number of status conferences. *See id.* at 26-29, 40, 56.

Two status conferences are relevant here. At the November 2006 conference, the United States informed the district court that it had withdrawn the authorization for the Divine Strake test. *Id*. at 28. At the January 2007 conference, the United States said that it would give the Colony and the court 30 days' notice if it rescheduled the test. *Id.* at 29.

Although it had previously withdrawn authorization for the Divine Strake test pending further environmental review, on February 22, 2007, the DTRA voluntarily cancelled the proposed Divine Strake test altogether. *See id*. at 51-55. The parties discussed the cancellation at a status conference, where the United States informed the Colony and the court that it had no plans to conduct the Divine Strake test at the Nevada Test Site. *Id.* at 40.

The Colony then filed its first attorneys' fees motion, which the United States opposed and the district court dismissed as premature. ER 204-271; SER 41-50, 60. The United States moved to dismiss and the district court granted the motion but retained jurisdiction solely to determine whether the Colony was entitled to attorneys' fees under EAJA. *Id*. at 57-61. The Colony renewed its request for attorneys' fees, alleging that its lawsuit caused the DTRA to cancel the Divine Strake test. ER 452-455. It claimed that it was therefore a prevailing party under EAJA. *Id.* at 470-71. The Colony sought over $500,000 in attorneys' fees and costs for four attorneys and five expert witnesses even though no proceedings on the merits were ever held. *Id.* at 475.

The district court denied the Colony's attorneys' fees motion because the Colony did not receive any court-ordered relief. SER 63. The court noted that the Colony's assertion that the government would not have cancelled the Divine Strake test but for this lawsuit impermissibly relied on the "catalyst theory" rejected by the Supreme Court in *Buckhannon*. *Id.* This appeal followed. ER 529-32.

SUMMARY OF ARGUMENT

The Colony is not a prevailing party within the meaning of EAJA. The Colony's assertion that its lawsuit led to the cancellation of the Divine Strake

experiment, even if true, fails to make it a prevailing party under EAJA because the Supreme Court explicitly rejected the catalyst theory in *Buckhannon*. The Colony did not obtain any court-ordered relief that materially altered the legal relationship of the parties through the United States' voluntary representations made at status conferences or during any other part of the litigation. It therefore did not prevail. The district court's decision to deny the Colony's request for attorneys' fees and costs should be affirmed.

STANDARD OF REVIEW

This court reviews a district court's "denial of attorney's fees for abuse of discretion, but any elements of legal analysis and statutory interpretation which figure in the district court's decision are reviewable de novo." *Coalition for Clean Air v. Southern California Edison Co.*, 971 F.2d 219, 229 (9th Cir. 1992). Here, the Colony challenges the district court's legal determination that it is not a "prevailing party" within the meaning of EAJA. Although whether a party has prevailed has factual elements that are reviewed for clear error, this Court reviews de novo "the legal analysis underlying the district court's finding" on prevailing party status. *Citizens for Better Forestry v. U.S. Dept. of Agr.*, 567 F.3d 1128, 1131(9th Cir. 2009).

ARGUMENT

I. The district court correctly determined that the Colony is not entitled to recover attorneys' fees because it is not a prevailing party under EAJA.

When considering a fee petition, the first question is usually whether the fee applicant qualifies as a "prevailing party." *Carbonell v. I.N.S.*, 429 F.3d 894, 897 (9th Cir. 2005); *see also Texas State Teachers Ass'n v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 789 (1989) ("No fee award is permissible until the plaintiff has crossed the 'statutory threshold' of prevailing party status."). To be a prevailing party, a plaintiff must "obtain an enforceable judgment against the [government] . . . or comparable relief through a consent decree or settlement." *Farrar v. Hobby*, 506 U.S.103, 111 (1992). The Supreme Court has squarely rejected the "catalyst theory": the idea that a fee applicant can also qualify as a prevailing party if his or her lawsuit provoked a voluntary change in the government's conduct or policy. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 603 (2001). There, the Supreme Court held that "[a party's] voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change" to make the party a "prevailing party" under fee-

shifting statutes. *Id.* at 605. This court has held that *Buckhannon* applies to EAJA. *See Carbonell*, 429 F.3d at 898.

A. This case is controlled by the Supreme Court's decision in *Buckhannon.*

The primary thrust of the Colony's opening brief is that it is a prevailing party because its lawsuit caused the government to withdraw the authorization to conduct the Divine Strake test. The Colony claims, for example, that the chronology of the litigation, including the DTRA's ultimate cancellation of the test, demonstrates that the Colony is a prevailing party under EAJA. *See* Pls.' Opening Br. ("Br.") at 3. The Colony contends that the DTRA cancelled its plans to conduct the Divine Strake test because of the Colony's lawsuit. *Id.* at 4,11,13. Ultimately, the Colony concludes that it is entitled to attorneys' fees and costs because it "successfully prevented the [the government] from carrying through with [its] plans" by filing this lawsuit—never mind that it did not get any relief from the district court. *Id.* at 14-15.

At bottom, the Colony simply articulates the catalyst theory, which the Supreme Court rejected in *Buckhannon*. Even assuming that the Colony's lawsuit directly caused the DTRA to cancel the Divine Strake test, the Colony is not a prevailing party because it did not receive any *court-ordered* relief that materially altered the legal relationship between the parties. *Buckhannon,* 532 U.S. at 605.

Without qualifying as a "prevailing party," the Colony cannot seek an award of attorney's fees and costs. *See* 28 U.S.C. 2412(d)(1)(A) ("a court shall award to a *prevailing party* other than the United States fees and other expenses . . .") (emphasis added).

The Colony simply cannot establish that it is a prevailing party under EAJA. The cancellation of the proposed Divine Strake test was the result of a voluntary action by DTRA and not due to an order of any court. Then the district court dismissed the Colony's complaint as moot. Accordingly, the Colony cannot meet the standards necessary to prevail on their fees motion. Because DTRA voluntarily cancelled the Divine Strake test, *Buckhannon* controls.

B. The Colony did not receive any court-ordered relief that materially altered the relationship between the parties.

The Colony does not attempt to distinguish *Buckhannon*, instead it simply ignores the case, not even bothering to cite it in its opening brief. It does argue, though, that it "did obtain some relief on the merits of [its] claims." Br. at 21. It says it received that relief at two status conferences. But neither status conference resulted in any relief for the Colony, much less relief with a judicial imprimatur.

To qualify as a prevailing party under EAJA, a plaintiff generally must obtain an enforceable judgment against the United States or comparable relief through a consent decree or settlement. *Farrar v. Hobby,* 506 U.S. at 111; *see*

also Buckhannon, 532 U.S. at 603 (the term "prevailing party" used in the EAJA and other fee-shifting statutes means a party "who has been awarded some relief by [a] court"). In *Carbonell*, this Court laid out the two-part test for determining what type of relief qualifies a litigant as a "prevailing party": (1) there must be a material alteration in the legal relationship between the two parties; and (2) it must be "stamped with some 'judicial imprimatur.'" 429 F.3d at 900, citing *Buckhannon.* 532 U.S. at 604-05; *Labotest, Inc. v. Bonta,* 297 F.3d 892, 895 (9th Cir. 2002); and *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 374 F.3d 857, 865 (9th Cir. 2004).

Here, the Colony did not receive any judicially sanctioned relief that materially altered the legal relationship between the parties. There is no dispute that the district court dismissed the Colony's complaint as moot without ordering any relief. SER 61. The district court thus correctly held that "[the Colony does] not, and cannot, direct the court's attention to an enforceable judgment or court-ordered consent decree that materially altered the legal relationship of the parties." *Id.* at 63.

The Colony claims that it received judicially sanctioned relief that materially altered the legal relationship between the parties because at two status conferences "[t]he Court specifically and expressly stated that the Defendants

would remain at status quo and that the Defendants were required to give thirty days notice of the rescheduling of any detonation. (Docket No. 39 and 45)." Br. at 21. Voluntary actions taken by a defendant in the normal course of litigation do not a prevailing party make. Those status conferences occurred *after* the National Nuclear Security Administration/Nevada Site Office, the lead agency responsible for conducting the NEPA environmental reviews of the proposed Divine Strake test, had withdrawn the FONSI and authorization to conduct the blast. SER 18. The status conferences concerned only the procedures to be followed while the agency considered whether to re-authorize the test. It was not the *court* who directed the United States to "remain at status quo"—the status quo already had to prevail because by that time the test was no longer authorized. Thus, at the November 2006 status conference, counsel for the United States "represented to the court that there is no authorization for a blast at this time." *Id.* at 28. The Colony cannot show that it received relief relating to the cancellation of the Divine Strake test at status conferences that took place after authorization for the test had been withdrawn.

Similarly, the Colony alleges that at the January 2007 status conference, the court "ordered" the United States to give 30 days' notice of any scheduled detonation. Br. at 17-18. Again, it was the United States' counsel, not the court,

who "[stated] that it will notify the [the Colony] and the Court with 30 days notice if a test is to be performed." SER 29. Thus the "merits relief" that the Colony argues it obtained was just statements offered by the United States' counsel in the normal course of litigation to keep the Colony and the court informed about whether the Divine Strake test had been re-authorized.

The Colony wrongly relies on *Carbonell*, contending that "[t]his Court has previously held . . . that it is sufficient if the Court's action 'materially alters the legal relationship between the parties, because the defendants were required to do something directly benefitting the plaintiffs that they would not otherwise have had to do.'" Br. at 21, citing *Carbonell*, 429 F.3d at 900. The Colony's argument appears to be as follows: the Colony pled in its complaint that the United States failed to give adequate notice of the Divine Strake test, so the United States' statement at a status conference that it would provide 30 days' notice of any rescheduled test constitutes the United States doing something that "directly benefit[s] the plaintiffs that they would otherwise not have had to do," thus qualifying the Colony as a "prevailing party." *See* Br. at 21 (*citing Carbonell*, 429 F.3d at 900*)*. But in *Carbonell*, the plaintiff obtained a court order that included a stay of deportation—relief issued by a court that is judicially enforceable—whereas here the United States agreed to give 30-days notice before

conducting the test and the Colony obtained no court-ordered relief. 429 F.3d at 899. Even if the district court had issued an order requiring the United States to give 30-days' notice before conducting the test, an order at a status conference requiring notice to permit an orderly continuation of the litigation—and not based on any finding of relative merit of the parties' positions in the lawsuit—is not the kind of *material* alteration of the *legal status* of the parties that qualifies a party as a prevailing party for purposes of fee-shifting statutes. "Our '[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.'" *Citizens for Better Forestry*, 567 F.3d at 1128 (*quoting Hewitt v. Helms*, 482 U.S. 755, 760 (1987)); *see also Biodiversity Conservation Alliance v. Stem*, 519 F.3d 1226, 1229 (10th Cir. 2008) (O'Connor, J., sitting by designation).

Indeed, all of the district court cases the Colony relies on involved at least a modicum of judicial action. In *Klamath Siskiyou Wildlands Center v. Bureau of Land Management*, the plaintiff received a court-entered stipulation staying the project until a specified date consistent with a pre-existing seasonal restriction and foregoing the federal defendant's right to override the seasonal restriction. 522 F.

Supp. 2d 1302, 1307 (D. Ore. 2007)[1/]. In the other two cases, the district court entered a preliminary injunction in favor of the plaintiffs. *Californians for Alternatives to Toxics v. United States Forest Service,* 2007 WL 2993132 (E.D. Cal. 2007); *Oregon Natural Desert Ass'n v. Lohn*, 522 F. Supp. 2d 1295, 1298 (D. Or. 2007); *see also, e.g., Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002). Here, the Colony did not even obtain any limited initial "victory" on the merits of its claims. It is therefore not a prevailing party even under the broadest view of that statutory term of art.

* * * *

The Colony is not a prevailing party under EAJA. Its theory runs expressly counter to the Supreme Court's rejection of the "catalyst theory" in *Buckhannon*. And its claim that it received relief from the district court fails because it did not receive any judicially sanctioned relief that materially altered the legal relationship between the parties, as EAJA requires.

CONCLUSION

The district court's judgment in favor of the United States should be affirmed.

[1/] The federal government's appeal, 9th Cir. No. 08-35463, has been argued and is awaiting decision.

Respectfully submitted,

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[2/] Sara Vink, George Washington University Law School '12, a participant in the Summer Law Intern Program, contributed significantly to the preparation of this brief.

STATEMENT OF RELATED CASES

Counsel for the Appellees is unaware of any pending case that is related to this appeal within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I certify that this brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1. According to the software used to prepare this brief, WordPerfect X3, the brief contains 3,069 words.

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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