ORAL ARGUMENT NOT SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW JERSEY, *et al.*,

Petitioners,

Case No. 05-1097 (and consolidated cases)

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

TRIBAL PETITIONERS' MOTION FOR COSTS OF LITIGATION INCLUDING ATTORNEY FEES[1]

The Tribal Petitioners (along with the National Congress of American Indians and a number of states and environmental groups) sought in the above-captioned action to vacate two EPA Rules governing mercury emissions. This Court granted the Tribal and other petitioners' requests, finding the Rules to be unlawful under the Clean Air Act and vacating them. *See State of New Jersey v.*

[1] The Tribal Petitioners are the National Congress of American Indians, Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Jamestown S'Klallam Tribe, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, Lower Elwha Klallam Tribe, Lummi Nation, Minnesota Chippewa Tribe, Nisqually Tribe and Swinomish Indian Tribal Community.

EPA, 517 F.3d 574 (D.C. Cir. 2008). The Tribal Petitioners respectfully move this Court for an award of litigation costs, including reasonable attorney fees, under the Clean Air Act, 42 U.S.C. § 7607(f), in the amount of $305,389.00 As explained below, this figure reflects a very substantial reduction in the actual amount of time the Tribal Petitioners' attorneys devoted to this critical litigation. The Tribal Petitioners sought to resolve this matter with the Department of Justice and without the involvement of the Court, but those efforts have unfortunately failed.

As also explained below, the Tribal Petitioners' participation in this litigation was necessitated by EPA acts and omissions that were undertaken in disregard of its statutory obligations and that posed grave and direct threats to the health, economic and other vital interests of the Tribal Petitioners. The deficiencies in the EPA's development and support of the challenged Rules, as well as the distinctly heightened risks the Rules posed for Native Americans, were brought to the EPA's attention by the Tribal Petitioners through their vigorous participation in the rulemaking comment process. The EPA chose to ignore those concerns and proceeded to implement its Rules, despite the fact that the same concerns were brought to the EPA's attention by the U.S. Government Accountability Office and by the EPA's own Inspector General. The latter reported that in developing its new mercury Rules the EPA had ignored critical information, including the Rules' potential impacts on Native Americans, in favor of preferred, predetermined

outcomes. In the litigation that followed, this Court likewise admonished the EPA for "substituting EPA's desires" for its plain statutory duties. 517 F.3d at 582. Under these circumstances, and for the additional reasons set forth below, the Tribal Petitioners should be compensated for their participation in this costly and time-consuming litigation that was unfortunately rendered necessary by the EPA's intransigence and disregard of its own fundamental obligations.[2]

I. STATUTORY BASIS: THE CLEAN AIR ACT

Section 7607 of the Clean Air Act ("Section 307"), which governs judicial review of Environmental Protection Agency ("EPA") actions, provides that "[i]n any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." 42 U.S.C. § 7607(f).

II. AN AWARD OF ATTORNEY FEES IS "APPROPRIATE"

A. The Tribal Petitioners Achieved Complete Success

For an award of attorney fees under Section 307(f) to be appropriate, a party must have achieved "some degree of success" on its claims. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983). The Tribal Petitioners achieved complete success on their claims. They sought to have vacated two EPA Rules governing mercury

[2] The Tribal Petitioners and the Department have agreed, subject to the Court's approval, that the Department may have 60 days to respond to this motion and the Tribal Petitioners may have 30 days thereafter to reply.

emissions. *See* 70 Fed.Reg. 15,994 (Mar. 29, 2005) (the "delisting rule") and 70 Fed.Reg. 28,606 (May 18, 2005) ("CAMR"). *See also* Brief of Petitioners National Congress of American Indians and Treaty Tribes at 44, January 12, 2007 ("Br. of Tribal Petitioners") (requesting Court to vacate delisting rule and CAMR)). The case resulted in this Court's decision in *State of New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), which vacated the two EPA Rules, providing Tribal Petitioners with the precise relief they sought. Because the Tribal Petitioners were fully successful on their claims, and for the additional reasons stated below, the award of costs and attorney fees requested on this motion is appropriate.

In pressing their claims, the Tribal Petitioners argued that the EPA's actions were unlawful because the EPA failed to consider the effect of its actions on the Tribal Petitioners' treaty rights as guaranteed by treaties with the United States. In addition, the Tribal Petitioners expressly adopted the threshold statutory interpretation arguments ("Section 112 arguments") pressed by the State and Environmental Petitioners, though in the interests of efficiency the Tribal Petitioners did not expend duplicative efforts fully reiterating those arguments in their brief. *See* Br. of Tribal Petitioners at 23. This Court resolved the dispute based on the threshold Section 112 arguments made by the State and Environmental Petitioners and adopted by the Tribal Petitioners. The Court

accordingly did not address the Tribal Petitioners' treaty arguments.

The Department may argue that the Tribal Petitioners' eligibility for attorney fees is undermined by the fact that this Court did not address the Tribal Petitioners' treaty arguments. However, for purposes of determining eligibility for attorney fees, whether a party achieved the requisite degree of success does not depend on the court's treatment (or lack thereof) of a particular theory, argument or ground upon which a given claim is based. Rather, it depends on whether the party failed or succeeded in obtaining the ultimate result that it sought. As explained in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), a "court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. *The result is what matters*." *Id*. at 435 (emphasis added and footnote omitted). Here, the Tribal Petitioners brought two claims to vacate two Rules, and vacatur of those two Rules was precisely "the result" returned on both claims.

Nor does the requirement of an "issue-by-issue" analysis of the Tribal Petitioners' success undercut their eligibility for fees. In *Sierra Club v. EPA*, 769 F.2d 796 (D.C. Cir. 1985), this Court held that a court is required to evaluate a party's success (and, hence, its eligibility for fees) on "an issue-by-issue basis." *Id.* at 801. *Sierra Club* derived the "issue-by-issue" requirement from *Hensley*. *Id.* (expressly relying on "the rationale of the *Hensley* Court in requiring an issue-by-issue consideration of success"). The rationale of the *Hensley* Court, according to

Sierra Club, was that "a party should not be able to 'piggyback' fees for unsuccessful *claims* upon unrelated, successful *claims*. Requiring an issue-by-issue analysis prevents [this result]." *Sierra Club*, 769 F.2d at 801 (emphasis added) (discussing *Hensley*). The *Hensley* Court thus instructed that in determining a party's eligibility for attorney fees, a court must separately evaluate the success or failure of each of that party's "distinctly different *claims*[.]" *Hensley*, 461 U.S. at 434-35 (emphasis added).

Accordingly, in *Sierra Club*, the fee petitioners had sought to invalidate eleven distinct EPA regulatory provisions. *Id.* at 802-07. The Court's issue-by-issue analysis involved separately evaluating the petitioners' success in invalidating each provision. *Id*. The Court approved fees for work related to provisions that had been invalidated and denied fees for work related to provisions that had been upheld. *Id*. The Court did not index the fee award to the treatment of particular arguments advanced in support of the successful claims.

This Circuit has since applied *Hensley* and *Sierra Club* precisely this way, as requiring courts evaluating fee requests to focus on the results achieved on a given claim, not on the court's treatment (or lack thereof) of the particular theories, arguments or grounds asserted in support of each such claim. For example, in *American Petroleum Institute v. EPA*, 72 F.3d 907 (D.C. Cir. 1996), a litigant had successfully challenged an EPA regulation on various grounds, only one of which

was reached by the Court, obviating the need to reach the others. *Id.* at 911. The government opposed a portion of the fee request under Section 307(f) related to arguments not reached by the Court on the theory that, pursuant to the issue-by-issue analysis required by *Hensley*, the petitioners had not been successful on those "distinctly different claims[.]" *Id*. This Court rejected that reasoning:

> Petitioners did not raise any claims distinct and separate from the one on which they prevailed. They pursued *only one claim for relief – the invalidity of the regulation at issue*. . . . [T]here were no fourth and fifth claims. There were only fourth and fifth arguments for the one claim. . . . As there are no "separate claims" but only separate arguments in support of the same claim, *Hensley v. Eckerhart* has no applicability.

Id. at 911-12 (emphasis added) (citing *Sierra Club*, 769 F.2d at 801-04, and *Kennecott Corp. v. EPA*, 804 F.2d 763, 765-66 (D.C. Cir. 1986)).

Kennecott Corp. v. EPA , 804 F.2d 763 (D.C. Cir. 1986), likewise illustrates the proper focus on the success of claims, as opposed to a court's treatment of specific arguments in support thereof, in evaluating eligibility for fees under Section 307(f). There, the government sought a reduction in the fee award for time spent on a rejected argument raised by a petitioner in support of a successful claim. This Court awarded compensation for time spent on the argument because, although the argument was rejected, the petitioners were "completely successful" on their claim – *i.e.*, the challenged regulation had been vacated. *Id*. at 766. *See Hensley*, 461 U.S. at 435 ("The result is what matters."). Conversely, the petitioner

in *Kennecott* also sought fees for time spent on an argument in support of an unsuccessful claim on the grounds that, although the court had rejected the claim, it had not explicitly addressed and rejected that particular argument. This Court denied the fee request and stated:

> Since it is clear that this circuit is "extremely reluctant to award fees for time expended on . . . unsuccessfully raised issues," *Sierra Club*, 769 F.2d at 802 (applying *Hensley*), petitioners now attempt to cast the court's conclusion in this regard not as a "loss," but as a failure to reach the merits. . . . *If that were so, there would be no basis for reducing the fee. See Hensley*, 461 U.S. at 435, 103 S.Ct. at 1940 (a court's "failure to reach" an issue is not grounds to reduce a fee award).

804 F.2d at 766 (emphasis added). *See also Davis County Solid Waste Mgmt. and Energy Recovery Special Serv. Dist. v. EPA*, 169 F.3d 755, 760 n.8 (D.C. Cir. 1999) ("The court did not reach the arbitrary and capricious challenge, deciding the case on *Chevron* step one. Given [the petitioner's] success in the case, however, the time its attorneys spent on alternative grounds should not be used to reduce its award.")

These cases make clear that a court should not index an award of attorney fees to the success or failure of a particular argument or theory pressed by a party in support of a claim. Rather, "[t]he result is what matters." *Hensley*, 461 U.S. at 435. Thus, the fact that this Court's resolution of the mercury litigation on the threshold Section 112 ground obviated the need for it to reach the Tribal Petitioners' treaty arguments raised in support of their two successful claims

cannot weigh against the Tribal Petitioners' entitlement to reasonable attorney fees. A contrary approach would create highly undesirable consequences. If the Tribal Petitioners were eligible to receive attorney fees only for arguments reached by the Court, they would have had an incentive to duplicate the briefing done by the State and Environmental Petitioners, with whom they cooperated in this litigation. Such an approach would incentivize the waste of judicial resources and the resources of the parties and ultimately the public. The Tribal Petitioners instead expressly adopted those arguments, thereby promoting efficient, cooperative litigation.

Moreover, if the Tribal Petitioners had not raised their treaty rights arguments when they did, they would have forever waived those arguments in the context of this litigation. The Tribal Petitioners had no way of predicting with certainty that the Court would resolve the case solely on the threshold Section 112 grounds, or that the Court would resolve the case against the EPA on those grounds. (The United States vigorously opposed the Section 112 argument and initially sought a writ of certiorari from the Supreme Court on that issue). The Tribal Petitioners should not now be punished for raising arguments that needed to be made in the event that the Section 112 argument did not prevail. Congress intended Section 307(f) to be a necessary "inducement" to suits to enforce the Clean Air Act. *See Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 639 F.2d 802, 804 (D.C. Cir. 1981). Congress cannot have intended

Section 307(f) to be interpreted so as to put litigants to the choice of either waiving critical rights by refraining from making particular arguments, or making those arguments subject to the risk that a court will not reach them, thus rendering them inappropriate for compensation. *See American Petroleum Institute*, 72 F.3d at 912 ("It is not necessary that a fee-petitioning client and its attorney have acted with the 20/20 acuity of hindsight in developing their arguments in order to collect attorneys' fees."). Because the Tribal Petitioners succeeded on both of their claims, an award of attorney fees is appropriate.

B. The Tribal Petitioners' Suit Contributed to the Goals of the Clean Air Act for Purposes of Determining Eligibility for Fees Under Section 307(f)

An award of costs including attorney fees for the Tribal Petitioners is also appropriate because their suit was precisely the type of suit that Congress sought to encourage with Section 307 of the Clean Air Act – *i.e.*, one to force an agency into compliance with its own statutory obligations. It is well-known that the effects of mercury pollution can be devastating for both individuals and communities; and the EPA has acknowledged that Native Americans, because of their distinctively heavy reliance on the consumption of fish for subsistence, are the United States subpopulation most vulnerable to mercury pollution. *See, e.g.*, Br. of Tribal Petitioners at 6-8. Many of the Tribal Petitioners accordingly had submitted rulemaking comments to the EPA containing extensive scientific and other

evidence establishing that the EPA's proposed Rules posed grave threats to their interests; and the EPA thoroughly disregarded its statutory obligations to take those threats meaningfully into account when developing its new rules. *See id*. at 27-44. Indeed, the EPA's Inspector General reported in 2005 that the EPA had ignored scientific evidence and had instead developed the new mercury Rules with a politicized bias toward preferred, predetermined outcomes; she noted the particular vulnerability of Native Americans to mercury pollution and that "tribal concerns were not addressed during the development" of the new Rules as they should have been.[3] Similarly, the Government Accountability Office likewise noted the heightened vulnerability of Native Americans to the deleterious health effects of mercury exposure and concluded that in developing its proposed Rules, the EPA, among other "major shortcomings," had failed to "adhere to the principles of full disclosure and transparency" and had failed to account for "the expected human health and other benefits of decreased exposure to mercury emissions in the analysis supporting the proposed rule[.]"[4] This Court, in the same vein, admonished the EPA for "substituting EPA's desires" for its plain statutory duties.

[3] U.S. EPA, Office of Inspector General, *Additional Analyses of Mercury Emissions Needed Before EPA Finalizes Rules for Coal-Fired Electric Utilities*, 3, 2-16, 24-25 (Feb. 3, 2005), OAR 2002-0056, Item 5686 [JA-1530]. *See also* Brief of Environmental Petitioners at 9-10.

[4] U.S. Government Accountability Office, Report to Congressional Requesters, *Observations on EPA's Cost-Benefit Analysis of Its Mercury Control Options*, GAO-05-252 at 4, 5, 12 (February 2005).

517 F.3d at 582. In sum, the EPA's actions related to its new mercury Rules fell manifestly short of its statutory obligations and as such invited, indeed *necessitated*, the litigation that ensued, particularly by entities such as the Tribal Petitioners who were at the highest risk of harm from the agency's actions and omissions. There simply is no principled basis to require a successful litigant to bear the costs of such litigation under those circumstances.

That the Court did not reach the Tribal Petitioners' treaty arguments in striking down the EPA Rules does not undermine the fact that the Tribal Petitioners' suit contributed to the goals of the Clean Air Act for purposes of determining their eligibility for attorney fees. This Circuit's decisions in *Alabama Power Co. v. Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982), and *Washington Coalition* are instructive in this regard. Those cases were decided before *Ruckelshaus* and thus do not reflect that case's "degree of success" analysis. But they are this Circuit's most recent decisions addressing whether a given suit can be said to have contributed to the goals of the Clean Air Act for purposes of determining eligibility for attorney fees under the Act. And they make clear that the Tribal Petitioners' suit clearly contributed to the goals of the Act notwithstanding that the Court did not address their treaty arguments.

In *Alabama Power*, an environmental group sought fees under Section 307(f) for time devoted to an argument that the Court did not reach because the

group had voluntarily withdrawn it before the litigation concluded. The Court approved compensation for that work, reasoning as follows:

> We have no doubt that the issue was advanced in earnest, and that, had it remained in the case, its resolution would have contributed importantly to administration of the Act. What we hold, then, is that we will not use hindsight to deny an otherwise appropriate recovery simply because a substantial issue, originally raised in good faith, is later withdrawn as a matter of legitimate litigation strategy.

672 F.2d at 5 n.18. That reasoning applies here. That the relevant issue in *Alabama Power* was withdrawn by the party is an immaterial distinction. There, as here, the Court did not address the issue, but the petitioners' work on the arguments was nonetheless appropriately compensable.

Similarly, in *Washington Coalition*, a party's appeal of its Clean Air Act suit to enjoin the operation of a solid-waste incinerator had been dismissed as moot as a result of EPA and court action permitting the operation under a revised implementation plan. 639 F.2d at 803. The district court had denied attorney fees under Section 307(f) to that party, reasoning that the mooted suit did not tangibly advance the public interest in clean air. The D.C. Circuit reversed, reasoning as follows:

> We think the District Court incorrectly focused its attention on the outcome and practical effects of the litigation, to the exclusion of a more relevant consideration: whether the suit was of the type that Congress intended to encourage when it enacted the citizen-suit provision. . . . Quite obviously, the legislature, when it called for citizen-suits, considered a fee recovery to be consonant with the public interest whenever the underlying suit was a prudent and

> desirable effort to achieve an unfulfilled objective of the Act. . . . [D]ecisions on fee-allowance cannot make wholesale substitutions of hindsight for the legitimate expectations of citizen plaintiffs.
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> * * *
>
> We conclude that the District Court, by confining itself to a post hoc exploration for actual and tangible effects of the litigation, departed from the fundamental purpose of the citizen-suit provision.

Id. at 804-05.

As both *Alabama Power* and *Washington Coalition* illustrate, a determination of whether attorney fees are appropriate cannot be premised on hindsight. Going into this litigation, none of the parties could have predicted in what sequence the Court would address the arguments, or which, if any, arguments would prove dispositive. As discussed above, the Tribal Petitioners' expectation that the Court would reach their treaty arguments was eminently reasonable (as evidenced by the government's vigorous opposition to the Section 112 arguments, as well as its similarly vigorous opposition to the Tribal Petitioners' specific treaty arguments, *see, e.g.*, Brief of EPA at 68-80, 86-98). That the Court chose to address the Section 112 arguments first and found them dispositive certainly does not undermine the fact that the Tribal Petitioners' treaty arguments were "advanced in earnest," that their suit was a "prudent and desirable effort" to seek compliance with the Act, and that they had "legitimate expectations" that had the Court reached their arguments, its resolution of those arguments would have concretely

advanced the goals and proper interpretation of the Act.

Moreover, as noted previously, hinging fee eligibility in multi-party litigation on whether a court ultimately addressed a given argument would create a perverse incentive to all parties to deluge the court with every possible argument, regardless of the redundancies among parties. Here, the other petitioners ably briefed the Section 112 issue, and the Tribal Petitioners expressly adopted those arguments, *see, e.g.*, Br. of Tribal Petitioners at 23, instead of expending the additional attorney hours drafting their own versions – hours that would have been billable to the public. Section 307(f) simply cannot be interpreted in a way that penalizes the prudent efficiency demonstrated by the Tribal Petitioners and their attorneys here, especially in light of this Circuit's clear admonitions against using hindsight to make fee eligibility determinations.

In sum, the Tribal Petitioners were completely successful on their claims and their suit contributed to the goals of the Clean Air Act for purposes of determining eligibility for attorney fees under Section 307. Therefore, an award of fees is appropriate. As discussed next, the total amount of costs and fees requested by the Tribal Petitioners in this case is reasonable.

III. THE TRIBAL PETITIONERS' REQUEST FOR COSTS AND ATTORNEY FEES IS REASONABLE

Awards of attorney fees are calculated using the lodestar method, in which a reasonable hourly rate of compensation is multiplied by the number of hours

reasonably expended on the litigation. *Hensley*, 461 U.S. at 433; *Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995). The Tribal Petitioners have followed this lodestar method in calculating their requested fees.

A. Hourly Rates

The hourly rates that are the basis of the Tribal Petitioners' fee request are set forth in the attached declaration of Riyaz Kanji. *See* Declaration of Riyaz Kanji at ¶ 9. Those rates are based on the 2003-2010 Laffey Matrix developed by the United States Attorney's Office for the District of Columbia.[5] Those rates are reasonable in light of the complex and critical nature of this litigation and the skill, experience and reputation of the attorneys involved. This litigation entailed the compilation and synthesis of voluminous historical, cultural, scientific and public health data contained in a large agency record. It raised legal questions involving the interplay of federal Indian law, environmental law and administrative law that were matters of great import nationally (and that were vigorously litigated by the United States in opposition to the Tribal Petitioners' arguments). The attorneys of Kanji & Katzen are nationally recognized as preeminent practitioners specializing in federal Indian law matters, including the interplay of the treaty and environmental issues implicated by the Tribal Petitioners' involvement in this case. *See* Attachment A (biographical summaries of the Kanji & Katzen attorneys

[5] *See* http://www.justice.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_8.html.

involved in this matter); *see also* Declaration of John Dossett.

The rates set forth in the U.S. Attorney's Office matrix and reflected in this fee request are somewhat higher than those typically charged by Kanji & Katzen for clients such as the Tribal Petitioners in this case. However, Kanji & Katzen deliberately sets its billing rates for such clients lower than the prevailing market would otherwise permit based on its reputation and the skill and experience of its attorneys. Kanji & Katzen charges reduced rates for such clients as part of its commitment to the perpetuation and viability of Indian tribes and tribal governments in the United States. Tribal governments vary significantly in their access to the financial resources necessary to vindicate their array of vital legal interests, and Kanji & Katzen seeks to ensure that its services remain accessible by as broad a range of tribal clients as possible, and to ensure that it is able to work on a diverse range of issues for those clients. *See* Declaration of Riyaz Kanji *and* Declaration of John Dossett. *See also Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1524 (D.C. Cir. 1988) (approving fees at prevailing market rates for "attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals"); *Covington*, 57 F.3d at 1107-08 (same when attorneys charge reduced rates for "public-spirited goals"). Additionally, the rates requested by the Tribal Petitioners pursuant to the U.S. Attorney's Office matrix are lower than those based on other fee matrices that have been approved by courts

within this Circuit. *See, e.g., Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 15 (D.D.C. 2000); *Smith v. District of Columbia*, 466 F. Supp. 2d 151, 156 (D.D.C. 2006).

B. Hours Expended

The Tribal Petitioners are entitled to recover fees for the number of hours their attorneys reasonably expended on this litigation. *See Covington*, 57 F.3d at 1107. In determining the number of hours for which they are seeking compensation, Tribal Petitioners' attorneys have exercised stringent billing judgment to ensure that the time claimed is not excessive, redundant or otherwise unwarranted. *See* Declaration of Riyaz Kanji at ¶¶ 4-5, 7-8. As a result of exercising that judgment, they have largely eliminated the hours spent by more than one attorney in internal meetings and on conference calls (which communications in a multi-plaintiff case of this nature are frequent and essential). *See id.* They have further eliminated substantial hours spent on legal research, document review and the review of other parties' pleadings, even though much of this work was central to Kanji & Katzen's representation of the Tribal Petitioners. *See id.* The firm also eliminated substantial hours spent on internal email communications as well as all entries not sufficiently specific to permit a determination of the reasonableness of the hours spent. *See id.* Further, in allocating tasks among the attorneys on this matter, Kanji & Katzen was careful to

avoid assigning tasks to attorneys with higher billing rates when an attorney was available with the appropriate skill and experience but with a lower billing rate. *See id.* The firm also strove to assign tasks to a paralegal whenever appropriate to keep costs low and it allocated tasks, when appropriate, to attorneys with particularly relevant expertise so as to maximize efficiency. *See id.*

Altogether, the Tribal Petitioners' attorneys and paralegal expended 1,578 hours on this litigation. In exercise of billing judgment and additionally in the spirit of compromise, they have excluded time entries totaling 582 hours, reducing the total hours for which they seek compensation to 996. Thus, the Tribal Petitioners' figure of 996 hours reflects a reduction of over *one third* of the total amount of time in fact expended by their attorneys and paralegal on this litigation. A detailed documentation of the hours, rates and tasks performed by each attorney and paralegal throughout this litigation is attached. *See* Attachment B (Attorney and Paralegal Billing Entries).

The number of hours expended by Tribal Petitioners' attorneys for which they seek compensation is eminently reasonable for a case that extended over a period of three years and required the compilation, synthesis and analysis of complex historical, scientific and public health data. In addition, the case raised questions – involving the interplay of Indian law, environmental law and administrative law – that had never been fully canvassed by any federal court.

And, as noted, the agency actions invalidated by this litigation threatened uniquely devastating consequences for the Tribal Petitioners in terms of their health, their economic livelihood and their cultural existence. The time spent on this matter by the Tribal Petitioners' attorneys is clearly reasonable in light of the complexity of the arguments and the extraordinarily grave stakes for the Tribal Petitioners.

The Tribal Petitioners are also entitled to be compensated for time reasonably spent attempting to obtain compensation for their work on this matter including preparing this fee petition. *See Sierra Club*, 769 F.2d at 811; *Environmental Defense Fund v. EPA*, 672 F.2d 42, 62 (D.C. Cir. 1982).

IV. COSTS

The Tribal Petitioners are entitled to be compensated for reasonable costs associated with the litigation. *See, e.g., Salazar*, 123 F.Supp.2d at 16-17 (awarding costs for expenses such as photocopying, telephone calls, messengers and Westlaw). The Tribal Petitioners incurred $3,186.50 in costs associated with this litigation. *See* Declaration of Riyaz Kanji at ¶ 11.

V. CONCLUSION

For the foregoing reasons, the Tribal Petitioners respectfully request that the Court grant their Motion for Costs of Litigation Including Attorney Fees and award Tribal Petitioners $305,389.00 as compensation for a portion of the costs and fees incurred in their participation in this unfortunately necessary litigation.

Dated: February 7, 2011

Respectfully Submitted,

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