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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DAVID and BONNIE LITTLE, et al.,)	3:13-cv-00046-HDM-WGC
)	
Plaintiffs,)	
)	ORDER
vs.)	
)	
HILDA L. SOLIS, et al.,)	
)	
Defendants.)	
)	

Before the court is plaintiff Western Range Association's ("WRA") Motion for Fees and Costs Pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (#42). The defendants, the United States Secretary of Labor, the United States Assistant Secretary of Labor, and the Acting Deputy Administrator of the Wage and Hour Division of the United States Department of Labor, have opposed (#48). The plaintiff has replied (#51).

Factual and Procedural Background

Plaintiffs are "individual sheep producers and organizers of sheep producers." (P. Mot. 2.) On January 8, 2013, the defendants issued a Federal Register Notice that raised the adverse effect wage rate ("AEWR") of shepherders substantially in several Western

1 states. (*Id.*) For example, the federally mandated wage rates for
2 shepherders in Nevada would have been raised by 78%, and the rates
3 in Arizona would have been raised by 90%. (*Id.*)

4 Plaintiffs filed a complaint on January 29, 2013 claiming that
5 the wage rates were arbitrary and capricious in violation of the
6 Administrative Procedures Act. Plaintiffs sought emergency
7 injunctive relief from the court. Following a hearing regarding
8 Plaintiffs' request for a temporary restraining order, the parties
9 entered into a stipulation that was "incorporated herein by
10 reference" into a court order on February 4, 2013.

11 Under the terms of the stipulation, the plaintiffs withdrew
12 their motion for a temporary restraining order and preliminary
13 injunction without prejudice, while the defendants agreed not to
14 implement or enforce the wage rates with respect to shepherding
15 announced in the January 8 Federal Register in Nevada, Arizona,
16 Oregon, and Washington "until and unless the Court enters judgment
17 on the merits in favor of the validity of the Notice." (Order,
18 Doc. #21.) The parties also agreed to an expedited dispositive
19 motions timeline, and that the defendants would file the
20 administrative record on or before February 22, 2013.

21 Defendants did file the administrative record on February 22,
22 2013, along with an unsworn declaration providing the Department of
23 Labor's ("DOL")'s rationale for promulgating the January 8 Federal
24 Register Notice. Then, on March 28, 2013, the DOL promulgated a
25 new Federal Register Notice rescinding the January 8 Notice and
26 setting the AEWRs back prior to the levels before the January 8
27 Notice. The new Notice also stated that the relevant State
28 Workforce Agencies ("SWAs") were currently collecting new wage data

1 for the occupations and geographic locations in question, and that
2 that the DOL would eventually issue new AEWRS based on the new
3 data. (D. Resp. 4.)

4 On April 19, 2013, the plaintiffs moved for summary judgment.
5 On the same day, the defendants filed a "Motion to Dismiss for Lack
6 of Subject Matter Jurisdiction or Failure to Exhaust Administrative
7 Remedies." The defendants argued that the case was moot, and that
8 the "voluntary cessation" exception to mootness did not apply
9 because "[t]he Ninth Circuit has held that an agency's adoption of
10 a new rule or policy that resolves the plaintiff's legal challenge
11 is enough to moot the case." (Def. Mot. Dismiss 13.) Defendants
12 argued that the March 28 Notice completely nullified the January 8
13 Notice and constituted an adoption of a new rule or policy that
14 resolved the plaintiffs' legal challenge. (*Id.* 13-14 ("The Federal
15 Register Notice demonstrates that DOL did not voluntarily cease
16 applying the January 8 AEWRS. Rather, it issued a new, final wage
17 rate determination setting Plaintiffs obligations under the
18 statute, which rescinded the January 8 rates. Thus, the issuance
19 of DOL's new, final rule moots this case.").)

20 On May 10, 2013, the plaintiffs then filed a document titled
21 "Plaintiffs' Suggestion of Mootness," in which they "respectfully
22 submit[ted] that this case ha[d] been mooted by the Department of
23 Labor's ("DOL") involuntary cessation of its illegal activity."
24 (P. Suggestion of Mootness 1.) Plaintiffs "reserve[d] the right to
25 file another lawsuit should DOL resume its unlawful conduct." (*Id.*
26 2.)

27 On May 16, 2013, the court issued an order granting "the
28 defendants' unopposed motion to dismiss . . . this action as moot."

1 (ECF #41.) The plaintiffs then filed for attorneys' fees and
2 costs, and that motion is now before the court.

3 **Standard**

4 Under the Equal Access to Justice Act ("EAJA"),
5 [e]xcept as otherwise specifically provided by statute, a
6 court shall award to a prevailing party other than the United
7 States fees and other expenses, in addition to any costs
8 awarded pursuant to subsection (a), incurred by that party in
9 any civil action (other than cases sounding in tort),
10 including proceedings for judicial review of agency action,
11 brought by or against the United States in any court having
12 jurisdiction of that action, unless the court finds that the
13 position of the United States was substantially justified or
14 that special circumstances make an award unjust.

15 28 U.S.C. § 2412(d) (1) (A). A "party" that may recover under the
16 EAJA is defined to include

17 any owner of an unincorporated business, or any partnership,
18 corporation, association, unit of local government, or
19 organization, the net worth of which did not exceed \$7,000,000
20 at the time the civil action was filed, and which had not more
21 than 500 employees at the time the civil action was filed.

22 *Id.* at § 2412(d) (2) (B) (ii). Thus, to prevail on an EAJA fees and
23 costs claim, a party must meet the EAJA definition of a "party" and
24 must have "prevail[ed]," while the position of the United States
25 must be found not to have been "substantially justified," and there
26 must be "no special circumstances mak[ing] an award unjust." *Id.*;
27 *Id.* at § (d) (1) (A).

28 **I. Is WRA a "Party" Eligible to Recover Attorneys' Fees Under the EAJA?**

WRA operates as a member association. WRA applies for H-2A
visas for foreign shepherders, and then facilitates their
employment at its member organizations, which are sheep ranches.
The Immigration and Nationality Act provides for the H-2A program,
which allows foreign workers to obtain visas to perform
agricultural labor or services of a temporary or seasonal nature in

1 the United States. See 8 U.S.C. § 1101(a)(15)(H). H-2A visas can
2 only be granted when there are "not sufficient workers . . . to
3 perform the labor or services involved" and "the employment of the
4 [foreign workers] . . . will not adversely affect the wages and
5 working conditions of workers in the United States similarly
6 employed." 8 U.S.C. § 1188(a)(1).

7 Ninth Circuit case law is quite clear that when determining if
8 a member association is eligible for attorneys' fees under the
9 EAJA, whether the individual member organizations themselves meet
10 the requirements of being a party eligible to recover under the
11 EAJA is not relevant. See *Love v. Reilly*, 924 F.2d 1492, 1494 (9th
12 Cir. 1991). The court must determine the "party in interest," and
13 the members are parties in interest only if they are liable for the
14 attorneys' fees. See *id.* (citing *Unification Church v. I.N.S.*, 762
15 F.2d 1077, 1082 (D.C. Cir. 1985)). If only the member association
16 bears the cost of the litigation (see P. Mot. 5), the member
17 association is the party in interest and the size and net worth of
18 the individual member organizations need not be considered. See
19 *Love*, 924 F.2d at 1494.

20 Here, WRA admits it is responsible for all of the attorneys'
21 fees in this litigation and that it is the real party in interest.
22 (P. Mot. 5.) It must therefore show that it qualifies as a party
23 under the EAJA. Moreover, the size and net worth of the member
24 ranch organizations are not relevant to the inquiry of whether WRA
25 is an eligible "party" under the EAJA. *Love*, 924 F.2d at 1494.
26 WRA asserts in its motion that its members' size and net worth are
27 not relevant, and the DOL does not contest this particular point.
28 (See P. Mot. 5; D. Opp'n 5-11.)

1 a. Was WRA's net worth less than \$7,000,000 at the time this
2 lawsuit was filed?

3 WRA asserts that it meets the first requirement of 28 U.S.C. §
4 2412(d)(2)(B)(ii) by having a net worth of "far below the
5 \$7,000,000 maximum at the time of filing the complaint and all
6 times since then." (P. Mot. 4.) The only support for this is a
7 declaration from Dennis Richins, the Executive Director of WRA
8 since 2001. (Richins Dec. ¶ 3.)

9 The defendants argue that WRA's "unsupported statements are
10 not sufficient to meet WRA's burden under EAJA." (Def. Opp'n 5.)
11 In support of this argument, the defendants cite two cases. The
12 first is a Ninth Circuit case, *Thomas v. Peterson*. In *Thomas*, the
13 court found that a plaintiff's affidavit was not sufficient to
14 establish that it was an organization eligible for fees under the
15 EAJA. *Thomas v. Peterson*, 841 F.2d 332, 337 (9th Cir. 1998).
16 However, while the court did criticize the sparse nature of the
17 affidavit, the fault the court found seems to be that the affidavit
18 only addressed the net worth of the organization and did not
19 address the organization's size. *Id.* ("The government correctly
20 notes that the affidavit of the assistant director of the Idaho
21 Conservation League, the plaintiff that filed the fee application,
22 shows only that the League is a 'non-profit, public interest
23 corporation' which is worth less than \$1 million, but not that the
24 League employs fewer than 500 employees. We agree that the
25 affidavit is not sufficient to establish that the League is
26 eligible for fees." (internal citations omitted).) Thus, *Thomas*
27 does not actually stand for the proposition that an affidavit alone
28 is not enough to show EAJA party eligibility; rather, it holds that

1 both elements of EAJA party qualification - net worth and the
2 number of employees - must be established by the plaintiff by
3 competent evidence.

4 The other case cited by the defendants is *Impresa Costruzioni*
5 *Geom. Domenico Garufi v. United States*. The *Impresa* court did hold
6 that the plaintiffs in an EAJA action must show significant
7 "documentary evidence" regarding both the size and the net worth of
8 their organization. 89 Fed. Cl. 449, 451 (2009). With regard to
9 the size of the organization, the *Impresa* court concluded that a
10 "bare statement" was not enough and that "substantiating
11 documentation" was necessary. *Id.* Additionally, *Impresa* held that
12 "affidavits which are 'self-serving' and 'unsupported,' including
13 those that contain unaudited balance sheets, are not sufficient to
14 establish net worth." *Id.*

15 *Impresa* is a case from the United States Court of Federal
16 Claims. As WRA points out in its reply, there does not appear to
17 be any correlating Ninth Circuit authority. (See P. Reply 4 n.2.)
18 While case law from the Court of Federal Claims may be instructive,
19 it is not binding on this court. Nevertheless the court is
20 persuaded that WRA's affidavit is self serving and unsupported and
21 therefore insufficient to establish that WRA meets the first
22 requirement under the EAJA. While the plaintiff seeks leave of
23 court to supplement the record on this issue if the court finds its
24 documentation insufficient (see *id.*), the court does not need to
25 address the issue further because WRA does not meet the second
26 element of the party qualification under the EAJA, discussed below.

27 b. *Did WRA employ no more than 500 employees at the time this*
28 *lawsuit was filed?*

1 WRA asserts that it has only 8 employees, who work in its Salt
2 Lake City Office. (P. Mot. 4; Richins Dec. ¶ 5.) WRA explains,
3 however, that

4 for the purposes of submitting H-2A applications under DOL'S
5 "special procedures: for shepherders, WRA is referred to as a
6 "joint employer" of H-2A shepherders with the individual
7 employer members. Richins Dec. ¶ 4. In the "special
8 procedures," DOL specifically recognizes the "specific tasks
and responsibilities" that WRA "performs and assumes on behalf
of the individual rancher members. *Id.* DOL concludes that
"The WRA operates as a joint employer solely for H-2A program
purposes."¹ *Id.*"

9 (P. Mot. 4.) WRA's position is that "[t]he shepherders are
10 employed by the individual sheep producer members; WRA's role is
11 simply an accommodation under the H-2A special procedures to permit
12 an H-2A visa holder shepherder to change from one WRA member to
13 another as weather, lambing seasons, and other factors require."

14 (*Id.*) WRA explains that compliance with the DOL's "special
15 procedures" means it is identified as a "joint employer" of more
16 than 800 H-2A workers at any given time. (*Id.*) However, WRA
17 claims that its "joint employer solely for H-2A program purposes"
18 status does not render it ineligible for EAJA recovery, and that it
19 truly only has 8 employees. (*Id.*)

20 In response the defendant asserts that WRA's status as a joint
21 employer of more than 800 H-2A workers means that it is does not
22 meet the definition of a "party" eligible for recovery under the
23 EAJA. The defendants deny that WRA's role is simply one of
24 "facilitation" and argue that the WRA's activities with regard to

25 _____
26 ¹ The DOL's language that "WRA operates as a joint employer solely for H-2A
27 program purposes" comes from page 8 of a document titled "Special Procedures
28 for Labor Certification Process for Shepherders and Goatherders Under the
H-2A Program," issued by DOL as part of Field Memorandum FM 24-01, published
on August 1, 2001. *Id.* The document is attached as Exhibit A to the
Richins Declaration.

1 the foreign shepherders do constitute those of an employer.

2 Defendant point out that “[a]ssociations like WRA that file
3 master applications with DOL for H-2A workers on behalf of
4 employer-associated members necessarily assume the status of a
5 joint employer by virtue of their control over the H-2A recruiting
6 and employment process, see 20 C.F.R. § 655.131(b), which includes
7 joint employer association filings for H-2A shepherding
8 occupations, see 76 Fed. Reg. at 47,260-61.” (Def. Opp’n 7-8.)
9 The defendant further notes that “[t]he regulations define an
10 employer as an ‘association’ having an employer relationship with
11 H-2A workers, as evidenced by ‘the ability to hire, pay, fire,
12 supervise or otherwise control the work of the employee.’” (Def.
13 Opp’n 8 n.3 (quoting 20 C.F.R. § 655.103(b))). Additionally,
14 “joint employment” exists under the regulations “[w]here two or
15 more employers each have sufficient definitional indicia of being
16 an employer to be considered the employer of a worker . . . Each
17 employer in a joint employment relationship to a worker is
18 considered a joint employer of that worker.” 20 C.F.R. §
19 655.103(b).

20 *i.* *Ruiz* and the Ninth Circuit “Economic Realities Test” as
21 articulated in *Bonnette*

22 The defendant details the many activities related to the H-2A
23 workers that the plaintiff undertakes beyond simply “facilitation,”
24 heavily citing to a recent and as-of-yet unpublished² Eastern
25 District of Washington case, *Ruiz v. Fernandez*. (See Def. Opp’n 7-
26 10.) In *Ruiz*, Chilean shepherders who came to the U.S. under the
27 H-2A program sued both WRA and an individual member ranch for

28 ² As an unpublished decision from a different federal district, *Ruiz*
is persuasive authority but is not binding on this court.

1 violations of Washington State wage law, breach of employment
2 contracts, and violations of the Fair Labor Standards Act (FLSA),
3 among other claims. *Ruiz v. Fernandez*, No. CV-11-3088-RMP, 2013 WL
4 2467722, at *2 (E.D. Wash. June 7, 2013). Applying the Ninth
5 Circuit "economic realities test," and determining that the
6 economic realities factors used in *Bonnette v. Cal. Health &*
7 *Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), as opposed to those
8 applied in *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997), were
9 the most relevant to its analysis, the *Ruiz* court found that WRA
10 was indeed a joint employer under FLSA. See *Ruiz*, 2013 WL 2467722,
11 at *7-8, *14; see also Def. Opp'n 9-10. The Ninth Circuit in
12 *Bonnette* analyzed whether state and county welfare agencies were
13 joint employees of "chore workers" who provided in-home domestic
14 services to disabled persons, a fact pattern the *Ruiz* court found
15 quite similar to the question of whether the H-2A shepherders are
16 joint employees of WRA. See *Ruiz*, 2013 WL 2467722, at *8.

17 The four factors used in *Bonnette* to analyze whether or not
18 WRA was a FLSA employer, were "whether the alleged employer (1) had
19 the power to hire and fire the employees, (2) supervised and
20 controlled employee work schedules or conditions of employment, (3)
21 determined the rate and method of payment, and (4) maintained
22 employment records." *Bonnette*, 704 F.2d at 1470. In exploring
23 these factors and determining that each of them weighed in favor of
24 WRA being a joint employer under FLSA, the *Ruiz* court went into
25 some detail about the power and authority WRA exercises over the H-
26 2A shepherders. The WRA does not substantially dispute the
27 accuracy of these findings as they are applicable to this
28 litigation. (See P. Reply 5-6.)

1 With regard to "the power to hire and fire the employees," the
2 Ruiz court found that WRA "plays an integral role in initiating H-
3 2A shepherders' employment with its member ranches." *Ruiz*, 2013
4 WL 2467722, at *8. WRA has "recruitment coordinators" who go to
5 foreign countries to recruit workers. *Id.* These recruitment
6 coordinators work only for WRA, not its member ranches. *Id.* The
7 recruitment coordinators provide potential H-2A employees with a
8 document titled "Pre-Employment Notice of Rights and Obligations,"
9 which the shepherders must sign before they can come to the U.S.
10 *Id.* at *9.

11 "The Pre-Employment Notice generally describes the necessary
12 qualifications for the job, the nature of the work that the
13 shepherd will perform, the wage rate that they will be
14 paid, the transportation that will be provided to and from the
15 shepherd's home country, and the tools, housing, food, and
16 insurance benefits that will be provided. The Pre-Employment
17 notice additionally informs the shepherd that they are
18 guaranteed to '3/4 time employment'; that they are subject to
19 transfer among member ranches; that the shepherd is to
20 contact Western Range if a member ranch no longer has need of
21 them, at which time they will be transferred to another ranch;
22 and that the shepherd shall contact Western Range
23 immediately if the worker has 'any problems' or becomes
24 unemployed."

18 *Id.* The Notice does state in it that the shepherd "[is] NOT
19 employed by Western Range Association but by a MEMBER of Western
20 Range Association." *Id.* at *9 n.2. However, the economic reality
21 of the joint employment relationship, not the disclaimer, is
22 controlling on the issue before the court. *See id.*

23 After a shepherd signs the WRA Pre-Employment Notice and
24 obtains the necessary visa, WRA assigns the shepherd to a member
25 ranch of its choosing, arranges for the shepherd's
26 transportation to a member ranch, and pays up front for the
27 transportation (though the member ranches later reimburse WRA for
28

1 travel expenses). *Id.* at *9. It is legally necessary for WRA to
2 be considered a joint employer of the workers; only an employer of
3 prospective H-2A workers can petition for issuance of H-2A visas.
4 *Id.* at *9; 20 C.F.R. § 655.130-131. In applying for the H-2A
5 visas, WRA holds itself out as the workers' employer to the
6 Department of Homeland Security. *Id.* at *10.

7 Once a shepherd arrives in the U.S., the shepherd and
8 the member ranch are required to sign WRA's "Shepherd Employment
9 Agreement."

10 The Agreement allows Western Range to terminate the employment
11 of a worker who commits a willful breach of contract.
12 Moreover, the undisputed evidence establishes that the
13 individual member ranches cannot terminate a shepherd's
14 employment with Western Range and may only refer the
shepherd to Western Range for reassignment to another ranch
. . . When Western Range terminates a shepherd, it offers
the shepherd prepaid return transportation to their home
country.

15 *Ruiz*, 2013 WL 2467722, at *9. WRA attempted to minimize its role
16 in firing, claiming that while it can fire employees, it does so
17 only in "'very limited circumstances'" and "'has not done so in
18 recent memory.'" *Id.* The *Ruiz* court found that the frequency with
19 which WRA exercises its right to fire is not necessary; the fact
20 that WRA has the power to fire is what is relevant to the economic
21 realities test. *Id.*

22 Based on all of this information, this court, as did the *Ruiz*
23 court, finds that WRA does have the power to hire and fire
24 employees. While WRA clearly has the power to fire based on the
25 Shepherd Employment Agreement, it also has the power to hire in
26 that it is the "gatekeeper" of the shepherders' employment in the
27 U.S. and it "sets all key terms of . . . employment through the
28

1 Pre-Employment Notice that workers are required to sign before
2 being transported to the member ranch in the U.S.” *Id.* at *10.

3 On the issue of supervision and control of the conditions of
4 the shearers, it is clear that while WRA does not supervise or
5 control the “day to day” activities of its H-2A workers, it still,
6 like the agencies in *Bonnette*, “exercised ‘considerable control
7 over the structure and conditions of employment.’” *Id.* (citing
8 *Bonnette*, 704 F.2d at 1470). This is so because the WRA Pre-
9 Employment Notice outlines the general terms and conditions of
10 employment with member ranches. *Ruiz*, 2013 WL 2467722, at *10.
11 Additionally, while WRA is not *nominally* a party to the Shepherder
12 Employment Agreement, it requires H-2A workers and member ranches
13 to enter into the agreement once the workers arrive in the U.S.
14 Furthermore,

15 the individual member ranch is identified expressly as a
16 member of the Western Range Association [in the agreement].
17 Western Range provides the standard form agreement and does
18 not allow the member ranches or workers to deviate from its
19 terms. The agreement sets the terms of employment, the
20 employee’s duties, compensation, and other conditions of the
21 shepherd’s employment with the member ranch.

19 *Id.* at *11. WRA has the power to suspend or terminate the
20 membership of ranchers who violate their conditions. *Id.*

21 Moreover, WRA “serves as a joint guarantor of the employment
22 contract between member ranches and shearers.” *Id.* It is
23 therefore clear that WRA exercises broad control over the general
24 conditions of employment of the H-2A shearers. *Id.*

25 Further, WRA has significant control of the rate and method of
26 pay even though the member ranches are the ones who - in most
27 circumstances - pay the workers. *Id.* at *12. WRA is required as a
28 joint employer under the H-2A program to ensure that the proper

1 wage rate is followed. *Id.* (citing 20 C.F.R. § 655.135). WRA has
2 the responsibility of ensuring that its member ranches do not pay
3 shepherders less than required by law. *Ruiz*, 2013 WL 2467722, at
4 *12. If a member ranch fails to pay the correct rate, WRA may
5 compel that ranch to pay it. *Id.* In fact, WRA actually pays a
6 shepherd's wages if a member ranch does not pay them, or if a
7 gap between a shepherd's employment at different ranches means
8 that the shepherd would not otherwise be paid for an extended
9 period of time. *Id.* WRA ensures that shepherders are still paid
10 wages in the event that a member ranch files for bankruptcy. *Id.*
11 Additionally, WRA requires that member ranches provide worker's
12 compensation insurance to the shepherders as required by the H-2A
13 rules. *Id.* Finally, WRA provides health and life insurance to
14 shepherders pursuant to WRA's group insurance plan. *Id.* None of
15 these findings are disputed by WRA. (See P. Reply 5-6.)

16 With regard to the final *Bonnette* economic realities factor,
17 maintenance of employment records, WRA maintains employment records
18 for all shepherders. *Id.* The files WRA maintains contain
19 employment contracts, labor certifications, travel information,
20 records of transfers between member ranches, and records of any
21 complaints made by or concerning the shepherders. *Id.*

22 Therefore, this court concludes that WRA is a joint employer
23 under FLSA. *Id.* at *14. The critical inquiry into whether or not
24 an employer is a joint employer under FLSA is not which employer
25 the worker is *more* dependent on, but rather the economic reality of
26 each individual worker-employee relationship. *Id.* at *12-13
27 (citing *Torres-Lopez*, 111 F.3d at 640). This is consistent with
28 the H-2A regulations discussed above, which state that joint

1 employment exists simply "[w]here two or more employers each have
2 sufficient definitional indicia of being an employer to be
3 considered the employer of a worker." 20 C.F.R. § 655.103(b). The
4 joint employers need not have the same amount or degree of indicia
5 of an employer; they merely must each have "sufficient" indicia.
6 *Id.* The economic realities test as articulated in *Bonnette* and
7 applied in *Ruiz* is also consistent with the H-2A regulations'
8 definition of an "employer" as "a[n] . . . organization that . . .
9 [h]as an employer relationship (such as the ability to hire, pay,
10 fire, supervise or otherwise control the work of employee) with
11 respect to an H-2A worker." 20 C.F.R. § 655.103(b).

12 The undisputed facts discussed in *Ruiz* and presented by the
13 defendants support the conclusion that plaintiff WRA is indeed a
14 joint employer of the H-2A shepherders and therefore is not
15 eligible to recover under the EAJA. While WRA does not seriously
16 dispute the factual findings of the *Ruiz* Court, WRA does argue that
17 the *Ruiz* court "only decided that there was a genuine issue of
18 material fact on the record before it." (P. Reply. 6.) However,
19 while the *Ruiz* court did determine that there were genuine issues
20 of material fact for trial with regard to several of the *Ruiz*
21 plaintiffs' claims, the court explicitly granted summary judgment
22 to the plaintiffs "insofar as Western Range was a joint employer of
23 Plaintiffs under FLSA." *Ruiz*, 2013 WL 2467722, at *22. Thus the
24 court did make a legal finding based on the facts in evidence that
25 WRA is a joint employer of the H-2A shepherders under FLSA, and
26 WRA has not disputed the facts leading to that conclusion. *Id.*; P.
27 Reply 5-6.

28 ii. *Unification Church*

1 Furthermore, *Unification Church*, which plaintiff WRA cites to
2 as articulating a “test” that demonstrates the H-2A shepherders
3 are not “employees” of WRA under the EAJA, in fact supports a
4 finding that the H-2A shepherders *are* employees of WRA under the
5 EAJA. See P. Reply 4-5; *Unification Church*, 762 F.2d at 1092. The
6 D.C. Circuit found that the Unification Church, the plaintiff in
7 that action, was an employer of its members under the EAJA and
8 therefore not eligible to recover fees under that statute.³ See
9 *Unification Church*, 762 F.2d at 1092. Without actually stating a
10 test to be used in further analysis, the *Unification Church* court
11 noted that the relationship between the church and its members
12 “resembles a typical employer-employee relationship in all respects
13 save for compensation in kind rather than specie.” *Id.* While the
14 relationship between WRA and the H-2A shepherders may be different
15 from many employer-employee relationships, it is typical of joint
16 employer-employee relationship. See *Ruiz*, 2013 WL 2467722, at *9;
17 20 C.F.R. § 655.103(b).

18 Additionally, *Unification Church* supports the conclusion that
19 an entity’s status as an employer to workers under other statutory
20 schemes, while not dispositive, is relevant to the inquiry into
21 whether that entity is an employer of the same workers under the
22 EAJA. *Unification Church*, 762 F.2d at 1092 (noting that the
23 district court had been “hasty” in concluding that the Church could
24 not “seek admission of workers under the immigration statutes and
25 then attempt to classify them as non-employees under the Equal

26 _____
27 ³ Notably, in making this finding, the court cited to a U.S. Supreme
28 Court case in which “workers at [a] commercial business owned by [a]
religious group [were found to be] ‘employees’ under [the] Fair Labor
Standards Act.” *Unification Church*, 762 F.2d at 1092 (citing *Tony & Susan
Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985)).

1 Access to Justice Act," but that other evidence in combination with
2 these "purely logical grounds" was sufficient to conclude that the
3 Church was an employer of its members and therefore not an eligible
4 party under the EAJA). Thus, WRA's classification as a joint
5 employer of the shepherders under the H-2A "special procedures" is
6 relevant evidence in support of a finding that WRA is an employer
7 of those same shepherders under the EAJA.

8 **Conclusion**

9 In the Ninth Circuit, "[t]he party seeking fees [under the
10 EAJA] has the burden of establishing its eligibility." *Love*, 924
11 F.2d at 1494 (citing *Thomas v. Peterson*, 841 F.2d 332, 337 (9th
12 Cir. 1988)). However, regardless of which party bears the burden of
13 proof, the undisputed facts in the case at hand support this
14 court's conclusion that plaintiff WRA is an employer of the H-2A
15 shepherders and as such had more than 500 employees at the time of
16 filing the instant action. WRA is therefore not a "party" eligible
17 to recover fees under the EAJA.⁴ See 28 U.S.C. §
18 2412(d)(2)(B)(ii).

19 Having so concluded, it is unnecessary for the court to decide
20 whether plaintiff WRA "prevail[ed]" in this litigation, whether the
21 position of the United States in this matter was "substantially

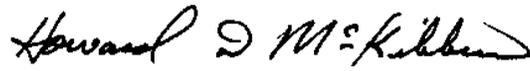
22 ⁴ The court believes this finding is consistent with the "[t]he
23 central objective of the EAJA[, which is] to encourage relatively
24 impecunious private parties to challenge unreasonable or oppressive
25 governmental behavior by relieving such parties of the fear of incurring
26 large litigation expenses." *Spencer v. N.L.R.B.*, 712 F.2d 539 (D.C. Cir.
27 1983); P. Mot. 5. With its large employee roster, the WRA is not the sort
28 of "relatively impecunious private party" the EAJA was meant to assist in
pursuing meritorious litigation that would otherwise be impossible due to
cost. "[T]he intent of the EAJA is to assist individuals or small entities,
not to subsidize large entities that are better able to afford legal
services." *Owner-Operator Independent Drivers Ass'n, Inc. v. Federal Motor
Carrier Safety Admin.*, 675 F.3d 1036, 1040 (7th Cir. 2012) (citing
Unification Church, 762 F.2d at 1081); D. Opp'n 11.

1 justified," or whether there are any "special circumstances [that]
2 make an award unjust." See *id* at § (d)(1)(A). It is also
3 unnecessary for the court to make any inquiry into the
4 reasonableness of the fees and costs requested.

5 On the basis of the foregoing, plaintiff WRA's Motion for Fees
6 and Costs Pursuant to the Equal Access to Justice Act (#42) is
7 **DENIED.**

8 **IT IS SO ORDERED.**

9 DATED: This 27th day of January, 2014.

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11 UNITED STATES DISTRICT JUDGE

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