INTERIOR BOARD OF LAND APPEALS

Bureau of Land Management
v.
Robert and Barbara Cosimati

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BUREAU OF LAND MANAGEMENT

v.

ROBERT AND BARBARA COSIMATI

IBLA 91-276 Decided January 18, 1995

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., granting application for award of attorney's fees and expenses. NM-03-88-001/EAJA.

Affirmed.

1. Equal Access to Justice Act: Adversary Adjudication--Grazing Permits and Licenses: Adjudication

   A hearing held pursuant to 43 U.S.C. § 315h (1988) in an appeal by the holder of a permit issued under 43 U.S.C. § 315b (1988) from the denial of a permanent increase in grazing privileges is an adversary adjudication under the Equal Access to Justice Act, 5 U.S.C. § 504 (1988), and does not constitute an adjudication for the purpose of granting or renewing a license as defined in 5 U.S.C. § 504(b)(1)(C) (1988) and 43 CFR 4.602(b).

2. Equal Access to Justice Act: Generally

   A party who succeeds on any significant issue in the litigation which achieves some of the benefits sought may be eligible to recover fees under the Equal Access to Justice Act.

3. Equal Access to Justice Act: Generally

   An application for an award of attorney's fees to a prevailing party under the Equal Access to Justice Act is properly denied if the position of the Government is substantially justified. That position must be substantially justified throughout the course of an adversary adjudication, and liability for attorney's fees may commence at any point where substantial justification ceases.

4. Equal Access to Justice Act: Generally

Only the most extraordinary special circumstances can support the conclusion that the position of the Government was substantially justified under the Equal Access to Justice Act where its decision was found to be arbitrary, capricious, and an abuse of discretion.

5. Equal Access to Justice Act: Generally

Individuals whose net worth does not exceed the $2,000,000 limit in 5 U.S.C. § 504(b) (1988) are eligible for an award of attorney's fees if the other requirements of the Equal Access to Justice Act are met.

APPEARANCES: Gayle E. Manges, Esq., Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management; Lee E. Peters, Esq., Las Cruces, New Mexico, for Robert and Barbara Cosimati.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Bureau of Land Management (BLM) has appealed the March 27, 1991, decision of Administrative Law Judge John R. Rampton, Jr., awarding Robert and Barbara Cosimati $24,515.39 for attorney's fees and expenses pursuant to the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. § 504 (1988), and Departmental regulations at 43 CFR Part 4, Subpart F. 1/

The Cosimatis incurred these fees and expenses in their appeal from a March 31, 1988, decision by BLM's Las Cruces, New Mexico, District Manager denying their application for permanent increase in their grazing preference on the Afton Allotment from 130 cattle-year-long (CYL) to 250 CYL. BLM's decision held the permanent level at 130 CYL but granted an indefinite temporary increase of 40 CYL for a total of 170 CYL. In their letter of appeal dated April 28, 1988, the Cosimatis alleged BLM's decision was arbitrary and capricious and requested a permanent increase to 150 CYL, a temporary increase of 20 CYL (for the same total of 170 CYL), and a phased-in temporary increase up to 202 CYL depending on the results of continued monitoring of the allotment (Exh. App. #18 at 5-6). Their request reflected Alternative 3 that was evaluated in the revised environmental assessment (EA) prepared in connection with their application
(EA NM-036-87-32 at 5, 18-19).

Based on evidence received during 6 days of hearing, Judge Rampton set aside BLM's decision and awarded the Cosimatis the preference increase requested in their appeal, finding BLM's decision "arbitrary, capricious,

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1/ The Cosimatis requested a total amount of $29,010.73 but Judge Rampton determined that they were entitled only to $24,515.39, a determination which the Cosimatis do not challenge.

* * * outside the bounds of reasonable discretion, and * * * unsupported by the evidence as it fails to comply with applicable statutes, regulations, BLM guidelines and procedures and existing BLM's [sic] administrative actions and interpretations." Cosimati v. BLM, NM-03-88-001 (Dec. 19, 1989, at 24). Although the intervenor environmental groups and Cosimatis filed cross-appeals from Judge Rampton's decision, they withdrew these appeals, which we dismissed. Robert & Barbara Cosimati, New Mexico Wilderness Coalition, IBLA 90-202 (Order of Feb. 21, 1990).

BLM contends Judge Rampton's March 27, 1991, award was improper because several requirements of the EAJA are not met. That statute provides in pertinent part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. [Emphasis added.]

5 U.S.C. § 504(a)(1) (1988). BLM contends that the proceeding is not an adversary adjudication, that the Cosimatis were not a prevailing party, that the agency's position was substantially justified, and that special circumstances would make an award unjust. In addition, BLM argues that the Cosimatis' net worth exceeds the limitations that define eligible parties. We will address each of these contentions, bearing in mind that in Ardestani v. I.N.S., ___ U.S. ___, 112 S. Ct. 515, 520 (1991), the Supreme Court held: "The EAJA renders the United States liable for attorney's fees for which it otherwise would not be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States." See also Kaycee Bentonite Corp., 79 IBLA 182, 185, 91 I.D. 138, 140 (1984).

ADVERSARY ADJUDICATION

The EAJA defines the term "adversary adjudication" as "an adjudication under section 554 of [Title 5] in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license." 5 U.S.C. § 504(b)(1)(C)(i) (1988); see also 43 CFR 4.602(b). By its terms, 5 U.S.C. § 554 (1988) applies "in every case of adjudication required by statute to be determined on the record after the opportunity for an agency hearing," subject to certain exceptions not relevant here. The definition of "adversary adjudication" in 43 CFR 4.603(a) parallels the language of section 554, and adds: "These rules do not apply where adjudications on the record are not required by statute even though hearings are conducted using procedures comparable to those set forth in 5 U.S.C. 554."

We have held that an appeal resulting from BLM decisions "to assess trespass damages, cancel * * * existing authorized grazing use, deny * * * applications for further grazing use authorization, and bar appellants from any future authorized grazing use" is an "adjudication * * * governed by

section 9 of the Taylor Grazing Act [43 U.S.C. 315h (1988)], is required to be determined on the record after opportunity for an agency hearing, and thus is subject to section 203(a)(1) of the EAJA [5 U.S.C. 504(a)(1) (1988)]." BLM v. Ericsson, 98 IBLA 258, 262-63 (1987). BLM acknowledges this decision, but argues that "[n]ot all actions under the Taylor Grazing Act require a hearing pursuant to section 9," and "an adjudication of a grazing application for an increase in preference" does not (Statement of Reasons (SOR) at 13, 14).

Section 9 requires the Secretary to provide "for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department." In Ericsson, supra at 262, we said that section 9 "applies generally to 'matters that arise in the administration of grazing districts,'" quoting LaRue v. Udall, 324 F.2d 428, 432 (D.C. Cir. 1963), cert. denied, 376 U.S. 907 (1964). More recently, we held that a hearing on a BLM decision allocating maintenance responsibility for range improvements on the basis of active preference was a section 9 hearing. Eason v. BLM, 127 IBLA 259, 261 (1993). We note that both E. L. Cord, 64 I.D. 323 (1957), and M. F. Sullivan, 63 I.D. 269 (1956), involved appeals from decisions denying applications for grazing privileges. We believe an appeal from a decision to deny an application for an increase in a grazing preference also falls under section 9.

BLM also argues also that an appeal from the denial of an application to increase a grazing preference is "an adjudication for the purpose of granting or renewing a license" and is therefore excluded from EAJA coverage by section 504(b)(1)(C) and 43 CFR 4.602(b) (SOR at 13-15). Judge Rampton, in response to BLM's argument before him that the adjudication was excluded from EAJA coverage because it involved the granting or renewing of a license, said that "assuming, without deciding" that it did involve a license, "I find that the proceedings nevertheless qualify for consideration of an award of fees and expenses. See H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15, reprinted in 1980 U.S. Code Cong. & Admin. News at 4994" (Mar. 27, 1991, Decision at 1-2). That legislative history of the EAJA states that the licensing "exclusion does not extend to proceedings under section 554 involving the suspension, annulment, withdrawal, limitation, amendment, modification or conditioning of [a] license."

On appeal BLM argues that it has been "unable to locate a reported case wherein the sole issue to be decided was whether a grazing application for a preference for a license to increase an existing preference may entitle the permittee to attorney fees and costs pursuant to 5 U.S.C. § 504(b) and 43 CFR 4.602(b)" (SOR at 13-14). It distinguishes the Cosimatis' case from the Ericsson case as "not a factual case wherein the permittee was being assessed damages for violation of the Range Code or the Bureau was denying them or limiting grazing privileges they had enjoyed in the past." Id. BLM quotes the EAJA legislative history cited by Judge Rampton, but argues its decision

> could not and did not result in a "suspension, annulment, withdrawal, limitation, amendment, modification or conditioning" of a preference for an existing grazing license or permit.

> Arguably a modification of the license was involved, however, the Bureau did not initiate any modification of the grazing license. This action was initiated by the Cosimatis * * *.

(SOR at 14-15). "This limitation [excluding proceedings for granting or renewing a license] must include hearings on appeals from denials of increases in applications to renew existing grazing authorizations," BLM concludes. Id.

[1] We think Judge Rampton was clearly correct that BLM's decision was a "proceeding * * * involving the * * * amendment [or] modification of" the Cosimatis' grazing privileges. The fact the proceeding resulted from the Cosimatis' application, i.e., that BLM did not initiate the proceeding, does not alter the fact that it involved a modification of their preference, not its granting or renewal.

But we also think the Cosimatis' grazing privileges are not properly characterized as a license for EAJA purposes. Historically, section 3 of the Taylor Grazing Act denominated the privilege to graze in a grazing district as a "permit" (while section 15 authorizes the Secretary to "lease" public domain lands situated so as not to justify their inclusion in a grazing district). Although before the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1988), was enacted, BLM issued annual licenses under the Taylor Grazing Act, in anticipation of issuing permits "as soon as the necessary data can be obtained or after agreements as to the extent of their individual grazing privileges have been reached," 43 CFR 4111.3-2(b) (1976), the authority to issue licenses disappeared from regulations promulgated after FLPMA's enactment. See 43 CFR Subpart 4130, 43 FR 29058, 29059-60, 29072-73 (July 5, 1978). The authority to issue such temporary licenses was derived from section 2 of the Taylor Grazing Act, 43 U.S.C. § 315a (1988), not section 3, and even section 2 does not refer to the issuance of grazing licenses. E. L. Cord, supra at 238. Subchapter IV of FLPMA relating to range management identifies the instruments which authorize grazing as "permits and leases," not licenses. 43 U.S.C. § 1752 (1988). We are aware that the definition of "license" under the Administrative Procedure Act, 5 U.S.C. § 551(8) (1988), includes the term "permit," and that at least one court has referred to that definition in deciding whether an EAJA award was appropriate. See Bullwinkel v. United States Department of Transportation, FAA, 787 F.2d 254 (7th Cir. 1986). However, the Government is not deemed to be a party to a license in the same sense that it is a party in a contractual relationship, which more nearly describes the grazing privileges-for-fees arrangement under section 3 of the Taylor Grazing Act. See Stein, Mitchell, and Mezines, Administrative Law, § 41.01 (1990). 2/ The Cosimatis observe that BLM offers no authority for its conclusion that a grazing permit or lease is a license, and argue:

2/ Because particular provisions affecting licenses appear throughout the APA, e.g. 5 U.S.C. §§ 554(d), 558 (1988), classification of the underlying proceeding as licensing may have ramifications beyond the context of the instant appeal.

> The federal courts do not refer to grazing leases and permits as mere licenses and this was, at the time of the adoption of EAJA, the status of the case law. Grazing leases and permits under the extensive regulatory scheme contained with the Taylor Grazing Act, FLPMA and the Federal Range Code are recognized by Congress and the Department of Interior, in interpreting and carrying out the will of Congress, as statutory rights and not bare licenses.

(Answer Brief of Permittees/Appellees at 17, 21). They cite Oman v. United States, 179 F.2d 738 (10th Cir. 1949), McNeil v. Seaton, 281 F.2d 931 (D.C. Cir. 1960), and United States v. Fuller, 442 F.2d 504 (9th Cir. 1971). Id. at 19-20.

We conclude that a hearing held pursuant to 43 U.S.C. § 315h (1988) in an appeal by the holder of a permit issued under 43 U.S.C. § 315b (1988) from the denial of a permanent increase in grazing privileges is an adversary adjudication under the Equal Access to Justice Act, 5 U.S.C. § 504 (1988), and does not constitute an adjudication for the purpose of granting or renewing a license as defined in 5 U.S.C. § 504(b)(1)(C) (1988) and 43 CFR 4.602(b).

PREVAILING PARTY

[2] On appeal BLM contends "the Bureau prevailed as to the substantive issue in this action" (SOR at 3). BLM argues that the Cosimatis did not prevail because Judge Rampton did not grant them the 250 CYL they sought in their application and rejected their argument that they had grandfathered grazing rights in excess of 130 CYL under 43 U.S.C. § 1782(c) (1988) (SOR at 8-9). The Cosimatis contend that "BLM's argument that the 'real issue' in the hearing was that of an increase to 250 CYL is not borne out by the evidence and the findings by Judge Rampton" (Answer Brief at 7). The record supports the Cosimatis' contention. In its brief submitted to Judge Rampton, BLM said the issue was "whether 20 CYL of the authorized 170 CYL should be permanent as demanded by Appellants or temporary as determined by the BLM" (Opening Brief at 2; see also Apr. 25, 1989, Hearing Transcript at 10). On appeal BLM acknowledges elsewhere that was the issue at the hearing (SOR at 11).

In finding that the Cosimatis prevailed, Judge Rampton said "[t]he issue at [the] hearing was the propriety of the [District] Manager's decision not to permit any permanent increase. * * * The Cosimatis' appeal asserted that the Manager's decision was unreasonable. It was. They prevailed" (Mar. 27, 1991, Decision at 2). Courts have recognized that a party who succeeds on any significant issue in the litigation which achieves some of the benefits sought may be eligible to recover fees. See Chapoose v. Hodel, 831 F.2d 931, 936 (10th Cir. 1987). 3/ The Cosimatis

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3/ Chapoose v. Hodel, supra, involved interpretation of the "prevailing party" language in 28 U.S.C. § 2412(d)(1)(A) (1988), a substantially identical statutory provision for award of attorney's fees connected with court litigation.

got the relief asked for in their April 28, 1988, letter of appeal from Judge Rampton. Therefore, they prevailed.

SUBSTANTIALLY JUSTIFIED/SPECIAL CIRCUMSTANCES

[3] BLM likewise refers to its rejection of the Cosimatis' 250 CYL application in claiming that its position was substantially justified. However, the fact that BLM may have been justified in rejecting the Cosimatis' 250 CYL application does not mean that BLM was substantially justified in continuing the litigation after the Cosimatis filed their April 28, 1988, letter of appeal asking for only a 20 CYL permanent increase from 130. In Leeward Auto Wreckers, Inc. v. National Labor Relations Board, 841 F.2d 1143, 1149 (D.C. Cir. 1988), for example, the Court found that the agency was not substantially justified in continuing administrative litigation after the conclusion of a hearing against an employer at which the employer introduced exculpatory evidence in defense, so that the employer was entitled to recover "considerable" expenses incurred after the close of the hearing. See also Quality C.A.T.V., Inc. v. N.L.R.B., 969 F.2d 541, 545 (7th Cir. 1992). It is plain that if BLM had moved to remand -- or made any attempt to settle -- in light of the request for relief in Cosimatis' April 28, 1988, letter of appeal, the costs of litigation and potential for liability for attorney's fees might well have been avoided. Unlike Leeward, this was not a case in which the Government had no reason to know the weakness of its case until the evidence had been heard because Judge Rampton's findings were primarily based on BLM's evidence and not that of the private party.

BLM also refers to the fact that the allotment is within a wilderness study area (WSA) as a basis for its claim that its position was substantially justified and as a special circumstance that would make an award unjust, contending that the Cosimatis' application confronted it with an unprecedented issue as to whether a permanent increase in grazing preference could be granted without violating the nonimpairment criteria applicable to the management of lands within a WSA. See 43 U.S.C. § 1782(c) (1988). BLM refers to our decision in Kaycee Bentonite Corp., 79 IBLA at 195, 91 I.D. at 145-46, where we quoted the following item from legislative history to describe what Congress meant by action that was substantially justified:

> The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing. Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie

> vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

H.R. Rep. No. 96-1418, 96th Cong. 2d Sess. 11, reprinted in 1980 U.S. Code Cong. & Admin. News 4990.

We agree that BLM may have raised an issue of first impression in contending that the nonimpairment criteria may preclude an increase in permanent preference. Because we did not decide the merits of the appeals from Judge Rampton's underlying decision, that issue remains open because it has "never reached the level of administrative appeal at which authoritative departmental determinations on behalf of the Secretary are made." Udall v. Battle Mountain Co., 385 F.2d 90, 95 (9th Cir. 1967). But just because a case may raise an issue of first impression does not automatically mean that BLM is substantially justified in litigating it.

It was BLM's position that an increase in permanent grazing preference within a WSA could be granted only if there would be a negligible effect with respect to each of five criteria and BLM contended that its local officials could not make a "conclusive" determination as to trend and condition (Opening Brief at 3). In Kaycee, we found BLM's position to be substantially justified despite its erroneous legal theory because once the relevant issues were properly identified, it was clear that the mineral patent applicant had won only by a narrow preponderance of the evidence on those novel questions. The instant appeal is quite different. We do not construe Judge Rampton's December 19, 1989, decision as finding error in the legal premise for BLM's action, but finding instead that the evidence failed to sustain BLM's application of that legal premise.

Moreover, unlike the mining claimants in Kaycee, the Cosimatis did not just narrowly preponderate but instead established that BLM's action was arbitrary, capricious, and an abuse of discretion. Unlike the circumstances in Kaycee, Judge Rampton's decision in the instant case was not appealed by BLM. Lacking compelling legal or equitable reasons, we may treat his decision as final, see Helit v. Gold Fields Mining Corp., 113 IBLA 299, 308, 97 I.D. 109, 114 (1990), and his determination is important in identifying the burden carried by BLM to establish that its position was substantially justified within the meaning of the EAJA.

[4] Although we did not find that the BLM decision upon which the attorney's fees application in Kaycee was based was arbitrary and capricious, see United States v. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982), we nevertheless referred to several court cases and observed:

> Even if the Government loses under the narrow standards of judicial review set forth at 5 U.S.C. § 706 (1976) [e.g., arbitrary, capricious, or abuse of discretion], one cannot conclude its position was not substantially justified.

> Otherwise, the EAJA would be no different from an automatic fee-shifting statute, which Congress clearly did not intend it to be. [Citations omitted.]

Kaycee Bentonite Corp., 79 IBLA at 196, 91 I.D. at 146. Congress, however, later repudiated a similar analysis when it enacted amendments to the EAJA:

> Especially puzzling, however, have been statements by some courts that an administrative decision may be substantially justified under the Act even if it must be reversed because it is arbitrary and capricious or was not supported by substantial evidence. [Footnote omitted.] Agency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act. Only the most extraordinary special circumstances could be found to be substantially justified under the Act.

H.R. Rep. No. 99-120, 99th Cong., 1st Sess. 10 (1985), reprinted in 1 Stein, Mitchell, and Mezines, Administrative Law, App. 1D-10 (1990). In Eason v. BLM, supra at 260, we found that the Administrative Law Judge's characterization of the issue as whether the BLM District Manager's decision was arbitrary, capricious, or contrary to law was consistent with the standard of review set forth in 43 CFR 4.478(b), i.e., whether the decision was "reasonable [and in] substantial compliance with [43 CFR] part 4100." See also Jerry Kelly v. BLM, 131 IBLA 146, 151 (1994). Thus, whether a BLM decision is determined on appeal to be arbitrary and capricious, as in this case, or unreasonable, the consequence is that BLM will be exposed to liability for fees and expenses except in "[o]nly the most extraordinary special circumstances."

The circumstances of this case are set forth at length in Judge Rampton's decisions and we see no reason to repeat them here. The circumstances that impressed Judge Rampton were that the Cosimatis improved the condition of the range (Rampton's Decision of Dec. 19, 1989, at 17); that the district staff had recommended granting them a permanent increase to 150 CYL in implementation of Alternative 3 (id. at 20); that the carrying capacity of the allotment at 202 CYL provided adequate forage for grazing with no adverse effect on wilderness values from increases in grazing to the same level. Id. at 21-23. We regard these findings as final. Even if the circumstances pleaded by BLM may be characterized as "special," we do not find them to be "most extraordinary."

NET WORTH

[5] BLM asserts that the Cosimatis filed the appeal and application for attorney fees as individuals and not as the owners of an unincorporated business identified as Cosimati Farms and that their assets as individuals exceed the $1,000,000 limit set forth in 43 CFR 4.608(b) so that they are not eligible for an award of attorney's fees. The $1,000,000 limit in this regulation was not updated when 5 U.S.C. § 504(b) (1988) was amended by the Act of August 5, 1985, P.L. 99-80, 99 Stat. 183, to raise the individual net

worth limit to $2,000,000, and the current statutory provision must be given effect. See generally Eason v. BLM, supra; George E. Krier, 92 IBLA 101, 103-06 (1986) (Burski, A.J., concurring); Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981). The Cosimatis net worth as individuals as set forth in their financial statement comes within the $2,000,000 limit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge