INTERIOR BOARD OF LAND APPEALS

William J. Thoman

157 IBLA 95 (July 24, 2002)

Title page added by:
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Editor's Note: Reconsideration denied by order dated September 17, 2003

WILLIAM J. THOMAN

IBLA 97-486, 533 Decided July 24, 2002

Appeal from the decision of an Administrative Law Judge denying an application for an award of attorney fees and expenses under the Equal Access to Justice Act. WY 04-91-01/EAJA.

Affirmed.

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

Grazing permits issued under the authority of 43 U.S.C. §§ 315b (1994) are "licenses" within the meaning of 5 U.S.C. § 504(b)(1)(C)(i) (1994).

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

A challenge to the issuance of a crossing permit is a challenge to the granting of a "license" within the meaning of 5 U.S.C. § 504(b)(1)(C)(i) (1994) and, as such, is statutorily excepted under the Equal Access to Justice Act from the allowance of an award for fees and expenses incurred in pursuing the challenge.

BLM v. Cosimati, 131 IBLA 390 (1995), modified and explained.

APPEARANCES: W. Alan Schroeder, Esq., Boise, Idaho, for appellant William J. Thoman; Jennifer E. Rigg, Esq., Office of the Solicitor, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

William J. Thoman has appealed from a decision of Administrative Law Judge Harvey C. Sweitzer, dated July 29, 1997, denying his application for an award of attorney fees and expenses under the Equal Access to Justice

Act (EAJA), 5 U.S.C. § 504 (1994). For the reasons set forth below, we affirm Judge Sweitzer's determination.

The present appeal arises from a challenge by Thoman to a verbal authorization given by the Green River Resource Area Manager, Bureau of Land Management (BLM), which allowed the Big Sandy and Green River Livestock Company (BS&GR) to trail 4,100 sheep across the Lombard Allotment in southwestern Wyoming. See generally, BLM v. Thoman, 139 IBLA 48 (1997). Even though Thoman held a grazing preference which was exercised in the Lombard allotment, Thoman was not provided with either a proposed decision or an opportunity to protest the authorization before it became final, notwithstanding the provisions of 43 CFR 4160.1-1 (1991). Id. at 49. Indeed, Thoman was not informed that the trailing had been authorized until after it had already occurred. Id.

When apprised of BLM's approval of BS&GR's request, Thoman immediately protested and, when his protest was denied by BLM, formally appealed the allowance of the crossing. - Thoman's attempt to appeal was vigorously opposed by BLM. Thus, on April 3, 1991, counsel for BLM sought to have the appeal dismissed on the grounds that it was frivolous, that Thoman had suffered no adverse effects from the approval, and that, in any event, no effective relief could be granted Thoman even if he were successful in his appeal because the trailing had long since been completed. By Order dated May 8, 1991, District Chief Administrative Law Judge John R. Rampton, Jr., refused to dismiss Thoman's appeal, noting that there were genuine issues of law as to whether the procedures followed by BLM in authorizing trailing across the Lombard allotment were lawful. Id. at 49-50.

Thoman thereafter filed a motion seeking, inter alia, summary judgment on the question whether issuance of a crossing permit was subject to the provisions of 43 CFR Subpart 4160 (1991), which required that he be served with a proposed decision and then provided with the opportunity to appeal from the denial of any protest he chose to file. Counsel for BLM opposed this request for summary judgment and argued, under various differing theories, that BLM was not required to issue a proposed decision in the instant case. Id. at 50-51.

By Order dated October 25, 1991, Administrative Law Judge Ramon M. Child granted partial summary judgment to appellant, expressly finding that issuance of a crossing permit was subject to the provisions of 43 CFR Subpart 4160 (1991). Id. at 51. However, Judge Child declined to grant summary judgment in its entirety to Thoman, noting that this Board had determined in its decision in Rudnick v. BLM, 93 IBLA 89 (1986), that, while the failure to comply with the procedural requirements of 43 CFR Subpart 4160 (1991) rendered any decision voidable, it was still necessary for someone challenging such a decision to show some reason beyond procedural irregularity to justify the voiding of that decision. Accordingly, Judge Child held that Thoman was required to show that he had suffered some

harm or injury in order to ultimately prevail in his appeal. Id. The matter, therefore, proceeded to hearing.

At the one-day hearing which was held on November 5, 1991, considerable evidence was adduced. Some of this evidence was tendered by BLM to show the circumstances under which the trailing had been authorized in an attempt to establish, as Judge Child had allowed in his October 25, 1991, order, that emergency circumstances existed which justified BLM's failure to provide Thoman with advance notification. Other evidence was presented by Thoman concerning the adverse effects which the sheep trailing had caused on the Lombard allotment and how it had forced him to curtail use of lambing grounds within the allotment the next Spring. Id. at 51-53.

In his March 25, 1992, decision, Judge Child made two findings. First of all, he concluded that BLM had failed to show that any emergency existed as would justify its failure to notify Thoman of the pendency of BS&GR's request that it be allowed to cross the Lombard allotment. Id. at 53. Judge Child also found that, had Thoman been timely notified of the proposed crossing, he might have been able to present BLM with sufficient evidence relating to the availability and passability of alternate trails which would have accommodated BS&GR's needs and that Thoman was, in fact, harmed by the BLM decision allowing trailing across the Lombard allotment. Id. at 53-54. Pursuant to these findings, Judge Child set aside the determination of the Area Manager.

BLM then pursued an appeal to this Board. While BLM attacked Judge Child's conclusions that no emergency existed as would justify the failure of BLM to notify Thoman and also Judge Child's determination that the failure to notify Thoman may have both compromised the decisionmaking process and injured Thoman, the Board merely noted that "our own review of the facts of record fully substantiates Judge Child's findings and * * * we believe no further belaboring of these points is warranted." Id. at 54.

The only argument presented by BLM that the Board deemed necessitated any detailed analysis was BLM's contention that the matter should have been considered moot since all the trailing had occurred almost coincident with BLM's approval. But, while this Board examined this argument in some detail, this argument, too, was rejected. Noting that, under well-established precedents, an appeal will not be dismissed for mootness where the actions complained of are "capable of repetition but evading review" (see Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)), the Board held that Thoman's appeal clearly met both prongs of the exception. Id.; see also Southern Utah Wilderness Alliance, 137 IBLA 24, 26 (1996). Ultimately, the Board fully affirmed Judge Child's determination.

This did not end the matter, however. Upon receipt of Judge Child's March 25, 1992, decision, Thoman had submitted a petition seeking an award of attorney fees and expenses under the EAJA. By Order dated May 22, 1992,

Administrative Law Judge Sweitzer, noting that an appeal from Judge Child's decision had been filed by BLM, stayed any action on this motion, as provided by 43 CFR 4.611, pending final disposition of the proceedings. Upon receipt of the Board's decision affirming Judge Child's determinations, Thoman, by notice dated April 14, 1997, inquired of the Board as to whether he should pursue the issue of attorney fees and expenses before the Board or before the Hearings Division. Thoman noted that, in any event, it would be necessary to supplement the petition to cover fees and expenses incurred subsequent to the issuance of Judge Child's decision. While the Board did not directly respond to Thoman's request for guidance, the matter was referred to the Hearings Division. 1/

Before Judge Sweitzer, BLM opposed approval of an award on the grounds that the proceedings which had been held did not constitute an "adversary adjudication" within the meaning of 5 U.S.C. § 504(a)(1) (1994), and, in any event, BLM's position in the matter was substantially justified and, therefore, no award was warranted. In a decision dated July 29, 1997, Judge Sweitzer held that Thoman could not obtain an award of fees and expenses under the EAJA because the matter involved was "an adjudication * * * for the purpose of granting * * * a license," and, as such, was expressly excluded by the EAJA from the general rule authorizing the award of attorney fees and expenses. See Decision at 2-4. In view of his ruling on this issue, Judge Sweitzer did not reach the question of whether or not BLM's position was substantially justified. Thoman thereupon pursued the instant appeal before the Board. For the reasons set forth below, we hold that the position of BLM was not substantially justified. However, we also conclude that, while the hearing was an "adjudication" within the meaning

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1/ At the time that Thoman's petition for an award of attorney fees and expenses was filed, it was unclear as to the proper forum in which to initially pursue a request for fees and expenses made during Board consideration of an appeal. Subsequently, in a decision styled United States v. Willsie, 155 IBLA 296 (2001), the Board, relying on the statutory requirement that such applications be filed with the "adjudicative officer," held that all such requests must first be pursued before the Hearings Division. Id. at 297-98.

The instant case, however, arose before the Board's Willsie decision. In an excess of caution, the Board not only referred the matter to the Hearings Division for decision but also docketed the appeal before the Board as IBLA 97-486. When Thoman later appealed from Judge Sweitzer's denial of his petition for an award of attorney fees and expenses, the matter was again docketed by the Board, this time as IBLA 97-533.

As the decision in Willsie indicates, it was error for the Board to initially docket the petition prior to the Hearing Division's consideration thereof. In any event, while there are now two docket numbers assigned to this appeal, it is clearly only a single appeal and will be treated as such in the text of this decision.

of 5 U.S.C. § 554 (1994), it was not an "adversary adjudication" within the scope of 5 U.S.C. § 504 (1994) because, as Judge Sweitzer held, it involved the obtaining of a "license," which is expressly excluded from the definition of "adversary adjudication" by the plain terms of the EAJA. As a result, no award of fees and expenses is permissible under that Act.

Insofar as the issue of whether BLM's position was "substantially justified" is concerned, we believe the record clearly establishes that it was not. BLM's initial position was that, regardless of whether or not an emergency existed, it was under no obligation to inform Thoman that BS&GR had filed an application to cross the Lombard allotment. This position was totally rejected by Judge Child in his October 25, 1991, order, wherein he held that "there is no doubt that the BLM was required to serve upon appellant a proposed decision prior to approving [BS&GR's] application for a crossing permit." Order of October 25, 1991, at 2.

With respect to BLM's subsequent assertion that emergency conditions existed which justified its failure to provide Thoman with an opportunity to protest a proposed decision, we note that Judge Child similarly rejected this contention, expressly noting that:

> [BS&GR] created an emergency for itself by belatedly applying for the permit and then trailing its sheep through [an adjacent allotment] up to the edge of the Lombard Allotment before it was even authorized to do so. Moreover, it applied for the crossing permit along Highway 28 before the conditions [on alternate trails] had been investigated, suggesting that the applied for route was in fact merely the most convenient route. BLM compounded the problem by condoning these actions and ignoring its own regulations.

Decision of March 25, 1992, at 14-15. When BLM sought review of this determination, the Board simply noted that "our own review of the facts of record fully substantiates Judge Child's findings and * * * we believe no further belaboring of these points is warranted." BLM v. Thoman, supra at 54.

Indeed, the only issue which the Board judged to merit extended review was the question whether the matter should be dismissed as moot. And that question was decided adversely to BLM, primarily because BLM refused to admit that it had erred in failing to issue Thoman a proposed decision which he could protest. Id. at 54-55. Any review of the various orders and decisions entered in this proceeding leads ineluctably to the conclusion that there was clearly little, if any, justification for BLM's position in this case, and BLM's argument that Thoman's request for fees and expenses under the EAJA should be denied because BLM's position was "substantially justified" is expressly rejected.

We turn, then, to the nub of the present controversy: is Thoman barred from receiving an award of fees and expenses under the terms of the EAJA? The starting point for any analysis of this question must be the terms of the statute itself.

In relevant part, the EAJA defines an "adversary adjudication" as "an adjudication under section 554 * * * 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) (1994). Thus, to be eligible for an award in the present case, Thoman must show two separate things. First, he must establish that there was an adjudication under 5 U.S.C. § 554 (1994) in order to bring this case within the general confines of the EAJA. And, second, he must also show that this appeal did not involve the granting or renewal of a license such as would exclude it from EAJA coverage.

Insofar as the question of whether the hearing held herein was an "adjudication" within the meaning of 5 U.S.C. § 554 (1994) is concerned, we note that 5 U.S.C. § 554 (1994) does not cover all adjudications conducted by an agency but merely those adjudications "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a) (1994). Relying on this language, the Department adopted a provision expressly noting that "[t]hese 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." 43 CFR 4.603(a). 2/

Notwithstanding the Department's regulation, however, in Collord v. U.S. Department of the Interior, 154 F.3d 933, 936-37 (9th Cir. 1998), the Court of Appeals held that a hearing conducted into the validity of a mining claim was an "adversary adjudication" within the meaning of the EAJA because it was "governed by" 5 U.S.C. § 554 (1994), citing the United States Supreme Court decision in Ardestani v. INS, 502 U.S. 129, 135 (1991). Thus, hearings required by due process are subject to an award of

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2/ Pursuant to this provision, the Board subsequently held that an adjudication under the Color of Title Act, 43 U.S.C. § 1068 (1994), was not an "adversary adjudication" within the meaning of the EAJA because no hearing on the record was "required by statute." Benton C. Cavin, 93 IBLA 211, 214-16 (1986), aff'd Cavin v. United States, 19 Cl.Ct. 198 (1989). The continued efficacy of this analysis is in question, however, in view of the Ninth Circuit Court of Appeals decision in Collord v. U.S. Department of the Interior, 154 F.3d 933, 936-37 (9th Cir. 1998), discussed in the text of this opinion. See also Heirs of David F. Berry, 156 IBLA 341, 343-44 (2002).

fees and expenses to the same extent as those affirmatively required by statutory mandate. 3/

In United States v. Ericsson, 98 IBLA 258 (1987), this Board for the first time directly faced the question whether fees and expenses were available under the EAJA in the context of a grazing adjudication. Ericsson involved a request for attorney fees and expenses resulting from a successful challenge to a trespass determination issued by a BLM District Manager. Though compensation was ultimately denied on the ground that BLM's position in the case was "substantially justified," the Board also held that, in the proper circumstances, fees and expenses under the EAJA could be awarded in the context of a grazing hearing. The basis for this holding was the Board's conclusion that "the adjudication here is governed by section 9 of the Taylor Grazing Act, 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)]." Id. at 263. See also Frank Halls, 62 I.D. 344, 346 (1955) ("The Department has interpreted this statutory provision for hearings as bringing such hearings within the scope of the Administrative Procedure Act").

Since issuance of the Board's Ericsson decision, the Board has had occasion to consider a number of appeals concerning the availability of awards under the EAJA in the context of grazing hearings. See e.g., J. Claude Frei & Sons v. BLM, 145 IBLA 390 (1998); United States v. Falen, 141 IBLA 394 (1997). Of particular importance herein is the Board's decision in BLM v. Cosimati, 131 IBLA 390 (1995).

3/ While some recent Board decisions have suggested that the Collord decision serves as the basis for an award of fees and expenses in grazing cases (see, e.g., Hart v. BLM, 154 IBLA 260, 263 (2001); Tuledad Grazing Association v. BLM, 153 IBLA 25, 29 (2000)), their reliance on the Collord decision is misplaced. As explained in the text of this decision, the Board has traditionally justified awards of fees and expenses under the EAJA in grazing permit cases on the theory that section 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1994), mandates a hearing on the record within the meaning of 5 U.S.C. § 504 (1994). Thus, grazing hearings are "statutory" hearings not "due process" hearings.

In any event, it is doubtful whether the Collord principle is applicable with respect to grazing permits since, unlike the situation which arises with respect to the location of a valid mining claim, a grazing permittee has no compensable interest in the Federal lands being grazed. See, e.g., Public Lands Council v. Babbitt, 529 U.S. 728, 743 (2000); United States v. Fuller, 409 U.S. 488, 493 (1973); Alves v. United States, 133 F.3d 1454, 1457 (Fed.Cir. 1998); Hage v. United States, 51 Fed.Cl. 570, 586-87 (2002). The fundamental predicate on which "due process" hearings are based, i.e., the existence of a property interest

The decision in Cosimati involved a request for an award of attorney fees and expenses growing out of a successful challenge by appellants therein to a BLM decision denying an application for a permanent increase in grazing preference. BLM opposed any award under the EAJA on two separate bases. First, BLM argued that, even granting that hearings under section 9 of the Taylor Grazing Act were "hearings on the record" under 5 U.S.C. § 554 (1994), the hearing in the Cosimati case was not a hearing under section 9 of the Taylor Grazing Act since it involved an application for an increase in grazing preference. Second, BLM argued that, even if such a hearing were deemed to be conducted under section 9 of the Taylor Grazing Act, an award was still barred by the express language of the EAJA excepting adjudications "for the purpose of granting or renewing a license" from the regulatory definition of "adversary adjudications." In Cosimati, the Board rejected both arguments.

With respect to the question of whether or not the hearing arose under section 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1994), the Board repeated its observation from Ericsson that section 9 "applies generally to 'matters that arise in the administration of grazing districts.'" Id. at 393, quoting LaRue v. Udall, 324 F.2d 428, 432 (D.C. Cir. 1963), cert. denied, 376 U.S. 907 (1964). The Board concluded that a hearing held on a denial of an application to increase grazing preference involved a matter related to the administration of grazing districts and, thus, fell under section 9 of the Taylor Grazing Act. Id.

The Board's analysis of the question whether an award was prohibited because of the statutory exclusion language was more complicated. In his consideration of the Cosimatis' request for an award, Administrative Law Judge Rampton had cited the legislative history of the EAJA for the proposition 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." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15, reprinted in 1980 U.S.C.C.A.N. at 4994. Based on this language, Judge Rampton had concluded that it was unnecessary to decide whether a grazing permit was a "license" since he believed that the legislative history clearly established that, regardless, the action occurring therein was not within the intended scope of the license exclusion. Id.

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fn 3 (continued)
which cannot be extinguished without a prior hearing, is simply lacking in the grazing context. But for the statutory grant of a hearing under section 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1994), no hearing would generally be required even where BLM actions adversely affect grazing interests. See, e.g., LaRue v. Udall, supra.which cannot be extinguished without a prior hearing, is simply lacking in the grazing context. But for the statutory grant of a hearing under section 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1994), no hearing would generally be required even where BLM actions adversely affect grazing interests. See, e.g., LaRue v. Udall, supra.

While the Board agreed with Judge Rampton that the proceeding involved a modification of the Cosimatis' grazing preference and not its granting or renewal and, therefore, was not properly within the scope of the license exclusion, the Board went on to hold that, in any event, a grazing permit was not properly characterized as a "license" for EAJA purposes. Id. at 394-95. In reaching this conclusion, the Board quoted, with apparent approval, from the Cosimatis' brief:

> 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.

Id. at 395.

Notwithstanding the failure of BLM to provide support for its claim that "a grazing permit * * * is a license," 4/ plentiful authority for BLM's proposition does exist. 5/ Indeed, some of these decisions go far back to the early days of adjudication under the Taylor Grazing Act and under the Administrative Procedure Act (APA), Act of June 11, 1946, 60 Stat. 242, as amended, 5 U.S.C. §§ 551-706 (1994).

Thus, in Frank Halls, 62 I.D. 344 (1955), Deputy Solicitor Fritz reviewed a decision in which a 10-year grazing permit had been canceled by BLM. In examining the procedures mandated in such situations, the Deputy Solicitor adverted to the fact that section 9(b) of the Act of June 11, 1946, 60 Stat. 242, provided, subject to certain exceptions, that "no

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4/ We note, however, that one of the decisions which appellant cited in support of its position, United States v. Fuller, 442 F.2d 504 (9th Cir. 1971), was reversed by the United States Supreme Court in United States v. Fuller, 409 U.S. 488, 493 (1973).

5/ There is, in this analysis, an important distinction to keep in mind. Grazing "licenses" were issued under the general authority of section 2 of the Taylor Grazing Act, 43 U.S.C. § 315a (1994), as a way to authorize grazing prior to the adjudications of grazing preferences under both sections 3 and 15 of the Taylor Grazing Act, 43 U.S.C. §§ 315b and 315m (1994). See generally, E.L. Cord, dba El Jiggs Ranch, 64 I.D. 232, 238 (1957); Grazing Fees under the Taylor Grazing Act, 59 I.D. 340 (1946). What the discussion in the text of this opinion is directed to, however, is an examination of whether or not permits issued under section 3 of the Taylor Grazing Act are "licenses" within the meaning of the EAJA and the Administrative Procedure Act (APA). The answer to that question, we would submit, is clearly in the affirmative.

withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements." 6/ Examining the definition of "license" 7/ and "licensing" which appeared in the APA at that time (and which still appear at 5 U.S.C. § 551(8) and (9) (1994)), he expressly held that "canceling Mr. Halls' permit in full was the revocation of a license within the scope of the Administrative Procedure Act." Id. at 347. This analysis was reaffirmed in Casey Ranches, 14 IBLA 48, 53, 80 I.D. 777, 779 (1973).

Similar determinations have been made by Federal courts. For example, in Osborne v. United States, 145 F.2d 892 (9th Cir. 1944), the Court of Appeals affirmed a decision of United States District Court for Arizona after noting that the District Court had proceeded on the theory "that the grazing privileges were mere licenses, revokable at will without legal right to compel compensation." Id. at 893, Similarly, in United States v. Cox, 190 F.2d 293 (1951), the Tenth Circuit Court of Appeals noted that Taylor Grazing Act permits conferred "a privilege 'withdrawable at any time for use by the sovereign without the payment of compensation.'" Id. at 296 (quoting Osborne v. United States, supra). 8/ More recently, in Hage v. United States, 51 Fed.Ct. 570 (2002), the Court of Federal Claims cited the United States Supreme Court's decision in United States v. Fuller, 409 U.S. 493 (1973), for the proposition that "grazing permits are licenses rather than rights." Id. at 587.

In view of the foregoing, we believe that the Board erred in its Cosimati decision to the extent that it held that grazing permits are not "licenses" within the meaning of the APA and the EAJA. 9/ This conclusion,

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6/ While this provision was substantially amended in 1966, the general thrust of the rule can still be found at 5 U.S.C. § 558(c) (1994).

7/ A "license" was at that time, and is still today, defined as including "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8) (1994). This definition clearly covers crossing permits issued with respect to lands within a grazing district.

8/ See also Bowman v. Udall, 243 F.Supp. 672, 678 (D.D.C. 1965) ("the plaintiffs' permits and leases under sections 3 and 15 of the Taylor Grazing Act * * * confer upon the plaintiffs a mere privilege to graze livestock--a privilege which can be withdrawn by the United States without payment or compensation").

9/ That the same definition applies to determine what is a "license" under both the APA and the EAJA is made absolutely clear by paragraph (b)(2) of the EAJA, which provides that "[e]xcept as otherwise provided in paragraph (1), the definitions provided in section 551 of [Title 5] apply to this section." Thus, a "license" under 5 U.S.C. § 551(8) (1994) is necessarily a "license" within the meaning of the EAJA.

however, does not, ipso facto, dispose of the instant appeal. The exclusion in the EAJA's coverage does not go to every case involving a "license," but rather only to those adjudications "for the purpose of granting or renewing a license." 5 U.S.C. § 504(b)(1)(C)(i) (1994) (emphasis supplied). And, in this regard, we believe the Cosimati decision's reliance on the legislative history of the EAJA is cogent.

As noted above, the legislative history of the exclusion of "license" applications and renewals from the scope of the EAJA indicates that Congress intended that the exclusion be somewhat narrowly interpreted. Thus, Congress noted that the exclusion was not intended to "extend to proceedings under section 554 involving the suspension, annulment, withdrawal, limitation, amendment, modification or conditioning of [a] license." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15, supra.

The dividing line seems to be between those activities in which the Government is acting in a purely proprietary capacity in deciding whether or not to grant or renew a license affording rights to individuals (in this case denominated as a grazing permit), and those actions subsequently undertaken within the confines of an issued license which may adversely impact upon the enjoyment of rights already conferred by the Government. In the former, no award of fees and expenses under the EAJA can be authorized, regardless of any ultimate success an applicant might achieve in obtaining substantive relief, while, in the latter situation, an award of fees and expenses may be authorized if the individual otherwise establishes his or her qualifications for an award under the terms of the EAJA.

Thoman essentially argues that the proceedings herein were an outgrowth of his attempts to protect his interests under his grazing permit and, therefore, the exclusion does not apply because the adjudication was not for the purpose of "granting or renewing a license." Rather, Thoman contends that the challenged crossing permit was, in fact, an "amendment, modification or conditioning" of his grazing permit. See SOR at 8.

For its part, BLM responds that the sole issue adjudicated was BS&GR's application for a crossing permit, that a crossing permit is clearly a "license" even under the Board's Cosimati decision, and that, since all of appellant's expenses and fees were incurred fighting the issuance of the crossing permit, none are recoverable under the EAJA. In our view, BLM is clearly correct and the matter under adjudication at the hearing was not appellant's grazing permit but rather BS&GR's crossing permit application.

It may well be that the overriding reason that Thoman challenged the crossing permit was a desire to protect his operations from what he viewed as an undesirable incursion. But appellant's subjective motivation for pursuing an appeal cannot change the fact that the matter which he was

contesting was the issuance of a crossing permit to BS&GR. 10/ Indeed, had BS&GR applied for a right-of-way across the lands within Thoman's grazing permit, no hearing would have been held at all even though the possible impact might have been far greater. See Tom Cox, 142 IBLA 256 (1998). It was only the fact that BS&GR sought a crossing permit which was challenged by Thoman that compelled the holding of the hearing in this case.

The mere fact that actions which BLM may propose might have effects upon land within a grazing permit does not operate to make those actions subject to review under section 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1994). Thus, in LaRue v. Udall, supra, the Court held that no hearing need be held in a challenge brought by a grazing permittee to a proposed exchange of grazing lands because section 9 of the Taylor Grazing Act applied only to "matters that arise in the administration of grazing districts" and this did not include exchanges of grazing lands even under section 8 of the Taylor Grazing Act. Id. at 432.

Similarly, in Tom Cox, 155 IBLA 273 (2001), we rejected an application for an award of fees and expenses under the EAJA filed by a grazing permittee who had successfully challenged issuance of a right-of-way across his grazing allotment. Our decision noted that there was no "adversary adjudication" involved because there was no statutory requirement that decisions rejecting or granting rights-of-ways be made on the record after an opportunity for a hearing. Therefore, no award was possible under the EAJA.

It is, of course, true that issuance of a crossing permit for lands within a grazing district is, itself, subject to the hearings requirement of section 9 of the Taylor Grazing Act since such permits are issued "in the administration of grazing districts." Indeed, recognition of this point was implicit in our original consideration of this appeal. See BLM v. Thoman, supra. However, the immediate question before the Board is not whether appellant had a right to a hearing on his protest to the crossing permit, but rather whether such hearing involved the issuance or renewal of a "license" within the meaning of the EAJA exclusion provision. For the reasons set forth above, we hold that it did. Accordingly, no award of fees and expenses is allowable because the EAJA excludes such matters from the purview of its application. Judge Sweitzer's decision so holding must be affirmed.

10/ Had an environmental group, rather than Thoman, challenged issuance of the same crossing permit to BS&GR, alleging that unacceptable damage to forage would occur if the permit were granted, there would be little doubt that the proceeding involved a challenge to the issuance of a license, i.e., the crossing permit. That the challenge was in actuality brought by Thoman, himself a grazing permittee, may obscure this fundamental fact, but it cannot change it.

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.

James L. Burski
Administrative Judge

I concur:

T. Britt Price
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

In my view, it is not possible to know the story of what happened in December 1990-January 1991, read our decision vindicating Mr. Thoman's complaint about those events, and yet come to the conclusion that he is not entitled to an award of attorney fees. Judge Burski's decision in Bureau of Land Management v. William J. Thoman, 139 IBLA 48 (1997), tells the story with his customary clarity.

A winter storm struck southwestern Wyoming on Christmas Eve 1990. At the time, the Big Sandy and Green River Livestock Company had more than 4,000 sheep on the Big Sandy Allotment. The company wanted to move the sheep to a lower elevation with more forage on the Rock Springs Allotment, where it had grazing privileges. The Lombard Allotment, where Thoman held a grazing preference, lay between. Because of the weather conditions, the company had already trucked the ewe lambs to the Rock Springs Allotment and was feeding the ewes remaining on the Big Sandy Allotment when it approached BLM on December 28. Although it was authorized to use two other trails across the Lombard Allotment to reach the Rock Springs Allotment, the company asked BLM for a permit to cross the Lombard Allotment by a different route along Highway 28, where it had no grazing privileges.

BLM's range conservationist, Jim Sparks, called Thoman about the company's request. Thoman objected, based on the condition of the forage in the Big Sandy River area of the Lombard Allotment, and Sparks told him he would recommend the crossing permit be denied. When the company returned to BLM's office on the morning of January 2, Sparks said its request was being denied and suggested it use one of the two trails. Having already trailed its sheep from the Big Sandy Allotment through an adjacent allotment up to the edge of the Lombard Allotment, the company returned to BLM's office on the afternoon of January 2, told the BLM Area Manager that the two trails were not passable for the vehicles needed to transport feed for the sheep, and pleaded that he allow the crossing. The Area Manager orally approved the company's request that afternoon, without examining the trails or getting in touch with Thoman. The crossing took place the morning of January 3. Thoman discovered it that afternoon. On January 5 he examined the trails and found they would have been passable. He appealed BLM's action.

At the hearing conducted by Administrative Law Judge Ramon Child, Thoman testified that the crossing sheep had trampled the forage and consumed up to 28 animal unit months (AUM's) of forage on the Lombard Allotment. As a result, he said, he had to curtail the use of his lambing grounds the following spring. Judge Child found no emergency existed that justified BLM's action without providing Thoman a copy of the proposed decision and an opportunity to protest, as required by 43 CFR 4160.1-1 (1991). Had Thoman been given notice of the proposed decision he might have been able to present evidence about the condition of the trails that could have changed BLM's decision, Judge Child found. He also found that

BLM's action had harmed Thoman because of the impact on the forage on the Lombard Allotment. Judge Child set aside the Area Manager's oral approval as void. On appeal by BLM, we affirmed. We said "our own review of the facts of record fully substantiates Judge Child's findings." 139 IBLA at 54.

Thoman had filed an application for an award of attorney fees under the Equal Access to Justice Act (EAJA), based on having been the prevailing party before Judge Child. After our decision affirming Judge Child, Thoman's application was denied by Administrative Law Judge Harvey Sweitzer on the grounds that, although the hearing that was held was required by statute, it was not an "adversary adjudication," as defined in 5 U.S.C. 504(b)(1)(C), because it was an adjudication "for the purpose of granting * * * a license," which is excluded from the definition. Thoman argued that he was entitled to an award because he was safeguarding his existing grazing preference from a "suspension, annulment, withdrawal, limitation, amendment, modification or conditioning * * *." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15, reprinted in 1980 U.S. Code Cong. & Admin. News at 4994. Judge Sweitzer rejected this argument: "The hearing in this matter was clearly an 'adjudication * * * for the purpose of granting * * * a license,' namely the crossing permit. The plain statutory language cannot be reasonably interpreted to mean that the motivations of the EAJA applicant, in opposing a license grant, determine[s] whether such an adjudication is, in fact, subject to the license exclusion." July 29, 1997 Decision at 3-4.

Although I hold Judge Sweitzer and my colleagues in the highest regard, I believe in this case they have lost the substance by grasping at a shadow. Thoman's appeal of BLM's action was based on its de facto "limitation, amendment, modification or conditioning" of his grazing permit. The exclusion for licensing application hearings from the statutory definition of "adversary adjudication" does not extend to such proceedings. See Bureau of Land Management v. Cosimati, 131 IBLA 390,
393-395 (1995). Judge Child found, and we affirmed, that BLM's action harmed Thoman because of the impact on the forage in the Lombard Allotment. In effect, BLM's action was a modification of his permit. Fundamentally, this case is not about the crossing permit. Indeed, BLM did not actually issue a crossing permit. What it did do was authorize a reduction in available forage on the Lombard Allotment to the detriment of Thoman and others with grazing rights there. Nor is this case about Thoman's "subjective motivation" for opposing the company's request, about which my colleagues apparently harbor dark doubts.

This Department has a history of parsimony in response to applications for awards under the Equal Access to Justice Act. In my view, characterizing this case as a proceeding about the granting of a license is a transparent excuse not to make an award that the Congress clearly intended should be made: "A party who prevails in the latter circumstances [suspension, annulment, withdrawal, limitation, amendment, modification, or

conditioning of a license] is entitled to an award of attorney fees under the terms of this section." 1980 U.S. Code Cong. & Admin. News at 4994, supra. I would grant Thoman's application. (If an environmental group, rather than Thoman, held the grazing permit, it would be just as entitled to an award as he is, because it would be protecting its rights under an existing permit.)

I dissent.

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Will A. Irwin
Administrative Judge