



INTERIOR BOARD OF INDIAN APPEALS

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation
v. Sacramento Area Director, Bureau of Indian Affairs

17 IBIA 141 (06/19/1989)

Judicial review of this case:

Denial of attorney fees reversed, *Utu Utu Gwaitu Paiute Tribe v. Department of the Interior*,
766 F. Supp. 842 (E.D. Cal. 1991)

Related Board case: 17 IBIA 78



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

UTU UTU GWAITU PAIUTE TRIBE OF THE BENTON PAIUTE RESERVATION

v.

SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-19-F
(IBIA 88-26-A)

Decided June 19, 1989

Application for attorney's fees and expenses under the Equal Access to Justice Act.

Denied.

1. Attorney's Fees: Equal Access to Justice Act: Application and Jurisdiction--Equal Access to Justice Act: Generally--Indians: Attorneys: Fees

By regulation, the Department has interpreted the Equal Access to Justice Act to exclude all proceedings except those required by statute to be conducted under 5 U.S.C. § 554 (1982).

2. Board of Indian Appeals: Jurisdiction--Regulations: Generally

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid.

APPEARANCES: Lawrence R. Stidham, Esq., and Richard E. Olson Jr., Esq., Bishop, California, for appellant; William M. Wirtz, Esq., Acting Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Utu Utu Gwaitu Paiute Tribe seeks attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1982), as amended by the Act of August 5, 1985, P.L. 99-80, 99 Stat. 183,

for costs incurred in pursuing its appeal in Docket No. IBIA 88-26-A. 1/ For the reasons discussed below, the Board denies appellant's application.

Background

The underlying proceeding in this matter concerned a challenge to a November 24, 1987, decision of the Sacramento Area Director, Bureau of Indian Affairs (BIA), holding that no compensation was due for the taking of a right-of-way over tribal land on the Benton Paiute Reservation where the taking was for the purpose of paving existing roads and adding them to the BIA road system. On February 22, 1989, the Board remanded the case to the Area Director for preparation of another appraisal. Ututu Gwaitu Paiute Tribe v. Sacramento Area Director, 17 IBIA 78 (1989).

On March 27, 1989, the Board received from appellant an application for attorney's fees and expenses under the EAJA. On March 28, 1989, the Board issued a notice of docketing, in which it established a briefing schedule and instructed appellant to discuss in its brief the Department's regulations implementing the EAJA 2/ and the Board's decision in In re Attorney's Fees Request of DNA--People's Legal Services, Inc., 11 IBIA 285, 90 I.D. 389 (1983).

Both appellant and appellee filed briefs.

Discussion and Conclusions

Appellant acknowledges that 43 CFR 4.603(a) limits the application of the Department's EAJA regulations to "adversary adjudications required by statute to be conducted by the Secretary under 5 U.S.C. 554." 3/ Although it contends that the Department's regulation is contrary to the purpose and intent of the EAJA and the Supreme Court's holding in Wong Yang Sung v. McGrath, 339 U.S. 33, modified, 339 U.S. 908 (1950), it also acknowledges the Board's previous holdings that it lacks the authority to declare duly promulgated Departmental regulations invalid. Appellant states that it

1/ All further references to the United States Code are to the 1982 edition.

2/ These regulations are found at 43 CFR Part 4, Subpart F.

3/ 43 CFR 4.603(a) provides:

"These rules apply to adversary adjudications required by statute to be conducted by the Secretary under 5 U.S.C. 554. Specifically, these rules apply to adjudications conducted by the Office of Hearings and Appeals under 5 U.S.C. 554 which are required by statute to be determined on the record after opportunity for an agency hearing. 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."

submits its application to the Board for final agency action and to exhaust agency remedies, in order to comply with the requirements of 5 U.S.C. § 504(a)(2) and to preserve its right to pursue its petition for attorney's fees under 5 U.S.C. § 504(c)(2).

[1,2] In In re Attorney's Fees Request of DNA--People's Legal Services, Inc., the Board held that the Department has, by regulation, interpreted the EAJA to exclude all proceedings except those required by statute to be conducted under 5 U.S.C. § 554. 4/ It further held, in accordance with previous Board decisions, that it lacks the authority to declare a duly promulgated Departmental regulation invalid. See also Sohappy v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 100, 93 I.D. 176 (1986).

The proceeding at issue here is not a proceeding within the scope of 43 CFR 4.603(a). The Board is bound by the parameters set by the Department.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, appellant's application for attorney's fees and expenses is denied.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

4/ See also Benton C. Cavin, 93 IBLA 211 (1986).