INTERIOR BOARD OF INDIAN APPEALS

Beverly C. Cloud v. Alaska Regional Director, Bureau of Indian Affairs

51 IBIA 206 (04/06/2010)

Related Board case:
50 IBIA 262

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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BEVERLY C. CLOUD, Appellant,	)	Order Denying Petition for Attorney Fees and Related Costs
v.	)	
	)	Docket No. IBIA 07-086-1
ALASKA REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	April 6, 2010

Beverly C. Cloud (Appellant) petitions the Board of Indian Appeals (Board) for an award of attorney fees and costs pursuant to 43 C.F.R. Part 4, Subpart F, for her successful appeal to the Board from a February 2, 2007, decision of the Alaska Regional Director (Regional Director), Bureau of Indian Affairs (BIA).[1] In his February 2 decision, the Regional Director declined to retroactively approve a purported sale of Allotment No. A-067524, USS 7889, containing 5.0 acres, more or less, from Willis Roehl, now deceased, to Appellant, which left the proposed sale null and void. On October 22, 2009, the Board vacated the Regional Director's decision and remanded the matter to him for further consideration. 50 IBIA 262. We deny Appellant's petition for attorney fees and related costs because we conclude that the Board's proceeding did not constitute an "adversary adjudication" as required by EAJA, and Appellant does not argue otherwise.

Under EAJA, fees and costs are available to certain eligible prevailing parties for administrative "adversary adjudications." 43 C.F.R. §§ 4.603(a), 4.605(a); *see also id.* § 4.604 (eligibility for award of EAJA fees). An "adversary adjudication" means, in relevant part, an adjudication "under 5 U.S.C. 554." *Id.* § 4.602; *see* 5 U.S.C. § 504(b)(1)(C).[2] In turn, section 554 applies, with exceptions not relevant here, "in every case of adjudication required by statute to be determined on the record after an opportunity for an agency

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[1] Subpart F of 43 C.F.R. Part 4 implements that portion of the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, that applies to Federal administrative proceedings.

[2] To constitute an adversary adjudication under section 4.502 and EAJA, BIA's position must also be presented by an attorney or other representative. That element was satisfied in this case and is not an issue.

hearing." 5 U.S.C. § 554(a). In effect, section 554 applies when an appellant is entitled *by statute* to a formal, trial-type hearing. *See Pension Benefit Guaranty Corp. v. LTV Corp.*, 486 U.S. 633, 655 (1990) (distinguishing formal and informal adjudications); *see also Aageson Grain & Cattle v. U.S. Dept. of Agriculture*, 500 F.3d 1038, 1043 (9th Cir. 2007); *cf. Collord v. U.S. Dept. of the Interior*, 154 F.3d 933, 936-37 (9th Cir. 1998) (where the due process clause of the Fifth Amendment of the United States Constitution requires an administrative hearing, the prevailing party if other than the United States is entitled to fees under EAJA).

In the underlying proceeding, Appellant appealed from a decision by the Regional Director in which he declined to approve a sale by Roehl to Appellant of certain restricted fee land obtained by Roehl under the Alaska Native Allotment Act of 1906, Act of May 17, 1906, Ch. 2469, 34 Stat. 197, 48 U.S.C. § 357 (1952). The Regional Director's authority to approve a conveyance of an Alaska Native allotment is found in 43 U.S.C. § 270-1 (1970) (repealed).[3] *See also* 25 U.S.C. § 404. Thus, BIA's approval is required for any "deed of conveyance" that transfers title to Roehl's allotment. *See also* Native Allotment Certificate No. 50-90-0424, July 31, 1990.

Appellant contends in her petition for attorney fees and costs that she was the prevailing party in the proceedings before the Board, and that the Regional Director's position was not substantially justified. She does not address, however, the fact that an EAJA award is only available for an "adversary adjudication." *See* 43 C.F.R. § 4.603(a); 5 U.S.C. § 504. The Regional Director, responding in opposition to Appellant's petition, points to the requirement for an "adversary adjudication," and argues that the Board's appeal proceedings for which Appellant seeks to be awarded EAJA fees were not such a proceeding because they were not conducted "under 5 U.S.C. § 554." *See* 43 C.F.R. § 4.602; 5 U.S.C. § 504(b)(1)(C). Appellant did not file a reply brief, and thus does not dispute the Regional Director's contention.

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[3] Section 357 of 48 U.S.C. was amended by the Act of Aug. 2, 1956, Ch. 891, § l(a) to (d), 70 Stat. 954, and was moved to 43 U.S.C. § 270-1 (1970). Section 270-1 was then repealed in 1971 by subsection 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a), with a savings provision for applications pending before the Department of the Interior on December 18, 1971. Section 270-1 required title to Roehl's allotment to be restricted against alienation and required any conveyance to have the approval of the Secretary of the Interior (Secretary). Roehl's allotment is covered by the savings clause of section 270-1 because his allotment application was submitted and remained pending on December 18, 1971. *Id*.

The Regional Director is correct that the Board's proceedings did not constitute an adversary adjudication, as defined by the regulations and EAJA, and thus Appellant is not entitled to fees and costs, regardless of whether the other requirements for such an award are satisfied.[4] With limited exceptions, *see, e.g.*, 25 U.S.C. § 450f(b)(3), 25 C.F.R. § 900.177 (Indian Self-Determination Act and implementing regulation), the Board's proceedings are not adjudications under 5 U.S.C. § 554, which applies to adjudications "required by statute to be determined on the record after opportunity for an agency hearing." In the present case, the statute governing BIA's discretionary authority whether to approve the conveyance by Roehl of his allotment to Appellant is the Alaska Native Allotment Act of 1906. Nothing in that Act requires a formal hearing under section 554 as part of the Secretary's exercise of that discretionary authority to approve or disapprove a proposed conveyance of a allotment of an Alaska native. Appellant does not argue otherwise.[5]

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Appellant's application for attorney's fees and costs is denied.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

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[4] Consequently, we need not address whether BIA's position was "substantially justified," within the meaning of EAJA.

[5] Even if this proceeding were one for which fees might be awarded under EAJA, Appellant failed to submit documentation from her attorney itemizing the hours spent on discrete tasks associated with his representation of Appellant in this matter and for which fees are sought. *See* 5 U.S.C. § 504(a)(2); 43 C.F.R. § 4.612. For this additional reason, fees are denied.