

ANN MARIE SAYERS

IBLA 88-525

Decided June 8, 1990

Application for attorney's fees and expenses under the Equal Access to Justice Act. CA 12519.

Dismissed.

1. Act of February 8, 1887--Equal Access to Justice Act: Adversary Adjudication--Indians: Attorneys: Fees--Indians: Lands: Allotments: Generally

An application for attorney's fees and expenses under the Equal Access to Justice Act, 5 U.S.C.A. § 504 (West Supp. 1989), for services rendered in obtaining BLM approval of an allotment under the General Allotment Act of 1887, 25 U.S.C. § 334 (1982), is properly denied when no adversary adjudication has occurred or when the Office of Hearings and Appeals has not conducted an adjudication.

APPEARANCES: Steven Hirsh, Esq., Oakland, California, for the applicant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

On July 5, 1988, California Indian Legal Services (CILS) filed with the Board an application for attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C.A. § 504 (West Supp. 1989), and Departmental regulations at 43 CFR 4.601. The basis for this application was CILS' representation of Ann Marie Sayers before various California officials of the Bureau of Land Management (BLM) in obtaining approval of Sayers' allotment under the General Allotment Act of 1887, 25 U.S.C. § 334 (1982).

Authorization for the award of fees and expenses is set forth in EAJA at 5 U.S.C.A. § 504(a)(1) (West Supp. 1989), which provides in 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.]

An "adversary adjudication" is defined at 5 U.S.C.A. § 504(b)(1)(C) (West Supp. 1989) to mean "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise." (Emphasis added.)

Regulations implementing the above-quoted provisions provide that an award of fees and expenses may be awarded to an eligible party who "prevails over the Department in an adversary adjudication under 5 U.S.C. § 554 before the Office of Hearings and Appeals." 43 CFR 4.601.

[1] Our review of the above provisions causes us to dismiss CILS' application for fees and expenses. Key to our holding is 5 U.S.C. § 554 (1982), which sets forth certain adjudication standards applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Thus, we read EAJA to authorize an award of fees and expenses in those adjudications required by statute to be determined on the record after opportunity for an agency hearing. Benton C. Cavin, 93 IBLA 211, 214 (1986), aff'd, 19 Cl. Ct. 198 (1989). We find no reference in the General Allotment Act of 1887 to adjudications on the record or to any provision invoking section 554. Cf. Bureau of Land Management v. Ericsson, 98 IBLA 258, 260 (1987). It follows, therefore, that CILS' efforts to obtain for Sayers an allotment under the General Allotment Act are not recognized by EAJA as compensable.

Our reading of 5 U.S.C. § 504 (1982) is supported by 43 CFR 4.603(a), which states:

These rules [implementing EAJA] 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.

Yet another basis for dismissal is apparent upon review of 43 CFR 4.601 and 43 CFR 4.603. Each of these regulations, quoted supra, requires that a compensable adversary adjudication be conducted by the Office of Hearings and Appeals. To date, there has been no adjudication conducted by any component of the Office of Hearings and Appeals, whether by the Hearings Division or by this Board. While it is clear that Sayers did file an appeal to this Board (see IBLA 88-83), the Board did not reach the merits of the appeal. Prior to reaching the merits, the Board granted BLM's motion to remand the case so that the agency could issue a proposed decision approving Sayers' allotment.

Because both statute and regulation require dismissal of CILS' application, there is no need to inquire whether, inter alia, the position of the agency was substantially justified or whether special circumstances would make an award unjust.

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

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Gail M. Frazier  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge

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