

BUREAU OF LAND MANAGEMENT

v.

JOHN L. FALEN

IBLA 96-185

Decided December 10, 1997

Appeal from an order by an administrative law judge awarding fees and expenses under the Equal Access to Justice Act in a grazing appeal. N2-91-8.

Reversed.

1. Attorney Fees: Generally--Attorney Fees: Equal Access to Justice Act: Prevailing Party

Under 43 C.F.R. § 4.616, an award of fees and expenses that lacks findings of fact to support a conclusion that the applicant was a prevailing party, and lacks findings of fact and conclusions concerning whether the position of the Department was substantially justified, is reversed when supporting documentation to show the existence of both required elements for an award is not present in the administrative record.

APPEARANCES: John R. Payne, Esq., Assistant Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management; Karen Budd-Falen, Esq., Cheyenne, Wyoming, for John L. Falen.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Bureau of Land Management (BLM) has appealed from a January 19, 1996, Order issued by Administrative Law Judge Ramon M. Child awarding John L. Falen a reduced payment of \$88,396.40 for attorney fees and other expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1994), and Departmental regulations found at 43 C.F.R. Subpart F. On March 3, 1996, Falen also filed a notice of appeal from Judge Child's Order, denominated a cross-appeal, seeking payment of the full amount of fees and expenses claimed: \$132,579.60.

The notice of appeal filed by Falen was late. Under 43 C.F.R. §§ 4.476 and 4.411, a notice of appeal was required to be filed not later than 30 days following receipt of Judge Child's Order if an appeal was to be taken therefrom. The record shows that both BLM and Falen received the Order on January 22, 1996. A notice of appeal was therefore required to be filed by both parties not later than February 21, 1996. Falen's notice was not filed, however, until March 3, 1996. No extension of time is allowed within which to file a notice of appeal. 43 C.F.R. § 4.411(c). When a notice of appeal is not timely filed, this Board lacks jurisdiction to proceed further on the issue sought to be raised thereby. See James M. Chudnow, 72 IBLA 60 (1983), and cases cited therein. Falen's cross-appeal, therefore, is dismissed, and our review is limited to consideration of BLM's appeal from the Order granting payment of Falen's fees and expenses in a reduced amount.

Falen claims attorney fees and expenses incurred in prosecuting an appeal before Judge Child from a May 30, 1991, Final Multiple Use Decision issued by the Paradise-Denio Resource Area Manager, BLM. Judge Child granted the fee application in part, concluding that Falen was a prevailing party under 5 U.S.C. § 504(a) (1994). Because this conclusion is not supported by findings in Judge Child's Order and, moreover, lacks support on the record provided, and also because Judge Child's Order made no findings or conclusions concerning whether the position taken in BLM's 1991 Decision was substantially justified, the Order appealed from must be reversed. See 43 C.F.R. § 4.616.

While BLM questions the timeliness and completeness of Falen's application, these technical arguments are rejected as without merit. We find that his application, which was filed before the Order dismissing the proceedings before Judge Child, was filed within 30 days of issuance of the Order upon which it relied and was timely under 5 U.S.C. § 504(a)(2) (1994). See generally Dunn v. United States, 775 F.2d 99, 103 (3d Cir. 1985), finding that a timely filing, arguably defective in content, may nonetheless be considered. This means that we must decide questions concerning whether Falen was a prevailing party so as to entitle him to an award and whether the position of the United States, as stated in the 1991 BLM Decision, was substantially justified.

To recover fees and expenses under the EAJA, among other requirements imposed by the statute not presently relevant, an applicant must be a prevailing party. See 5 U.S.C. § 504(a)(1) (1994). It must also be shown that the position of the United States was not substantially justified. Id. Concerning the first stated required element for an award, one who obtains a favorable settlement of his case may be a prevailing party. Foster v. Boorstin, 561 F.2d 340, 343 (D.C. Cir. 1977). As to the second enumerated element, the statute's use of the word "substantially" in regard to the respect to be given the Government's position may be viewed as meaning "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 564, 565 (1988).

The 1991 BLM Decision from which Falen appealed established short- and long-term management objectives for the Jordan Meadows allotment, on which Falen holds leases for livestock grazing pursuant to the Taylor Grazing Act, 43 U.S.C. §§ 315, 315a-315r (1994). A principal purpose of the 1991 Decision was to protect trout habitat on the allotment; construction of fences was required to exclude cattle from Riser, Washburn, and Crowley Creeks, while providing water gaps for some cattle use, and actions were taken to facilitate fence construction around the headwaters of the streams.

Falen argues that he is a prevailing party entitled to an award under the EAJA and that the position taken by BLM in 1991 was shown to be substantially without justification when, in 1995, a new Decision dealing with management of the allotment to protect trout habitat was issued. Pointing out that a favorable settlement of his case entitles him to an award as much as would a favorable ruling from Judge Child on the merits of his appeal, he states that a negotiated settlement embodied in the 1995 Decision establishes his entitlement to an award. He avers that, until his case came before Judge Child for hearing, BLM refused to consult with him in earnest, but that, as a result of his appeal, such consultation was realized and a settlement acceptable to him was negotiated in 1995. He sees five revisions of substance in the 1995 Decision attributable to his hearing before Judge Child, including matters relating to development of water resources, fence location, grazing utilization standards, grazing rotation system, and stream sedimentation levels.

The 1991 BLM Decision limited Falen's grazing access along three riparian areas on the allotment: Riser Creek, Washburn Creek, and Crowley Creek. In consultation with the U.S. Fish and Wildlife Service, BLM found that continued livestock access to those areas would endanger habitat for Lahontan cutthroat trout, listed as a threatened species pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531 through 1544 (1994). The 1991 Decision found that, while long-term objectives could be met for the riparian areas through fencing, interim changes in livestock use were required. The 1991 Decision required fencing the three streams on both public and private lands to exclude livestock. The rest and rotation system in place beforehand, which rested a different pasture each year, was changed to rest one pasture until fences and other improvements could be completed. The Decision also permitted BLM to make adjustments to livestock use if allotment utilization goals were not met.

Hearings on Falen's appeal from this Decision were held by Judge Child in March and November 1994, and were concluded with an Order issued on October 20, 1995, that dismissed the consolidated appeals by Falen and Nevada Garvey Ranches, appeals numbered N2-91-7 and N2-91-8 on the Hearings Docket. The October 1995 Order was issued in response to a motion to withdraw the appeals submitted by the Appellants and BLM, which stated that the 1991 BLM Decision had been replaced by a BLM Decision issued on June 19,

1995. While the parties do not agree that this action constituted a negotiated settlement of the pending dispute between them in the Hearings Division, we find that the 1995 Decision should be so considered for the purposes of this opinion.

The 1995 Decision, like the 1991 Decision, lists short- and long-term objectives. The short-term objectives in the 1995 Decision are unchanged from the 1991 version and, except for a long-term objective of maintaining stream sedimentation below 10 percent, the long-term goals also are unchanged. The 1995 Decision recites, among other matters, that Falen has agreed to fence the private headwaters of Washburn Creek and makes changes to the grazing schedule that are, except for a change in the rotational system, generally congruent with the 1991 Decision.

The parties disagree also about whether consultation required by BLM's regulations was had with Falen beginning in October 1987 concerning changes in grazing patterns on the allotment. This question is relevant because Judge Child's Order granting fees and expenses rests in part on a finding that BLM "ignored the requirements of its own regulations in adopting a Biological Assessment and presenting it to the U.S. Fish and Wildlife Service without prior cooperation, consultation and coordination with appellant." (Order at 1.) The Order itself does not explain this conclusion, although 43 C.F.R. § 4.616 requires that an order disposing of an application for such relief contain findings to support a conclusion that a party entitled to an award is a prevailing party. While this conclusion about consultation is not explained, the Order does hint that it is connected to Falen's qualification for an award. This reasoning is suggested by a subsequent statement that

Appellant prevailed in the appeal of the May 30, 1991 decision in that the case was dismissed on stipulation only after hearing and after BLM abandoned its position announced in the May 30, 1991 Decision and issued a new decision acceptable to the Appellant in June of 1995, after full cooperation, consultation and coordination with the appellant.

(Order at 2.)

Inherent in this statement is a finding that Falen obtained relief from certain provisions of the 1991 Decision by using the hearing before Judge Child to force issuance of the 1995 Decision which contained concessions from BLM. But even if this is the meaning of the Order, the successes obtained by Falen's hearing strategy are not described. There is, however, an inference that a comparison of the 1991 and 1995 BLM Decisions will show how he prevailed over BLM's initial demands made in the 1991 Decision.

[1] Comparison of BLM's 1991 and 1995 Decisions does not support the conclusion that Falen was a prevailing party. The differences between them seem to be attributable as much to the passage of time as to efforts

by Falen to change requirements imposed by BLM on his grazing lease. The requirement that trout habitat be protected from cattle grazing by fences remains substantially the same in the 1995 Decision as it was in 1991, as do the short- and long-term objectives stated by each Decision. Although some differences between the two Decisions do exist, the general structure and plan for Falen's grazing in relation to the trout habitat appears to be both unchanged and of central importance, the principal focus of each Decision being fence construction near trout habitat to manage grazing so as to accommodate the presence of trout. Assuming for the purposes of discussion that Falen's appeal was instrumental in obtaining changes to the 1991 Decision, the changes appearing in the 1995 amendment thereof are minor. Since Judge Child did not explain what revisions he perceived to be enough to support his finding that Falen had prevailed in his effort to avoid the 1991 Decision, and because we cannot identify them on the record presented, it must be concluded that his finding that Falen was a prevailing party lacks support in the record. This does not end the matter, however, for the Order under review also failed to comment about the merit of the Government's position, contrary to 43 C.F.R. § 4.616(c).

Whether the position of the Government is substantially justified in any given EAJA case is essentially one of reasonableness in law and fact. Iowa Express Distribution, Inc. v. National Labor Relations Board, 739 F.2d 1305, 1308 (8th Cir. 1984). A recent amendment to the EAJA adds further to an understanding of how the reasonableness standard should be applied; in 1996, the following provision was added as paragraph (4) to section 504(a):

If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

Pub. L. No. 104-121, 110 Stat. 862 (1996). The word "demand" used in the quoted provision, is defined to mean "the express demand of the agency which led to adversary adjudication," in this case, the 1991 Decision. This change to the statute indicates an intention to allow an award of fees even in cases where the Government prevails, provided that the final result obtained is significantly less than the original agency demand. A comparison of the 1991 and 1995 BLM Decisions, in this case, indicates that the Government's position prevailed substantially unchanged.

Absent altogether from Judge Child's Order are findings and conclusions concerning whether the position of the United States was substantially justified. While Falen argues that this necessary element of his application is nonetheless supplied by the record, a comparison of the

1991 and 1995 Decisions indicates that the position of the United States was justified, inasmuch as the requirement to fence the headwaters of the creeks supporting trout was continued in both Decisions, and short- and long-term management objectives continued virtually unchanged from 1991 until 1995 when they were accepted by Falen. Further, the Government's position, stated in both Decisions, that grazing will be managed by using fences to protect and encourage the natural recovery of trout habitat is the same. We find, therefore, that the position of the United States was substantially justified and that the failure of the Order under review to make required findings and conclusions concerning this necessary element of an EAJA award by the Department requires that the Order be reversed.

To summarize: The Order awarding fees and expenses cannot be affirmed because it fails to conform to 43 C.F.R. § 4.616 and lacks support in the record. In order to support an EAJA award in this case, findings showing that Falen was a prevailing party should have been made, as required by 43 C.F.R. § 4.616(a). Findings to support a conclusion that the position of the Department was not substantially justified were also required to be made, pursuant to 43 C.F.R. § 4.616(c), but were not included in the Order. The Order under review does not, therefore, provide any basis for an award for fees and expenses in this case and instead indicates no award should be made when the record as a whole is considered.

Motions made by the parties not specifically mentioned herein are denied. To the extent that the parties have raised arguments not directly addressed by this opinion, such arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Order appealed from is reversed.

Franklin D. Amess
Administrative Judge

I concur:

James P. Terry
Administrative Judge

