

J. CLAUDE FREI AND SONS, ET AL.
v.
BUREAU OF LAND MANAGEMENT

IBLA 96-245

Decided September 24, 1998

Appeal from a decision of Administrative Law Judge Ramon M. Child denying an application for attorney fees and expenses under the Equal Access to Justice Act. AZ-010-93-01 through AZ-010-93-25.

Affirmed in part; reversed in part; and remanded.

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

A party need not obtain a final decision on the merits to be considered a prevailing party for the purpose of considering the merits of awarding attorney fees if the party received some of the benefits sought when bringing the appeal and there is a clear causal connection between the appeal and the beneficial outcome attained. In consolidated grazing appeals, when some of the appealing permittees were ultimately authorized to continue spring grazing but others remained subject to spring grazing restrictions, only those permittees authorized to continue spring grazing can be considered to be prevailing parties.

APPEARANCES: Karen Budd-Falen, Esq., and Daniel B. Frank, Esq., Cheyenne, Wyoming, for Appellants; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management; Johanna H. Wald, Esq., San Francisco, California, for the Natural Resources Defense Council. 1/

1/ The Natural Resources Defense Council (NRDC) was an intervener in the appeal giving rise to this attorney fee application. Other than filing a change of address notice, neither NRDC nor any of the other interveners has participated in the attorney fee application proceedings.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

J. Claude Frei and Sons, et al. ^{2/} (Permittees), appealed the January 25, 1996, Decision issued by Administrative Law Judge Ramon M. Child denying their application for attorney fees and expenses in the amount of \$35,480.89, filed pursuant to the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. § 504 (1994), and Departmental regulations at 43 C.F.R. Part 4, Subpart F.

The Permittees incurred the fees and expenses in their appeal of January 1993, final, full force and effect Decisions issued by the Shivwits Resource Area Manager, Arizona Strip District, Bureau of Land Management (BLM), eliminating spring livestock grazing on category 1 and 2 desert tortoise habitat in 11 of 12 grazing allotments utilized by the Permittees. The Area Manager Decisions were based on mandatory terms and conditions contained in an incidental take statement in a February 21, 1992, Biological Opinion issued by the Fish and Wildlife Service (FWS) pursuant to section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536 (1994), and 50 C.F.R. § 402.16. The terms and conditions imposed by FWS prohibited livestock grazing on category 1 and 2 desert tortoise habitat from March 15 through May 31.

In an Order dated April 7, 1993, District Chief Administrative Law Judge John R. Rampton, Jr., denied BLM's motion to dismiss the appeals and granted the Permittees' motion to stay implementation of the Decisions pending resolution on appeal. This Board affirmed Judge Rampton's Order on June 4, 1993 (IBLA 93-330). ^{3/}

In a memorandum dated September 8, 1994, FWS asked BLM to reinitiate section 7 consultation regarding cattle grazing on desert tortoise habitat within the Shivwits Resource Area. FWS explained that renewed consultation was necessary because the stay issued by the administrative law judge and affirmed by this Board had prevented BLM from applying the mandatory terms and conditions set out in the Biological Opinion calling for reduction of incidental take of desert tortoises, including the requirement that cattle be removed from category 1 and 2 desert tortoise habitat between March 15

^{2/} The Permittees, other than J. Claude Frei and Sons (AZ-010-93-01), include Landon Frei (AZ-010-93-02), Shelby Frei (AZ-010-93-03), Marion Graf (AZ-010-93-04), Clair Hafen (AZ-010-93-05), Grant Hafen (AZ-010-93-06), Black Rock Cattle Company (AZ-010-93-07 and AZ-010-93-08), DeMar Ltd. (AZ-010-93-09), C. Judd Burgess (AZ-010-93-10), JEL Development (AZ-010-93-11), F. Duane Blake (AZ-010-93-12), Bruce and Pam Jensen (AZ-010-93-13), Bingham and Bunker (AZ-010-93-14 and AZ-010-93-25), Cleve Esplin (AZ-010-93-15), Arlin and Denice Hughes (AZ-010-93-16), Simmons and Hughes (AZ-010-93-17), Melvin Hughes (AZ-010-93-18), Clifford Peterson (AZ-010-93-19), Melvin and Mervin Peterson (AZ-010-93-20), Jay Reber (AZ-010-93-21), Dan Reber (AZ-010-93-22), Jim Whitmore (AZ-010-93-23), and Steve Layton (AZ-010-93-24).

^{3/} The Permittees also sued FWS in Federal district court. DeMar Ltd. v. Fish and Wildlife Service, CIV 93-2250 PHX-RGS (D. Ariz.). The district court stayed all action pending completion of the administrative appeals.

and June 1 of each year. FWS further deemed reinitiation of formal consultation warranted because pertinent new information (including draft and final desert tortoise recovery plans) had become available and portions of the Shivwits Resource Area had subsequently been designated as desert tortoise critical habitat.

After completion of the renewed consultation process, FWS issued its June 23, 1995, Biological Opinion, superseding the February 21, 1992, Biological Opinion. On August 11, 1995, BLM issued 23 new grazing Decisions, superseding its 1993 Decisions. ^{4/} The 1995 Decisions implemented mandatory terms and conditions set out in FWS' 1995 Biological Opinion and allowed spring livestock grazing on eight of the grazing allotments. ^{5/} On August 14, 1995, BLM moved for dismissal of the appeals of the 1993 Decisions on the ground that the 1995 Decisions had rendered the appeals moot. The Permittees concurred in the dismissal, reserving the right to file an EAJA application, and by Order dated September 8, 1995, the Administrative Law Judge dismissed the appeals subject to the stipulated reservation of the right to file an EAJA application.

In their application, the Permittees sought \$35,480.89 in attorney fees and expenses, asserting that they had repeatedly prevailed in their position that BLM was not justified in issuing the full force and effect Decisions without supporting scientific data. ^{6/} Permittees further

^{4/} Only 23 decisions were issued in 1995. Clair Hafen (AZ-010-93-05) transferred privileges to Black Rock Cattle Company, and Vern Frehner (no 1993 appeal) transferred privileges to Bruce Jensen.

^{5/} Spring grazing remained prohibited or restricted to certain elevations on six allotments used by 12 Permittees who appealed the 1995 Decisions. They include: F. Duane Blake (Highway Allotment, AZ-010-95-01); JEL Development (Mormon Well Allotment, AZ-010-95-02); C. Judd Burgess (Mormon Well Allotment, AZ-010-95-03); DeMar Limited (Mormon Well Allotment, AZ-010-95-04); Black Rock Cattle Company (Cedar Wash Allotment, AZ-010-95-05, and Beaver Dam Slope Allotment, AZ-010-95-06); Grant Hafen (Beaver Dam Slope Allotment AZ-010-95-07); Marion Graf (Beaver Dam Slope Allotment, AZ-010-95-08); Shelby Frei (Beaver Dam Slope Allotment, AZ-010-95-09); Landon Frei (Beaver Dam Slope Allotment, AZ-010-95-10); J. Claude Frei and Sons (Beaver Dam Slope Allotment, AZ-010-95-11); and Bruce and Pam Jensen (Mesquite Community Allotment, AZ-010-95-12, and Littlefield Community Allotment, AZ-010-95-13). By Order dated Nov. 30, 1995, Administrative Law Judge James H. Heffernan dismissed these appeals for lack of jurisdiction. The dismissal was appealed to the Board (IBLA 96-155), and the Board affirmed the dismissal on Aug. 6, 1998. See F. Duane Blake v. BLM, 145 IBLA 154 (1998).

^{6/} The application identifies the applicant as "Washington County Cattle - Legal Fund," an unincorporated association of the 25 affected Permittees. The Permittees had individually retained Budd-Falen Law Offices, P.C., created the fund to cover legal expenses, and contributed to the fund in proportion to their annual BLM grazing preference rights. BLM has challenged the adequacy of the documentation supporting the fund's qualifications to receive a fee award. The Permittees' Statement of Reasons (SOR) appears to abandon the position that the fund is the proper applicant for a fee award. See SOR at 2 and n.1.

claimed that BLM's position was not substantially justified because BLM knew that it was improper to unilaterally eliminate grazing from public lands without proof that livestock grazing would adversely affect the desert tortoise.

BLM argued that the Permittees were not prevailing parties entitled to an award of fees and expenses because they had not received benefits from and had not obtained a ruling on the merits of the appeals. BLM also contended that its position was substantially justified and that special circumstances made an award unjust. The amount sought by the Permittees was also questioned.

In his Decision, Judge Child concluded that the Permittees were not entitled to an award of attorney fees and expenses because they did not prevail in the parent action. He found that "the dismissal of the parent cases was made as a legal convenience not as a result of capitulation by [BLM]," and that the Permittees had not claimed otherwise. (Decision at 2.) Judge Child did not examine the remaining issues raised by the fee application.

In their SOR, the Permittees address only the issue of whether they were prevailing parties entitled to an EAJA award. They assert that they prevailed because they obtained a stay of the 1993 Decisions enabling them to remain in business and their appeals precipitated the 1995 Decisions allowing spring grazing on eight of the allotments. The Permittees also object to Judge Child's characterization of the dismissal of the appeals as a legal convenience, noting that the appeals had been dismissed because they were moot, and not for legal convenience. They ask the Board to find them to be prevailing parties and remand the case for determination on the merits of their EAJA application.

In its Answer, BLM contends that there was no prevailing party because the 1993 Decisions were superseded and, in effect, vacated by the 1995 Decisions. BLM argues that the only thing the Permittees achieved by bringing the appeals was the opportunity to seek some of the same benefits in subsequent appeals of the 1995 Decisions, which BLM submits does not suffice to classify the Permittees as prevailing parties because the appeals of the 1995 Decisions were dismissed by the Administrative Law Judge. BLM further argues that the April 7, 1993, stay order was not a determination on the merits of the appeals, and that the changes in the terms and conditions of the 1995 Decisions emanated from new information, such as the desert tortoise recovery plan, and not as a result of the issuance of the stay. In addition, BLM reiterates the additional grounds for rejecting the Permittees' EAJA application raised in its reply to the application.

[1] Under the EAJA, as amended,

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. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1) (1994). The only issue now before us is whether the Permittees were prevailing parties in the appeals of the 1993 Decisions.

A party need not obtain a final judgment on the merits to be considered a prevailing party under the EAJA. The party qualifies as a prevailing party if the action was a "causal, necessary, or substantial factor in obtaining the result" the party sought. Public Citizen Health Research Group v. Young, 909 F.2d 546, 549 (D.C. Cir. 1990), quoting Commissioners Court of Medina County, Texas v. United States, 683 F.2d 435, 442 (D.C. Cir. 1982) (construing the "prevailing party" language in 28 U.S.C. § 2412(d)(1)(A) (1994), a substantially identical statutory provision for award of attorney fees connected with court litigation). A party who succeeds on any significant issue in the litigation and achieves some of the benefits sought may be eligible to recover attorney fees. BLM v. Cosimati, 131 IBLA 390, 395 (1995); see Chapoose v. Hodel, 831 F.2d 931, 936 (10th Cir. 1987). The inquiry focuses on whether the action was a material factor or acted as a catalyst in bringing about the desired outcome. Wilderness Society v. Babbitt, 5 F.3d 383, 386 (9th Cir. 1993); Taylor Group Inc. v. Johnson, 915 F. Supp. 295, 297 (M.D. Ala. 1995). The party seeking fees has the burden of demonstrating a sufficient causal relationship between the action and the ultimate relief obtained. Chapoose v. Hodel, *supra*.

It is clear from the record that the stay of the 1993 Decisions was the crucial factor triggering the FWS request and the BLM reinitiation of the section 7 consultation regarding cattle grazing on desert tortoise habitat in the Shivwits Resource Area. The September 8, 1994, FWS memorandum requesting reinitiation of consultation stated that the issuance of the stay had made reinitiation of the consultation necessary. The memorandum further indicated that, even if other justifications for consultation, such as the availability of pertinent new information and the designation of desert tortoise critical habitat in the Shivwits Resource Area, did not exist, reinitiation of consultation

would be warranted in any case because the [livestock grazing] is proceeding in the absence of an incidental take statement; which means that any "take" of a desert tortoise as a result of spring grazing is in violation of the [ESA] * * * since there is no permissible amount of incidental take for this activity.

(Sept. 8, 1994, Memorandum, at 2.) A January 13, 1995, FWS memorandum clarifying the September 8, 1994, memorandum also identified BLM's inability to implement protective measures to minimize incidental take of desert tortoises because of the stay of the 1993 Decisions as one of the factors precipitating the reinitiation request and relied on the stay to

distinguish the situation in the Shivwits Resource Area from that in other BLM resource areas with grazing allotments containing desert tortoise habitat. See Jan. 13, 1995, Memorandum, at 4, 5. Thus, we find the requisite sufficient causal connection between the stay issued in the Permittees' appeals of the 1993 Decisions and the issuance of the 1995 Decisions emanating from the reinitiation of section 7 consultation. Had the Permittees not appealed, the stay would not have been issued. Had the stay not have been issued, there would have been no reconsultation. Had there been no reconsultation, spring grazing would not have been allowed or reinstated on eight of the grazing allotments.

The existence of the causal connection does not end our inquiry, however. We must examine whether the 1995 Decisions provided the Permittees with some of the benefits they sought when appealing the 1993 Decisions. The Permittees admit that the 1995 Decisions did not remove the spring grazing prohibitions and restrictions on all of the allotments, and acknowledge that 12 Permittees using allotments retaining the spring grazing prohibitions and restrictions appealed the 1995 Decisions. Those 12 Permittees did not achieve the benefits sought by bringing the parent appeals, see n.5, supra, and do not qualify as prevailing parties. Thus the attorney fees and expenses directly attributable to their appeals of the 1993 Decisions are not recoverable. See Hensley v. Eckerhart, 461 U.S. 424, 434-36 (1983); Community Heating & Plumbing v. Garrett, 2 F.3d 1143, 1146 (Fed. Cir. 1993). Accordingly, we affirm Judge Child's Decision to the extent he found that 12 of the Permittees did not prevail. However, eight of the Permittees did obtain the relief they sought, and were prevailing parties. Therefore, we reverse Judge Child's Decision to the extent he found that those Permittees did not prevail and remand their EAJA application to the Office of Hearings and Appeals for further action.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Child's Decision is affirmed in part and reversed in part and the EAJA application is remanded for further action.

R.W. Mullen
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge

