

**Editor's Note: Reconsideration denied by order dated October 6, 2003; second petition for reconsideration denied by order dated May 28, 2004**

TULEDAD GRAZING ASSOCIATION  
v.  
BUREAU OF LAND MANAGEMENT

IBLA 98-166

Decided July 14, 2000

Appeal from a decision of Administrative Law Judge James H. Heffernan, denying an application for award of attorney fees and expenses.

Reversed and remanded.

1. Equal Access to Justice Act: Adversary Adjudication--Grazing Permits and Licenses: Adjudication

In order to qualify for attorney fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994), an applicant must be a prevailing party in an adversary adjudication. Where the applicant has succeeded on a significant issue in the litigation which achieved the result it sought, and prevailed over BLM in gaining the vacation by the Board of an Administrative Law Judge order dismissing an appeal, which precluded BLM from implementing the terms of a settlement agreement that would have worked to the detriment of applicant, the applicant is a prevailing party even though it has not played the traditional role of adversary in an adjudication with the Department.

APPEARANCES: W. Alan Schroeder, Esq., Boise, Idaho, for Tuledad Grazing Association; David Nawi, Regional Solicitor, and John R. Payne, Assistant Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Tuledad Grazing Association (TGA) has appealed from a January 12, 1998, decision by Administrative Judge James H. Heffernan, denying an application for attorney fees and expenses, 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 procedural events giving rise to the present appeal are concisely set out in Nevada Division of Wildlife v. BLM, 138 IBLA 382 (1997).

Because those events are utilized in TGA's arguments supporting its application, we restate them here, as necessary, to provide a context for our decision.

On April 15, 1992, the District Manager, Susanville (California) District, Bureau of Land Management (BLM), issued a decision to grazing permittees in the Tuledad allotment that amended the grazing system and monitoring sections of the Tuledad Allotment Management Plan (Allotment Management Plan) for the next 3 years. The District Manager's decision required implementation of the following actions:

- a. Determine more conclusively which animals are using bitterbrush, to what extent they are using it and at what time of year they are using it by constructing three-way exclosures in bitterbrush areas.
- b. Make a minimum amount of bitterbrush available for deer use by eliminating almost all livestock grazing on significant bitterbrush stands after seed ripe on grass (July 15) with the intent of limiting livestock use on bitterbrush to less than 10% of the annual leader growth. Measure success with actual use by season and area, including leakage.

The decision made specific changes to the grazing system in the Allotment Management Plan for cattle and sheep for 1992, 1993, and 1994. To evaluate the effectiveness of the grazing system specified in the decision, the decision set forth changes to the monitoring section of the Allotment Management Plan that would be implemented. The decision stated it would become effective April 15, 1992, and would remain in effect until October 15, 1994.

BLM placed its decision into immediate effect, citing 43 C.F.R. § 4160.3(c) (1991). The Nevada Department (now Division) of Wildlife, the California Department of Fish and Game, the California Mule Deer Association, the Natural Resources Defense Council, the Sierra Club, the California Native Plant Society, and the Mountain Lion Foundation (hereinafter "original appellants") filed appeals. The appellant/applicant in the case now before us, TGA, consisting of several of the affected permittees, sought to intervene in the appeals. Administrative Law Judge Ramon M. Child, to whom the appeals were assigned, took TGA's Motion to Intervene under advisement. Before the scheduled hearing, the original appellants reached a settlement agreement (Stipulation) 1/ with BLM and withdrew their appeals.

1/ Paragraph 1 of the Stipulation provided:

"1. Alteration of Decisions. By February 15, 1994, BLM shall supplement and modify the Interim Grazing Decision, dated April 15, 1992, for the Tuledad Allotment in accordance with the provisions of this Stipulation. The modified Interim Grazing Decision shall be in effect until the earlier of either the adoption of a decision implementing an Integrated Activity Plan covering the Tuledad Allotment, or December 31, 1995."

Judge Child dismissed the appeals and denied the motion to intervene based on his understanding that the Stipulation was effectively a laundry list of procedures and strategies which BLM would consider in arriving at decisions in the future pertaining to the allotments, that it was not a condition essential to the dismissal of the action before him, and that the April 15, 1992, decision remained in effect. TGA appealed.

In Nevada Division of Wildlife, supra at 390-91, we characterized as follows the relationship between the April 15, 1992, decision and the Stipulation:

While BLM's April 15, 1992, Decision was to remain in effect until October 15, 1994, the Stipulation provided that annual grazing authorizations were to be issued no later than February 15, 1994, with the specified terms and conditions and placed in full force and effect. It is apparent the Stipulation modifies BLM's Decision; it is not apparent that any further BLM Decision would be needed to implement the Stipulation (apart, of course, from the annual authorizations).

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The members of [TGA] had a direct interest in BLM's April 15, 1992, Decision and any potential modifications of it, as the Motion to Intervene filed December 7, 1993, \* \* \* made clear. They would have been entitled to appeal the April 15, 1992, Decision. See Glenn Grenke v. BLM, 122 IBLA 123, 128-29 (1992). They were therefore entitled to intervene as a matter of right. United States v. United States Pumice Co., [37 IBLA 153, 157 (1978)].

Accordingly, we vacated Judge Child's January 10, 1994, orders dismissing the appeals from BLM's April 15, 1992, decision, granted TGA's motion to intervene and remanded the matter to the Hearings Division for hearing. Id. at 391.

On June 5, 1997, TGA filed an application for award of attorney fees and expenses totaling \$33,985.09 with the Board of Land Appeals (IBLA 97-325). On August 7, 1997, the Board issued an order referring this application to the Hearings Division.

On July 21, 1997, TGA filed a request to stay the EAJA application for attorney fees and expenses. In a September 19, 1997, order, Judge Heffernan scheduled a hearing on the merits of the grazing cases, pursuant to the Board's remand in Nevada Division of Wildlife, supra. Finding that no "final disposition" had as yet taken place, Judge Heffernan stayed TGA's EAJA application.

No hearing on the merits took place. The original appellants filed petitions to withdraw their appeals. TGA did not object to these petitions. Accordingly, by orders dated December 3 and 9, 1997, Judge

Hefferman dismissed those appeals. On December 23, 1997, TGA filed with the Hearings Division a motion to lift the stay and for a ruling upon its EAJA application.

In his January 12, 1998, decision, Judge Hefferman stated the issue to be whether TGA was a prevailing party under the EAJA and the regulations at 43 C.F.R. § 4.601 and 43 C.F.R. § 4.603(a). 43 C.F.R. § 4.601 provides in pertinent part:

Under the [EAJA] an eligible party may receive an award for attorney fees and other expenses when it prevails over the Department in an adversary adjudication under 5 U.S.C. 554 before the Office of Hearings and Appeals unless the Department's position as a party to the proceeding was substantially justified or special circumstances make an award unjust.

43 C.F.R. § 4.603(a) provides that "[t]hese rules apply to adversary adjudications required by statute to be conducted by the Secretary under 5 U.S.C. 554."

Judge Hefferman found that the test was whether the applicant was a prevailing party "over the Department" under 43 C.F.R. § 4.601. Citing Ann Marie Sayers, 115 IBLA 40 (1990), Judge Hefferman ruled:

It is the opinion of the undersigned that 43 C.F.R. § 4.601 and § 4.603(a), in context, require an adjudication on the merits of a case before a party or intervenor can be construed to have prevailed over the government for purposes of recovering fees under the auspices of EAJA.

In addition, the Judge found that TGA did not meet the test of 43 C.F.R. § 4.605(a), which requires, as does 43 C.F.R. § 4.601, that an applicant "be a party prevailing over the Department." In this case, the Judge found that TGA had intervened not in order to prevail over the Department but to support the Department's decision, which had been appealed and challenged by each of the original appellants.

TGA contends that it was a "prevailing party" because it "succeeded on \* \* \* significant issues in the litigation which achieved the benefits it sought." As examples of its success, TGA cites the Board's decision in Nevada Division of Wildlife, *supra*. TGA contends that its action in intervening resulted in the withdrawal of the original appellants' appeals, preventing BLM and the original appellants from implementing an agreement which would have adversely affected TGA's interests. (Statement of Reasons (SOR) at 12, 13.)

TGA further argues that it did not advocate the same outcome as BLM. TGA explains that what it wished to achieve was that BLM not accept the settlement agreement, which was adverse to TGA. Because it challenged the settlement agreement, TGA argues, it advocated a different outcome

than BLM after December 13, 1993, and because, as a result of its challenge, the other appellants filed unconditional withdrawals of their appeals, TGA was a prevailing party. (SOR at 14.)

BLM asserts that an adversary adjudication is a necessary element for qualification under the EAJA, that no adversary adjudication on the merits was conducted by any component of the Office of Hearings and Appeals and that without such an adjudication, an award is not proper.

BLM asserts that the fact that TGA obtained intervenor status did not make it a "prevailing party." BLM notes that the settlement agreement was never in issue and was not adjudicated. BLM states that TGA's goal throughout was to defend the April 15, 1992, decision.

[1] The EAJA defines the term "adversary adjudication" as "an adjudication under section 554 of [Title 5] in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license." 5 U.S.C. § 504(b)(1)(C)(i) (1994); see also 43 C.F.R. § 4.602(b). By its terms, 5 U.S.C. § 554 (1994) applies "in every case of adjudication required by statute to be determined on the record after the opportunity for an agency hearing," subject to certain exceptions not relevant here. In Collord v. U.S. Department of the Interior, 154 F.3d 933 (9th Cir. 1998), the court held that 5 U.S.C. § 554 (1994) applies where a hearing is required by due process, even though it may not be required by statute. Thus, we find that the grazing rights which were to be the subject of the Administrative Law Judge hearing were rights whose adjudication could form the basis for attorney's fees.

While in the case before us there was no "traditional" adversary adjudication pursuant to 5 U.S.C. § 504(b)(1)(C)(i) (1994), in the form of a hearing, we find that TGA's actions in anticipation of an adversary adjudication had the same effect. TGA's intervention in the grazing case, granted by the Board in Nevada Division of Wildlife, supra, was a necessary action enabling TGA to participate in the scheduled adversary adjudication. Although no such proceeding was ultimately held by either the Hearings Division or by this Board, it was TGA's participation that resulted in the withdrawal of the original appellants' appeals, and allowed TGA to prevail over the position then taken by the Department in supporting the settlement agreement, a position which would have been contested by TGA at an adjudicative hearing. We do not believe that TGA can be penalized for succeeding, lest all requests for settlement by the Department would be carefully declined by potentially successful litigants until after a hearing to ensure the preservation of the right to attorney fees. This approach would neither serve judicial economy nor the spirit of the Department's commitment to Alternative Dispute Resolution.

We likewise find that BLM's position in supporting the settlement agreement has not been shown to be "substantially justified." The agreement was clearly adverse to the applicant's members, grazing allottees with BLM permits, and it substantially differed, with its conditions, from BLM's

1992 grazing decision, issued pursuant to BLM grazing regulations, upon which applicant's members had a right to rely. See J. Claude Frey and Sons v. BLM, 145 IBLA 390, 392-393 (1998).

We further note that had the planned adjudication not been cancelled as a result of the withdrawals largely resulting from applicant's efforts, and the same result ensued from the formal adjudication as resulted from applicant's prehearing efforts, we would be hard pressed to find that applicant did not qualify for attorney fees. Moreover, with respect to the situation, as here, where the adjudication is precluded because the relief is obtained prior to hearing, we stated in the surface mining context, but applicable in principle here, that:

If subsequent to the filing of an appeal, but before the Board addresses the merits of the controversy, OSM takes some of the action requested by appellant, OSM concedes fees could be awarded if a causal nexus can be shown between the prosecution of the appeal and the action taken by OSM. We find this to be consistent with the prior Board action in [Donald] St. Clair [84 IBLA 236, 92 I.D. 1 (1985)]. Allowance of an award of fees where citizens have commenced a proceeding, but the action or inaction which is the subject of the complaint has been corrected without any formal judgment, has been found consistent with the regulatory standard where a showing has been made that the corrective action was taken as a result of the citizens' complaint. Donald St. Clair, supra at 265-66, 270-71, 92 I.D. at 17-18, 19-20.

Kentucky Resources Council, Inc. v. OSM, 137 IBLA 345, 351 (1997), rev'd Kentucky Resources Council, Inc. v. Babbitt, 997 F. Supp. 814 (E.D. Ky. 1998).

In Kentucky Resources Council, Inc. v. Babbitt, supra, the District Court reversed our finding that applicant was not entitled to costs and expenses because it had not shown a "causal nexus between its actions in prosecuting an appeal to the Board and the corrective actions taken by OSM in response to the citizen's complaints (137 IBLA at 352)." Kentucky Resources Council, Inc. v. Babbitt, supra at 820. The court, in holding that a causal connection had been shown and that petitioner was entitled to costs and expenses of both the appeal and the preliminary informal proceedings leading up to the appeal, remanded the case to the Department for determination of an appropriate award. Id. at 821.

Similarly, we find that Administrative Law Judge's findings appealed from here are erroneous. We find that applicant was a prevailing party in its dispute with the Department over the settlement agreement. If upheld, the settlement agreement would have been adverse to applicant's members' interests and in the interest of the Department. The prehearing process through which applicant challenged the position of the original appellants before the Department and prepared for an adjudicative hearing, was cancelled only because of applicant's singular efforts, and equated to an

adjudicative process, as determined in similar proceedings for purposes of attorney fees and costs within the context of section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1994). See Kentucky Resources Council, Inc. v. OSM (On Judicial Remand), 151 IBLA 324, 332 (2000).

Except to the extent they have been expressly or impliedly addressed in this decision, all other errors of fact or law raised by applicant are rejected on the ground that they are contrary to the facts or law or are immaterial.

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 decision appealed from is reversed and the case is remanded to the Hearings Division for a determination of applicant's costs and expenses, including attorney fees, as set forth herein.

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James P. Terry  
Administrative Judge

I concur:

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James L. Byrnes  
Chief Administrative Judge