



WESTERN WATERSHEDS PROJECT
IDAHO BIRD HUNTERS
IDAHO WILDLIFE FEDERATION
IDAHO NATIVE PLANT SOCIETY

171 IBLA 304

Decided June 26, 2007

Editor's Note: appeal filed, Civ. No. 07-498-E-BLW (D. ID. Nov. 21, 2007), aff'd (June 22, 2009), appeal filed No. 09-35708 (9th Cir. July 31, 2009), aff'd (Oct.12, 2007).



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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IBLA 2006-276

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Appeal from a decision of an Administrative Law Judge denying application for an award of attorney's fees and expenses. ID 130-2005-026 - ID 130-2005-35.

Affirmed as modified.

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

A challenge to the renewal of grazing permits is a challenge to the granting of a "license" within the meaning of 5 U.S.C. § 504(b)(1)(C)(i) (2000) and, as such, is statutorily excepted under the Equal Access to Justice Act from the allowance of an award for fees and expenses incurred in pursuing the challenge.

APPEARANCES: Todd C. Tucci, Esq., Boise, Idaho, for appellants; Kenneth M. Sebby, Esq., Office of the Field Solicitor, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Western Watersheds Project (WWP), Idaho Bird Hunters, Inc. (IBH), Idaho Wildlife Foundation (IWF), and Idaho Native Plant Society (Plant Society), or collectively, appellants, have appealed Administrative Law Judge James H. Heffernan's July 25, 2006, Order (EAJA Order) denying their application for award of attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000), for their prosecution of the underlying consolidated matters in *Western Watersheds Project, et al. v. BLM*, ID 130-2005-026 through ID 130-2005-035.

As explained by the ALJ, the underlying consolidated matters were initiated by appellants in separate appeals from and petitions for stay of five Final Decisions

(Final Decisions), each dated April 22, 2005, and issued by the Field Manager, Owyhee Field Office, Bureau of Land Management (BLM). The Final Decisions provided for the renewal of five 10-year grazing permits to the permittees¹ of the Hardtrigger Allotment (Allotment) which is located approximately 10 miles south of Marsing, Idaho.²

Each of the Final Decisions was based on Environmental Assessment (EA) #ID 130-2005-EA-759. They were identical except for the name and address of the permittee and the amount of grazing use authorized. By Order dated July 5, 2005, the ALJ consolidated the 10 appeals, ID 130-2005-026 through ID 130-2005-035. EAJA Order at 1.

Taken together, the Final Decisions decreased the amount of authorized active grazing use in the Allotment by approximately 16%. The Final Decisions also authorized the construction of at least 15 range improvements, including spring developments, pipelines, troughs, fences, and cattle guards. Upon the completion of a particular fence and two pipelines, the decisions implemented a grazing rotation system, periodically deferring spring grazing in the spring pastures. The Final Decisions provided that until these three improvements were constructed, pasture rotation would occur in accordance with an “interim management” system.

On July 5, 2005, the ALJ issued an order granting in part and denying in part appellants’ petition for stay. The ALJ stayed all construction of range improvements solely in order to maintain the status quo pending appeal. For the same reason, he denied the request for a stay of implementation of the “interim management” system,

¹ The Permittees included William (Bill) Watterson (Watterson), Mike and Judy Henderson (Henderson), Anna M. Curtis, Calvin Johnston (Johnston), and Richard and Connie Brandau (Brandau). WWP, IBH, and IWF challenged a permit renewal issued to Brandau (ID 130-2005-026) as did Plant Society (ID 130-2005-031). WWP, IBH, and IWF (ID 130-2005-027) and Plant Society (ID 130-2005-032) challenged a permit renewal issued to Watterson. WWP, IBH, and IWF (ID 130-2005-028) and Plant Society (ID 130-2005-033) challenged a second permit renewal issued to Watterson. WWP, IBH, and IWF (ID 130-2005-029) and Plant Society (ID 130-2005-034) challenged a renewal permit issued to Johnston. WWP, IBH, and IWF (ID 130-2005-030) and Plant Society (ID 130-2005-035) challenged a renewal permit issued to Henderson

² The Hardtrigger Allotment contains 21,588 acres of public land administered by BLM, 1,230 acres of state land, and 1,847 acres of private land. The Allotment is divided into five designated pastures, the Alfalfa, Opalene, Hardtrigger, Piutte Butte, and Hemingway pastures. BLM Answer/Response to Appellant’s Statement of Reasons (Answer) at 1-2.

which reduced the number of active animal unit month (AUMs). He reasoned that resorting to the previous grazing management system under prior permits which authorized a higher grazing use would be more harmful to the Allotment than denying such a stay.

A hearing originally set for September 19, 2005, was reset to commence on December 12, 2005. On October 20, 2005, BLM filed a “Request for Remand to Issue a New Proposed Decision,” in which it requested that the consolidated matters be remanded to the Field Manager for the purpose of having him issue new proposed decisions. BLM represented that the portion of the Final Decisions which had not been stayed, specifically the “interim management” grazing system including the reduction in AUMs, would remain in effect pending issuance of a new proposed decision. On October 21, 2005, the ALJ denied BLM’s request, asserting that granting BLM’s request “would deprive the Appellants and Intervenors of the procedural right to adjudicate that portion of BLM’s Final Decision which was not stayed, namely, the interim grazing system.” EAJA Order at 5, *quoting* Oct. 21, 2005, Order at 5.

Thereafter, on November 9, 2005, BLM filed a “Request to Vacate and Remand Decision.” Appellants opposed it. The ALJ denied BLM’s request on November 22, 2005, concluding, *inter alia*, that having timely filed their appeals, appellants “had a jurisdictional procedural right to adjudicate the grazing portion of BLM’s Final Decisions that could not be unilaterally subverted by BLM through a request to vacate.” EAJA Order, *quoting* Nov. 22, 2005, Order. BLM immediately sought reconsideration, but the ALJ denied this request on November 23, 2005.

Days before a scheduled hearing, on December 8, 2005, the parties entered into a Joint Stipulated Settlement Agreement (Settlement Agreement) and filed with the ALJ a Joint Motion for Remand, to which they attached a copy of the executed Settlement Agreement. By order dated December 8, 2005, the ALJ approved the parties’ Settlement Agreement and granted the Joint Motion for Remand.³ EAJA Order at 5. On January 9, 2006, appellants filed their application for \$16,652.44 in attorney’s fees and costs under EAJA. In his July 25, 2005, Order, the ALJ denied

³ The Dec. 8, 2005, Order captioned “Joint Motion for Remand Granted, Public Hearings Cancelled” reads, *inter alia*: “For good cause shown therein, the Joint Motion for Remand is *granted*, and the parties’ Joint Stipulated Settlement Agreement is *approved*. Pursuant to the terms of said Agreement, the April 22, 2005, Final Decisions of the [BLM], Owyhee Field Office, covering the Hardtrigger Allotment, which are on appeal herein, are *reversed*, and *docket numbers ID 130-2005-026-035*, are *remanded to BLM for further action and adjudication in accord with the parties’ Settlement Agreement*. The public hearings in these consolidated dockets, which were previously scheduled to commence on December 12, 2005, and January 23, 2006, are *cancelled*.” Order at 1.

appellants' EAJA application finding that appellants were not a "prevailing party," pursuant to EAJA. EAJA Order at 5-9. Appellants timely appealed.

On appeal appellants charge that the ALJ erred in holding that they were not a "prevailing party." Statement of Reasons (SOR) at 10. Appellants argue that the ALJ's December 8, 2005, dismissal order approving the Settlement Agreement and reversing and remanding the challenged Final Decisions and the stay order barring construction of improvements on the allotment constituted sufficient "administrative imprimatur" to alter the legal relationship between appellants and BLM, entitling appellants to an award of fees and expenses under EAJA. SOR at 11-18. The disposition of this case, appellants contend, is controlled by *Tuledad Grazing Association*, 153 IBLA 25 (2005),⁴ and *Jay Claude Frei and Sons v. BLM*, 145 IBLA 390 (1998). SOR at 20.

BLM supports the decision of the ALJ. It notes that the ALJ was correct in concluding that appellants are not a prevailing party because the ultimate terms of the grazing permits are yet to be established, and may yet contain terms to which appellants object. Answer at 15-21. BLM contends that the ALJ's decision to grant in part the stay request does not change this conclusion: first, because the ALJ denied appellants' request to stay the interim grazing use allowed and, second, because, to the extent he granted the stay, it was only to prevent the construction of range improvements pending appeal so as to maintain the status quo. *Id.* at 24-25. BLM also complains that much of the expenditure for the appeals was due to appellants' refusal to agree to a remand, which is the very relief accorded by the settlement. Thus, according to BLM, the appellants could have saved themselves and BLM considerable expense by agreeing to a remand rather than opposing it. BLM also argues that its position was substantially justified. *Id.* at 21-24.

Notably, BLM also maintained before the ALJ and continues to maintain before this Board that this case should be controlled by *William J. Thoman*, 157 IBLA 95 (2002). Under this precedent, BLM denies that attorney's fees and expenses are allowed in this case because the underlying proceeding was an "adjudication for purposes of establishing or fixing a rate or for the purposes of granting or renewing a license," as provided in 5 U.S.C. § 504(b)(1)(C)(i) (2000), and is therefore statutorily excluded from EAJA. Answer at 13-15.

We agree that this Board's decision in *William J. Thoman* controls the disposition of this case and thus affirm the ALJ's conclusion as modified to reflect that outcome. It cannot be disputed that what appellants were challenging in this case was *renewals* of five 10-year grazing permits on the Allotment.

⁴ We denied reconsideration twice in *Tuledad*. May 28, 2004, Order Denying Second Petition and Oct. 6, 2003, Order denying Petition for Reconsideration.

In *William J. Thoman*, we held that grazing permits issued under the authority of the Taylor Grazing Act, 43 U.S.C. § 315b (2000), are “licenses” within the meaning of 5 U.S.C. § 504(b)(1)(C)(i) (2000). EAJA provides that:

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.

5 U.S.C. § 504(a)(1) (2000). The Department has implemented EAJA in Subpart F of the Code of Federal Regulations beginning at 43 C.F.R. § 4.601. The rule at 43 C.F.R. § 4.601(a) repeats the statutory language quoted above. But EAJA defines an “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 purposes 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) (2000) (emphasis added).⁵

Although grazing appeals can lead to adjudications for purposes of 5 U.S.C. § 554 (2000), *United States v. Ericsson*, 98 IBLA 258 (1987); *see also William J. Thoman*, 157 IBLA at 100-101, this case nonetheless falls within one of the exceptions to the class of adversary adjudications for which fees are awarded. Specifically, this appeal involves the granting or renewal of a “license” within the meaning of the EAJA exclusion.

In *William J. Thoman*, we modified and explained our decision in *BLM v. Cosimati*, 131 IBLA 390 (1995), finding that the Board erred in the *Cosimati* decision to the extent that it held that grazing permits are not “licenses” within the meaning of EAJA. 157 IBLA at 104. Instead, we noted in *Thoman* that the Department has long recognized that the definitions of “license” and “licensing” in 5 U.S.C. § 551(8), (9) (2000) include grazing permits and proceedings involving grazing permits. 157 IBLA at 104, *citing Frank Halls*, 62 I.D. 344 (1955). In so holding, we observed that the exclusion in EAJA’s coverage does not go to every case involving a “license,” but rather only to those adjudications “for the purpose of granting or renewing a license.” 5 U.S.C. § 504(b)(1)(C)(i) (2000). We quoted with approval the *Cosimati* decision’s

⁵ The Feb. 8, 2006, version of the Department’s EAJA regulations, 71 Fed. Reg. 6366, states that it applies “to any application for an award of attorney fees and other expenses that is, (1) [p]ending on February 8, 2006; or (2) [f]iled on or after February 8, 2006.” Due to the pendency of the appeal of the ALJ’s decision before this Board, appellants’ application for attorney’s fees was pending on Feb. 8, 2006.

reliance on the legislative history of EAJA, which indicated that Congress intended that the exclusion be somewhat narrowly interpreted. Specifically, Congress stated that the exclusion was not intended to “extend to proceedings under section 554 involving the suspension, annulment, withdrawal, limitation, amendment, modification or conditioning of [a] license.” H. R. Rep. No. 96-1418 at 15, *reprinted in* 1980 U.S.C.A.A.N. at 4994. We reasoned in *Thoman*:

The dividing line seems to be between those activities in which the Government is acting in a purely proprietary capacity in deciding whether or not to grant or renew a license affording rights to individuals (in this case denominated as a grazing permit), and those actions subsequently undertaken within the confines of an issued license which may adversely impact upon the enjoyment of rights already conferred by the Government. In the former, no award of fees and expenses under the EAJA can be authorized, regardless of any ultimate success an applicant might achieve in obtaining substantive relief, while, in the latter situation, an award of fees and expenses may be authorized if the individual otherwise establishes his or her qualifications for an award under the terms of the EAJA.

157 IBLA at 105.

We rejected Thoman’s argument that his challenge to the granting of a public land crossing permit to Big Sandy and Green River Livestock Co. (BS&GR) was an outgrowth of his attempts to protect his interest under his grazing permit such that it was an adversary adjudication for which he was entitled to fees. In so doing, we rejected his contention that the crossing permit issued to BS&GR “was an amendment, modification or conditioning of [his grazing] license” for which an adversary adjudication would justify fees, and held that the issue was the granting of a license (the crossing permit) for which fees were not allowed under EAJA. We explained that while it may well be that the “overriding reason that Thoman challenged the crossing permit was a desire to protect his operations from what he viewed as an undesirable incursion, [an] appellant’s subjective motivation for pursuing an appeal cannot change the fact that the matter he was contesting was the issuance of a crossing permit to BS&GR.” 157 IBLA at 106.

We recognize here that construing the EAJA exception narrowly could support an argument, advanced by appellants, that they were not challenging a permit renewal decision so much as the allotment management decisions addressed in the EA. Under this reading, it could be argued that a grazing permittee appealing a decision to grant or renew its permit would fall within the EAJA exception, such that he or she could not recover fees, while an environmental or other group challenging precisely the same decision would fall outside the exception because the group was

protecting other interests, and could recover fees. Reading the exception this way would support the view that EAJA meant to prohibit persons such as grazing licensees or permittees from being compensated for pursuing the terms of the very license or license renewal for which they had applied.

Nonetheless, in *Thoman*, this Board already considered this question and chose to follow an approach that applies the exclusion based on the nature of the appeal and not the identity of the appellant. In fact, in a footnote we observed:

Had an environmental group, rather than Thoman challenged issuance of the same crossing permit to BS&GR, alleging that unacceptable damage to forage would occur if the permit were granted, there would be little doubt that the proceeding involved a challenge to the issuance of a license, *i.e.*, the crossing permit. That the challenge was in actuality brought by Thoman, himself a grazing permittee, may obscure this fundamental fact, but it cannot change it.

157 IBLA at 106 n.10. Having already decided the question of whether to except environmental challenges from the rule excluding fee awards for challenges to permit renewals, we follow our prior ruling as we see no reason to amend it now.

In fact, our conclusion in *Thoman*, at footnote 10, comports with the Supreme Court's analysis that waivers of sovereign immunity by the United States must also be construed narrowly. In *Kaycee Bentonite*, 79 IBLA 182, 91 I.D. 138 (1984), we noted our obligation to construe the waiver in EAJA narrowly:

In *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685, 103 S.Ct. 3274, 3277 (1983), the Supreme Court reiterated the following principles as governing the construction of any statute authorizing an award of attorney's fees by the Government:

Except to the extent it has waived its immunity, the Government is immune from claims for attorney's fees, *Alyeska [Pipeline Co. v. Wilderness Society]*, 421 U.S. 240,] 267-268, and n.42, 95 S.Ct. at 1626, and n.42. Waivers of immunity must be "construed strictly in favor of the sovereign," *McMahon v. United States*, 342 U.S. 25, 27, 72 S.Ct. 17, 19, 96 L.Ed. 268 (1951), and not "enlarge[d] . . . beyond what the language requires," *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686, 47 S.Ct. 289, 291, 71 L.Ed. 472 (1927).

Thus, we are required to reject any application for an award of attorney's fees that would require us to depart from a strict construction of the language of the statute.

79 IBLA 185; *see also Ardestani v. I.N.S.*, 502 U.S. 129, 137, 112 S. Ct. 515, 520 (1991) (“EAJA renders the United States liable for attorney’s fees for which it otherwise would not be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States.”)

[1] The factual scenario referenced in the *Thoman* footnote is the analog to the scenario presented here. Appellants here challenged the renewal of five 10-year grazing permits; therefore, their appeals are challenges to permit renewals which fall within adjudications excluded from those for which an award of attorney’s fees and expenses is allowed under 5 U.S.C. § 504(b)(1)(C)(i) (2000). We will not look behind the *Thoman* decision to parse out portions of appeals based on the subjective motivations of appellants in challenging BLM’s consideration in its EA. As in *Thoman*, the “overriding reason” that appellants challenged the permit renewals was that BLM allowed grazing in them. 157 IBLA at 106. Had BLM denied grazing permits, it would not have approved grazing improvements, and appellants would not have appealed. Likewise, “appellants’ subjective motivation for pursuing an appeal cannot change the fact that the matter [they were] contesting was the issuance of a [grazing] permit to [grazers].” *Id.*

Finally, while we affirm as modified, this should not imply that we necessarily disagree with the ALJ’s conclusion that appellants have not demonstrated that they are prevailing parties. Rather, our decision to affirm as modified reflects our choice to conform an EAJA conclusion with a decision of the Board, *Thoman*, which carefully reconsidered and repudiated in part a prior Board decision, *BLM v. Cosimati*. Our modification of the outcome seeks consistency with *Thoman*.

Appellants explain that these appeals are the latest step in a series of judicial and administrative proceedings involving these permits and this Allotment. Environmental groups first appealed a set of grazing decisions in *IWP v. Hahn*, and won. No. CV-97-0519-S-BLW (D. Idaho). In 1999, the District Court ordered BLM to reconsider management, *inter alia*, of the Hardtrigger Allotment. It did so, also in 1999, issuing permits to the grazers. The grazers appealed; in 2003, they then settled with BLM. WWP and others challenged the 2003 decision in Federal court. *WWP v. Secrist*, No. 04-0167-S-BLW (D. Idaho). BLM *sua sponte* withdrew the actions at issue in the 2003 decision in order to revisit grazing management in an EA. After performing further NEPA review, it issued the 2005 permit renewal decisions at issue here. Now, appellants claim that the ALJ’s December 8, 2005, Order approving the Settlement Agreement shows that they prevailed in their appeals because the ALJ

granted substantive relief, in the form of cancellation of construction plans, NEPA analysis, and the added protections found in the interim grazing system. SOR at 11.⁶

We agree with the ALJ that, at most, he granted the joint motion for remand pending the review BLM agreed to undertake in the Settlement Agreement. The fact that the appellants appealed, and refused to agree to BLM's decision to request a remand until BLM entered into a Settlement Agreement by which it would obtain a remand, does not reflect that the proceedings in this case have resulted in appellants' ultimate desired goal. The Settlement Agreement ensures that BLM will consider the Allotment issues, but BLM may yet choose the same, an increased, or a decreased grazing level in subsequent permits. While delay may be to appellants' advantage, it is not the same as "prevailing." We also agree with BLM that a large portion of the fees sought can be attributed to appellants' opposition to BLM's three requests to remand the matter to BLM. Nonetheless, we modify the decision to rely on the analysis in *Thoman*, for reasons stated above.

Therefore, 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 affirmed as modified.

/s/

Lisa Hemmer
Administrative Judge

I concur:

/s/

R. Bryan McDaniel
Administrative Judge

⁶ These assertions are not accurate. The ALJ did not prohibit the construction projects or mention them in his order, nor did he direct particular NEPA obligations. Moreover, while appellants champion the interim grazing system left in place, this is the same system established in the Final Decisions which appellants unsuccessfully asked the ALJ to stay.