



LONE TREE CATTLE COMPANY

175 IBLA 37

Decided June 27, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

LONE TREE CATTLE COMPANY

IBLA 2007-162

Decided June 27, 2008

Appeal from a decision of an Administrative Law Judge denying an application for an award of attorney's fees and expenses. CA-170-01-01/EAJA, *et al.*

Affirmed as modified.

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

A grazing permit is a license within the meaning of the Equal Access to Justice Act, 5 U.S.C. § 504(b)(1)(C)(i) (2000). Under the Act, an adjudication for the purpose of granting or renewing a license does not constitute an adversary adjudication for which attorneys fees and expenses can be awarded.

APPEARANCES: W. Alan Schroeder, Esq., Boise, Idaho, for Lone Tree Cattle Company.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Lone Tree Cattle Company (Lone Tree) has appealed Administrative Law Judge Andrew S. Pearlstein's April 12, 2007, decision denying its application for award of attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000), for its prosecution of the underlying consolidated matters in *Lone Tree Cattle Company v. Bureau of Land Management (BLM)*, dismissed by Order dated August 8, 2006. We affirm Judge Pearlstein's denial, but on a different ground.

Background

Lone Tree is the holder of grazing preferences and permits for four allotments in the Bishop, California, grazing district. In the underlying proceeding, Lone Tree appealed six grazing decisions of the Bishop Field Office, BLM, issued February 19, 2001 (CA-170-01-01, grazing permit); March 12, 2001 (CA-170-01-01 (MCFGP),

environmental assessment (EA)/finding of no significant impact (FONSI)/decision record (DR)); May 9, 2003 (CA-170-03-02, final grazing decision); July 31, 2003 (CA-170-03-04, grazing permit); May 5, 2003 (CA-170-03-05 EA/FONSI/DR served on Lone Tree on September 2, 2003); and May 28, 2003 (CA-170-03-06 EA/FONSI/DR served on Lone Tree on September 2, 2003). These decisions analyzed and/or established terms and conditions for Lone Tree's grazing permits within the four allotments. The decisions issued in 2001 concerned two permits issued for 1-year terms and the 2003 decisions concerned four permits issued for 10-year terms. Each permit included a term that read as follows: "Comply with the Central CA [California] Standards and Guidelines for livestock grazing management."

A. Central California Standards and Guidelines

BLM amended its grazing regulations in 1995, 60 Fed. Reg. 9969 (Feb. 22, 1995), with a call for separate standards and guidelines to be formulated for specific geographic areas. The Secretary of the Interior approved the Central California Standards and Guidelines (CCS&G) on July 13, 2000, a management document that had been prepared by the California State Office, BLM, under Secretarial recommendation and in compliance with 43 C.F.R. Subpart 4180. The CCS&G were developed in consultation with the Central California Resource Advisory Council and involved full public participation. They were also analyzed in an environmental impact statement. Upon approval by the Secretary, the Bishop Field Office amended its range management plan (RMP) to include the new standards and guidelines. In December 2000, BLM sent letters to the grazing permittees in the Bishop grazing district, enclosing the CCS&G.

Shortly thereafter in 2001, BLM began its review of the grazing permits held by Lone Tree and proceeded to issue new permits which included the provision "Comply with the Central CA Standards and Guidelines for livestock grazing management." The inclusion of this provision was the substance of the several challenges filed by Lone Tree in 2001 and 2003. Lone Tree's Memorandum in Support of Application filed Sept. 11, 2006, at 2. The appeals were assigned to Judge William E. Hammett and ultimately consolidated for review.

B. Judge Hammett's Order Clarifying Proper Scope of Appeals

As agreed in conference with Judge Hammett, the parties prepared briefs discussing the proper scope of the appeals and the application of the CCS&G. At the onset, BLM sought a ruling limiting the scope of the proceeding, arguing that Judge Hammett, under his delegated authority, did not have jurisdiction to directly review the Secretary-approved CCS&G or the RMP. On July 12, 2004, Judge Hammett issued a 33-page "Order Clarifying Proper Scope of Appeals."

Judge Hammett concluded that he did not have jurisdiction to consider direct challenges to the CCS&G or the RMP, but that he could review whether they had been properly interpreted and implemented. Order at 4-7. He set out the appeal points that would be addressed as asserted grounds of error and those that would be excluded from further discussion. Order at 22-31.

Judge Hammett observed with respect to BLM's added stipulation requiring compliance with the CCS&G:

BLM's decision to include a term and condition in each of the grazing permits requiring "compliance" with the [CCS&G] is misguided. In essence, what this term and condition does is to make the four standards and 18 guidelines found in the [CCS&G] separate terms and conditions in each grazing permit. . . . [A] requirement that a permittee "comply" with the [CCS&G] skips an important step, and places an inappropriate burden on the permittee.

Order at 8. Concluding with "it appears that the Department did not anticipate that BLM would make each standard and each guideline a separate term and condition of each permit," Judge Hammett stated: "Therefore, this forum finds that the requirement . . . is an unreasonable term and condition, and this forum intends to vacate this term and condition when it issues its final order(s) in the cases at issue." *Id.* at 9.

At the close of his Order, Judge Hammett declared that "[t]his is an interim order designed to clarify the appeals for further proceedings, as opposed to a final order subject to appeal. . . . [T]his order is not appropriate for interlocutory appeal . . . because it does not involve rulings which, left undisturbed, necessarily result in specific dispositions of the cases." Order at 31. He did confirm, however, that he intended to incorporate his order in any final orders adjudicating each appeal. *Id.* at 32.

Following his ruling, Judge Hammett passed away and these grazing appeals were transferred to Judge Pearlstein in October 2005. As a result, we find that Judge Hammett did not act to vacate the objectionable term and the matter was left for Judge Pearlstein to consider.

C. Settlement

Shortly after he assumed responsibility over this matter, Judge Pearlstein contacted the parties and was informed that, based upon ongoing negotiations, BLM "intend[s] to issue new grazing decisions and permits" and "also intends to engage in consultation with the appellants in fashioning new or modified terms and conditions

appropriate to the particular circumstances of each affected grazing allotment.” Order Directing Status Reports dated Dec. 8, 2005, at 1. Whether BLM’s decisions should be vacated or the decisions stayed pending the outcome of the negotiations was discussed with the parties, but Judge Pearlstein determined not to implement either course of action. *Id.* at 2. Eventually, a Stipulation of Agreement, Motion to Remand and Vacate, and Motion to Dismiss Appeals were filed on August 8, 2006. “Under this agreement, BLM will issue new fully processed permits within [2] years, while the allotments may continue to be grazed” Orders Dismissing Proceeding dated Aug. 8, 2006. Judge Pearlstein accordingly dismissed the proceeding “with prejudice” and remanded and vacated the appealed decisions. *Id.*

D. EAJA Application

On September 7, 2006, Lone Tree filed an application for an award of fees and expenses pursuant to the EAJA, seeking a total award in the amount of \$45,221.57. In its memorandum in support of its application for fees and expenses, Lone Tree asserted it was a prevailing party in an adversary adjudication in which BLM’s position was not substantially justified, thus entitling it to an award.

E. Judge Pearlstein’s Denial of the EAJA Application

In his April 12, 2007, Decision, Judge Pearlstein concluded that Lone Tree was not a “prevailing party” within the meaning of the EAJA, because the underlying grazing appeals were resolved by a settlement agreement. Decision at 1. In his discussion, Judge Pearlstein noted that the EAJA provides for an award to the prevailing party unless the adjudicative officer finds that the agency’s position was substantially justified. *See* 5 U.S.C. § 504(a)(1) (2000). He observed that in its opposition to the EAJA application, BLM focused on whether its actions were “substantially justified.” Decision at 8. Judge Pearlstein, however, concentrated on whether Lone Tree was a “prevailing party.” *Id.*

Citing *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), Judge Pearlstein stated that, in addition to gaining the results desired, a party asserting “prevailing party” status must demonstrate a change in the legal relationship of the parties. Adhering to the principle established in *Buckhannon* that the change in legal relationship also requires “judicial imprimatur,” Judge Pearlstein reasoned that Judge Hammett’s ruling at a preliminary stage of the proceeding was not a final disposition on the matter, but merely signaled his intentions, and therefore did not have any material effect on the legal relationship between the parties. Decision at 11-12. He further remarked that Judge Hammett’s ruling on a general compliance term was only a small part of the order and was “essentially procedural.” *Id.* at 12. In his final observation, Judge Pearlstein recognized that under *Buckhannon* and the preamble to recent revisions to

the EAJA regulations, a settlement or voluntary dismissal is not a sufficient basis for an award. *Id.* at 13.

Lone Tree has appealed, arguing that the Judge Hammett's Order Clarifying Proper Scope of Appeals, not Judge Pearlstein's Dismissal Order, is the basis for the "prevailing party" status. Lone Tree contends that the insertion of the term, "Comply with the [CCS&G]," in the grazing permits was the primary issue and that the parties' relationship was altered because of Judge Hammett's ruling, producing the result Lone Tree sought. Lone Tree argues that Judge Pearlstein erred in holding that it was not a "prevailing party."

Discussion

[1] As stated, Judge Pearlstein's decision denying an award of attorney's fees and expenses is properly affirmed, but for a different reason than that articulated in the decision. Lone Tree challenged the renewal of a 1-year grazing permit and the issuance of four 10-year grazing permits. The issuance or renewal of a license is within the class of adjudications for which an award of attorney's fees and expenses is excluded under the EAJA. 5 U.S.C. § 504(b)(1)(C)(i) (2000). The EAJA provides:

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 EAJA defines an "adversary adjudication" as "*an adjudication* under section 554 of [the Administrative Procedure Act in 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); *William J. Thoman*, 157 IBLA 95, 105 (2002).

Despite the clear language of the statute, Lone Tree asserts that an award of fees in this case is not excluded, arguing that "the appealed decisions did not simply grant or renew LTCC's Grazing Permit, but limited it, modified it, and conditioned it with *at least* different terms & conditions, as BLM concedes by their own statements. [Footnote omitted.]" (Emphasis in the original.) Reply at 4. Lone Tree's characterization of BLM's decisions cannot be sustained. As the Board stated in explaining the difference between a decision granting or renewing a license and one that modifies, amends, or conditions a license,

[t]he 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.^[1]

William J. Thoman, 157 IBLA at 105 (emphasis added). As the decisions Lone Tree appealed clearly did not pertain to subsequent actions affecting rights already conferred under a grazing permit it then held, an award for fees and expenses under the EAJA was properly denied. *See Western Watersheds Projects*, 171 IBLA 304, 308 (2007). Judge Pearlstein's decision is modified accordingly and affirmed as so modified.²

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/
T. Britt Price
Administrative Judge

¹ Lone Tree relies on the Declaration of Bill Dunkelberger, the Bishop Office Field Manager, in which he averred that BLM had "issued *new temporary grazing permits* . . . containing terms and conditions derived from the new standards and guidelines." Ex. 12 to BLM's Dec. 9, 2003, Brief Relating to Standards and Guidelines (filed in lieu of cross-motions for summary judgment), ¶ 5 (emphasis added). Lone Tree's reliance on Dunkelberger's statement is plainly misplaced.

² That we have modified Judge Pearlstein's decision is not to state or imply that we disagree with his conclusion that Lone Tree failed to demonstrate that it was the prevailing party.

I concur:

_____/s/
Geoffrey Heath
Administrative Judge