



ROBERT W. & MARJORIE E. MILLER

177 IBLA 352

Decided June 23, 2009



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

ROBERT W. & MARJORIE E. MILLER

IBLA 2007-133

Decided June 23, 2009

Appeal from a decision of Administrative Law Judge Andrew S. Pearlstein denying an application for attorney's fees and expenses under the Equal Access to Justice Act for participation in a Government mining claim contest proceeding and subsequent appeal. Colorado 762/EAJA.

Affirmed as modified.

1. Attorney Fees: Equal Access to Justice Act: Adversary Adjudication--Attorney Fees: Equal Access to Justice Act: Application and Jurisdiction--Equal Access to Justice Act: Adversary Adjudication--Equal Access to Justice Act: Application--Mining Claims: Contests

Except where the prevailing law of the United States Court of Appeals for the Ninth Circuit, embodied in *Collord v. U.S. Department of the Interior*, 154 F.3d 933 (9th Cir. 1998), controls, an application for attorney's fees and expenses under section 203(a)(1) of the Equal Access to Justice Act, 5 U.S.C. § 504 (2006), is properly denied for a Government mining claim contest proceeding arising under the General Mining Law of 1872, 30 U.S.C. §§ 21-54 (2006), because such a proceeding does not constitute an "adversary adjudication," as defined in section 203(b)(1)(C) of the Equal Access to Justice Act, 5 U.S.C. § 504(b)(1)(C) (2006).

APPEARANCES: Paul Zogg, Esq., Boulder, Colorado, for Robert W. and Marjorie E. Miller; Daniel B. Rosenbluth, Esq., Office of the General Counsel, U.S. Department of Agriculture, Denver, Colorado, for the United States.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Robert W. and Marjorie E. Miller have appealed from a February 16, 2007, decision of Administrative Law Judge (ALJ) Andrew S. Pearlstein, denying their application filed under section 203(a)(1) of the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1) (2006), and the Department's implementing regulations, 43 C.F.R. §§ 4.601-4.628, for an award of attorney's fees and expenses in connection with the Government's contest of the Robin Redbreast Lode mining claim, CMC-164159.¹ The claim is situated in sec. 34, T. 45 N., R. 6 W., New Mexico Principal Meridian, Hinsdale County, Colorado, in the Uncompahgre Wilderness Area, within the Uncompahgre National Forest. The lands embraced by the claim, which are under the administrative jurisdiction of the Forest Service, U.S. Department of Agriculture, were withdrawn from location under the mining laws on January 1, 1984.

The Millers ask the Board to reverse the decision of Judge Pearlstein and find that the Forest Service's case lacked substantial justification under EAJA, both in the adjudicative contest hearing and in the appeal to the Board.

In this decision, we conclude that the mining claim contest proceeding in this case is not an "adversary adjudication" under EAJA for which a claimant may seek attorney's fees and expenses. For that reason, we affirm ALJ Pearlstein's denial of the application. We also conclude that, even if the proceeding in question were to be considered an "adversary adjudication," ALJ Pearlstein correctly decided that the Government was substantially justified in pursuing the contest and subsequent administrative review.

I. Factual and Procedural Background

The history of the Millers' involvement with the Robin Redbreast Lode mining claim is set forth in detail in this Board's decision in *United States v. Miller*, 165 IBLA

¹ We note that by decision dated Mar. 31, 2008, the Colorado State Office, Bureau of Land Management (BLM), declared five lode mining claims held by the Millers, including the Robin Redbreast Lode claim, CMC-164159, forfeited and void by operation of law for failure to pay the \$125 per claim maintenance fee or to file a Maintenance Fee Payment Waiver Certification on or before Sept. 1, 2007, for the 2008 assessment year. By order dated July 15, 2008, the Board affirmed that decision. *Robert and Marjorie Miller*, IBLA 2008-149.

342, 344 (2005), and will only briefly be discussed herein in order to give context to the present appeal.

The Robin Redbreast Lode mining claim has been the subject of two contest proceedings before the Hearings Division, Office of Hearings and Appeals, and this Board, each initiated by the filing of a contest complaint by the United States, acting through BLM, on behalf of the Forest Service, the first in 1992 (Colorado 754) and the second in 1999 (Colorado 762). Each contest was based on the results of a Forest Service mineral examination, which consisted of field inspections of the claim, sampling surface and underground exposures of the Robin Redbreast vein and other areas of interest, fire assaying of the samples, and evaluation of the quality and quantity of mineralization and, ultimately, the profitability of developing the mineral ore deposit.

In each contest, the Government, relying on the results of the Forest Service's mineral examination, challenged the claim on the basis that a valuable mineral deposit had not been discovered within the boundaries of the claim, as required by 30 U.S.C. § 22 (2006), either before withdrawal of the land from mineral entry or at the time of initiation of the contest. In each instance, an ALJ held a hearing and issued a decision.

In the first contest proceeding, ALJ John R. Rampton, Jr., issued a November 21, 1993, decision declaring the claim invalid, based on his conclusion that the Millers had failed to overcome, by a preponderance of the evidence, the Government's prima facie case that the claim was not supported by the discovery of a valuable mineral deposit. On appeal, this Board reversed, concluding that Judge Rampton erred, as a matter of law, in considering all of the evidence offered by both parties in determining whether the Government established its prima facie case. Exercising our de novo review authority, we held in *United States v. Miller*, 138 IBLA 246 (1997), that the Government had failed, solely on the basis of the evidence offered in its case-in-chief, to establish a prima facie case that the claim was not supported by the discovery of a valuable mineral deposit, and that the evidence, as a whole, did not establish a lack of discovery. Finally, we noted that, despite our ruling, the Government retained the authority to bring another contest were it to determine, based on new evidence, that "there is not a reasonable likelihood that the mineral from the claim can be mined, milled, and marketed at a profit." 138 IBLA at 281.

Thereafter, the Forest Service pursued a second contest, and, on July 31, 2003, following a hearing, Judge Pearlstein issued a decision dismissing the

Government contest, concluding that the Millers had overcome the Government's prima facie case of lack of discovery by a preponderance of the evidence. The Forest Service appealed that decision to the Board, and the Millers filed an EAJA application with Judge Pearlstein seeking attorney's fees and expenses for their participation in the second contest proceeding.

By order dated September 5, 2003, Judge Pearlstein stayed the Millers' EAJA application pending the Board's resolution of the appeal. On May 9, 2005, the Board affirmed Judge Pearlstein's decision. 165 IBLA 342. Thereafter, the Millers filed an updated EAJA application and subsequently supplemented their application on two occasions to encompass their attorney's work in pursuing their application before Judge Pearlstein and their appeal in this case.

II. Judge Pearlstein's Decision

While Judge Pearlstein found that the Government mining claim contest proceeding was an "adversary adjudication," within the meaning of EAJA, he denied the EAJA application because he concluded that the Government was substantially justified in bringing the second contest and in pursuing the case through appeal to the Board.² He pointed out that the key issue before him, after the presentation of all the evidence, and before the Board, was the grade of gold ore the Millers could likely extract from the claim, an issue he termed not easy to resolve. Decision at 7. The Judge stated that at the hearing the answer did not become so obvious or self-evident that the Government should have withdrawn the contest, or that his decision was itself "so bulletproof that the Forest Service was not substantially justified in pursuing an appeal." *Id.* at 7-8. He further noted that, in affirming his decision, the Board analyzed the key issue of likely gold values in detail, which he considered to be reflective of the difficulty of the issue. *Id.* at 8.

III. Discussion

Section 203(a)(1) of EAJA provides, in relevant part, that

² By order dated June 22, 2006, Judge Pearlstein afforded the parties an opportunity to submit briefing regarding whether the underlying contest proceeding constituted an "adversary adjudication" under section 203(a)(1) of EAJA. The Government argued that it did not, while the Millers argued that it did. The Government has not pursued the issue on appeal. Despite that fact, we regard the matter as fundamental to the question of the Millers' eligibility under EAJA, and thus address it, *sua sponte*, below in accordance with our de novo review authority.

[a Federal] 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) (2006).

Thus, a prevailing party is only eligible for an award of attorney's fees and expenses when the party prevailed in an "adversary adjudication" conducted by the Federal agency at issue, in which the party participated, incurring the fees and expenses.

A. Whether the Underlying Government Mining Claim Contest Proceeding was an "Adversary Adjudication"

[1] EAJA defines an "adversary adjudication" for purposes of section 203(a)(1) as "an adjudication under section 554 of [5 U.S.C.] in which the position of the United States is represented by counsel or otherwise." 5 U.S.C. § 504(b)(1)(C) (2006). Section 554 of 5 U.S.C. is part of the Administrative Procedure Act (APA) that sets forth the procedures for agency hearings. It applies, by its own terms (subject to certain exceptions not relevant here), "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a) (2006).

We have long held that EAJA applies only in the case of proceedings that are required by statute to be determined on the record after an opportunity for an agency hearing, and have looked to the applicable statute to see whether there was such a requirement and, absent finding any such requirement, have held in many different contexts that EAJA does not apply, even where the Department has chosen to afford a hearing in order to satisfy procedural due process considerations.³

³ *Sigma M Explorations Inc.*, 145 IBLA 182, 192 (1998) (Mining claim rental fee statute); *Ray Rothbard*, 143 IBLA 183, 184-85 (1998) (Federal Land Policy and Management Act of 1976); *Herbert J. Hansen*, 119 IBLA 29, 31-32 (1991) (Surveying statutes); *Rife Oil Properties, Inc.*, 116 IBLA 18, 20-21 (1990) (Mineral Leasing Act); *Ann Marie Sayers*, 115 IBLA 40, 41 (1990) (General Allotment Act of 1887);

(continued...)

We initially had occasion to consider the specific question of whether a Government mining claim contest proceeding constitutes an adversary adjudication, under section 203(a)(1) of EAJA in *Kaycee Bentonite Corp.*, 79 IBLA 182, 91 I.D. 138 (1984). After carefully considering the matter, we concluded that such a proceeding is not an adversary adjudication, stating: “Although mining claim contests are conducted in accordance with the procedural requirements of this provision of the Administrative Procedure Act (APA) [5 U.S.C. § 554(a)] in order to satisfy due process requirements, *see United States v. O’Leary*, 63 I.D. 341 (1956), no statute requires such hearings.”⁴ 79 IBLA at 186, 91 I.D. at 141. We reached this conclusion by the following analysis.

First, we stated that, in determining the applicability of EAJA to mining claim contests, we would be guided by the overriding principle that a statute waiving sovereign immunity, such as EAJA, should be “construed strictly in favor of the sovereign.” *Kaycee Bentonite Corp.*, 79 IBLA at 185, 91 I.D. at 140 (*quoting Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983)); *see Hart v. BLM*, 154 IBLA 260, 264 (2001) (*citing Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 137 (1991)).

Focusing next on the express language of 5 U.S.C. § 554, we held that no statute required a hearing on the record for a mining claim contest. 79 IBLA at 186, 91 I.D. at 141. Nonetheless, we noted that the applicability of the procedural protections of section 554 had been extended by the U.S. Supreme Court in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), and by other Federal courts to cover situations where, although not expressly required by any statute, a hearing pursuant to section 554 was, in fact, determined to be necessary to satisfy procedural due process requirements. However, we held that, while the courts might extend the scope of section 554 to afford section 554 hearings in cases where such a hearing was not expressly required by any statute, therefore adopting a liberal interpretation of

³ (...continued)

Jase O. Norsworthy, 114 IBLA 96, 130, 97 I.D. 137, 155-56 (1990) (Mineral Leasing Act for Acquired Lands); *Merrill G. Memmott*, 100 IBLA 44, 49 n.4 (1987) (General Mining Law of 1872); *Benton C. Cavin*, 93 IBLA 211, 214-16 (1986), *aff’d*, *Cavin v. United States*, 19 Cl. Ct. 198 (Cl. Ct. 1989) (Color of Title Act); *Bering Straits Native Corp.*, 83 IBLA 280, 288 (1984) (Alaska Native Claims Settlement Act).

⁴ In his Decision at page 4, Judge Pearlstein noted that “Congress has never amended the mining law to provide for a hearing on mining contests or to reference the APA.”

section 554 designed to afford procedural due process, it did not follow that the scope of EAJA should be expanded to encompass such hearings. We declined to extend the scope of EAJA, finding that a statute waiving sovereign immunity should be strictly construed. 79 IBLA at 187-88, 91 I.D. at 141-42.

In a subsequent EAJA case involving an underlying grazing dispute, *Bureau of Land Management v. Ericsson*, 98 IBLA 258 (1997), we stated that we would look to the express dictates of the statute at issue to see whether it required a section 554 hearing, adding that we found nothing in the legislative history of EAJA “which suggests that Congress intended . . . to leave the question of what adjudications were covered by section 203(a)(1) of the EAJA in the hands of the courts or the Department, which would decide whether and when to invoke section 554.” 98 IBLA at 262. We concluded in *Ericsson* that “the adjudication here is governed by section 9 of the Taylor Grazing Act [43 U.S.C. § 315h (2006)], is required to be determined on the record after opportunity for an agency hearing, and thus is subject to section 203(a)(1) of the EAJA.” 98 IBLA at 263.

Nevertheless, in 1998, the United States Court of Appeals for the Ninth Circuit, in *Collord v. U.S. Department of the Interior*, 154 F.3d 933 (9th Cir. 1998), held, contrary to the Board’s 1984 ruling in *Kaycee Bentonite*, that a Government mining claim contest proceeding constitutes an adversary adjudication, under section 203(a)(1) of EAJA. Relying on the Supreme Court’s pronouncement in *Wong Yang Sung*, the Ninth Circuit Court concluded that a hearing will be considered to be “required by statute,” within the meaning of 5 U.S.C. § 554 (2006), in every instance where a hearing is required either explicitly by statute, because it is expressly stated in the applicable statute, or implicitly by statute, because it is deemed necessary in order to satisfy the procedural due process requirements of the U.S. Constitution.⁵

⁵ Believing that the “constitutional requirement of procedural due process of law derives from the same source as Congress’ power to legislate and, where applicable, permeates every valid enactment of that body,” the Supreme Court held in *Wong Yang Sung*:

We do not think the limiting words [in 5 U.S.C. § 554 (2006), which limit the statutory provision only to hearings “required by statute,”] render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority. We would hardly attribute to Congress a purpose to be less scrupulous

(continued...)

Collord v. U.S. Department of the Interior, 154 F.3d at 936 (citing *Wong Yang Sung v. McGrath*, 339 U.S. at 49-51).

The court in *Collord* ruled that a hearing was required by the procedural due process requirements of the U.S. Constitution for a mining claim contest proceeding, since a mining claim is a property right that cannot be extinguished except following a hearing. *Collord v. U.S. Department of the Interior*, 154 F.3d at 935-36 (citing *Adams v. Witmer*, 271 F.2d 29, 33 (9th Cir. 1958)). Further, the court held that such a proceeding constituted an adjudication “under section 554 of [5 U.S.C.],” within the meaning of EAJA, since, as the court also found in *Adams v. Witmer*, 271 F.2d at 33 (relying on *Wong Yang Sung*), such a proceeding was “‘subject to’ or ‘governed by’ § 554.” *Collord v. U.S. Department of the Interior*, 154 F.3d at 936 (quoting *Ardestani v. Immigration and Naturalization Service*, 502 U.S. at 135).

The Board applied the court’s ruling in *Collord* in several subsequent EAJA decisions involving Federal lands in states served by the Ninth Circuit. In *United States v. Willsie*, 155 IBLA 296, 297 (2001), in which the underlying case involved a Government contest of mining claims on public land in Arizona, we held that “[attorney’s] fees and expenses are available under the EAJA to mining claim contestees in the proper circumstances.” See *American Independence Mining and Minerals*, 163 IBLA 192 (2004) (Adjudication of EAJA application stayed pending final disposition of underlying Government contest involving mining claims on National forest lands in Idaho). We then referred the EAJA application at issue, wrongly filed with the Board, to the Hearings Division, for the purpose of having the official who presided during the contest proceeding act as the “adjudicative officer,” under 5 U.S.C. § 504(a)(1) (2006), in deciding whether Willsie, the successful claimant, was entitled to an award.

In *United States v. Heirs of David F. Berry*, 156 IBLA 341, 345 (2002), the Board stated: “We conclude that a contest of an Alaska Native Allotment Act claim, like a contest of a mining claim, is an adversary adjudication under the EAJA.” In 1988, the Government had initiated a contest, in accordance with the procedures set

⁵ (...continued)

about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency. 339 U.S. at 49, 50. The court in *Collord* excluded only those situations where a hearing is required or otherwise held by virtue of “regulation, rule, custom, or special dispensation.” *Collord v. U.S. Department of the Interior*, 154 F.3d at 936 (quoting *Wong Yang Sung v. McGrath*, 339 U.S. at 50).

forth by the Board in *Donald Peters*, 26 IBLA 235, 83 I.D. 308 (1976), of the Alaska Native allotment application filed by David F. Berry under the Alaska Native Allotment Act of 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970), *repealed subject to pending applications*, 43 U.S.C. § 1617(a) (2006). Following a hearing, ALJ Harvey C. Sweitzer dismissed the contest and ruled that entitlement to the claim had been established. In *United States v. The Heirs of David F. Berry*, 127 IBLA 196 (1993), we affirmed Judge Sweitzer's decision.

Berry's heirs filed an application for an award of attorney's fees and expenses under EAJA, and ALJ Rampton denied an award based on his conclusion that the heirs were not eligible for an award because the contest proceedings were not an adversary adjudication under EAJA. On appeal, we affirmed that decision, as modified, concluding that, even though no statute required a hearing on the record, under the *Collord* ruling, the Government contest of an Alaska Native allotment claim was an adversary adjudication, but that BLM was substantially justified in pursuing a contest of Berry's claim. *United States v. Heirs of David F. Berry*, 156 IBLA at 345.

Despite the broad nature of our statements in the *Willsie* and *Berry* EAJA cases, they were informed by the fact that judicial review of agency action in those cases would potentially fall, due to the location of the Federal lands, under the jurisdiction of the Ninth Circuit, and, therefore, that court's ruling in *Collord*. In *United States v. Oneida Perlite Corp.*, 57 IBLA 167, 210, 88 I.D. 772, 796 (1981), we set aside and remanded for rehearing an ALJ decision holding that portions of six mining claims on National Forest lands in Idaho were valid and should be patented. In doing so, we cited two Ninth Circuit court rulings and stated that "this Department should strive to conform any final administrative determination to the prevailing law of that circuit." *Id.*

The question now is whether the rationale offered by the court for its decision in *Collord* should be extended beyond that circuit and made applicable in this case, where the Federal land involved is National Forest land in Colorado and the Federal circuit court with jurisdiction over the Federal District courts in that State is the United States Court of Appeals for the Tenth Circuit. In the regulatory history underlying promulgation of the Department's most recent revisions of its EAJA regulations (43 C.F.R. Part 4, Subpart F), the Department left open the question of extending the *Collord* rationale beyond the jurisdiction of the Ninth Circuit.

The Department issued proposed revised EAJA regulations on October 5, 2005, 70 Fed. Reg. 58167 (Oct. 5, 2005), and final rules effective February 8, 2006, 71 Fed. Reg. 6364 (Feb. 8, 2006). In the course of that rulemaking, the Department

revisited the question concerning what proceedings are covered by the Department's EAJA regulations. The question was answered before the rulemaking, and continues to be answered, by the rule that the regulations apply "to adversary adjudications." 43 C.F.R. § 4.603(a) (2004); 43 C.F.R. § 4.603(a) (2006). Further, the phrase "[a]dversary adjudication" was, and continues to be, defined as "an adjudication under 5 U.S.C. 554," in which the position of the United States was represented by counsel or other representative. 43 C.F.R. § 4.602(b) (2004); 43 C.F.R. § 4.602 (2006). As explained in the preamble to the proposed regulations, such an adjudication "includes those proceedings required by statute to be conducted under section 554, e.g., section 9 of the Taylor Grazing Act, 43 U.S.C. 315h (2006), see *Bureau of Land Management v. Ericsson*, 98 IBLA 258 (1987), and the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450f(b)(3) (2006)." 70 Fed. Reg. 58169.

The Department also spoke directly to the question whether the rules were applicable to mining claim contest proceedings, which are not required by statute to be determined on the record after opportunity for an agency hearing. The preamble to the proposed rules confronted the rule laid down in *Collord*, recognizing that it "held that, because a mining claim is a property interest that may not be extinguished without due process, section 554 governs mining claim contests, and therefore those proceedings are adversary adjudications under the [EAJA]." 70 Fed. Reg. at 58169. It then noted that the Board had, in *Willsie*, "followed the *Collord* decision," and, in *Berry*, had "extended its applicability to Alaska Native Allotment Act claim contests." *Id.*

Nevertheless, the Department stated that the Ninth Circuit court's reliance on the Supreme Court's decision in *Wong Yang Sung v. McGrath*, 339 U.S. at 50-51, which underpinned the Ninth Circuit court's "adversary adjudication" interpretation, was "open to question."⁶ 70 Fed. Reg. at 58169. The Department then stated:

⁶ In stating that the Ninth Circuit court's reliance on *Wong Yang Sung* was open to question, the Department cited two treatises, "A *Guide to Federal Agency Adjudication* ¶¶ 3.02, 11.03 (Michael Asimow, ed., American Bar Association, 2003); 1 Richard J. Pierce, Jr., *Administrative Law Treatise*, § 8.2 (4th ed. 2002)." 70 Fed. Reg. at 58169. While the cited portions of those treatises illuminate a perceived shift in Federal judicial precedent away from the Supreme Court's holding in *Wong Yang Sung*, that is not a view shared by all. See William Funk, *The Rise and Purported Demise of Wong Yang Sung*, 58 Admin. L. Review 881 (2006).

Under existing court precedent, therefore, mining claim contests and Native allotment contests in the Ninth Circuit are deemed to fall within the [adversary adjudication] proceedings covered by section 4.603(a), while mining claim contests in other judicial circuits may not be. See *Kaycee Bentonite Corp.*, 79 IBLA 182 (1984) (pre-*Collord* analysis of the applicability of the [EAJA] to mining claim contest proceedings).

Id. While confirming that mining claim contest proceedings arising “in the Ninth Circuit” are considered to be adversary adjudications under EAJA, the Department left open the question whether such proceedings arising outside the jurisdiction of the Ninth Circuit might be adversary adjudications under EAJA.

The rationale offered by the Ninth Circuit for its decision in *Collord*, we believe, should not be extended beyond that circuit because we continue to believe that our rationale, as expressed in *Kaycee Bentonite*, discussed above, for finding that EAJA is not applicable to mining claim contest hearings is the better rule. Whether or not the Supreme Court’s rationale in *Wong Yang Sung* (and the *Collord* court’s reliance thereon) is of continuing vitality is open to question. Nevertheless, as pointed out in *Kaycee Bentonite*, “[w]hen the issue is solely one of the procedure needed to protect a constitutional right, there is no inhibition on adopting so liberal a construction of the applicability of the APA.” 79 IBLA at 187, 91 I.D. at 141. There is such an inhibition, however, when considerations germane to the waiver of sovereign immunity are at issue.

In this case we are not concerned with extending the clear meaning of the language of 5 U.S.C. § 554 (2006), which unmistakably applies only in those cases of adjudication required *by statute* to be determined on the record after opportunity for an agency hearing, to protect a constitutional right because, unlike procedural due process, which was the Court’s concern in *Wong Yang Sung*, there is no constitutional right to an award of attorney’s fees.

Attorney’s fees may be awarded against the United States only when Congress provides a mechanism for doing so, which it did with passage of EAJA. However, it limited the scope of proceedings covered by EAJA to adjudications under 5 U.S.C. § 554 (2006), *i.e.*, those required by statute to be determined on the record after opportunity for a hearing. The mining law does not require a hearing on the record before a mining claim may be declared null and void. The fact that the Department of the Interior has extended procedural due process protections to mining claimants by providing for notice and an opportunity for a hearing prior to a declaration of

invalidity for a mining claim cannot serve as a basis for expanding the scope of EAJA to encompass such proceedings. They are not required by statute.

If Congress believes that attorney's fees should be available against the United States in adjudications involving procedural due process hearings that are required, not by statute, but by a court or the Department, it may say so. To date, it has not.

We must conclude that the mining claim contest proceeding in question is not an "adversary adjudication" within the meaning of section 203(a)(1) of EAJA. For that reason, we must hold that the Millers are not eligible for an award of attorney's fees and expenses under EAJA. Accordingly, we must affirm ALJ Pearlstein's denial of the Millers' EAJA application, but we modify his decision to reflect the basis for denial.

B. Whether the Government's Position was "Substantially Justified"

Even assuming that the mining claim contest proceeding at issue was an "adversary adjudication" within the meaning of section 203(a)(1) of EAJA, we would affirm ALJ Pearlstein's denial of the EAJA application because the Government's position was substantially justified.

Section 203(a)(1) of EAJA requires an award of attorney's fees and expenses to a prevailing party in an adversary adjudication "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) (2006); *see* 43 C.F.R. § 4.605(a). It further states: "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) (2006).

Substantially justified means not "justified to a high degree," but rather "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. 552, 565 (1988) (cited in *BLM v. Falen*, 141 IBLA 394, 395 (1997)). Thus, the position of an agency will be considered substantially justified "if it has a reasonable basis in both law and fact," considering "the record of both the underlying government conduct at issue and the totality of circumstances present before and during [the adjudicative process]." *Barry v. Bowen*, 825 F.2d 1324, 1330 (9th Cir. 1987); *see BLM v. Ericsson*, 98 IBLA at 263 (citing H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4989); *BLM v. Falen*, 141 IBLA at 398.

There is no presumption that the Government position is not substantially justified simply because it loses the case. Nor does “substantially justified” require that the Government establish that its determination to litigate was based on a substantial probability of prevailing. *BLM v. Ericsson*, 98 IBLA at 264; *Kaycee Bentonite Corp.*, 79 IBLA at 195-96, 91 I.D. at 145-46.

Further, even though an agency may initially be substantially justified in bringing an action, where it later becomes evident that the agency is no longer so justified, but yet proceeds with the action, attorney’s fees and expenses may be awarded for the period of time after the agency’s case loses its justification. *Quality CATV, Inc. v. National Labor Relations Board*, 969 F.2d 541, 545 (7th Cir. 1992); *Leeward Auto Wreckers, Inc. v. National Labor Relations Board*, 841 F.2d 1143, 1148-49 (D.C. Cir. 1988); *BLM v. Cosimati*, 131 IBLA 390, 396 (1995).

Finally, the burden is upon the Government to prove substantial justification throughout the adjudicative process. *Barry v. Bowen*, 825 F.2d at 1330.

On appeal, the Millers contend that, looking at the matter as a whole, the present case represents a “*paradigm*” of what “*Congress had in mind in enacting the EAJA*,” when it envisioned the following circumstances in which the Government’s position would not be substantially justified:

small miners, few resources, the government threatening complex, expensive and lengthy litigation on very flimsy grounds, where the cost of litigation might exceed the value of the mining claim, and after losing the first time, starting all over again, relitigating the same issues again, despite years of unreasonable delay, and using its superior resources to hire outside “hired gun” experts to try to crush the Millers’ case.

SOR at 15. They argue that Judge Pearlstein failed to analyze these factors, and that, properly considered, they are entitled to an award of attorney’s fees and expenses.⁷

⁷ While the Millers argue that the outcome of the first contest “weighs against a finding of substantial justification” (SOR at 13), the only contest at issue in this proceeding is the second contest, and as we stated: “Although the existence of the discovery of a valuable mineral deposit was once again placed in issue in the second contest, the specific issues which arose in that contest are new and/or arise from new or additional evidence which was not previously adjudicated by the Department.” 165 IBLA at 384.

At the time of the second contest, the Millers held a mining claim in a Federally-designated wilderness area, which, in the Government's opinion, was not supported by the discovery of a valuable mineral deposit, as revealed either by sampling and assaying or by exploration and mining, since very little mining had ever been undertaken by or on behalf of the Millers.⁸ See 165 IBLA at 345-49, 352.

Whether the Government was substantially justified in contesting the Robin Redbreast Lode mining claim must be judged by whether it had a "reasonable basis in both law and fact" to challenge the claim, given what was known regarding the presence on that claim of minerals sufficient in quality and quantity to constitute the discovery of a valuable mineral deposit.

Judge Pearlstein concluded that the Government had a reasonable basis in law and fact to pursue the mining contest of the claim based solely on the fact that the Board, affirming his holding, concluded that the Forest Service presented a prima facie case supporting the invalidity of the claim. Decision at 7. In essence, he held that, where the evidence upon which the Government relied in bringing and pursuing the contest was sufficient, on appeal, to convince the Board that the Government had carried its burden to establish a prima facie case that the claim was not supported by the discovery of a valuable mineral deposit, the Government was also substantially justified in bringing and pursuing the contest. We agree. See *Poole v. Rourke*, 779 F. Supp. 1546, 1563 (E.D. Cal. 1991) (applying 28 U.S.C. § 2412 (2006)) ("Factors that have supported a substantial justification finding are: (1) the ability of the United States to make out a *prima facie* case," citing 1 Derfner & Wolf, *Court Awarded Attorney Fees* § 10.03 (1991)).

The Millers' arguments in this appeal relating to the Board's conclusion regarding the prima facie case issue are essentially an attempt to relitigate an issue resolved in the underlying Board decision. They do not illuminate the issue of substantial justification and need not be addressed herein. Our conclusion on the prima facie case issue supports a finding that the Government was substantially justified in bringing and pursuing the contest.

⁸ We recognize that the Millers were limited in what activities they could pursue following the Jan. 1, 1984, withdrawal. Nevertheless, they were allowed to sample the existing exposures. 165 IBLA at 357. However, they undertook no acceptable sampling from 1984 until after the filing of the second contest in 1999: "[N]one of these samples [taken from 1983 to 1990] accurately represents the value of the mineral in the vein." *Id.* at 361 n.27.

We reach this conclusion because of the significance of finding that the Government has made a prima facie case. Once the Government has satisfied its burden of going forward with sufficient evidence to establish a prima facie case on one or more of the issues raised in a mining claim contest complaint, the claimant has the ultimate burden of persuasion on those issues to overcome that case by a preponderance of the evidence.⁹ *United States v. Dwyer*, 175 IBLA 100, 112 (2008); *United States v. Mavros*, 122 IBLA 297, 302 (1992). Were the claimant not to present any evidence or to present evidence insufficient to preponderate, the Government would prevail based solely on its prima facie case. *United States v. Knoblock*, 131 IBLA 48, 81-82, 101 I.D. 123, 141 (1994). Therefore, having established a prima facie case, the Government has offered evidence sufficient for a final dispositive ruling.¹⁰ The finding of a prima facie case establishes, regardless of the ultimate outcome of the case, that the Government had a reasonable basis in both law and fact to bring and pursue the contest. The ALJ's and the Board's ultimate assessment of the relative merits of the evidence offered by the parties at the hearing does not detract from the fact that the Government was substantially justified in pursuing the case through both levels of administrative review.

Conclusion

We hold that the Government mining claim contest proceeding at issue is not an "adversary adjudication," under section 203(a)(1) of EAJA, and affirm Judge Pearlstein's denial of the EAJA application on that modified basis. Even were we to conclude that the contest proceeding was an "adversary adjudication" and that the Millers were, therefore, eligible for an award under EAJA, we would agree with Judge Pearlstein that they were not entitled to an award because the Government was substantially justified in bringing the contest and in pursuing the case through hearing and appeal.

⁹ Absent a patent application, a mining claim contestee need not show that a claim is valid. *E.g.*, *United States v. Ware*, 113 IBLA 1, 6 (1990).

¹⁰ The Millers argue that the establishment of a prima facie case "merely means that the party's case was not entirely frivolous," which is not sufficient to demonstrate that the Government's position was substantially justified. SOR at 9 (citing *Dairy Maid Dairy, Inc. v. United States*, 837 F. Supp. 1370, 1383 (E.D. Va. 1993)). We disagree. As stated above, the Government's establishment of a prima facie case in a mining claim contest is sufficient to support the ultimate decision in the Government's favor should the claimant fail to meet its burden.

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 affirmed as modified.

_____/s/_____
Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

_____/s/_____
H. Barry Holt
Chief Administrative Judge