

KAYCEE BENTONITE CORP

IBLA 84-54

Decided February 28, 1984

Appeal of decision by Administrative Law Judge Robert W. Mesch, denying application for award of attorney's fees under the Equal Access to Justice Act.

Affirmed and modified.

1. Equal Access to Justice Act: Generally -- Statutory Construction: Generally

Although the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), may be characterized as a remedial statute, this does not support the proposition that it should be construed liberally. Every waiver of sovereign immunity is remedial, and statutes waiving sovereign immunity such as the Equal Access to Justice Act must be strictly construed.

2. Administrative Procedure: Adjudication -- Administrative Procedure: Administrative Procedure Act -- Contests and Protests: Generally -- Equal Access to Justice Act: Adversary Adjudication -- Mining Claims: Contests

Under 5 U.S.C. § 504 (1982) and 43 CFR 4.603, 48 FR 17596 (Apr. 25, 1983), an adversary adjudication is one required by statute to be conducted by the Secretary under 5 U.S.C. § 554 (1982). Because there is no statutory requirement that a mining claim contest be conducted under 5 U.S.C. § 554 (1982), mining claim contests are not proceedings covered by Equal Access to Justice Act.

3. Equal Access to Justice Act: Generally

An award of attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), is properly denied when the applicant is a corporation which fails to demonstrate that its net worth combined with that of its affiliates is not more than \$5 million.

4. Equal Access to Justice Act: Generally

An application for an award of attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), is properly denied when special circumstances make an award unjust. An award is unjust when 49 percent of the applicant corporation's stock is held by one of the nation's largest companies which shares the production and operating costs with the majority shareholder in proportion to its percentage share of ownership.

5. Equal Access to Justice Act: Generally

Even though a party may have prevailed in an adversary proceeding, an award of attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504 (Supp. V 1981), is properly denied where the position of the agency was substantially justified. In order to establish that its action was substantially justified, the Government is not required to establish that its decision to proceed was based on a substantial probability of prevailing. The standard was intended to ensure that the Government is not deterred from advancing in good faith a novel but credible interpretation of the law.

APPEARANCES: Bonnie S. Mandell-Rice, Esq., Denver, Colorado, for appellant Lowell L. Madsen, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Kaycee Bentonite Corporation (Kaycee) has appealed from the September 14, 1983, decision of Administrative Law Judge Robert W. Mesch denying its application for award of attorney's fees under the Equal Access

to Justice Act (EAJA), 5 U.S.C. § 504 (1982), which provides in part as follows:

(a)(1) 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 as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

The proceedings giving rise to Kaycee's application began when Kaycee filed applications for patents conveying certain bentonite mining claims. In 1973, BLM filed contest complaints against the validity of those claims. These contests were consolidated with other contests against bentonite claims held by other claimants, and during the 5-year period between the filing of the complaints and the hearing before an Administrative Law Judge, the parties engaged in a protracted discovery process in connection with the administrative contest as well as related judicial proceedings. Judge Mesch conducted a hearing in January and February 1978. In 1979, he issued a decision holding 125 claims held by Kaycee to be valid. On May 27, 1982, the Board affirmed Judge Mesch's decision. United States v. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982). As the prevailing party under the Board's decision, Kaycee filed an application for attorney's fees and expenses under the EAJA, aggregating in excess of \$79,000.

In denying Kaycee's application, Judge Mesch determined that under the Department's regulations, a mining claim contest is not an "adversary adjudication" within the meaning of the above provision. Kaycee appealed.

On appeal, the Solicitor argues that an award should be denied because the agency's position was substantially justified and that special circumstances make an award unjust.

[1] The merits of appellant's arguments depend to some extent on the principle of construction to be applied to the above-quoted statutory provision. Although the provision may be characterized as remedial, such characterization does not automatically support liberal construction in favor of appellant. Monark Boat Co. v. National Labor Relations Board, 708 F.2d 1322, 1327 (8th Cir. 1983). In Ruckelshaus v. Sierra Club, \_\_\_ U.S. \_\_\_, 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. Bearing this in mind, we turn now to appellant's contention that mining claim contests should be deemed adversary adjudications within the meaning of the statute.

[2] The Act provides the following definition of the proceedings it covers:

"[A]dversary adjudication" means an adjudication under section 554 of this title 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[.] [Emphasis added.]

5 U.S.C. § 504(b)(1)(C) (1982). By its own terms, section 554 "applies, according to the provisions thereof, 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) (1982) (emphasis added). Although mining claim contests are conducted in accordance with the procedural requirements of this provision of the Administrative Procedure Act (APA) in order to satisfy due process requirements, see United States v. O'Leary, 63 I.D. 341 (1956), no statute requires such hearings.

In its regulations implementing the EAJA, the Department defines adversary adjudication in the same language as the statute. 43 CFR 4.602(b), 48 FR 17596 (Apr. 25, 1983). Even though appellant contends that the regulations were not intended to exclude mining claim contests, the following provision of 43 CFR 4.603(a) makes it clear that appellant's contention is incorrect: "These rules do not apply where adjudications on the record are not required by statute even though hearings are conducted using procedures comparable to those set forth in 5 U.S.C. 554." The Department clearly intended to exclude from the coverage of the Act all proceedings except those

required by a statute to be conducted under 5 U.S.C. § 554. In re Attorney's Fees Request of DNA -- People's Legal Services, Inc., 11 IBIA 285, 90 I.D. 389 (1983).

We do not take issue with appellant's observation that the courts and this Department have extended the applicability of section 554 to adjudications beyond those described by the exact language of that section. See, e.g., Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); United States v. O'Leary, supra. Such opinions inferred that in enacting the APA, Congress intended to make section 554 applicable in cases where there was a due process right to a hearing, notwithstanding the absence of a statutory requirement for a hearing on the record. 1/ When 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. See Wong Yang Sung v. McGrath, supra. That statute did not involve a waiver of sovereign immunity, so no principle of construction required courts to narrowly construe its scope. In the instant appeal, the language of section 554 must be analyzed in a totally different context. We are not concerned here with extending its application

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1/ We note that some courts are no longer automatically applying APA requirements to hearings required by due process or even by statute. Instead, courts first examine the legislative intent underlying the particular substantive statutory provision under which the agency is proceeding before concluding that the APA applies. See generally United States Steel Corp. v. Train, 556 F.2d 822, 833 (7th Cir. 1977); Phillips Petroleum Co. v. FPC, 475 F.2d 842, 851 (10th Cir. 1973), cert. denied, 414 U.S. 1146 (1974). In United States v. Independent Bulk Transport, Inc., 480 F. Supp. 474 (SD N.Y. 1979), the court concluded that section 554 did not apply to hearings for civil penalties arising from oil spills, notwithstanding a statutory requirement for a hearing. The court further held that the Coast Guard's non-APA procedures satisfied due process requirements.

to protect a constitutional right because there is no constitutional right to an award of attorney's fees in a case such as this. Because section 554 is incorporated by reference in a statute that constitutes a waiver of sovereign immunity, its language is subject to the same rules of construction that pertain to the legislation in which it is referenced in the absence of specific evidence of contrary legislative intent. Although courts may have enlarged the scope of section 554 beyond what its language required in cases involving procedural due process, such an approach cannot be used to establish the liability of the United States for attorney's fees. Indeed, the House report on the legislation supports narrow construction of the provision to avoid exposing the United States to greater financial liability than necessary: "In part, the decision to award fees only in adversary adjudications reflects a desire to narrow the scope of the bill in order to make its costs acceptable." H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 14, reprinted in 1980 U.S. Code Cong. & Ad. News 4993.

Prior to 1976 this Board had consistently held that notice and an opportunity for a hearing were not prerequisite to the rejection of an application for an allotment of land pursuant to the Alaska Native Allotment Act of May 17, 1906 (34 Stat. 197; repealed 1970), because the issuance of the allotment was considered to be a matter of Secretarial discretion rather than a matter of right or entitlement enjoyed by the applicant. ("[T]he Secretary \* \* \* is hereby authorized and empowered, in his discretion \* \* \* to allot \* \* \* land \* \* \* to any Indian or Eskimo \* \* \*." Id.) Nevertheless, in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the Court held that such Native applicants have a sufficient property interest in the government benefit denied by the agency

to warrant due process protection. In discussing "what process is due," the Court stated:

\* \* \* [T]he Alaska Native applicants whose applications the Secretary intends to reject must be given some kind of notice and some kind of hearing before the rejection occurs. [Emphasis by the Court.]

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\* \* \* [A]t a minimum, applicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment. Beyond this bare minimum, it is difficult to determine exactly what procedures would best meet the requirements of due process. \* \* \* It is up to the Secretary, in the first instance, to develop regulations which provide for the required procedures, subject to review by the district court and, if necessary, by this court.

Pence v. Kleppe, *supra* at 142, 143.

The Court obviously did not regard its recognition of a property interest sufficient to command the protection of due process as requiring an adjudication pursuant to section 554. Nevertheless, in a subsequent case, this Board held that the Native's entitlement to due process could best be satisfied by proceedings held in accordance with the Department's existing regulations relating to Government contest procedures, under which adjudications arising under section 554 are also conducted. The Board noted in that decision that the same procedures had been utilized to provide due process in other types of cases where protectable property interests had been discerned, specifically referring to cases involving homesteads, desert lands entries,

trade and manufacturing sites, and mining claims. Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976), sustained, Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976). On review of our Peters decisions, the Court of Appeals held that the Department's utilization of such procedures complies, at least facially, with the due process requirements set forth in Pence v. Kleppe, supra. Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

The foregoing serves to illustrate that not every case involving a protectable right to due process must be treated as one arising under section 554, and the mere fact that the Department affords due process by utilizing the same procedures does not convert such a case to a section 554 adjudication. Just as the Department opted to utilize these procedures for Alaska Native allotment cases in Peters, it had earlier determined to conform mining claim contests to these procedures "even though there is no statute requiring that the matter be determined on the record after opportunity for an agency hearing." United States v. O'Leary, supra, at 63 I.D. 345.

We conclude that mining claim contests are not adjudications arising under section 554.

[3] Even if mining claim contests constituted adversary adjudications within the meaning of the Act, further inquiry would be necessary to determine whether Kaycee qualifies as a "party" under the definition set forth at 5 U.S.C. § 504(b)(1)(B) (1982) which excludes any corporation whose net worth exceeds \$5 million at the time the adversary adjudication was initiated. Although Kaycee's statement of net worth includes inventories of bentonite,

it does not appear that reserves were included. <sup>2/</sup> Furthermore, under the Department's regulations, not only would Kaycee's reserves have to be included, but also those of Black Hills Bentonite (Black Hills), which owns 51 percent of Kaycee's voting stock. Departmental regulation 43 CFR 4.605(f) provides in pertinent part:

Any individual or group of individuals, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares of another business, or controls in any manner the election of a majority of that business' board of directors, trustees, or other persons exercising similar functions shall be considered an affiliate of that business for purposes of this part. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in the paragraph constitute special circumstances that would make an award unjust.

Because Kaycee has failed to include the value of its reserves in calculating its net worth, Kaycee has not demonstrated that its net worth combined with its affiliates is less than \$5 million.

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<sup>2/</sup> Although the hearing was not held until 5 years after the contest was initiated, Kaycee's president testified to holding bentonite reserves other than those at issue in the contest proceeding, and that those reserves on other claims covered several times the acreage at issue in the contest proceeding. We note that Kaycee must assign those reserves a value greater than that which could be assigned to reserves of common clay, because if the reserves have no greater value than reserves of common clay, then the comparable bentonite reserves in the contest proceeding would not have been subject to location and Kaycee could never have prevailed in the administrative proceeding. This is because Kaycee prevailed only by showing that its bentonite was not a common clay, *i.e.*, that it was presently marketable for uses which common clay would not serve. The fact that bentonite could be marketed at a price significantly higher than common clay was a critical element in our conclusion that the clay was uncommon and therefore locatable. 64 IBLA at 196, 89 I.D. at 269. While the propriety of using the value of ore reserves as a component of corporate net worth may be open to question, in any case the other factors discussed below would be sufficient to disqualify Kaycee on financial grounds.

[4] The last sentence of the above-quoted regulation requires us to consider another element. The remaining 49 percent of Kaycee's stock is owned by Bethlehem Steel Corporation (Bethlehem), one of America's largest enterprises. Kaycee contends that we may not look beyond the corporation to the wealth of its shareholders as a means of disqualifying an applicant. However, according to the notes to Kaycee's financial statements submitted with Kaycee's application, Bethlehem's role is not that of a mere shareholder who shares in the monetary profits of a business of which it owns a part and whose obligations are limited to capital already contributed. Those notes state that the percentage of the stock ownership of Black Hills and Bethlehem is the basis for the transfer of the bentonite processed by Kaycee to those two shareholders, for advances to Kaycee by the shareholders for operating costs incurred, and for the application of operating costs to Black Hills and Bethlehem for Federal income tax purposes. Thus, Bethlehem would share directly and substantially in the benefits provided by an award in this appeal. To allow an application in these circumstances would create in the legislation a loophole so large as to be in flagrant disregard of Congress express intention to establish "financial criteria which limit the bill's applications to those persons and small businesses for whom costs may be a deterrent to vindicating their rights." H.R. Rep. No. 96-1418, supra at 15, reprinted in 1980 U.S. Code Cong. & Ad. News, at 4994. In view of this evident intent, we cannot turn a blind eye to the extent of Bethlehem's participation, and must find that the arrangement between Kaycee and Bethlehem constitutes a special circumstance that would make an award unjust.

[5] Furthermore, Kaycee's application must be denied because we find that the Government was substantially justified in contesting Kaycee's claims.

Although Kaycee in its application refers to our disparaging characterizations of the Government's legal argument, resolution of the issue before us now does not merely depend on whether the Government's legal argument was correct. Instead, we must determine whether BLM was substantially justified in contesting Kaycee's claims. Because locatability of a clay claim is often determined by the use for which the clay is marketed, there might be a lack of substantial justification for the Government's position if there were clear precedent on the precise issue of locatability of bentonite marketable for pelletizing taconite. As we noted in our decision, however, no such precedent existed. 64 IBLA at 197, 89 I.D. at 269. Moreover, there was no substantial evidence that more than a small amount of the bentonite on Kaycee's claims could be marketed for such a use directly; instead, it would have to be blended with a higher grade of clay from claims not in issue. <sup>3/</sup> Thus, Kaycee's patent application confronted BLM with two legal issues of first impression: (1) Whether bentonite marketable for pelletizing taconite was locatable, and (2) Whether bentonite which could not be marketed for such use by itself but which must be blended with other bentonite to become marketable for such use was also locatable. Although the Board rejected the general legal theory offered by the Government to establish criteria by which locatability of any bentonite deposit could be determined, it is quite clear when one reads that portion of our opinion specifically concerning Kaycee's claims that Kaycee only prevailed because of our favorable resolution of these particular narrow and novel legal questions.

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<sup>3/</sup> We expressly overruled Judge Mesch's contrary finding as unsupported by the evidence. 64 IBLA 229-30, 89 I.D. at 287.

Moreover, we find that BLM was substantially justified in contesting Kaycee's claims on the basis of the evidence in the record, notwithstanding the error in BLM's legal theory. Although Kaycee prevailed by a preponderance of the evidence, the following paragraphs of our decision make it clear that Kaycee's preponderance was narrow:

The contestant then cites the lack of evidence that bentonite found on the contested claims will in fact satisfactorily serve as a binder in the taconite processing industry. Contestant cites the testimony of some of the witnesses of the contestees and intervenors that the critical test to be used for determining the ability of a deposit of bentonite to serve as a binder is the "balling test" (Tr. 997), the "dry ball test" (Tr. 1171, 1174), and the "batch ball" test (Tr. 1661). Appellants note that Mr. Auer, the vice president of Wyo-Ben Products, Inc., testified that he would require some "batch ball tests" before he would purchase the contested Kaycee claims (Tr. 1669).

Clearly the absence of these tests raises some doubt about whether the material on these claims can be marketed as the testimony of Kaycee's witnesses would have us believe. We note that a mining claimant need only establish the validity of his claim by a preponderance of the evidence; he does not have to establish their validity beyond a reasonable doubt. See Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); see also United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). A reversal of Judge Mesch's decision would be warranted only if the inference to be drawn from the absence of these tests negates the positive testimony concerning the marketability of the material on these claims for pelletizing taconite, or if it renders that testimony so insubstantial that it cannot be given any weight in determining which evidence preponderates. [Emphasis added.]

64 IBLA at 229, 89 I.D. at 287. The fact that Kaycee merely preponderated does not mean that BLM's position was substantially unjustified.

Indeed, BLM's decision to contest Kaycee's claims provides a precise illustration of what Congress meant by action that was substantially justified:

The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing. Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made. [Emphasis added.]

H.R. Rep. No. 96-1418 supra at 11, reprinted in U.S. Code Cong. & Ad. News at 4990. 4/

The same standard also appears in the statutory provision for award of attorney's fees connected with court litigation. In applying that standard, some courts have noted that the Act should not be interpreted to provide for an award whenever a governmental decision is reversed. Even if the Government loses under the narrow standards of judicial review set forth at 5 U.S.C. § 706 (1976), one cannot automatically conclude its position was not substantially justified. See Grand Boulevard Improvement Ass'n v. City of Chicago, 553 F. Sup. 1154, 1163 (N. D. Ill. E. D. 1982); see also Kirkland v. Railroad Retirement Board, 706 F.2d 99 (2nd Cir. 1983). 5/ Otherwise, the EAJA would

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4/ This item of legislative history was cited as an explanation of the statutory standard in S & H Riggers & Erectors, Inc. v. O.S.H.R.C., 672 F.2d 426, 430-31 (5th Cir. 1982).

5/ In Kirkland, supra, the Court found that the agency's findings in the case "appear to be based upon little more than conjecture and surmise." Id. at 104. The Court concluded that the agency's findings were not supported by substantial evidence and rejected them. The Court further chastised the agency for failure to apply a Circuit Court decision which was directly on point, so affirmation of the agency's decision would have required the Court to overrule its own established precedent. Id. at 104. Notwithstanding the Court's

be no different from an automatic fee-shifting statute, which Congress clearly did not intend it to be.

We find that the statutory standard goes beyond what is necessary to shield the Government from liability in the instant case. While the Government's general legal theory for the locatability of bentonite was perceived by the Board to be contrary to a century of precedent relating to the locatability of clay, the precise legal questions relating to the locatability of Kaycee's deposits were not clearly controlled by Departmental precedent. BLM's action in contesting these claims was not in direct defiance of any controlling law. As to the factual issues, the Board recognized some doubt that Kaycee's deposits could be marketed for their claimed uses; Kaycee prevailed only by a preponderance of the evidence, which did not resolve our doubts arising from the fact that Kaycee had not performed the tests that the testimony of one of its own witnesses established as necessary to determine the marketability of the deposits. In short, we consider the action taken by BLM in this case to be precisely the type of governmental action that Congress wished to protect by the "substantially justified" standard, and Kaycee's application is properly denied for this reason. 6/

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fn. 5 (continued)

determination that the agency's factual findings were based on little more than conjecture or surmise and that it failed to apply the controlling legal case precedent, the Court rejected an application for an award of attorney's fees under the EAJA. The Court stated: " On the facts of this case, we believe the [agency] has sustained its burden of showing that its position, although erroneous, was not so devoid of legal or factual support that a fee award is appropriate." Id. at 105.

6/ We further note that some of Kaycee's fees appear to be based on charges in excess of the statutory limit of \$75 per hour. 5 U.S.C. § 504(b)(1)(A)(ii) (1982).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Edward W. Stuebing  
Administrative Judge

We concur:

Wm. Philip Horton  
Chief Administrative Judge

Anne Poindexter Lewis  
Administrative Judge

