

TOM COX

IBLA 98-181

Decided July 26, 2001

Application for an award of fees and expenses under the Equal Access to Justice Act.

Denied.

1. Administrative Procedure: Administrative Procedure Act--Equal Access to Justice Act: Generally

A decision of this Board is an "order" under the Administrative Procedure Act and, therefore, an "adjudication"; however, it does not follow that such a decision is an adjudication under 5 U.S.C. § 554 (1994).

2. Attorney Fees: Equal Access to Justice Act: Adversary Adjudication--Equal Access to Justice Act: Adversary Adjudication--Equal Access to Justice Act: Application

A request for an award of costs and attorney fees under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994), will be denied where there has been no adversary adjudication within the meaning of the Act.

APPEARANCES: Gary B. Hansen, Esq., Parker, Arizona, for appellant; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Tom Cox has applied to this Board under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1994), and the applicable Departmental regulations (see 43 CFR 4.601) for attorney fees and expenses incurred in an appeal he brought challenging a decision of the Tucson Resource Area Office, Bureau of Land Management (BLM). For the reasons set forth below, we deny the instant application.

The BLM decision in question had approved issuance to John F. Dirksen of a right-of-way (AZA 28493) which traversed a grazing allotment held by

Cox. In our decision styled Tom Cox, 142 IBLA 256 (1998), we set aside BLM's action. As we noted therein, the record, as developed on appeal, indicated that BLM might have premised its grant based on a mistaken view of the underlying fact situation. We remanded the case to BLM so that it might reexamine the matter in light of evidence that Dirksen's land might not have been landlocked as he had claimed in his application.

In the present petition, Cox asserts that he is eligible for an award of attorney fees and expenses because he was the prevailing party and because, in his view, the position of BLM was not substantially justified. Cox also avers that his net worth did not exceed \$2,000,000 at the time the appeal was commenced. See 5 U.S.C. § 504(b)(1)(B) (1994). Cox seeks compensation for attorney fees in the amount of \$6,564.00 (54.7 hours at \$120 per hour) and expenses in the amount of \$378.00.

BLM has filed a reply generally challenging Cox's entitlement to an award, arguing that, inasmuch as the Board had, in its decision, generally affirmed the exercise of BLM's discretion based on the record before BLM when it acted, BLM's position was clearly justified. Additionally, BLM challenges the \$120 hourly billing rate sought in Cox's petition, noting that it is in excess of the \$75 per hour allowable under the applicable regulation. See 43 CFR 4.607. BLM also questions the accuracy of Cox's net worth certification. However, notwithstanding the various BLM arguments, we believe that petitioner's request for an award of fees and expenses must be rejected for an entirely different reason.

[1] Cox's application for the award of attorney fees under the EAJA is based on 5 U.S.C. § 504(a)(1) (1994), which provides, in relevant part, 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.

Of central importance to Cox's application herein is the question whether his appeal of BLM's decision granting Dirksen a right-of-way and the Board's consideration thereof constituted an "adversary adjudication" within the meaning of the EAJA. The answer is, we believe, clearly in the negative.

In Benton C. Cavin, 93 IBLA 211 (1986), we explored the scope of the term "adversary adjudication" as used in the EAJA. Therein, after noting that section 504(b)(1)(C) of the EAJA defines an "adversary adjudication"

as "an adjudication under section 554" of Title 5 and that section 554 applies to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," we concluded that, while an IBLA decision qualifies as an "order" as defined by the APA and an appeal to the Board might be an "adjudication" within the broad ambit of the APA, section 554 applies only to adjudications "required by statute to be determined on the record after opportunity for an agency hearing." *Id.* at 214. Absent the existence of a requirement that parties be afforded a fact-finding hearing with respect to the specific subject matter under consideration, appeals adjudicated by this Board cannot give rise to a petition for costs and expenses under the EAJA regardless of the outcome of the appeal to the Board since the consideration of such an appeal would not constitute an adjudication under section 554 as required by the EAJA. *Id.* at 215. See also 43 CFR 4.603(a).

[2] In Benton C. Cavin, supra, we held that an appeal brought from a rejection of a color-of-title application was not an adjudication under section 554 of the APA since nothing in the Color of Title Act, 43 U.S.C. § 1068 (1994), required that an adjudication thereunder be determined on the record nor did that statute provide for any type of agency hearing in connection therewith. *Id.* We note that this decision was subsequently affirmed by the United States Claims Court, 19 Cl. Ct. 198 (1989). This principle has also been upheld on numerous occasions by the Board. See, e.g., Benson-Montin-Greer Drilling Co., 146 IBLA 387, 400-401 (1999); Sigma M Exploration Inc., 145 IBLA 182, 192 (1998), and cases cited.

In the instant case, no fact-finding hearing was held. Nor does the applicable statute require that decisions rejecting or granting rights-of-ways be made on the record after an opportunity for a hearing. ^{1/} Thus, the EAJA is inapplicable to the instant proceedings and petitioner's request must be rejected. Because of our holding that the EAJA does not apply, it is unnecessary to examine the various contentions pressed by the parties as to the appropriateness of any award thereunder. ^{2/}

^{1/} While it is true that under 43 CFR 2803.4(e) the suspension or termination of a right-of-way grant that is, under its terms, an easement entitles the holder to written notice and requires that an appeal be referred for a hearing before an Administrative Law Judge, that regulation is inapplicable in the instant case since the appeal in Tom Cox, supra, dealt with the initial issuance of a right-of-way and not the suspension or termination of an easement.

^{2/} We would note that in Benton C. Cavin, supra, we had pointed out that "as the regulations clearly contemplate the taking of an appeal from the decision of the adjudicative officer to the Board, 43 CFR 4.617 (an appeal which would be impossible if the Board were also expected to act as the adjudicative officer), it is clear that it was not contemplated that the Board would ever be deemed the adjudicative officer." *Id.* at 212-13. Thus, the instant appeal would arguably be subject to dismissal for this reason. However, for reasons similar to those provided in Cavin, the Board has determined to accept the matter to expedite ultimate decisionmaking.

Id.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, petitioner's request for an award of attorney fees and expenses is denied.

James L. Burski
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

