



DONALD E. ENO v. UNITED STATES

179 IBLA 227

Decided June 4, 2010

Editor's note: Appeal filed, Civ No. 2:10-cv-01691 (E.D. Cal. Jul 1, 2010)



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

DONALD E. ENO
v.
UNITED STATES

IBLA 2010-14

Decided June 4, 2010

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer denying an application for an award of attorneys fees and expenses under the Equal Access to Justice Act.

Affirmed.

1. Equal Access to Justice Act: Generally--Equal Access to Justice Act: Adversary Adjudication

Section 2(b) of the Mining Claims Rights Restoration Act, 30 U.S.C. § 621(b) (2006), requires a “public hearing” to determine whether placer mining operations would substantially interfere with other uses of land withdrawn for power site purposes but opened to location and patent under that statute. That public hearing is not an “adjudication required by statute to be determined on the record after opportunity for an agency hearing” under the Administrative Procedure Act at 5 U.S.C. § 554 (2006). Therefore, it is not an “adversary adjudication” as defined in the Equal Access to Justice Act, 5 U.S.C. § 504(b)(1)(C) (2006), and regulations at 43 C.F.R. § 4.602, in which a prevailing party other than the United States may obtain an award of attorneys fees and other expenses under 5 U.S.C. § 504(a)(1) (2006) and 43 C.F.R. §§ 4.601 and 4.603(a).

2. Equal Access to Justice Act: Generally--Equal Access to Justice Act: Adversary Adjudication

The permission to engage in placer mining that may be granted under 30 U.S.C. § 621(b) (2006) is a form of agency permission or approval which constitutes a “license” within the meaning of the Administrative Procedure Act at 5 U.S.C. § 551(8) (2006). Therefore, the granting of that permission is excluded from the

term “adversary adjudication” under the Equal Access to Justice Act, 5 U.S.C. § 504(b)(1)(C), and 43 C.F.R. § 4.603(b)(3), and the prevailing party is not eligible for an award of attorneys fees and expenses.

APPEARANCES: Steven J. Lechner, Esq., Lakewood, Colorado, for appellant; Rose Miksovsky, Esq., and Jeff Moulton, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for appellee.

OPINION BY ADMINISTRATIVE JUDGE HEATH

Donald E. Eno appeals from a denial of his application for attorneys fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1) (2006). In the underlying proceeding, CAMC 269556, Eno obtained permission from Administrative Law Judge (ALJ) William E. Hammett to engage in placer mining operations on the Hound Dog placer mining claim. The claim was located under the Mining Claims Rights Restoration Act of 1955 (MCRRA), 30 U.S.C. §§ 621-625 (2006), on land withdrawn for power site purposes. On appeal by the U.S. Forest Service, U.S. Department of Agriculture, this Board affirmed in part as modified, including affirming the grant of general permission to engage in placer mining. *United States v. Eno*, 171 IBLA 69 (2007). Eno subsequently filed with the Hearings Division his application for an award of attorneys fees and expenses incurred in the underlying proceeding, including the appeal to this Board. In a decision dated September 21, 2009 (“EAJA Decision”), ALJ Harvey C. Sweitzer denied Eno’s application, finding that the position of the Forest Service was substantially justified. Eno now appeals to this Board. For the reasons explained below, we find that Eno is ineligible for an award of attorneys fees and expenses under EAJA, and therefore affirm.

Factual and Legal Background

A. *The MCRRA*

The MCRRA opened public lands that had been withdrawn for power site purposes to location and patent under the mining laws. Placer claims located under the MCRRA, however, are subject to conditions, restrictions, and procedures to which ordinary mining claims (and lode claims located under the MCRRA) are not subject. Section 2(b) of the MCRRA, 30 U.S.C. § 621(b) (2006), provides in relevant part:

The locator of a placer claim under this chapter, however, shall conduct no mining operations for a period of sixty days after the filing of a notice of location pursuant to section 623 of this title. If the Secretary of the Interior, within sixty days from the filing of the notice

of location, notifies the locator by registered mail or certified mail of the Secretary's intention to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land included within the placer claim, mining operations on that claim shall be further suspended until the Secretary has held the hearing and has issued an appropriate order. The order issued by the Secretary of the Interior shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (3) a general permission to engage in placer mining. . . .

In short, the locator of a placer claim under the MCRRA is prohibited from engaging in operations until either (1) the Secretary decides (within 60 days from the filing of the notice of location) not to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land, and thereby accedes to placer mining operations, or (2) if the Secretary holds such a hearing, the Secretary grants permission to engage in placer mining operations.

B. The Hound Dog Mining Claim

The relevant facts regarding the Hound Dog mining claim and its history are given in detail in our earlier decision in the underlying case. *See* 171 IBLA at 70-75. We briefly review here those facts pertinent to resolving the EAJA claim. The record citations for these facts are given in the earlier decision.

The claim encompasses 40 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 3, T. 25 N., R. 9 E., Mount Diablo Meridian, Plumas County, California, within the Plumas National Forest. The claim area is commonly known as the "Soda Rock Area." Soda Rock is a travertine dome structure rising approximately 70 to 120 feet above Indian Creek. The dome is a continually developing deposit of multi-colored travertine containing mineral springs, stalactites, sinkholes, and terraced travertine pools of geologic interest that also was a focal point of Maidu Indian mythology. The dome occupies much of the claimed lands. Indian Creek flows along the northern and western edges of the dome in a narrow canyon.

The claimed lands originally were part of a placer mining claim located in 1907 when the lands were open to mineral entry and before the withdrawal for power site purposes.¹ Holders of the claim quarried part of the travertine deposit for

¹ Because of the early date of its location, the claim also was not subject to the
(continued...)

building stone from 1965-1993. In January 1982, on request of the Forest Service (based on certain iconographic features associated with the Maidu genesis mythology, beliefs, and cultural practices), the Keeper of the National Register of Historic Places (NRHP) determined that the Soda Rock Area was eligible for inclusion in the NRHP under criteria set out at 36 C.F.R. § 60.4(a) and (d).²

In a 1985 settlement of litigation with the Forest Service regarding plans of operations, the holder of the claim at that time agreed not to mine sites identified as Maidu Indian religious, historical, and cultural areas and as scenic areas. The agreement incorporated a plan of operations which limited quarry operations to 6.1 acres on the travertine outcrop. The claim was declared abandoned in 1993 for failure to pay required rental fees.³

In the Plumas National Forest Land and Resources Management Plan (LRMP), issued in August 1988, the Forest Service designated an unspecified 30 acres within the Soda Rock Area as a special interest area (geological area) to protect its unique geologic, scenic, and cultural values. However, the LRMP contemplated that travertine would be at least partially mined, presumably as a common variety under the Materials Act of 1947, 30 U.S.C. §§ 601-604 (2006). The LRMP provided management standards authorizing travertine extraction within specified limits, quarrying operations in accordance with an approved plan of operations, etc.

On August 5, 1997, the Forest Service filed an application with BLM to withdraw 40 acres within the Soda Rock Area from location and entry under the mining laws, subject to valid existing rights. On September 16, 1997, BLM published a notice of the proposed withdrawal in the *Federal Register*, in which BLM also segregated the land “for up to 2 years from mining,” but provided that the “land will remain open to mineral leasing and the Materials Act of 1947.” 62 Fed. Reg. 48668 (Sept. 16, 1997). On August 31, 1999, BLM issued Public Land Order (PLO) No. 7406, which withdrew the 40-acre Soda Rock Area “from location and entry under the United States mining laws for 50 years to protect the Soda Rock Special Interest Area,” subject to valid existing rights. However, the PLO noted that the “land has been and will remain open to mineral leasing.” 64 Fed. Reg. 47515 (Aug. 31,

¹ (...continued)

Common Varieties Act of 1955, 30 U.S.C. § 611 (2006), which withdrew common varieties of stone from location under the mining laws unless the deposit had some property giving it a distinct and special value.

² However, the Soda Rock site was not officially listed on the NRHP until Sept. 25, 2003, more than 21 years later.

³ The abandonment of the claim in 1993 ended its exemption from the Common Varieties Act. It also terminated the terms of the compromise settlement.

1999). It thus kept open the possibility that common variety travertine could be mined and sold under the Materials Act.

In the meantime, on August 15, 1996, before the 1997 segregation and the 1999 withdrawal, Gordon K. Burton and others located the Hound Dog placer mining claim under the MCRRA. The locators filed the required notice of location on August 16, 1996. BLM notified the Forest Service of the location during the 60-day no-operations period. The Forest Service objected to placer mining of the claim. On September 12, 1996, BLM sent a letter to each of the claimants informing them that a public hearing would be held under 30 U.S.C. § 621(b) (2006) (quoted above) to determine whether placer mining operations would substantially interfere with other uses of the land. Burton and the other locators transferred the claim to Donald E. Eno on July 28, 1998.

C. *Judge Hammett's Decision and the Board's Decision on Appeal*

ALJ Hammett conducted the public hearing on June 1-5, 2002. In his December 4, 2003, decision, Judge Hammett found that the Forest Service had not shown that there were substantial uses of the land other than mining justifying a prohibition on placer mining. He was of the view that the substantiality of the competing uses should be measured by their economic value. December 4, 2003, Decision at 6-7. But he found that in any event, the record failed to establish that cultural uses of the land within the claim were substantial uses that would warrant prohibiting placer mining. *Id.* at 8-14. He likewise found that Soda Rock's geologic and asserted scenic values did not constitute "substantial uses." *Id.* at 14-18.

Judge Hammett further held that allowing placer mining "must be tied to some reasonable expectation of gold recovery," but that proof of that expectation "is not equivalent to the standard of proof required for a validity proceeding." December 4, 2003, Decision at 19. Specifically, the claimant must show that there are "more than speculative gold values" that would "merit[] further exploration of the mineral values of the claim." *Id.* He concluded that the evidence showed sufficient quantities of gold that there was a possibility that the claim might contain a profitable mining opportunity. *Id.* at 20-23. He further opined that travertine extraction did not constitute placer mining, and that the travertine deposit therefore was not relevant to this proceeding. *Id.* at 23-24. Finally, Judge Hammett concluded that placer gold mining operations would not substantially interfere with other uses of the property. *Id.* at 24-26. He therefore granted general permission to engage in placer mining on the Hound Dog claim. *Id.* at 1, 4, 26.

The Forest Service appealed Judge Hammett's decision to this Board. In our February 13, 2007, decision, the Board held that neither the MCRRA nor Departmental precedent requires that competing uses be economically measurable.

171 IBLA at 94. Thus, “the competing uses need not be economically quantifiable and may include the preservation of cultural, geological, or scenic resources.” *Id.* We therefore reversed Judge Hammett to the extent his decision “rested on the lack of quantifiable evidence of the economic value of the competing uses.” *Id.* The Board further held that Judge Hammett failed to accord proper weight to the listing of the Soda Rock Area on the NRHP. Because we found that the weight of the evidence showed that preservation of the cultural resources and values constitutes a substantial use of the land, we reversed Judge Hammett to the extent he found otherwise. *Id.* at 95. We also found that preservation of the geologic values also was a substantial use in view of the rarity of rock formations of this kind in the western United States and the designation of the area as a geologic special interest area. We therefore reversed Judge Hammett’s contrary findings. *Id.* However, we agreed with Judge Hammett that the evidence does not establish that the area has important scenic uses warranting the prohibition of mining. *Id.* at 95-96.

We further agreed with the ALJ that the evidence established that the Hound Dog claim might contain a profitable gold mining opportunity meriting further exploration of the claim. 171 IBLA at 96-97. We also held that placer mining operations include the extraction of building stone, and reversed Judge Hammett’s conclusion that the travertine was not relevant to this proceeding. *Id.* at 97-98.⁴ We concluded that the record supported Judge Hammett’s determination that placer mining operations for gold in Indian Creek will not substantially interfere with the uses of the land for its cultural and geological values. *Id.* at 99-101. We held: “Balancing the benefits of placer mining against the potential harm to the other substantial uses of the land, we find no error in Judge Hammett’s decision to grant Eno a general permission to engage in placer mining on the Hound Dog claim,” subject to the modifications in analysis in our opinion. *Id.* at 101.

D. The EAJA Claim

1. Applicable Law

The EAJA, at 5 U.S.C. § 504 (2006), provides in relevant part:

(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 was substantially justified* or that special circumstances make an

⁴ We offered no opinion on the issue of whether the travertine is an uncommon variety mineral locatable under the Common Varieties Act, 30 U.S.C. § 621 (2006), because that question was not before us.

award unjust. 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.

....

(b)(1) For the purposes of this section—

....

(C) “adversary adjudication” means (i) *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.)

Title 5 U.S.C. § 554 (2006), part of the Administrative Procedure Act (APA), provides in subsection (a): “This section 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,*” except to the extent that any of six identified circumstances is involved, none of which is relevant here. (Emphasis added.) Section 554 then prescribes various requirements for notice of the hearing, notice of controverted factual and legal issues, submission of facts and arguments, reception of evidence, *ex parte* contacts, and separation of adjudicative functions from investigative or prosecuting functions.

Departmental EAJA regulations follow the statutory provisions. Title 43 C.F.R. § 4.603(a) provides: “The Act [EAJA] applies to adversary adjudications conducted by the Office of Hearings and Appeals, including proceedings to modify, suspend, or revoke licenses if they are otherwise adversary adjudications.” Section 4.602 defines “adversary adjudication” in relevant part as “[a]n adjudication under 5 U.S.C. 554 in which the position of the Department or other agency is presented by an attorney or other representative who enters an appearance and participates in the proceeding.” The same section defines “adjudicative officer” as “the deciding official(s) who presided at the adversary adjudication, or any successor official(s) assigned to decide the application.” Section 4.603(b) provides in relevant part: “The Act [EAJA] does not apply to: (1) Other hearings and appeals conducted by the Office of Hearings and Appeals, even if the Department uses procedures comparable to those in 5 U.S.C. 554 in such cases; . . . [or] (3) Proceedings to grant or renew licenses.” Section 4.601 provides that an eligible party may receive an award “when it prevails over the Department or other agency, unless the position of the Department or other agency was substantially justified or special circumstances make an award unjust.”

In summary, an “adversary adjudication” under EAJA is an adjudication required by statute to be determined on the record after opportunity for a hearing, in which the Government agency’s position is represented by counsel. However, the term excludes, among other things, an adjudication for granting or renewing a license. The fact that the Department may, in a particular instance, employ hearing procedures similar to those in 5 U.S.C. § 554 (2006) does not imply that the procedure is an adversary adjudication. In an adversary adjudication, an eligible prevailing party other than the Department or other agency is entitled to an award of attorneys fees and expenses unless the agency adjudicative officer finds that the agency’s position was “substantially justified,” which shall be determined based on the administrative record as a whole.

2. *Eno’s Application and Judge Sweitzer’s Decision*

On March 14, 2007, approximately one month after the Board’s decision upholding the grant of general permission to engage in placer mining operations, Eno filed his application for an award of more than \$160,000 in attorneys fees and more than \$35,000 in expenses with the Hearings Division.⁵ The submissions of both Eno and the Forest Service argued at length the question of whether the Forest Service’s position was “substantially justified.”

ALJ Harvey C. Sweitzer, the successor ALJ assigned to decide the application, issued his decision on September 19, 2009. Judge Sweitzer emphasized that the balancing test or “weighing process” of comparing the benefits of mining against injury to other uses of the land required under *United States Forest Service v. Milender*, 104 IBLA 207, 218-20 (1988) (“*Milender II*”) “can lead reasonable minds to different conclusions in general and specifically with regard to the facts of this case.” EAJA Decision at 18. In the instant case, he found, this was particularly so because of (1) ambiguity regarding the scope of the Forest Service’s authority to regulate mining (a major factor in determining the extent to which mining would interfere with other uses and whether the benefits of mining outweigh the detriments); (2) complex geologic processes; (3) uncertainty regarding valuation of the land for mining before the Board’s February 13, 2007, decision; and (4) the inherent subjectivity of weighing the competing land use values, especially where the other uses are not economically quantifiable. *Id.* In the analysis which followed, he explored these issues at length. *Id.* at 18-30.

⁵ The Departmental EAJA regulations at 43 C.F.R. § 4.620 further provide in relevant part: “You must file and serve all documents related to an application for an award under this subpart on all other parties to the proceeding in the same manner as other pleadings in the proceeding.” Thus, in this case, because the underlying proceeding was a public hearing conducted by an ALJ of the Hearings Division, the application was properly filed with the Hearings Division.

Judge Sweitzer concluded that the Forest Service's position "had a reasonable basis in fact and law at all times, especially given the substantial subjectivity and difficulty of reaching factual and legal determinations pertinent to MCRRA's application." EAJA Decision at 2. Thus, the Forest Service "was substantially justified in prosecuting the MCRRA proceeding against Mr. Eno from start to finish." *Id.* After holding that Eno was not entitled to an award of fees and expenses for that reason, Judge Sweitzer stated in a footnote:

It is not clear that Applicant would be entitled to an award of fees and expenses even if Respondent was not substantially justified. The provisions of EAJA only allow for recovery of fees and expenses "in the case of proceedings that are required by statute to be determined on the record after an opportunity for a hearing" *Robert W. & Marjorie Miller*, 177 IBLA 352, 356 (2009). While MCRRA requires a "public hearing," the statute does not explicitly require a hearing on the record. *See* 30 U.S.C. § 621(b) (2006).

Id. n.2. Judge Sweitzer did not address this question further.

Eno then appealed to this Board. Eno asserts a variety of arguments to the effect that the position of the Forest Service in the underlying proceeding was not "substantially justified."⁶ The Forest Service responds to these arguments and adds arguments of its own in support of Judge Sweitzer's conclusion that the Forest Service's position was substantially justified.

Although Judge Sweitzer deferred the issue of whether Eno is eligible for an award of attorneys fees, we find that issue to be dispositive. For the reasons

⁶ He asserts, among other things, (1) the Forest Service violated certain provisions of the *Forest Service Manual* by failing to prepare an environmental analysis and make recommendations before objecting to placer mining, Appellant's Statement of Reasons (SOR) at 21-26; (2) the Forest Service's approval of a plan of operations as a result of the 1985 settlement with a prior claim holder (under which 6.1 acres on the travertine outcrop were quarried), as well as the 1988 LRMP and the Forest Service's delay in seeking withdrawal, demonstrate that the Forest Service knew that normal placer mining operations could occur without interfering with other uses of the land, SOR at 26-30; (3) the Forest Service's experts' and employees' reports and testimony do not show that mining would substantially interfere with other uses, and actually show the opposite, SOR at 30-35; (4) the Forest Service's expert's sampling and evaluation of the gold potential on the claim were plainly wrong and were rejected by this Board, SOR at 38-44; and (5) the Forest Service had no basis, in light of the evidence, to argue that scenic values constituted a use of the land, SOR at 51-53. Eno also attacks various of the Forest Service's legal arguments as he portrays them.

explained below, we hold that Eno was not eligible for an award of attorneys fees under EAJA. We therefore do not reach the question of whether the Forest Service's position was substantially justified.

Analysis

I. A "Public Hearing" under the MCRRA Is Not an Adjudication Required by Statute to Be Determined on the Record after Opportunity for an Agency Hearing.

As quoted above, section 2(b) of the MCRRA provides that the Secretary may notify a locator of his intention "to hold a *public hearing* to determine whether placer mining operations would substantially interfere with other uses of the land included within the placer claim[.]" 30 U.S.C. § 621(b) (2006) (emphasis added). The statute is silent regarding whether there must be a hearing and determination on the record.

Eno attacks the footnote in Judge Sweitzer's decision observing that the MCRRA does not explicitly require a hearing on the record as an "absurd" suggestion. SOR at 18. While admitting that the MCRRA "does not expressly provide for a 'hearing on the record,'" Eno cites 43 C.F.R. § 4.24, part of the Department's general rules relating to procedures and practice before the Office of Hearings and Appeals (OHA). SOR at 18. Section 4.24(a)(2) and (3) require that the record of a hearing "shall be the sole basis for decision." Eno refers to section 4.24 as "regulations implementing the MCRRA mandate." SOR at 18. This is not correct. While section 4.24 applies to all types of hearings before any of the appeals boards or the Hearings Division of the OHA, it was not promulgated pursuant to the MCRRA and does not cite the MCRRA as authority. Moreover, section 4.24 is a regulation, not a statute.

Eno also cites references to the "record" in Judge Hammett's decision and this Board's earlier decision in this case. SOR at 18-19. But the fact that a record of the hearing was made does not imply that the statute required a hearing on the record. Nor does the fact that a record was made or certain procedures followed otherwise imply that the proceeding was subject to EAJA, as 43 C.F.R. § 4.603(b)(1), quoted above, specifically notes.

Eno further asserts that section 9 of the Taylor Grazing Act (TGA), 43 U.S.C. § 315h (2006) "does not provide for a hearing 'on the record,'" but the Board nevertheless "recognizes that such proceedings are 'adversary adjudications' for purposes of EAJA." SOR at 19. Section 315h provides that the Secretary "shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure

in the land department.” Eno overlooks the import of the statutory requirement that hearings be conducted similar to the “procedure in the land department.”⁷

On December 9, 1910, the Commissioner of the GLO issued Rules of Practice effective February 1, 1911. These rules were reprinted, with amendments, on September 1, 1926. 51 L.D. 547 (1926). They addressed proceedings before registers in contests initiated by a party seeking to acquire title to, or claiming an interest in, land involved against a party to any entry, filing, or other claim under laws relating to the public lands, as well as hearings and contests before the district cadastral engineer. They provided for notice and service of notice, an answer responding to the allegations of the contest, depositions of certain witnesses, conduct of trials, receipt of trial testimony and evidence, transcription of testimony, and a report and opinion by the register. The rules also addressed new trials and procedures for appeals to the GLO Commissioner and the Secretary. In *State of California, Standard Oil Co. of California*, 51 L.D. 141, 144 (1925), Secretary Hubert Work explained:

The long-established and general practice of the Department of the Interior in land matters is that determinations are not made either upon reports of special agents or upon the statements of parties in interest in controverted matters, but that *hearings or trials are ordered and held, at which all parties in interest may present testimony and where witnesses may be examined and cross-examined*, as is customary in such proceedings. [Emphasis added.]

These are the procedures to which section 315h referred when it was enacted in 1934. The 1926 rules impose requirements similar to several of those imposed in the later-enacted APA provision at 5 U.S.C. § 554 (2006), discussed above, as well as requirements in addition to those in section 554. Thus, in *Frank Halls*, 62 I.D. 344, 346-47 (1955), the Deputy Solicitor interpreted section 315h as bringing the prescribed hearings under the TGA within the APA hearing requirements, specifically including APA section 5—now codified, as amended, at section 554. *See also, e.g., Burke Ranches, Inc. v. BLM*, 173 IBLA 45, 46-47 (2007); *BLM v. Ericsson*, 98 IBLA 258, 263 (1987); *E.L. Cord*, 64 I.D. 232, 239 (1957). In short, the TGA and the APA have consistently been interpreted to require an opportunity for an APA hearing on the record under section 554.

There is no statutory provision or history associated with the MCRRA analogous to that of the TGA. Section 2(b) of the MCRRA, 30 U.S.C. § 621(b)

⁷ The “land department” was part of the General Land Office (GLO). The Grazing Service and the GLO were merged in 1946 to form the BLM under section 403 of Reorganization Plan No. 3, 11 Fed. Reg. 7875, 7876 (July 20, 1946).

(2006), simply requires a “public hearing.” The Supreme Court made clear in *Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 135-36 (1991), that an “adversary adjudication” within the meaning of EAJA, 5 U.S.C. § 504(b)(1)(C), means an adjudication that is subject to section 554.⁸ The question is whether a bare reference to a “public hearing” operates to make the hearing subject to section 554 procedures.

Friends of the Earth v. Reilly, 966 F.2d 690 (D.C. Cir. 1992), involved section 3006(e) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6926(e) (2006). It provides that whenever the Administrator of the Environmental Protection Agency (EPA) “determines after public hearing” that a State is not administering a hazardous waste program as required under that section, the Administrator shall withdraw authorization of the program unless the state takes corrective action. An environmental advocacy organization, as intervenor, had prevailed against the EPA in a withdrawal proceeding and then sought attorneys fees under EAJA. After quoting the statute, the court explained:

The text requires only a “public hearing”; it does not expressly require either that the withdrawal hearing be “subject to section 554” or that the hearing be “on the record.” See 5 U.S.C. § 554. Nevertheless, the absence of these “magic words” is not dispositive. *St. Louis Fuel [Supply Co., Inc. v. Federal Energy Regulatory Commission]*, 890 F.2d [446] at 448 [(D.C. Cir. 1989)]; see also *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972). Rather, “[w]hat counts is whether the statute indicates that Congress intended to *require* full agency adherence to all section 554 procedural components.” *St. Louis Fuel*, 890 F.2d at 448-49 (emphasis in original).

966 F.2d at 693. The court contrasted RCRA section 3006(e) with section 7001(b), 42 U.S.C. § 6971(b) (2006), which prohibits discrimination against employees who

⁸ The Supreme Court explained:

While it is possible, as *Ardestani* contends, that Congress’ only intent in defining adversary adjudications was to limit EAJA fees to trial-type proceedings in which the Government is represented, Congress chose to refer to adversary adjudications “under section 554.” Section 554 does not merely describe a type of agency proceeding; it also prescribes that certain procedures be followed in the adjudications that fall within its scope. We must assume that the EAJA’s unqualified reference to a specific statutory provision mandating specific procedural protections is more than a general indication of the types of proceedings that the EAJA was intended to cover.

502 U.S. at 136.

have reported RCRA violations or testified in RCRA proceedings and authorizes an employee to seek review of the discriminatory action. The Secretary of Labor then must conduct an investigation, which “shall provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to such alleged violation.” Further, “[a]ny such hearing shall be of record and shall be subject to section 554 of Title 5.” 42 U.S.C. § 6971(b) (2006). The court noted:

In *St. Louis Fuel*, we found it “significant” that the provision being reviewed required only a “hearing” but other provisions of the Department of Energy Organization Act “expressly invoke[d] the APA.” 890 F.2d at 449. We think it also significant that while Congress, in enacting section 3006(e), merely required a “public hearing,” it required a hearing “subject to section 554” in enacting section 7001(b).

966 F.2d at 694. After analyzing several other arguments, the court ultimately concluded that the EAJA claimant “has failed to show Congress intended that withdrawal proceedings be ‘subject to’ or ‘governed by’ section 554.” *Id.* at 696.

In cases not involving EAJA, courts have consistently held that a statutory requirement for a “public hearing,” without more, does not grant a right to a trial-type hearing and does not invoke the procedures of section 554. See *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 16 (1st Cir. 2006); *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477, 1482-83 (D.C. Cir. 1989); *Buttrey v. United States*, 690 F.2d 1170, 1174-75 (5th Cir. 1982).

We have found no case in which a statutory requirement for a “public hearing,” without more, has been construed as an adjudication under section 554, or as requiring the procedural formalities and protections of section 554, or as an “adversary adjudication” within the meaning of EAJA, 5 U.S.C. § 504(b)(1)(C).⁹ We have also found nothing evidencing any intent on the part of Congress in enacting

⁹ When Congress intends to require a hearing on the record that is subject to section 554, it plainly knows how to do so. Examples from the United States Code are abundant. The following are but an extract of those examples (all references are to the 2006 U.S. Code): 7 U.S.C. §§ 1515h, 2279e(a), 3804(b), 3805(a), and 4815(b)(1)(D); 12 U.S.C. §§ 1701q-1(d)(1)(B), 1723i(c)(1)(B), and 1735f-14(c)(1)(B); 15 U.S.C. § 1717a(B)(1)(A); 21 U.S.C. § 1041(c)(1)(B); 30 U.S.C. § 1719(e); 33 U.S.C. § 1319(g)(2)(B); 42 U.S.C. § 1437z-1(c)(1)(B); 42 U.S.C. §§ 3783 and 7413(d)(2)(A); 43 U.S.C. § 1656(d); 49 U.S.C. §§ 46301(d)(5)(B) and (d)(7)(A), 70115(c)(1).

section 2(b) of the MCRRA to require all of the section 554 procedural components.¹⁰

One further question remains because this case arises in California, within the geographic jurisdiction of the Court of Appeals for the Ninth Circuit. In *Collord v. Department of the Interior*, 154 F.3d 933 (9th Cir. 1998), BLM contested the validity of certain lode mining and mill site claims. The Ninth Circuit held that the mining and mill site claims “are property interests and the Constitution requires a hearing before the agency can cancel these claims.” 154 F.3d at 936. Relying on *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), and *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1958), the court held that the scope of hearings covered by section 554 includes those required by constitutional due process. 154 F.3d at 936. On that basis, the court held that a mining claim contest is an “adversary adjudication” under EAJA, notwithstanding the absence of a statutory requirement in the mining law for a hearing on the record.

In *Robert W. & Marjorie E. Miller*, 177 IBLA 352 (2009), a case involving a contest to a lode mining claim, we explained that we had applied *Collord* to contest cases arising within the Ninth Circuit. 177 IBLA at 359-60, and cases cited. However, for reasons explained in our opinion, we declined to extend the *Collord* rationale to cases arising outside the Ninth Circuit. See 177 IBLA at 360-63. Because the instant case arises within the Ninth Circuit, we will take *Collord* into account.

In the instant case, however, in contrast to *Collord*, neither the Forest Service nor BLM sought to cancel or extinguish any property interest that Eno possesses. This case does not involve a mining claim contest. Under the MCRRA, at 30 U.S.C. § 621(b) (2006), Eno’s property interest in the Hound Dog placer mining claim is expressly subject to the Secretary’s authority to grant or deny permission to mine, and his exercise of any right to mine is conditioned on such permission. Effectively, the holder of a placer mining claim located under the MCRRA has no right to conduct any operations unless BLM decides to let him do so, either by acquiescence (deciding not to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land), or by granting conditional or general permission to engage in placer mining after holding a hearing and undertaking the balancing test or “weighing process” described in *Milender II*. The Secretary may prohibit mining on the grounds specified in section 621(b) even

¹⁰ Section 2(b) (30 U.S.C. § 621(b)(2006), quoted above) is identical to language proposed by the Department. See letter from Assistant Secretary Orme Lewis to the Chairman of the Senate Interior and Insular Affairs Committee dated July 18, 1955, appended to S. Rep. No. 1150, 84th Cong., 1st Sess., 1955 U.S.C.C.A.N. 3006, 3010-11. The concern was potential conflicts between surface uses. There was no discussion at all regarding procedures for the “public hearing.” See also H.R. Conf. Rep. No. 1610, 84th Cong., 1st Sess., 1955 U.S.C.C.A.N. 3012.

though a placer mining claim is valid, as we acknowledged in *Milender II*, 104 IBLA at 223-24. If he does so, there is no loss of any property right on the part of the holder of the placer mining claim. Therefore, the *Collord* rationale does not apply to require a section 554 hearing on the record here.

For all of these reasons, we conclude that a “public hearing” under 30 U.S.C. § 621(b) (2006) is not an “adversary adjudication” within the meaning of EAJA and the Department’s implementing regulation at 43 C.F.R. § 4.602.

II. Granting of General Permission to Engage in Placer Mining under the MCRRA Constituted Granting a “License” within the Meaning of EAJA.

Even if we were to assume, *arguendo*, that an MCRRA “public hearing” otherwise is an “adversary adjudication,” the definition of that term at 5 U.S.C. § 504(b)(1)(C) specifically excludes adjudications that are for the purpose of granting or renewing a license. The regulation at 43 C.F.R. § 4.603(b)(3) mirrors that exclusion.¹¹ The question is whether permission to engage in placer mining constitutes a license.

The APA defines the term “license” as follows: “‘license’ includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission[.]” 5 U.S.C. § 551(8) (2006). The wording of this provision is broad and it has been construed accordingly. In *Air North America v. Department of Transportation*, 937 F.2d 1427, 1437 (9th Cir. 1991), the court held that certificate authority issued to an airline by the Federal Aviation Administration (FAA) was a “license” under section 551(8):

First, the definition of license in the APA is extremely broad. The relevant section says that a license “includes the *whole or a part* of any agency permit, *certificate*, approval, registration, charter, membership, statutory exemption or other form of permission.” 5 U.S.C. § 551(8) (emphasis added). The Department’s certificate, if not in itself sufficient to allow AirNA [Air North America] to fly, fell within this broad language. Second, other courts that have addressed the scope of the APA’s definition of “license” have read section 551(8) broadly, in accord with its terms. *See, e.g., Atlantic Richfield Co. v. United States*, 774 F.2d 1193, 1200 (D.C. Cir. 1985).

¹¹ Proceedings to revoke, suspend, or modify a license are not excluded from the definition of “adversary adjudication.” *See, e.g., Hirschey v. Federal Energy Regulatory Commission*, 760 F.2d 305, 311 n. 31 (D.C. Cir. 1985).

By way of other illustrative examples, an airman medical certificate was held to be a license in *Bullwinkel v. Federal Aviation Administration*, 787 F.2d 254, 256-57 (7th Cir. 1986). An Incidental Take Statement under the Endangered Species Act was held to constitute a license in *South Yuba River Citizens League v. National Marine Fisheries Service*, 629 F. Supp. 2d 1123, 1131 (E.D. Cal. 2009).

Issuance or renewal of a grazing permit is the granting of a “license.” *Oregon Natural Desert Ass’n v. U.S. Forest Service*, 465 F.3d 977, 983 (9th Cir. 2006). This Board likewise so held in *Western Watersheds Project*, 171 IBLA 304, 308 (2007) (denying an award under EAJA on that ground), and *William J. Thoman*, 157 IBLA 95, 104 (2002). In *Thoman*, we also held that a livestock crossing permit was a “license,” 157 IBLA at 106, and denied an award under EAJA for that reason.

Permission to engage in placer mining under section 2(b) of the MCRRA is certainly a form of agency permission or approval. Particularly in view of the precedents discussed above, it would be difficult to maintain that such permission does not come within the definition of “license” in section 551(8), and we hold that it does. The granting of that permission therefore is the granting of a license, and is therefore excluded from the definition of “adversary adjudication” in EAJA under 5 U.S.C. § 504(b)(1)(C) (2006), and 43 C.F.R. § 4.603(b)(3).

Conclusion

For the reasons explained above, we hold (1) the MCRRA’s “public hearing” provision at 30 U.S.C. § 621(b) (2006) does not require a hearing “on the record” subject to 5 U.S.C. § 554 (2006), and therefore is not an “adversary adjudication” within the meaning of EAJA at 5 U.S.C. § 504(b)(1)(C) (2006) and the regulation at 43 C.F.R. § 4.602; and (2) even if the MCRRA were interpreted as requiring a hearing on the record, granting permission to engage in placer mining constitutes granting a license within the meaning of the APA at 5 U.S.C. § 551(8) (2006), and therefore is excluded from the definition of “adversary adjudication” under 5 U.S.C. § 504(b)(1)(C) (2006) and 43 C.F.R. § 4.603(b)(3). It follows that Eno is ineligible for an award of attorneys fees and expenses under EAJA, 5 U.S.C. § 504(a)(1) and 43 C.F.R. §§ 4.601 and 4.603(a).

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.

_____/s/
Geoffrey Heath
Administrative Judge

I concur:

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