



GLENN'S FERRY GRAZING ASSOCIATION, INC,  
JUNIPER MOUNTAIN GRAZING ASSOCIATION, LLC

180 IBLA 25

Decided September 9, 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

GLENNS FERRY GRAZING ASSOCIATION, INC,  
JUNIPER MOUNTAIN GRAZING ASSOCIATION, LLC

IBLA 2010-10

Decided September 9, 2010

Appeal of a decision by an Administrative Law Judge denying an application for an award of attorney fees and expenses under the Equal Access to Justice Act.

Affirmed.

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

A grazing permit is a license under the Equal Access to Justice Act. An administrative adjudication for the purpose of granting or renewing a license does not constitute an adversary adjudication for which attorney fees and expenses can be awarded.

APPEARANCES: W. Alan Schroeder, Esq., Boise, Idaho, for the Glens Ferry Grazing Association, Inc., and Juniper Mountain Grazing Association, LLC.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

The Glens Ferry Grazing Association, Inc., and Juniper Mountain Grazing Association, LLC (jointly, GFGA) have appealed a September 30, 2009, “Order Dismissing Proceeding” issued by Administrative Law Judge (Judge or ALJ) Andrew S. Pearlstein denying their application for an award of attorney fees and expenses under the portion of the Equal Access to Justice Act (EAJA) applicable to administrative proceedings, 5 U.S.C. § 504 (2006). The proceedings were resolved by the Board’s December 30, 2008, Order titled “Western Watersheds Project & Idaho Birdhunters, Inc., *et al.* v. Bureau of Land Management” (hereinafter, Dec. 30, 2008, Order). For reasons discussed below, we affirm Judge Pearlstein’s decision.

*Background*

The factual, administrative, and adjudicative history leading to the present appeal is complex; the issue presented on appeal is not, and requires our recitation of

only an abbreviated procedural history. As described in the Board's December 30, 2008, Order, the decision which the Bureau of Land Management (BLM) issued in 1997, authorizing grazing on the Nickel Creek and Nickel Creek Fenced Federal Range (FFR) Allotments<sup>1</sup> for a 10-year term, was found by U.S. District Court Judge B. Lynn Winmill to have violated section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006). See Dec. 30, 2008, Order at 3. Judge Winmill's March 31, 1999, Memorandum Decision and Order (Civ. No. 97-0519-S-BLW) applied to 68 grazing permits in the Owyhee Resource Area and eventually led to the decision in *Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9th Cir. 2002).

Responding to the court's ruling, the Field Manager of BLM's Owyhee (Idaho) Field Office, Lower Snake River District, issued, on November 6, 2003, an environmental assessment (EA), a Finding of No Significant Impact, and a final decision renewing the grazing permit for the allotments for a 10-year term beginning March 1, 2004 (hereinafter, the 2003 Decision). *Id.* at 4. Both GFGA and the Western Watersheds Project (WWP), joined by Idaho Birdhunters, Inc., appealed the decision. Judge Pearlstein, to whom the two cases were assigned, consolidated them, conducted a hearing,<sup>2</sup> and by decision dated September 28, 2007, set aside the 2003 Decision and remanded the case for BLM to issue a new grazing decision regarding authorized grazing use after supplementing the EA. *Id.* at 1, 6-7.

BLM appealed Judge Pearlstein's decision (docketed as IBLA 2008-20), as did GFGA (docketed as IBLA 2008-23). By Order dated March 20, 2008, the Board consolidated the appeals and granted GFGA's petition for a stay. WWP did not appeal, but participated in the appeals as a party until it withdrew from the case on November 25, 2008, prior to issuance of the Board's December 30, 2008, Order. *Id.* at 1 n.1. On November 22, 2008, WWP filed, with the U.S. District Court for the District of Idaho, a complaint it described as a "follow-up" to the litigation in *Idaho*

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<sup>1</sup> A declaration by Michael F. Hanley, IV, submitted with the application explains that GFGA owns the base property for the Nickel Creek and Nickel Creek FFR Allotments, as well as other private property, and operates a livestock business through an operating agreement with Juniper Mountain Grazing Association, LLC. That entity leases the base property from GFGA and holds the grazing permits for the allotments. Declaration ¶¶ 3, 9.

<sup>2</sup> The 15-day hearing was conducted at various dates in November and December of 2004 and June of 2005. Order dated Jan. 24, 2008, *Glenns Ferry Grazing Association, Inc. v. Bureau of Land Management*, denying BLM petition for stay in appeal docketed IBLA 2008-20, at 4, vacated by Order dated Mar. 20, 2008, *Western Watersheds Project & Idaho Birdhunters, Inc. v. Bureau of Land Management* at 3.

*Watersheds Project v. Hahn. Western Watersheds Project v. U.S. Department of the Interior*, Civ. No. 08-cv-506-BLW (D. Idaho filed Nov. 22, 2008) at 1.

The Board's December 30, 2008, Order concluded that BLM and GFGA had both prevailed on the merits of their arguments concerning Judge Pearlstein's rulings in favor of WWP and reversed the ALJ decision. Dec. 30, 2008, Order at 2-3. It affirmed, however, his basic finding that BLM had correctly determined in its 2003 Decision that the Idaho Standards for Rangeland Health were not being met on the allotments, and remanded to BLM for further action to modify the 2003 Decision in regard to various terms and conditions that Judge Pearlstein had found to warrant consideration. *Id.* at 14.

By memorandum decision dated December 30, 2009, District Court Judge Winmill set aside the Board's decision and remanded the matter to BLM to make the "Management Guidelines" identified in its 2003 Decision mandatory terms and conditions of GFGA's permit. *Western Watersheds Project v. U.S. Department of the Interior*, Civ. No. 08-cv-506-BLW (D. Idaho Dec. 30, 2009) at 20, 26, 34. He also required BLM to issue a new decision addressing the Nickel Creek FFR Allotment. *Id.* at 31-32, 34.

In the meantime, on November 1, 2007, GFGA filed an application for attorney fees and expenses in the amount of \$101,531.61, including fees for payment of an expert witness who appeared at the hearing. *See* 43 C.F.R. §§ 4.606(a), 4.613(a).<sup>3</sup> WWP submitted a response opposing an award. Although GFGA moved to strike WWP's response, in a December 6, 2007, Order Judge Pearlstein accepted it as providing "comments" and stayed further proceedings on the application pending a final disposition of the underlying decision. *See id.* §§ 4.613(b)(1), 4.623. After the Board issued its December 30, 2008, Order, Judge Pearlstein issued the September 30, 2009, "Order Dismissing Proceeding" which is the subject of this appeal. The ALJ dismissed GFGA's application because, whatever the outcome of the underlying proceeding, they could not qualify for an award under the EAJA.

#### *Applicable Law*

[1] As Judge Pearlstein recognized, the EAJA provides in relevant part that:

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<sup>3</sup> On Apr. 6, 2010, WWP filed a motion for attorney fees and expenses with the U.S. District Court for the District of Idaho. In a recent memorandum decision dated July 20, 2010, the court awarded WWP fees under 28 U.S.C. § 2412(d)(1)(A) (2006) for work performed in both administrative and judicial proceedings. *Western Watersheds Project v. U.S. Department of the Interior*, Civ. No. 08-cv-506-BLW (D. Idaho July 20, 2010).

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1) (2006). An “adversary adjudication” is defined to include “an adjudication under section 554 of [Title 5] in which the position of the United States is represented by counsel or otherwise, but *excludes an adjudication* for the purposes of establishing or fixing a rate or *for the purpose of granting or renewing a license.*” *Id.* § 504(b)(1)(C)(i) (emphasis supplied). Departmental regulations implementing the EAJA appear in 43 C.F.R. Part 4, Subpart F. They differ from the statute in making the exclusion of “[p]roceedings to grant or renew licenses” separate from the definition of an “adversary adjudication,” but the difference is not consequential. 43 C.F.R. § 4.603(b)(3).

As Judge Pearlstein also recognized, the Board held in *William J. Thoman*, 157 IBLA 95, 103 n.5, 104 (2002), that a grazing permit issued under section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (2006), is a “license” within the meaning of 5 U.S.C. § 504(b)(1)(C)(i) (2006).<sup>4</sup> More specifically, Judge Pearlstein noted that in *Lone Tree Cattle Co.*, 175 IBLA 37, 41-42 (2008), the Board rejected the argument that challenges to the terms and conditions of a renewed grazing permit were excepted from the exclusion for licenses because Congress did not intend that exclusion to extend to proceedings under section 554 [of 5 U.S.C.] involving “the suspension, annulment, withdrawal, limitation, amendment, modification or conditioning of [a] license.” H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15, *reprinted in* 1980 U.S.C.C.A.N. at 4994. We had considered this statement of Congressional intent in *Thoman*, and concluded:

The dividing line seems to be between those activities in which the Government is acting in a purely proprietary capacity in deciding whether or not to grant or renew a license affording rights to individuals (in this case denominated as a grazing permit), and those *actions subsequently undertaken within the confines of an issued license which may adversely impact upon the enjoyment of rights already conferred by the Government.* In the former, no award of fees and expenses under the EAJA can be authorized, regardless of any ultimate success an applicant might achieve in obtaining substantive relief,

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<sup>4</sup> The Board rejected the contrary conclusion it had previously reached in *Bureau of Land Management v. Cosimati*, 131 IBLA 390, 394-95 (1995), and modified that decision accordingly.

while, in the latter situation, an award of fees and expenses may be authorized if the individual otherwise establishes his or her qualifications for an award under the terms of the EAJA.

*Lone Tree Cattle Co.*, 175 IBLA at 42, quoting with added emphasis, *William J. Thoman*, 157 IBLA at 105; see also *Western Watersheds Project*, 171 IBLA 304, 308-09 (2007).

#### *Discussion*

GFGA contends that BLM's 2003 Decision had "two fundamental, but legally distinct, purposes" of (1) renewing its grazing permit and (2) modifying the permit "to ensure conformance with the applicable Land Use Plan objectives and with the applicable Standards for Rangeland Health." Statement of Reasons (SOR) at 2. The first purpose, GFGA explains, was never at issue because it did not appeal the issuance or renewal of its permit. *Id.* Rather, GFGA states, the claims it raised "tied directly to limiting, amending, modifying or conditioning" the permit. SOR at 3. Judge Pearlstein concluded there was no distinction between the situation in *Lone Tree Cattle Co.* and the facts pertaining to GFGA's application because the Board applies the "license" exclusion "based on the nature of the appeal" brought for a hearing—in this case a challenge to the terms and conditions of the renewal of a grazing permit—and "not the identity of the appellant" or "the subjective motivations of appellants." Sept. 30, 2009, Order Dismissing Proceeding at 3-4, quoting *Western Watersheds Project*, 171 IBLA at 310-11. We agree with Judge Pearlstein's reasoning and conclusion, and are unpersuaded by GFGA's arguments on appeal.

GFGA concedes that it advances the administrative adjudication specifically for the purpose of challenging the terms and conditions of the grazing permit (SOR at 6), but argues that the Board's decisions in *Thoman*, *Lone Tree Cattle Co.*, and *Western Watersheds Project* failed to consider that renewal of a grazing permit occurs by operation of law under 43 U.S.C. § 1752(c) (2006). SOR at 4-5. GFGA does not cite any authority stating that renewal occurs under this provision "by operation of law," as there is none. Indeed, a simple reading of the statute reveals that a grazer's first priority for renewal does not occur by operation of law, but rather is issued by BLM only when three conditions are met, the first of which is that "the permittee or lessee accepts the terms and conditions to be included . . . in the new permit or lease." 43 U.S.C. § 1752(c) (2006); see *Natural Resources Defense Council v. Hodel*, 618 F. Supp. 848, 859 (E.D. Cal. 1985) ("and has accepted any new conditions of the Secretary").<sup>5</sup> When GFGA appealed BLM's 2003 Decision by seeking to limit, amend,

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<sup>5</sup> The priority accorded by 43 U.S.C. § 1752(c) (2006) is different from the preference right to a grazing permit or lease recognized by sections 3 and 15 of the  
(continued...)

or modify some of its terms and conditions, it failed to satisfy this portion of the statute and the corresponding regulation, 43 C.F.R. § 4130.2(e)(3).<sup>6</sup> Indeed, it is unclear whether the terms and conditions of GFGA's renewed permit have been resolved since the Board's issuance of its December 30, 2008, Order.

GFGA also points out that the Board's decision denying attorney fees in *Western Watersheds Project*, as affirmed by Judge Winmill (Civ. No. 07-498-E-BLW (D. Idaho June 22, 2009)), is on appeal before the Ninth Circuit (No. 09-35708, appeal filed July 31, 2009) and GFGA incorporates WWP's opening brief as part of its SOR. SOR at 5. In addition to this adoption, GFGA argues that Administrative Judge Irwin correctly suggested, in his dissent in *Thoman*, that the Board's position would have the effect of nullifying application of the EAJA to administrative appeals of grazing decisions because BLM can control when it chooses to renew a permit. SOR at 6.

The Board disagrees with GFGA's characterization of Judge Irwin's dissent, but sees no need to respond further. The reasons supporting the Board's position were set forth by Administrative Judge Burski in *Thoman* and it is apparent that, under the ruling in that decision, the hearing for which GFGA seeks attorney fees and expenses was "for the purpose of granting or renewing a license" and therefore was not an "adversary adjudication" as defined at 5 U.S.C. § 504(b)(1)(C)(i). As explained in *Thoman*, awards under the EAJA remain available for administrative actions that may adversely impact the enjoyment of rights conferred by a previously issued grazing permit. *William J. Thoman*, 157 IBLA at 105. As such is not the case, we affirm.<sup>7</sup>

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<sup>5</sup> (...continued)

Taylor Grazing Act, 43 U.S.C. §§ 315b, 315m (2006). See *Garcia v. Andrus*, 692 F.2d 89, 93 (9th Cir. 1982).

<sup>6</sup> BLM's revision of its regulations effective Aug. 11, 2006 (71 Fed. Reg. 39402 (July 12, 2006)), was enjoined by Judge Winmill. *Western Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Idaho 2008). In accordance with Instruction Memorandum No. 2007-137, BLM utilizes the regulations in effect on July 11, 2006. The provision cited is the same in both versions of the regulations.

<sup>7</sup> We note that the Ninth Circuit has found a grazing permit to be a "license" as that term is defined by the Administrative Procedure Act, 5 U.S.C. § 551(8) (2006). *Anchustegui v. Department of Agriculture*, 257 F.3d 1124, 1129 (9th Cir. 2001); see also *Oregon Natural Desert Association v. United States Forest Service*, 465 F.3d 977, 983 (9th Cir. 2006).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Pearlstein's September 30, 2009, "Order Dismissing Proceeding" is affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
Christina S. Kalavritinos  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
James K. Jackson  
Administrative Judge