

(b) *Effect of substantial compliance.* No adjudication of grazing preference will be set aside on appeal, if it appears that it is reasonable and that it represents a substantial compliance with the provisions of part 4100 of this title.

Subpart F—Implementation of the Equal Access to Justice Act in Agency Proceedings

AUTHORITY: Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 (5 U.S.C. 504(c)(1)).

SOURCE: 48 FR 17596, Apr. 25, 1983, unless otherwise noted.

GENERAL PROVISIONS

§ 4.601 Purpose of these rules.

These rules are adopted by the Department of the Interior pursuant to section 504 of title 5, United States Code, as amended by section 203(a)(1) of the Equal Access to Justice Act, Pub. L. 96-481. Under the Act, an eligible party may receive an award for attorney fees and other expenses when it prevails over the Department in an adversary adjudication under 5 U.S.C. 554 before the Office of Hearings and Appeals, unless the Department's position as a party to the proceeding was substantially justified or special circumstances make an award unjust. The purpose of these rules is to establish procedures for the submission and consideration of applications for awards against the Department.

§ 4.602 Definitions.

As used in this part:

(a) *The Act* means section 504 of title 5, United States Code, as amended by section 203(a)(1) of the Equal Access to Justice Act, Pub. L. 96-481.

(b) *Adversary adjudication* means an adjudication under 5 U.S.C. 554 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.

(c) *Adjudicative officer* means the official who presided at the adversary adjudication.

(d) *Department* refers to the Department of the Interior or the relevant de-

partment component which is a party to the adversary adjudication (e.g., Office of Surface Mining Reclamation and Enforcement or Bureau of Land Management).

(e) *Proceeding* means an adversary adjudication as defined in § 4.602(b).

(f) *Party* includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes.

§ 4.603 Proceedings covered.

(a) These rules apply to adversary adjudications required by statute to be conducted by the Secretary under 5 U.S.C. 554. Specifically, these rules apply to adjudications conducted by the Office of Hearings and Appeals under 5 U.S.C. 554 which are required by statute to be determined on the record after opportunity for an agency hearing. 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.

(b) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered matters.

§ 4.604 Applicability to Department of the Interior proceedings.

The Act applies to any adversary adjudication pending before the Office of Hearings and Appeals of the Department of the Interior at any time between October 1, 1981, and September 30, 1984. This includes proceedings begun before October 1, 1981, if final Departmental action has not been taken before that date, and proceedings pending on September 30, 1984.

§ 4.605 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party prevailing over the Department in the adversary adjudication for which it seeks an award. The applicant must

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show that it meets all pertinent conditions of eligibility set out in these regulations.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than \$1 million;

(2) The sole owner of an unincorporated business which has a net worth of not more than \$5 million, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than \$5 million and not more than 500 employees. A unit of state or local government is not a public organization within the meaning of this provision.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the adversary adjudication was initiated.

(d) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included.

(f) The net worth and the number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. 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 con-

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sidered 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.

(g) An applicant is not eligible if it has participated in the proceeding solely on behalf of other persons or entities that are ineligible.

§ 4.606 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding unless (1) the position of the Department as a party to the proceeding was substantially justified, or (2) special circumstances make the award sought unjust. No presumption arises that the Department's position was not substantially justified simply because the Department did not prevail.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding.

§ 4.607 Allowable fees and expenses.

(a) The following fees and other expenses are allowable under the Act:

(1) Reasonable expenses of expert witnesses;

(2) Reasonable cost of any study, analysis, engineering report, test, or project which is found necessary for the preparation of the party's case; and

(3) Reasonable attorney or agent fees.

(b) The amount of fees awarded will be based upon the prevailing market rates for the kind and quality of services furnished, except that—

(1) Compensation for an expert witness will not exceed the highest rate at which the Department pays expert witnesses; and

(2) Attorney or agent fees will not exceed \$75 per hour.

(c) In determining the reasonableness of the fee sought, the adjudicative officer shall consider the following:

(1) The prevailing rate for similar services in the community in which the attorney, agent, or witness has performed the service;

(2) The time actually spent in the representation of the applicant;