

# **Attorneys' Fees in NAD Hearings**

by Karen R. Krub

© Copyright 1998, Farmers' Legal Action Group, Inc.  
Reprint only with written permission.

Two North Dakota brothers have won the right to claim compensation for their costs and attorneys fees incurred in successful USDA National Appeals Division (NAD) appeals. Their victory opens the door to all farmers and ranchers in the region covered by the Eighth Circuit Court of Appeals—North Dakota, South Dakota, Minnesota, Iowa, Nebraska, Missouri, and Arkansas—to try to recover such costs after a successful NAD appeal.

## **Equal Access to Justice Act (EAJA) Allows Recovery of Costs and Attorney Fees**

The right to recover costs and attorney fees from the United States government in cases of successful challenges to government action is based on a federal statute called the Equal Access to Justice Act (EAJA), found at 5 U.S.C. § 504. First enacted in 1980 and expanded in 1985, EAJA is intended to level the playing field for individuals, small businesses, and other organizations who may be discouraged by high costs from challenging or defending against unreasonable government action. Because the federal government has greater resources and expertise behind it when pursuing its position in a dispute with an individual, the individual may be unable to afford the fight. EAJA provides that a party who successfully challenges or defends against government action can recover fees and expenses incurred if the adjudicating officer finds that the government's position was not substantially justified.

## **USDA Regulations Say EAJA Does Not Apply to NAD Appeals**

EAJA provides that claims for costs and fees may be made for any adjudication brought under the federal Administrative Procedures Act (APA), found at 5 U.S.C. § 554. The APA establishes procedures and requirements for "on the record" adjudications by federal agencies. USDA has always contended, and the NAD regulations so state, that the APA and EAJA do not apply to NAD appeals. This is a carryover from 1988 when USDA established the National Appeals Staff (NAS) of the Farmers' Home Administration (FmHA, now Farm Service Agency). The NAS regulations explicitly denied the applicability of EAJA and the APA, and the prefatory comments rejected arguments that their applicability was uncertain. After the Reorganization Act of 1994, NAD was established and USDA again argued in prefatory comments to the NAD regulations that the APA (and therefore EAJA) are not applicable. The Lanes' case was, according to USDA, the first to challenge USDA's NAD regulations barring EAJA claims.

## **Lanes Challenge NAD Denial of EAJA Application**

In 1992, brothers Dwight and Darvin Lane applied for delinquent loan servicing from FmHA. After FmHA discovered possible loan agreement violations, USDA's Office of General Counsel (OGC) issued a "bad faith" determination for each brother, and the Lanes' applications for loan servicing were denied. The Lanes appealed the bad faith determinations to NAS. While the appeals were pending, USDA was reorganized and their appeals were transferred to the new NAD. After the transfer a NAD hearing officer ruled in the brothers' favor, finding "serious flaw[s]" in the OGC report. As successful appellants, the Lanes then applied for reimbursement of their fees under EAJA. NAD denied the applications, without submitting them to the hearing officer for review. In rejecting the EAJA claim, the agency relied on then proposed (now final) USDA regulations stating that the APA and EAJA do not apply to NAD appeals.

## **Federal Courts Rule for Lanes, Overturn USDA Regulation Which Denies EAJA Applicability**

The Lanes sought judicial review of the rejection of their EAJA application and the USDA regulation which was the basis for the denial. In June 1996, United States District Judge Rodney Webb of the District of North Dakota issued a ruling in the Lanes' favor, finding that the APA and EAJA do apply to NAD appeals and overturning the USDA regulation which states the contrary. USDA appealed to the Eighth Circuit Court of Appeals, continuing to argue that the APA and EAJA are not applicable to NAD appeals. In *Lane v. USDA*, 120 F.3d 106 (8th Cir. 1997) decided July 14, 1997, a three-judge panel of the Eighth Circuit Court of Appeals affirmed Judge Webb's ruling that the APA and EAJA do apply to NAD hearings and successful appellants may claim costs and attorneys fees from the government. The Court considered the elements of EAJA and APA applicability and determined that NAD hearings clearly fall within the intended scope of those laws.

## **The Court's Reasoning**

Only parties to adjudications conducted under § 554 of the APA are eligible for EAJA fee reimbursements. Therefore, for EAJA compensation to be available for NAD hearings, those hearings must be shown to fall under § 554 of the APA. There are three prerequisites for a government proceeding to come under § 554 of the APA. The proceeding must be an adjudication, there must be statutory opportunity for a hearing, and the hearing must be on the record. The Eighth Circuit panel found that NAD hearings meet all three prerequisites for APA and EAJA applicability: (1) NAD hearings are agency proceedings for the purpose of formulating an order based upon resolution of disputed facts; (2) once a NAD hearing is requested by a participant, the hearing is mandatory for the agency; and (3) NAD orders are based upon evidence presented by the agency and the participant in a trial-type process.

USDA argued that even if NAD proceedings satisfied the requirements under § 554 of the APA, the NAD statute had superseded the APA and taken NAD proceedings out of the APA realm, thereby precluding EAJA claims. The Eighth Circuit panel rejected this argument, noting that the APA was enacted to provide uniform and comprehensive procedures for federal agency adjudications. The panel quoted from the APA to the

effect that only express language in subsequent statutes would be held to modify or supersede the APA. Courts cannot infer—as the USDA here urged them to do—that the APA has been superseded. The panel rejected the USDA’s attempt to draw an analogy to the United States Supreme Court’s ruling in *Marcello v. Bonds*, 349 U.S. 302 (1955), that deportation hearings fall outside of the APA. They found that the Supreme Court’s ruling in *Marcello* was based on the Immigration and Nationality Act’s comprehensive and express preemption of the APA in the deportation context. No such statutory provision could be found for NAD proceedings, therefore the APA applies.

### **Lanes’ Claim for Fees Remanded to NAD Hearing Officer**

EAJA provides that fees will not be awarded where the adjudicator finds that the government’s position in the dispute was substantially justified. On review, Judge Webb found that the NAD hearing officer made no such finding, USDA had not argued the point, and the hearing officer’s order contained language which would, if necessary, allow Judge Webb to make an independent finding of “no substantial justification.” Judge Webb found that the Lanes were entitled to recover their costs and remanded the case to NAD for a determination of the amount to be paid. On appeal, the Eighth Circuit reversed Judge Webb’s finding as to the lack of substantial justification, holding that the NAD hearing officer had not addressed the justification of USDA’s position because the agency had rejected the EAJA applications without submitting them to the hearing officer. The panel found that the hearing officer must consider the merits of an EAJA application before the application could be considered under judicial review. The fee application was remanded to NAD for a determination of whether FmHA’s position against the Lanes was substantially justified.

### **Impact of *Lane v. USDA* for Farmers and Ranchers Outside the Eighth Circuit’s Jurisdiction**

The decision in *Lane v. USDA* has not led to a general change in USDA policy which would allow farmers and ranchers outside the Eighth Circuit to bring EAJA claims. Instead, NAD has apparently decided to limit the impact of the ruling to the Eighth Circuit. EAJA applications filed by farmers and ranchers in other states will be rejected, forcing those applicants to pursue litigation if they want to establish the applicability of EAJA to NAD appeals in their own Circuits. Suits by farmers and ranchers in the other Circuits may bring different outcomes, resulting in different EAJA eligibility from region to region.