

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:

Sun Mountain Logging, L.L.C.,)	DNS-FS Docket No. 02-0001
Sherman G. Anderson, and)	
Bonnie Anderson,)	
)	Decision & Order Awarding EAJA
Applicants)	Attorneys' Fees to Sun Mountain

Decision Summary

1. Applicants Sun Mountain Logging, L.L.C., Sherman G. Anderson, and Bonnie Anderson (collectively, Sun Mountain) are entitled to reimbursement under the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504, 7 C.F.R. §§ 1.180-1.203.

Introduction

2. Sun Mountain sought EAJA reimbursement from the U. S. Forest Service (Forest Service) for monies expended to defend against suspensions imposed by the Forest Service. *See* Sun Mountain's Application for Award of Fees and Expenses Under Equal Access to Justice Act, filed December 11, 2002, with supporting documents (Application); and Sun Mountain's Reply Brief in Support of Application for Award of Fees and Expenses Under Equal Access to Justice Act, filed February 28, 2003 (Reply). Sun Mountain sought "\$32,527.41 attorneys fees and attorneys costs," plus "\$192 in expenses for mileage and meals for employees required to testify."

3. The Forest Service imposed the suspensions against Sun Mountain under the Governmentwide Debarment and Suspension (Nonprocurement) regulations, found in Title 7 Part 3017 of the Code of Federal Regulations.

4. The Forest Service opposed Sun Mountain's EAJA application. *See* the Forest Service Suspending Official's Response, filed January 31, 2003 (Response).¹

Background

5. In a Decision issued November 14, 2002, I ordered the Forest Service suspensions of Sun Mountain vacated, finding that the Forest Service decisions to suspend Sun Mountain were not based on the applicable standard of evidence. *See* 7 C.F.R. § 3017.515 Appeal of debarment or suspension decisions. *In re Sun Mountain Logging, L.L.C., et al.*, 61 Agric. Dec. 627 (2002).

6. The Forest Service is authorized to impose suspension based upon adequate evidence that a cause for debarment may exist. I concluded that, given the knowledge within the Forest Service, the Forest Service did not have the authority to suspend Sun Mountain, because there was never "adequate evidence" of a "cause of so serious or compelling a nature that it affect(ed) the present responsibility" of Sun Mountain. 7 C.F.R. §§ 3017.400, 3017.405, and 3017.305(d).

7. The suspensions the Forest Service imposed on Sun Mountain involved the Mudd-York Salvage Timber Sale, on the Beaverhead-Deerlodge National Forest, Wise River Ranger

1. Contrary to the Forest Service's assertion, made by Lori Polin Jones, Esq. (Response, p. 1), I did *not* hold the Sun Mountain suspensions to have been arbitrary and capricious; I held that the Sun Mountain suspensions were not based on the applicable standard of evidence.

District, in Montana. The Mudd-York Salvage Timber Sale was contracted to Darby Lumber, Inc., which contracted with two logging subcontractors, Sun Mountain and Myrsdol Logging.

8. On October 8, 1999, the Forest Service notified the timber purchaser, Darby Lumber, Inc., that it, Darby Lumber, Inc., was in breach of contract for the removal of undesignated timber from the sale area and owed damages to the Forest Service in the amount of \$596,283.71. In January 2000, the Forest Service revised the amount of damages owed by Darby Lumber, Inc. downward to \$321,012.95. In March 2000, the Forest Service revised the amount of damages owed by Darby Lumber, Inc. downward to \$179,456.15 (including not only stumpage, but associated charges, the cost of a recruise, government costs, and interest).² Darby Lumber, Inc., in February 2000, appealed the Forest Service determination to the Board of Contract Appeals, U. S. Department of Agriculture. *See Darby Lumber Incorporated*, AGBCA No. 2000-131-1, Ruling of the Board of Contract Appeals (October 15, 2003).

9. The Mudd-York Salvage Timber Sale was not a clear-cut project, so the two logging subcontractors for Darby Lumber, Inc., Sun Mountain and Myrsdol Logging, were expected to cut additional timber for "skid roads, landings, and just to get through the woods." The "additional volume" logs were to be billed to Darby Lumber, Inc. by the Forest Service.

10. The Forest Service failed to bill Darby Lumber, Inc. adequately for the "additional volume" logs; thus the Forest Service was not paid adequately by Darby Lumber, Inc. for the "additional volume" timber.

2. Forest Service Contracting Officer's Findings and Decision dated March 17, 2000, Ex. 4 at p. 7. Brown hard-back binder, containing Administrative Record Exhibits 1-11.

Findings of Fact and Conclusions

11. During the latter half of 1998, Sun Mountain was responsible for removing more "additional volume" timber, also called "undesignated" timber, than was billed by the Forest Service. [Regarding the timber being removed by the other logging subcontractor, Myrsdol Logging, there is no evidence before me.]

12. The Forest Service Suspending Officials had adequate evidence that timber was unaccounted for; but taking into account the knowledge within the Forest Service, the Suspending Officials did not have adequate evidence to believe that Sun Mountain caused the timber to be unaccounted for. Consequently, I concluded that the Forest Service's decisions to impose suspensions on Sun Mountain were not substantially justified.

13. The Forest Service took a position adversary to Sun Mountain on July 9, 2001, by imposing suspensions, effective immediately. The Forest Service then, after a hearing August 8, 2001, extended the suspensions, effective August 13, 2001. Then, after a hearing February 25-26, 2002, the Forest Service terminated the suspensions effective June 26, 2002, but failed to vacate the suspensions.

14. An adversarial proceeding begins when there is an "action or failure to act by the agency" which becomes the basis for the adversary adjudication. 5 U.S.C. § 504(b)(1)(E).

15. The adversary adjudications at issue commenced on July 9, 2001, when the Forest Service imposed suspensions on Sun Mountain. *In re Dwight L. Lane, et al.*, 59 Agric. Dec. 148, 162-165 (2000); *aff'd*, No. A2-00-84 (D. N.D. July 18, 2001) (unpublished), *but see* 60

Agric. Dec. 506 (2001); *aff'd*, 294 F.3d 1001 (8th Cir. 2002), *see also* 61 Agric. Dec. 143 (2001).

16. On July 9, 2001, when the Forest Service imposed the suspensions, the Forest Service's actions were adversary adjudications against Sun Mountain, followed by continuing adversary adjudications within the meaning of the Equal Access to Justice Act.

17. Sun Mountain, assisted by attorneys, immediately opposed the suspensions imposed by the Forest Service, as evidenced by the request for oral hearing dated July 24, 2001, and the written argument in opposition dated July 25, 2001. These documents alerted the Forest Service that the suspensions against Sun Mountain were questionable; the Forest Service could have terminated the suspensions pending further investigation.

18. Sun Mountain continued to provide the Forest Service with documents including Affidavits, and the Forest Service proceeded with two hearings.

19. The hearing on August 8, 2001, was a portion of the adversary adjudications. The Forest Service was represented by counsel; Sun Mountain was represented by counsel. Evidence was presented, including the testimony of witnesses who testified on direct and cross examination. The presiding officer was a Forest Service Suspending Official. The hearing persuaded the Suspending Official that further investigation was warranted, but he did not terminate the suspensions pending further investigation.

20. The hearing on February 25-26, 2002, in Missoula, Montana was a portion of the adversary adjudications. The Forest Service was represented by counsel (Lori Polin Jones, Esq., and Marcus Wah, Esq.); Sun Mountain was represented by counsel (Douglas D. Harris, Esq., and James J. Masar, Esq.). Evidence was presented, including the testimony of

witnesses who testified on direct and cross examination. The presiding officer was a Forest Service Suspending Official. The hearing persuaded the Suspending Official that the suspensions should be terminated. Sun Mountain had lost approximately a year and would have lost more had it not so vigorously opposed the suspensions.

21. When Sun Mountain filed this case (August 13, 2002), the Forest Service continued to take a position adversary to Sun Mountain. Sun Mountain's attorneys' fees and costs in defense of the adversary adjudications continued to accrued through November 19, 2002, when Sun Mountain's counsel received my Decision.

22. I ordered the suspensions vacated (*In re Sun Mountain Logging, L.L.C., et al.*, 61 Agric. Dec. 627 (2002)), and Sun Mountain is the prevailing party, for purposes of the Equal Access to Justice Act.

23. The Forest Service decisions to suspend Sun Mountain were not substantially justified. The fault in the Forest Service's failure to bill Darby Lumber, Inc. adequately for the "additional volume" logs, lay in large part with the failure of Forest Service personnel, in particular the Timber Sale Administrator, to relay accurate counts of "additional volume" timber to the resource clerk for billing. Sun Mountain had no responsibility and no opportunity to review the information being submitted to the resource clerk, which was done electronically by computer within the Forest Service.

24. Following the two-day hearing February 25-26, 2002, the Forest Service Suspending Official who terminated the suspensions made no credibility findings but found that both the Forest Service and Sun Mountain were responsible for the lack of clear communication and failure to ensure that the government was paid for the amount of additional timber removed.

25. In my November 14, 2002 Decision, I noted that it may have initially appeared that there was "adequate evidence" of a "cause of so serious or compelling a nature that it affect(ed) the present responsibility" of Sun Mountain, but that initial appearance was false, as proved by evidence within the knowledge of the Forest Service. I also remarked that while both the Forest Service and Respondent Sun Mountain may have contributed to the problem, it was the Forest Service that had the opportunity to remedy the problem early on.

26. The Forest Service asks me to put myself in the shoes of the Suspending Official, who first decided in June 2001 to impose the suspension (the suspension referral is dated June 7, 2001). It is not what the Suspending Official knew or did not know that determines whether the Forest Service was substantially justified. The collective knowledge of the Forest Service, including the knowledge of the Timber Sale Administrator, must be considered.

27. Originally, the method of handling the "additional volume" logs was that they would be decked separately to await the Timber Sale Administrator's inspection(s) each week to count them and mark them with paint, prior to their being hauled away. That method of handling the "additional volume" logs was soon modified (about two weeks into the work), however, with the requirement that Respondents' workers keep a hand-counter tally of the additional logs cut, clearing the counter each time the tally was reported to the Timber Sale Administrator.

28. Whether the modification relieved Sun Mountain from complying with the original method is in dispute. In any event, the Timber Sale Administrator failed to compare the data gathered from counting and painting separately decked logs, with the data provided by Respondents' workers' hand-counter tallies. He failed to report any of the "additional

volume" logs revealed by the hand-counter tallies to the resource clerk for billing. He failed to do anything with the hand-counter tallies.

29. The preponderance of the evidence showed that Sun Mountain accurately kept hand-counter tallies of harvested "additional volume" logs and reported them to the Forest Service, as requested. The Forest Service requested those hand-counter tallies and then failed to do anything with them. Since the hand-counter tallies reported by Sun Mountain were part of the evidence known to the Forest Service, the Forest Service did not have "adequate evidence" of a "cause of so serious or compelling a nature that it affect(ed) the present responsibility" of Sun Mountain.

30. The Forest Service states that my "November 14, 2002 Decision discounts the testimony of the Forest Service timber sale administrator. The sale administrator testified that he used the applicants' hand-counter tallies to compare the counts of the separated additional, undesignated, and unpaid decked logs. LB, Tab 33, at 390." Response, at 12. Sadly, the documentation does not support that claim. The Timber Sale Administrator's "Tally Sheet" (Tab 30), which is pitifully inadequate, demonstrates the failure of the Forest Service to do anything with the hand-counter tallies. There is no record, no documentation, of coordinating the separately decked logs counts with Sun Mountain's reports of hand-counter counts. The "Tally Sheet" doesn't show an adequate number of logs; and the dates shown are not frequent enough to account for the harvest of the "additional volume" logs. The preponderance of the evidence shows that the Forest Service either failed to get an accurate count of the separately decked logs, or failed to utilize the hand-counter tallies effectively, or both. Thus, accurate

counts of "additional volume" timber were not relayed to the resource clerk for billing by the Timber Sale Administrator.

31. In June 2001, the Suspending Official may have been unaware of the pressures on the ground during the latter half of 1998 and the competing demands upon the Timber Sale Administrator's time, including those occasioned by fire season. The Suspending Official may have been unaware that the Timber Sale Administrator's visits to the decks to count the harvested logs and mark them with paint were not occurring at least once per week as agreed. The Suspending Official may not have had a look at the Timber Sale Administrator's "Tally Sheet" and may not have been aware of its inadequacies. The Suspending Official may not have been aware of the contract modification, by which Sun Mountain kept hand-counter tallies of the additional logs cut, clearing the counter each time the tally was reported to the Timber Sale Administrator. The Forest Service is responsible for its decisions made, including failing to take into account its own inadequacies while blaming Sun Mountain.

32. During the latter half of 1998, neither Sun Mountain nor Darby Lumber, Inc., was tasked with recording and reporting numbers of logs removed (which could have been done in a number of ways); neither was tasked with keeping tallies to compare with those of the Timber Sale Administrator for maximum accountability; nor did either Sun Mountain or Darby Lumber, Inc. initiate such actions. Both they and the Forest Service relied too heavily on the Timber Sale Administrator for accurate reporting, which was beyond his capability, given all the circumstances.

33. The Equal Access to Justice Act allows for an award of fees and expenses "in connection with" an adversarial proceeding. 5 U.S.C. § 504(a)(1).

34. Sun Mountain is the prevailing party, for purposes of the Equal Access to Justice Act.

35. Sun Mountain expended monies reimbursable under the Equal Access to Justice Act in the adversarial adjudications, beginning July 9, 2001, when the Forest Service imposed the suspensions, and ending November 19, 2002, when Sun Mountain's counsel received my Decision.

36. Sun Mountain's Application for Award of Fees and Expenses under Equal Access to Justice Act was timely filed, on December 11, 2002. 5 U.S.C. § 504(a)(2), 7 C.F.R. § 1.193(a). Sun Mountain meets the eligibility requirements.

37. Sun Mountain's rulemaking request to increase the maximum allowable attorney's fee rate was not successful. By letter dated July 1, 2004, over the signature of General Counsel Nancy S. Bryson, the Secretary of Agriculture denied Sun Mountain's petition "to increase the hourly rate at which fees may be awarded in adversary adjudications before the Department." The letter includes in pertinent part,

After publishing for public comment a notice of proposed rulemaking, the Department revised its EAJA regulation at 67 Fed. Reg. 63237, October 11, 2002. The regulation as revised is codified at 7 C.F.R. 1.180 *et seq.* In view of the recency of the latest revision, we do not believe that further amendment is warranted at this time.

38. Based on United States Department of Agriculture (USDA) limits, the maximum allowable attorneys' fee rate is \$125.00 per hour for attorneys' work beginning October 11, 2002; and the maximum allowable attorneys' fee rate is \$75 per hour for attorneys' work through October 10, 2002. 7 C.F.R. §§ 1.182, 1.186, and 1.187. USDA kept the maximum

rate at \$75 per hour long after the EAJA raised the maximum to \$125 per hour in 1996. Were it not for these regulations and the rulemaking result, I would have awarded the \$150 per hour that Sun Mountain paid for its attorneys' work, based on the reasons enumerated in Sun Mountain's Application and Reply, including especially the prevailing rates and the extraordinarily effective representation of a small business against an agency of the United States of America. On rare occasion Sun Mountain paid less than \$150 per hour for its attorneys' work (for example, \$100 per hour for the work of attorneys Cory Laird and Julie Gardner); such work was also worth more than \$75 per hour and I have awarded the \$75 maximum.

39. Beginning July 9, 2001, work in connection with the Board of Contract Appeals action was intertwined with the Suspensions actions, in that timber not accounted for was key to both actions. Beginning July 9, 2001, separation of the work is not practical and the work done by Sun Mountain's attorneys occasioned by the Board of Contract Appeals action is connected to the Suspension actions and reimbursable here.

40. Beginning July 9, 2001, response to the criminal investigation prompted by the Forest Service was intertwined with the Suspensions actions, in that timber not accounted for was key to both actions. Beginning July 9, 2001, separation of the work is not practical and the work done by Sun Mountain's attorneys occasioned by the criminal investigation is connected to the Suspension actions and reimbursable here.

41. I have omitted from the award here the work regarding a new entity as not connected to the Suspension actions for EAJA purposes, even though the Suspensions actions triggered such work.

42. The adversary adjudications concluded on November 19, 2002, when the Decision I issued November 14, 2002, was delivered to and considered by Sun Mountain's counsel. [Although Sun Mountain incurred additional attorneys' fees in connection with this EAJA proceeding, those attorneys' fees are not reimbursable. A portion of even the November 19, 2002 attorneys' fees has been eliminated as not reimbursable here because the attorneys' work was in furtherance of the EAJA award.]

43. The portion of the attorneys' fees and costs in the amount of \$32,527.41 that Sun Mountain paid, that was connected to opposing the Forest Service imposed suspensions against it, that does not exceed USDA's maximum rates for EAJA awards, and that was reasonable and necessary and in accordance with 7 C.F.R. § 1.186, is detailed as follows, in reverse chronology:

Attorneys' Fees & Attorneys' Costs in 2002

<u>Attorneys' Fees</u>	<u>Attys' Costs</u>	<u>2002</u>
\$ 93.75 (\$125 x 0.75)		November
\$ 7.50 (\$75 x 0.1)	\$ 10.11	October
\$ 1,260.00 (\$75 x 16.8)	\$ 438.82	September
\$ 52.50 (\$75 x .7)		August
\$ 187.50 (\$75 x 2.5)	\$ 30.26	July
\$ 150.00 (\$75 x 2)	\$ 4.00	June
\$ 885.00 (\$75 x 11.8)		May
\$ 37.50 (\$75 x 0.5)	\$ 5.36	April
\$ 150.00 (\$75 x 2)	\$ 28.10	March

\$ 3,060.00 (\$75 x 40.8) February

\$ 206.25 (\$75 x 2.75) January

Attorneys' Fees & Attorneys' Costs in 2001

<u>Attorneys' Fees</u>	<u>Attys' Costs</u>	<u>2001</u>
\$ 457.50 (\$75 x 6.1)		October/November/December
\$ 1,061.25 (\$75 x 14.15)	\$ 43.51	September
\$ 2,643.75 (\$75 x 35.25) ³	\$ 567.99 ⁴	August
\$ 2,898.75 (\$75 x 38.65)	\$ 80.00	July (beginning July 9, 2001)

44. The foregoing totals \$13,151.25 attorneys' fees and \$1,208.15 attorneys' costs.

45. In addition to the \$13,151.25 attorneys' fees and \$1,208.15 attorneys' costs, Sun Mountain's expenditures of \$192.00 for mileage and meals of Sun Mountain employees who traveled on February 25 and 26, 2002, to Missoula, Montana for purposes of presenting testimony, are connected to the Suspension actions and are added to Sun Mountain's reimbursement.

3. Three hours of work on 08/28/2001, I have eliminated as not connected to the Suspension actions.

4. Contrary to the Forest Service's argument made by Ms. Polin (Response), I find the August 8 hearing transcript cost to be Sun Mountain's reasonable and necessary cost in defending against the suspensions.

Order

46. The Forest Service shall pay Sun Mountain **\$14,551.40**, payable to the order of “Sun Mountain Logging, L.L.C., Sherman G. Anderson, and Bonnie Anderson,” referencing **DNS-FS Docket No. 02-0001**. In seeking payment, Sun Mountain should comply with 7 C.F.R. § 1.203.

This Decision and Order shall become final and effective 35 days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice, 7 C.F.R. § 1.145 (*see* attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 27th day of November 2007

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
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Washington, DC 20250-9203
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APPENDIX A**7 C.F.R.:****TITLE 7—AGRICULTURE****SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE****PART 1—ADMINISTRATIVE REGULATIONS**

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SUBPART H—RULES OF PRACTICE GOVERNING FORMAL**ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER****VARIOUS STATUTES**

...

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in

§ 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of

objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145