2-Bar Ranch Limited Partnership v. U.S. Forest Service—Ninth Circuit construes forest plan to exclude allotment subject to 1995 riparian mitigation measures and the Equal Access to Justice Act to not apply to the Forest Service administrative appeal process

Several ranching enterprises acquired ten-year grazing permits from the Forest Service beginning in 1996 for the Dry Cottonwood Allotment situated in the Beaverhead-Deerlodge National Forest. Following a site-specific environmental assessment under the National Environmental Policy Act, the first permit incorporated 1995 riparian mitigation measures to determine the appropriate levels of grazing under four metrics. These mitigation measures were also applied to other grazing allotments on a case-by-case basis. The ranches' subsequent permits incorporated a 1997 version of the measures that, however, did not alter use levels allowable under the 1995 measures. The Service issued a new forest plan for the Forest in 2009. The plan modified the 1995 riparian measures somewhat and provided that the allowable use levels prescribed in the relevant interim grazing standard applied to "'[a]ny allotment management plan *lacking riparian management objectives and guides designed specifically for that allotment*.'" [Emphasis added.] The ranches were issued notices of noncompliance in 2017 and eventually a decision by the district ranger suspending grazing privileges by 20% for 2018 and 2019 on the allotment. In reaching that determination, the ranger applied the 1995 mitigation measures' allowable use standards; the ranches contended, in contrast, that 2009 interim standards controlled. On administrative appeal, the forest supervisor reversed the suspension but confirmed that the 2009 interim standards did not apply to the allotment because "'[s]ite specific [allowable use levels] have been in place for the Dry Cottonwood Allotment since 1996' and 'clarified that the 1996 NEPA process 'clearly selected' the allowable use levels described in the 1995 Riparian Mitigation Measures." Having succeeded in their appeal as to the suspension reversal, the ranches requested attorney's fees under the Equal Access to Justice Act, but the forest supervisor denied the request in part on the ground that the appeal proceeding was not an "adjudication" under 5 U.S.C. § 554—a condition precedent to presumptive EAJA fee entitlement.

On judicial review, the district court granted in part the ranches' motion for summary judgment. *2-Bar Ranch Limited Partnership v. U.S. Forest Serv.*, 377 F. Supp. 3d 1172 (D. Mont. 2019). In its view, "[t]he plain meaning of the phrase 'designed specifically for' is descriptive of that which was conceived or devised with a view towards or a purpose for a particular object or cause. In the context of the 2009 Forest Plan, application of the phrase required that the 2009 Interim Standards apply to an allotment unless [allowable use levels] were originally created for the purpose of managing grazing in riparian areas on that particular allotment." The court declined to resolve the EAJA "adjudication" issue, choosing to remand the question to the forest supervisor for determination of whether any presumptive entitlement to fees would be rebutted in this matter by a finding "'that the position of the agency was substantially justified or that special circumstances make an award unjust.'" 5 U.S.C. § 504(a)(1).

The Ninth Circuit reversed the district court on the merits and then proceeded on to resolve the EAJA issue by holding that the administrative appeal was not an "adjudication" under § 554. *2-Bar Ranch Limited Partnership v. U.S. Forest Serv.*, No. 19-35351, 2021 WL 1804543 (9th Cir. May 6, 2021). As to whether the Dry Cottonwood Allotment was governed by the 1995 riparian mitigation measures, it reasoned:

> [T]he [district] court relied on the phrase "designed specifically for" in isolation, and interpreted it to mean that each excluded allotment had to have a separate mitigation plan created for that allotment only; no use of a template or matrix applicable to certain, specifically chosen allotments was allowed. The phrase "designed specifically for" cannot have the exceedingly narrow meaning the district court attributed to it. [¶] Of particular significance in interpretating the 2009 Forest Plan's exclusion for certain allotments is the sentence providing that the 2009 levels apply "unless ... specific ... allowable use levels have been designed through ... site-specific NEPA decisions." This language amplifies what is meant by "designed specifically for," making clear that the reference includes "specific ... allowable use levels ... designed through ... site-specific NEPA decisions."

The panel found that "[e]xactly that process occurred here: The Service made a site-specific NEPA decision in 1996 that applied only to the Dry Cottonwood Allotment. The purpose of that process was to 'change current grazing practices by implementing [the 1995] riparian mitigation measures' on that allotment." It further rejected the ranches' position that there was a "conflict between applying the 2009 Forest Plan's Grazing Standard 1 'forestwide' and applying different allowable use levels to particular allotments based on site-specific processes." Instead, "[t]he caveat that different levels may apply to some allotments is already built into Grazing Standard 1, which itself states that the measures it contains apply to 'livestock grazing operations unless or until specific long-term objectives, prescriptions, or allowable use levels have been designed through individual resource management plans or site-specific NEPA decisions.'"

In concluding that the administrative appeal was not a § 554 "adjudication," the panel stated that "an agency proceeding is an 'adversary adjudication' for EAJA purposes only if it is actually governed by the [Administrative Procedure Act's] formal adjudication requirements, as opposed to, for example, the similar requirements of another statute or regulation[,]" and that "Section 554 'generally applies where an administrative hearing is required by statute or the Constitution.'" Here, the ranches did not contend that any statute required the administrative appeal process; it was merely secured by Forest Service regulations in 36 C.F.R. part 214. But, they argued, a constitutional due process right to a hearing existed "before their permits were suspended and that section 554 therefore applied to their administrative appeal." The panel was unpersuaded. The Forest Service appeal-hearing regulations, it pointed out, had been held constitutionally sufficient in *Buckingham v. Secretary of United States Department of Agriculture*, 603 F.3d 1073 (9th Cir. 2010). Those regulations differ in material respects from administrative proceedings governed by § 554, and thus the ranches' "administrative appeal was not in fact conducted in accordance with the terms of 5 U.S.C. § 554. And, as *Buckingham* held, there was no statutory or constitutional requirement that it be so conducted. In these circumstances, we cannot say the administrative appeal was '"governed by"' § 554." The forest supervisor, in sum, properly denied the EAJA fee request.