



## COALEX STATE INQUIRY REPORT - 180

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**TOPIC:** ATTORNEYS' FEES IN NON-ENFORCEMENT, NON-ADVERSARIAL PROCEEDINGS (Includes Report No. 120; updates 120 & 163)

**INQUIRY:** Are attorneys who speak during informal conferences, held as a means of gathering data on a pending permit, entitled to an award of costs, expenses and attorneys' fees for their appearance? Please locate relevant administrative, federal and state decisions.

**SEARCH RESULTS:** Research was conducted using the COALEX Library and the other materials available in LEXIS. No decisions were identified that discuss the specific issue of this inquiry; however, related attorneys' fees cases were identified. These are discussed below; copies of the decisions and an existing COALEX REPORT are attached. Also included, are pertinent portions of a chapter on "Attorney Fees for Participation in Ancillary Proceedings" from a three volume text on court awarded attorneys' fees.

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Mary Frances Derfner and Arthur D. Wolf, Volume 2, COURT AWARDED ATTORNEY FEES (Bender, 1991).

### CHAPTER 13: ATTORNEY FEES FOR PARTICIPATION IN ANCILLIARY PROCEEDINGS

Chapter 13 addresses when and under what circumstances federal courts may award attorney fees for legal services rendered in another forum, e.g., administrative agency, state court or legislative body. The awards are for legal services rendered for proceedings which occur prior to, simultaneously with or after principal litigation in federal court.

#### PARA. 13.02 ADMINISTRATIVE PROCEEDINGS.

[1] Introductory Note. "While the use of the word 'proceeding' in statutes gives the courts some latitude to award fees for a wide range of services performed at the administrative level, the fee statute itself may expressly limit or expand the instances in which attorney fees may be recovered." p. 13-14.2



[3] Non-Mandatory Proceedings. "While precedents on the compensability of services in non-mandatory administrative proceedings are apparently contradictory, reconciling principles are available. First, even if the litigant is not required to exhaust administrative remedies, attorney fees may still be awarded so long as the work before the agency has some reasonable relationship or contributes to the resolution of the claims being advanced in the lawsuit. Second, although a legal compulsion to participate in the agency proceeding is not an absolute prerequisite for a fee award, statutory or other authorization for fees is. That is, a party seeking to recover fees for work done at the agency level must show that the basis for the fee award in court (i.e., statute, bad faith, common fund, etc.) reasonably encompass fees for work in the ancillary proceeding." p. 13-16.13

### **RELEVANT CASES DISCUSSED IN THE CHAPTER:**

PENNSYLVANIA v DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, 478 U.S. 546 (1986), see below.

NORTH CAROLINA DEPT. OF TRANSPORTATION v CREST STREET COMMUNITY COUNCIL, 479 US 6 (1986).

The Supreme Court held that plaintiffs may not file a federal suit for the sole purpose of recovering attorney fees in ancillary proceedings: "If fees are available at all for ancillary federal court lawsuits...they would have been sought in the ancillary proceeding itself and not in an independent suit to recover fees."

WEBB v BOARD OF EDUCATION OF DYER CITY, 471 US 234 (1985).

"The Court included hours spent working on optional ancillary administrative hearings when the work was 'useful and of a type ordinarily necessary to secure the final result obtained from the litigation.'"

US (EPA) v ENVIRONMENTAL WASTE CONTROL, INC., 737 F Supp 1485 (ND Ind 1990).

"The Court excluded hours expended in participating in administrative agency proceedings concluding that these efforts were not essential to the final outcome of the litigation."

HONDA v MITCHELL, 417 F 2d 324 (DC Cir 1969).

"[T]he mere fact that the administrative determination was not at first favorable to any of the claimants does not affect the fact that appellants performed an obvious service for [claimants of related litigations] by building the administrative record upon which each was later to succeed."

DEMIER v GONDLES, 676 F 2d 92 (4th Cir 1982).



"[A] party need not obtain a final judgment in order to 'prevail' for purposes of the statute; a settlement, consent decree, or other resolution of the underlying dispute short of formal adjudication may still support an award of fees."

PANITCH v WISCONSIN, 451 F Supp 132 (ED Wisc 1978).

"The Court allowed attorneys' fees for 'monitoring of the legislative activity', which began in part as a result of plaintiffs' law suit seeking to improve the quality of public education for handicapped children."

WINTON v AMOS, 255 US 373 (1921).

"The Court allowed fees for time counsel had spent before the Congress in promoting legislation for the benefit of the plaintiff class."

COALEX STATE INQUIRY REPORT - 120, "Attorneys' Fees" (1989).

This Report includes federal and state court cases and administrative decisions which discuss the following three issues:

1. Award of attorneys' fees to surface mining operators as a result of a challenge to a permit decision;
2. Recovery of attorneys' fees by litigants against a governmental agency;
3. Discuss Sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) or 43 CFR 4.2190 et seq.

**CASES OF PARTICULAR INTEREST FROM THIS REPORT ARE THE FOLLOWING:**

PENNSYLVANIA v DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, 478 U.S. 546 (1986).

Sec. 304(d) of the Clean Act authorizes attorney's fees for "any action". The Court determined that (1) participation in administrative proceedings are included under 304(d); and (2) the "lodestar" figure provided a "reasonable fee award reflecting the quality of representation", without the need for additional "enhancement".

UTAL INTERNATIONAL, INC. v DEPARTMENT OF INTERIOR, 643 F.Supp. 810 (D. Utah 1986).

In UTAL INTERNATIONAL, the court ruled that "groups were not entitled to award for those claims on which they were aligned with government". Environmental groups that were successful as defendants could recover attorney's fees, based on rates charged by attorneys at the time "of government's remand motion", for work performed in conjunction with those claims. Environmental groups could not recover attorney fees for "work done in conjunction with



nonenforcement, nonadversarial administrative proceedings which led to unsuitability designation". Finally, the court held that groups "which had received an award under SMCRA were not entitled to award of fees pursuant to Equal Access to Justice Act".

### **OTHER SMCRA-RELATED DECISIONS**

#### **NATURAL RESOURCES DEFENSE COUNCIL, et al. v OSM, WEST ELK COAL, INTERVENOR, STATE OF COLORADO, INTERVENOR, 107 IBLA 339, IBLA 87-200 (1989).**

Petition for award of costs and expenses, including attorneys' fees approved in part; information requested.

The Board's rulings include the following:

1. The provision for the awarding of attorneys' fees in Sec. 525(e) of SMCRA is applicable to permit review proceedings.
2. To be entitled to an award, 43 CFR 4.1294(b) requires that the record show that the person made a substantial contribution to a full and fair determination of the issues.
3. A person challenging issuance of a permit to mine will be deemed eligible for an award where the person achieved at least some degree of success on the merits.
4. Where a person is determined to be eligible for an award, a further determination must be made of what issues are compensable.
5. A person challenging issuance of a permit to mine may receive an award for work performed in preparing and filing the petition for review of the permit; however, the award will not include compensation for work performed in state proceedings involving the same minesite and related state permitting process.
6. A person may receive an award for work performed with respect to procedural victories which contributed to the person achieving some degree of success on the merits.
7. A person is not entitled to an award for work performed on unsuccessful settlement negotiations unless the hours claimed are limited to those issues upon which petitioner is ultimately successful.

#### **SAVE OUR CUMBERLAND MOUNTAINS, INC. (SOCM), 111 IBLA 197, IBLA 89-410 (1989).**

SOCM's petition for attorneys' fees was approved because SOCM met the conditions of 43 CFR 4.1290 through 4.1296 [From the Headnotes]: A person must prevail in whole or in part, achieving at least some degree of success on the merits. The record must show that the person made a substantial contribution to a full and fair determination of the issues. Where the person has prevailed on all issues decided in the administrative proceeding and has been granted his request for specific relief, he has made such a contribution and is entitled to costs and expenses, including attorneys' fees.



**MARTIN v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, 1989 Pa Envirn LEXIS 99, EHB Docket No. 85-064-W (1989).**

"A request for attorney's fees under sec. 4(b) of the Surface Mining Conservation and Reclamation Act, 52 P.S. sec. 1396.4(b), will be denied where no proceeding was properly initiated before the Board. The letter being appealed from by the petitioner, being a re-iteration of the Department of Environmental Resources' prior position, did not alter the petitioner's rights, duties, or obligations, and therefore, was not an appealable action."

**DECISIONS CITING STATUTES OTHER THAN SMCRA**

**KAY v EHRLER & KENTUCKY BOARD OF ELECTIONS, 111 S Ct 1435, 113 L Ed 2d 486, (1991).**

The Court held that "a pro se litigant who is also a lawyer may not be awarded attorney's fees under [42 USC] sec. 1988." In affirming the prior decisions, the Court quoted from the Sixth Circuit majority's ruling that the language of the statute assumed the existence of "a paying relationship between an attorney and a client." The court found that even "a skilled lawyer who represents himself is at a disadvantage in contested litigation because ethical considerations may make it inappropriate for him to appear as a witness, and because he is deprived of the judgment of an independent third party during the litigation."

**AVOYELLES SPORTSMEN'S LEAGUE v MARSH, 786 F 2d 631 (5th Cir 1986).**

"We hold today that federal statutes authorizing awards of litigation costs against the government when 'appropriate' are limited to those portions of the litigation made necessary by government opposition to legitimate claims of the property seeking the award. An award is not appropriate for expenses incurred either in litigating an issue on which the government finally prevailed or in a phase of the litigation in which the party seeking an award was opposed only by other, non-governmental parties."

**ALABAMA POWER CO., et al. v GORSUCH AND SIERRA CLUB, et al., INTERVENORS, 672 F 2d 1 (DC Cir 1982).**

In discussing applicants' request for fees as intervenors, the court stated: "If ever an intervenor can recover attorneys' fees from a party on whose side it participated -- a question we do not here reach -- the justification would have to be a clear showing of some unique contribution of the intervenor to the strength of that party's legal position."

**ATTACHMENTS**

1. NORTH CAROLINA DEPT. OF TRANSPORTATION v CREST STREET COMMUNITY COUNCIL, 479 US 6 (1986).
2. WEBB v BOARD OF EDUCATION OF DYER CITY, 471 US 234 (1985).



3. US (EPA) v ENVIRONMENTAL WASTE CONTROL, INC., 737 F Supp 1485 (ND Ind 1990).
4. HONDA v MITCHELL, 417 F 2d 324 (DC Cir 1969).
5. DEMIER v GONDLES, 676 F 2d 92 (4th Cir 1982).
6. PANITCH v WISCONSIN, 451 F Supp 132 (ED Wisc 1978).
7. WINTON v AMOS, 255 US 373 (1921).
8. COALEX STATE INQUIRY REPORT - 120, "Attorneys' Fees" (1989).
  - A. ANNOTATION, "Award of Attorneys' Fees Pursuant to Sec. 520(d), 520(f), 525(e), or 703(c) of Surface Mining Control and Reclamation Act of 1977 (30 USCS Sec. 1270(d), 1270(f), 1275(e), 1293(c)", 89 A.L.R. Fed. 170 (1988).
  - B. RUCKELSHAUS v SIERRA CLUB, 463 U.S. 680 (1983).
  - C. PENNSYLVANIA v DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, 478 U.S. 546 (1986).
  - D. BLUM v STENSON, 104 S.Ct. 1541 (1984).
  - E. COPELAND v MARSHALL, 641 F.2d 880 (D.C. Cir. 1980).
  - F. UTAH INTERNATIONAL, INC. v DEPARTMENT OF INTERIOR, 643 F.Supp. 810 (D. Utah 1986).
  - G. HARDY v COMMONWEALTH OF PENNSYLVANIA, 101 Pa. Commw. 1 (1986).
  - H. VIRGINIA CITIZENS FOR BETTER RECLAMATION, 88 IBLA 126, IBLA 84-838 (1985).
  - I. DONALD ST. CLAIR, 84 IBLA 236 (1985).
  - J. COUNCIL OF THE SOUTHERN MOUNTAINS, INC. v OSM, 3 IBSMA 44, IBSMA No. 80-34 (1981).
  - K. DENNIS R. PATRICK v OSM, 1 IBSMA 248, Appeal No. IBSMA 79-21 (1979).
  - L. TURNER BROS., INC. v OSMRE, Docket Nos. TU 6-24-R, TU 6-28-R, TU 6-36-R, TU 6-45-R, TU 6-51-R, TU 6-74-R, TU 6-106-R, TU 7-3-R, TU 7-17-R, TU 7-20-R, TU 7-24-R, TU 7-25-R, TU 7-27-R, TU 7-28-R (1987).
  - M. ALTERNATE FUELS, INC. v OSM, Docket No. TU 5-23-R (1985).
  - N. DELTA MINING CORP., 3 IBSMA 252, IBSMA 81-60 (1981).
  - O. JAY TOWNSHIP v COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, EHB Docket No. 82-300-W (1987).
  - P. KWALWASSER v COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, EHB Docket No. 84-108-M (1988).
  - Q. SHEESLEY v COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, EHB Docket No. 81-061-H (1982).
9. NATURAL RESOURCES DEFENSE COUNCIL, et al. v OSM, WEST ELK COAL, INTERVENOR, STATE OF COLORADO, INTERVENOR, 107 IBLA 339, IBLA 87-200 (1989).
10. SAVE OUR CUMBERLAND MOUNTAINS, INC. (SOCM), 111 IBLA 197, IBLA 89-410 (1989).
11. MARTIN v COMMONWEALTH OF PENN. DEPT. OF ENVIRONMENTAL RESOURCES, 1989 Pa Envirn LEXIS 99, EHB Docket No. 85-064-W (1989).



12. **KAY v EHRLER & KENTUCKY BOARD OF ELECTIONS**, 111 S Ct 1435, 113 L Ed 2d 486, (1991).
13. **AVOYELLES SPORTSMEN'S LEAGUE v MARSH**, 786 F 2d 631 (5th Cir 1986).
14. **ALABAMA POWER CO., et al. v GORSUCH AND SIERRA CLUB, et al., INTERVENORS**, 672 F 2d 1 (DC Cir 1982).