

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

IN THE MATTER OF THE PROPOSED )  
REVISION OF CHAPTER V OF THE )  
DEPARTMENT OF ENVIRONMENTAL )  
QUALITY RULES OF PRACTICE AND )  
PROCEDURE )

FILED

NOV 24 1992

Ferri A. Lorenzen, Admin. Aide  
Environmental Quality Council

PETITION FOR REHEARING/RECONSIDERATION

Pursuant to Chapter IV of the Department of Environmental Quality Rules of Practice and Procedure (DEQ Rules of Practice and Procedure),<sup>1</sup> Thunder Basin Coal Company (Thunder Basin) through its counsel, Holland & Hart, hereby petitions the Environmental Quality Council (Council) to reconsider its written decision dated October 29, 1992, that includes the language, "contested case proceeding," in the new version of Chapter V, Section 2(a)(3) of the DEQ Rules of Practice and Procedure. As adopted, that rule provides:

(3) To any person, other than the permittee or his representative, from the Department if the person initiates or participates in any **CONTESTED CASE** proceeding under the Act as it provides for regulation of surface coal mining and reclamation operations in accordance with P.L. 95-87, WHO PREVAILS IN WHOLE OR IN PART, ACHIEVING AT LEAST SOME DEGREE OF SUCCESS ON THE MERITS and the Council finds that the person substantially contributed to a full and fair determination of the issues.

Thunder Basin objects to the inclusion of the terminology "contested case" in the rule and proposes that the term "enforcement" be substituted in its place. Petitioner's proposed version of the Rule would provide:

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<sup>1</sup> Chapter IV, Section 2(a) provides that a petition for rehearing may be filed in hearings conducted under Chapter III (the rule-making provisions).

(3) To any person, other than the permittee or his representative, from the Department if the person initiates or participates in any **ENFORCEMENT** proceeding under the Act as it provides for regulation of surface coal mining and reclamation operations in accordance with P.L. 95-87, WHO PREVAILS IN WHOLE OR IN PART, ACHIEVING AT LEAST SOME DEGREE OF SUCCESS ON THE MERITS and the Council finds that the person substantially contributed to a full and fair determination of the issues.

The possibility that the language "contested case proceeding" would be included in the new rule was not specifically raised or discussed at the hearing on this rule-making on July 8, 1992. Consequently, petitioner did not have an opportunity to argue the issue before the council in the context of the rule-making proceeding.<sup>2</sup>

The Council acted beyond the scope and intent of Wyo. Stat. § 35-11-437(f) by adopting a rule that permits attorneys' fees and costs to be awarded in any contested case proceeding, (a term which presumably includes permit proceedings).

Wyo. Stat. § 35-11-437(f) provides in relevant part:

Whenever an order is issued under this section, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the director to have been reasonably incurred by such person for or in connection with his participation in such

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<sup>2</sup> The issue was discussed in connection the former version of this rule, which was in dispute in the contested case proceeding In the Matter of Objections to the Mining Permit Application of Thunder Basin Coal Company, Black Thunder Mine, TFN 2 3/175, Docket No. 2221-91; Powder River Basin Resource Council, Petitioner, v. Wyoming Department of Environmental Quality, Respondent, Docket No. 2221-91. The Council is referred to "JOINT REPLY OF WYOMING MINING ASSOCIATION AND THUNDER BASIN COAL COMPANY TO PETITIONER'S RESPONSE TO THE COUNCIL'S REQUEST FOR FURTHER BRIEFS" for further discussion of this issue.

proceedings, including any judicial review of agency actions, may be assessed against either party as the court or the director deems proper. This subsection shall apply to any administrative proceeding under this act as it provides for the regulation of surface coal mining and reclamation operations in accordance with P.L. 95-87, as that law is worded on August 3, 1977.

There is no authority or legislative intent to suggest the language of the statutory provision, i.e. "any administrative proceeding under this act . . .," is generally limited to contested case proceedings.<sup>3</sup> Petitioner's argument should not be misconstrued, however, to infer that Thunder Basin believes the statute was meant to apply to "any administrative proceeding." To the contrary, there is compelling authority that the provision is limited only to enforcement proceedings. See Utah International Inc. v. Department of Interior, 643 F.Supp. 810 (D. Utah 1986).

The court in Utah International clearly found that Congress did not intend for the phrase "any administrative proceeding," as used in section 525(e), the federal counterpart to Wyo. Stat. § 35-11-437(f), to extend beyond enforcement proceedings.<sup>4</sup> Utah

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<sup>3</sup>The definition of "this act" as used in section 35-11-437(f) is not limited to "contested case proceedings" but also includes Wyo. Stat. § 35-11-402, the statutory provision giving the agency authority to promulgate rules and regulations in various areas, including matters affecting surface coal mining.

<sup>4</sup> The language of Wyo. Stat. § 35-11-437(f), even more so than section 525(e) of the federal SMCRA, makes limitation to enforcement proceedings apparent. Section 525(e) provides: "Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, [in the original "this act"], at the request of any person, . . . costs (continued...)"

International, Inc. v. Department of Interior, 643 F.Supp. 810  
(D.Utah 1986).

Congressional intent found in the legislative history of the counterpart federal provision (section 525(e)), supports a ruling that the federal and Wyoming statutory provisions apply to enforcement proceedings only. The Senate Report provides:

The success or failure of a national coal surface mining program will depend, to a significant extent, on the role played by citizens in the regulatory process. The State regulatory authority or Department of Interior can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing . . . . While citizen participation is not, and cannot be, a substitute for governmental authority, citizen involvement in all phases of the regulatory scheme will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information. In addition, providing citizen access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the Act.

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<sup>4</sup>(...continued)  
and expenses . . . may be assessed against either party as the .  
. . . Secretary, resulting from administrative proceedings, deems  
proper."

Section 437(f) of the Wyoming statute provides: "Whenever **an order is issued under this section**, at the request of any person, . . . costs and expenses . . . may be assessed against either party as the court or the director deems proper." "This section" refers to section 437 which provides for "Enforcement for surface coal mining operations." In a separate sentence, the statute provides: "This subsection shall apply to any administrative proceeding under this act as it provides for the regulation of surface coal mining and reclamation operations in accordance with P.L. 95-87 . . ." This "subsection," however, provides only for costs and expenses when an order is issued under "this section" -- the statutory section providing for "enforcement."

In many if not most cases in both the administrative and judicial forum, the citizen who sues to enforce the law, or participates in administrative proceedings to enforce the law, will have little or no money with which to hire a lawyer. If private citizens are to be able to assert the rights granted to them by this bill, . . . then citizens must have the opportunity to recover the attorneys' fees necessary to vindicate their rights. Attorneys' fees may be awarded to the permittee or government when the suit or participation is brought in bad faith.

S. Rep. No. 128, 95th Cong., 1st Sess. 59 (1977), reprinted in 1977 U.S.C.C.A.N. 625.<sup>5</sup>

The court in Utah International points out the fact that the SMCRA fee provisions, including the citizen suits provision, were to be construed consistently with the Water Pollution Control Act Amendments of 1972 and the Marine Protection, Research and Sanctuaries Act of 1972. Utah International 643 F.2d at 824, citing H.R. Rep. No. 218, 95th Cong., 1st Sess. 88-89 (1977), reprinted in 1977 U.S.C.C.A.N. 593.<sup>6</sup> Neither of these two model statutes provides for fees in administrative proceedings and the legislative history of those acts demonstrate that Congress intended the fee award provision only to encourage citizen participation in enforcement activities. Utah International, 643 F.2d at 824, (citations omitted).

The Utah district court rejected the broad view that the term "any administrative proceeding" included even permit

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<sup>5</sup> See also, Big B Mining v. Department of Environmental Resources, 597 A.2d 202 (Pa. Commw. 1991).

<sup>6</sup> "It is the committee's intention that this section be construed consistently with the history of similar federal statutes providing for awards of attorney's fees in citizen suit actions." 1977 U.S.C.C.A.N. 627.

proceedings. 643 F.2d at 821 n.20 .<sup>7</sup> Without question, the Utah International case stands for the proposition under federal law that Section 525(e) of SMCRA does not allow, and was not intended to allow, award of costs and expenses in any administrative setting other than enforcement proceedings. Id. at 821. Similar intent should be found in Wyo. Stat. § 35-11-437(f).

WHEREFORE, petitioner, Thunder Basin Coal Company, respectfully requests the Council to reconsider its action adopting Section 2(a)(3), Chapter V, of the which authorizes the award of attorneys' fees and expenses against the State in any "contested case proceeding" and further requests the Council to revise the Rule to apply in "enforcement" proceedings only.

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<sup>7</sup> In rejecting the assertion that attorney fee awards should be awarded in "all" administrative proceedings the court listed some of the potential proceedings that might be included in this term -- but which were ultimately rejected. These included: "1) rulemaking on the interim program; 2) rulemaking on the permanent program; 3) revisions to rules; 4) petitions for rulemaking; 5) designation proceedings; 6) **permit issuance on federal lands**; 7) **permit modifications**; 8) bond release; 9) approval of state programs, etc." Utah International, 643 F.2d at 821 n.20 (emphasis added).

DATED this 18th day of November, 1992.

*Marcelle Shoop*

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CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of November, 1992, I served the foregoing PETITION FOR REHEARING a true and correct copy thereof in the United States mail, postage prepaid and properly addressed to the following:

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