

INTERIOR BOARD OF LAND APPEALS

Pacific Coast Coal Company

v.

Office of Surface Mining Reclamation and Enforcement

165 IBLA 52 (February 25, 2005)

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PACIFIC COAST COAL COMPANY v. OSM

IBLA 2004-150

Decided February 25, 2005

Appeal from the denial of an application for an award of fees and expenses under the Equal Access to Justice Act. Hearings Division Docket No. DV 2002-2-R (EAJA).

Reversed and remanded.

1. Attorney Fees: Equal Access to Justice Act: Adversary Adjudication – Attorney Fees: Surface Mining Control and Reclamation Act of 1977 – Equal Access to Justice Act: Adversary Adjudication – Surface Mining Control and Reclamation Act: Attorney Fees/Costs and Expenses: Generally

A proceeding to review a Notice of Violation under section 525(a) of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1275(a), is an adversary adjudication under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1).

2. Attorney Fees: Equal Access to Justice Act: Generally – Attorney Fees: Surface Mining Control and Reclamation Act of 1977 – Equal Access to Justice Act: Awards – Surface Mining Control and Reclamation Act: Attorney Fees/Costs and Expenses: Generally

A person who holds a permit under the Surface Mining Control and Reclamation Act and who prevails in a proceeding to review issuance of a notice of violation may apply either for fees and other expenses under the Equal Access to Justice Act, 5 U.S.C. § 504(a), or for costs and expenses, including attorney fees, under the Surface Mining Act, 30 U.S.C. § 1275(e).

APPEARANCES: David J. Morris, General Manager, Pacific Coast Coal Company, Black Diamond, Washington, for appellant; John S. Retrum, Esq., Office of the Regional Solicitor, United States Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Pacific Coast Coal Company (PCC) has appealed an order issued on February 9, 2004, by Administrative Law Judge William E. Hammett denying its application for an award of fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1) (2000), and the implementing regulations in 43 CFR 4.601 et seq.

In May 2002, the Office of Surface Mining Reclamation and Enforcement (OSM) issued Notice of Violation (NOV) No. 02-141-244-3 to PCC for “failure to have an authorized representative of [PCC] [accept] delivery of each truck load of clean fill material by affixing a legible signature to individual trip tickets,” in accordance with a Permit Revision Order that OSM issued in December 2000.<sup>1/</sup> OSM cited 30 CFR 773.17(b) and (c), regulations implementing the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201 et seq. (2000), that require a permittee to conduct its operations in compliance with the terms and conditions of its permit. PCC sought review of the NOV under 30 U.S.C. § 1275(a) and 43 CFR 4.1160 et seq. By order dated July 28, 2003, Judge Hammett reversed the NOV.<sup>2/</sup>

Section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (2000), authorizes the award of costs and expenses, including attorney fees, to any person “as determined by the Secretary to have been reasonably incurred” by such person “for or in connection with his participation in” any administrative proceeding under SMCRA, and provides

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<sup>1/</sup> We reviewed this Permit Revision Order in Pacific Coast Coal Co. v. OSM, 158 IBLA 115 (2003).

<sup>2/</sup> Judge Hammett noted that the Permit Revision Order [PRO] did not define “authorized representative,” and observed that the term “does not simply mean ‘employee.’ \* \* \* If OSM had intended the term ‘authorized representative’ to be limited to PCC employees, it could, and should, have stated as much in the PRO.” July 28, 2003, Order at 7-8. “[I]n the absence of any explicit language in the PRO,” Judge Hammett adopted a standard of reasonableness concerning who may be designated an authorized representative and concluded he did not view “the fact that the [truck drivers from another firm] are delivering material to PCC as disqualifying those drivers from accepting material on PCC’s behalf.” Id. at 9.

that such costs and expenses may be assessed “against either party” as the Secretary “deems proper.” <sup>3/</sup>

The procedural regulations implementing this provision, 43 CFR 4.1290-1295, allow an award to a permittee such as PCC from OSM “when the permittee demonstrates that OSM issued [an NOV or other enforcement action] in bad faith and for the purpose of harassing or embarrassing the permittee.” 43 CFR 4.1294(c). PCC stated that it “was not evident in this case that OSM acted in ‘bad faith,’” so it applied for approximately \$7700 in fees and expenses under EAJA. (Application at 3.) OSM filed a motion for summary denial and dismissal of PCC’s application. Judge Hammett’s February 9, 2004, order denied the application.

[1] EAJA provides:

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1) (2000).

Judge Hammett concluded that the proceeding for which PCC sought an award was an adversary adjudication, as defined by the Department’s regulations implementing EAJA in 43 CFR 4.602(b) (“an adjudication under 5 U.S.C. 554 in which the position of the United States is represented by counsel or otherwise”), because the proceeding under 30 U.S.C. § 1275(a)(1) (2000) required a “public

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<sup>3/</sup> Section 525(e) provides: “Whenever an order is issued under this section, or as a result of any administrative proceeding under this Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.”

hearing” and “involved a full adjudicatory hearing at which OSM was represented by counsel.” (Feb. 9, 2004, Order at 4, n.2.)

We agree. 43 CFR 4.603(a) provides that the regulations implementing EAJA “apply to adjudications conducted by the Office of Hearings and Appeals under 5 U.S.C. 554 which are required by statute to be determined on the record after opportunity for an agency hearing.” 30 U.S.C. § 1275(a)(2) requires that the “public hearing” provided for in § 1275(a)(1) “shall be of record and shall be subject to section 554 of title 5 of the United States Code.” See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 875-78 (1st Cir.), cert. denied, 439 U.S. 824 (1978); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1260-64 (9th Cir. 1977). See also Steadman v. SEC, 450 U.S. 91, 96 n. 13 (1981).

Judge Hammett observed:

EAJA contains three fee-shifting provisions. One concerns administrative proceedings, and is codified at 5 U.S.C. § 504. The other two concern civil cases in federal court, and are codified at 28 U.S.C. § 2412. See 94 Stat. 2325-27 (administrative provisions), 94 Stat. 2327-30 (federal court provisions). Although the fee-shifting provisions at 5 U.S.C. § 504 and 28 U.S.C. § 2412(d) are similar with regard to the qualifications and standards for an EAJA award, they differ in an important respect. The judicial provision starts off with the phrase “[e]xcept as otherwise specifically provided by statute \* \* \* .” 28 U.S.C. § 2412(d). This phrase, together with related legislative history, has been interpreted by some courts to mean that Congress did not intend the EAJA to apply in cases which fall within the scope of other statutory fee-shifting provisions. \* \* \* On the other hand, EAJA’s administrative provision does not contain the language “except as otherwise specifically provided by statute.” See 5 U.S.C. § 504. The Departmental regulations implementing EAJA \* \* \* also lack the explicit limitation set forth in 28 U.S.C. § 2412(d).

(Feb. 9, 2004, Order at 2.)

Judge Hammett framed the question raised by OSM’s motion as whether a permittee may receive an award of fees and expenses under EAJA when it prevails over OSM in an administrative proceeding concerning an NOV if it “cannot make the bad faith showing required for an award of costs and expenses under SMCRA.” Id. at 3. He noted that both 30 U.S.C. § 1275(e) and 5 U.S.C. § 504 are silent as to how they are to be construed in conjunction with the fee-shifting provisions of other

statutes. Id. at 5. However, he continued, the Secretary used the discretion provided by § 1275(e) to determine in 43 CFR 4.1294(c) that an award of costs and expenses to a permittee in an NOV proceeding would only be appropriate when the permittee is able to demonstrate bad faith on the part of OSM. “The Secretary’s determination in this regard cannot be contradicted or ignored by this forum,” he stated. Id.

Judge Hammett noted that the Department’s regulations implementing EAJA were intended to provide for awards in a broad set of proceedings and therefore were more general than 43 CFR 4.1294(c). “A canon of statutory construction, used by analogy, is helpful to the present analysis,” he wrote:

Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible, but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling. 2B Norman J. Singer, Statutes and Statutory Construction, § 51.05 (pp 244-57 (6th ed. 2000) (citations omitted).

\* \* \*

Id. Because 43 CFR 4.1294(c) was more specific than the EAJA regulations, he reasoned, it should be applied. “Otherwise, \* \* \* PCC would be able to evade the ‘bad faith’ requirement by simply putting a different label on its application for fees and expenses. Such a result would frustrate the explicit intent of the Secretary.” Id. at 6.

Judge Hammett acknowledged that in U.S. v. Trident Seafoods Corporation, 92 F.3d 855 (9th Cir. 1996), cert. denied, 519 U.S. 1109 (1997), the U.S. Court of Appeals for the Ninth Circuit held that a more specific provision of the Clean Air Act could be harmonized with a more general provision of EAJA if the provisions were “interpreted to provide alternative bases for the recovery of costs,” id. at 864, and therefore the Court affirmed an award under EAJA. He found Trident was not binding “because it concerns a provision of EAJA, 28 U.S.C. § 2412(a), which is not at issue in this case. Therefore, Trident does not require this forum to ignore the ‘bad faith’ requirement promulgated by the Secretary. See Kathleen K. Rawlings, et al., 137 IBLA 368, 372 (1997) (‘It is well-settled that the Secretary of the Interior is bound by [his or her] own regulations. Vitarelli v. Seaton, 359 U.S. 535, 539 (1959) \* \* \*’). Order at 6-7. <sup>4/</sup>

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<sup>4/</sup> Because he denied PCC’s application on the grounds that it had not demonstrated bad faith on OSM’s part in issuing the NOV, Judge Hammett did not deal with OSM’s  
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[2] Of course we agree we must abide by the Department's regulations. With great respect for Judge Hammett, however, and with appreciation for his thoughtful order, we do not agree that it is necessary to resort to applying the canon of statutory construction by analogy to the Department's regulations implementing EAJA and SMCRA. Rather, we agree with the Court in Trident that "to the extent that statutes can be harmonized, they should be." U.S. v. Trident Seafoods Corp., *supra* at 862; see State of Alaska v. Marcia K. Thorson, State of Alaska v. Phyllis Westcoast (On Reconsideration), 83 IBLA 237, 252, 91 I.D. 331, 340 (1984), citing Kenai Peninsula Borough v. State of Alaska, 612 F.2d 1210, 1213-14 (9th Cir. 1980), *aff'd sub nom. Watt v. Alaska*, 451 U.S. 259 (1981).

In Trident, the U.S. District Court had awarded Trident costs, as the prevailing party, under § 2412(a) of EAJA, one of the provisions of that Act that relates to civil litigation in Federal court. That section begins "[e]xcept as otherwise specifically provided by statute \* \* \* ." The United States argued, on appeal to the Ninth Circuit, that this provision was pre-empted by § 111(b) of the Clean Air Act, 42 U.S.C. § 7413(b) (2000), which permits an award of costs only if the Government action involved is found "unreasonable".

The Court of Appeals stated that it reviews questions of statutory interpretation de novo, based upon the following guidelines:

First, if the statutory language is clear, we need look no further than that language itself in determining the meaning of the statute. Certainly that is true if there is no clearly expressed congressional intent to the contrary. Second, to the extent that statutes can be harmonized, they should be, but in case of an irreconcilable inconsistency between them the later and more specific statute usually controls the earlier and more general one. Finally, Congress must be presumed to have known of its former legislation and to have passed new laws in view of the provisions of the legislation already enacted.

92 F.3d at 862.

The Court found that the plain language of the provisions of EAJA and the Clean Air Act did not make clear whether the statutes provided "alternative or

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<sup>4/</sup> (...continued)

other reasons for denying it, *i.e.*, that OSM's position was "substantially justified" and that PCC may not recover "agent fees" for the services of its general manager in the proceeding. *Id.* at 3.

mutually exclusive bases for costs awards,” so it proceeded to “the next step \* \* \* to determine whether the statutes may be read harmoniously.” Id. at 863.

These statutes may be harmonized if they are interpreted to provide independent bases for the recovery of costs. Thus, a defendant may recover costs \* \* \* under 7413(b), if the government’s action was unreasonable, whether or not the defendant prevails. \* \* \* In contrast, a prevailing plaintiff or defendant may recover costs \* \* \* under the EAJA, whether or not the action was reasonable, unless costs are specifically precluded by another statute. \* \* \* Section 7413(b) does not specifically preclude costs; it simply provides that costs may be awarded if the court finds the action was unreasonable. Thus, there is no irreconcilable inconsistency.

Id.

The United States argued that the Clean Air Act and EAJA were not intended to be read harmoniously and that EAJA was only a gap-filling statute that did not apply because the more restrictive Clean Air Act provision already applied. “[T]he purpose of the EAJA is to ‘reduce the deterrents and disparity’ in contesting government action,” the Court responded, citing H.R. Rep. No. 96-1418, 96th Cong., 2nd Sess. 6 (1980), reprinted in 1980 U. S. Code Cong. and Admin. News [U.S.C.C.A.N.] 4984. “An interpretation of the EAJA that permits costs awards in actions under the Clean Air Act only if the government was unreasonable [even when a private party prevails] undermines the EAJA’s purpose.” Id.

Finally, the Court of Appeals observed, “Congress must be presumed to have known of its former legislation and to have passed new laws in view of the provisions of the legislation already enacted,” id. at 864, quoting Hellon & Assoc., Inc. v. Phoenix Resort Corp., 958 F.2d 295 at 297 (9th Cir. 1992), and Congress had long since waived sovereign immunity to liability for awards of costs to prevailing parties when it enacted the Clean Air Act. The Court concluded the District Court had not erred in awarding costs to Trident.

Although we recognize the Trident decision is not precedential, because it deals with § 2412(a) rather than § 504(a) of EAJA<sup>5/</sup>, we find the Trident Court’s reasoning

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<sup>5/</sup> See Melkonyan v. Sullivan, Secretary of Health and Human Services, 501 U.S. 89, 94-95 (1991), in which the Court noted the differences between the provisions in EAJA and commented that “[c]learly the Congress knew how to distinguish” between  
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persuasive. As Judge Hammett noted, there is nothing in the plain language of either provision that addresses how they are to be construed together or with other fee-shifting provisions. Because § 504(a) does not contain the “except as otherwise specifically provided by statute” language in § 2412(a) of EAJA that the Court in Trident had to reconcile with the language of the Clean Air Act, the next step of determining whether the two statutes may be read harmoniously in this case is easier. Both statutes authorize awards in administrative proceedings – § 504(a)(1) to a “prevailing party” for “fees and other expenses” incurred in connection with an adversary adjudication, “unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust;” and § 525(e) to “any person” for “all costs and expenses (including attorney fees) \* \* \* determined by the Secretary to have been reasonably incurred \* \* \* for or in connection with \* \* \* participation in” any administrative proceeding under SMCRA. Although there are differences in the language of the two provisions – e.g., only a “prevailing party” in an “adversary adjudication” may receive “fees and other expenses” under EAJA, while “any person” may receive “all costs and expenses (including attorney fees)” for “participation” in “any administrative proceeding” under SMCRA – these differences do not preclude interpreting them to provide “independent bases for the recovery of costs,” i.e., that a person who prevails over the government may receive an award for expenses in an adversary proceeding such as the one involved in this case under either statute. Therefore, there is no irreconcilable inconsistency between the statutes.

Finally, the EAJA was enacted in 1980 – after SMCRA was enacted in 1977. As the Court of Appeals noted, EAJA’s purpose was to “reduce the deterrents and disparity” in contesting action taken by the government. In formulating a standard of recovery under EAJA, the House Committee on the Judiciary specifically considered and rejected a “purely discretionary standard,” like the one provided in § 525(e) of SMCRA, finding that such a standard both “fails to account for the natural reluctance of agencies to award fees against themselves and offers little direction to exercise of agency discretion.” H.R. Rep. No. 96-1418, 96th Cong., 2nd Sess. 14 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4992-93.<sup>5/</sup> See also H.R. Rep. No. 99-120, Part

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<sup>5/</sup> (...continued)

an action in court and an adversary adjudication by an agency.

<sup>6/</sup> It also rejected a standard proposed by the Department of Justice – that “fees would be awarded only where the government action was ‘arbitrary, frivolous, unreasonable, or groundless, or the United States continued to litigate after it clearly became so,’” – as “unnecessarily restrictive.” Id., 1980 U.S.C.C.A.N. 4984, 4993.

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I, 99th Cong., 1st Sess. 4 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 132-33. <sup>7/</sup> It is consistent with presuming the Congress knew of SMCRA when it enacted EAJA to interpret § 504(a)(1) as providing an alternative basis for an award of expenses from that provided in section § 1275(e) for persons who qualify under EAJA's provisions.

We conclude that a permittee may apply for fees and other expenses under 5 U.S.C. § 504(a) of EAJA, or for costs and expenses, including attorney fees, under 30 U.S.C. § 1275(e) of SMCRA. <sup>8/</sup>

Under EAJA, it is the adjudicative officer who makes the decision whether an applicant is eligible for an award, *i.e.*, the person who presided at the adversary adjudication. 5 U.S.C. § 504(b)(1)(D); 43 CFR 4.616, 43 CFR 4.602(c); U.S. v. Willsie, 155 IBLA 296, 297 (2001). As noted above, *supra* note 4, Judge Hammett did not reach the issues of whether PCC is eligible for an award or whether OSM's position was substantially justified. If PCC is eligible, it is OSM's burden to show its position was substantially justified. See Heirs of David F. Berry, 156 IBLA 341, 344 (2002); see also H.R. Rep. No. 96-1418, 96th Cong., 2nd Sess. 10-11, 13 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4989-90, 4992; H.R. Rep. No. 99-120, Part I, 99th Cong., 1st Sess. 9-10, 12 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 138, 140-41.

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<sup>6/</sup> (...continued)

We note that 43 CFR 4.1294(c), which was adopted in 1978, could be viewed as an example of "the natural reluctance of agencies to award fees against themselves." In rejecting comments that objected to the requirement in the proposed rule that a permittee must show bad faith to receive an award, the Department relied on legislative history stating that attorney 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)). 43 FR 34376, 34386 (Aug. 3, 1978). Read in context, however, that statement in the legislative history refers to suits brought, or participation in administrative proceedings, in bad faith by private citizens, not the Government. See Alternate Fuels Inc. v. Office of Surface Mining Reclamation and Enforcement, 103 IBLA 187, 191 (1988).

<sup>7/</sup> Section 504(a) of EAJA was enacted with a sunset provision in 1980. Pub. L. No. 96-481, 94 Stat. 2325, 2327 (1980). It was amended and reenacted as permanent in 1985. Pub. L. No. 99-80, 99 Stat. 183 (1985), reprinted in 1985 U.S.C.C.A.N. 132.

<sup>8/</sup> 43 CFR 4.607(a) governs the fees and other expenses that are allowable under EAJA, 43 CFR 4.1295 under SMCRA. We note that EAJA has been amended since the Department's regulations implementing it were adopted and now allows an award of up to \$125/hour. 5 U.S.C. § 504(b)(1)(A) (2000).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Hammett's February 9, 2004, order is reversed, and the matter is remanded to Judge Hammett.

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Will A. Irwin  
Administrative Judge

I concur:

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James F. Roberts  
Administrative Judge