



BLACK MESA WATER COALITION, *ET AL.* v. OSM

181 IBLA 205

Decided July 6, 2011



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

BLACK MESA WATER COALITION, *ET AL.*

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 2010-172

Decided July 6, 2011

Appeal from a decision of Administrative Law Judge Robert G. Holt denying a petition for fees and expenses under section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (2006), and its implementing regulations. DV 2009-1-PR/AP.

Affirmed.

1. Attorney Fees: Surface Mining Control and Reclamation Act of 1977--Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Generally

Under 43 C.F.R. § 4.1294, OSM may award appropriate costs and expenses, including attorney fees, to any person who participates in any proceeding under SMCRA and achieves some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues. When an administrative law judge consolidates several requests for review under SMCRA and grants the motion for summary disposition of one of the parties, a petitioner claiming costs and expenses must have made a substantial contribution to a full and fair determination of the issues that is separate and distinct from the party whose motion was granted. A petition for an award will be denied where the record does not show that the petitioner achieved some degree of success on the merits or made a substantial contribution to the full and fair determination of the issues.

APPEARANCES: Amy R. Atwood, Esq., Portland, Oregon, Brad A. Bartlett, Esq., Durango, Colorado, and Walton D. Morris, Esq., Charlottesville, Virginia, for

appellants; John R. Retrum, Esq., Lakewood, Colorado, Office of the Regional Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

#### OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Black Mesa Water Coalition, *et al.* (BMWC or the Coalition),<sup>1</sup> appeals from a May 28, 2010, Order of Administrative Law Judge (ALJ) Robert G. Holt denying BMWC's petition for an award of attorney fees and related expenses associated with its request for review of a decision by the Office of Surface Mining Reclamation and Enforcement (OSM) approving an application by Peabody Western Coal Company (Peabody) for a significant revision of Permit No. AZ-0001D governing surface coal mining operations at Peabody's Kayenta and Black Mesa Mines in northeastern Arizona. BMWC filed its petition pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), 30 U.S.C. § 1275(e) (2006), and 43 C.F.R. § 4.1294(b), the implementing regulation. Judge Holt explained in his Order that BMWC had failed to achieve any degree of success on the merits of its request for review, and had failed to substantially contribute to the proceeding's outcome, as required by 43 C.F.R. § 4.1294(b).<sup>2</sup> Thus, he concluded that BMWC was neither eligible nor entitled to an award of fees, as explained below. For the following reasons, we affirm Judge Holt's Order.

#### I. BACKGROUND

Peabody has operated the Kayenta and Black Mesa Mines as two separate surface coal mining operations, comprising 62,930 acres, on Hopi and Diné (Navajo) lands in northern Arizona since the early 1970s. The Kayenta mining operation has supplied coal to the Navajo Generating Station, near Page, Arizona, since 1973. The coal is transported to the station via an 83-mile-long rail line. The Black Mesa mining operation supplied coal to the separate Mohave Generating Station, near Laughlin, Nevada, from 1970 until December 2005, when the power plant suspended

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<sup>1</sup> The Diné Citizens Against Ruining Our Environment, the Diné Hataalii Association, Inc., the Diné Alliance, the C-Aquifer for Diné, the Sierra Club, the To Nizhoni Ani (Beautiful Water Speaks), the Center for Biological Diversity, and the Natural Resources Defense Council joined BMWC jointly to contest the surface mining permit. For ease of reference, we refer to BMWC in the singular.

<sup>2</sup> Californians for Renewable Energy (CARE) submitted a petition for attorney fees and expenses associated with its separate request for review of OSM's decision, as described below. In his May 28, 2010, Order, Judge Holt also denied CARE's petition for attorney fees and related expenses. CARE appealed that denial of fees and expenses to this Board, which docketed CARE's appeal as IBLA 2010-171.

operations. The coal was transported to this generating station via a 273-mile-long coal-slurry pipeline.

The two mines operated under SMCRA's initial regulatory program until 1990, when Peabody applied for a permanent program permit to cover both operations. OSM issued a permanent program permit for only the Kayenta mining operation, and subsequently renewed that permit in 1995, 2000, and 2005. At the direction of the Secretary, OSM administratively delayed a decision on Peabody's Black Mesa permanent program permit application because of concerns by the Hopi Tribe and the Navajo Nation regarding use of Navajo-aquifer water for coal-slurry purposes. Because of this administrative delay, Peabody mined coal at the Black Mesa Mine under the initial regulatory program until December 2005, when the Mohave Generating Station ceased operations.

On February 12, 2004, Peabody submitted an application to add operations at the Black Mesa Mine to its existing permanent program permit for the Kayenta Mine operation, forming a single Life-of-Mine operation called the "Black Mesa Complex." On June 15, 2004, OSM deemed the application to be administratively complete. OSM reviewed Peabody's application as constituting a significant permit revision. Subsequently, in 2005 and 2006, Peabody further revised the application. Peabody's revised application sought approval of several related projects, including a new coal-wash plant, a new haul road, a rebuilt 273-mile-long coal-slurry pipeline to the Mohave Generating Station, and a new aquifer water-supply system with a 108-mile-long pipeline. On November 22 and December 1, 2006, OSM and the Environmental Protection Agency respectively published notices in the *Federal Register* announcing availability of the Draft Environmental Impact Statement (EIS) for comment (71 Fed. Reg. 67637 and 71 Fed. Reg. 69562). The Draft EIS identified three alternatives: (A) approve Peabody's application with the related construction projects; (B) approve a combined permanent permit for the Kayenta and Black Mesa operations, but without the construction projects and with no coal mining from the Black Mesa Mine; and (C) disapprove Peabody's application, leaving the operations in the status quo.

In 2008, prior to issuance of the Final EIS, Peabody revised its application to remove the plans and activities that supported the Mohave Generating Station, *i.e.*, production of coal at the Black Mesa mining operation, construction of a new coal-wash plant, construction of a new haul road, reconstruction of the coal-slurry pipeline, and development of a new aquifer water-supply system. Peabody made these revisions believing that the Mohave Generating Station would not likely reopen as a coal-fired facility. Peabody's further revised application added the 18,857-acre program area for the Black Mesa mining operation, including surface facilities and coal reserves, to the 44,073-acre existing permanent program area for the Kayenta

mining operation, bringing the total acreage of the permanent program permit area to 62,930 acres. The permit area would no longer distinguish between the Kayenta mining operation and the Black Mesa mining operation. OSM would consider the two operations as a single operation, known as the Black Mesa Complex. Approval of Peabody's revised application would not authorize mining of unmined coal reserves in the Black Mesa mining operations area; however, those areas could be mined in the future upon Peabody's submission of a permit revision application, subject to OSM's approval.

OSM announced in the *Federal Register* that it had changed its preferred alternative from Peabody's original proposal of supplying coal to both the Navajo Generating Station and the Mohave Generating Station (Alternative A) to Peabody's current proposal of operating the Black Mesa Complex (Alternative B), with the Kayenta and Black Mesa permit areas comprising a single operation, and reopened the comment period on the Draft EIS to allow public review and comment on the revised application. *See* 73 Fed. Reg. 30160 (May 23, 2008). OSM then announced the availability of the Black Mesa Final EIS on November 7, 2008. *See* 73 Fed. Reg. 66255. OSM's Record of Decision approving Peabody's revised application was issued on December 22, 2008.

BMWC was among ten different individuals, groups of individuals, or organizations who filed requests for review of OSM's permit approval decision. Each request was assigned an individual docket number. Two of the original applicants were dismissed early in the proceedings, leaving eight applicants, and three parties were later added as intervenor-respondents. *See* July 1, 2010, Order at 3 (tables providing identity of parties, docket numbers, and name abbreviations).<sup>3</sup> In an order dated February 6, 2009, Judge Holt consolidated the requests for hearing and decision and set a cut-off date for discovery and dispositive motions. Prior to the cut-off date, various parties filed 19 motions for dismissal or for summary decision. *Id.* at 7-8 (table showing moving party, title of motion, abbreviated title of motion, and opposing party).

On January 5, 2010, Judge Holt entered a summary decision in favor of only one of the petitioners—Kendall Nutumya—and vacated OSM's permit decision based

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<sup>3</sup> The applicants claimed that OSM's decision should be vacated because it violated several statutes, including SMCRA, 30 U.S.C. §§ 1201-1309b (2006); the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370 (2006); the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2006); the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2006); the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb thru 2000bb-4 (2006); and the Clean Water Act, 33 U.S.C. §§ 1251-1387 (2006).

solely on Nutumya's NEPA claims.<sup>4</sup> He provided a detailed review of the Final EIS in light of Nutumya's NEPA arguments, and concluded that OSM had violated NEPA by its failure to supplement its EIS when Peabody changed its petition for permit revision to combine operations at the Kayenta and Black Mesa Mines. He concluded further that "the Final EIS did not consider a reasonable range of alternatives, described the wrong affected environmental baseline, and did not achieve the informed decision-making and meaningful public comment required by NEPA." Jan. 5, 2010, Order at 6. He accordingly granted Nutumya's motion for summary decision, vacating OSM's decision approving the revised permit and remanding the matter to OSM for further NEPA review.

BMWC was among the parties who filed a motion for summary decision. BMWC specifically argued that the Final EIS inadequately analyzed impacts related to global warming caused by greenhouse gases emitted into the air by burning coal, and that Peabody's application violated Federally-issued water pollution prevention permits. BMWC requested that "the ALJ grant summary decision in [its] favor, vacate OSM's decision to approve Peabody's permit revision application[,] and remand the matter for proceedings consistent with the requirements of NEPA." See BMWC's Motion for Summary Decision for Failure to Comply with NEPA at 27.

Judge Holt did not address the merits of BMWC's request for review. Nor did he consider any other outstanding claim, motion, or pending matter brought by any other party, which he dismissed:

Other pending motions also raise NEPA issues. For example, BMWC's NEPA Motion alleges that the Final EIS failed to (1) adequately analyze impacts related to global warming, (2) consider the impacts of mercury and selenium emissions, and (3) consider the impacts of the National Pollution Discharge Elimination System permit issued by the Environmental Protection Agency. . . .

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<sup>4</sup> In an Interlocutory Order dated May 28, 2010, Judge Holt determined that Nutumya was eligible and entitled to an award of attorney fees from OSM, but noted that OSM disputed the amount claimed. Judge Holt found that Nutumya's petition for fees and expenses contained deficiencies, and authorized Nutumya to file an amended petition and OSM to file an answer to the amended petition. Nutumya appealed the Interlocutory Order to this Board, based upon his belief that he is entitled to the amount claimed in his petition. In *Kendall Nutumya*, 180 IBLA 371, 374 (2011), the Board dismissed Nutumya's appeal on the basis that he had not sought Judge Holt's certification of the interlocutory ruling, as required by 43 C.F.R. § 4.1124.

I need not address the merits of BMWC's motion because I can grant no additional relief, even if a favorable result could be rendered on its motion. The result it sought—vacatur of the OSM decision—has been granted.

In such circumstances, where no relief can be given, further administrative review is normally moot. Nevertheless[,] an exception applies where an issue exists that is “capable of repetition, yet evading review.” *See Colo. Env't Coal.*, 108 IBLA 10, 15-16 (1989). While BMWC may make the same allegations about any new NEPA document that OSM may prepare in the future, such allegations will not escape review because they may be reviewed then in the context of any new NEPA document instead of one that this order holds invalid.

. . . Thus[,] the motion is no longer ripe for review.

Jan. 5, 2010, Order at 34.

No party appealed the ALJ's decision and it therefore became final for the Department.

## II. BMWC'S FEES PETITION

On February 23, 2010, BMWC filed its petition in the amount of \$221,895.86 to cover its attorney and expert witness fees, incurred over a span of 1,065 hours, associated with litigating OSM's permitting decision. BMWC stated that its request for review had been consolidated with Nutumya's request, and that BMWC was therefore a successful “co-appellant” alongside Nutumya. BMWC further stated that, regardless of the cases' consolidation, the “findings and relief granted by [Judge Holt] are virtually *identical* to the claims and relief sought by BMWC . . . during appeal,” and success on the merits therefore can be reasonably inferred. BMWC's Fees Petition at 5. “Additionally, BMWC's timesheets show coordination with Petitioner Kendall Nutumya . . . in development of Nutumya's motion for summary disposition[,] which formed the basis of the Judge's decision.” *Id.* Moreover, BMWC asserts that Judge Holt was aware that the parties had implicitly agreed not to duplicate each other's NEPA arguments for the sake of economy and efficiency. Based on that “team” relationship, BMWC insisted that it substantially contributed to the outcome of Nutumya's case and is thus entitled to recover the fees it accrued while working on its own separate NEPA arguments. *Id.* at 7.

OSM responded to BMWC's fees petition with an answer styled “Motion to Dismiss.” Therein, the agency argued that “BMWC's arguments are without merit,”

and that “BMW’s petition must be denied.” Motion to Dismiss at 4. OSM contended that Judge Holt’s grant of Nutumya’s motion cannot serve as the basis for BMW’s claim of eligibility, because SMCRA does not provide “that a person in one proceeding may be eligible for an award . . . merely because the relief he seeks is consistent with or virtually identical to the relief granted to another person in another proceeding.” Motion to Dismiss at 4-5 (internal quotation marks omitted). OSM argues further that BMW did nothing to substantially contribute to a full and fair determination of the issues:

Nothing in SMCRA or its implementing regulations provides that, where cases have been consolidated for hearing, a person in one case may be deemed to have made a “substantial contribution to a full and fair determination of the issues” raised by a person in another case merely because both persons raised similar issues in their respective cases and may have acted in concert or coordinated their efforts in some way in their respective prosecution of their cases.

Motion to Dismiss at 7.<sup>5</sup>

### III. JUDGE HOLT’S DECISION TO DENY BMW’S FEES PETITION

Judge Holt denied BMW’s fee petition by Order dated May 28, 2010. He began his Order by outlining the legal framework for awarding fees. Under section 525(e) of SMCRA, a person who participated in “any administrative

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<sup>5</sup> In its Response in Opposition to OSM’s Motion to Dismiss, BMW asserted, *inter alia*, that OSM’s motion to dismiss constituted an improper pleading that the ALJ should reject out of hand. BMW contended that the regulations only allow the agency to file an answer, not a motion to dismiss.

The regulation at 43 C.F.R. § 4.1293 allows OSM to file an answer to a fees petition. In essence, OSM’s pleading was an answer. It addressed the merits of the fees petition. BMW even acknowledged that OSM’s “motion directly addressed the petitioner’s substantive merit,” regardless of what OSM titled its pleading. BMW’s Response in Opposition to OSM’s Motion to Dismiss at 2. Furthermore, even if OSM’s pleading could not be reasonably construed as an answer, 43 C.F.R. § 4.1112 certainly allows any party to file a motion during a SMCRA proceeding taking place before OHA, and nothing in 43 C.F.R. Subpart L mandates that the failure to file an answer would automatically result in a default. This procedural argument is simply misguided.

proceeding under [SMCRA <sup>6</sup>]” may collect “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.” May 28, 2010, Order at 9 (quoting 30 U.S.C. § 1275(e) (2006)). And under 43 C.F.R. § 4.1294(b),

[a]ppropriate costs and expenses including attorneys’ fees may be awarded . . . [f]rom OSM to any person . . . who initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues.

Judge Holt stated that a person must be both *eligible* for an award by showing at least some degree of success on the merits and *entitled* to an award by proving that it made a substantial contribution to the determination of the issues in order to rightfully collect reasonably expended fees. *Id.* at 11 (citing *Natural Resources Defense Council, Inc., v. OSM*, 107 IBLA at 363-64, and *West Virginia Highlands Conservancy*, 152 IBLA 66, 74 (2000)).

The Judge then applied those provisions to BMWC’s participation in the underlying proceeding.

#### A. *BMWC Is Not Eligible for a Fee Award*

Judge Holt concluded that BMWC failed to prevail on the merits, in whole or in part, because he dismissed BMWC’s request for review without considering the merits of BMWC’s position. He concluded that, because each case was separately ruled upon, an actual judgment in BMWC’s favor was a prerequisite to filing an adequate fees petition. He disagreed with BMWC’s argument that consolidation and the relief granted was legally sufficient to meet SMCRA’s eligibility requirement, regardless of its case’s dismissal.

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<sup>6</sup> It is not in dispute that fees petitions may be filed under this provision to recoup monies expended during SMCRA permit review proceedings. *See Natural Resources Defense Council, Inc. v. OSM*, 107 IBLA 339, 355-60 (1989); *see also* 30 C.F.R. § 750.6(a)(7) (a SMCRA regulation requiring OSM to ensure that permits and mining plans comply with NEPA). Nor is there a dispute that BMWC appealed a final order and participated in a SMCRA administrative proceeding. *See* 43 C.F.R. § 4.1290.

### 1. *Dismissal Precluded Achieving Success on the Merits*

Judge Holt stated that the fact that BMWC may have made NEPA arguments, as Nutumya did in his motion for summary decision, or that BMWC requested relief similar to the remedy Nutumya received, was a *non sequitur* for attorneys' fees purposes because BMWC's pleadings were dismissed. He emphasized that 43 C.F.R. § 4.1294(b) requires a party to achieve at "least some degree of success on the merits," but that he "never addressed the merits of the errors claimed by [BMWC]." May 28, 2010, Order at 17. Therefore, Judge Holt held that BMWC was not eligible for an award of fees and expenses.

### 2. *Consolidation Did Not Merit Eligibility*

Judge Holt did not accept BMWC's premise that, because its request for review was consolidated with Nutumya's request, and because BMWC sought the same general remedy as the one Nutumya received, BMWC had achieved "some degree of success on the merits," a prerequisite for an award under 43 C.F.R. § 4.1294(b). He held that consolidation does not automatically make the actions of one petitioner the actions of all petitioners involved in the consolidated matter. May 28, 2010, Order at 12; *see id.* at 14. He reasoned that consolidation normally means either "several actions are combined and lose their separate identities, becoming a single action with a single judgment entered," or that "several actions are tried together, but each suit retains its separate character, with separate judgments entered." *Id.* at 12 (quoting *Schnabel v. Lui*, 302 F.3d 1023, 1035 (9th Cir. 2002) (citing 9 Wright & Miller, Fed. Practice & Procedure: Civil 2d § 2382 (1995))). In Judge Holt's opinion, the latter context applied to this case. Moreover, "each party filed separate motions for summary decision on the issues they independently chose." *Id.* at 14. Finally, he pointed out that his January 5, 2010, decision "separately considered Nutumya's motion, rendered a[n] order granting only it, specifically dismissed the other motions, and separately dismissed the requests for review filed by the Other Petitioners." *Id.* Based upon those actions, he concluded that the success of Nutumya's summary decision motion is not properly attributable to BMWC.

### B. *BMWC Is Not Entitled to a Fee Award*

Moreover, even if BMWC was somehow eligible for attorneys' fees, Judge Holt ruled that it did not substantially contribute to Nutumya's successful motion for summary decision and therefore is not entitled to any award under SMCRA.

1. *Coordinated Contribution is not Supported by the Record*

The ALJ rejected BMW's contention that, because the parties agreed to divvy up NEPA arguments so that no one's efforts were unnecessarily duplicative, BMW substantially contributed to the NEPA claims and therefore should be attributed some involvement, regardless of whether its own claims were adjudicated. Judge Holt could find no evidence that the parties entered into any formal agreement in advance of dividing up their respective NEPA issues, and, consequently, the "parties remained free to choose those [NEPA arguments] for which they would seek summary decision and those they would not, and for whatever reason they chose." May 28, 2010, Order at 19. Nor could Judge Holt find that Nutumya relied on any work done by, or produced in conjunction with, any other party. Thus, according to Judge Holt, BMW did not substantially contribute to Nutumya's winning motion.

2. *No Causal Connection Found*

Implementing a "but/for" test, the ALJ also found that "[t]he result would have been the same if [BMW] had not filed any requests for review," because the January 5, 2010, Order "did not rely on anything presented in [BMW's] motions or requests for review." May 28, 2010, Order at 21. As discussed in more detail below, Judge Holt rejected BMW's argument that the decision of the U.S. Court of Appeals for the Fourth Circuit in *West Virginia Highlands Conservancy, Inc. v. Kempthorne* (*WVHC v. Kempthorne*), 569 F.3d 147, 154 (4th Cir. 2009), requires approval of BMW's fees petition.<sup>7</sup> He found no indication that BMW caused in any way the

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<sup>7</sup> *WVHC v. Kempthorne* involved an OSM inspection that resulted in this Board remanding the case to OSM for a determination of whether or not there was a basis for OSM to reassert jurisdiction to review post-mining water quality under 30 C.F.R. § 700.11(d)(1)(i). See *WVHC*, 165 IBLA 395, 406 (2005). WVHC filed a petition for attorney fees, docketed by the Board as IBLA 2005-204, which the Board denied by Order dated Dec. 30, 2005. The Board concluded that WVHC could not claim "any measure of success at this point" because the Board's remand Order had rejected an assumption underlying WVHC's appeal, *i.e.*, that OSM had jurisdiction over the post-mining water quality issue. The U.S. District Court for the Northern District of West Virginia granted summary judgment to WVHC, concluding that the Board's remand order represented "a partial success on the merits for [WVHC]," rendering the organization eligible for fees. *WVHC v. Kempthorne*, No. 2:06-cv-00011-FPS, slip op. at 17, 2007 WL 2752695 (N.D. W.Va. Sept. 20, 2007). The Department appealed to the Fourth Circuit, which affirmed the District Court's ruling that as the result of WVHC's participation, OSM was "required . . . to properly carry out the duty mandated by 30 C.F.R. § 700.11(d) to determine whether it was required to reassert

(continued...)

outcome of Nutumya's case; therefore, he ruled that BMWC was not entitled to an award of fees and expenses under 43 C.F.R. § 4.1294(b).

BMWC appealed to this Board.

#### IV. THE PARTIES' ARGUMENTS

BMWC claims that it is both eligible and entitled to recover fees for participating in the underlying administrative proceeding involving OSM's permitting decision. BMWC's principal claim is that Judge Holt's dismissal of its case is not a lawful basis for denying its fees petition. BMWC's Opening Brief at 14-16. Even though Judge Holt dismissed its motion for summary decision, BMWC reasons that it meets the eligibility requirement as a matter of law because reversal of OSM's decision on NEPA grounds not only applies to Nutumya, but was the exact relief sought by BMWC, and that therefore Nutumya's success automatically transfers to BMWC. *Id.* at 13-14; *see id.* at 16 (“[T]he relief [the ALJ] granted in ruling on Nutumya's summary decision motion satisfied the demand for relief in BMWC's motions for summary decision as well.”). According to BMWC, such transferred success meets SMCRA's eligibility requirement where another's action was consolidated with the successful case.

OSM argues otherwise, maintaining that BMWC provides no legal authority for its position that consolidation satisfies the requirement to participate in a successful proceeding. Answer at 8. According to OSM, BMWC cannot show success merely by claiming Nutumya's success as its own. “At best, BMWC merely disagrees with Judge Holt's finding and conclusion. This does not show error in Judge Holt's Order.” *Id.* at 9 (citing *Glanville Farms, Inc. v. BLM*, 122 IBLA 77, 87 (1992)).

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<sup>7</sup> (...continued)

regulatory jurisdiction over the LaRosa reclamation site,” and that “[t]hat achievement by WVHC amounts to some degree of success on the merits.” 569 F.3d at 153.

Quoting *WVHC v. Norton*, 343 F.3d 239, 347 (4th Cir. 2003), the District Court held that the “key to a finding of substantial contribution [to a full and fair determination of the issues] is ‘the existence of a causal nexus between petitioners’ actions in prosecuting the Board appeal and the relief obtained,’” and accordingly remanded the case to this Board “for further proceedings on the issue of substantial contribution.” *WVHC v. Kempthorne*, slip op. at 16, 19, 2007 WL 2752695, at \*6, \*8. On remand, in *WVHC v. OSM (On Judicial Remand)*, 181 IBLA 31, 51-54 (2011), the Board ruled that WVHC had failed to meet its burden to show that it had made a substantial contribution to a full and fair determination of the issues.

BMWC further argues that it substantially contributed to Judge Holt's ruling on Nutumya's NEPA claims. BMWC asserts that Judge Holt overlooked the fact that the organization's counsel collaborated with Nutumya's legal team regarding the NEPA charges, and therefore contributed to having OSM's decision overturned. BMWC's Opening Brief at 18.<sup>8</sup> OSM counters that BMWC has not shown error in Judge Holt's "lack of entitlement" determination. OSM, pointing to the record, states that there is no evidence showing significant collaboration between BMWC and Nutumya or that Nutumya relied on BMWC's work in any way when it filed its successful motion for summary decision. Answer at 13-14.

Alternatively, BMWC submits that, where a fees petition does not neatly pass the traditional eligibility and entitlement tests, the ALJ has the duty to consider whether denying a petition contravenes SMCRA policy. In BMWC's view, "[n]othing would do more to discourage interested citizens from bringing good faith actions to enforce SMCRA than to deny the majority of a group of citizen litigants . . . recovery of attorney fees," where, like here, "an [ALJ] elects to resolve the dispute by adjudicating the summary decision motion of one plaintiff, in a manner that moots the claims of remaining parties." BMWC's Opening Brief at 17. Thus, argues BMWC, its fees petition should be granted on policy grounds. OSM responds that no authority exists for BMWC's "good faith" policy exception. See Answer at 11.

## V. DISCUSSION

[1] Section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (2006), authorizes the award of costs and expenses, including attorneys' fees, "as determined by the Secretary to have been reasonably incurred" to any person for or in connection with his participation in any administrative proceeding under the Act. Section 525(e) further provides that such costs and expenses, including attorneys' fees, may be assessed "against either party" as the Secretary "deems proper." *Id.* The applicable regulation, 43 C.F.R. § 4.1294(a), provides that an award of costs and expenses will only be appropriate where the SMCRA proceeding "results in . . . [a] final order being

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<sup>8</sup> Without further discussion, BMWC believes that "Judge Holt's assertion that fee entitlement extends only to the single party in consolidated proceedings who fortuitously files the only summary decision motion that he elected to adjudicate is wholly repugnant to the principle announced in *Kemphorne*." BMWC's Opening Brief at 20. This case, states BMWC, eliminated the causal "but for" test applied by Judge Holt and therefore BMWC's involvement constitutes entitlement. We summarily dispose of this argument here because the *Kemphorne* court dealt only with the legal question of eligibility and not the factual question of entitlement. The analysis regarding each fee requirement is not interchangeable. See *CCC*, 168 IBLA 222, 229-30 (2006).

issued” by an administrative law judge or the Board. Under 43 C.F.R. § 4.1294(b), such costs and expenses, including attorneys’ fees, may be awarded to any person “who initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues.”

The Board applied these provisions in *CCC*, 168 IBLA 220, in which ALJ James H. Heffernan denied a petition for fees and expenses submitted by CCC as an intervenor in *Amcord v. OSM*, DV-94-21 and DV 95-3-P (Oct. 21, 1994). Amcord filed and was granted a motion for voluntary dismissal of its application for review of a notice of violation (NOV) concerning handling of acid-forming combustible materials. During the period when CCC’s procedural appeals were pending before the Hearings Division, Amcord, OSM, the Navajo Nation, and the Bureau of Indian Affairs negotiated a global settlement that would include the subject NOV. CCC in fact opposed the settlement. Nonetheless, CCC filed a petition for fees and expenses, arguing that it had made a “substantial contribution” to the “successful final order” entered in the case. In denying CCC’s petition, the Board set forth the governing framework, as established by section 525(e) of SMCRA and 43 C.F.R. § 4.1294, as follows:

As noted, Departmental regulations require that in order to recover an award from either the permittee or OSM, the petitioner must have initiated or participated in an administrative review proceeding “reviewing enforcement actions” where a “final order” has been issued finding that the permittee violated SMCRA, its implementing regulations, or the permit. 43 CFR 4.1290(a), 4.1294; *see Natural Resources Defense Council, Inc. v. OSM*, 107 IBLA 339, 96 I.D. 83 (1989). The proceeding in this case was initiated by Amcord to challenge the issuance of the NOV. CCC eventually participated in the administrative process as an intervenor. A final order was issued by Judge Heffernan, allowing for enforcement of the NOV by OSM.

In evaluating CCC’s petition for fees and costs, we must apply the related standards of whether CCC is *eligible* for an award of fees and costs under section 525(e) of SMCRA, and, if it is eligible, whether it has demonstrated that it is *entitled* to such an award. *West Virginia Highlands Conservancy*, 152 IBLA 66, 74 (2000); *Natural Resources Defense Council, Inc. v. OSM*, 107 IBLA at 363-65, 96 I.D. at 96-97. First, under 43 CFR 4.1294(b), in order to be eligible for an award, the person must show at least “some degree of success on the merits by the claimants.” *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983); *see also*

*Utah International, Inc. v. U.S. Dept. of the Interior*, 643 F. Supp. 810, 817 (D. Utah 1986). . . . As noted by Amcord, in defining the phrase “some success on the merits,” the *Utah International* court deferred to the Supreme Court’s conclusion that “trivial success on the merits, or purely procedural victories, would not justify an award of fees.” (Amcord’s Opposition Brief at unnumbered 5, quoting 643 F. Supp. at 817.) This Board has ruled similarly. See, e.g., *Donald St. Clair*, 84 IBLA 236, 242 (1985). Thus, in order to be eligible for an award of fees and costs, a petitioner must have achieved some degree of success on the merits of a substantial matter at issue. *Id.*

Second, in order to be entitled to an award of fees and costs, an eligible petitioner must demonstrate that it “made a substantial contribution to the full and fair determination of the issues.” 43 CFR 4.1294(a). The test of whether a party made the requisite contribution is whether there is a “causal nexus” between the petitioner’s actions and the relief obtained, the determination of which depends upon the totality of the circumstances. See, e.g., *David Ruth*, 164 IBLA 250, 255 (2005); *West Virginia Highlands Conservancy*, 152 IBLA at 74. Further, the petitioner’s contribution must be “separate and distinct” from OSM’s. 43 CFR 4.1294(a). See, e.g., *Jerry Hylton v. OSM (On Reconsideration)*, 145 IBLA 167, 170 (1998); *Jerry Hylton v. OSM*, 141 IBLA 260, 262 (1997).

168 IBLA at 228-30 (footnotes omitted). The Board agreed with Judge Heffernan that CCC failed to meet both standards. With these principles in mind, we now turn to BMWC’s petition for fees and expenses.

#### A. *BMWC Does Not Meet the Eligibility Requirement*

We first consider whether BMWC achieved “some degree of success on the merits.” Judge Holt determined that BMWC was not eligible for an award of fees and costs because he dismissed BMWC’s request for review without considering the merits of that request, and that he did not rely on any claim, argument, or error set forth in BMWC’s pleadings. He specifically rejected BMWC’s argument that the overall disposition of the consolidated matter led to the very relief sought by the BMWC in its pleadings, *i.e.*, the revocation of Peabody’s permit, and that therefore BMWC accomplished some success for which it should be compensated.

We agree with Judge Holt’s analysis. He correctly ruled that, unless specified otherwise, case consolidation generally affects only the procedure of the combined cases, such as coordination of pre-hearing conferences, discovery, and scheduling

orders, thereby preserving the individual, substantive integrity of the several actions. See *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) (declaring that “consolidation . . . does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another”);<sup>9</sup> see also *Schnabel v. Lui*, 302 F.3d at 1035; *Intown Properties Management, Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 168 (4th Cir. 2001). We agree with Judge Holt’s ruling that under 43 C.F.R. § 4.111, consolidation “does not make one applicant the agent of another applicant, nor does it make the actions of one the actions of all. Each individual applicant must still prove their alleged error independently.” May 28, 2010, Order at 12. He provided a lengthy, careful discussion of why consolidation of the various administrative proceedings did not result in one proceeding; each of those proceedings retained their separate character resulting in separate judgments. He concluded that “the success of Nutumya’s summary decision motion cannot also attribute success to [BMWC].” *Id.* at 14. This Board has observed that allowing an award of costs and expenses for “mere ‘participation in a proceeding that results in a decision or order that furthers the purpose of SMCRA’ would render the phrase ‘success on the merits’ meaningless.” *National Wildlife Federation v. OSM*, 177 IBLA 315, 337 (2009) (quoting Order, IBLA 2005-204 (Dec. 30, 2005)).

#### *B. BMWC Does Not Meet SMCRA’s Entitlement Requirement*

Judge Holt found that BMWC did not make a substantial contribution toward achieving the remand he ordered in Nutumya’s case. The record supports this conclusion. The Board has held that “[t]he test of whether a party made the requisite [substantial] contribution” under 30 C.F.R. § 4.1294(b) “is whether there is a ‘causal nexus’ between the petitioners’ actions and the relief obtained, *the determination of which depends upon the totality of the circumstances.*” *WVHC v. OSM (On Judicial Remand)*, 181 IBLA at 47 (emphasis added); *National Wildlife Federation v. OSM*, 177 IBLA at 332; *CCC*, 168 IBLA at 229. In considering the totality of the facts and circumstances surrounding BMWC’s request for review, we conclude that there is no causal nexus between BMWC’s actions and Judge Holt’s disposition of Nutumya’s motion for summary decision. See, e.g., *WVHC v. OSM (On Judicial Remand)*, 181 IBLA at 47-48; *David Ruth*, 164 IBLA 250, 255 (2005); see also *National Wildlife Federation v. OSM*, 177 IBLA at 338.

Out of the 1,065 hours BMWC counsel documented as having spent litigating OSM’s decision, they spent a total of 5.33 hours conferring with Nutumya’s legal

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<sup>9</sup> The Court examined consolidation under 28 U.S.C. § 734, which has since been repealed and replaced by Federal Rule of Civil Procedure 42(a). This rule provides that, when actions involving a common question of law or fact are pending before a court, the court may order consolidation.

team about NEPA issues. BMWC's Fees Petition at 7.<sup>10</sup> Moreover, BMWC's discussions with Nutumya's legal team do not establish any causal link between BMWC's motion for summary decision and Judge Holt's remand order. Judge Holt thoroughly explained the basis for his conclusion that the record did not establish that BMWC had an agreement with Nutumya to divide the work on the issues to be addressed. May 28, 2010, Order at 19. He noted that BMWC's own attorney stated, by affidavit, that BMWC chose to focus on certain NEPA arguments after learning what arguments Nutumya would make, and that such an approach does not demonstrate an agreement between the parties to divide up the work. *Id.* The record does not show that BMWC worked to litigate the NEPA issues presented in Nutumya's motion or that Nutumya's legal theories arose from those advocated by BMWC. This lack of evidence undermines BMWC's claim that its participation in the underlying SMCRA proceeding had a causal link to Nutumya's case. Considering the totality of the circumstances presented here, we find that BMWC has not proven that a causal nexus exists between the prosecution of its case and the relief Nutumya achieved. We conclude that Judge Holt properly ruled that BMWC failed to establish its entitlement to an award of costs and expenses, including attorney's fees.

As noted, Judge Holt was not persuaded that the Fourth Circuit's ruling in *WVHC v. Kempthorne* requires approval of BMWC's fees petition. We agree with his reasoning that the facts in *WVHC v. Kempthorne* present a "different situation" than those involving BMWC, in that "[t]here the fee applicant had brought the proceeding that resulted in the remand to OSM," whereas "[h]ere [BMWC] did not bring the proceeding that resulted in the remand; Nutumya did." May 28, 2010, Order at 22. He stated:

Nothing in the *West Virginia Highlands* decision supports the notion that an applicant may become entitled to costs and expenses simply by initiating a proceeding similar to one in which another person achieved success. An applicant must still make a substantial contribution to the determination of the issues.

*Id.* As we have found, the record herein makes clear that in awarding fees and costs to Nutumya, Judge Holt did not rely upon any claim, argument, or error asserted by BMWC. He properly ruled that BMWC did not make a substantial contribution to a full and fair determination of the issues, as required by 43 C.F.R. § 4.1294(b).

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<sup>10</sup> See BMWC's Fees Petition, Ex. 4 at 6 ((9/16/09 - 0.19 hrs) ( 9/21/09 - 1.0 hrs) (9/22/09 - 0.27) and Ex. 5 at 64 ((0.60 hrs), 84 (1.20 hrs), 85 (0.40 hrs), 107 (0.30 hrs), 108 (0.60 hrs).

BMWC is concerned that, if attorneys' fees are not awarded in this case, the public will be less inclined to file future SMCRA proceedings in good faith and therefore that granting the application would best serve the public interest. It is true that SMCRA was enacted to, among other things, "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a) (2006). Congress placed the public in a position to help enforce SMCRA's environmental standards because "providing citizens access to administrative appellate procedures . . . is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the act." H.R. Rep. No. 95-218, at 88-89 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 624-25. For this reason, section 525(e) of SMCRA provides for the award of costs, including attorneys' fees, "to compensate participants in the administrative process. . . . It is [Congress'] intention that this subsection not be interpreted or applied in a manner that would discourage good faith actions on the part of interested citizens." H.R. Rep. No. 95-218 at 131, 1977 U.S.C.C.A.N. at 663. Denying fees in this case, according to BMWC, would wholly discourage interested citizens from bringing good-faith actions to enforce SMCRA.

In addressing BMWC's public policy argument, Judge Holt stated that section 525(e) of SMCRA is not "base[d] . . . solely on an interested citizen's good faith," but "ha[s] been interpreted and applied consistent with the public policy expressed in the congressional report." May 28, 2010, Order at 18. He stated that "Nutumya will be awarded costs and expenses because it is eligible to receive them," a result that indeed "encourages good faith actions on the part of interested citizens." *Id.* We agree with Judge Holt that BMWC exaggerates the legislative history of SMCRA in arguing that it should receive attorney's fees because it filed its request for review in good faith. As OSM observed,

Judge Holt did not find that appellants in a consolidated proceeding may not work jointly together in prosecuting common goals to avoid duplicative effort if they wish to do so. He only determined that BMWC's claim that it had an agreement with Nutumya to divide up work on the motions to dismiss was not supported by the record.

OSM's Answer at 13-14. Judge Holt stated that "public policy does not make [BMWC] eligible for attorney fees simply because [it] challenged a government action that another person succeeded in having remanded." May 28, 2010, Order at 17. He rightly concluded that good faith participation in a SMCRA proceeding does not necessarily confer eligibility for an award of attorney fees and expenses, and that even if it could be concluded that BMWC was eligible for an award,

BMWC was not entitled to an award under section 525(e) of SMCRA and 43 C.F.R. § 4.1294(b).<sup>11</sup>

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the May 28, 2010, Order appealed from is affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Roberts  
Administrative Judge

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<sup>11</sup> Congress could have included a provision with the effect argued by BMWC. *See, e.g.,* 42 U.S.C. § 300aa-15(e) (2006) (Vaccine Act allows agency to award attorneys' fees even if the petitioner does not prevail, so long as there was a reasonable basis for the suit and the suit was brought in good faith).

## ADMINISTRATIVE JUDGE JACKSON, CONCURRING:

I write separately to emphasize that the representations and facts presented by Black Mesa Water Coalition (BMWC) in its petition for an award of costs and expenses show it is neither eligible nor entitled to award under 43 C.F.R. § 4.1294. Those representations and facts show BMWC coordinated with Nutumya pursuant to their informal agreement to present separate issues to Judge Hold for a decision on the merits. They also show that it conferred with Nutumya on their NEPA issues for less than 6 of the more than 1,000 hours BMWC expended in this matter. Coordinating in the presentation of separate issues for decision is similar to, if not the same as, merely participating in a proceeding under the Act. Standing alone, neither is a sufficient basis upon which to find that a participant prevailed on the merits of an issue separately presented by another party in a consolidated proceeding. *See National Wildlife Federation v. OSM*, 177 IBLA 315, 337 (2009). Under the circumstances of this case, I agree and concur that BMWC is not eligible or entitled to an award of its costs and expenses under 43 C.F.R. § 4.1294(b).

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/s/

James K. Jackson  
Administrative Judge