

SAVE OUR CUMBERLAND MOUNTAINS, BLEDSOE COUNTY CHAPTER

IBLA 88-519; 89-420

Decided September 28, 1993,

Petition for award of costs and expenses, including attorneys' fees, from the permittee, Rith Energy, Inc., in accordance with section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1988), and 43 CFR 4.1294(a)(1).

Petition denied.

1. Attorney Fees: Surface Mining Control and Reclamation Act of 1977  
-- Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

In order for one who participates in an administrative proceeding reviewing an enforcement action to receive an award of costs and expenses under 43 CFR 4.1294(a)(1), there must be a determination that (1) a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed; (2) the participant made a substantial contribution to the full and fair determination of the issues; and (3) the contribution was separate and distinct from the contribution made by the person initiating the proceeding.

2. Attorney Fees: Surface Mining Control and Reclamation Act of 1977  
-- Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award -- Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Substantial Contribution

Where a participating party seeking an award of costs and expenses, including attorneys' fees, under 43 CFR 4.1294(a)(1), alleges that it made a separate and distinct contribution but fails to describe with specificity what that separate and distinct contribution was and the case record does not demonstrate such a contribution, the request for an award will be denied.

3. Attorney Fees: Surface Mining Control and Reclamation Act of 1977 -- Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award -- Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Substantial Contribution

Where the contribution of an intervenor is different than that of OSM, it still may not be considered "separate and distinct" under 43 CFR 4.1294(a)(1), when that contribution relates to a subsidiary issue that is decided favorably to the permittee, and the intervenor's contribution to the ultimate issue for resolution is minimal or merely cumulative to that of OSM.

4. Attorney Fees: Surface Mining Control and Reclamation Act of 1977 -- Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

Where a person intervenes in support of OSM in an administrative proceeding reviewing an enforcement action, and, thereafter, takes a position opposed to OSM, that person must be a prevailing party on that issue in order to be eligible for an award of costs and expenses, including attorneys' fees, for that issue from the permittee under 43 CFR 4.1294(a)(1).

APPEARANCES: Carol S. Nickle, Esq., and Elizabeth S. Tonkin, Esq., Knoxville, Tennessee, for Save Our Cumberland Mountains, Bledsoe County Chapter; Michael W. Boehm, Esq., Chattanooga, Tennessee, for Rith Energy, Inc.

#### OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Save Our Cumberland Mountains, Bledsoe County Chapter (SOCM) has filed a petition seeking an award of costs and expenses, including attorneys' fees, from Rith Energy, Inc. (Rith), pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (1988), and 43 CFR 4.1294(a)(1), for its participation in administrative proceedings before the Hearings Division, Office of Hearings and Appeals, which culminated in the decision by this Board in Rith Energy, Inc., 101 IBLA 190 (1988). A brief summary of the history of the proceedings will provide a basis for considering this petition.

On July 15, 1987, the Office of Surface Mining Reclamation and Enforcement (OSM) issued a notice of violation (NOV) to Rith for a violation at its Eagle-Ferguson No. 1 minesite in Bledsoe County, Tennessee. The NOV cited Rith for violating section 521(a)(3) of SMCRA, 30 U.S.C. § 1271(a)(3) (1988), and 30 CFR 773.17 and described the nature of the violation as: "Failure to conduct reclamation operations according to the Reclamation Plan and Backfilling and Soil Stabilization Plan specified in the approved permit

and as set forth in letter of July 2, 1987, from OSMRE Division of Tennessee Permitting." 1/ See Rith Energy, Inc., 101 IBLA at 192. The NOV required, inter alia, immediate reclamation of "cut 13."

On July 20, 1987, Rith filed an application for review of and temporary relief from that NOV. The Hearings Division docketed the case as NX 7-169-R. In a petition to intervene dated July 27, 1987, SOCM, through counsel Carol S. Nickle, sought intervention "to protect the interest of its members \* \* \* some of whom live within one-half mile of the minesite." At the August 13, 1987, hearing, Administrative Law Judge David Torbett granted SOCM's petition. 2/ He continued the hearing on August 14 to permit Rith to demonstrate that no environmental harm would occur if temporary relief were granted (Tr. 279). 3/ At the conclusion of the August 14 hearing, Judge Torbett denied Rith's application for temporary relief on the grounds that there was not a substantial likelihood Rith would prevail on the merits (Tr. 361-62).

On October 14, 1987, OSM issued a cessation order (CO) to Rith for failure to abate the violation set forth in the July 15 NOV. On October 21, 1987 Rith filed for expedited review of the CO and the Hearings Division assigned docket number NX 88-9-R. On October 27, 1987, counsel for SOCM, Elizabeth S. Tonkin, petitioned for leave to intervene and filed a motion to consolidate the proceeding to review the CO with the proceeding to review the NOV. At the outset of the hearing, Judge Torbett granted SOCM's petition and motion to consolidate and OSM filed a motion for leave to terminate the NOV. SOCM opposed the motion for leave to terminate the NOV (Tr. 8).

Judge Torbett issued separate decisions dated November 10, 1987, sustaining the issuance of the NOV and the CO. Rith appealed each decision to this Board, and we assigned docket numbers IBLA 88-89 and 88-90. On February 17, 1988, we affirmed Judge Torbett's decision in NX 7-169-R (IBLA 88-89) and affirmed his decision in NX 88-9-R as modified (IBLA 88-90). Rith Energy, Inc., supra. 4/

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1/ That July 2, 1987, letter denied Rith's application to revise its permit by adding a toxic material handling plan. It also established a reclamation schedule. Rith filed for administrative review challenging the established reclamation schedule, and the Hearings Division docketed the case as NX 7-3-PR.

2/ At the Aug. 13, 1987, hearing, Judge Torbett consolidated NX 7-169-R with NX 7-3-PR (Tr. 3). In his Nov. 10, 1987, decision on those consolidated proceedings, Judge Torbett found that a subsequent modification of the July 2 letter had effectively granted Rith the relief it sought in NX 7-3-PR and mooted the matter. No appeal was taken from that ruling.

3/ The regulations provide that one seeking temporary relief must show that such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources. 43 CFR 4.1263(c); see 30 U.S.C. § 1275(c) (1988).

4/ On Feb. 24, 1988, SOCM filed a motion for reconsideration of our decision and for stay of the decision pending reconsideration. It also filed a motion for clarification of the decision on Feb. 29, 1988. Rith filed its

SOCM filed its first petition for an award of costs and expenses in this proceeding with Judge Torbett on September 8, 1987, seeking costs and expenses, including attorney's fees, for work performed by Nickle through August 14, 1987. On December 10, 1987, SOCM filed a revised petition with Judge Torbett for work performed by Nickle, and on December 21, 1987, it filed a supplementary petition. On December 22, 1987, SOCM filed a petition for award of costs and expenses, including attorney's fees, with Judge Torbett for work performed by Tonkin in connection with the hearing on November 4 and 6, 1987. During the pendency of Board review of Judge Torbett's November 10, 1987, decisions, SOCM "stayed" its petitions and reserved the right to renew them and file an accompanying memorandum and appropriate documents. Following issuance of our April 18, 1988, order, counsel for SOCM filed a "Renewal of Motions for Award of Fees, Costs and Expenses," affidavits and a supporting memorandum with Judge Torbett on June 6, 1988.

Thereafter, Judge Torbett forwarded SOCM's June 6, 1988, submission along with related documents, to this Board, and we docketed it as IBLA 88-519. Among the documents was Rith's motion to dismiss on the ground the petition was improperly filed and untimely because it was not filed with the Board within 45 days of our February 17 decision or our April 18, 1988, order, as required by 43 CFR 4.1291. In Rith Energy, Inc. v. OSM, 108 IBLA 114 (1989), we held that the failure to file a timely petition for award of costs and expenses in the proper office of the Office of Hearings and Appeals does not constitute a waiver of the right to such an award, if good cause is shown for such failure. We found that good cause existed for SOCM's failure to file timely in the correct office and SOCM was directed to file with this Board a new petition for costs and expenses. 108 IBLA at 119. Thereafter, on May 12, 1989, SOCM filed that new petition, which was docketed as IBLA 89-420. It covers the attorneys' costs and expenses and fees associated with the hearings before Judge Torbett. 5/

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FN. 4 (continued)

own motion for reconsideration of the decision on Mar. 7, 1988. On Apr. 18, 1988, we issued an order denying the motions for reconsideration, granting the motion for clarification, and affirming our Feb. 17 decision as clarified. Our clarification stated that "we intended in our decision only to address the two-cut violation" (Apr. 18, 1990, Order at 3; see 101 IBLA at 196 n.15; see Save Our Cumberland Mountains, Inc., 108 IBLA 70, 78-79, 96 IBLA 139, 144 (1989)).

5/ In Rith Energy, Inc. v. OSM, we stated:

"SOCM suggests that since it is seeking an award for work performed before Judge Torbett, he should resolve the petition in the first instance. Had his decision become final, that clearly would be so. However, where review of an Administrative Law Judge's decision or order is sought, the Board may proceed on a case-by-case basis in dealing with a petition for an award that is filed with it. In Natural Resources Defense Council, Inc. v. Office of Surface Mining Reclamation and Enforcement, 107 IBLA 339, 382-88, 96 I.D. [83], [106-110] (1989), the Board recently ruled on a petition for an award of costs and expenses, including attorneys' fees, where the petitioners were seeking an award for work before both an Administrative Law rve the right to involve the Administrative Law Judge.

[1] SOCM petitions for an award from Rith pursuant to 43 CFR 4.1294(a)(1), which provides:

Appropriate costs and expenses including attorneys' fees may be awarded --

(a) To any person from the permittee, if --

(1) The person initiates or participates in any administrative proceeding reviewing enforcement actions upon a finding that a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed, and the administrative law judge or Board determines that the person made a substantial contribution to the full and fair determination of the issues, except that a contribution of a person who did not initiate a proceeding must be separate and distinct from the contribution made by a person initiating the proceeding.

The regulation authorizes an award of costs and expenses from a permittee to a person who participates in a proceeding that reviews an enforcement action if there is "a finding that a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed." There must also be a determination that the person seeking the award made a substantial contribution to a full and fair determination of the issues. Finally, in a case such as this, the contribution must be separate and distinct from that of the initiating party.

The "separate and distinct" requirement was added to the regulation in 1985 to express the Department's intent that a participant not receive an award if its contribution "is essentially the same as that of the initiating party." 50 FR 47222 (Nov. 15, 1985). Thus, it appears clear that the Department wanted to preclude third parties from intervening in the review of OSM enforcement actions merely for the purpose of establishing a basis on which to collect attorneys' fees.

SOCM argues it is entitled to an award "for its participation in Docket Nos. NX 7-169-R and NX 7-3-R, heard on August 13-14, 1987, and in Docket No. NX 88-9-R heard on November 4 and 6, 1987 [because] SOCM made a substantial contribution to the full and fair determination of the issues" (Petition at 2). It contends that its participation in the August 1987 hearing resulted in an order denying temporary relief to Rith and in Judge Torbett's decision sustaining the issuance of the NOV. It further asserts that its

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fn. 5 (continued)

Judge and the Board. The Board did not involve the Administrative Law Judge in reviewing the petition. However, that decision does not mean that we would not in another case, and we reserve the right to do so." 108 IBLA at 117-18. While we consider it appropriate, under the circumstances of this case, for the Board to rule on the present petition, we continue to reserve the right to involve the Administrative Law Judge.

participation in the November 1987 hearing resulted in Judge Torbett's decision sustaining the CO. It also claims that its contribution was separate and distinct from OSM.

In support of its petition, however, SOCM does little more than make these allegations, provide citations to various pages of the transcripts, which, it contends, reflect its oral contributions, and provide an accounting of Nickle's and Tonkin's hours and expenses related to their representation of SOCM. <sup>6/</sup> Therefore, we believe the proper way to proceed is separately to examine SOCM's participation in each of the review proceedings in light of the standards set forth in 43 CFR 4.1294(a)(1).

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NX 7-3-PR and NX 7-169-R

In this case, there was the requisite finding of a violation. We concluded that Rith had violated 30 CFR 773.17, and we affirmed the Administrative Law Judge's decision sustaining the issuance of the NOV. Rith Energy, Inc., 101 IBLA at 194. This finding is tantamount to a showing of some degree of success on the merits. <sup>7/</sup> However, a critical examination of the "contribution" of Nickle at the August 1987 hearing clearly shows that she is not entitled to an award.

[2] Nowhere does SOCM specifically state what Nickle's "separate and distinct" contribution was to the case. Certainly, there must be some burden on the party seeking an award to do so, especially where that party is an intervenor who has intervened in support of an initiating party and their ultimate goal is the same -- in this proceeding, the denial of temporary relief and the sustaining of the NOV. The transcript citations provided by SOCM from the August 1987 hearing fail to support the request for an award. They show that Nickle merely confirmed points previously established at the hearing (Tr. 78-79; 139 (see Tr. 129-30); 158-64; 168); elicited testimony that did not affect the outcome of the proceeding (Tr. 108-11; 120-21;

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<sup>6/</sup> On Exhibit 1 of Exhibit C to SOCM's May 12, 1989, petition, SOCM lists Nickle's oral contributions at the August hearing. Those contributions are described, following citation to particular transcript pages, only as "Argument," "Cross-examination of [name of individual]," or "Direct-examination of [name of individual]." Therefore, it is left to the reviewer to characterize what the contribution was. <sup>7/</sup> In the preamble to the final rulemaking revising 43 CFR 4.1294(a)(1) to include the separate and distinct requirement, the Department stated:

"[Commenters] criticized the proposed rules for failing to make the requirement that a party prevail in whole or in part, achieving some degree of success on the merits, applicable to fees awarded to any person from the permittee. Such a revision of subsection (a)(1) is unnecessary to conform the regulation to the Ruckelshaus [463 U.S. 680 (1983)] decision because the regulation has always required 'a finding that a violation of the act, regulations or permit has occurred, or that an imminent hazard existed.' Meeting this requirement is comparable to a showing of some degree of success on the merits." 50 FR 47222-23 (Nov. 15, 1985).

133-36; 220; 312-22); or offered arguments or observations on various points (Tr. 18-19; Tr. 234-35; Tr. 238-39; Tr. 268-72; Tr. 275-76; Tr. 350-52).

Judge Torbett continued the hearing to August 14 to allow Rith to show that no environmental harm would result from the granting of temporary relief and to allow SOCM to show otherwise. SOCM called one witness and offered exhibits in support of its contention that environmental harm would result.

At the conclusion of the hearing, Judge Torbett denied Rith's request for temporary relief. However, in doing so, he found with regard to environmental harm: "And there has to be a showing there'll be no environmental harm or danger to the public. I'm convinced that the proof shows that. I don't have any problem with that. There's been a showing to meet that requirement" (Tr. 358).

[3] Where the contribution of an intervenor is different than that of OSM, it still may not be considered "separate and distinct" under 43 CFR 4.1294(a)(1), when that contribution relates to a subsidiary issue that is decided favorably to the permittee, and the intervenor's contribution to the ultimate issue for resolution is minimal or merely cumulative to that of OSM. In this case, Judge Torbett ruled in favor of Rith and against SOCM on the one subsidiary issue on which SOCM offered testimony. He found that if he were to grant temporary relief, which he did not, no environmental harm would result. The fact that SOCM's ultimate position prevailed, which was the same as OSM's, that temporary relief should be denied and the NOV sustained, does not, in the absence of a showing of a separate and distinct contribution, support an award.

#### NX 88-9-R

We do not believe that Tonkin is entitled to an award either for her participation in the proceedings related to NX 88-9-R, which involved an expedited review of the failure to abate CO related to the NOV which was the subject of the August 1987 hearing. A review of the transcript of the November 1987 hearing shows that it was principally directed toward the issue of whether or not OSM's motion to terminate the NOV should be granted. 8/ Judge Torbett specifically stated at the conclusion of the hearing that "I'm sustaining the validity of the cessation order if I sustain the validity of the NOV" (Tr. 296-97); see also Nov. 10, 1987, Decision on NX 88-9-R at 1. He also stated that the validity of the NOV would depend exclusively on the evidence presented at the August 1987 hearing. 9/ He further stated that in his decision he would not address

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8/ Counsel for OSM: "Just very briefly with regard to our motion to terminate the --." Judge Torbett: "You need to go ahead and make your argument on that, too, because that's really what the trial is all about. Go ahead" (Tr. 266).

9/ Judge Torbett: "That brings up the question then, can this proceeding affect that proceeding. I think not. It's my position that we have to decide the NOV case based on what was presented that day" (Tr. 291).

the question of OSM's attempt to modify the NOV -- "We'll just brief that" (Tr. 292-93).

At the hearing, Tonkin sought to establish two things: (1) that Rith had failed to reclaim those cuts mined prior to cut 13, which she believed was required by the NOV, and (2) that OSM could not properly terminate the NOV. Judge Torbett's November 10, 1987, decisions did not address either of those issues. We did, however. In our February 17, 1988, decision, we approved the termination of the CO, and, implicitly, the underlying NOV, effective November 2, 1987. In our April 18, 1988, clarification, we stated that the NOV related only to the two-cut violation, thereby effectively ruling that SOCM's presentation regarding incomplete reclamation of cuts mined prior to cut 13 was not relevant to the NOV in question because it was not a requirement thereof.

[4] Where a person intervenes in support of OSM in an administrative proceeding reviewing an enforcement action, and, thereafter, takes a position opposed to OSM, that person must be a prevailing party on that issue in order to be eligible for an award of costs and expenses, including attorneys' fees, for that issue from the permittee under 43 CFR 4.1294(a)(1). In this case, SOCM did not ultimately prevail on the merits of either of the positions it advocated at the November 1987 hearing. First, Judge Torbett made no ruling on either issue. Rather, he sustained the NOV on the basis of the record established at the August 1987 hearing, and having sustained the NOV in one decision, he sustained the CO in a companion decision. Second, our rulings were both adverse to SOCM. SOCM opposed OSM on the issue of termination of the NOV. Our approval of the termination of the CO and underlying NOV foreclosed an award for Tonkin on that issue.

As for the subsidiary issue of pre-cut 13 reclamation, SOCM clearly made a contribution and that contribution was different from that of OSM because OSM did not pursue that issue; however, Tonkin is not entitled to an award. The reason is, as with Nickle's contribution, Tonkin's presentation related to a subsidiary issue which was decided unfavorably to SOCM and its contribution to the ultimate issue was minimal or merely cumulative.

In the petition for an award, SOCM implies that OSM would not have enforced the Act but for its insistence that enforcement action be taken against Rith, citing to other proceedings (Hardeman v. OSM, IBLA 87-156, and Save Our Cumberland Mountains, Inc., 108 IBLA 70, 96 I.D. 139 (1989)). <sup>10/</sup> However, the award under consideration is sought for work

<sup>10/</sup> Hardeman v. OSM, IBLA 87-156, an interlocutory appeal from an OSM decision to grant Rith a permit, was dismissed by order dated May 18, 1987, as a result of a settlement between Hardeman and Rith. In Save Our Cumberland Mountains, Inc., this Board reversed a decision by the Director, Knoxville Field Office, OSM, responding to a citizen's complaint filed by SOCM regarding Rith's Eagle-Ferguson No. 1 minesite and directed OSM to conduct another inspection. The Board approved a petition for an award from OSM of costs and expenses, including attorney's fees incurred by

undertaken in the specific proceedings in question, not for actions in other cases. Here, OSM issued the enforcement actions, presented a prima facie case in support of their validity, prevailed before Judge Torbett, and had the termination of the enforcement actions approved by the Board, such approval being contrary to SOCM's position.

In its petition, SOCM also points to the fact that but for a subpoena that it presented to Judge Torbett, various photographs would not have been available at the November 1987 hearing for review by Judge Torbett. However, those photographs were expressly presented for the purpose of establishing the existence of unreclaimed areas mined prior to cut 13 -- an issue not addressed by Judge Torbett in his November 10, 1987, decisions and one which the Board held was not raised by the NOV.

In conclusion, where an award is sought pursuant to 43 CFR 4.1294(a)(1), by a petitioner who did not initiate the proceeding, that person must establish that it made a substantial contribution to the full and fair determination of the issues, which was separate and distinct from the contribution made by the initiating party. SOCM did not meet that burden in this case. 11/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition is denied.

Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

James L. Byrnes  
Chief Administrative Judge

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fn. 10 (continued)

counsel for SOCM in connection with the proceedings before the Board in that case. Save Our Cumberland Mountains, Inc., 111 IBLA 197 (1989).

11/ Under the dissent's interpretation of 43 CFR 4.1294(a)(1), the finding of a violation of SMCRA, the regulations, or the permit ends the inquiry regarding the success of an intervenor. Therefore, such a party may receive an award of costs and expenses, including attorneys' fees, from the permittee, even where the intervenor pursues an issue that is decided in favor of the permittee or where the intervenor takes a position contrary to OSM and the permittee, which has no bearing on the finding of violation in the case, and is unsuccessful therein. It would be ironic, indeed, if an intervenor could obtain its attorney's fees from the permittee under such circumstances.

## ADMINISTRATIVE JUDGE IRWIN DISSENTING:

Section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (1988), authorizes the Secretary to assess costs and expenses reasonably incurred for participating in an administrative proceeding against either party in a sum he "deems proper."

Implementing this section, 43 CFR 4.1294(a)(1) authorizes an award of costs and expenses from a permittee to a person who participates in a proceeding for administrative review of an OSM enforcement action if there is "a finding that a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed." If this condition is met, the regulation provides that an award may be made if the Administrative Law Judge or the Board "determines that the person made a substantial contribution to the full and fair determination of the issues."

In 1985 the Department proposed to amend this regulation, saying that it did not adequately distinguish the contribution of a person who participates in but does not initiate an administrative proceeding that reviews an enforcement action from the contribution made by the person who initiates the proceeding. "It is not the intent of [the Office of Hearings and Appeals] that a person who participates in but does not initiate an administrative proceeding under § 4.1294(a)(1) receive [an] award if such person's contribution is essentially the same as that of the initiating party," the Department stated. 50 FR 21470 (May 24, 1985). "In order to notify the public of this distinction," the Department proposed to revise the regulation to add "which was separate and distinct from that contribution made by a person initiating the proceeding" at the end. 50 FR 21470, 21471 (May 24, 1985).

The Department also proposed to amend 43 CFR 4.1294(b), the regulation authorizing an award of costs and expenses from OSM to any person other than a permittee, based on a "recent decision of the United States Supreme Court [which held] in a statutory context similar to section 525(e) of SMCRA that an award of costs and expenses is conditioned upon a party prevailing in whole or in part in the underlying proceeding." 50 FR 21470-21471 (May 24, 1985). See Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983).

Those who commented on the proposed revision of section 4.1294(a)(1) criticized it "for failing to make the requirement that a party prevail in whole or in part, achieving some degree of success on the merits, applicable to fees awarded to any person from the permittee." To this comment the Department responded:

Such a revision of subsection (a)(1) is unnecessary to conform the regulation to the Ruckelshaus decision because the regulation has always required "a finding that a violation of the act, regulations

or permit has occurred, or that an imminent hazard existed." Meeting this requirement is comparable to a showing of some degree of success on the merits.

50 FR 47222-47223 (Nov. 15, 1985). Therefore, the Department made only editorial changes in the final revision of section 4.1294(a)(1). <sup>1/</sup>

By contrast, section 4.1294(b) was amended so that it would "contain criteria with regard to the degree of success on the merits to be achieved "for awards from OSM to persons other than the permittee. 50 FR 21470, 21471 (May 24, 1985); 50 FR 47222, 47223 (Nov. 15, 1985). In addition to "includ[ing] this condition," 50 FR 21470, 21471 (May 24, 1985), the final revision restored the requirement that a person make a substantial contribution to a full and fair determination of the issues. 50 FR 47222, 47223 (Nov. 15, 1985).

Thus, although section 4.1294(b) was amended to add the requirement that a person prevail "in whole or in part, achieving at least some degree of success on the merits," in order to receive an award from OSM, the standard in section 4.1294(a)(1) for an award from a permittee to a person who initiates or participates in a proceeding, *i.e.*, the person "made a substantial contribution to the full and fair determination of the issues," was not altered. The Department only added the condition that the contribution of a person who did not initiate a proceeding be "separate and distinct" from the contribution of one who did.

The majority acknowledges that there was "the requisite finding of a violation" by Rith and that this finding "is tantamount to a showing of some degree of success on the merits" (Majority Opinion at 250).

The majority faults SOCM for failing to point out how Nickle's contribution at the August 1987 hearing was separate and distinct. It says that the transcript citations provided by SOCM "show that Nickle merely confirmed points previously established at the hearing \* \* \* or elicited testimony that did not affect the outcome of the proceeding." *Id.* Although SOCM offered testimony that environmental harm would result if temporary relief were granted, the Administrative Law Judge ruled that it would not result. So, the majority says, even though SOCM's contribution on this issue was different from OSM's, it was not separate and distinct because "that contribution relate[d] to a subsidiary issue that [was] decided favorably to the permittee, and [SOCM's] contribution to the ultimate issue for resolution [was] minimal or merely cumulative to that of OSM." *Id.* at 251. "The fact that SOCM's ultimate position prevailed,

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<sup>1/</sup> The Department substituted "except that a contribution of a person who did not initiate a proceeding must be" for "which was" before the phrase "separate and distinct from the contribution made by a person initiating the proceeding." 50 FR 47224 (Nov. 15, 1985).

which was the same as OSM's, that temporary relief should be denied and the NOV sustained, does not, in the absence of a showing of a separate and distinct contribution, support an award." Id.

In making a determination under section 4.1294(a)(1), it is appropriate to examine the entire record, i.e., pre-hearing work, including motions, subpoenas, discovery, and conferences; the transcript of the hearing; exhibits; affidavits; and briefs, and to consider whether the petitioner's effort to support OSM's enforcement action, the procedural and substantive issues it purposes independently of OSM or other initiating person, and its procedural work (e.g., motions and argument concerning the conduct of the proceeding), taken together, make a substantial contribution to the full and fair determination of the issues that is separate from that of the person who initiated the proceeding.

In discounting SOCM's efforts at the August 1987 hearing as merely confirming points previously established or eliciting testimony that did not affect the outcome of the proceeding the majority gives SOCM no credit for any contribution these points and this testimony made by supplementing and strengthening OSM's case.

Further, the majority declines to evaluate several of SOCM's contributions to this hearing. SOCM helped clarify the scope of the hearing (Tr. 18-19); attempted to clarify the limitation imposed by OSM on its employees' testimony (Tr. 189, 220); refocused attention, after a protracted and frustrating dispute about the scope of this limitation, on whether OSM had presented a prima facie case in support of its NOV (Tr. 234); pointed out that granting Rith temporary relief under the circumstance that coal remained available for mining would be equivalent to deciding on the merits of the NOV (Tr. 268-69); in response to the Administrative Law Judge's observation that Rith had offered no proof on the issue of environmental harm, contributed to the discussion of what the scope of that issue is and what evidence would be required (Tr. 269-70, 275-76); presented concluding argument on whether temporary relief should be granted (Tr. 350-52); and emphasized the fact that the abatement action required by the NOV included final grading on several cuts mined before Cut 13 (Tr. 355-56; see Exh. R-8).

In holding that because SOCM did not prevail on the issue of whether there would be environmental harm its contribution was not separate and distinct, the majority ignores the fact that its witness and exhibits nevertheless made a "contribution to the full and fair determination of the issues." As set forth above, section 4.1294(a)(1) does not require that a person prevail in whole or in part, achieving at least some degree of success on the merits, in order to demonstrate a substantial contribution.

The majority holds that SOCM may not receive an award for its participation in the November 1987 hearing because the Administrative Law Judge did not address either of the two issues it presented at the hearing in his

November 10, 1987, decisions, and ultimately SOCM did not prevail before the Board on those issues:

Where a person intervenes in support of OSM in an administrative proceeding reviewing an enforcement action, and, thereafter, takes a position opposed to OSM, that person must be a prevailing party on that issue in order to be eligible for an award of costs and expenses, including attorneys' fees, for that issue from the permittee under 43 CFR 4.1294(a)(1). In this case, SOCM did not ultimately prevail on the merits of either of the positions it advocated at the November 1987 hearing. First, Judge Torbett made no ruling on either issue. \* \* \* Second, our rulings were both adverse to SOCM. SOCM opposed OSM on the issue of termination of the NOV. Our approval of the termination of the CO and the underlying NOV foreclosed an award for Tonkin on that issue. As for the subsidiary issue of pre-cut 13 reclamation, SOCM clearly made a contribution and that contribution was different from that of OSM because OSM did not pursue that issue; however, Tonkin is not entitled to an award. The reason is, as with Nickle's contribution, Tonkin's presentation related to a subsidiary issue which was decided unfavorably to SOCM and its contribution to the ultimate issue was minimal or merely cumulative.

(Majority Opinion at 252).

The majority ignores several contributions SOCM made before, during, and after the November hearing. These included a motion to intervene, a motion to consolidate the proceedings to review the NOV and the CO, four subpoenas to assure the availability of OSM's records at the hearing, a motion that the Administrative Law Judge take official notice of a related proceeding, an affidavit containing testimony that the Administrative Law Judge excluded at the hearing, and a substantial brief filed at the Administrative Law Judge's request after the hearing.

Again, the question is whether SOCM should receive an award for a substantial contribution to a full and fair determination of all the issues involved in a proceeding to review an OSM enforcement action, not for a particular issue based on whether or not it opposed OSM or prevailed on that issue. The fact that an Administrative Law Judge does not reach one or more issues in his decision does not erase a participant's contribution to a full and fair determination of the issues. An issue not reached might have been reached if other evidence or another legal theory had not been available, or might yet be reached, and presenting it is therefore a contribution. In this case, the issue of whether OSM could terminate the NOV had been briefed and was pending before the Administrative Law Judge when we issued our February 1988 decision. The fact that we approved the termination of the CO should not deprive SOCM of any credit for its efforts on whether OSM could terminate the NOV. SOCM's petition is for its contributions before

the Administrative Law Judge, not the Board, and the issues involved with whether OSM could terminate the NOV were different from the reasons we approved the termination of the CO.

When 43 CFR 4.1294 was first proposed, the Office of Hearings and Appeals stated:

The legislative history of the Act is clear that section 525(e) of the Act is intended to encourage public participation in the administrative process. Such a provision is designed to encourage citizens to bring good faith actions to insure the Act is being properly enforced. It is the intention of the Office that these proposed rules not be interpreted to discourage good faith actions on the part of interested citizens.

43 FR 15444 (Apr. 13, 1978).

In my view, most citizens groups are wiser than to waste their limited resources "intervening in the review of OSM enforcement actions merely for the purpose of establishing a basis on which to collect attorneys' fees" (Majority Opinion at 249), and SOCM intervened in these proceedings in good faith to insure the Act was being properly enforced. We should examine whether SOCM made the kinds of contributions originally intended by the concept of "substantial contribution to a full and fair determination of the issues," and, if so, whether they were separate and distinct from OSM's. See Donald St. Clair, 84 IBLA 236, 288-96, 92 I.D. 1, 30-34 (1985). I believe this is the correct way to interpret section 4.1294(a)(1) and to determine whether an award of costs and expenses is "proper" under section 525(e) of the Act.

I dissent.

Will A. Irwin  
Administrative Judge

