

Editor's Note: appeal filed, Civ. No. 2:00-0293 (S.D. W.Va. April 14, 2000), rev'd, (April 24, 2002), appeal filed No. 03-1015 (4th Cir.)

WEST VIRGINIA HIGHLANDS CONSERVANCY, ET AL.

IBLA 96-56

Decided March 17, 2000

Petition for award of costs and expenses, including attorney fees, under 30 U.S.C. § 1275(e) (1994), and implementing regulations. 94-7-WVH.

Petition denied.

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

A petition for an award of costs and expenses, including attorney fees, under 30 U.S.C. § 1275(e) (1994), and its implementing regulations, 43 C.F.R. §§ 1290-1296, will be denied where the petitioners fail to establish their entitlement to an award by showing a causal nexus between their formal appeal of OSM's determination that a Federal court injunction barred the agency from taking action on their citizen's complaint and the reclamation agreement reached by the State and an affiliate of the coal company named in the citizen's complaint which provided the ultimate relief sought in the complaint.

APPEARANCES: L. Thomas Galloway, Esq., Boulder, Colorado, and Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for petitioners; Wayne A. Babcock, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On November 3, 1995, the West Virginia Highlands Conservancy and the National Wildlife Federation filed a petition with this Board for an award of costs and expenses, including attorney fees, pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (1994), and its implementing regulations, 43 C.F.R. §§ 4.1290-4.1296. Petitioners claimed that they were eligible for and entitled to such an award as a result of their prosecution of a

citizen's complaint before the Office of Surface Mining Reclamation and Enforcement (OSM), which culminated in a September 15, 1995, Board order dismissing as moot their appeal (IBLA 93-392) of OSM's decision not to take action in response to the complaint.

Petitioners initiated the action underlying the fee request on November 17, 1992, by filing a citizen's complaint with OSM's Charleston Field Office (CHFO) charging that the Pittston Company (Pittston) and its affiliates owned or controlled Careers, Inc. (Careers), and ZY Coal Company (ZY), which had unabated violations of the surface mining laws at five sites previously permitted to Careers and ZY. The complaint further alleged that Pittston had failed to disclose its relationship to Careers and ZY in permit applications, that the West Virginia Department of Environmental Protection (WVDEP) had failed to block the issuance of permits to Pittston, and that WVDEP had improperly granted permits to the company and its affiliates notwithstanding the outstanding infractions, all in violation of SMCRA, Federal regulations, and the approved West Virginia surface mining program. The complaint requested that OSM begin appropriate proceedings under 30 C.F.R. § 843.21 to rescind or cause WVDEP to rescind the improvidently granted permits until the violations had been abated. The complaint detailed the violations on the sites and the purported relationships between Pittston, Careers, and ZY, and provided supporting documentation.

The processing of petitioners' complaint was delayed due to the uncertainty created by a February 24, 1992, injunction issued by the U.S. District Court for the Western District of Virginia in Pittston Coal Co. v. Lujan, No. 91-0006-A (W.D. Va. Feb. 24, 1992) (the Virginia injunction), which OSM interpreted as prohibiting the agency from taking enforcement action against Pittston based on violations of entities owned or controlled by Pittston, without giving Pittston a hearing to determine whether it was directly responsible for the violations at issue. 1/ On January 28, 1993, CHFO forwarded the citizen's complaint to WVDEP with an advisory explanation of the Virginia injunction but did not invoke the normal 10-day notice procedures. 2/ CHFO notified petitioners of this action and its interpretation of the Virginia injunction on February 1, 1993.

1/ After a hearing on the merits of the action, the district court dismissed the case for lack of jurisdiction but left in place an expanded injunction precluding OSM from applying the ownership and control rule to Pittston pending an appeal to the court of appeals. The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's dismissal of the case on Oct. 6, 1995. Pittston Coal Co. v. Babbitt, 66 F.3d 714 (4th Cir. 1995).

2/ OSM states that WVDEP subsequently advised CHFO that the State had been investigating Pittston's relationship with Careers and ZY for some time, and that petitioners had obtained most of the information supporting the citizen's complaint from WVDEP.

Petitioners requested informal review of CHFO's action on February 10, 1993, arguing that CHFO should have issued a 10-day notice to the State and simply afforded Pittston the hearing required by the Virginia injunction. On March 22, 1993, the Assistant Deputy Director, OSM, upheld the CHFO decision explaining that, because the 10-day notice process required OSM enforcement if the state regulatory authority failed to act, it would have been inappropriate for OSM to start the process if it was unprepared to follow through on the action. The Assistant Deputy Director also noted that the hearing required by the injunction was on Pittston's direct liability for the violations, notwithstanding the ownership and control regulations, not on the validity of the violations cited against the controlled entity or Pittston's link to the entity. OSM advised petitioners that it did not possess sufficient evidence of Pittston's responsibility for the minesites to proceed against the company directly but that it was continuing to investigate that possibility.

On March 26, 1993, petitioners appealed the Assistant Deputy Director's decision, naming both OSM and Pittston as respondents (IBLA 93-392). In their statement of reasons for appeal, petitioners raised the issue of the proper interpretation of the Virginia injunction, specifically whether it precluded the initiation of the 10-day notice procedures in this case. They challenged OSM's failure to process their request to block issuance of new permits to Pittston and its refusal to take other actions, including issuing initial notices to Pittston under 30 C.F.R. § 843.21(a) (procedures for improvidently granted State permits) and taking steps to rescind permits improvidently furnished to Pittston and its subsidiaries, actions assertedly not affected by the injunction.

In response, in addition to addressing the merits of the appeal, Pittston also challenged petitioners' standing to bring the appeal. OSM focused solely on the merits, contending that the Virginia injunction barred the relief petitioners demanded and that it had taken no enforcement action in this matter because its investigation had disclosed no ownership or control relationship between Pittston and ZY or Careers.

On September 29, 1993, Pittston filed a motion for summary disposition based on petitioners' alleged lack of standing which petitioners opposed.

Contemporaneously with the prosecution of their citizen's complaint, petitioners' counsel also met with WVDEP to try to persuade the State to take action based on the allegations in the complaint. Although the State refused to take the requested enforcement actions, WVDEP began negotiating site reclamation with Vandalia Resources, Inc. (Vandalia), a Pittston subsidiary interested in remining the five ZY and Careers mining sites. During the course of these negotiations, the WVDEP Director consulted with petitioners' counsel about various provisions proposed as part of the reclamation agreement. On December 8, 1994, WVDEP and Vandalia, executed a Mitigation and Reclamation Agreement (reclamation agreement) in which Vandalia agreed to reclaim the ZY and Careers sites in exchange for which

the State agreed to accept the reclamation as compensation for any liability of Pittston or its subsidiaries for civil penalties associated with the permits. The agreement also stated that it did not constitute any admission of ownership or control over the ZY and Careers mining operations.

On August 7, 1995, Pittston filed a motion to dismiss the appeal because the reclamation agreement had settled Pittston's alleged liability for the outstanding violations and reclamation obligations at issue in the appeal and thus rendered moot any further proceedings on the citizen's complaint. Petitioners responded, conceding that the merits of the appeal were moot. They claimed, however, that the reclamation agreement emanated from their complaint and Board appeal, an allegation which Pittston denied. By order dated September 15, 1995, the Board granted Pittston's motion and dismissed the appeal.

On November 3, 1995, petitioners filed their petition for an award of costs and expenses, including attorney fees, under section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1994), and its implementing regulations, 43 C.F.R. §§ 4.1290-4.1296, seeking \$39,257.50 in fees and \$939.39 in expenses for work performed. They asserted that they were eligible for and entitled to an award because their complaint had compelled the actions taken by WVDEP resulting in the settlement agreement and the reclamation of the abandoned mines. They also provided documentation addressing the time expended, the reasonable hourly rates, and the costs incurred.

In its answer to the petition, OSM asserted that petitioners had failed to make a substantial contribution to the determination of the issue before the Board, i.e., the validity of OSM's interpretation of the Virginia injunction, or any issue raised in their citizen's complaint. OSM disputed petitioners' claims that they had achieved success on the merits and contributed to the determination of the relevant issues through the reclamation agreement, pointing out that petitioners were not parties to the agreement, that Pittston had denied that they played any role in the negotiation or execution of the agreement, that the issue of Pittston's ownership or control of the Careers and ZY mining operations had not been resolved by the agreement, and that the agreement had not arisen from the theories they had espoused. ^{3/} OSM argued that, given the lack of resolution of the sole issue before the Board and petitioners' failure to

^{3/} Based on the legal citations in the agreement, OSM speculated that WVDEP had used the State's water pollution control act as leverage to negotiate the reclamation agreement, noting that the agreement indicated that the State required mitigation for any destruction or adverse impact on water resources, and that Pittston or its affiliates had pending surface mining permit applications proposing to destroy or adversely affect water resources. OSM suggested that the State conditioned approval of the permits on reclamation of the ZY and Careers minesites as mitigation for adversely affecting water resources, and that the reclamation agreement therefore could not be construed as a determination that Pittston was responsible for the sites.

establish any success on the merits because site reclamation was attributable to the State, petitioners were not eligible for or entitled to fees and expenses under any reasonable interpretation of the applicable regulations. OSM further maintained that petitioners' request for payment included uncompensable items including payment for work conducted in a forum separate from the Department of the Interior and unnecessary to maintaining its Departmental actions, compensation for litigating issues solely with parties other than OSM, remuneration for undocumented time, and recompense at an improper hourly rate for work performed by one of petitioners' counsel.

Thereafter, the Board issued a decision in Kentucky Resources Council, Inc. v. OSM, 137 IBLA 345 (1997), denying a petition for attorney fees under SMCRA. Petitioners sought and received an extension of time to file a reply brief in this case stating that they were evaluating their petition in light of that decision.

However, Kentucky Resources Council, Inc., sought judicial review of the Board's decision, and on February 20, 1998, the U.S. District Court for the Eastern District of Kentucky issued a decision granting the plaintiff's motion for summary judgment and remanded the petition for fees to the Secretary for determination of an appropriate reward. Kentucky Resources Council, Inc. v. Babbitt, 997 F. Supp. 814 (E.D. Ky. 1998). Therein, the court identified three prerequisites for an award of fees under SMCRA: "a final order by an appropriate body or judge; and 2) participation in an 'administrative proceeding' which 3) resulted in relief." Id. at 818. The court found that the requisite "final order" included a final Board order dismissing an appeal without addressing the merits of the appeal and interpreted the term "administrative proceeding" as requiring substantial participation in a formal proceeding before the Board. Id. at 818-19. The court held that satisfaction of the third prerequisite entailed "a showing that the appeal had some bearing on the actions ultimately taken by OSM officials. * * * In other words, there must be a causal nexus between [petitioners'] actions in prosecuting the appeal to the Board and the corrective actions taken by OSM." Id. at 820 (citations omitted). The court looked to the totality of the circumstances in determining the existence of the causal nexus. Id. at 821. Several recent Board decisions have accepted and applied the principles espoused in Kentucky Resources Council, Inc. v. Babbitt. See Harvey A. Catron, 146 IBLA 31 (1998); Citizens Coal Council v. OSM, 145 IBLA 304 (1998); Hylton v. OSM (On Reconsideration), 145 IBLA 167 (1998); Wyoming Outdoor Council, 145 IBLA 63 (1998).

Petitioners and OSM each filed supplemental pleadings addressing petitioners' entitlement to a fee award in light of the above decisions. 4/ Petitioners argue that their successful administrative action in bringing

4/ We hereby grant OSM's motion for leave to file a reply brief and petitioners' motion for leave to file a surreply brief.

about Pittston's reclamation of the five ZY and Careers minesites satisfies the three-part test established in Kentucky Resources Council, Inc. v. Babbitt and adopted by the Board. Specifically, they assert that they obtained the requisite final order from the Board when the Board dismissed their appeal as moot due to the reclamation agreement between the State and Vandalia, and that their participation in the adversary proceedings before the Board in the underlying appeal fulfills the requirement that they substantially participate in an administrative proceeding before the Board.

Petitioners maintain that there is a causal nexus between their appeal to this Board and the relief obtained on their citizen's complaint. They contend that the causal nexus issue focuses on whether they obtained some ultimate success from whatever source on the merits of their complaint after filing their appeal with the Board. They claim that they secured the ultimate relief they sought in their citizen's complaint through the reclamation agreement in which Pittston's subsidiary agreed to take responsibility for the outstanding violations at the five minesites and to reclaim those sites, and that their attainment of success on the merits via the settlement agreement, which reflects their input, establishes their entitlement to a fee award. Petitioners argue that, under Kentucky Resources Council, Inc. v. Babbitt, the causal relationship between the Board appeal and the success on the merits can be inferred from the timing of the appeal and the relief. Because their Board appeal was pending during the period of the settlement negotiations between WVDEP and Vandalia and when the reclamation agreement was signed, petitioners assert that the appeal is presumptively a contributing factor to the successful outcome negotiated in the reclamation agreement, a presumption allegedly unrebutted by the record. They further aver that, although their appeal raised a purely procedural error, it nevertheless suffices to establish a causal link to the relief attained through the settlement since it was an appropriate response to OSM's order delaying action on their claim for relief, notwithstanding the fact that relief was ultimately attained by way of concurrent State enforcement efforts in which they participated.

Petitioners also rebut OSM's objections to their petition, arguing that their success on the merits supports an award under the applicable regulations. They maintain that they made a substantial contribution to the success on the merits despite not being a party to the reclamation agreement, reiterating that their consultations with the WVDEP Director during the settlement process establish that they had a causal effect on the final agreement. They discount as inadequate Pittston's unsworn denial that the appeal had any effect on the reclamation agreement, pointing out that Pittston would not have been aware of their direct involvement and influence on the agreement since their contacts were with the State. The agreement's failure to resolve the ownership and control issue has no relevance to the determination of whether they succeeded on the merits of their complaint, petitioners submit, nor does the State's reliance on its Water Pollution Control Act undermine the fact that the agreement required the complete reclamation of all five sites, including the elimination of highwalls.

Petitioners again assert that their appeal was causally related to the

success on the merits, regardless of the fact that the relief obtained did not come from the Board or OSM, asserting that their complaint alerted both OSM and the State to Pittston's outstanding violations, and that only OSM's recalcitrance in enforcing SMCRA shifted the source of relief from OSM to the State. Since they clearly would have been entitled to an award if the relief had come from OSM, petitioners claim that OSM's inaction cannot defeat their fee award especially given their participation in and influence on the reclamation agreement. That they did not prevail on the issue before the Board does not undermine their fee request or reduce the degree of their success on the merits of their complaint, petitioners submit, because they received the site specific substantive relief they sought through the reclamation agreement. They further contend that the claimed amount is reasonable, that the time spent in settlement negotiations with the State and in defending their standing to bring their appeal is compensable, that their records support the time claimed, and that the hourly rates sought have been previously approved by the Board. They also request leave to file a supplemental request for fees and expenses incurred subsequent to the filing of their petition.

In response, OSM concedes that petitioners have met the final order and the success on the merits components of the applicable test. OSM denies, however, that petitioners have shown the requisite causal nexus between their appeal and the merits relief achieved, asserting that petitioners' position that the causal nexus can be shown simply by the pendency of an appeal contemporaneously with the achievement of success on the merits outside of the Board litigation virtually eliminates the causality requirement. While acknowledging that the timing of an appeal and settlement is a relevant factor when looking at the totality of the circumstances, OSM insists that it cannot be dispositive especially if, as here, the appeal was baseless and the settlement resulted from other catalysts. OSM contends that the causal nexus finding requires a determination that the appeal was necessary and that it contributed to some success by the petitioners, neither of which is present here. Although the Board did not rule on the issue raised in petitioners' appeal, OSM points out that the Board subsequently upheld OSM's interpretation of the Virginia injunction, a holding that directly refutes petitioners' characterization of OSM's position in this case as unnecessarily recalcitrant and undermines their claim that their appeal was necessary.

OSM also disputes petitioners' assertion that their appeal affected WVDEP's success in obtaining reclamation of the minesites. It iterates that the reclamation agreement was not based on petitioners' ownership and control charges but rather on the mitigation requirements of the State's water pollution control laws which led the State to condition its approval of Vandalia's permits to remine the ZY and Careers sites, which would adversely impact water resources, on reclamation of those sites. OSM asserts that there is no indication that petitioners' appeal of OSM's failure to process the ownership and control citizen's complaint in violation of the Virginia injunction had any effect on the State action. Even

assuming that the complaint ultimately influenced the reclamation agreement, as petitioners allege, that would not suffice to establish the causal connection necessary for an award, OSM submits, because the law requires that the proceedings before the Board, not the complaint, have some substantial causal effect on the relief obtained, and no logical link between the appeal and the relief achieved can be found in this case. OSM further denies that petitioners' appeal influenced Pittston's conduct, pointing out that Pittston disclaims any such connection, and that the facts of this case preclude any such inference. OSM avers that, looking at the totality of the circumstances, including its justified position and the absence of any obstruction or improper delays caused by erroneous procedural or substantive decisions on its part, it committed no errors warranting an award of fees and expenses and, therefore, no basis for holding it liable for fees and expenses exists.

In a brief surreply, petitioners maintain that OSM has presented no evidence rebutting their clear showing that their efforts during the pending appeal led to the success on the merits. They restate their belief that the mere timing of an appeal is sufficient to establish a causal nexus but add that in this case they have also presented factual evidence demonstrating the causal connection between the Board appeal and the success on the merits based on their participation in and influence on the settlement negotiations occurring between March 1993 and December 1994. They explain that their involvement in the negotiations was based on their citizen's complaint to OSM which would not have remained alive absent the Board appeal, and that without pending Federal legal action against Pittston on the ownership and control of the ZY and Careers sites, WVDEP's ability to enforce a permit block would have been hampered and no settlement would have resulted. Petitioners further submit that a later adverse decision in another case does not strip their earlier appeal of its value as a catalyst in achieving the success on the merits.

[1] Section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1994), provides that

[w]henver an order is issued * * * as a result of an administrative proceeding under this chapter, 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, * * * may be assessed against either party as the * * * Secretary * * * deems proper.

The implementing regulations specify that "[a]ny person may file a petition for an award of costs and expenses including attorneys' reasonably incurred as a result of that person's participation in any administrative proceeding under the Act which results in * * * (2) A final order being issued by the

Board." 43 C.F.R. § 4.1290(a). The right to recover an award from OSM is limited by regulation to

any person, other than a permittee or his representative, 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.

43 C.F.R. § 4.1294(b).

There is no dispute that the Board order dismissing petitioners' appeal as moot satisfies the requirement that there be a "final order" in the case, and that their appeal to the Board qualifies as the requisite participation in an administrative proceeding. See Kentucky Resources Council, Inc. v. Babbitt, 997 F. Supp. at 818-19; Hylton v. OSM (On Reconsideration), 145 IBLA at 170. Therefore, the inquiry shifts to whether petitioners are eligible for and entitled to receive an award of costs and expenses, including attorney fees, based on their participation in the Board appeal. See Natural Resources Defense Council, Inc. (NRDC) v. OSM, 107 IBLA 339, 361, 96 I.D. 83, 95 (1989).

The eligibility determination focuses on whether the petitioners have shown that they achieved at least some degree of success on the merits. Id. at 365, 96 I.D. at 97. In this case the ultimate relief sought in petitioners' underlying citizen's complaint, i.e., the reclamation of the five ZY and Careers minesites, was attained through the reclamation agreement between WVDEP and Pittston's subsidiary. See Hylton v. OSM (On Reconsideration), supra. Since petitioners achieved some degree of success on the merits of their complaint, they have established that they are eligible for a fee award. Id.

The remaining question is whether petitioners are entitled to an award, i.e., whether they made a substantial contribution to a full and fair determination of the issues. NRDC, 107 IBLA at 368, 96 I.D. at 99; see also Hylton v. OSM (On Reconsideration), supra. The key to resolving this query rests on the existence of a causal nexus between petitioners' actions in prosecuting the Board appeal and the relief obtained, the determination of which depends on the totality of the circumstances. Kentucky Resources Council, Inc. v. Babbitt, 997 F. Supp. at 820-21. The mere pendency of an appeal at the time relief is granted does not suffice; there must be a causal link between the appeal and the relief attained. Id. at 819.

In this case, petitioners obtained no relief from OSM, nor did they establish any error in OSM's handling of the their citizen's

complaint. ^{5/} Thus, this case is distinguishable from Kentucky Resources Council, Inc. v. Babbitt, wherein all the substantive issues raised in the underlying citizen's complaint were addressed and resolved through a settlement between the state and the coal company. See id. at 817. In that case, the court found that OSM had provided the procedural relief sought in the Board appeal and had erred in handling the underlying citizen's complaint. Accordingly, the court predicated the fee award on the causal nexus between the prosecution of the appeal and the procedural relief obtained from OSM, not the substantive relief granted via the settlement agreement. Id. at 820-21.

The Board cases cited by petitioners similarly do not support an award here since, regardless of the source of the substantive relief, they involve OSM taking some or all of the action requested in the citizen's complaint such as ordering a Federal inspection (Hylton v. OSM (On Reconsideration), 145 IBLA at 169), or a change in OSM's position after the filing of the appeal (Harvey Catron, 146 IBLA at 33, 35), or a Board decision on the merits reversing OSM's decision (Wyoming Outdoor Council, 145 IBLA at 68), plus a finding that the appeal influenced those results. See Harvey Catron, 146 IBLA at 35; Hylton v. OSM (On Reconsideration), 145 IBLA at 171; Wyoming Outdoor Council, 145 IBLA at 69. In all these cases petitioners' citizen's complaint and/or appeal prompted an OSM response either favorable to the petitioners or erroneous in some respect. None of these conditions is present here.

Petitioners nevertheless maintain that they are entitled to an award regardless of the lack of any OSM wrongdoing, change in position, or remedial action because the ultimate relief they sought was obtained through the reclamation agreement negotiated between the State and Vandalia, the terms of which they purportedly affected through consultations with the WDEP Director. While the record establishes that petitioners' counsel engaged in discussions with the State about the settlement (see Oct. 31, 1995, Declaration of L. Thomas Galloway at 9; Oct. 8, 1998, Supplemental Declaration of L. Thomas Galloway at 1-2; Oct. 8, 1998, Declaration of David C. Callaghan), these declarations do not establish a causal link between petitioners' appeal to this Board on the issue of the proper construction of the Virginia injunction and the settlement negotiations or the reclamation agreement. The simple pendency of the appeal during the negotiation period does not demonstrate the requisite causal nexus between that appeal and the reclamation agreement reached in that unrelated proceeding to which petitioners and OSM were not parties, and which neither resolved the issue of Pittston's ownership or control of the ZY and Careers mining operations nor arose from the theories advocated by petitioners.

^{5/} In fact, after this case had been dismissed, the Board explicitly rejected the position espoused by petitioners in this appeal and upheld OSM's interpretation of the scope of the Virginia injunction. See West Virginia Highlands Conservancy v. OSM, 136 IBLA 65, 69 (1996); see also West Virginia Highlands Conservancy, 149 IBLA 106, 112 (1999).

Furthermore, petitioners' records indicate that the State was already pursuing the negotiations before they filed their March 26, 1993, appeal. See Client Billing Worksheet attached to Oct. 31, 1995, Declaration of L. Thomas Galloway, at 4 (reference to Mar. 24, 1993, calls re: status of State negotiations). The records also establish that petitioners began discussing various matters with the State as early as November 1992, well before the filing of the appeal. See id. at 1. These facts undermine petitioners' claim that their Board appeal had a causal link to the negotiations between WVDEP and Vandalia. Considering the totality of the circumstances presented here, we find that petitioners have not proven that a causal nexus exists between the prosecution of their appeal and the relief achieved. Since petitioners have not established their entitlement to an award of costs and expenses, including attorney fees, we deny their petition for those costs and expenses.

To the extent not specifically addressed herein, petitioners' other arguments have been considered and rejected.

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 petition for costs and expenses, including attorney fees, is denied.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge