

CITIZENS COAL COUNCIL

IBLA 2003-18

Decided March 20, 2006

Appeal from an order of Administrative Law Judge James H. Heffernan denying the petition for costs and fees in Amcord v. Office of Surface Mining Reclamation and Enforcement, Hearings Division Docket Nos. DV 94-21-R and DV 95-3-P (DV-94-21-R-EAJA).

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 CFR 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. An intervenor claiming costs and expenses based upon its challenge to an application to review an NOV must make a substantial contribution which is separate and distinct from OSM's. A petition for an award will be denied where the record does not show that the petitioner made a substantial contribution to the full and fair determination of the issues or that it achieved some degree of success on the merits.

APPEARANCES: Reed Zars, Esq., Laramie, Wyoming, for Citizens Coal Council; John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and

Enforcement; David E. Moser, Esq., San Francisco, California, for Amcord, Inc.; John B. Rutherford, Esq., Navajo Nation Department of Justice, Window Rock, Arizona, for the Navajo Nation. ^{1/}

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Citizens Coal Council (CCC) has appealed a September 6, 2002, order issued by Administrative Law Judge James H. Heffernan denying a petition for fees and costs in Amcord v. Office of Surface Mining Reclamation and Enforcement, DV 94-21-R and DV 95-3-P, based on his finding that “CCC did not prevail in whole or in part on the merits of the underlying case, nor did it make a substantial contribution to a full and fair determination of the issues.” (Decision at 6.)

CCC’s claim for fees is made pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (2000), and implementing regulations at 43 CFR 4.1290 through 4.1296, which authorize the award of costs and expenses, including attorneys’ fees, to any person “as determined by the Secretary to have been reasonably incurred” by such person for or in connection with his participation in any administrative proceeding under the Act. 30 U.S.C. § 1275(e) (2000). 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 regulation at 43 CFR 4.1294, which governs who may receive an award of costs and expenses, provides as follows as it pertains to awards to parties other than OSM and the permittee:

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; or

^{1/} The Navajo Nation, a participant in Amcord v. Office of Surface Mining Reclamation and Enforcement, Hearings Division Docket Nos. DV 94-21-R and DV 95-3-P, but not an affected party in the matter of Citizen Coal Council’s Petition for Costs and Fees, is filing an Amicus Brief.

(2) The person initiates an application for review of alleged discriminatory acts, pursuant to 30 CFR part 830, upon a finding of discriminatory discharge or other acts of discrimination.

(b) From OSM 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 * * *.

Moreover, such an award of costs and expenses will only be appropriate where the SMCRA proceeding “results in * * * [a] final order being issued” by an administrative law judge or the Board. 43 CFR 4.1290(a).

On September 19, 1994, the Office of Surface Mining Reclamation and Enforcement (OSM) issued Notice of Violation (NOV) No. 94-02-116-2 citing Amcord, Inc. (Amcord), for “[f]ailure to cover acid-forming combustible materials with a minimum of 4 feet of nontoxic and noncombustible materials; or, if necessary, treat to neutralize toxicity in order to prevent water pollution and sustained combustion, and to minimize adverse effects on plant growth and land uses” on approximately 67 acres of the Amcoal Mine, in violation of 25 CFR 216.105(j).^{2/} The Amcoal Mine, situated on Navajo lands in New Mexico, is the result of a lease between Amcord and the Navajo Nation and embraces 300 acres. About 233 acres were disturbed before the enactment of SMCRA, 30 U.S.C. § 1231 (2000) (referred to as “pre-law” lands).^{3/} The 67 acres disturbed after passage of SMCRA are the only lands at the mine subject to the administration of SMCRA by OSM (referred to as “post-law” lands).

Initial reclamation efforts at the mine commenced about 1977. The State of New Mexico determined in 1985 that reclamation had been achieved in accordance with Amcord’s State permit and released Amcord from its jurisdiction over the pre-law lands. However, upon observing several continuing problems with revegetation

^{2/} OSM had previously issued a NOV for violation of 25 CFR 216.105(j) in March 1984. Pursuant to a settlement agreement, the NOV was modified to reflect a violation of 25 CFR 216.110(a)(1), failure to achieve revegetation success.

^{3/} In 1985, the State of New Mexico determined that Amcord had reclaimed the “pre-SMCRA” disturbance as required by Mining Permit 006, and released Amcord from further reclamation obligations with respect to those lands. The Navajo Nation, however, has expressed dissatisfaction with Amcord’s reclamation. OSM’s experts also believed that reclamation efforts on the post-SMCRA 67 acres may be compromised unless further work is done on the pre-SMCRA 233 acres.

on the post-law lands, OSM gathered a few “grab samples” of topsoil from various areas, which revealed the presence of acid- and toxic-forming materials (ATFMs.) In 1984, OSM issued an NOV to Amcord for failure to adequately cover or treat the ATFMs in violation of 25 CFR 216.105(j). Amcord applied for review of the NOV, and the case was resolved by settlement agreement in 1984 (1984 Agreement) pursuant to which OSM modified the NOV by dropping the violation of 25 CFR 216.105(j), and in its place cited Amcord for failure to achieve revegetation success as required by 25 CFR 216.110(a)(1). For abatement, Amcord was required to cover certain “bare areas” with topsoil and to revegetate them to the standards required by that regulation.

Over the following years, OSM continued to observe sporadic problems with revegetation. In 1993, OSM collected soil samples at 18 random sites at various depths down to 4 feet, and the results revealed the presence of ATFMs in varying degrees in the post-law areas. On September 9, 1994, OSM issued to Amcord the challenged NOV No. 94-02-116-1 for failure to cover or treat the materials in violation of 25 CFR 216.105(j). This NOV is virtually identical to the pre-modified 1984 NOV.

On October 21, 1994, Amcord sought review of the NOV and requested a hearing pursuant to rules at 43 CFR 4.1160 through 4.1171 (Hearings Division Docket No. DV 94-21-R). Amcord’s challenge was two-fold: (1) OSM was barred from enforcing 25 CFR 216.105(j) at the mine because the matter had been resolved by the 1984 Agreement; and (2) Amcord’s compliance with 25 CFR 216.110(a)(1) under that Agreement released it from the requirements of 25 CFR 216.105(j). After receiving notice of the proposed assessment of a civil penalty, Amcord petitioned for review under 43 CFR 4.1150 (Hearings Division Docket No. DV 95-3-P). The cases were consolidated by the Hearings Division. Amcord requested and was granted temporary relief from the 90-day abatement deadline stipulated in the NOV.

On March 13, 1995, CCC filed a petition to intervene in the consolidated proceeding pursuant to 43 CFR 4.1110. Administrative Law Judge Ramon M. Child initially granted CCC intervenor status. Following certain disclosures by the parties, however, Judge Child dismissed CCC as an intervenor by order dated September 8, 1995. CCC appealed to this Board (IBLA 96-69), and by order dated March 6, 1996, we set aside that portion of Judge Child’s order dismissing CCC as an intervenor because, in our view, he had provided insufficient reasoning for his conclusion.^{4/}

^{4/} In the Sept. 8 order, Judge Child had also granted a motion by OSM to change the citation of the regulation violated from 25 CFR 216.105(j) to 30 CFR 715.14(j). On Sept. 22, 1994 (three days after the NOV was issued), the Indian Lands Regulatory
(continued...)

On remand, the case was reassigned to Judge Heffernan, who gave effect to the Board's order by granting CCC's motion to file an amended petition to intervene and providing a de novo opportunity for the parties to present evidence and file briefs on whether CCC met the requirements for intervention. Following briefing, in an order dated February 13, 1997, Judge Heffernan denied CCC's amended petition, which had relied on a different approach as to the scope of its membership. CCC appealed to the Board (IBLA 97-280), which reversed Judge Heffernan's order by granting CCC intervenor status in Citizens Coal Council, 155 IBLA 331 (2001), because CCC's membership groups included one whose interests could be adversely affected by the outcome of the proceeding.

During this period when CCC's interlocutory appeals concerning its right to intervene were under review, Amcord, OSM, the Navajo Nation, and the Bureau of Indian Affairs (BIA) (settlement parties) were engaged in protracted settlement negotiations intended to effectuate a "global settlement" which would address consistent reclamation work throughout the entire 300-acre mine site and not focus on just the 67 post-law acres. ^{5/} Amcord presented the settlement parties with a reclamation proposal for the entire 300 acres in 1998. OSM provided a coordinated response in April 2001 and the parties' technical representatives met and consulted at the mine in May 2002. Amcord then proposed a new reclamation plan for the entire 300-acre mine in September 2001.

Following the Board's decision in Citizens Coal Council, CCC was apprised of the details of the pending negotiations. On November 26, 2001, Judge Heffernan denied several pending motions for summary judgment previously filed by both CCC and OSM, ruling that disputed issues of material fact requiring an evidentiary hearing existed. ^{6/} Consequently, Judge Heffernan scheduled a hearing to commence in Gallup, New Mexico, on April 15, 2002 (later rescheduled to July 16, 2002). Following a prehearing telephone conference, Judge Heffernan reported that the parties were on the verge of achieving a global settlement, possibly in early March 2002, based upon Amcord's proposed plan. (Feb. 5, 2002, Order at 2.)

^{4/} (...continued)

Program was moved from 25 CFR Part 216, Subpart B, to 30 CFR Chapter VII, Subchapter B. See 59 FR 43414 (Sept. 22, 1994).

^{5/} Amcord offered to do significant remedial work on the pre-SMCRA lands in return for not having to fully comply with 25 CFR 216.105(j) on the post-SMCRA lands.

^{6/} On June 6, 2002, CCC submitted another motion for summary decision, which was denied by Judge Heffernan by order dated June 12, 2002, finding that the arguments by CCC had been previously raised and rejected.

However, the global settlement effort ended on May 16, 2002, when the Navajo Nation withdrew from the negotiations. (May 17, 2002, Order.)

On June 12, 2002, Amcord moved for voluntary dismissal of its Application for Review of the NOV. The next day, CCC filed a response requesting that Judge Heffernan withhold any ruling on Amcord's motion to dismiss until he either vacated or clarified his June 12, 2002, order denying CCC's third motion for summary decision and "find Amcord liable for the violations alleged in the NOV." (CCC's June 13, 2002, Response at 1.) The Navajo Nation also filed a response raising requests for additional adjudicatory proceedings. OSM filed an objection to the responses filed by CCC and the Navajo Nation, and posited no objection to Amcord's motion to dismiss. By order dated June 18, 2002, Judge Heffernan granted Amcord's motion to dismiss, denied CCC's and the Navajo Nation's requests for additional adjudication, and vacated the hearing set for July 2002. By his June 18, 2002, order, he thus ended the review process without the substantive merits of OSM's NOV ever having been determined.⁷ Dismissal of the case terminated the temporary relief from the 90-day abatement deadline, meaning, as explained by OSM, "that Amcord was obligated to abate the NOV on the post-law lands within 90-days of the June 18, 2002, dismissal order." (OSM's Response Brief at 8.)

On August 1, 2002, CCC filed a Petition for Costs and Fees pursuant to 43 CFR 4.1290(a)(1), based upon its participation in the proceedings leading up to Judge Heffernan's June 18 order dismissing the case. CCC seeks recovery in the amount of \$67,752.50 from both OSM and Amcord, "in shares to be determined." (Petition for Costs and Fees at 1, 5.) CCC based its petition on assertions that "(1) CCC's substantial contribution in this matter over the last seven years led to a successful final order that found that Amcord, Inc., violated SMCRA, and (2) CCC's contribution was separate and distinct from the contribution of OSM." *Id.* at 1.

Judge Heffernan denied the petition by order on September 6, 2002, stating that CCC's participation was procedural in nature and did not satisfy the requirements:

In my opinion, CCC's participation in the underlying dockets from the time it was accorded Intervenor status by IBLA on September 6, 2001, was wholly procedural in nature and content, and CCC's procedural participation did not pass either of the * * * regulatory tests with respect to either Amcord or OSM, respectively. Indeed, I denied CCC's Motions for Summary Decision twice, and short of having granted those

⁷ Judge Heffernan also denied CCC's and Navajo Nation's separate requests for additional adjudication.

Motions, in whole or in part, the merits of the underlying dockets were never adjudicated. * * * In my opinion, CCC would have had to prevail in either its summary decision motions or, in the alternative, in the public hearing, in order to have passed the * * * regulatory tests with respect to the potential liability of either Amcord or OSM. CCC accomplished neither of these milestones, because the underlying dockets were, ultimately, resolved on purely procedural grounds.

With respect to Amcord's potential liability under the referenced regulatory provision, I would have had to make a finding that a violation of the Act, regulations, or permit had occurred, or that an imminent hazard existed and that CCC had made a substantial contribution to the full and fair determination of the issues. I made no full and fair determination of the issues because of two reasons. First, the underlying proceedings were dismissed prior to convening the public hearing. Second, I had consistently denied CCC's Motions for Summary Decision based upon my determination that material issues of fact were in dispute, and, because of the ultimate dismissal for mootness, those disputed factual issues were never adjudicated in any way. Because these material issues of fact were never adjudicated in any way, it is my determination with respect to Amcord's potential liability, that CCC did not achieve any success on the underlying merits. For example, IBLA has stated the following:

Phrased in the language of the applicable Departmental regulations, the question is properly stated in terms of whether petitioners have, by achieving a measurable success, made a 'substantial contribution' to the resolution of the issues as determined in the decision in St. Clair. Donald St. Clair ET AL., 84 IBLA 236, 246 (1985).

In my opinion, in order for CCC to have passed the "substantial contribution" test in this matter, it would have had to prevail in either its Motion For Partial Summary Decision or on the merits in a public hearing. CCC did not accomplish either of these milestones. I denied its Motion for Partial Summary Decision, determining that, because of disputed issues of fact, a public hearing was essential. That public hearing never took place because of Amcord's Motion For Voluntary Dismissal, which mooted the underlying case on the merits. Because the merits of the underlying dockets were never adjudicated, but were merely dismissed, it is my determination that CCC did not make the requisite "substantial contribution" to the resolution of the issues,

which were on appeal in the underlying dockets. Consequently, it is my determination with respect to Amcord's potential liability under the purview of 43 C.F.R. 4.1294(a), that CCC has not met its regulatory burden of proof for entitlement to the requested costs and fees from Amcord.

(Order at 5-6.)

With regard to the potential liability of OSM under 43 CFR 4.1294(b), Judge Heffernan determined that CCC did not prevail by achieving some degree of success on the merits, "because the underlying merits of the NOV were never adjudicated." Id. at 6. He observed:

Those dockets were merely dismissed, and those dockets would have been dismissed pursuant to Amcord's Motion, with or without CCC's prehearing participation as an Intervenor. Stated somewhat differently, CCC's prehearing participation from the time of IBLA's intervention order on September 6, 2001, was not material with respect to my Dismissal Order of June 18, 2002, which granted Amcord's Motion for Voluntary Dismissal.

Id.

Judge Heffernan concluded that "CCC did not prevail in whole or in part on the merits of the underlying case, nor did it make a substantial contribution to a full and fair determination of the issues." Id. at 6-7. Accordingly, he denied CCC's petition for an award of fees and costs. CCC appealed.

In its Opening Brief, CCC contends that Judge Heffernan's conclusions are in error, that it satisfied the regulatory thresholds of 43 CFR 4.1294, and that it should therefore be awarded costs and fees. CCC argues that a final order was issued that affirmed the validity of the challenged NOV, and that CCC substantially contributed to this successful result, a contribution that was separate and distinct from OSM's. CCC asserts that it was successful on the merits because Amcord "completely capitulated" to CCC's position on the validity of the NOV. CCC avers that it substantially contributed to Amcord's decision to voluntarily dismiss its Application for Review of the NOV, by "conducting and responding to discovery, briefing the legal and factual issues, prevailing before the Board, fulfilling all requirements to participate in the public hearing, and refusing to enter into an agreement * * * that would have vacated the NOV." (CCC's Opening Brief at 7.)

In its Opposition Brief, Amcord does not dispute whether Judge Heffernan's June 18, 2002, Order is a "final order" for purposes of 4.1294, but argues that CCC is not entitled to an award because it did not contribute to a full and fair determination of the issues. Amcord contends that the administrative proceeding at issue and the resulting rulings dwelt on merely procedural issues. In addition, Amcord asserts that the sole issue CCC argued, whether acid-forming soils existed, was not challenged by Amcord, but, rather, the administrative proceedings were initiated on the basis of seven other points of contention which CCC did not address in its motions for dismissal. Amcord insists that there is no "causal nexus" between CCC's motions and Judge Heffernan's order granting Amcord's motion for voluntarily dismissal of the Application for Review, and that Judge Heffernan's order would not support a decision that CCC had made a substantial contribution to a full and fair determination of the issues.

In its Response Brief, OSM contends that CCC's arguments are based on speculation and cannot be supported by the record. OSM asserts that CCC does not identify any fact of record in support of its argument that it forced or induced Amcord to file its motion to dismiss. OSM argues that Judge Heffernan's determination is correct, given that the validity of the NOV was not upheld or even addressed. OSM concludes that CCC's involvement is not compensable under 43 CFR 4.1294.

In its Amicus Brief, the Navajo Nation contends that Judge Heffernan erred by finding that Amcord's voluntary dismissal did not resolve the merits of the NOV, and by finding that as a matter of law CCC had not made a substantial contribution to the outcome. Navajo Nation argues that, had Judge Heffernan applied the correct legal standards, he would have awarded costs and expenses to CCC. Navajo Nation notes that, as a result of the dismissal, Amcord acknowledged validity of the NOV, thereby causing a corresponding alteration in the legal relationships of the parties, and waived all defenses to reclamation enforcement and penalties, thereby resolving any issue regarding the NOV. Navajo Nation further argues that the "causal nexus" test was satisfied in CCC's role in getting Amcord to accept the NOV, stating that "CCC helped bring the legal issues to the front and gave the Nation a helpful ally in resisting the efforts of Amcord to settle." (Amicus Brief at 14.)

[1] 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.^{8/}

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) (considering requests of two environmental groups for fees and costs incurred through participation in SMCRA administrative proceedings and subsequent judicial proceedings, the District Court held that "in order to be eligible for an award of fees pursuant to Section 525(e), the petitioners must have achieved at least some success on the merits.") 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).^{2/} 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

^{8/} The threshold requirement that there be a "final order" has been met in this case; there is nothing in the regulation that requires the final order to decide the merits of the dispute. 43 CFR 4.1290(a)(2); see Kentucky Resources Council v. OSM, 137 IBLA 345, 351 (1997), reversed on other grounds, Kentucky Resources Council, Inc. v. Babbitt, 997 F. Supp. 814 (E.D. Ky. 1998); see e.g., Harvey A. Caron, 146 IBLA 31, 34-35 (1998).

^{2/} In 1985, the Department amended 43 CFR 4.1294(b) by adding the "some degree of success on the merits" language of Ruckelshaus. 50 FR 47222, 47223 (Nov. 15, 1985.)

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).

Accordingly, we first consider whether CCC achieved "some degree of success on the merits." Amcord challenged the NOV on the grounds that compliance with the 1984 Agreement constituted compliance with the cover or treatment standards for the lands at issue. (Amcord's Amended Application for Review, dated Dec. 20, 1994, at 9, 13.) CCC sought a summary decision, arguing that the actual conditions present at the mine site justified as a matter of law OSM's declaration that Amcord failed to comply with 25 CFR 216.105(j).^{10/} See CCC's June 29, 1995, Motion (renewed in CCC's May 7, 1996, Motion).

CCC, however, did not address the actual reasons for Amcord's challenge, *i.e.*, its assertion that any potential violation of 216.105(j) had been resolved by the 1984 Agreement. CCC's successive motions for summary decision addressed the single issue of whether acid-forming soils existed on the post-law lands in 1994, but, as noted by Amcord, "that issue was not in contention and would not have been considered by Judge Heffernan had the litigation reached the merits." (Amcord's Opposition Brief at unnumbered 7.) Indeed, Amcord did not challenge the factual basis for the NOV, but rather asserted that compliance would be prohibitive and would undo years of reclamation work. (Amcord's Application for Temporary Relief, dated Oct. 21, 1994.) The 1984 Agreement was negotiated, Amcord argues, to avert such problems. *Id.* On the other hand, OSM also filed its own motion for summary decision which explored several issues posed by Amcord's challenge to the NOV. (OSM's Motion, dated Aug. 31, 1995.) Thus, OSM focused on whether it was precluded from enforcement by reason of accord and satisfaction, estoppel, or laches owing to the 1984 Agreement or because the cited regulation had been rescinded. *Id.*

Judge Heffernan rejected the motions of both CCC and OSM because the record would not support a finding that there were no factual issues to be resolved. (Nov. 26, 2001, Order, at 2-3.) CCC renewed its motion for summary decision with the same arguments, and it was again denied by Judge Heffernan. (CCC's Motion,

^{10/} OSM determined in the NOV that Amcord failed to comply with that portion of the regulation establishing an obligation to cover acid-forming or toxic-forming materials produced during mining with a minimum of 4 feet of nontoxic and noncombustible material or treat, if necessary, to neutralize toxicity and minimize adverse effects on plant growth and land uses.

The citation, 25 CFR 216.105(j), was later amended in accordance with changes in the regulations. See n. 4.

dated June 6, 2002; June 12, 2002, Order.) His final order did nothing to uphold the NOV, and the objective of CCC's participation up to that point, a decisive determination by Judge Heffernan that Amcord had violated Departmental regulation, was not realized when Amcord's challenge was dismissed.^{11/} Instead, Judge Heffernan had refused CCC's several attempts to seek a determination of the issues and that opportunity was lost. Amcord's dismissal interrupted what CCC sought to achieve by intervention. As a result, we conclude that CCC did not achieve any degree of success on the merits, and that it is not eligible for an award.

Even were we to conclude that CCC was eligible for an award simply because the challenge was dropped, we would still have sufficient reason to affirm Judge Heffernan's decision to deny the award because CCC did not demonstrate entitlement, based on the foregoing and other reasons. As an intervenor in the process, CCC must show that it made a substantial contribution to the full and fair determination of the issues separate and distinct from the contribution made by OSM, which initiated the proceeding. See 43 CFR 4.1294. CCC argues that it contributed to Amcord's voluntary dismissal. However, the record shows that it was OSM which brought forth arguments addressing the substance of Amcord's challenge. Judge Heffernan was emphatic in rejecting CCC's argument that its filings and actions forced or induced Amcord to file its motion for voluntary dismissal:

CCC argues, in context, that their prehearing participation, including their Motion for Partial Summary Decision, induced or forced Amcord to file its Motion for Voluntary Dismissal. I disagree completely. In my opinion, the timing of Amcord's Motion was influenced by two developments that had nothing to do with CCC's filing in this matter. First, in May 2002, the Intervenor Navajo Nation officially rejected the so-called "global settlement" option, which had been under active negotiations for some four years. Second, my procedural rulings made clear to all of the parties that there was, in the absence of such a settlement, going to be a long, complex and expensive public hearing in this matter, which had been formally scheduled for months, and which was going to commence in July 2002 in Gallup, New Mexico. In my opinion, Amcord's Dismissal Motion was motivated by the rejection in May 2002 by the Intervenor Navajo Nation of the multi-year global settlement negotiations and by the related prospect of a protracted and very expensive public hearing, including the necessity for expert witnesses and extensive travel. I have concluded that neither Amcord's dismissal

^{11/} Amcord reports that "[f]ollowing dismissal, [it] filed a report with OSM documenting that it had abated the violation in the NOV." (Amcord Reply at unnumbered 8 n.8.)

motion, nor my ruling thereon, was influenced in any material degree by any of CCC's pre-hearing filings or actions in the underlying dockets. In short, I conclude that the total administrative record, especially that portion after IBLA's intervention order on September 6, 2002, makes plain that CCC's Intervenor participation and related filings essentially irrelevant to the ultimate, procedural outcome of the underlying dockets.

(Order at 6-7.) There is a degree of irony in CCC's contention that its filings forced Amcord to voluntarily dismiss the proceedings before Judge Heffernan, given that both CCC and the Navajo Nation filed objections to that very dismissal. See Amcord's Opposition Brief at unnumbered 8.

CCC further argues that it is entitled to an award for thwarting the global settlement. However, our review of the record confirms OSM's statement that "[t]here is nothing * * * to support CCC's assertions that it induced the Navajo Nation to reject the potential global settlement option, that the option was 'brokered by OSM and Amcord' apart from the other settlement parties, that the option was 'illegal,' or that Amcord moved for dismissal because of CCC's alleged action." (OSM's Response Brief at 16.) Moreover, CCC did not participate in any negotiations for a global settlement. The record shows that Amcord offered a proposed reclamation plan for the entire 300-acre mine as a potential basis for global settlement, and that the settlement parties had expressed general support for a global settlement based upon Amcord's draft reclamation plan. What is clear is that only CCC opposed global settlement. See Judge Heffernan's Feb. 5, 2002, Order. On May 17, 2002, new counsel for the Navajo Nation announced the Nation's formal rejection of the global settlement option. The Navajo Nation's own comments belie its assertion that "CCC played a crucial role in the Nation's decision to withdraw from the settlement":

By letter dated April 18, 2002, the [Bureau of Indian Affairs (BIA)] notified OSM that "it does not find any scientific evidence to support OSM's apparent conclusion that the current vegetation appearances justify terminating the 1994 NOV in this case." The BIA's letter caused the Nation to completely reevaluate its involvement in the "global settlement." BIA, the federal land manager and the Nation trustee, had determined that Amcord's reclamation plan * * * would not effect a permanent reclamation. * * * The price of settlement was too dear, and the Nation withdrew.

(Amicus Brief at 13.) The Navajo Nation later lauded CCC's participation, stating that "CCC helped bring the legal issues to the front." Id. at 14. However, as stated by OSM, "CCC has not shown how undermining the 4-year settlement effort achieved

‘success on the merits’ of CCC’s claims that the NOV was viable or constituted a ‘substantial contribution to a full and fair determination of the issues.’” (OSM’s Response Brief at 19.) Further, the facts of record do not reflect that it was CCC which was responsible for Navajo Nation’s withdrawal from the global settlement discussion, the purported reason why Amcord chose to end its challenge. Rather, the Navajo Nation came to its own decision to withdraw, as aided by BIA’s letter. The record simply does not support CCC’s claim that it was a facilitator in the global settlement effort. ^{12/}

The test for determining whether a party has made a “substantial contribution to a full and fair determination of the issues” is whether there is a “causal nexus” between the petitioner’s actions and the relief obtained. Kentucky Resources Council, Inc. v. Babbitt, 997 F. Supp. 814, 820 (E.D. Ky. 1998). The facts are clear and straightforward. OSM issued the NOV, and Amcord challenged it, citing the 1984 Agreement. When global settlement negotiations ultimately failed, Amcord filed a voluntary dismissal of its challenge to the NOV. CCC’s claim that it influenced the events precipitating the dismissal finds no support in the record.

In conclusion, the record is clear that Judge Heffernan did not adjudicate any issue whatever as to the merits of the NOV, that CCC did not contribute to the resolution of any issue on the merits, and that there is no evidence establishing a causal connection between CCC’s filings and actions and either Amcord’s decision to move for dismissal of its application for review or Judge Heffernan’s order granting dismissal. Not having shown that it achieved at least some degree of success on the merits, CCC is not eligible for an award of fees and expenses, and not having shown that it made a substantial contribution to a full and fair determination of the issues, it is not entitled to such an award. See West Virginia Highlands Conservancy, 152 IBLA at 74. ^{13/}

^{12/} OSM takes the position that “[e]ven if CCC’s assertion that it thwarted or helped to thwart the potential global settlement was in fact of record, CCC should not be compensated for doing so,” given that CCC’s efforts were aimed at “thwart[ing] a long and difficult effort to achieve amicable settlement under circumstances where it was not privy to the settlement negotiations.” (OSM’s Response Brief at 18.)

^{13/} Given our ruling that CCC is not entitled to an award of fees and costs, we do not address OSM’s argument that the amount of fees and costs sought by CCC is unjustified. See OSM’s Response Brief at 20.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James F. Roberts
Administrative Judge

I concur:

Christina S. Kalavritinos
Administrative Judge