Land & Water Law Review

Volume 30 | Issue 2 Article 12

1995

Environmental Law - Deliberating over Dollars - Fee-shifting and the Wyoming Environmental Quality Act - Powder River Basin Resource Council v. Wyoming Environmental Quality Council

Jennifer Paige Hanft

ENVIRONMENTAL LAW—Deliberating Over Dollars—Fee-shifting and the Wyoming Environmental Quality Act. *Powder River Basin Resource Council v. Wyoming Environmental Quality Council*, 869 P.2d 435 (Wyo. 1994).

On January 3, 1991, the Wyoming Department of Environmental Quality (DEQ) published a legal notice.[1] The notice announced DEQ's intention to renew Thunder Basin Coal Company's (TBCC) permit to conduct strip mining.[2] Powder River Basin Resource Council (PRBRC) successfully challenged the permit renewal and then claimed the right to receive attorney's fees from the DEQ under fee-shifting provisions in the Wyoming Environmental Quality Act (EQA).[3] This series of events ultimately forced the Wyoming Supreme Court to examine principles of sovereign immunity and define the State's obligation to pay attorney's fees under fee-shifting provisions in environmental legislation.[4]

The problem with DEQ's renewal of TBCC's permit was that it deviated from the original permit without observing the proper revision process.[5] PRBRC objected to the renewal on several grounds, including TBCC's addition of a permanent water impoundment.[6] The Wyoming

---

1. Brief of Petitioner at 1, Powder River Basin Resource Council v. Wyoming Environmental Quality Council, 869 P.2d 435 (Wyo. 1994) (No. 93-97) [hereinafter Brief of Petitioner]. Powder River Basin Resource Council (PRBRC) is the Petitioner; Wyoming Environmental Quality Council (EQC) is the Respondent.

2. *Id.*

3. Powder River Basin Resource Council v. Wyoming Environmental Quality Council, 869 P.2d 435 (Wyo. 1994) (*Powder River*).

4. The relevant fee-shifting provisions in this case are the Wyoming Environmental Quality Act, WYO. STAT. § 35-11-437(f) (1988) [hereinafter EQA], and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1275(d) (1986) [hereinafter SMCRA]. *See infra* text accompanying notes 11 and 22, respectively.

5. The DEQ failed to include in its legal notice that the permit renewal encompassed significant changes including the permanent water impoundment. Brief of the Petitioner *supra* note 1, app. at Exhibit C: The DEQ's original notice regarding the permit renewal of TBCC. January 3, 1991. *See also* Gillette News Record, January 3, 1991. This failure violated the DEQ public notice and comment requirements. *See infra* note 9.

6. PRBRC's objections related to the placement of permanent impoundment ponds, the mitigation of the effects of the mining, and the procedural failure to provide significant notice and opportunity for public participation required of significant revisions to the permit. Brief of the Respondent at 3, Powder River Basin Resource Council v. Wyoming Environmental Quality Council, 869 P.2d 435 (Wyo. 1994) (No. 93-97) [hereinafter Brief of Respondent]. *See also* Brief of the Petitioner, *supra* note 1, at 2.

Environmental Quality Council (EQC) had scheduled a hearing[7] when PRBRC, TBCC, and the DEQ entered into an enforceable settlement agreement.

In the settlement agreement the DEQ made two main concessions. First, the DEQ agreed to withdraw its conditional approval of TBCC's proposed water impoundment as part of the permit renewal.[8] Second, the DEQ agreed that "in the future, if [the DEQ] proposes to issue a permit renewal together with a significant permit revision, it will provide for applicable public notice and comment within a single notice."[9]

Following completion of the settlement agreement, PRBRC petitioned the DEQ to pay the attorney's fees it had incurred by participating in the administrative proceeding.[10] PRBRC petitioned for attorney's fees pursuant to Wyoming Statute section 35-11-437(f) (1988), which states:

> Whenever an order is issued under this section, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the director to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court or the director deems proper. This section shall apply to any administrative proceeding under this act as it provides for the regulation of surface coal mining and reclamation

---

7. The Environmental Quality Council issued a Notice of Hearing and Order on March 1, 1991, that required all parties to prepare a prehearing memorandum. The DEQ filed its prehearing memoranda five days later. PRBRC argued that the DEQ's prehearing memorandum was evidence that the DEQ was a party. Brief of Petitioner, *supra* note 1, at 2.

8. Brief of Petitioner, *supra* note 1, at 3. The settlement agreement states, "The permit does not authorize the impoundment as a final approved reclamation plan. However, DEQ/Land Quality Division (LQD) recognizes that Thunder Basin intends to file a permit revision application proposing the impoundment when the design is approved by the United States Forest Service and all DEQ/LQD technical requirements are met." Brief of Petitioner, *supra* note 1, app. at Exhibit G: The Settlement Agreement between the parties, including PRBRC, DEQ and TBCC. March 11, 1991 [hereinafter Settlement Agreement] at 3.

9. The settlement agreement indicated that the agreement concerning public notice and comment was pursuant to WYO. STAT. §§ 35-11-406(j) and (k) and the DEQ/LQD Rules and Regulations, Chapter 14, § 3. Brief of Petitioner, *supra* note 1, app. at Exhibit G: Settlement Agreement at 3.

10. *Powder River*, 869 P.2d at 439. *See also* Brief of Petitioner, *supra* note 1, at 3.

The EQC emphasized that according to DEQ regulations, the DEQ could have assessed PRBRC's attorney's fees against TBCC had PRBRC made such a request. Brief of Respondent, *supra* note 6, at 3. However, PRBRC intentionally sought an award only from the DEQ to clear up what it considered a clouded issue under Wyoming's EQA. Interview with Mark Squillace, Professor of Law at University of Wyoming, in Laramie, Wyoming (Aug. 22, 1994). Mark Squillace was the attorney representing PRBRC in the permit renewal proceedings and the subsequent settlement agreement.

> operations in accordance with P.L. 95-87 [SMCRA], as that law is worded on August 3, 1977.[11]

Initially, the DEQ responded positively to PRBRC's petition for attorney's fees. On July 19, 1991, through the Office of the Attorney General, the DEQ submitted a response which acknowledged that PRBRC was entitled to costs and expenses.[12] However, on November 22, 1991, the Director of the DEQ reversed the DEQ's position after the Wyoming Mining Association (WMA) and TBCC objected to any payment of fees.[13]

The basis for the DEQ's new decision not to pay attorney's fees was that the rules and regulations the Department promulgated to implement the EQA did not authorize an award against the DEQ.[14] When PRBRC petitioned the EQC, appealing the DEQ's decision, the EQC affirmed its holding on the sole ground that DEQ's rules did not provide for the payment of attorney's fees by the State.[15] On April 6, 1993, PRBRC and the EQC filed a Joint Petition for Certification of Appeal to the Wyoming Supreme Court.[16] On April 13, 1993, the Laramie County District Court entered an order certifying the appeal.[17]

On appeal, the Wyoming Supreme Court considered whether the fee-shifting provision of Wyoming Environmental Quality Act[18] authorized the DEQ/EQC to pay attorney's fees to PRBRC.[19] The court read the Wyoming Act as a state counterpart[20] to the federal Surface Mining Control and Reclamation Act (SMCRA).[21]

---

11. "This section" refers to WYO. STAT. § 35-11-437 which establishes procedures for enforcing Wyoming's surface coal mining regulations when violations occur.

12. *Powder River*, 869 P.2d at 439. *See also* Brief of Petitioner, *supra* note 1, at 3.

13. The Wyoming Mining Association was allowed to intervene and TBCC was permitted to continue as a party in this suit. *Powder River*, 869 P.2d at 436. *See* Brief of Petitioner, *supra* note 1, at 3-4. Both WMA and TBCC dropped out of the suit after PRBRC amended its complaint to include them as parties from whom it sought an award. Interview with Mark Squillace (Aug. 22, 1994), *supra* note 10.

14. Brief of Petitioner, supra note 1, app. at Exhibit A: DEQ Director's Finding of Fact Conclusions of Law, and Decision. November 22, 1991 at 6.

The court characterized the DEQ's position toward fee awards from the Department as a "silent rule." *Powder River*, 869 P.2d at 437. *See also infra* note 40.

15. Brief of Petitioner, *supra* note 1, at 6 and app. at Exhibit B: EQC Findings of Fact, Conclusions of Law and Order. February 4, 1993 at 3. *See also* Brief of Respondent, *supra* note 6, at 5.

16. Brief of Petitioner, *supra* note 1, at 4.

17. *Id.*

18. WYO. STAT. § 35-11-437(f) (1988).

19. *Powder River*, 869 P.2d at 437.

20. *Id.* at 438. *See also* Belle Fouche Pipeline Co. v. State, 766 P.2d 537, 544 (Wyo. 1988), which held that SMCRA is the federal counterpart to the Wyoming Environmental Quality Act.

21. 30 U.S.C. §§ 1201-1328 (1986).

SMCRA's fee-shifting provision states:

> Whenever an order is issued under this section, or as a result of any 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 proceeding, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.[22]

Utilizing case law which interpreted this federal provision, the court held that under Wyoming Statute section 35-11-437(f), the EQC has the authority to assess attorney's fees against the State.[23]

This casenote will examine two main issues. First, it will analyze the EQC's unsuccessful attempt to distinguish the application of Wyoming's fee-shifting provision in the EQA from the fee-shifting provision in SMCRA. Second, it will discuss how the Wyoming Supreme Court holding relates to principles of sovereign immunity.

BACKGROUND

Powder River is a significant decision in Wyoming law in part because it is the first time the Wyoming Supreme Court addressed Wyoming Statute section 35-11-437(f).[24] Although Wyoming had no precedent on this fee-shifting provision, this section will examine the existing relevant law which affected the *Powder River* decision. First, it will explain how the federal surface coal mining law correlates with Wyoming's law. Second, it will discuss fee-shifting provisions generally, and examine a few key federal cases which address fee-shifting provisions in environmental legislation.

---

22. 30 U.S.C. § 1275(e) (1986).

23. *Powder River*, 869 P.2d at 439. *See infra* text accompanying notes 121-22 for discussion of the court's use of federal case law.

24. In fact, PRBRC brought this suit specifically to create precedent. *See supra* note 10. The only other time the Wyoming Supreme Court has addressed a fee-shifting in the Wyoming EQA was in Stalkup v. State Department of Environmental Quality, 838 P.2d 705, 713-14 (Wyo. 1992) (holding that under Wyo. Stat. § 35-11-902(a) adjoining landowners could not bring an action for civil penalties and punitive damages). Note that § 35-11-901(a) is the Wyoming provision analogous to the SMCRA citizen suit provision, 30 U.S.C. § 1270, and the Wyoming provision was amended in 1995. *Id.* at 713 n.9. *See infra* note 50.

Surface Mining Control and Reclamation Act and the Wyoming Environmental Quality Act

The Surface Mining Control and Reclamation Act (SMCRA) is a federal statute designed to regulate surface coal mining.[25] SMCRA regulations are enforced in part through a fee-shifting provision.[26] Fee-shifting provisions are an exception to the American Rule, which ordinarily prevents the prevailing litigant from collecting attorney's fees.[27]

As a model of cooperative federalism,[28] SMCRA provides states with the opportunity to develop and administer their own regulatory programs.[29] Under SMCRA, states may assume primary jurisdiction over the regulation of surface coal mining and reclamation activities within the state as long as the state program is "in accordance with" SMCRA, "consistent with" the federal implementing regulations, and approved by the Secretary of the Interior.[30]

The standard SMCRA establishes for state compliance with the statute itself is higher than the standard for compliance with the Secretary's regulations. To be "in accordance with" SMCRA, the state laws and regulations must be "*no less stringent* than, meet the minimum requirements of and include all applicable provisions of the Act."[31] To

---

25. 30 U.S.C. §§ 1201-1328.

26. 30 U.S.C. § 1275(e) (1986). *See supra* text accompanying note 22 for statutory language. This provision provides the criteria a person must meet to have all costs and expenses assessed against either party as the court, or Secretary of the Interior deems proper. *Id.* Note that SMCRA has two fee-shifting provisions: 30 U.S.C. §§ 1270 and 1275(e) and the principal case relies solely on the latter. Note also that even though both provisions provide for fee-shifting, only 30 U.S.C. § 1270 is labeled as a "citizen suit" provision. *Id.*

Some commentators assert that, in general, fee-shifting provisions are enforcement mechanisms because they encourage citizens to bring enforcement suits. *See* Steven M. Dunne, *Attorney's Fees for Citizen Enforcement of Environmental Statutes: The Obstacles for Public Interest Law Firms*, 9 STAN. ENVTL. L.J. 1 (1990). *See also infra* note 58.

27. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). In the United States, in the absence of contrary statutory authority, the prevailing litigant is not entitled to collect attorney's fees from the loser. *Id. See also* Fleischman v. Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1976), elaborating on the American Rule.

28. Cooperative federalism refers to the distribution of power between the national and state governments while each recognizes the power of the other. BLACK'S LAW DICTIONARY 335 (6th ed. 1990).

29. 30 U.S.C. § 1253(a) (1986). *See also* Brief of Petitioner, Powder River Basin Resource Council v. Babbitt, at 12 (No. 93-8117) [hereinafter Babbitt Brief of Petitioner] [pending appeal]. *Babbitt* is another case which originated out of the same factual situation as the principal case. *See infra* text accompanying notes 44-55.

30. 30 U.S.C. § 1253(a)-(b). Note also that if the state does not develop a program, the federal government is obligated to adopt a program for that state. 30 C.F.R. § 1253(a).

31. 30 C.F.R. § 730.5(a) (emphasis added).

meet the "consistent with" standard, states must promulgate laws and regulations which are "*no less effective* than the Secretary's regulations in meeting the requirements of the Act."[32]

Once a state promulgates its regulatory scheme, the Secretary of the Interior may grant either conditional or unconditional approval of the state program.[33] The Secretary may conditionally approve a state program when the program contains minor deficiencies, but the state "agrees in writing to correct such deficiencies within a time . . . stated in the conditional approval."[34]

In response to SMCRA, Wyoming promulgated its state program in the Wyoming Environmental Quality Act,[35] and the Secretary conditionally approved Wyoming's program in November 1980.[36] One of the deficiencies the Secretary identified in the conditional approval involved Wyoming's fee-shifting provision.[37] To obtain final approval, the Department of Interior required that Wyoming "establish requirements which are consistent with the Federal attorneys' fees and intervention regulations in 43 C.F.R. part 4."[38] Despite this regulatory mandate, Wyoming did not correct the deficiencies. After several extensions by the Federal Office of Surface Mining (OSM), Wyoming had failed to comply by May 20, 1983, the final deadline.[39]

In response to the Secretary's conditions, Wyoming filed a petition with the OSM requesting exemption from the requirement that allows

---

32. 39 C.F.R. § 730.5(b) (emphasis added). Of course, states do not have to promulgate regulatory schemes. When states choose to do so, though, their programs must meet these standards, including presumably, waivers of sovereign immunity required by SMCRA's fee-shifting provision.

33. 30 C.F.R. § 732.13(j) (1993).

34. 30 C.F.R. § 732.13(j)(2), (3).

35. WYO. STAT. §§ 35-11-101 to -1428 (1988 & Supp. 1993).

36. 30 C.F.R. § 950.11(c). Approval or conditions for approval for each state's regulatory program are published in 30 C.F.R. §§ 906 to 950.35. *See also* Brief of Respondent, *supra* note 6, at 5 (citing 45 Fed. Reg. 78,637 (1980)).

37. For text of Wyoming's fee-shifting provision *see* text accompanying note 11.

38. 30 C.F.R. § 950.11(c). The federal attorney's fee regulations referred to in Wyoming's conditional approval are in part contained in 43 C.F.R. § 4.1294. Although under SMCRA's cooperative federalism model a state is supposed to perform the same duties the Office of Surface Mining (OSM) would, Wyoming's program was inconsistent with 43 C.F.R. § 4.1294(b), which states:

> Appropriate costs and expenses including attorneys' fees may be awarded—(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.

See also Babbitt Brief of Petitioner, *supra* note 29, at 12-13.

39. Powder River Basin Resource Council v. Babbitt, 834 F. Supp. 358, 359 (D.Wyo. 1993). *See also* 30 C.F.R. § 950.11(c).

attorney's fees to be assessed against a state.[40] However, the OSM never acted on Wyoming's petition or on Wyoming's failure to amend its program as required by 30 C.F.R. section 950.11(c).[41] The Secretary's conditional approval provided that Wyoming's program "will terminate unless the . . . conditions are fulfilled by the dates indicated."[42] However, neither the OSM nor the State of Wyoming took steps to ensure that the condition on the EQA's fee-shifting provision was met. The first action taken to amend the provision did not occur until PRBRC filed notice of intent to sue, pursuant to 30 C.F.R. section 1270, in *Powder River Basin Resource Council v. Babbitt*.[43]

Powder River Basin Resource Council v. Babbitt

Powder River Basin Resource Council v. Babbitt[44] *(Babbitt)* is a citizen suit initiated by PRBRC in federal district court in response to the DEQ/EQC's denial of its petition for attorney's fees.[45] Thus, this case was ongoing during the same time the principal case was pending appeal in the Wyoming Supreme Court.

PRBRC initiated this suit against the Secretary of the Interior, the Director of OSM, and the Director of Wyoming's DEQ.[46] Following notification of PRBRC's intent to sue, the OSM and the Wyoming EQC began rulemaking procedures to correct Wyoming's fee-shifting provision.[47] On October 22, 1992, Wyoming fulfilled the 1983 mandate to adopt rules which allowed for attorney fee awards against the State.[48]

---

40. According to the Respondent's brief, Wyoming intentionally did not promulgate a rule which would allow for an award of attorney's fees against the state. Nancy Fruedenthal, who worked on drafting the rules, expressly noted in a memorandum to the EQC that "I also eliminated the opportunity for someone to receive an attorney fee award from the department." Brief of Respondent, *supra* note 6, at 5 (citing R.A., Vol. II, p.144).

41. In 1985, the Casper office of the OSM advised Wyoming that "no action by Wyoming is necessary at this time. You will be informed if further action from Wyoming is needed." Brief of Respondent *supra* note 6, at 6 (citing R.A., Vol. II, p. 157).

42. 30 C.F.R. § 950.11.

43. *Babbitt*, 834 F. Supp. at 360. PRBRC filed notice of intent to sue on March 31, 1992, almost ten years after the "final" deadline to meet the Secretary's conditions. *Id.* 30 U.S.C. § 1270(b)(2) provides in part that no action may be commenced "under subsection (a)(2) . . . prior to sixty days after the plaintiff has given notice in writing of such action."

44. 834 F. Supp. 358 (D.Wyo. 1993).

45. The citizen suit provision in SMCRA gives federal district courts jurisdiction over actions "without regard to the amount in controversy or the citizenship of the parties." 30 U.S.C. § 1270(a).

46. *Babbitt*, 834 F. Supp. at 358. PRBRC sought compliance with 30 U.S.C. § 1253(a) and 30 C.F.R. § 732.13(j)(4). *Id.* at 360.

47. *Id.*

48. *Id.*

In light of the new EQC rules, the federal district court determined that "[t]he main issue in this case is whether rules adopted by the Wyoming [EQC] . . . should be applied retroactively to May 20, 1983."[49] The court granted summary judgment for the defendants because it found that the sovereign immunity provided in the Eleventh Amendment of the U.S. Constitution[50] protects Wyoming from retroactive monetary awards.[51]

PRBRC was concerned that the Wyoming Supreme Court would view the fact that the EQC amended its fee-shifting provision in response to PRBRC's federal suit as evidence that the old provision did not provide for fee awards.[52] However, instead of viewing the *Babbitt* decision as supporting the EQC's interpretation of the old rule, the Wyoming court used *Babbitt* to support PRBRC's position. EQC's amended rule indicated to the Wyoming Supreme Court that the "EQC's contention that no legal authority exists to award attorney fees to PRBRC is without merit."[53] The court looked at federal case law interpreting the "plain meaning" of section 1275(e) and found SMCRA did authorize fee awards.[54] The court then referred to *Babbitt* (and implicitly to the fact that the EQC had to amend its rule) to support its conclusion that the EQC's regulations must be "consistent with" the waiver of immunity in SMCRA's fee-shifting provision.[55]

---

49. *Id.* at 359. May 20, 1983 was the final deadline to satisfy the terms of the Secretary's conditional approval of Wyoming's surface coal mining regulatory scheme. 30 C.F.R. § 950.11.

50. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. This provision is the basis for state sovereign immunity.

The Statutory language in SMCRA recognizing state sovereign immunity limitations on actions taken against a state is found at 30 U.S.C. § 1270 which provides in part that:

> any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter—(2) *against* the Secretary or *the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution* where there is alleged a failure . . . to perform any act or duty under this chapter which is not discretionary.

30 U.S.C. § 1270(a) and (a)(2) (emphasis added).

It is important to distinguish, however, that *Babbitt* was brought under 30 U.S.C. § 1270, and the complaint in *Powder River* was based solely on 30 U.S.C. § 1275(e).

51. *Babbitt*, 834 F. Supp. at 361. The court also found that PRBRC's complaint was not ripe because the federal defendants had not yet decided whether Wyoming's program amendments were adequate. *Id.* at 362. According to Squillace, one of the reasons PRBRC is appealing this decision is because the court denied its request for leave to amend its complaint. Thus, PRBRC alleges that it was not given the opportunity to address the new EQC rules, since the EQC issued them after PRBRC had filed its complaint. Interview with Mark Squillace (Aug. 22, 1994), *supra* note 10.

52. Interview with Mark Squillace (Feb. 15, 1995), *supra* note 10.

53. *Powder River*, 869 P.2d at 439.

54. *Id.* at 438-39.

55. *Id.* at 439. The Wyoming Supreme Court stated in support of its holding that "since

Fee-shifting Provisions in Federal Environmental Legislation and Judicial Interpretation

Congress has attempted to encourage citizen enforcement suits[56] by including fee-shifting provisions in almost every major environmental statute since the 1970 Clean Air Act (CAA).[57] The purpose of fee-shifting provisions in environmental legislation is to create a financial incentive for bringing citizen suits or at least to combat the prohibitive cost of attorney's fees in such suits.[58]

While fee-shifting provisions allow courts to award attorney's fees to successful citizen-enforcers,[59] the imprecise language of these provisions

---

EQC's decision, a rule authorizing such an award against the department has been promulgated and adopted. *See Powder River Basin Resource Council v. Babbitt." Id.* at 439.

56. Citizen enforcement suits are statutorily authorized lawsuits which are prosecuted by private citizens to enforce a right created by the statute authorizing the lawsuit. Michael D. Axline, *Decreasing Incentives To Enforce Environmental Laws*, 13 WASH. U. J. URB. & CONTEMP. L. 257, at 258 n.6.

57. 42 U.S.C. § 7604 (1982). The exceptions to this generalization are the Marine Mammal Protection Act, 7 U.S.C. §§ 1361-1407 (1988), and the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1988). Axline, *supra* note 56, at 258 n.9 (1993). *See also* Dunne, *supra* note 26, at 1 n.2. For a full discussion of all twenty statutes containing citizen suit provisions *see* MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS app. A-A-1—A-A-9 (1991).

58. Dunne asserts: "Implicit in the fee-shifting statutes is the notion that the polluter should have to pay not only the usual penalties for its violations, but also the transaction costs to society (in the form of legal fees) that otherwise would have prevented enforcement of the law." Dunne, *supra* note 26, at 6.

In general, legislative history for fee-shifting provisions is meager. Attorneys sometimes use the legislative history of section 304(d) of the Clean Air Act (CAA) for fee award cases under other environmental legislation, because CAA contained the first citizen suit provision and Congress used the provision in CAA as a model. Dunne, *supra* note 26, at 1. The congressional goal in the CAA was to authorize fee awards "which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." S. REP. NO. 1011, 94th Cong., 2d Sess. 6 (1976), *quoted in* Save Our Cumberland Mountains v. Hodel, 857 F.2d 1516, 1521 (D.C. Cir. 1982) (en banc). *See also* Dunne, *supra* note 26, at 7, for legislative history regarding fee-shifting provisions in environmental statutes.

59. Dunne, *supra* note 26, at 3. Typically the Supreme Court uses the lodestar approach to calculate attorney's fees. To find the lodestar amount, the Court multiplies the reasonable number of hours expended times the appropriate hourly rate set by the marketplace. The lodestar approach was adopted by the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

The appropriate hourly rate will depend upon the market rate of the relevant community for attorneys of similar experience working on similar cases and upon the statute authorizing the court to award fees. *See* AXLINE, *supra* note 57, § 8.04 at 8-14. In the settlement agreement reached in the principal case, the parties settled on a lump sum payment. However, Mary Guthrie, counsel for the Attorney General's Office, agreed in a hearing before the EQC that the original petition for $110 per hour was a reasonable rate. Interview with Mark Squillace (March 14, 1995), *supra* note 10. *See infra* note 117.

leaves some practical questions open for the courts to decide.[60] As a result, courts have considerable discretion when making awards.[61]

In the last decade the U.S. Supreme Court has handed down several decisions which interpreted fee-shifting provisions narrowly[62] and applying defenses to citizen enforcement broadly.[63] While the Supreme Court has not addressed the states' fee-shifting provisions in SMCRA, it did examine a provision of the Clean Air Act[64] identical to section 1270 of SMCRA in *Ruckelshaus v. Sierra Club*.[65]

First, the *Ruckelshaus* Court found that, because the fee-shifting provision "affects" awards against the United States, the Court must consider principles of sovereign immunity when interpreting the statutory language.[66] The Court noted that statutory waivers of sovereign immunity must be "construed strictly in favor of the sovereign."[67] Thus, the Court

60. The fee-shifting provision in the CAA, which became the model for nearly identical provisions in other environmental statutes, states, "The court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate." 42 U.S.C. § 7604(d) (1982). *See also* Dunne, *supra* note 26, at 3.

A few questions which continue to draw considerable judicial attention are: 1) whether the party applying for fees is the type of party Congress intended to benefit from the attorney fee provision, 2) whether and to what extent is it "appropriate" to award attorney's fees, and 3) what is a "reasonable" amount to award? AXLINE, *supra* note 57, § 8.01 at 8-3. *See also* Dunne, *supra* note 26, at 3.

61. Most of the factors courts consider when calculating fees can work to severely limit awards. For example, courts may award fees only for hours expended on successful claims. Hensley v. Eckerhart, 461 U.S. 424, 435 (1983). They must therefore use their discretion in calculating the reduction of an award for partial success. Dunne, *supra* note 26, at 13-15.

Fee awards may also be reduced if the attorney fails to keep contemporaneous records or if the court is of the opinion that too much time was spent on the case. AXLINE, *supra* note 57, § 8.01, at 8-3. *See infra* note 135 and text accompanying note 69.

62. *See, e.g.*, Gwaltney v. Chesapeake Bay Found., Inc., 484 U.S. 49, 67 (1987) (holding that a complaint must allege that the defendant is "in violation" of the Clean Water Act at the time the complaint is filed, rather than that the defendant "has violated" the Act); Hallstrom v. Tillamook County, 493 U.S. 20, 31 (1989) (finding that prior notice of intent to file a citizen suit is a prerequisite to such suits, even if the defendant has actual notice through service of complaint); City of Burlington v. Dague, 112 S. Ct. 2638, 2639 (1992) (holding that the typical fee-shifting provision does not allow for contingency enhancements). Axline, *supra* note 56, at 257 n.3.

63. *See, e.g.*, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2139-40 (1992) (finding that the plaintiff's allegations of standing were insufficient to show "direct" injury from government action); Department of Energy v. Ohio, 112 S. Ct. 1627, 1634-35 (1992) (finding that Congress was not sufficiently clear in its waiver of sovereign immunity to subject federal agencies to civil penalties); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) (holding that plaintiffs must allege use of precise area affected by government land policies in order to establish standing); Chevron USA v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984) (stating that courts should defer to agency interpretation of statutes unless Congress has addressed the precise question at issue). Axline, *supra* note 56, at 257-58 n.4.

64. 42 U.S.C. § 7607(d).

65. 463 U.S. 680 (1983). For the statutory language of 30 U.S.C. § 1270 *see supra* note 50.

66. *Ruckelshaus*, 463 U.S. at 685.

67. *Id.* (citing McMahon v. United States, 342 U.S. 25, 27 (1951)).

asserted that it must carefully interpret a waiver of sovereign immunity so as not to enlarge the waiver beyond what the fair reading of the section's language requires.[68] Second, the Court concluded that, in light of the historical principles of fee-shifting, courts should require a party seeking an award to obtain some success on the merits before they become eligible for a fee award under the CAA.[69]

Ruckelshaus is relevant to *Powder River* because the EQC relied on it and other cases to argue that the court had an obligation to narrowly interpret Wyoming's waiver of sovereign immunity.[70] The EQC asserted that the EQA provision does not authorize fee awards from the State except in enforcement and adversary proceedings. Thus, the EQC concluded that an assessment of attorney's fees, absent express authority, would abrogate Wyoming's sovereign immunity.[71]

Another relevant federal case is *Illinois South Project, Inc., v. Hodel.*[72] *Illinois South* is important in understanding the principal case because, like the Wyoming Supreme Court, the Seventh Circuit Court of Appeals addressed the state's obligation to pay fee awards under the same SMCRA fee-shifting provision discussed by the Wyoming Supreme Court.[73] Unlike the Wyoming Supreme Court, though, the *Illinois South* court found that the language in section 1275(e), which states that costs "may be assessed against either party," precludes an award against the agency (state or federal).[74] The court reasoned that in administrative proceedings the agency cannot be a "party" to a proceeding because it is the adjudicator.[75] Therefore, the Seventh Circuit concluded that "[n]o statute authorizes the award of fees against the agency to a party who prevails in proceedings before the agency, and . . . the doctrine of [state] governmental immunity therefore would bar such an award."[76]

The Wyoming Supreme Court, of course, was not bound by the *Illinois South* decision. However, the *Illinois South* holding does pro-

68. *Id.* (citing Eastern Transportation Co. v. United States, 272 U.S. 675, 686 (1927)).

69. *Id.* at 686.

70. The EQC also relied on Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 267-68 n.42 (1975) (attorneys fees and costs will not be assessed against the government unless expressly provided for by statute), and Bennett v. Department of Navy, 699 F.2d 1140, 1143 (D.C.Cir. 1983) (a statute awarding attorney's fees against the government must be strictly construed because it involves the abrogation of sovereign immunity). Brief of Respondent *supra* note 6, at 21.

71. Brief of Respondent, *supra* note 6, at 21.

72. 844 F.2d 1286 (7th Cir. 1988).

73. *Illinois South*, 844 F.2d at 1294-95.

74. *Id.* at 1294.

75. *Id.*

76. *Id.*

vide an alternative to the court's analysis of SMCRA's fee-shifting provisions discussed below.

PRINCIPAL CASE

In *Powder River*, the Wyoming Supreme Court found that Wyoming Statute section 35-11-437(f) authorizes the DEQ to award fees.[77] Thus, the court reversed the Wyoming EQC's ruling that the agency had no authority to provide attorney's fees to the citizen group PRBRC after PRBRC had substantially prevailed in its administrative action against the DEQ.[78]

Justice Golden wrote the opinion for the unanimous court in *Powder River*. He began by analyzing the DEQ Director's decision to deny fees.[79] The court found that the Director had based his decision on a "statement of principal reasons for adoption" filed with the EQC rules.[80] The court explained that, from this statement, the Director had discerned an intent by the EQC to adopt rules which limited awards from the DEQ, despite the fact that the EQC rules did not address the issue.[81]

The court did not find the Director's analysis persuasive. Relying on Wyoming Statute section 16-3-114(c)[82] and *Jackson v. State*,[83] the court asserted that "a silent rule is not a bar to agency action which is authorized by statute."[84] Therefore, Justice Golden determined that the issue was whether Wyoming's statute authorized an award from the state, and this issue, he concluded, was necessarily a question of statutory interpretation.[85]

---

77. *Powder River*, 869 P.2d at 437-39. The EQC had proposed four issues but the court, citing WYO.R.APP.P. 12.09(a), determined that it was confined to issues presented in the petition and raised before the agency. In effect, the court precluded EQC's waiver issue but addressed its sovereign immunity issue.

The court also noted that the Wyoming legislature amended WYO. STAT. 35-11-437(f) (1988) to apply to all actions filed on or after the effective date, March, 1993. 1993 WYO. SESS. LAWS, ch 154 § 3. *Id.* at 437 n.1.

78. *Powder River*, 869 P.2d at 436. *See supra* text accompanying note 69 for the significance of "substantially prevailing" on the merits of a case.

79. *Powder River*, 869 P.2d at 437.

80. *Id. See also* Brief of the Petitioner, *supra* note 1, app. at Exhibit A: Director's Finding of Fact, Conclusions of Law and Decision, at 9.

81. *Powder River*, 869 P.2d at 437.

82. *Id.* at 439. WYO. STAT. § 16-3-114(c) (1990) is part of the Wyoming Administrative Procedures Act, and requires reviewing courts to compel agency action unlawfully withheld.

83. 786 P.2d 874, 880 (Wyo. 1990) (holding that an agency may not disregard a controlling statute).

84. *Powder River*, 869 P.2d at 437.

85. *Id.* Justice Golden articulated the proper standard of review for any conclusion of law: "If the conclusion . . . is in accordance with law, it is affirmed and if it is not in accordance with law, it is to be corrected." *Id.* at 437 (quoting Parker Land & Cattle Co. v. Wyo. Game & Fish Comm'n, 845 P.2d 1040, 1042 (Wyo. 1993)).

Using Parker Land & Cattle Co. v. Wyoming Game & Fish Commission[86] as a reference, Justice Golden stated and applied Wyoming's principles of statutory construction.[87] He explained that the first step is to determine whether the statutory language is clear or ambiguous.[88] If the language is clear,[89] the court looks at the plain and ordinary meaning of the words.[90] While the court can resort to extrinsic aids like legislative history and rules of construction, it need not look further than the text if the text is not subject to varying interpretations.[91]

The court then turned to the EQC's arguments. The court concluded that the "thrust" of EQC's argument was that the court should read the administrative proceeding language in the Wyoming EQA[92] as applying only to those enforcement actions against the permittee which result in an order by the agency.[93] Therefore, the EQC argued, the settlement agreement should preclude an attorney fee award because the agency had issued no order.[94] The court quickly dispensed with this argument in a footnote, stating that "[r]esolution by a settlement agreement does not prevent eligibility for attorney fees."[95]

EQC's alternative argument was that a mine permit renewal is not an enforcement action, and the administrative agency can never be a "party."[96] Addressing these contentions, the court relied on two federal cases: *Utah International, Inc. v. Department of the Interior*[97] *(Utah International)* and *Natural Resources Defense Council, Inc. v. Office of Surface Mining Reclamation and Enforcement*[98] *(NRDC)*.

---

86. 845 P.2d 1040 (Wyo. 1993). *See generally* Leonard R. Carlman, Note, *WILDLIFE-PRIVATE PROPERTY DAMAGES LAW-Once upon a time in Wyoming there was room for millions of cattle and enough habitat for every species of game to find a luxurious existence.* Parker Land Cattle Company v. Wyoming Game and Fish Commission, 845 P.2d 1040 (Wyo. 1993). 29 LAND & WATER L. REV. 89 (1994).

87. *Powder River*, 869 P.2d at 438.

88. *Id.*

89. Statutory language is clear when reasonable people can consistently and predictably agree to its meaning. *Id.* (citing *Parker*, 845 P.2d at 1043).

90. *Id.* (citing *Parker*, 845 P.2d at 1045).

91. *Id.*

92. WYO. STAT. § 35-11-437(f) provides in part that "[t]his section shall apply to any administrative proceeding under this act." For full text, *see supra* text accompanying note 11.

93. *Powder River*, 869 P.2d at 438.

94. *Id.*

95. *Id.* at 439 n.6. The court supported this conclusion by explaining that "Wyoming's APA authorizes agencies to informally dispose of a contested case by agreed settlement in appropriate circumstances. WYO. STAT. § 16-3-107(n) (1990 & Supp. 1993)." *Id.*

96. *Powder River*, 869 P.2d at 438. In making this argument the Respondent relied on *Illinois South*. *See generally* Brief of Respondent, *supra* note 6, at 14-20. *See also supra* text accompanying notes 72-76 and *infra* text accompanying notes 123-30 for discussion of *Illinois South*.

97. 643 F. Supp. 810 (D. Utah 1986).

98. 96 Interior Dec. 83, 107 IBLA 339 (1989).

Both *Utah International* and *NRDC* are cases from the Interior Department's Interior Board of Land Appeals (IBLA) which interpreted the fee-shifting provision in SMCRA.[99] The Wyoming Supreme Court's reliance on these federal cases is perhaps the linchpin of the *Powder River* decision. The Wyoming court held that, since "Wyoming implemented the policy of the SMCRA," it can utilize *Utah International* and *NRDC* in construing the Wyoming statute.[100] Therefore, the court applied the IBLA's analysis of the fee-shifting provision of SMCRA to the analogous provision in the EQA.[101]

The Wyoming Supreme Court closely examined the IBLA's analysis of two types of administrative proceedings.[102] In the first situation in *Utah International*, environmental groups participated in a proceeding and were aligned with the Department during litigation.[103] In the second situation, the groups opposed the Department.[104] The *Utah International* court distinguished the Department's role in the two situations, holding that only when the groups opposed the Department was the Department a party to the action and thus only in the latter situation was an award of fees against the Department appropriate.[105]

Utah International limited awards under the federal provision to "proceedings related to the enforcement scheme of the Act."[106] The EQC contended that, under the *Utah International* analysis, the court should interpret the "administrative proceeding" language[107] as allowing awards

---

99. *See supra* text accompanying note 22 for statutory language of SMCRA's fee-shifting provision.

100. *Powder River*, 869 P.2d at 438 (quoting Belle Fouche Co. v. State, 766 P.2d 537, 548 (Wyo. 1988) and referring to Apodaca v. State, 627 P.2d 1023 (Wyo. 1981)). In *Belle Fouche* the court held that SMCRA is the federal counterpart to Wyoming's EQA. 766 P.2d at 544. In *Apodaca* the court held that case law construing a statute of another jurisdiction from which the legislature derived its statute is persuasive authority. 627 P.2d at 1027.

101. *Powder River*, 869 P.2d at 438. The provision analogous to the Wyoming provision under litigation is 30 U.S.C § 1275(e). *See supra* text accompanying note 22 for federal provision.

102. *Utah International*, 643 F. Supp. at 812-13, 818, 820-21, 827. The facts in this case concerned the designation of certain land as unsuitable for surface coal mining. *Id.* at 812. The Sierra Club, Environmental Defense Fund (EDF) and other groups were aligned with the Department during the unsuitability proceedings and subsequent litigation defending that decision. *Id.* at 813. In another related case the Sierra Club and EDF brought counterclaims and cross-claims against the government for moving to remand the unsuitability decision. *Id.* at 827.

103. *Id.* at 820-21.

104. *Id.* at 821.

105. *Id.* at 820. *See also Powder River*, 869 P.2d at 439.

106. *Utah International*, 643 F. Supp. at 824. *See also Powder River*, 869 P.2d at 439 n.4.

107. WYO. STAT. § 35-11-437(f) (1988) states: "*This section shall apply to any administrative proceeding* under this act as it provides for the regulation of surface coal mining and reclamation operations." (emphasis added). *See supra* text accompanying note 11 for full provision.

from the permittee only for enforcement actions which resulted in an order by the agency.[108] The Wyoming Supreme Court concluded that, despite its duty to strictly construe statutes which waive the State's sovereign immunity, EQC's narrow interpretation of *Utah International* was without merit.[109]

Instead, the court turned to *NRDC*[110] for an analysis more consistent with its own sense of the "plain and ordinary meaning" of the "administrative proceeding" language.[111] The court in *NRDC* applied *Utah International's* interpretation of the "administrative proceeding" language to mine permit renewal proceedings.[112] *NRDC*'s holding relied on a footnote in *Utah International* which stated in part that "proceedings involving the Act's enforcement scheme are also necessarily adjudicatory proceedings."[113] Thus, *NRDC* held that permit renewals, even though adjudicatory, were proceedings related to the Act's enforcement scheme.[114]

The Wyoming Supreme Court found *NRDC* persuasive: "We agree with the *NRDC* case which considered similar arguments and interpreted the *Utah International* decision to state that permit reviews were related to the enforcement scheme of the Act."[115] Therefore, the court found that once PRBRC opposed DEQ's decision to renew TBCC mine permit, the DEQ became a "party" and was subject to the Wyoming fee-shifting provision.[116] Having determined that the DEQ has the authority to grant attorney's fees, the court remanded and instructed the agency to decide whether PRBRC was entitled to attorney's fees for its appeal.[117]

---

108. *Powder River*, 869 P.2d at 438.

109. *Id.* The court stated that "our reading of [*Utah International*] convinces us that the plain meaning of the statute is not subject to varying interpretations, and such a narrow interpretation is without merit." *Id.*

The court does not cite any authority in this discussion, but since EQC's argument relies on the *Ruckelshaus* decision, the court's language is presumably referring to it. *Ruckelshaus*, 463 U.S. at 685. *See* Brief of Respondent, *supra* note 2, at 21. *See also supra* text accompanying notes 65-69 for discussion of *Ruckelshaus*.

110. 96 Interior Dec. 83 (1989).

111. *Powder River*, 869 P.2d at 438.

112. *NRDC*, 96 Interior Dec. at 94.

113. *Utah International* at 824 n.25. The rest of the footnote states, "Adjudicatory proceedings require an expertise that only an attorney possesses. This fact lends further support to the position that an award is authorized only for certain types of administrative proceedings." *Id.*

114. *NRDC*, 96 Interior Dec. at 94. *See also Powder River*, 643 P.2d at 439.

115. *Powder River*, 869 P.2d at 439 (citing *NRDC*, 96 Interior Dec. at 94).

116. *Powder River*, 869 P.2d at 439.

117. *Id.* The court reminded the DEQ that it had already decided that PRBRC would be eligible for attorney's fees for its successful negotiation of a settlement agreement. *Id.*

Note also that after the court handed down this holding, the DEQ and PRBRC entered into a settlement agreement in which the DEQ paid PRBRC for both the original litigation and the appeal. Interview with Mark Squillace (Aug. 22, 1994), *supra* note 10.

ANALYSIS

In *Powder River* the court made several important determinations which affect Wyoming law. This section will analyze how the Wyoming Supreme Court decision relates to state sovereign immunity. It also will identify some of the effects of *Powder River* and reflect on whether the holding is consistent with the congressional intent behind SMCRA.

Effects of Powder River *on Principles of State Sovereign Immunity*

The court's holding relates to state sovereign immunity principles in two important ways. First, by minimizing the differences between the fee-shifting provisions in the Wyoming EQA and SMCRA, the court rejected EQC's argument that the state provision provides a more narrow waiver of immunity than the federal provision.[118] The Wyoming provision deviates from the federal provision by excluding the phrase "or as a result of any administrative proceeding under this chapter" in the first sentence and by adding a sentence at the end: "This section shall apply to any administrative proceeding under this act as it provides for the regulation of surface coal mining and reclamation operations in accordance with P.L. 95-87 [SMCRA], as that law is worded on August 3, 1977."[119]

The EQC contended that these deviations warranted an interpretation of Wyoming's waiver of immunity as limited to enforcement or adversary proceedings which result in an order by the agency.[120] In effect, the EQC was arguing that the Wyoming EQA did not grant express authority to assess fees against the State in PRBRC's situation and in the absence of express authority, an assessment of attorney's fees would abrogate Wyoming's sovereign immunity. By utilizing the IBLA's analysis of the federal provision to interpret the Wyoming provision, though, the court ignored the differences between the two provisions.[121] Thus, the court implicitly rejected that Wyoming's sovereign immunity could provide a basis for a more limited interpretation of the waiver required by SMCRA.[122]

---

118. *Powder River*, 869 P.2d at 438.

119. WYO. STAT. § 35-11-437(f). For entire language of this provision *see supra* text accompanying note 11.

120. *Powder River*, 869 P.2d at 438. *See* Brief of Respondent, *supra* note 6, at 21-22. *See supra* text accompanying notes 107-09.

121. In fact, the court commented on the similarities between the two provisions. *Powder River*, 869 P.2d at 438 n.3.

122. 30 U.S.C. § 1275(e).

The second way the court affected the extent of Wyoming's sovereign immunity was by implicitly rejecting the analysis in *Illinois South*.[123] The court in *Illinois South* did find that Illinois' sovereign immunity provided some discretion when adopting the waiver required by SMCRA.[124] The court reasoned that satisfying SMCRA's requirement that state programs be "consistent with" the federal regulations depends more on the ability of a state to achieve the objectives of the federal rule than on selection of identical means. Thus, the court stated: "Congress did not require states to implement federal regulations jot and tittle. States may select their own devices, provided that they head in the direction the federal rules point and get as far."[125] Thus, under *Illinois South's* analysis, limiting awards from the state to enforcement and adversary proceedings may be "no less effective" than the federal regulation and therefore, within Wyoming's discretion to "select [its] own devices."[126]

While the court in *Powder River* never directly rejected *Illinois South*, it is clear from the court's decision that it did not agree.[127] Under *Powder River's* analysis, Wyoming cannot adopt a rule which deviates in any way from the congressional mandate in 30 U.S.C. section 1275(e).[128] When the Wyoming Supreme Court found that EQC's rule was not "in accordance with" the plain meaning of SMCRA,[129] it implicitly rejected the contention that sovereign immunity could provide Wyoming with discretion to "select

123. 844 F.2d 1286 (7th Cir. 1988). *See supra* text accompanying notes 72-76 for discussion of *Illinois South*.

124. 844 F.2d 1286 (7th Cir. 1988). The Seventh Circuit found that "parties" to an administrative proceeding, under SMCRA's fee-shifting provision, could not include the agency because it is the adjudicator. *Id.* at 1294. Note this holding directly contradicts the holding in *NRDC*. *See supra* text accompanying notes 96-114 for discussion of *NRDC*.

The court also found that 43 C.F.R. § 4.1294 was not binding on the states. *Illinois South*, 844 F.2d at 1295. Section 4.1294 provides, in part, that attorney's fees may be awarded, "from OSM to any person . . . who initiates or participates in any proceeding under the Act." For full text of 43 C.F.R. § 4.1294 *see supra* note 38. The *Illinois South* court asserted that "section 4.1294 *permits but does not require* the federal agency to award attorney's fees to helpful parties." *Illinois South*, 844 F.2d at 1295 (emphasis added).

125. *Illinois South*, 844 F.2d at 1295.

126. *See supra* text accompanying notes 29-30 for SMCRA definitions of "consistent with" and "in accordance with." The counter argument to *Illinois South's* approach is that limiting awards from Wyoming to enforcement or adversary proceedings which result in an order from the agency is not "as effective as" the Department of Interior's application of the federal provision.

127. The Wyoming Supreme Court, of course, was not bound to address *Illinois South*. However, the fact that the court embraced some federal case law, but never reconciled its holding with *Illinois South*, weakens its analysis.

128. *See supra* text accompanying notes 29-30 for discussion of congressional mandate. Also note that by minimizing the differences between the Wyoming and federal provisions, the court, in effect, made the changes mandated in Wyoming's program by the Secretary's conditional approval unnecessary.

129. *Powder River*, 869 P.2d at 439.

[its] own devices." Thus, *Powder River* indicates that the Wyoming Supreme Court will not deviate from the IBLA's interpretation of the fee-shifting provision in SMCRA and it perhaps suggests that the court will defer to other IBLA interpretations of SMCRA provisions.[130]

Effects on Wyoming Law

Powder River affects Wyoming law in three possible ways. First, the analysis in *Powder River* provides attorneys with a new interpretive tool. The court had previously found in *Apodaca* that, when the Wyoming legislature adopts a statute from another jurisdiction, the case law construing the statute from that jurisdiction is persuasive authority.[131] The court extended *Apodaca* when it applied it to SMCRA, a cooperative federalism model. Since cooperative federalism statutes usually authorize a federal agency to oversee state implementation, it is likely that when the court interprets a statute which follows a cooperative federalism model, it will look to the federal agency's interpretation of the law for persuasive authority.[132]

Second, the holding ensures an attorney, who takes a citizen suit to enforce the surface coal mining regulations in the EQA, that the director of the DEQ (or the court) has the authority to assess attorney's fees against the State.[133] Of course, attorney's fees will still be limited by the director's interpretation of "reasonable fees,"[134] and still contingent on the party having at least partial success on the merits.[135]

---

130. Other federal laws which follow a cooperative federalism model also require states to provide for citizen enforcement of any state programs developed to implement the federal laws. For example, the Clean Water Act provides:

> Public participation in the development, revision and enforcement of any regulations, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.

33 U.S.C. § 1251(e).

See Citizens For A Better Environment v. EPA, 596 F.2d 720 (7th Cir. 1979) (upholding the requirement for citizen participation in enforcement of the Clean Water Act).

Since Congress has included similar fee-shifting provisions in almost every major environmental statute in the last twenty years, the Wyoming Supreme Court's holding to enforce fee awards from the State may indicate the approach the court might take when interpreting other fee-shifting provisions in environmental statutes which follow the cooperative federalism model. *See* AXLINE, *supra* note 57, § 4.02 at 4-2. *See also* Dunne, *supra* note 26, at 1.

131. *Apodaca*, 627 P.2d at 1027. *See supra* note 100.

132. *See supra* text accompanying note 38 for an example of how a federal agency oversees state implementation.

133. *Powder River*, 869 P.2d at 439.

134. Fee-shifting provisions generally allow for "reasonable fees." *See supra* notes 58 and 59 for a discussion of "reasonable fees."

135. The court in *Utah International* held that while judges have wide discretion in awarding fees, a petitioner can recover only for work spent on successful issues. 654 F. Supp. at 816, 826-27.

Finally, by ensuring that fees are available when appropriate, the court encourages citizen enforcement suits.[136] Encouraging citizen suits is important because it effectuates congressional intent[137] and because it provides a mechanism for enforcing environmental regulations against the government. According to the legislative history, "providing citizens access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of [SMCRA]."[138] Government agencies are among the worst violators of environmental laws.[139] Private enforcement is therefore essential because it provides arguably the only means of enforcing environmental laws against government agencies.[140] Thus, when the Wyoming Supreme Court found that the DEQ had the authority to assess attorney's fees against the State, it provided citizens and their attorneys with an incentive to bring SMCRA citizen enforcement suits against the State.

CONCLUSION

The *Powder River* decision addressed a question which had clouded the fee-shifting provision in the EQA since the Secretary of the Interior conditionally approved Wyoming's surface coal mining regulatory program over ten years ago. It affirmatively answered the question whether, under Wyo. Stat. section 35-11-437(f), the DEQ had the authority to assess fees against the State.

In so deciding, the Wyoming Supreme Court went against the recent federal judicial tendency to limit fee-shifting provisions in environmental legislation.[141] By holding that the court can use federal

---

The court in *NRDC* elaborated on this precedent by recognizing three categories of claims: 1) successful; 2) unsuccessful but sufficiently related to the successful claims to warrant an award for time spent thereon; and 3) unsuccessful and unrelated. The first two categories result in an award; the third does not. 107 IBLA at 367-369, (citing *Hensley*, 461 U.S. at 436; *Utah International*, 643 F. Supp. at 826). Mark Squillace, *Awards of Costs, Including Attorney Fees, Under SMCRA*, (on file with Land and Water Law Review). *See supra* text accompanying note 69.

136. *See supra* text accompanying notes 56-58.

137. The court in *Utah International* examined the legislative history of the relevant fee-shifting provision, 30 U.S.C. § 1275(e), and found that Congress enacted it to encourage citizen participation in enforcement activities because such participation is essential to effectuating SMCRA. 643 F. Supp. at 822-25. *See also* Squillace, *supra* note 135, at 2.

138. Act of Aug. 3, 1977, Pub. L. No. 95-87, 1977 U.S.C.C.A.N. (91 Stat.) 593, 625.

139. Michael D. Axline et al., *Stones For David's Sling: Civil Penalties In Citizen Suits Against Polluting Federal Facilities*, 2 J. ENVTL. L. & LITIG. 1, 4-7 (1987). *See also* Axline, *supra* note 56, at 270 n.55.

140. Axline, *supra* note 56, at 270.

141. *See* text accompanying notes 62-63.

case law to interpret Wyoming's provision, the court implicitly found that state sovereign immunity could not limit the waiver SMCRA explicitly requires for approval of state programs.[142]

Finally, *Powder River* is consistent with the congressional intent behind fee-shifting provisions in environmental legislation.[143] By ensuring that attorney fees can be assessed against the State, the court encourages citizens to bring SMCRA enforcement suits in Wyoming.

JENNIFER PAIGE HANFT

142. 30 U.S.C. § 1253. *See* text accompanying notes 29-30.
143. *See* text accompanying notes 136-40.