

STATE OF INDIANA )  
 ) SS:  
COUNTY OF MARION )

MARION COUNTY SUPERIOR COURT  
CIVIL DIVISION NO. 1  
CAUSE NO. 49D01-0804-PL-018489

HOOSIER ENVIRONMENTAL COUNCIL, INC., )  
 )  
Petitioner - Claimant Below, )  
 )  
v. )  
 )  
INDIANA DEPARTMENT OF NATURAL RESOURCES )  
 )  
Respondent - Respondent Below. )

**FILED**

DEC 22 2008

94

*Elizabeth J. White*  
CLERK OF THE MARION CIRCUIT COURT

**FINAL ORDER GRANTING SUMMARY JUDGMENT  
AND ADDITIONAL AWARD OF ATTORNEY'S FEES AND LITIGATION EXPENSES**

This matter is a judicial review initiated by Petitioner Hoosier Environmental Council ("HEC"), pursuant to Ind. Code §§ 4-21.5-5-1 *et seq.*, of the final order of the Natural Resources Commission ("NRC") issued March 20, 2008 ("Third NRC Fee Order") in *Hoosier Environmental Council v. Indiana Department of Natural Resources*, Administrative Cause No. 97-065R.

This is the third round of judicial review in a series of proceedings (collectively "HEC Fee Proceedings") extending back to 1999. The subject matter of the HEC Fee Proceedings is HEC's request for an award of attorney's fees and litigation expenses pursuant to Ind. Code § 14-34-15-10 and 312 IAC 3-1-13(d). The statute and regulation in question are elements of a comprehensive framework of state and federal law for the regulation of the surface mining of coal. They are intended to encourage participation by citizens groups like HEC in the enforcement of this regulatory framework by providing for the payment of their reasonable attorney's fees and litigation expenses under circumstances including those involved here. HEC's fee and expense request relates to its participation in (a) all phases of underlying proceedings before the NRC and the Daviess Circuit Court relating to an amendment to a coal combustion waste ("CCW") disposal permit issued by Respondent Department of Natural Resources ("DNR") to the Foertsch Construction Company (collectively "Foertsch Permit Proceedings") and (b) all phases of the HEC Fee Proceedings. By its pending Verified Petition

for Review, HEC seeks to have the Court enter an order that sets aside the Third NRC Fee Order, to the extent that it is contrary to applicable law, and thereafter remand the case to the NRC for entry of a modified order that awards HEC fees and expenses in accord with the applicable law.

This matter comes before the Court at this time on the Parties' Cross-Motions for Summary Judgment, filed and served on September 30, 2008. By its Motion, HEC claims that no genuine issue of material fact exists and HEC is entitled to judgment as a matter of law that the Third NRC Fee Order is contrary to law because it awards HEC most but not all of the fees and expenses to which it is legally entitled for the Foertsch Permit Proceedings in their entirety and the HEC Fee Proceedings through May 31, 2002. By its Motion, DNR agrees that there is no genuine issue of material fact but argues that Third NRC Fee Order is lawful and reasonable in all respects and should be affirmed.

#### **ISSUES FOR DECISION**

Respondent DNR no longer contests that HEC is entitled the fees and expenses awarded by the Third NRC Fee Order, i.e. \$99,154.57. Accordingly, by separate order, the Court has granted HEC's Verified Motion for an Interim Award of Uncontested Attorney's Fees and Litigation Expenses and directed DNR to pay HEC this amount within thirty days.

Thus, the issues before the Court now involve only three different disallowances made in the Third NRC Fee Order which HEC has challenged on judicial review as contrary to the law of the case generally and specifically to the final order entered in July, 2007, in the immediately preceding round of judicial review by the Honorable Michael D. Keele, Judge, Marion Superior Court, Civil Division No. 12.

In particular, the three fee and expense items actually at issue before the Court at this time are:

1. The attorney's fees and expenses to be awarded for the services of HEC's now deceased former attorney, Max Goodwin, during the Objections and Judicial Review Phases of the underlying Foertsch Permit Proceedings;
2. The litigation expenses to be awarded for the wages and expenses of HEC employees Fry, Waldo, and Stant for their services as paralegal assistants to attorney Goodwin during the Objections and Judicial Review Phases of the underlying Foertsch Permit Proceedings; and

3. The recovery percentage to be applied to HEC's otherwise allowable fees and expenses in the current Fee Proceedings for the period through May 31, 2002.

**FINDINGS OF UNDISPUTED FACTS MATERIAL TO ISSUES TO BE DECIDED**

There is no dispute between the Parties on judicial review that the Third NRC Fee Order made the following disallowances to HEC's request for attorney's fees and litigation expenses:

1. Disallowed any compensation for 30.0 of attorney Goodwin's hours previously allocated by the Commission to the Objections and Judicial Review Phases of the Foertsch Permit Proceedings because "the hours cannot be reasonably separated [between the Permit and Fee Proceedings] to provide the appropriate award percentage." Supp. R. 82, Findings 249 & 250. At the \$150 hourly rate which the Commission previously allowed for Goodwin's time, this disallowance amounts to \$4,500.00.

2. Disallowed any compensation for 61.5 hours of HEC employee Stant's hours previously allocated by the Commission to the Objections and Judicial Review Phases of the Foertsch Permit Proceedings because "Stant's time sheets provide insufficiently detailed information by which to ascertain how many, if any, of those 61.5 hours relates to the Fee Proceeding Phase or the Judicial Review Phase such that appropriate percentage calculations may be made." Supp. R. 84, Finding 267. At the \$20 hourly rate which the NRC previously allowed for Stant's time, this disallowance amounts to \$1,230.00.

3. Compensated HEC for only 37.5% of the following: (a) The remaining 93.75 Goodwin hours previously allocated by the Commission to the Objections and Judicial Review Phases, for a disallowance of \$8,789.06; (b) Goodwin's expenses allocated to the Objections and Judicial Review Phases, for a disallowance of \$1,041.03; (c) HEC employee Fry's wages and expenses for the Judicial Review Phase, for a disallowance of \$2,227.82; and (d) HEC employee Waldo's wages and expenses for the Judicial Review Phase, for a disallowance of \$70.62. The NRC made these disallowances because, "mathematically, success on three of eight issues warrants an award of 37.5% of the fees sought by HEC for the Commission Objections [and Judicial Review] Phases." Supp. R. 67 & 69, Findings 143-144 & 154.

4. Reflects the disallowances in the Permit Proceedings referenced above by applying a recovery percentage of 57.0% to the amount of fees and expenses found by the Commission to

be otherwise allowable for the Fee Proceedings through May 31, 2002, resulting in a disallowance of \$3,628.60. Supp. R. 86, Finding 282, esp. n. 12.

5. In sum, disallowed \$17,858.53 for the Objections and Judicial Review Phases of the Foertsch Permit Proceedings and \$3,628.60 for the HEC Fee Proceeding through May 31, 2002, for a total disallowance of \$21,487.13.

### **CONCLUSIONS OF LAW**

1. The Court is not bound by the NRC's interpretation of the law and is free to decide any legal question that arises out of the HEC Fee Proceedings. *See Indiana Civil Rights Comm'n v. Alder*, 714 N.E.2d 632, 635-636 (Ind. 1999)."

2. Interpretations of statutes are questions of law and the Court is not bound by the NRC's interpretation of the meaning and effect to be given to Ind. Code § 14-34-15-10 and 312 IAC 3-1-13(d) in reviewing the Third Fee Order. *See Indiana Dep't of Pub. Welfare v. Payne*, 622 N.E.2d 461, 465 (Ind. 1993); *Indiana Family & Social Services Admin. v. Culley*, 769 N.E.2d 680, 682 (Ind. Ct. App. 2002). Furthermore, the NRC's findings of ultimate fact, defined as factual conclusions inferred from basic facts, are subject to a reasonableness standard of review. *See Weatherbee v. Indiana Civil Rights Comm'n*, 665 N.E.2d 945, 947 (Ind. Ct. App. 1996). Whether an ultimate fact is a reasonable inference from the basic facts is a question of law properly subject to *de novo* review and determination by the court. *Id.*

3. In issuing its Third Fee Order on remand following Judge Keele's July 7, 2007 Order, the NRC was limited by the "law of the case" doctrine and the "mandate" rule.

4. Under the law of the case doctrine, a reviewing court's determination of a legal issue is binding both on remand and on any subsequent appeal, given the same case with substantially the same facts. All issues decided directly or implicitly in a prior decision are binding on all subsequent portions of the case. The doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided. The doctrine is based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter. *Humphreys v. Day*, 735 N.E.2d 837, 841 (Ind. Ct. App. 2000), *trans. denied* (citations omitted).

5. Thus, on second remand, it was the law of the case that HEC was a prevailing party in the Foertsch Proceedings both eligible for and entitled to an award equal to the aggregate amount

of all costs and expenses, including attorney's fees, reasonably incurred for or in connection with HEC's participation in the proceedings, including any judicial review of agency actions.

6. The law of the case doctrine also stands for the proposition that "facts established at one stage of a proceeding, which were part of an issue on which judgment was entered and appeal taken, are unalterably and finally established as part of the law of the case and may not be relitigated at a subsequent stage." *Platt v. State*, 664 N.E.2d 357, 361 (Ind. Ct. App. 1996) (citations omitted). In particular, a tribunal is bound by its own earlier rulings, if they have been adopted by reviewing court's decision on appeal. *See Howard D. Johnson Co. v. Parkside Development Corp.*, 348 N.E.2d 656, 659-660 (Ind. Ct. App. 1976).

7. Here, the record relating to HEC's initial request for fees and expenses incurred through May 31, 2002, had been closed for over five years, the case was on its second remand from judicial review, and the ultimate facts found in the Second NRC Fee Order which were not reversed directly or by implication by the Keele Order had become the law of the case.

8. The Third NRC Fee Order correctly concluded that it was the law of the case on remand that HEC was eligible for an award of attorney's fees and litigation expenses for its participation in an earlier phase of the HEC Fee Proceeding and all phases of the Foertsch Permit Proceedings. Supp. R. 45, Finding 31. The NRC Order also correctly followed the law of the case when it determined that HEC was entitled to a fee and expense award under the applicable legal standards. Supp. R. 57, Findings 85 & 86. Additionally, the Order properly applied the law of the case when it concluded that HEC was entitled to an award of all of the fees and expenses it reasonably incurred in the Administrative Review Phase of the Foertsch Permit Proceedings without any deduction for any lack of success in that phase of the proceedings. Supp. R. 63, Finding 122.

9. However, the Order erred when it disallowed for lack of success a substantial part of HEC's otherwise reasonable fees and expenses for the Objections and Judicial Review Phases of the Foertsch Permit Proceedings. These disallowances, in turn, resulted in a reduction in the NRC Order's calculation of the fees and expenses to which HEC was otherwise entitled for its participation in the HEC Fee Proceedings through May 31, 2002. These are errors which are prejudicial to the determination of the fees and expenses to which HEC is lawfully entitled. Specifically:

**A. Disallowance of 62.5% of Otherwise Allowable Fees and Expenses for the Objections and Judicial Review Phases of Foertsch Permit Proceedings**

(1) The Third NRC Fee Order disallows 62.5% of HEC's otherwise allowable fees and expenses for the Objections and Judicial Review Phases of the Foertsch permit proceedings because, "mathematically, success on three of eight issues warrants an award of 37.5% of the fees sought by HEC for the Commission Objections [and Judicial Review] Phases." Supp. R. 67 & 69, Findings 143-144 & 154. However, this reasoning directly conflicts with the Keele Order, the underlying statute, and applicable precedent and thus clearly constitutes reversible legal error.

(2) The Keele Order expressly concluded:

The NRC awarded HEC all of the attorney's fees and expenses which it found to be reasonable in type and amount for the Administrative Review Phase of the Foertsch Permit Proceedings. Under the plain meaning of Ind. Cod § 14-34-1-1 *et seq.*, then, a prevailing party is eligible for and entitled to an award of the "entire amount" or "complete whole" of its fees and expenses which have been reasonably incurred in the course of its participation in the relevant proceedings. In the NRC Order, the NRC applied the correct legal standard and expressly made the findings required for an award to HEC of all of its fees and expenses reasonably incurred in the Administrative Review Phase of the Foertsch Permit Proceedings.

Supp. R. 29, Conclusion of Law No. 12.

(3) Specifically, the "correct legal standard" on which the Commission relied in its Second Fee Order to award HEC all of its fees and expenses for the Administrative Review Phase is "whether the individual issues upon which HEC achieved success are related to those issues on which HEC was entirely unsuccessful." R. 419, Finding No. 99. *See also Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (holding that attorneys fees and expenses need not be apportioned between successful and unsuccessful claims or issues where they involve a common core of facts or are based on related legal theories) and *Citizens Action Coalition of Indiana, Inc. v. PSI Energy, Inc.*, 664 N.E.2d 401, 409-410 (Ind. Ct. App. 1996) (holding that fees and expenses incurred in litigating both successful and unsuccessful claims in administrative proceedings are compensable when the claims arise from the same common core of facts).

(4) According to the Keele Order, the Second NRC Fee Order correctly awarded HEC all of its reasonable fees and expenses for the Administrative Review Phase because it “expressly found that all of the issues litigated in the Administrative Review phase arose from the same common core of facts and under related legal theories and were thus related for purposes of a fee and expense award.” Supp. R. 30, Conclusion of Law No. 15.

(5) This legal conclusion in the Keele Order, which follows the applicable case law, requires the same result with respect to the Objections and Judicial Review Phases of the Foertsch Permit Proceedings as it did for the Administrative Review Phase. This is because the Keele Order expressly concluded as a matter of law, “The issues litigated in the Objections and Judicial Review Phases of the Foertsch Permit Proceedings were identical to those litigated in the Administrative Review Phase.” Supp. R. 30, Conclusion of Law No. 15. Thus, it is now the law of the case (*see* 735 N.E.2d at 841) that the issues on which HEC did not prevail in the Objections and Judicial Review Phases were related to those on which it did prevail, just as they were during the Administrative Review Phase.

(6) As a result, HEC is entitled to an award of all of its otherwise allowable fees and expenses for the Objections and Judicial Review Phases, without any reduction for degree of success, just as it was for the Administrative Review Phase.

#### **B. Disallowances of Stant and Goodwin Time**

(1) The Third NRC Fee Order disallows 61.5 hours of Stant’s hours for the reason that his related time entries did not provide sufficient detail to allocate the reported time between the Permit Proceedings and the Fee Proceedings even though its Second Fee Order had allocated that time to the Objections and Judicial Review Phases of the Permit Proceedings. Similarly, the Order allows only 93.75 of the 123.75 hours of Goodwin’s time which the Second NRC Fee Order previously allocated to the Objections and Judicial Review Phases because Goodwin’s time entries did not provide sufficient detail to determine whether the disallowed 30.0 hours had actually been spent on the Permit Proceedings or the Fee Proceedings so that the appropriate award percentage could be applied. These disallowances are plainly errors of law.

(2) The Third NRC Fee Order follows the Second NRC Fee Order and accepts Stant’s sworn statement that he “assisted HEC’s attorney [Goodwin] in every aspect of this permit

challenge, including permit review, witness preparation, and preparation of legal pleadings.”  
Supp. R. 72, Finding 169. Similarly, the Third NRC Fee Order follows the Second Fee Order in ruling in the following Findings that HEC employee time assisting Mr. Goodwin is compensable:

176. Without attempting to opine in general on the split regarding the award of salaries for employees assisting outside counsel, in this particular situation discretion dictates that HEC’s employees’ salaries be allowed.

177. HEC’s evidentiary submission relating to Fry, Stant and Waldo confirm that the services they provided equivocated [sic] the services of a paralegal. Tender of Affidavits in Support of Fee Petition and Verified Statement of Tim Maloney Re: HEC payments for Employee Time and Expenses.

178. Goodwin’s billing records indicate that Goodwin charged HEC his lower hourly rate, which did not include charges for paralegal services.

179. Consequently, an award of fees to Goodwin at \$150.00 (as opposed to his \$225.00 rate, which includes paralegal fees) requires that, in fairness, HEC be compensated [for] the salaries of those employees who fulfilled that paralegal function.

Supp. R. 73. These same findings in the Second NRC Fee Order were upheld on judicial review in the Keele Order: “[I]t is clear that the NRC committed no error when it followed well-settled Indiana law in awarding compensation for paralegal services.” Supp. R. 30-31, Conclusion of Law No. 18. Thus, they “are unalterably and finally established as part of the law of the case and may not be relitigated at a subsequent stage.” *Platt v. State*, 664 N.E.2d at 361.

(3) Per Conclusion 9.A(6) above, HEC is legally entitled to 100% of its otherwise allowable fees and expenses for the Objections and Judicial Review Phases of the Foertsch Permit Proceedings. Thus, it is entitled to be compensated for all 61.5 hours of Stant’s time, or \$1230.00, disallowed by the Third NRC Fee Order.

(4) The Second NRC Fee Order expressly found that 123.75 hours of Goodwin’s time, including the 30.0 hours of his 1999 time, “related to the Commission Objection[s] and Judicial Review Phase[s]” of the Permit Proceeding. R. 440, Finding 239. This finding was not vacated or modified by the Keele Order and thus is “unalterably and finally established as part of the law of the case and may not be relitigated at a subsequent stage.” *Platt v. State*, 664 N.E.2d at 361. However, the Third NRC Fee Order disallows those 30.0 hours in their entirety because “the



hours cannot be reasonably separated [between the Permit and Fee Proceedings] in order to apply the appropriate award percentage.” Supp. R. 82, Finding 249.

(5). Per Conclusion 9.A(6) above, HEC is legally entitled to 100% of its otherwise allowable fees and expenses for the Objections and Judicial Review Phases of the Foertsch Permit Proceedings, so the Third Fee Order should have awarded HEC \$4,500.00 for all 30.0 hours of the disallowed Goodwin time previously allocated to those Phases.

### **C. Award Percentage Applicable to Fee Proceeding**

(1) The Third Fee Order awarded HEC 57% of its otherwise allowable fees and expenses in the initial phase of the Fee Proceedings because the award made for all three phases of the Foertsch Permit Proceedings was 57% of the amount of HEC’s initial request for an award as determined by the Commission. Supp. R. 86, Finding 282, esp. n. 12. Correcting the legal errors outlined in subsections 9.A and 9.B above, HEC’s fee and expense award for the Foertsch Proceedings would be increased to 69.3% of its initial request as determined by the Commission.

(2) Thus, following the same reasoning as employed in the Third NRC Fee Order and affirmed on judicial review of the Second NRC Fee Order, the percentage of HEC’s otherwise allowable fees and expenses to be awarded in the initial phase of the Fee Proceeding should also be increased from 57% to 69.3%, increasing HEC’s award by \$3,628.60.

### **ORDER**

1. In view of the foregoing findings of undisputed material facts and conclusions of law, the Court hereby GRANTS HEC’s Motion for Summary Judgment and DENIES DNR’s Motion for Summary Judgment.

2. Based on the record before the Court on judicial review, there is no dispute as to the amount of fees and expenses to which HEC is entitled as a result of this Court’s grant of summary judgment, i.e. \$21,487.13 in addition to the \$99,154.57 provided for in both the NRC’s Third Fee Order and this Court’s separate Order of Interim Award of Uncontested Attorneys Fees and Expenses. As a result, there would be no useful purpose served in remanding this matter to the Commission to calculate this undisputed amount. Accordingly, Respondent DNR

is directed to pay to HEC, in due course and within thirty (30) days, the additional amount of \$21,487.13 in order to compensate HEC for its reasonable fees and expenses for the entirety of the Foertsch Permit Proceedings and the HEC Fee Proceeding through May 31, 2002, in the total amount of \$120,641.70.

3. To the extent required by Trial Rule 54, the Court expressly finds that there is no just reason for delay and this order of summary judgment should be entered as a final order with respect to HEC's claim for fees and expenses for the entirety of the Foertsch Permit Proceedings and the HEC Fee Proceeding through May 31, 2002.

4. This matter is remanded to the NRC for further proceedings consistent with the findings and conclusions in this Order for purposes of determining any additional award due to HEC under the applicable law for the attorney's fees and litigation expenses it has incurred in the Fee Proceedings subsequent to May 31, 2002.

IT IS SO ORDERED.

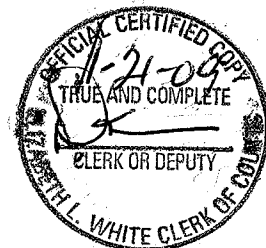
December 8, 2008  
Date

Thomas L. Ryan  
Thomas L. Ryan, Senior Judge  
Marion Superior Court, Civil Division 1

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**FILED**

DEC 22 2008

94

*Elizabeth d. White*  
CLERK OF THE MARION CIRCUIT COURT

**ORDER GRANTING INTERIM AWARD  
OF UNCONTESTED ATTORNEY'S FEES AND LITIGATION EXPENSES**

This matter comes before the Court on Petitioner's Verified Motion for Interim Award of Uncontested Attorney's Fees and Litigation Expenses, filed and served on August 8, 2008.

Being duly advised by the Certified Record of Administrative Proceedings, the filings of the parties, and the oral argument held on December 8, 2008, in this matter, the Court GRANTS Petitioner's Motion.

It is therefore ORDERED and DECREED that, pending final determination of this matter, (1) Petitioner Hoosier Environmental Council, Inc., is hereby awarded uncontested attorney's fees and litigation expenses in the amount of \$99,154.57, and (2) Respondent Indiana Department of Natural Resources is hereby directed to pay this award to the Hoosier Environmental Council in due course and within (30) days of this Order.

IT IS SO ORDERED.

*December 8, 2008*  
Date

*Thomas L. Ryan*  
Thomas L. Ryan, Senior Judge  
Marion Superior Court, Civil Division 1

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DEC 22 2008

OFFICIAL CERTIFIED COPY  
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CLERK OR DEPUTY  
ELIZABETH D. WHITE CLERK OF COURTS

STATE OF INDIANA ) MARION COUNTY SUPERIOR COURT  
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**FILED**  
DEC 28 2008 (94)  
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IT IS SO ORDERED.

*December 8, 2008*  
Date

*Thomas L. Ryan*  
Thomas L. Ryan, Senior Judge  
Marion Superior Court, Civil Division 1

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