

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BLACK WARRIOR RIVERKEEPER,
INC.,

Plaintiff,

v.

SALLY JEWELL, IN HER OFFICIAL
CAPACITY AS SECRETARY OF
THE INTERIOR *et al.*,

Defendants.

CIVIL ACTION NO.
2:15-cv-01190-AKK

SETTLEMENT AGREEMENT

WHEREAS, on May 15, 2014, Black Warrior Riverkeeper (Riverkeeper) informed the U.S. Office of Surface Mining Reclamation and Enforcement (OSMRE) and the Alabama Surface Mining Commission (ASMC) by letter that Ala. Admin. Code r. 880-X-5A-.35 does not contain the bad faith limitation on recovery of costs and expenses, including attorney fees, from private citizens that is contained in the counterpart federal regulation, 43 C.F.R. § 4.1294; and

WHEREAS in that letter Riverkeeper requested that OSMRE require ASMC to amend its regulations to address the "bad faith" omission at Ala. Admin. Code r. 880-X-5A-.35; and

WHEREAS, since that time, OSMRE has used its oversight authority to persuade ASMC to address the problem with Ala. Admin. Code r. 880-X-5A-.35, in lieu of proceeding through a formal federal intervention process; and

WHEREAS, on May 20, 2014, representatives from OSMRE met with representatives from ASMC and asked if the State agency would be willing to amend the alleged deficiencies in Ala. Admin. Code r. 880-X-5A-.35; and

WHEREAS, in July 2014, OSMRE requested that the U.S. Department of Interior's Office of the Solicitor determine whether Ala. Admin. Code r. 880-X-5A-.35 is less effective than its federal counterpart regulation, 43 C.F.R. § 4.1294; and

WHEREAS, in January 2015, at the regular quarterly meeting between OSMRE and ASMC, representatives of OSMRE discussed with representatives of ASMC the language of Ala. Admin. Code r. 880-X-5A-.35, and asked whether ASMC would voluntarily amend the regulation or whether OSMRE would need to issue a letter, pursuant to 30 C.F.R. § 732.17 (732 Letter), to cause the certain changes to be made; and

WHEREAS, by letter dated February 13, 2015, Riverkeeper, having received no formal response from OSMRE or ASMC about whether the regulation would be amended, acted pursuant to 30 U.S.C. § 1270(b), and submitted a notice of intent to sue the Secretary of the Interior for allowing "prevailing parties [in

Alabama] to recover attorneys' fees against all challengers, apparently even where the challenge is in good faith[]"; and

WHEREAS, in the letter of February 13, 2015, Riverkeeper demanded that OSMRE cause ASMC to amend Ala. Admin. Code r. 880-X-5A-.35 "to make it explicitly clear that citizens who undertake permit or rules challenges are entitled to attorneys' fees and costs—and that permittees are not, absent bad faith or harassment[]"; and

WHEREAS, by memorandum to ASMC's Division of Hearings and Appeals, dated February 27, 2015, ASMC's Director instructed ASMC's Chief Hearing Officer of the Division of Hearings and Appeals to apply the "guidance" provided in 43 C.F.R. §§ 4.1290–4.1296 in determining to whom and under what circumstance to award costs and fees in administrative cases; and

WHEREAS, ASMC further attempted to address OSMRE's concerns on March 12, 2015, by adopting a policy at a monthly meeting of the Commission members, passed as a resolution by a vote of the Commission members, that declares the guidelines of the Code of Federal Regulations found at 43 C.F.R. §§ 4.1290–4.1296 will be applied in administrative cases by the Commission in its role as an appellate body; and

WHEREAS, in March 2015, the U.S. Department of Interior's Office of the Solicitor advised OSMRE that Ala. Admin. Code r. 880-X-5A-.35 is less effective

than its federal counterpart regulation, 43 C.F.R. § 4.1294, and further advised that a mere change in policy would not make the Alabama regulation as effective as its Federal counterpart; and

WHEREAS, on April 23, 2015, after a briefing by his staff, OSMRE's Director decided that if the State agency would not agree to voluntarily amend Ala. Admin. Code r. 880-X-5A-.35, OSMRE would initiate the process, pursuant to 30 C.F.R. Part 732, to compel ASMC to amend the Alabama regulation to make it at least as effective as 43 C.F.R. § 4.1294; and

WHEREAS, in response to the OSMRE Director's decision, OSMRE began to draft a 732 Letter to ASMC whereby, pursuant to 30 C.F.R. § 732.17, ASMC would be compelled to change Ala. Admin. Code r. 880-X-5A-.35 to make it no less effective than its Federal counterpart; and

WHEREAS, on July 15, 2015, Riverkeeper, still having received no formal response from OSMRE or ASMC about whether the regulation would be amended, initiated this suit in the Northern District of Alabama against Sally Jewell, Secretary of the Interior, and Randall Johnson, Director of ASMC, alleging in relevant part that OSMRE had failed to address the problem identified in the Notice of Intent to Sue; and

WHEREAS, after further consultation with OSMRE and with the U.S. Department of the Interior's Office of the Solicitor regarding the defects in Ala.

Admin. Code r. 880-X-5A-.35, the Director of ASMC and his Chief Counsel agreed in a meeting on August 11, 2015, to submit a program amendment to OSMRE for its review and approval that will resolve the issue with Ala. Admin. Code r. 880-X-5A-.35, by inserting a limitation that costs and expenses may be assessed against a citizen who participates in an administrative review of a decision of ASMC only upon a demonstration that such proceeding was initiated in bad faith for the purpose of harassing or embarrassing; and

WHEREAS, in a letter to OSMRE, dated August 21, 2015, ASMC promised to informally propose to OSMRE within 60 days, for its informal review, a rule change regarding awards of costs and fees in administrative proceedings before the state agency; and

WHEREAS, on October 19, 2015, ASMC informally submitted to OSMRE a proposed rule change regarding awards of costs and fees in administrative proceedings before the state agency; and

WHEREAS, OSMRE thereafter initiated an informal review of ASMC's proposed changes, and, in December 2015, OSMRE provided comments to ASMC regarding the proposed amendment to Ala. Admin. Code r. 880-X-5A-.35, and sought another meeting with ASMC regarding additional deficiencies in the Alabama program; and

WHEREAS, ASMC's proposed amendment, which included revisions made in response to OSMRE's comments, was published in the December 31, 2015 edition of *Alabama Administrative Monthly* for public comment; and

WHEREAS, in a letter dated February 3, 2016, Riverkeeper provided comments to ASMC's proposed amendments that were published in *Alabama Administrative Monthly* in which Riverkeeper alleged that the proposed amendment to Ala. Admin. Code r. 880-X-5A-.35 is less effective than its federal counterpart regulation, 43 C.F.R. § 4.1294. Riverkeeper specifically claimed that ASMC's continued use of "either" party, rather than "any" party in the proposed amendment, did not make it unequivocally clear that any person, other than a permittee or his representative, who initiated or participated in any proceeding under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), and who prevailed 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, may be entitled to a fee award from ASMC; and

WHEREAS, ASMC has now communicated to Riverkeeper that it will formally propose to OSMRE an amendment to Ala. Admin. Code r. 880-X-5A-.35 that fully addresses the concerns Riverkeeper expressed to ASMC in its February 3, 2016 letter; and

WHEREAS, ASMC incorporated Riverkeeper's comments into its proposed amendment and voted to approve that amendment at its March 10, 2016 meeting, so that the amendment can be submitted to OSMRE for approval pursuant to 30 C.F.R. § 732.17; and

WHEREAS, OSMRE and ASMC have a work plan for correcting the "bad faith" omission addressed in Riverkeeper's lawsuit and for discussing and addressing other possible deficiencies in the Alabama regulations dealing with awards of attorney fees and expenses;

NOW THEREFORE, it is hereby stipulated by and between Riverkeeper and Sally Jewell, acting in her official capacity as Secretary of the Interior, by and through their respective attorneys, as follows:

1. The parties to this Settlement Agreement agree that this Settlement Agreement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the Defendant, OSMRE, its agents, servants, or employees, and it is specifically denied that they are liable to the Riverkeeper. This Settlement Agreement is entered into by the undersigned parties for the sole purpose of compromising disputed claims under the SMCRA, and avoiding the expenses and risks of further litigation.

2. Defendant agrees to pay the sum of \$20,000 to Riverkeeper as attorneys' fees and costs, which sum shall constitute a full settlement, satisfaction, release,

and discharge of any and all claims alleged by Riverkeeper against Secretary Jewell in the Amended Complaint [Doc. 12].

3. Within three days of Riverkeeper signing this Settlement Agreement, the parties will jointly file a Joint Motion to Stay the Suit.

4. Following a stay of the suit, Defendant will submit a monthly status report to Riverkeeper on the last business day of each month. The status report will provide updates as to the federal approval of the proposed amended regulation submitted by ASMC.

5. Upon payment of the sums owing under paragraph 2 and within ten days of OSMRE's final approval of ASMC's proposed amendment of Ala. Admin. Code r. 880-X-5A-.35, Riverkeeper will file a Motion to Dismiss this action, with prejudice.

6. In the event any one or more of the provisions contained in this Settlement Agreement shall for any reason be held invalid, illegal, or unenforceable in any respect or should the Court deny the parties' Motion to Stay this action, such invalidity, illegality, unenforceability, or Court order shall not affect any other provisions if Riverkeeper and Secretary Jewell mutually elect to proceed as if such invalid, illegal, unenforceable, or Court Order provisions had never been included in this Settlement Agreement.

7. The parties to this Settlement Agreement agree that nothing in this Settlement Agreement should be construed as a waiver of any privilege or protection—including, but not limited to, the deliberative process privilege or the work product doctrine—on behalf of OSMRE, the U.S. Department of the Interior, or Secretary Jewell. In fact, OSMRE and Secretary Jewell specifically reserve the right to assert any privilege.

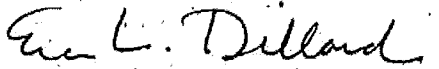
8. It is contemplated that this Settlement Agreement may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

FOR PLAINTIFF BLACK WARRIOR RIVERKEEPER, INC.

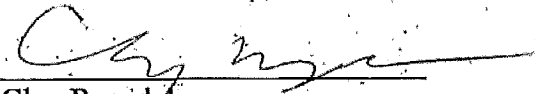


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