

1 Final agency action regarding decision below:

2
3 REQHRG Date hearing requested

4
5 STATE OF ARIZONA
6 IN THE OFFICE OF ADMINISTRATIVE HEARINGS

7
8 In The Matter Of:

9 Capital Gas, Crabtree Auto Center,
10 Eddie's Gas Station, Holbrook Police
11 Department, L & M Gas and Oil, Mr.
12 Maestas Restaurant, Rainbow Bread,
13 Rainbow Rock Shop, and Thompson's
14 Muffler,

15 LUST Nos. 2478.01-03, 1223.02-10,
16 1223.02-11, 5260.01-00, 5240.01-00,
17 2478.01, 3645.01-01, 5229.01-01,
18 5229.01-02, 5264.01-00, 5252.01-00
19 and 4367.01-10

Nos: 02A-F149-DEQ
02A-F150-DEQ
02A-F151-DEQ
02A-F152-DEQ
02A-F153-DEQ
02A-F148-DEQ
02A-F154-DEQ
02A-F155-DEQ
02A-F156-DEQ
02A-F157-DEQ
02A-F158-DEQ
02A-F159-DEQ

Minute Entry

20
21
22 Pending before the Office of Administrative Hearings is Appellants' **REQUEST FOR**
23 **AWARD OF FEES AND COSTS AS PREVAILING PARTY UNDER A.R.S. § 41-1007.** The
24 motion was filed on April 23, 2003 in accordance with an Order that had been issued by
25 the Administrative Law Judge on March 14, 2003. Thereafter, on April 29, 2003,
26 Respondent *Department of Environmental Quality* submitted its RESPONSE. On May 2,
27 2003, Counsel filed a REQUEST FOR LEAVE TO SUBMIT A REPLY IN SUPPORT OF ITS
28 REQUEST FOR AWARD OF FEES AND COSTS AS PREVAILING PARTY UNDER A.R.S. § 41-
29 1007.¹

30
¹ Leave is hereby granted; the REPLY has been read and considered.

Each of the Appellants is represented by *Fennemore Craig, P.C.*, John Pearce, Esq. The *Arizona Department of Environmental Quality* is represented by the Office of the Attorney General, Barbara U. Pashkowski, Assistant Attorney General.

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History of the Case

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2 Appellants, all but two of whom are “volunteers” as the term is comprehended by
3 Title 49, Chapter 6, through their consultant *Tierra Dynamic Company* have filed formal
4 appeals with the *Department*. The appeals were submitted to the *Department* because
5 the State Assurance Fund (hereafter also, “SAF” or “the Fund”) had failed to approve
6 their respective applications for reimbursement from the Fund, or deny the
7 application(s), or manifest to the applicants that it deemed the application(s) deficient. In
8 other words, the *Department* failed to respond to the applications.

9 A.R.S. § 49-1091(I) authorizes an owner or operator of a cleanup site to file an
10 informal appeal to the *Department* as a result of the *Department's* failure to issue a
11 written interim determination within ninety (90) days of the *Department's* receipt of the
12 application for reimbursement from the SAF.

13 Moreover and most significantly, A.R.S. § 49-1091(E) mandates that only a
14 written final determination or decision of the *Department* may constitute an appealable
15 agency action.

16 The occasion for each one of the A.R.S. § 49-1091(E) appeals that has been
17 filed herein is the *Department's* failure to have prepared and issued a written
18 determination, interim or final, on any of the applications. The *Department* has taken the
19 position that the appeals are accordingly premature, no determination having been
20 rendered in the matters, as is required by the statute.

21 The parties have each briefed the issue and the Administrative Law Judge has
22 found previously, *inter alia*, that “[t]he parties agree that the *Department* failed to act
23 upon the applications within the period provided by statute and that the *Department*
24 thereafter failed to act upon the timely submission of the claimants' informal appeals,
25 the statute, A.R.S. § 49-1091(E), mandating that the *Department* render a ‘final written
26 decision or determination’ within forty-five (45) days (or fifteen (15) days should an
27 informal appeal meeting have been held) of the claimant's submission of the informal
28 appeal. The statute provides that the *Department's* failure timely to render a ‘final
29 written decision or determination’ renders the interim decision or determination the ‘final
30 decision or determination’ for purposes of appeal. . . . **The problem presented results**

1 from *Department* inactivity. The *Department* did not issue either an interim
2 decision or determination or written final decision in any of the matters under
3 consideration [prior to the filing of each respective appeal].”(Emphasis added)²

4 Recognizing the apparent conundrum facing the parties (no final written decision
5 from which to appeal), the Administrative Law Judge proceeded to issue a “Directive”
6 whereby the matters were remanded to the *Department* upon admonition to issue final
7 determinations either agreeing with or manifesting disagreement with each application,
8 respectively and with specificity, within thirty (30) days of the Order. A footnote to the
9 Minute Entry was included wherein the Administrative Law Judge acknowledged
10 understanding that the Administrative Law Judge lacked authority to issue an Order in
11 the nature of Mandamus but suggested, in the interest of economy, that the parties
12 follow the path prescribed.

13 Thereafter, upon motion filed by the Assistant Attorney General, the Director
14 addressed the Administrative Law Judge’s Minute Entry on March 28, 2003 declining to
15 act upon the motion but, at the same time, opining that “[w]hile the failure to respond
16 within ninety days may be the basis for an informal appeal under A.R.S. § 49-1091(I),
17 the continuing failure to respond does not become the basis for a formal appeal under
18 A.R.S. § 49-1091(E)If there is no written determination on an application, there is
19 no agency action for the ALJ to review.”

20 The parties have followed the “suggestion” by providing additional information
21 where requested and by the *Department’s* issuance of the sought-after interim
22 determinations.³

23 THE CLAIM

24 In his January 6, 2003 Minute Entry, the Administrative Law Judge made an
25 effort “to mitigate the concern over an amelioration of the force and effect of the
26 statutory timing requirements⁴ [by preserving] Appellants[’] right to request attorney’s
27

28 ² See, Minute Entry of January 6, 2003.

29 ³ See, ADEQ’s April 8, 2003 NOTICE OF CASE STATUS AND REQUEST TO VACATE.

30 ⁴ A.R.S. § 49-1091.

1 fees and costs under A.R.S. § 49-1091.01 and A.R.S. § 41-1007(A), attributable to the
2 *Department's* failure to timely issue decisions in each one of these matters, at the
3 conclusion of the case." By their **REQUEST FOR AWARD OF FEES AND COSTS AS**
4 **PREVAILING PARTY UNDER A.R.S. § 41-1007**, Appellants seek an award of \$6,648.57.⁵

7 THE ISSUES

8 There are two issues that must be addressed, or must be answered, before
9 Appellants may be awarded their fees and costs as requested. The first issue concerns
10 whether Appellants may qualify as prevailing parties to an appealable agency action
11 under A.R.S. § 41-1007.⁶ If so, the second issue concerns whether Appellants have
12 established their eligibility for an award of fees and costs under A.R.S. § 41-1007.⁷

15 ⁵ Reduced by the Appellants in their REPLY from the \$7,261.17 originally claimed.

16 ⁶ See, A.R.S. § 41-1007:

17 A. Except as provided in section 42-2064, subsection G, a hearing officer or administrative law
18 judge shall award fees and other costs to any prevailing party in a contested case or an
19 appealable agency action brought pursuant to any state administrative hearing authority. For
20 purposes of this subsection, a person is considered to be a prevailing party only if both:

- 21 1. The agency's position was not substantially justified.
- 22 2. The person prevails as to the most significant issue or set of issues unless the reason that
23 the person prevailed is due to an intervening change in the law.

24 ⁷ *Id.*

25 C. A party that seeks an award of fees or other costs shall apply to the hearing officer or
26 administrative law judge, within thirty days after the final decision or order, providing:

- 27 1. Evidence of the party's eligibility for the award.
- 28 2. The amount sought.
- 29 3. An itemized statement from the attorneys and experts stating:
 - 30 (a) The actual time spent representing the party.
 - (b) The rate at which the fees were computed.

ISSUE 1

Whether Appellants may qualify as prevailing parties to an appealable agency action under A.R.S. § 41-1007? The short answer is: **No.**

The Administrative Law Judge has previously ruled⁸ on the question whether the claimants are precluded from filing their appeals to the Office of Administrative Hearings under A.R.S. § 41-1092.03 since A.R.S. § 49-1091(E) directs that only a final written decision or determination be deemed appealable. That the appellants lack standing under A.R.S. §§ 49-1091(E) and 41-1092.03 to file a § 41-1007 application for fees and costs is supported by the following analysis:

- a) the *Department* has failed to render a timely written interim decision on Appellants' applications for A.R.S. § 49-1052 corrective action costs, as is required by A.R.S. § 49-1091(I);
- b) the *Department* failed to issue a timely final written decision or determination from Appellants' notice of disagreement with the *Department's* failure to render a timely written interim decision on Appellants' applications for A.R.S. § 49-1052 corrective action costs under A.R.S. § 49-1091(I), as is required by A.R.S. § 49-1091(E);
- c) the *Department's* failure to issue a timely final written decision or determination from Appellants' notice of disagreement with the *Department's* failure to render a timely written interim decision on Appellants' applications for A.R.S. § 49-1052 corrective action costs under A.R.S. § 49-1091(I), as is required by A.R.S. § 49-1091(E), does not constitute an appealable agency action under A.R.S. § 41-1092(3).
- d) Under the statute, as enacted, the claimants hereto lack standing to appeal the *Department's* inaction. This conclusion is buttressed by 1) the allowance found in A.R.S. § 49-1091(I) that *Department* inaction constitutes basis for an informal appeal; 2) the explicit requirement established by A.R.S. § 49-1091(E) that only a final written decision

⁸ See, Minute Entry of January 6, 2003.

1 may be appealed under the authority of A.R.S. § 41-1092; and 3) the
2 explicit enablement of A.R.S. § 49-1091(B) to an informal appeal
3 following the *Department's* failure to issue a written interim decision
4 when such interim decision is warranted. The forgoing construction
5 permits the only reasonable reading of the statute that, in turn, gives
6 full force and effect to the prohibition of A.R.S. § 49-1091(E).

7
8 The conclusion set forth above has been reiterated by the Director in his March 28,
9 2003 Decision not to act. ("If there is no written determination on an application, there is
10 no agency action for the ALJ to review.") Therefore, under this statute it can only be
11 concluded that the Appellants are precluded from filing an application for fees and costs
12 at the administrative level.⁹

13 This having been said, the following language from A.R.S. § 41-1007 should also
14 be noted by the parties:

15
16 E. A decision of a hearing officer or administrative law judge under this section is subject to
17 judicial review. If fees and other costs were denied by the hearing officer or administrative law
18 judge because the party was not the prevailing party but the party prevails on appeal, the court
19 may award fees and other costs for the proceedings before the hearing officer or administrative
20 law judge if the court finds that fees and other costs should have been awarded under subsection
21 A of this section.

22 ⁹ Unlike other Agencies that have addressed the issue of administrative inaction in the form of a
23 regulation, ADEQ has not promulgated a rule to fill the gap. See A.A.C. Title 18, Chapter 12, Article 6.
24 For example, in a similar vein AHCCCS has implemented the following provision at A.A.C. R9-22-
25 802(B)(3) :

26 c. Request for hearing of Administration's final decision of grievance. A complainant may request
27 a hearing under A.R.S. § 41-1092 et seq. on the Administration's final decision of the grievance if:

28 i. The complainant files a written request for hearing with the Administration no later than 30
29 days after the date of the Administration's final decision of the grievance; or

30 ii. **A final decision of the grievance under subsection (B)(4)(a) is not rendered by the
Administration within 30 days after the filing of the grievance with the Administration, and
the complainant files a written request for hearing with the Administration based on the
Administration's failure or refusal to decide the grievance.** (Emphasis added)

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2 It appears, then, that the only remedy available to Appellants for fees and costs under
3 these facts is judicial review. To be sure, this conclusion may result in the inefficient use
4 of resources, public and private. At first blush, with awareness of the facts underlying
5 the motion that Appellants have filed, the conclusion also seems to violate the long-
6 standing rule of construction in Arizona that words of a statute are to be accorded their
7 usual and commonly understood meaning unless a different meaning was plainly
8 intended¹⁰ or unless such exegesis¹¹ would lead to an absurd result.¹² If the ordinary
9 meaning derived from the language would lead to an absurd result, the exegete is only
10 then permitted to employ other interpretive tools such as the policy, purpose, history, or
11 context of the statute to give effect to the Legislature's intent.¹³ Whether the result
12 identified herein [denying Appellants the right to apply for attorney's fees and costs
13 under A.R.S. § 41-1007 because they lack standing to do so under the statute] is
14 absurd depends upon whether the reading of A.R.S. § 49-1091(E) be viewed irrational,
15 unnatural or inconvenient.¹⁴

16 It would be improper to view the application of the prohibition set forth in the
17 statute as irrational. The Legislature, it appears, had in mind a safeguarding against
18 inundation of appeal filings challenging policy questions; a rational purpose. On the
19 other hand, the interpretation of the text obviously inconveniences Appellants and

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21 ¹⁰ *Id.*, citing *Life Investors Ins. Co. of Am. v. Horizon Resources Bethany, Ltd.*, 182 Ariz. 529, 531, 898
22 P.2d 478, 480 (App. 1995).

23 ¹¹ The antonym is "eisegesis," which describes reading into a text the interpreter's own ideas.

24 ¹² *State v. Estrada*, 201 Ariz. 247, 34 P.3d 356 (2001) ("For purposes of statutory construction, a result is
25 absurd if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the
26 intention of persons with ordinary intelligence and discretion."); *See also Arpaio v. Steinle*, 201 Ariz. 353,
27 35 P.3d 114 (App. 2001) ("If the statute's language is clear and unambiguous, the court gives effect to
28 that language and applies it without using other means of statutory construction, unless applying the
29 literal language would lead to an absurd result."); *See also Facilitec, Inc. v. J. Elliott Hibbs, Director,*
30 *Arizona Dep't. of Admin.*, 59 P. 3d 803, 386 Ariz. Adv. Rep. 6; 388 Ariz. Adv. Rep. 6 (Ariz. App., filed
Nov. 5, 2002, amended by Order Nov. 29, 2002).

¹³ *Id.* (*Facilitec, Inc.* at 804), citing *State v. Williams*, 175 Ariz. 98, 102, 854 P.2d 131, 135 (1993).

¹⁴ *State v. Estrada*, 201 Ariz. 247, 251, 34 P.3d 356, 360 (2001).

1 others similarly situated. What is a party to do when the Agency fails to fulfill its
2 responsibilities? Does the Agency have an unbridled discretion not to act? The question
3 is rhetorical. The real question concerns whether the construction is unnatural within the
4 context of the statute. And – upon reflection, it does seem unnatural. After all, the whole
5 scheme established by A.R.S. § 49-1091 is one manifestly intended to induce
6 expeditious responsiveness to a citizen's challenge to the Agency's action. That the
7 Agency's failure to respond should be construed as a legislatively authorized cutting off
8 of citizen's rights certainly appears counter-intuitive to the spirit of the section.

9 However, other considerations militate against an expansive construction. (1) It is
10 of note that the Federal Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, has a
11 provision, § 551(13), defining an "agency action" to include the "failure [of an Agency] to
12 act." (2) It is additionally of note that the MODEL STATE ADMINISTRATIVE PROCEDURE
13 ACT (1981), which was adopted by Arizona in 1986, in part, at A.R.S. Title 41, Chapter
14 6, defines an "agency action" as encompassing a [an Agency's] failure to issue an Order
15 or failure to perform any duty, function, or activity, discretionary or otherwise. But,
16 Arizona has not adopted this definition. The Arizona APA does not include the
17 language; the Legislature has not defined an "agency action."¹⁵ (3) It is of further note
18 that the Legislature has addressed potential Agency inaction and its susceptibility to
19 judicial review in other contexts within the Title, for example A.R.S. § 49-497.02.¹⁶ That
20 it has not done so here, while having done so elsewhere, implies intent to exclude.

21 ¹⁵ A.R.S. § 41-1092(3) merely defines an "'Appealable agency action' [as] an action that determines the
22 legal rights, duties or privileges of a party and that is not preceded by an opportunity for an administrative
23 hearing. Appealable agency actions do not include interim orders by self-supporting regulatory boards or
24 rules, orders, standards or statements of policy of general application issued by an administrative agency
25 to implement, interpret or make specific the legislation enforced or administered by it, nor does it mean or
include rules concerning the internal management of the agency that do not affect private rights or
interests. . . ."

26 ¹⁶ See § 49-497.02. Judicial review of appealable agency action not subject to review by hearing board or
27 administrative law judge

28 A. Any person having an interest that is or may be adversely affected may commence a civil action in
29 superior court against a control officer alleging that the control officer has failed to act in a timely manner
30 as provided in section 49-480, subsection B and section 49-426, subsection C. No action may be
commenced before sixty days after the plaintiff has given notice to the control officer. The court has
jurisdiction to require the control officer to act without additional delay.

1 Therefore, the Arizona Legislature has not made provision for the recovery of
2 fees and costs under the circumstances presented.¹⁷

3 The Legislature has spoken.¹⁸ The Legislature was free to provide protection for
4 would-be Appellants when that which would trigger the appeal is Agency inaction; it has
5 not done so. Therefore, under A.R.S. § 49-1091(E) and A.R.S. § 41-1007, jurisdiction is
6 wanting for a consideration of the application for fees and costs presented by these
7 Appellants.¹⁹

8 **ISSUE 2**

9 **Whether Appellants have established their eligibility for an award of fees**
10 **and costs under A.R.S. § 41-1007.** Given the determination regarding Issue 1, this
11 issue is moot.
12

13 **ORDER**

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16 ¹⁷ Whether there are other considerations that ought to be explored, such as case law identifying
17 situations whereof it has been determined that Agency silence constitutes appealable activity, has not
18 been determined because Counsel have not presented to the Administrative Law Judge comprehensive
19 argument and supporting law and analysis.

20 ¹⁸ But, the Legislature has also spoken to the Agency, and the Agency is in violation of the Legislature's
21 directive that it issue its interim determination within 90 days of the application for preapproval or
22 reimbursement from the UST Fund. Therefore, the Agency is at fault here, regardless the (perhaps
23 legitimate and understandable) reasons for the delinquency identified in its RESPONSE.

24 ¹⁹ That the Agency would be given such unbridled discretion not to act upon a claimant's exercise of its
25 statutory right, or to act whensoever it chooses, defies the manifest spirit and intent of the chapter. *Cf. In*
26 *re Frank H.*, 193 Ariz. 433; 973 P.2d 1194 (Ariz. App. 1998). ("A juvenile may not appeal [a conviction]
27 until a final order has been entered. [Citation omitted] If restitution is an issue, the final order is the
28 [victims' rights] restitution order. [Citation omitted] Until such an order is entered, no appeal may be taken.
29 The state asserts that 'the restitution claims of the victims can and should be considered when and if they
30 are submitted to the court, regardless of any deadline.' If we were to adopt the state's argument, a
dilatory victim could potentially block a juvenile from appealing his delinquency adjudication until just
before the juvenile court loses jurisdiction on the juvenile's eighteenth birthday. This situation would
arbitrarily nullify many juveniles' statutory rights to appeal. See A.R.S. § 8-236.") The Court of Appeals
went on to note in *Frank H.* that speedy disposition is presumptively desirable in the juvenile justice
system. Likewise, it would be thought that speedy disposition is desirable in the environmental regulatory
and enforcement context. Delay in decision-making, whether or not motivated by a questionable intention,
seems to violate the principle. However, it does not violate the language of the statute.

1 Appellants' **REQUEST FOR AWARD OF FEES AND COSTS AS PREVAILING PARTY**
2 **UNDER A.R.S. § 41-1007** is denied for want of jurisdiction.

3
4 Done this 7th day of May 2003.

5 **OFFICE OF ADMINISTRATIVE HEARINGS**

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9 _____
10 Gary B. Strickland
11 Administrative Law Judge

12 Copy mailed this ____ day of
13 _____, 2003 to:

14 Stephen A. Owens, Director
15 *Department of Environmental Quality*
16 Attn: Lavonne Watkins
17 1110 W. Washington, Sixth Floor
18 Phoenix, AZ 85007

19 **As a courtesy, also forwarded to Counsel this day *via* facsimile transmission.**

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By _____