

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:**

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11 **JUDD TRANSMISSION**
12 **200 South Haskell**
13 **Willcox, AZ 85643**

14 **LUST NOS. 4418.01**

15 **AND** -----

16
17 **In The Matter Of:**

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19
20 **WALKER DEVELOPMENT**
21 **391 North Haskell**
22 **Willcox, AZ 85643**

23 **LUST NOS. 4419.01**
24

Nos. 03A-U166-DEQ
03A-U167-DEQ

ORDER AWARDING ATTORNEY'S FEES,
CONSULTANT'S FEES AND COSTS

Administrative Law Judge Strickland

25
26 Pending before the Office of Administrative Hearings is APPELLANT'S
27 APPLICATION FOR FEES AND COSTS AS PREVAILING PARTY in each of the above-styled
28 matters, along with ADEQ'S OBJECTIONS thereto.¹ The OBJECTIONS, when filed, raised

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30 ¹ In addition, Appellants filed a REPLY memorandum on April 23, 2004, prior to the conference. The memorandum was considered. On the other hand, ADEQ submitted a SUR-REPLY TO APPELLANT'S REPLY, the document filed on April 26, 2004 **after** the conference for argument had been held. The document is not considered for two reasons: (1) it is a matter of late-filing (without leave); and (2) at the conference whereat argument was entertained, under a

1 issues that required further exploration before a fully-informed Order could be issued.
2 Therefore, a Post-hearing conference for the purpose of oral argument and an
3 opportunity for the Administrative Law Judge to pose questions was conducted at the
4 Office of Administrative Hearings on April 26, 2004 at 2:30 P.M.

5 The Post-hearing Conference convened at the Office of Administrative Hearings
6 as scheduled, April 26, 2004, 2:30 P.M. Appearing for Appellants was *Fennemore*
7 *Craig, P.C.*, Phillip F. Fargotstein, Esq., with John Leseur, Esq. assisting. Representing
8 the *Arizona Department of Environmental Quality* was the Office of Attorney General,
9 Shelley D. Cutts, Assistant Attorney General. Argument was made by Counsel. Post-
10 hearing Conference for the purpose of argument adjourned at 2:51 P.M.

11 I.

12 **APPELLANTS' MOTIONS FOR ATTORNEY'S FEES, CONSULTANT'S FEES AND COSTS**

13 Appellants *Judd Transmission* and *Walker Development* have each filed for fees
14 and costs as prevailing party in the above-styled wherein and whereby the
15 Administrative Law Judge's February 13, 2004 DECISION AND RECOMMENDED ORDER in
16 each case, finding exclusively in Appellant's favor on each question presented, was
17 adopted in its entirety on March 15, 2004 by the Director of the *Arizona Department of*
18 *Environmental Quality* without qualification, resulting in a rescission of the Agency's
19 previous action(s).

20 *Judd Transmission* seeks \$18,617.50 in attorney's fees, \$7,643.55 in consultant's
21 fees, and \$866.66 in costs for its efforts to challenge the Agency action.

22 *Walker Development* seeks \$15,939.50 in attorney's fees, \$7,547.85 in
23 consultant's fees, and \$399.36 in other costs for its efforts to challenge the Agency
24 action.

25 *Judd Transmission* and *Walker Development* have filed their motions under the
26 enablement alternatively of A.R.S. §§ 41-1007 (the general administrative fee recovery
27

28 specific question posed by the Administrative Law Judge to the Assistant Attorney General concerning what other
29 issues the AAG might be raising in opposition to the motion, the AAG responded that *ADEQ'S* argument in
30 opposition had been exhausted by *ADEQ'S* filing of its OBJECTIONS (that *ADEQ* was limiting its objections to those
stated in its brief; as would be expected). By failing timely to oppose the amount of fees and costs requested, *ADEQ*
has waived its objection.

act) and 49-1091.01.

II.

THE OBJECTIONS OF ADEQ TO AN AWARD OF FEES AND COSTS

ADEQ has set forth the following points in opposition to an award:

- (1) Neither Appellant incurred Attorney's fees, Consultant's fees, or costs in its appeal because the agreement between the Consultant ("TDC") and the named Appellants did not provide an explicit authorization to incur additional legal and technical fees in the pursuance of an appeal before the Agency;
- (2) A.R.S. § 49-1052(C) limits the power to designate a representative for purposes of seeking reimbursement of corrective action costs incurred to "owners" or "operators," thereby precluding the provision of such authority to a "volunteer," as was the designator in each of the cases before us;
- (3) Appellants do not meet the criteria of A.R.S. § 49-1091.01(A) and, therefore, are precluded from an award of fees and costs;
- (4) A.R.S. § 49-1091.01 must be read in tandem with A.R.S. § 41-1007 and must be read to impose additional requirements upon these Appellants to seek attorneys fees and costs, Appellants not capable of satisfying those requirements because their appeals involved "volunteer status" not reimbursement from the State Assurance Fund, owner/operator status, or ADEQ's approval or disapproval of site characterization reports or corrective action plans; and
- (5) ADEQ's position taken in each of the matters presented was substantially justified.

III.

RULING ON THE OBJECTIONS

Each of the Assistant Attorney General's objections is addressed in the order presented above.

(1) The Assistant Attorney General's argument that neither Appellant incurred Attorney's fees, Consultant's fees, or costs in its appeal because the agreement between the Consultant ("TDC") and the named Appellants did not provide an explicit authorization to incur additional legal and technical fees in the pursuance of an appeal before the Agency is not persuasive.

It is hornbook law² that in order to effect a legal assignment of any kind there must be evidence of an intent to assign or transfer the whole or part of some specific thing, debt, or chose in action, and the subject matter of the assignment must be described sufficiently to make it capable of being readily identified.³ Moreover, an assignment is subject to the same requisites for validity as are other contracts, i. e., mutuality of assent, proper parties with the capacity to make a contract, consideration and legal subject-matter.⁴

The assignment made in each of these cases is not challenged by the *Department* as to its validity. The agreement in each instance satisfies the validity requisites of an enforceable contract. However, the *Department* does challenge Appellants' assignment of its *appeal rights* and consequent recovery of fees and costs in pursuance of an appeal. In counterargument, Appellants argue that, while each agreement is silent on the issue, the right to exercise appeal rights is nonetheless *implicit* in the agreement.

Rule 17(a), Arizona Rules of Civil Procedure, provides :

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of

² See *Certified Collectors v. Lesnick*, 116 Ariz. 601, 603; 570 P.2d 769, 771 (S.Ct. 1977).

³ See *Ingram v. Mandler*, 56 F.2d 994 (10th Cir., 1932); *Novo Trading Corp. v. Commissioner*, 113 F.2d 320 (2nd Cir., 1940).

⁴ *Hutsell v. Citizens' National Bank*, 166 Tenn. 598, 64 S.W.2d 188 (1933).

1 commencement of the action by, or joinder or substitution of, the real party in interest; and such
2 ratification, joinder or substitution shall have the same effect as if the action had been
3 commenced in the name of the real party in interest.

4 The Administrative Law Judge is authorized by A.A.C. R2-19-102(C) to look to the
5 Rules of Civil Procedure on a procedural issue that may arise and that is not covered by
6 the administrative statute or rules.

7 At no time in these proceedings, prior to oral argument on the fees and costs
8 motions, has the Assistant Attorney General registered an objection to a person's or
9 entity's standing to participate in the appeal.⁵ As such, the objection has been waived.⁶

10 As part of the assignment, TDC agreed to accept as its compensation a direct
11 assignment of the "volunteers" payment benefits from the State Assurance Fund.⁷ It is
12 reasonable to infer that implicit in the agreement was TDC's right to pursue the
13 administrative appeal process in an effort to secure that payment; after all, the
14 Consultant would be in better position to assert the claim than would the non-involved
15 "volunteer." In its striving to assert the claim, it was foreseeable that the Consultant
16 would require legal representation. Such legal representation owed its duty of
17 representation to the Assignee, not the Assignor. It was the Assignee, a real party in
18 interest, that incurred the fee obligation that has resulted from the representation.⁸ The
19 assignee of a claim, whether by contract or by operation of law, is the real party in
20 interest to prosecute that claim.⁹ The Administrative Law Judge is unaware of any

21 _____
22 ⁵ An Assignee may sue in his own name. See *Skarecky & Horenstein, P.A. v. 3605 North 36th Street Co.*, 170 Ariz.
23 424, 428; 825 P.2d 949, 953 (App. 1991); See also *Certified Collectors, Inc. v. Lesnick*, 116 Ariz. 601, 602, 570
24 P.2d 769, 770 (1977).

25 ⁶ The provision found in Rule 17(a) was added in the interest of justice and to ensure that a judgment will have a
26 proper effect as *res judicata*. See the STATE BAR COMMITTEE NOTES to the 1966 Amendment.

27 ⁷ See Exhibit "B" ¶ 4 to TDC's WORK ORDER AGREEMENT in *Walker Development* and Exhibit "B" ¶ 4 to TDC's
28 WORK ORDER AGREEMENT in *Judd Transmission*.

29 ⁸ Cf. *Cruz v. Lusk Collection Agency*, 119 Ariz. 356; 580 P.2d 1210 (App. 1978). See also *Joel Erik Thompson, Ltd.*
30 *v. Holder*, 192 Ariz. 348 (App. 1998) (citing and affirming the rule of *Cruz*).

⁹ See *General Acc. Fire & Life Assurance Corp. v. Little*, 103 Ariz. 435, 443 P.2d 690; *Moore v. Toshiba*
International Corporation, 160 Ariz. 205, 772 P.2d 28 (App. 1989); *Cruz v. Lusk Collection Agency*, 119 Ariz. 356;
580 P.2d 1210 (App. 1978).

1 reason why the Assignee could not have been joined as an additional real party in
2 interest to these two actions, respectively, under the authority of A.A.C. R2-19-102(C)
3 and Rule 17(a), Arizona Rules of Civil Procedure, and A.R.S. § 41-1001(12).¹⁰
4 Therefore, the Assistant Attorney General's assertion that Appellant has not incurred
5 the subject attorney's fees is unavailing.

6 (2) The *Department* next calls attention to the fact that A.R.S. § 49-1052(C)
7 limits the stated power to designate a representative for purposes of seeking
8 reimbursement of corrective action costs incurred to "owners" or "operators." The
9 Assistant Attorney General asserts that the statute thereby precludes the vesting of
10 such enabling in a "volunteer," as was the status of the designator in each of the cases
11 before us.

12 The Assistant Attorney General's observation is partially correct; the statutory
13 section, when read in isolation, limits the conferment. However, when the section is
14 read in conjunction with and in a manner to harmonize with § 49-1052(I),¹¹ conflict in the
15 legislation is made apparent. The Legislature simply left out of § 49-1052(C) reference
16 to "volunteers" and the concomitant authority of a "volunteer" to designate a
17 representative to seek coverage from the SAF. The sections conflict when read
18 narrowly; following such construction, a "volunteer" could not himself seek coverage
19 under § 49-1052(C), not being an "owner" or "operator" or the "designated
20 representative of an owner or operator," despite the enabling found in § 49-1052(I). In
21 short, the language of § 49-1052(C) leaves something to be desired.¹² Because an
22 apparent contradiction has been created by the language of the section, viewed in light
23 of the related section, the statute must be liberally construed to effect its object and to

24 ¹⁰ The provision in Rule 17(a) permitting ratification or joinder by the real party in interest is intended to prevent the
25 forfeiture of claims when the determination of the real party in interest is difficult to make or when an
26 understandable mistake has been made. *Toy v. Katz*, 192 Ariz. 73, 961 P.2d 1021 (App. 1997). See DANIEL
J.McAULIFFE, ARIZONA CIVIL RULES HANDBOOK 238 (2003 ed.).

27 ¹¹ A section that provides authority to the *Department* to allow "a person with principal control of the property
28 [whereon remediation efforts are undertaken] or the underground storage tank and who undertakes to meet the
29 requirements of section 49-1005, but who is not an owner or operator" access to the State Assurance Fund.

30 ¹² Given the language of A.R.S. § 49-1052(C), one might also legitimately conclude that a political subdivision may
not designate a representative to make application on its behalf to the SAF. But, upon what conceivable rationale?

1 promote justice.¹³ The overriding purpose of the statute is to protect the environment¹⁴
2 by encouraging remediation efforts.¹⁵ It is a construing decision-maker's responsibility to
3 try "to harmonize related statutes and 'aim to achieve consistency among them' within
4 the context of the overall statutory scheme."¹⁶

5 An exegesis that harmonizes A.R.S. § 49-1052(C) with § 49-1052(I) finds that the
6 section (49-1052(C)) does not, when read within its body of law, preclude a "volunteer"
7 from designating a representative to make application to the State Assurance Fund for
8 costs incurred in the remediation effort.

9 **(3)** The Assistant Attorney General still further objects that Appellants do not
10 meet the criteria of A.R.S. § 49-1091.01(A) and, therefore, are ineligible for an award of
11 fees and costs under that section. Noting that the statute limits fee and cost
12 reimbursement to challenges concerning owner/operator status, reimbursement from
13 the SAF,¹⁷ and the adequacy of site characterization reports or corrective action plans,
14 the Assistant Attorney General observes that, since the present appeal involved none of
15 those, rather, an appeal concerning "volunteer status," Appellants are precluded from
16 filing for fees and costs under A.R.S. § 49-1091.01(A).

17 The Assistant Attorney General is correct. The statute specifically limits ("The

18 ¹³ A.R.S. § 1-211(B).

19 ¹⁴ See A.R.S. § 49-104(A)(1).

20 ¹⁵ See A.R.S. §§ 49-1017 and 49-1013.

21 ¹⁶ *State v. George*, 79 P.3d 1050; 2003 Ariz. App. LEXIS 192; 413 Ariz. Adv. Rep. 3 (November 26, 2003) quoting
22 *State v. Fell*, 203 Ariz. 186, P6, 52 P.3d 218, P6 (App. 2002). See also *Bills v. Ariz. Prop. & Cas. Ins. Guar. Fund*,
23 194 Ariz. 488, P18, 984 P.2d 574, P18 (App. 1999). See further *State v. Rodriguez*, 205 Ariz. 392, 396, 71 P.3d
24 919, 923 (App. 2003) ("[E]ven when statutory language, read in isolation, might be susceptible to a particular
25 construction, we employ a common sense approach, interpreting the statute 'by reference to its stated purpose and . .
26 . the system of related statutes of which it forms a part.'" Quoting *Goddard v. Superior Court*, 191 Ariz. 402, P8,
27 956 P.2d 529, P8 (App. 1998) ("Ultimately, 'our objective in interpreting a statute is to give effect to the legislative
intent behind the statute and, when possible, to harmonize all its sections.'") and *State v. Wagstaff*, 164 Ariz. 485,
491, 794 P.2d 118, 124 (1990) ("We strive to construe a statute and its subsections as a consistent and harmonious
whole.").

28 ¹⁷ It can be argued that because (1) the underlying actions do address recovery from the SAF, (2) the section
29 specifically includes within its orbit § 49-1052(I) applicants, and (3) maintenance of "volunteer" status is
30 prerequisite to recovery, the appeal by the Assignee is contemplated in § 49-1091.01. However, given the nature of
the appeal strictly construed (whether status itself may be conferred or removed by *ADEQ*), the added link in the
chain of argument produces such laxity as to reduce its efficacy.

1 provisions of this section apply to an owner, operator or a person who undertakes
2 corrective action pursuant to section 49-1052, Subsection I for any of the following:") an
3 application for fees and costs to those areas of recovery enumerated therein. The relief
4 sought in these cases does not fall within the enumerated class created by the statute.
5 These Appellants cannot obtain fees and costs under A.R.S. § 49-1091.01(A), those
6 fees and costs incurred pursuing an appeal of an issue not falling within the statute.

7 **(4)** The next prong in the Assistant Attorney General's argument, that A.R.S.
8 § 49-1091.01 must be read in tandem with A.R.S. § 41-1007 and must further be read
9 to impose additional requirements upon these Appellants as precondition to their ability
10 to seek attorneys fees and costs, is not persuasive. A.R.S. § 41-1007 is a statute¹⁸ that
11 was enacted to enable a recovery of fees and costs incurred and expended in an effort
12 to appeal from an Agency action that was not substantially justified in the first place.
13 The statute provides several exceptions to its coverage,¹⁹ all of which are totally
14 inapplicable here. That A.R.S. § 41-1007 and A.R.S. § 49-1091.01 are mutually
15 exclusive and offer distinct means to a remedy is manifested (a) by the specific
16 exclusion noted in § 41-1007,²⁰ and (b) by the absence of any exclusivity language in §
17 49-1091.01. One would expect, if the Assistant Attorney General's argument had
18 validity, that there be present in § 49-1091.01 language such as "Despite any statutory
19 provision otherwise" or, "Notwithstanding any other law" or, "This statute is the
20 exclusive means by which one may recover fees and costs in an Underground Storage
21 Tank State Assurance Fund appeal." The statute, § 49-1091.01, does not contain such
22 language.²¹ Additionally, A.R.S. §§ 49-1091.01 and 41-1007 are not the only examples

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24 ¹⁸ The Arizona Legislature has enacted more than sixty (60) statutes authorizing a recovery of attorneys' fees. *See*
25 *Arnold v. Arizona Department of Health Services*, 160 Ariz. 593, 609, 775 P.2d 521, 537 (App. 1989).

26 ¹⁹ A.R.S. § 42-2064 (taxpayer fee recovery); A.R.S. § 36-2901 *et seq.* (AHCCCS appeals); A.R.S. § 41-781 – 41-
27 786 (*Department of Administration* Personnel Board appeals); and, appeals filed by an inmate in the Arizona prison
28 system.

29 ²⁰ *Id.*

30 ²¹ *See, e.g.*, A.R.S. § 32-1132(A): "*Notwithstanding any other provision of law*, monies in the contractors' recovery
fund shall not be directly awarded for attorneys' fees or costs *except* in contested cases appealed to the superior
court." (Emphasis added.)" *See also Shelby v. Arizona Registrar of Contractors*, 172 Ariz. 95, 100, 834 P.2d 818,

1 of alternative means to a fee recovery provided by the Legislature. Other such mutually
2 exclusive statutes may be found.²²

3 Appellants are not prohibited by § 49-1091.01 from taking an alternative route to
4 the recovery of fees and costs.

5 **(5)** The final obstacle to recovery of fees and costs that has been erected in
6 argument by the Assistant Attorney General is that ADEQ's position taken in each of the
7 appeals presented was substantially justified. This is probably the weakest of the
8 arguments. In each case, the Administrative Law Judge applied basic rules of
9 construction to determine that the statutory language, on its face, did not create in
10 ADEQ the power to deny a status already conferred upon a party by the Legislature.
11 Indeed, the Administrative Law Judge found in each case that ADEQ's position in the
12 matter was "precipitate, if not presumptuous."

13 Upon Appellant's timely request for a hearing, the undersigned Administrative
14 Law Judge received argument on the question(s) posed. Each matter constituted an
15 appealable agency action as such action is contemplated by Title 41.²³ Based upon the
16 facts as they were presented, as well as in consideration of argument made and in
17 review of the relevant statute and regulations, the Administrative Law Judge issued his
18 Decisions in each of the appeals. Each DECISION AND RECOMMENDED ORDER was

19 823 (1992) (Petitioners, a condominium association and its individual owners, sought review of the decision of the
20 Court of Appeals that had affirmed the trial court in limiting the total award from the Residential Contractors'
21 Recovery Fund (Fund) under Ariz. Rev. Stat. §§ 32-1131 to -1140 because the petitioning class had filed under one
22 of two alternative enabling statute. The Court specifically denied an award of attorney's fees because the statute
23 under which Petitioners had filed, A.R.S. § 32-1132(A), prohibited a payout of attorneys' fees from the statutory
24 fund.) The facts of *Shelby* are readily distinguishable from the pertinent facts here. In these cases, Appellants had
25 filed their appeals under A.R.S. § 49-1052(I) and related statutes. Further, the limitations prescribed by A.R.S. § 49-
26 1091.01(A) do not include outright prohibition against the payout of attorney's fees from the SAF. Additionally, as
27 noted above, § 49-1091.01(A) lacks the exclusivity language of A.R.S. § 32-1132(A). On the other hand, it may
28 fairly be observed that A.R.S. § 41-1007 does not contain expansive enabling language such as that found at A.R.S.
29 § 12-348(A) ("In addition to any costs which are awarded as prescribed by statute, a court shall award fees[.]").
30 Notwithstanding, however, the lack of such expansive language, § 41-1007(A), by specifically identifying the
exclusions, allows application in all other instances under principles of *expressio unius est exclusio alterius*. See
NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.23 (6th ed., vol. 2A, 2001 Revision).

²² For example: A.R.S. § 12-341.01(A)/A.R.S. § 12-2030; A.R.S. § 38-431.07(A); A.R.S. § 39-121.02(B); A.R.S. § 12-348.

²³ A.R.S. § 41-1092(3) identifies an "appealable agency action" as an action undertaken by an agency that affects the legal rights and privileges of an individual and is not preceded by an opportunity for an administrative hearing.

1 adopted without modification by the Director's issuance of the *Department's* Final
2 Agency Decision on March 15, 2004.

3 A.R.S. § 41-1007 mandates an award of attorneys' fees and costs for
4 administrative proceedings in certain situations to parties who otherwise would not
5 qualify for them pursuant to § 12-348.²⁴ As a condition to recovery, an applicant must
6 demonstrate that Appellant prevailed on all issues presented at the hearing and that
7 substantial justification was lacking for the action undertaken by the Agency that led to
8 each appeal.

9 The phraseology "substantially justified" is generally referred to a consideration
10 whether a position taken is one that would induce a reasonable person so to conclude
11 and act in furtherance of that conclusion.²⁵ The present appeals do not present a "close
12 call," as it were. A reasonably based application of the language of the statute, if
13 followed, would have dictated a different course of action than that taken by *ADEQ*.
14 There was no reasonable basis in law or fact for the Agency to attempt to carry out its
15 statutory enforcement obligations by extinguishing, in one case, and denying, in another
16 case, a status that had been created by the Legislature. Therefore, the action taken by
17 the *Department* was not substantially justified.²⁶

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19 ²⁴ See *E. Vanguard Forex, LTD v. Ariz. Corp. Comm'n*, 79 P.3d 86; 2003 LEXIS 177; 411 Ariz. Adv. Rep. 6 (Ariz.
20 App. October 30, 2003) (The issue of attorney fees as to three claimants was remanded for a redetermination in the
21 court's discretion on their successful defense.).

22 ²⁵ See, e.g., *Pierce v. Underwood*, 487 U.S. 552 (1988) (the Supreme Court construing the language of the Equal
23 Access to Justice Act, 28 U.S.C. § 2412). See also *Blumm v. Ariz. Dep't of Revenue*, Docket No. 1812-99-
24 F, ARIZONA TAX COURT, (2000 Ariz. Tax LEXIS) (construing A.R.S. § 42-139.14(A), a section that allows for the
25 reimbursement of a taxpayer who is a prevailing party for amounts expended for reasonable fees and costs related to
26 administrative proceedings if the *Department's* position was not substantially justified and if the taxpayer prevails as
27 to the most significant issue or issues. Proceedings before the *Department* and the *Board* are
28 administrative proceedings for which reimbursement is allowed.). See further *Pulliam v. State*, 96 S.W.3d 904; 2003
29 Mo. App. LEXIS 117 (App. W.D. Mo. 2003) (Section 536.087 of the Missouri Statutes permits a prevailing party to
30 recover reasonable attorney's fees and expenses in civil actions or agency proceedings unless the court or agency
determines the State's position was "substantially justified" or that special circumstances make an award [of fees]
unjust Upon the filing of a fee application, the State has the burden of proving substantial justification. *Joseph*
v. Dishman, 81 S.W.3d 147, 151 (Mo.App. W.D. 2002). "Substantial justification" requires proof that the State had
a reasonable factual and legal basis for its position. *Dishman*, 14 S.W.3d at 716).

²⁶ The Administrative Law Judge had ruled in *Judd Transmission*: "The *Department's* decision to revoke the
"volunteer status" of [the "Volunteers"] was wrong as a matter of law. It was wrong (1) because there was no
"status" created by *ADEQ*; it was wrong (2) because the status of voluntary corrective actor was created by the

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IV.

FACTORS TO BE CONSIDERED IN THE AWARD OF A FEE

There is little Arizona law that is available in the consideration concerning whether attorneys' fees should be awarded to a prevailing party under A.R.S. § 41-1007.²⁷ However, some help is afforded by a review of those appellate cases that have construed a Superior Court Judge's award of fees under the authority of A.R.S. § 12-341.01(A). In *Associated Indem. Corp. v. Warner*,²⁸ the Arizona Supreme Court identified several factors indicative whether fees should be awarded. Those factors are:

1. The merits of the claim or defense presented by the unsuccessful party.
2. Whether the litigation could have been avoided or settled and whether the successful party's efforts were completely superfluous in achieving the result.
3. Whether assessing fees against the unsuccessful party would cause an extreme hardship.
4. Whether the successful party prevailed with respect to all of the relief sought.

Legislature at A.R.S. § 49-1052(I); it was wrong (3) because the *Department* has not developed policy in the manner prescribed by the Legislature at A.R.S. § 49-1014 to implement a process for payment of one voluntarily entering into remediation activities; and it was wrong (4) because the *Department* has muddied the waters, as it were, by raising the "status" issue when it merely needed to inform [the "Volunteers"] that it had concluded that the consultant could no longer handle the corrective action, in the *Department's* view, and that the *Department* was implementing a State Lead effort on the property; any further corrective efforts by the property owners would increase risk of accountability therefor." And – the Judge similarly found in *Walker Development*: "The *Department's* decision to deny [the "Volunteers"] "volunteer status" was wrong as a matter of law. It was wrong (1) because there is no "status" that may be created by *ADEQ*; it was wrong (2) because the status of voluntary corrective actor was recognized by the Legislature at A.R.S. § 49-1052(I); it was wrong (3) because the *Department* has not developed policy in the manner prescribed by the Legislature at A.R.S. § 49-1014 to implement a process for payment of one voluntarily entering into remediation activities; and it was wrong (4) because the *Department* has muddied the waters, as it were, by raising the "status" issue when it merely needed to inform [the "Volunteers"] that it had concluded that the consultant could not handle the corrective action, in the *Department's* view, and that the *Department* was implementing a State Lead effort on the property; that any corrective efforts by the property owners would increase risk of their accountability therefor. Moreover, application of this policy, as it currently is applied, directly contravenes the language of A.R.S. § 49-1019(E), a provision related to State Lead: "The *Department* may take corrective action . . . if an owner or an operator does not perform all necessary corrective actions **and there is no other person to perform corrective actions pursuant to § 49-1052, subsection I.**" (Emphasis added)."

²⁷ Formerly A.R.S. § 12-348.01)

²⁸ 143 Ariz. 567, 694 P.2d 1181 (1985).

1 5. Whether the legal question presented was novel and whether the claim or defense had
previously been adjudicated in this jurisdiction.

2 6. Whether the award in any particular case would discourage other parties with tenable claims or
3 defenses from litigating or defending legitimate contract issues for fear of incurring liability for
4 substantial amounts of attorney's fees.

5 In reviewing a fee application, no one factor is determinative.²⁹ It is true that such
6 assessment goes beyond that required by the language of A.R.S. § 41-1007(A).
7 However, in that an award under § 41-1007 is contingent upon a party's satisfaction of
8 certain criteria set forth in the statute (substantial justification being the threshold
9 criterion), the award is mandatory only after the assessment is made. The bases upon
10 which an award may be justified under A.R.S. § 12-341.01(A) are similar to those
11 required under § 41-1007. For convenience, § 41-1007 is presented below.³⁰

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13 ²⁹ See *Wilcox v. Waldman*, 154 Ariz. 532, 744 P.2d 444 (App. 1987).

14 ³⁰ A.R.S. § 41-1007

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

18 1. The agency's position was not substantially justified.

19 2. The person prevails as to the most significant issue or set of issues unless the reason that the person
20 prevailed is due to an intervening change in the law.

21 B. Reimbursement under this section may be denied if during the course of the proceeding the party unduly
and unreasonably protracted the final resolution of the matter.

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

24 1. Evidence of the party's eligibility for the award.

25 2. The amount sought.

26 3. An itemized statement from the attorneys and experts stating:

27 (a) The actual time spent representing the party.

28 (b) The rate at which the fees were computed.

29 D. The award of reasonable attorney fees pursuant to subsection A of this section need not equal or relate
30 to the attorney fees actually paid or contracted, but an award may not exceed the amount paid or agreed to

1
2 In *Judd Transmission* and *Walker Development*, it cannot be said that the
3 position taken by the Agency, that "volunteer status" may be conferred or rescinded by
4 the Agency, had merit; it can be observed that Appellants' efforts were not superfluous
5 in achieving the result; an assessment of fees against the Agency would not cause
6 extreme hardship (although not welcome, to be sure); Appellants prevailed by having
7 the questioned agency actions rescinded; the issue presented was one of first
8 impression; and, it cannot be seen that such an award would discourage others from a
9 challenge to unfounded agency action (the ruling would create just the opposite effect).
10 Therefore, Appellants have passed the *Warner* test. Moreover, an assessment of the

11 be paid.

12
13 E. A decision of a hearing officer or administrative law judge under this section is subject to judicial
14 review. If fees and other costs were denied by the hearing officer or administrative law judge because the
15 party was not the prevailing party but the party prevails on appeal, the court may award fees and other
16 costs for the proceedings before the hearing officer or administrative law judge if the court finds that fees
17 and other costs should have been awarded under subsection A of this section.

18
19 F. The department shall pay the fees and costs awarded pursuant to this section from any monies
20 appropriated to the department and available for that purpose, or from other operating costs of the
21 department. If the department fails or refuses to pay the award within thirty days after the demand, and if
22 no further review or appeals of the award are pending, the person may file a claim for the award with the
23 department of administration which shall pay the claim within thirty days in the same manner as an
24 uninsured property loss under chapter 3.1, article 1 of this title, except that the department shall be
25 responsible for the total amount awarded and shall pay it from operating monies. If the department had
26 appropriated monies available for paying the award at the time it failed or refused to pay, the legislature
27 shall reduce the department's operating appropriation for the following fiscal year by the amount of the
28 award and appropriate that amount to the department of administration as reimbursement for the loss.

29 G. This section does not apply to:

- 30 1. Any grievance and appeal procedure pursuant to title 36, chapter 29.
1. Any appeal procedure pursuant to chapter 4, article 6 of this title.
3. Any administrative appeal filed by an inmate in an Arizona state prison.

H. As used in this section:

1. "Department" includes a state agency, department, board or commission, and the universities.
2. "Party" includes an individual, partnership, corporation, association and public or private organization.

1 claims, upon which Appellants have gained success, under A.R.S. § 41-1007 reveals
2 similar results: As was concluded in the previous section, the Agency's position that led
3 to the appeals was not substantially justified; and, Appellants prevailed on the most
4 significant issue in each case (the Agency action was rescinded). Further, it cannot be
5 said that Appellants unreasonably protracted the final resolution of the matter; and,
6 Appellants, in their application for an award, established their eligibility, identified the
7 amount sought, and provided an itemization of the time spent and the rate at which the
8 fees were charged.

9 Unlike A.R.S. § 12-348(B), § 41-1007 does not place a cap on an attorney's
10 hourly rate; it is only required that the fees be reasonable. The statute merely requires
11 (1) that the prevailing party demonstrate eligibility for an award; (2) that the prevailing
12 party identifies the amount sought; and (3) that the prevailing party submit an itemized
13 statement of attorneys' and experts' fees. Appellants have each satisfied those
14 requirements.

15 16 V.

17 RULING ON ATTORNEYS' FEES

18 Appellants are each entitled to an award of attorneys' fees and costs in these
19 appeals. They each prevailed; the Agency's position was not substantially justified; each
20 has itemized the fees and costs incurred in the process of attempting to have the
21 Agency action overturned; and, each has justified the rate at which the fees were
22 assessed (given the attorney expertise required in the field of environmental law and the
23 credentials of the two lead attorneys).

24 Under A.R.S. § 12-348(C), a court is authorized to deny or reduce a fee award
25 under limited circumstances. Generally, the reasonableness of the government action is
26 not to be considered in the determination whether fees should be reduced or denied.³¹
27 Nevertheless, the fee application may be reduced or denied if the court determines: (1)
28 that the prevailing party unduly and unreasonably protracted the final resolution of the

29
30 ³¹ See *Cortaro Water Users' Ass'n v. Steiner*, 148 Ariz. 314, 317, 714 P.2d 807, 810 (1986; *American Cable Television, Inc. v. Arizona Pub. Serv. Co.*, 143 Ariz. 273, 693 P.2d 928 (App. 1984).

and \$399.36 in costs.

On Appellants' motion for fees and costs incurred in their efforts to respond to ADEQ's objections to an award, as has been noted, the Assistant Attorney General made five objections, one of which was successful (that these Appellants cannot obtain fees and costs under A.R.S. § 49-1091.01(A)). Therefore, Appellants would have been required to respond to the objection in any event; the one objection having been proved meritorious. Therefore, Appellants are not entitled to the fees and costs incurred by their response to ADEQ's objections.

So Ordered:

Done this 4th day of May 2004.

Gary B. Strickland
Administrative Law Judge

1 Copy mailed this ____ day of
2 _____, 2004 to:

3
4 Stephen A. Owens, Director
5 *Department of Environmental Quality*
6 Attn: Judith Fought
7 1110 W. Washington, Sixth Floor
8 Phoenix, AZ 85007

9 Office of the Attorney General
10 Environmental Enforcement Section
11 Shelley D. Cutts, Assistant Attorney General
12 1275 West Washington
13 Phoenix, AZ 85007
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15 *Fennemore Craig, P.C.*
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18 3003 North Central Avenue, Suite 2600
19 Phoenix, AZ 85012-2913
20 Fax #: (602)916-5576

21 **As a courtesy and in the interest of expedition, forwarded to Counsel this day via**
22 **facsimile transmission.**

23
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25
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27
28
29
30
By _____