

1 **Final agency action regarding decision below:**

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3 **REQHRG Date hearing requested**

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

7
8 **In The Matter Of:**

No. 02A-F171-DEQ
No. 02A-F173-DEQ

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11 **Circle K. Unit No. 01383**
815 East Main
12 **Springerville, AZ 85938**

Minute Entry

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14 **LUST NOS. 0263.01-22 and 0263.01-23**

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17 Pending before the Office of Administrative Hearings is Appellant *Circle K Store*
18 **#01383's APPLICATION FOR FEES AND COSTS AS PREVAILING PARTY UNDER A.R.S. §**
19 **49-1091.01** Appellant filed its motion on July 8, 2003. Upon motion submitted by the
20 *Arizona Department of Environmental Quality* for an extension to file its RESPONSE, the
21 Administrative Law Judge issued an Order on July 9, 2003 granting the motion, the
22 *Department* thereby allowed to 5:00 P.M. July 29, 2003 to file the pleading. The
23 *terminus ad quem* of the filing window has elapsed without the *Department of*
24 *Environmental Quality* having submitted a RESPONSE.

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26 **History of the Case**

27 *Circle K Stores, Inc.* is a wholly owned subsidiary of *ConocoPhillips*. As such,
28 Appellant is an owner/operator of a site in Springerville, Arizona whereat it has been
29 determined necessary to conduct remediation due to release of a regulated substance
30 from an underground storage tank situated at the property. In furtherance of efforts to
remediate the substance, Appellant submitted to the *Department* two applications for
coverage of corrective action costs from the State Assurance Fund ("SAF"). The

1 applications, numbers 22 and 23, sought coverage for costs associated with equipment
2 rental and operation and maintenance.

3 The facts pertaining to the two applications have been set out in Appellant's
4 **APPLICATION FOR FEES AND COSTS AS PREVAILING PARTY UNDER A.R.S. § 49-1091.01.**
5 The facts set forth therein remain uncontested. In both applications, Appellant
6 exhausted available procedural means in an attempt to gain favorable determinations
7 from the *Department* in Appellant's quest to obtain coverage of the subject costs.

8 Ultimately, Appellant was constrained to file formal appeals from the
9 *Department's* final determinations in Applications numbered 22 and 23. In anticipation of
10 a hearing of the issues presented, the parties engaged in settlement discussions both
11 during an informal settlement conference and thereafter. *ConocoPhillips* had filed an
12 informal appeal under A.R.S. § 49-1091(A), a result of which was participation of the
13 parties' representative(s) at the informal settlement meeting pursuant to A.R.S. § 49-
14 1091(C) and (D).

15 As a result of the discussions, the *Department* approved certain amounts
16 theretofore denied. Specifically, the *Department* has approved payment of \$11,673.68
17 of the \$29,082.95 sought on application 22 and \$41,182.18 of the \$66,656.04
18 reimbursement sought in application 23.

19 Despite the *Department's* manifest change of position on certain aspects of the
20 denials, reimbursement issues remained. *ConocoPhillips* contested those remaining
21 Final Determination issues by filing an appeal and by requesting an evidentiary hearing
22 under A.R.S. §§ 49-1091(E) and 41-1092.03. In due course, the hearing was conducted
23 on the amounts remaining, with the *Technical Appeals Panel* participating. The result of
24 the hearing was that Appellant failed to succeed on the remaining denied amounts.¹ By
25 this **APPLICATION FOR FEES AND COSTS AS PREVAILING PARTY UNDER A.R.S. § 49-**
26 **1091.01**, Appellant does not seek reimbursement of any costs associated with necessity
27 to proceed to the hearing.

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29 _____
30 ¹ See, the Director's June 2, 2003 DECISION adopting the Administrative Law Judge's DECISION AND
RECOMMENDED ORDER of April 30, 2003.

Appellant's Argument

1 Appellant seeks approval of its attorney's fees and costs application under A.R.S.
2 § 49-1091.01(C) ("in the portion of the proceedings that are the subject of the notice of
3 disagreement in which the owner, operator or person who undertakes corrective action
4 pursuant to section 49-1052, Subsection I, prevailed, including proceedings resulting in
5 a favorable decision or determination from the department or in a judicial proceeding").
6 While Appellant admits that it has not prevailed in a "portion of the proceedings,"
7 Appellant nonetheless asserts that Appellant successfully *has* "prevailed upon"² the
8 *Department* to pay 58% of the costs initially denied by the *Department* in its Final
9 Determinations on the subject applications. In essence, Appellant argues, the statute
10 allows for payment of fees and costs when a party can demonstrate that the
11 *Department* has altered its position after a final determination, resulting in a
12 determination now favorable to the applying party.

13 Appellant is requesting reimbursement of \$8,306.10 of the \$12,585.00 it incurred
14 in attorney's fees and costs on applications 22 and 23. The fees and costs sought are
15 reduced by 34% to reflect that amount it had been successful in obtaining from the
16 *Department* through negotiation.

17 Appellant is requesting reimbursement of \$4,623.46 of the \$7,005.25 it incurred
18 in consultant's fees and costs on applications 22 and 23. Again, the fees and costs
19 sought are reduced by 34% to reflect that degree to which Appellant had been
20 successful in its negotiations with the *Department*.

Applicable Law

21 Consideration of the motion is made in light of and as authorized by A.R.S. § 49-
22 1091.01. The statute is herein set forth in pertinent part below.³

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27 ² See, Appellant's APPLICATION FOR FEES AND COSTS AS PREVAILING PARTY UNDER A.R.S. § 49-1091.01, p. 5,
line 25.

28 ³ B. An owner, operator or person who undertakes corrective action pursuant to section 49-1052, Subsection I shall
29 receive reimbursement for reasonable attorney fees, consultant fees and costs that are actually incurred and not
30 excessive in all proceedings that follow the interim decision or interim determination pursuant to section 49-1091, if
that party satisfies both of the following requirements:

Analysis

The phraseology "prevailing party" is generally referred to as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded. . . . – Also termed *successful party*."⁴ Despite the customary usage and concomitant understanding of the phrase, the Legislature has seen fit to afford an owner, operator or person who undertakes corrective action under A.R.S. § 49-1052 opportunity to obtain reimbursement of fees and costs associated with the effort, even short of judicial or

1. Submitted a written notice of the disagreement to the department within thirty days pursuant to section 49-1091.

2. Requested and participated in a meeting with the department regarding decisions or determinations pursuant to section 49-1091, Subsection A, paragraph 2 or section 49-1091, Subsection G, paragraph 1 or 2.

C. The attorney fees, consultant fees and costs shall be paid only for those amounts that are reasonable, actually incurred and not excessive in the portion of the proceedings that are the subject of the notice of disagreement in which the owner, operator or person who undertakes corrective action pursuant to section 49-1052, Subsection I, prevailed, including proceedings resulting in a favorable decision or determination from the department or in a judicial proceeding.

D. The reimbursement provided by Subsection B of this section is subject to the following limitations:

1. Fees and costs shall not be paid if the department makes a favorable determination or decision on the issue appealed before or in the final decision or determination.

2. Fees and costs shall not be paid if all of the following conditions are met:

(a) Information requested pursuant to section 49-1052, Subsection B or section 49-1091, Subsection E is not provided to the department before the time the department issues a final decision or determination that is adverse to the owner, operator or person who undertakes corrective action pursuant to section 49-1052, Subsection I.

(b) The final decision or determination is subsequently reversed or otherwise decided in favor of the person based on information previously requested by the department.

3. In an appeal of a determination regarding an application for preapproval, direct payment or reimbursement from the assurance account, attorney fees, consultant fees and costs paid pursuant to this subsection may not exceed the amount that is in dispute.

4. If information requested by the department pursuant to section 49-1052, Subsection B or section 49-1091, Subsection E is provided to the department before the department issues a final decision or determination that is adverse to the owner, operator or person who undertakes corrective action pursuant to section 49-1052, Subsection I, and the final decision or determination is subsequently reversed or otherwise decided in favor of the owner, operator or person who undertakes corrective action pursuant to section 49-1052, Subsection I based on that information, attorney fees, consultant fees and costs shall only be paid for those amounts actually incurred after the information was provided.

⁴ BLACK'S LAW DICTIONARY 1145 (7th ed. 1999). BLACK'S defines the verbal form, *prevail*, as "[t]o obtain the relief sought in an action; to win a lawsuit." *Id.* at 1206.

1 quasi-judicial determination.⁵ In this sense, Appellant is correct that the statute triggers
2 the right to fees and costs upon the *Department's* failure to find in favor of the applicant
3 in its final determination, the determination that is appealable to the Office of
4 Administrative Hearings.

5 In arriving at the conclusion, one must properly exegete the language of A.R.S. §
6 49-1091.01(C) wherein is stated that a party eligible for fees and costs must have
7 prevailed in the context of proceedings judicial as well as "proceedings resulting in a
8 favorable decision or determination *from* the department."

9 The controlling statute, A.R.S. § 49-1091.01, has two components relevant to
10 consideration of the motion; subsections (B) and (D). There is no question that
11 Appellant satisfied the requirements of subsection (B) in this process. It timely filed a
12 written notice of disagreement and it requested and participated in an informal
13 settlement meeting regarding each of the subject applications.

14 Moreover, subsection (D) identifies certain preclusive considerations, none of
15 which apply here. The favorable decision was not made in or before the Final Decision
16 (rendered on October 31, 2002), and the *Department* did not make an information
17 request "before the time [that] the department issue[d] a final decision or determination."
18 Because A.R.S. § 49-1091.01(D)(2)(a) and (D)(4) are not triggered, no additional
19 information was requested, subsection 2(b) does not apply.

20 Finally, A.R.S. § 49-1091.01(D)(3) is not implicated because the amount sought
21 by Appellant in attorney's fees and costs does not exceed the amount awarded
22 Appellant by the *Department* subsequent to the issuance of the Final Determinations.

23 The question boils down to (1) whether Appellant is entitled to an award of
24 attorney's fees and costs under A.R.S. § 49-1091.01(B) *and* (2) whether the fees and
25 costs claimed under Appellant's motion are reasonable, actually incurred, and not
26 excessive.

27 The interim determinations for Applications 22 and 23 were issued on July 25,

28 ⁵ A.R.S. § 49-1091.01(C). "incurred and not excessive in the portion of the proceedings that are the subject of the
29 notice of disagreement in which the owner, operator or person who undertakes corrective action pursuant to section
30 49-1052, Subsection I, **prevailed, including proceedings resulting in a favorable decision or determination
from the department** or in a judicial proceeding." (Emphasis added).

1 2002 and May 7, 2002 respectively. The fees and costs for which reimbursement is
2 herein sought were incurred after issuance of the interim determinations and prior to
3 commencement of the hearing that was convened on the remaining contested issues.
4 The first date for which Appellant is requesting its fees and costs is December 19, 2002,
5 subsequent to the *Department's* issuance of the interim determinations in the matter.

6 The operative subsection, it then seems, is A.R.S. § 49-1091.01(C) wherein the
7 nuanced⁶ version of *prevailed* is set forth. The subsection identifies a "favorable
8 decision or determination from the department" as a forum, in addition to a court of law,⁷
9 in which it is necessary that the applicant for fees and costs have prevailed. The
10 questions introduced by the language are: What is referenced by "the department?" And
11 – what does it mean by "from?" The first question is readily understood. While it is a
12 subtle distinction, one might say that the use of the lowercase 'd' in "department" is
13 significant.⁸ The statute does not require that the "decision" have been issued by the
14 Director through the formal appeal process, contrary to the *Department's* argument.
15 Certainly, when A.R.S. § 49-1091(E) and other sections allude to a Final Determination,
16 the allusion is to an action taken by a department within the *Department*, to which
17 department responsibility of decision-making has been delegated. Furthermore, the
18 "from" may be construed as having two possible uses in this context: a) location; or b)
19 origination/source. In other words, is it intended that the use of the preposition "from"
20 indicate that the department is acting or being acted upon? Does the Legislature mean
21 that the decision must have come through the Office of Administrative Hearings after an
22 evidentiary hearing? Or, may the decision have been initiated by the department within
23 the *Department*? And, what of the reference to "proceedings?" Is it necessary that the
24 term be construed in its most formal sense? The answer to the latter question quite

25 ⁶ Implying a regulatory, rather than strictly legal, meaning of the word.

26 ⁷ Candidly, the strongest argument that the *Department* might put forth in support of its exposition of A.R.S. § 49-
27 1091.01(C) is to emphasize the disjunctive "or" ("from the department *or* in a judicial proceeding") to imply a
28 parallelism in function between what the *Department* does in comparison with a that done in a judicial proceeding.
29 The closest parallel would be the evidentiary hearing process, which culminates in a Director's Order. However, the
30 argument breaks down in light of the juxtaposition of "decision" and "determination."

⁸ Of course, the Legislature has used the lower case 'd' throughout the chapter.

1 clearly is no. For its secondary definition, the standard legal lexicon defines a
2 "proceeding" as including "[a]ny procedural means for seeking redress from a tribunal or
3 agency."⁹ Here, Appellant followed whatever procedural means were afforded by the
4 Agency's governing statute to gain reimbursement of its corrective action costs. Those
5 proceedings included informal processes under A.R.S. § 49-1091(E). The ultimate
6 approval determination came *from* the department charged with making these types of
7 decisions.

8 Of further significance in the analysis, it is noteworthy that the statute governing
9 proceedings before the Office of Administrative Hearings already provides a statutory
10 course for an award of attorney's fees and costs, A.R.S. § 41-1007. The statute under
11 consideration here, A.R.S. § 49-1091.01, enacted some seven years after § 41-1007,
12 would appear redundant if it were construed solely applicable or triggered strictly by an
13 Office of Administrative Hearings, quasi-judicial ruling.

14 Therefore, the question is: Did *ConocoPhillips* prevail in its efforts to obtain
15 reimbursement of the subject costs? The simple answer is yes. The *Department* initially
16 refusing to change its position led to additional expenditures of money by
17 *ConocoPhillips* in its efforts to gain the reimbursement. Those efforts succeeded, in
18 part, through negotiation, or, Appellant's prevailing upon the *Department*. This is the
19 kind of situation contemplated by the legislation.

20 Legal Conclusions

21 The principal goal sought to be achieved in the interpretation of a statute is to
22 determine a legislative intent¹⁰ and to give effect to that intent.¹¹ In order to achieve the
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24 ⁹ BLACK'S LAW DICTIONARY 1221 (7th ed. 1999).

25 ¹⁰ Recognizing that a proper construction of a statute justifies that great weight be given to maxims of interpretation
26 constituting generalizations concerning customary language usage, and that the Legislature has mandated that the
27 words and phrases found in a statute are to be construed according to the common and approved use of the
28 language, unless the language be employed in a technical sense, A.R.S. § 1-213, the Administrative Law Judge has
29 construed A.R.S. § 1091.01 in light of the manifest intent of the Legislature as that intent can be discovered by the
30 language used.

¹¹ *Southwest Airlines Co. v. AZ Dept. of Revenue*, 318 Ariz. Adv. Rep. 18, 19 (Ct. App., April 4, 2000). *See also*
Palmcroft Development Co. v. City of Phoenix, 46 Ariz. 200, 49 P.2d 626, modified in another respect 46 Ariz. 400,
51 P.2d 921 (1935) ("While [a] court must give effect to intention of the Legislature, it cannot substitute its opinion

1 goal, the endeavor requires a consideration of context, language, subject matter,
2 historical background, effects and consequences, and the spirit and purpose of the
3 law.¹² Words are to be accorded their usual and commonly understood meaning unless
4 a different meaning was plainly intended¹³ or unless such exegesis¹⁴ would lead to an
5 absurd result.¹⁵ If the ordinary meaning leads to an absurd result, the exegete may then
6 employ other interpretive tools such as the policy, purpose, history, or context of the
7 statute to give effect to the Legislature's intent.¹⁶ However, again, it is to the statute's
8 language that one must resort as the primary source material for proper exposition.
9 After all, the language of the statute is "the best and most reliable index of a statute's
10 meaning."¹⁷ If the language is plain, there is no need to inquire further.¹⁸

11 A reasonable reading of A.R.S. § 49-1091.01 finds that the Legislature's intent in
12 promulgating the section was to encourage the *Department* to fully apprise participants
13 of intended Agency action and to enable the participant to satisfy requirements having
14 been fully informed. Section (B) of the statute appears to encourage a clear and precise

15 of what was intended for intent of Legislature expressed in plain and unambiguous language which leads to no
16 absurd results.").

17 ¹² *Id.*, citing *Martin v. Martin*, 156 Ariz. 452, 457, 752 P.2d 1038, 1043 (1988).

18 ¹³ *Id.*, citing *See Life Investors Ins. Co. of Am. v. Horizon Resources Bethany, Ltd.*, 182 Ariz. 529, 531, 898 P.2d
19 478, 480 (App. 1995).

20 ¹⁴ The antonym is "eisegesis," which describes reading into a text the interpreter's own ideas.

21 ¹⁵ *State v. Estrada*, 201 Ariz. 247, 34 P.3d 356 (2001) ("For purposes of statutory construction, a result is absurd if
22 it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons
23 with ordinary intelligence and discretion."); *See also Arpaio v. Steinle*, 201 Ariz. 353, 35 P.3d 114 (App. 2001) ("If
24 the statute's language is clear and unambiguous, the court gives effect to that language and applies it without using
25 other means of statutory construction, unless applying the literal language would lead to an absurd result."); *See*
26 *also Facilitec, Inc. v. J. Elliott Hibbs, Director, Arizona Dep't. of Admin.*, 59 P. 3d 803, 386 Ariz. Adv. Rep. 6; 388
27 Ariz. Adv. Rep. 6 (Ariz. App., filed Nov. 5, 2002, amended by Order Nov. 29, 2002; rev. granted by the Ariz. S.Ct.
28 Apr. 22, 2003).

27 ¹⁶ *Id.*, citing *State v. Williams*, 175 Ariz. 98, 102, 854 P.2d 131, 135 (1993).

28 ¹⁷ *State v. Williams*, 175 Ariz. 98, 854 P.2d 131 (Ariz. S.Ct. 1993), citing *"Janson v. Christenson*, 167 Ariz. 470,
29 471, 808 P.2d 1222, 1223 (1991).

30 ¹⁸ *Id.*

1 application of statutory, regulatory and policy requirements.

2 Finally, while A.R.S. § 49-1091.01 is silent on the criteria that ought to be
3 entertained in an assessment of an application for fees and costs, A.R.S. § 41-1007
4 sets forth certain criteria that may appropriately be consulted in this context, such as a
5 requirement that an itemized statement, with actual time spent in the representation, be
6 submitted in support of the application, as well as the rate at which the fees were
7 computed.

8 FEES AND COSTS

9 The attorneys' fees and costs asserted¹⁹ herein by Counsel are reasonable given
10 Counsel's experience, the nature of the claim, the time and effort expended, the
11 outcome achieved, the rate at which the client was charged, and the itemization of the
12 actual costs pursued.

13 The Consultants' fees²⁰ are only partially substantiated; the description of activity
14 is insufficiently delineated. Twenty-six and three-quarters (26.75) of the sixty-four (64)
15 hours claimed refer to a process whereby the consultant sought to "gather information;"
16 42% of the sum claimed. While information-gathering is inherent in and necessary to the
17 process of contest and proof, greater specificity is warranted.²¹ Failing submission of a
18 proper itemization, the claimed fees are cut by two-fifths (40%).

19 ORDER

20 Based upon the foregoing,

21 **IT IS ORDERED** that Appellant's July 8, 2003 **Application for Award of**
22 **Attorney's Fees and Costs is granted.** Appellant is entitled to **\$8,306.00²²** in legal fees
23 and **\$4,623.00 – 40% (= \$2,774.00)** in Consultant's fees and costs under A.R.S. § 49-
24

25 ¹⁹ See Exhibit 'A' to APPELLANT'S APPLICATION FOR FEES AND COSTS AS PREVAILING PARTY UNDER A.R.S. §
26 49-1091.01.

27 ²⁰ See Exhibit 'B' to APPELLANT'S APPLICATION FOR FEES AND COSTS AS PREVAILING PARTY UNDER A.R.S. §
28 49-1091.01.

29 ²¹ It is suggested that the Consultant may want to review and compare the attorney's itemization.

30 ²² Rounded to the nearest dollar.

1091.01.²³

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²³ And, A.R.S. § 41-1007(C)(3).

1 Done this 11th day of August in the year 2003.
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5 _____
6 Gary B. Strickland
7 Administrative Law Judge
8

9 Copy mailed this ____ day of
10 _____, 2003 to:

11 Stephen A. Owens, Director
12 *Department of Environmental Quality*
13 Att'n: Lavonne Watkins
14 1110 W. Washington, Sixth Floor
15 Phoenix, AZ 85007

16 *Fennemore Craig, P.C.*
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18 3003 North Central Avenue, Suite 2600
19 Phoenix, AZ 85012-2913

20 Office of the Attorney General
21 Environmental Enforcement Section
22 Barbara U. Pashkowski, Assistant Attorney General
23 1275 West Washington
24 Phoenix, AZ 85007

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27
28 **As a courtesy, this Minute Entry Order has been forwarded to Counsel via
29 facsimile transmission this day.**
30

By _____