FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 15, 2002

PRONGHORN DRILLING COMPANY, Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
v.	:	DOCKET NO. EAJ 2001-4
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent:	:	Formerly WEST 2000-537-M / 538-M A. C. Nos. 48-00837-05501 N5Y 48-00837-05502 N5Y
	:	Smith Ranch Project

DECISION

Before: Judge Melick

This proceeding is before me upon the application of the Pronghorn Drilling Company (Pronghorn) for an award of fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, the "EAJ Act." Pronghorn prevailed over the Department of Labor's Mine Safety and Health Administration (MSHA) before trial by summary decision in the underlying penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (1994) the "Mine Act." The EAJ Act provides that a prevailing party may be awarded attorney's fees unless the position of the United States is substantially justified or that special circumstances make an award unjust. *Secretary v. Black Diamond Construction Inc.,* 21 FMSHRC 1188 (November 1999). The Supreme Court has defined substantially justified as "justified in substance or in the main," or a position that has a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1998). In *Pierce*, the Supreme Court set forth the test for substantial justification as follows:

> "A position can be justified even though it is not correct and we believe it can be substantially, "*i.e.,* for the most part" "justified if a reasonable person could think it correct, if it has a reasonable basis in law and fact." *Id.* at 566n.2. The Court also noted that certain "objective indicia" such as the terms of a settlement agreement, the stage of the proceedings at which the merits were decided and the views of other Courts on the merits can be relevant to the inquiry of whether the government's position was substantially justified. *Id.* at 568. In proceedings under the Act, the agency bears the burden of establishing that its position was substantially justified. *Lundin v. Mecham,* 980 F.2d 1450, 1459 (D.C. Cir. 1992).

In the underlying proceeding under the Mine Act, the Secretary charged independent contractor, Pronghorn, with Mine Act violations at the Smith Ranch Project, owned and operated by Rio Algom Mining Corporation (Rio Algom) and arising out of an accident which killed truck driver Philip Robideoux. Pronghorn and Rio Algom filed motions for summary decision in the underlying proceedings based on the claim that the Secretary was without jurisdiction under the Mine Act. The motions for summary decision were granted by decision dated September 7, 2001, and the Secretary did not seek review.

The rationale for the decision is set forth below:

> Whether the "Smith Ranch Project" is a "mine" depends on whether it meets the definition set forth in Section 3(h)(1) of the [Mine] Act. Section 3(h)(1) provides as follows:
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> > "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.
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> In connection with their motions for summary decision the parties have reached joint stipulations on the jurisdictional issue and more particularly regarding the processes and activities involved in uranium recovery at the Smith Ranch Project. The process utilized at the Smith Ranch Project is described in an article entitled, "The Smith Ranch Uranium Project" published in the Uranium Institute Twenty Second Annual International Symposium 1997, and authored by R. Mark Stout and Ennis E. Stover (SJ Exhibit No. 2). For purposes of this decision however, it is sufficient to note, and it is undisputed, that the mineral here at issue, *i.e.,* uranium, is extracted in liquid form without any workers underground.
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> As previously noted, Section 3(h)(1)(A) of the Act defines "coal or other

mine" as "[a]n area of land from which minerals are extracted in nonliquid form or, *if in liquid form, are extracted with workers underground*." (emphasis added). It is therefore beyond dispute that the Smith Ranch Project at issue herein is not a "mine" within the meaning of Section 3(h)(1)(A) of the Act.

The Secretary nevertheless argues that Rio Algom's processing of this mineral, which has been extracted in liquid form without workers underground, is covered under Section 3(h)(1)(C) of the Act as "the milling of such minerals." "Coals or other mine" is there defined to also include ". . . structures, facilities, equipments, machines, tools, or other property, . . . used in, or be used in, or resulting from, with workers underground, *or used in, or to be used in, the milling of such minerals . . .*" (*emphasis added*).

It is well established that "[w]hen the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails." *W. Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989). If it is plain on its face, effect should be given to its clear meaning. *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990).

Under the clear and plain language of Section 3(h)(1)(C) those milling operations covered under the Act are only those involving the milling of "such minerals," *i.e.,* "minerals extracted from their natural deposits in nonliquid form, or if in liquid form, with workers underground." Clearly when the adjective "such" is used to modify the noun "minerals" it qualifies the word "minerals" limiting it to only those minerals previously qualified in the statute, *i.e.,* only those minerals extracted from their natural deposits in nonliquid form, or if in liquid form, with workers underground.

The adjective "such" sometimes serves a useful purpose, as where it saves having to repeat a concept that cannot be referred to in a word or two. In statutes and regulations, for example, it may be necessary to make clearly that the second reference is exactly the same concept mentioned previously. The word "such" is the simplest way to do so. *See People v. Jones*, 46 Cal 3d 585, 250 Cal Rptr 635, 759 P2d 1165 (1988). The legislative history is also consistent with this construction. As that history reflects, the definition of mining was intended to encompass the milling process, but only those operations "related" to minerals defined by and incorporated into the Act's provisions.

Within this framework of law it is clear that the operations here at issue, whether or not they constitute "milling" within the meaning of the Act, are excluded from coverage under the Act and the Secretary has no jurisdiction in these proceedings. Accordingly all citations herein must be vacated and these civil

penalty proceedings dismissed.

23 FMSHRC at 1042-1044.

Pronghorn asserts that it is entitled to the requested award because the position of the Secretary was not "substantially justified in law or fact," and that its assertion is fully supported by the summary decision. I agree. The clear and plain language of the Mine Act as applied herein limits jurisdiction to only operations involving the milling of minerals extracted from their natural deposits in nonliquid form, or, if in liquid form, with workers underground. When it has never been disputed that the mineral at issue herein is extracted in liquid form with no workers underground there is no ambiguity and no room for debate. Indeed, the Secretary had no reasonable basis in law or fact to assert jurisdiction in the underlying proceedings. Accordingly the Secretary's position was not "substantially justified." In light of the plain and clear language of the jurisdictional statute, I cannot find that "reasonable people could genuinely differ" over this issue.

In reaching these conclusions I have not disregarded the Secretary's argument that she had a reasonable basis to proceed herein because neither the owner of the Smith Ranch Project, Rio Algom, nor the Applicant herein, independent contractor Pronghorn, had claimed at the time of the accident that the Secretary did not have jurisdiction and that they challenged her lack of jurisdiction only after litigation had commenced. The Secretary has also argued that MSHA had been conducting inspections at the Smith Ranch Project for years, apparently without being challenged for lack of jurisdiction by either Rio Algom or Pronghorn. I give such arguments but little weight, however, since following an unreasonable interpretation over several years or the acquiescence by lay persons who may be ignorant of the law in the Secretary's enforcement actions, does not transform an unreasonable interpretation into a reasonable one. See *F.J. Vollmer Company, Inc. v. Magaw (BATF)*, 102 F.3d 591 (D.C. Cir. 1996).

The Secretary also argues, however, that even assuming, *arguendo*, that her position in the underlying cases was not substantially justified, an award under the Act should nevertheless be denied because special circumstances make an award unjust. See 5 U.S.C. § 504(a)(1). She argues that such an award would be unjust because Pronghorn has been relieved of civil penalties only because the Secretary mistakenly believed that MSHA, not OSHA (Occupational Safety and Health Administration) had jurisdiction over the accident. She notes that she is now statutorily time-barred from bringing action under OSHA jurisdiction. See 29 U.S.C. § 658(c). This argument presumes, however, that Pronghorn was in fact guilty of violating some unidentified OSHA standards. Because of the early dismissal of the underlying penalty proceedings by summary decision no evidence was heard on the merits concerning any violations and accordingly the argument is indeed presumptuous.

The Secretary's argument is also patently absurd. According to her argument, an award would be unjust where she has wrongly and unreasonably asserted jurisdiction in the underlying case, thereby depriving herself of the opportunity to litigate. The Secretary also cites the case of *Mester Mfg. Company v. INS,* 900 F.2d 201, 204 (9th Cir. 1990) in support of her argument that an award would be unjust. *Mester* did not, however, address this particular issue and it is

therefore inapposite.

In summation I conclude that the Secretary has failed to sustain her burden of proving that her position in the underlying case was substantially justified or that an award in this case would be unjust. Accordingly, Pronghorn is entitled to an award under the EAJ Act. The Secretary does not challenge the Applicant's requested fees, costs and expenses of $50,942.45, through September 2001. I have reviewed the application and find that the listed fees, costs and expenses are allowable. Since those fees, costs and expenses apply only to the period through September 2001, however, a final order will not be issued in this case until a final application has been submitted by stipulation or otherwise and ruled upon by the undersigned. Such application must be submitted to this judge on or before January 31, 2002.

Gary Melick
Administrative Law Judge

Distribution: (By Certified Mail)

Sean P. Durrant, P.C., Palmerlee & Durrant, LLC, 11 North Main Street, Buffalo, WY 82834

Edward Falkowski, Esq., Office of the Solicitor, U.S. Dept. of Labor, P.O. Box 46550, Denver, CO 80201-6550

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