UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Silver State Aviation, Inc.	)	I.F.& R. VIII-70C
	)	
Respondent	)	

DECISION DENYING APPLICATION FOR ATTORNEY'S FEES AND EXPENSES

This is an application for attorney's fees and expenses pursuant to the Equal Access to Justice Act, Section 203(a)(1), Pub. L. No. 96-481, 94 Stat. 2325 (codified in 5 U.S.C. 504), and the Agency's implementing regulations, 40 CFR Part 17.

The applicant, Silver State Aviation, Inc. ("Silver State") was the respondent in a proceeding under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), Section 14(a), 7 U.S.C. 136l(a), for the assessment of civil penalties for alleged violations of the Act. The administrative complaint, issued on August 23, 1982, charged Silver State with misuse of the pesticide Hoelon in that Silver State's "operator" failed to follow the label direction that impermeable pants and shirt should be worn while mixing and loading the pesticide, and Silver State's pilot failed to follow the label's direction that a cartridge type resperator must be worn during aerial application. Silver State answered, denying liability, raising several defenses, and requesting a hearing. Settlement was discussed but proving unfruitful, the parties in preparation for the hearing exchanged witness lists and documents and supplied certain information about their respective positions which I had requested.

EPA thereafter moved for a partial accelerated decision which was granted in part, and also sought and was allowed additional discovery but not to the extent it had requested. For its part, Silver State moved for a stay of administrative proceedings pending determination of a district court action it had brought for a declaratory judgement that FIFRA had unconstitutionally delegated power to the pesticide producer to prescribe its condition of use. The stay was denied. A hearing was scheduled for June 8, 1983, but was never held, because the EPA on May 23, 1983, a little more than two weeks prior to the hearing, moved to dismiss the complaint with prejudice, stating the motion was based on the "discovery of new information."

To be entitled to an award of attorney's fees and expenses, the applicant must be an eligible prevailing party.1/ The grounds on which fees and expenses are awarded are set forth in 40 CFR 17.06(a), which provides as follows:

> A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding unless the position of the EPA as a party to the proceeding was substantially justified or unless special circumstances make the award sought unjust. The fact that the EPA did not prevail does not demonstrate that the Agency's position was not substantially justified.2/

As to its eligibility for an award of attorney's fees and other expenses, Silver State has submitted a financial statement showing a net worth of considerably less than $5 million.3/ While its application is silent as to its

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1/ See 5 U.S.C. 504(a)(1); 40 CFR 17.05.

2/ The first sentence in 40 CFR 17.06(a) follows generally the language of 5 U.S.C. 504(a)(1). The last sentence is not in the Act but is in accord with the legislative history. See infra at 5.

3/ "Net worth" is not specifically defined in the Act or the regulations but it is assumed to have its ordinary meaning of assets less liabilities.

number of employees, Silver State's size as shown in its financial statement and the nature of its business make it extremely unlikely that it has in excess of 500 employees, the maximum allowable for an eligible applicant. It is, accordingly, assumed for purposes of considering the application that Silver State is eligible for an award.

The next question to be considered is whether Silver State is a prevailing party. Neither the Equal Access to Justice Act nor the regulations define "prevailing party" but an explanation of what was intended is to be found in the committee reports. There, it is stated as follows:

> Under existing fee-shifting statues, the definition of prevailing party has been the subject of litigation. It is the committee's intention that the interpretation of the term in S. 265 be consistent with the law that has developed under existing statutes. Thus, the phrase "prevailing party" should not be limited to a victor only after entry of a final judgment following a full trial on the merits. A party may be deemed prevailing if he obtains a favorable settlement of his case, Foster v. Boorstin, 561 F. 2d 340 (D.C. Cir. 1977); if the plaintiff has sought a voluntary dismissal of a groundless complaint, Corcoran v. Columbia Broadcasting System, Inc., 121 F. 2d 575, (9th Cir. 1941); or even if he does not ultimately prevail on all issues, Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974).4/

The EPA contends that Silver State should not be considered to have prevailed since the dismissal did not in any way reflect a decision by the presiding officer giving credence to any of Silver State's defenses. Dismissal of the suit, however, was a disposition favorable to Silver State. Indeed, the dismissal with prejudice gave Silver State virtually the same relief that it would have obtained if it had prevailed on the

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4/ H.R. Rep. No. 96-1418, 96th Cong. 2d Sess. 11, reprinted in 1980 U.S. Code Cong. & Ad. News 4984, 4990. To the same effect, see also H.R. Conf. Rep. No. 96-1434, 96th Cong. 2d Sess. 21-22, reprinted in 1980 U.S. Code Cong. & Ad. News 5010-5011.

merits after a hearing. If the fact that it results from the voluntary action of the EPA rather than from a decision on the merits were of consequence, the Agency could press its case, no matter how unjustified, in the hopes of achieving some success, but defeat a party's right to an award by simply withdrawing short of actually litigating its claims. This would clearly be contrary to Congress' intent in passing the Equal Access to Justice Act. As the court stated in Goldhaber v. Foley, 698 F. 2d 193, 197, "[T]he Act's governing principle [is] that the United States should pay those expenses which are incurred when the government presses unreasonable positions during litigation. This principle devolves from the Act's central purpose to eliminate any barrier to litigation challenging unreasonable government conduct presented by the specter of attorney's fees."5/

It is found, therefore, that Silver State is a prevailing party within the meaning of the Equal Access to Justice Act and the regulations and is entitled

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5/ The EPA's argument, however, is relevant in determining the amount of the award, since Silver State is not entitled to an award for work done on interlocutory issues on which it did not prevail. Thus, although Silver State's application includes monies expended in connection with its district court action and accompanying motion for a stay of the administrative hearing, these would not be allowable expenses for this proceeding . The district court action was brought on the ground that FIFRA by making compliance with the labeling enforceable by civil or criminal penalties, unconstitutionally delegated legislative powers to the pesticide manufacturer, and the stay of administrative proceedings was sought on the ground that the Agency had no authority to decide the constitutionality of its enabling legislation. The stay of the administrative proceeding was denied because the constitutional question did not appear to be substantial and Silver State had an adequate remedy in the judicial review of any order that may be issued in the administrative proceeding. Clearly, then, Silver State did not prevail on the matter so far as it concerned the administrative proceeding and no reimbursement for expenses incurred in connection therewith should be allowed. As to Silver State's right to expenses in the district court action, the district court and not this proceeding is the proper forum to determine that question. See Corcoran v. Columbia Broadcasting System, Inc., 121 F. 2d 575 (9th Cir. 1941).

to reimbursement unless the EPA's position was substantially justified or unless special circumstances make the award unjust.

As to whether the EPA's position was substantially justified or whether special circumstances make an award unjust, the legislative history has this to say about the standard to be applied:

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made. In this regard, the strong deterrents to contesting Government action require that the burden of proof rest with the Government. This allocation of the burden, in fact, reflects a general tendency to place the burden of proof on the party who has readier access to and knowledge of the facts in question. The committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the Government was unreasonable.
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> Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim had been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.
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> The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing. Furthermore, the Government should not be held liable where "special circumstances would make an award unjust. This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts.
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> It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.6/

6/ H.R. Rep. No. 1418, 96th Cong. 2d. Sess. 10-11 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 4984-90; see also H.R. Conf. Rep. No. 96-1434, 96th Cong. 2d. Sess. 21-22 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 5010-11.

In short, the inquiry is to determine whether the EPA has shown that its case had a reasonable basis in law or fact.

Silver State was admittedly the owner of the airplane used to spray the pesticide. Its liability in this case turns on whether it should be held responsible for the failure of both the person loading the pesticide onto the plane and the pilot who made the application to follow label directions, and this, in turn, depends on the construction of FIFRA, Section 14(b)(4), 7 U.S.C. 136l(b)(4), which provides in relevant part that, "[T]he act, omission, or failure of any officer, agent, or other person acting for or employed by any person shall in every case be also deemed to be the act, omission, or failure of such person as well as that of the person employed." From outward appearances, the EPA could have reasonably concluded from its investigation that the relationship between Silver State which owned the airplane and contracted for the spraying, and the loader and the pilot was such as to make the loader and pilot each if not an employee of Silver State at least an "agent . . . acting for" Silver State.7/ Silver State, however, in its answer raised the defense that the pilot and loader were independent contractors. In its prehearing exchange, it explained in further detail that the two persons were both pilots certified as aerial applicators who had contracted with Silver State to do the actual application. It was further stated that they were paid a fee from which no monies were withheld for income tax or any employee deduction

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7/ Apparently no information was furnished by the loader or by the pilot or by Silver State during the investigation to lead to a different conclusion. To the contrary, the pilot acted in a manner that was entirely consistent with the assumption that he was an employee or at least stood in some agency relationship to Silver State, since he acknowledged receipt of the notice of inspection and of the receipt for pesticide samples on behalf of Silver State.

taken, that they had complete control over the mixing, mixing, loading and application of chemicals and that under their arrangement with Silver State, if their actions resulted in any claims against Silver State, their share of the fees would be withheld and applied toward satisfaction of the claim.

The EPA's first response to Silver State's statements was to seek to obtain further information through discovery about Silver State's relationship to the loader and pilot. The EPA then sought to obviate any need for discovery by moving for an accelerated decision on the legal grounds that under Section 14(b)(4), it was irrelevant whether the loader and pilot were or were not independent contractors. The accelerated decision was denied, since I did not construe Section 14(b)(4) as imposing liability on Silver State, if the loader and pilot were independent contractors not subject to Silver State's direction and control in loading and applying the pesticide, and Silver State had done everything that could reasonably be expected of it as owner of the airplane to insure that the label directions were complied with. Whether this was the relationship between Silver State and the loader and the pilot was definitely in dispute.

Following the denial of the motion, the EPA attempted to proceed with the discovery, but because of additional facts coming to its attention as well as for other reasons, the EPA moved to dismiss the complaint.8/

8/ In moving to dismiss, the EPA stated its motion was based on the discovery of new information. In its opposition to the application for fees, the EPA states that the motion was also prompted by the "escalating expenses involved with proceeding to a full hearing on the matter."

The EPA contends that its decision to institute the action was reasonable given the facts of which it had knowledge, and the record supports that contention. See supra at 6. Indeed, although Silver State in its answer alleged in conclusory terms that the pilot and loader were independent contractors, it appears that the details on which that conclusion was based were first made known to the EPA in the prehearing exchange.9/ The EPA, then, deciding, after attempting some discovery, that the case was now in a posture where it would be too expensive to bring the case to hearing as well as for other reasons, moved to dismiss.10/ It would certainly be reasonable for the EPA to terminate its prosecution of a case short of a hearing once it obtained information casting doubt upon a respondent's liability. While it appears that the EPA's reason here was also based upon its unwillingness to spend additional monies as well as upon any reassessment of Silver State's liability, this, of course, should have no bearing on the reasonableness of the EPA's position for purposes of determining whether fees and expenses are awarded. An Agency should be able to take into account the expense entailed to meet new facts which have come to light in deciding whether to proceed further in a case. The Equal Access to Justice Act certainly was not intended to confront the Agency with the dilemma of either expending monies it is unwilling to spend to continue with a case, or suffer payment of attorney's fees if it drops the case.

9/ This appears to have been the basis for EPA's discovery request and was not really disputed by Silver State.

10/ Brief in Response and Opposition to Respondent's Application for Fees and Expenses at 2.

The EPA argues that not only was the position it took with respect to Silver State's liability under Section 14(b)(4) for the acts of the loader and pilot reasonable on the facts, but that it also comes within the exception for "special circumstances [which] make the award unjust." In the committee reports this exception is described as a "safety valve" which "helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." The interpretation urged by the EPA does appear to be novel. At least no previous agency or court decisions have been cited where it was considered.11/ It is also one which had some support from the plain language of the Act. In fact, the correctness of the interpretation turned really on whether Congress intended to impose strict liability on Silver State for acts done by independent contractors with whom it contracted to do work, a question on which the legislative history itself offered little enlightment. While I did not agree with the EPA's postion, nevertheless it was certainly a credible one taken in good faith to carry out the law.

11/ The case of Magna Corporation, I.F. & R. Docket No. VIII-35C (EPA, Initial Decision issued November 14, 1978) cited by the EPA in its brief in its support of its motion for an accelerated decision was clearly distinguishable.

Accordingly, I find that the EPA's position was substantially justified and that, in any event, special circumstances would make an award unjust. It is recommended, therefore, that the application for fees and expenses be denied.12/

Gerald Harwood
Gerald Harwood
Administative Law Judge

August 15, 1983

12/ One point made by the EPA which need not be considered here since the application for fees is denied, but which counsel ought to be mindful of in any future application is that the regulations, 40 CFR 17.08(b)(2), limit attorneys fees to $75 per hour so that Silver State's application based on a rate of $100 would have to be reduced accordingly.