FILED
05/23/2022
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 22-0067

Attachment A
Judgment
May 16, 2022

DATE May 16, 2022
CLERK OF DISTRICT COURT
By: [illegible]

KATHERINE M. BIDEGARAY
District Judge, Department 2
Seventh Judicial District
300 12th Avenue, N.W., Suite #2
Sidney, Montana 59270

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, et al., Respondents.	Case No. DV 19-34 **JUDGMENT**

This action came before the Court for determination as a petition for judicial review of administrative action under the Montana Strip and Underground Mine Reclamation Act (MSUMRA) and the Montana Administrative Procedure Act (MAPA). A decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment is entered as follows:

1. Pursuant to this Court's October 28, 2021, Order on Petition, Judgment is granted to Petitioners and against Respondents under MSUMRA and MAPA and this matter is remanded to Respondent Montana Department of Environmental Quality (DEQ);
2. Pursuant to this Court's January 28, 2022, Order on Remedy and Stay, the challenged AM4 Permit is vacated and vacatur is deferred as provided in that Order (though

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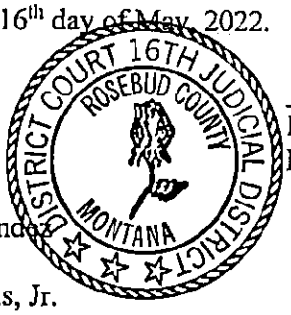
vacatur is presently stayed by the Montana Supreme Court, pending briefing on Respondents' requests for a stay);

3. Pursuant to this Court's April 21, 2022, Order on Petitioners' Motion for Fees and Costs, Petitioners are entitled to an award of reasonable fees and costs from DEQ under MSUMRA;

4. Pursuant to this Court's May 13, 2022, Order Awarding Reasonable Attorney Fees and Costs, Petitioners are entitled to an award of fees and costs of $896,030.25.

DATED this 16th day of May, 2022.



Katherine M Bidegaray

Hon. Katherine M. Bidegaray
District Court Judge

cc: Shiloh Hernandez
Derf Johnson
Walton Morris, Jr.
Roger Sullivan
Jeremiah Langston
Nicholas Whitaker
John Martin
Samuel Yemington
Victoria Marquis
Amy Christensen
alf 5.16.22

Attachment B

Order Awarding Reasonable Attorney Fees and Costs

May 13, 2022

KATHERINE M. BIDEGARY
District Judge, Department 2
Seventh Judicial District
300 12th Avenue, N.W., Suite #2
Sidney, Montana 59270

DATE May 13, 2022
CLERK OF DISTRICT COURT
By: [signature]

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY; MONTANA BOARD OF ENVIRONMENTAL REVIEW, NATURAL RESOURCES PARTNERS L.P.; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400; NORTHERN CHEYENNE COAL MINERS ASSOCIATION; and WESTERN ENERGY CO., Respondents.	**CAUSE NO.: DV 2019-34** **ORDER AWARDING REASONABLE FEES ATTORNEY FEES AND COSTS**

On April 21, 2022, this Court held that Petitioners Montana Environmental Information Center and Sierra Club (together, "the Conservation Groups") were eligible and entitled to costs and attorney fees under the Montana Strip and Underground Mine Reclamation Act (MSUMRA). On May 6, 2022, this Court held an evidentiary hearing at which the Conservation Groups and Respondent Montana Department of Environmental Quality (DEQ) presented expert testimony from L. Randy Bishop and

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Maxon Davis, respectively. The Conservation Groups also proffered counsel, Shiloh Hernandez, for cross-examination regarding certain time entries, but DEQ declined to examine him. Having reviewed the briefs and testimony, this Court is prepared to rule on the reasonable costs and attorney fees in this matter.

BACKGROUND

This action has been actively litigated in multiple forums over six years. The Conservation Groups filed the initial administrative appeal before the Montana Board of Environmental Review (BER) in January 2016. BER:1 at 3-4.

Before BER, the parties engaged in extensive discovery, including expert discovery, *e.g.* BER:33, BER:34, BER:46, BER:61, BER:62, BER:63; BER:95, Exs DEQ-23, DEQ-24; motions practice, including summary judgment, briefing of which consumed hundreds of pages, *e.g.*, BER:15, BER:17, BER:18, BER:21, BER:24, BER:25, BER:26; multiple hearings, including a four-day trial-type hearing, *e.g.*, BER:115, BER:116, BER:117, BER:118; and post-hearing briefing that consumed hundreds of additional pages, BER:121, BER:122, BER:123, BER:129, BER:130, BER:131, BER:139, BER:140, BER:141, BER:146, BER:147, BER:149. The administrative record is voluminous. At the hearing alone, the parties submitted over 100 exhibits, consisting of over 5,000 pages of highly technical and scientific information. BER:95, Exs. DEQ-1 to DEQ-37; BER:100, Exs. MEIC-6 to MEIC-59; BER:102, Exs. WRM-A to WRM-ZZ.

Intervenor-Respondent Westmoreland Rosebud Mining LLC (WRM) described the mobilization of resources required for this case: "Petitioners filed more than 5,000 pages of briefs and exhibits and participated in no less than seven days of hearings and

argument." WRM Br. in Supp. of Mot. on Remedy at 3 n.3 (Nov. 8, 2021). DEQ, for its part, acknowledges that simply reviewing the voluminous material in a coal-mining application can consume "a couple thousand manhours, potentially stretched out over months to years." Van Oort Decl. ¶¶ 22, 24 (Nov. 5, 2021).

And the pace of this litigation has not abated on judicial review. The parties have engaged in motions practice, merits briefing, remedy briefing, and briefing on costs and attorney fees, necessitating two hearings and four separate rulings from this Court over the course of three years. Order Denying BER Motion. to Dismiss (Mar. 12, 2020); Order on Petition (Oct. 28, 2021); Order on Remedy and Stay (Jan. 28, 2022); Order on Petitioners' Motion for Fees and Costs (Apr. 21, 2022). On three occasions respondents have filed interlocutory appeals that resulted in rulings from the Montana Supreme Court, remanding the matter to this Court. *Mont. Bd. of Env't Rev. v. Mont. Sixteenth Jud. Dist. Ct.*, OP 20-0292 (Mont. July 14, 2020) (denying petition for writ of supervisory control); *Westmoreland Rosebud Mining LLC v. Mont. Sixteenth Jud. Dist. Ct.*, OP 21-0655 (Mont. Jan. 4, 2022) (denying petition for writ of supervisory control); *Mont. Env't Info. Ctr. v. Western Energy Co.*, DA 22-0064, DA 22-0067, DA 22-0068 (Mont. Mar. 30, 2022) (staying three premature appeals pending resolution of costs and fees). In its most recent order from March 30, 2022, the Montana Supreme Court required this Court to resolve the issue of attorney fees and costs within 45 days, which is May 14. *Mont. Env't Info. Ctr. v. Western Energy Co.*, DA 22-0064, DA 22-0067, DA 22-0068, slip op. at 4. Because May 14 is a Saturday, the deadline "is extended to the next business day," which is May 16, 2022. M.R.App.P. 3.

Indicative of the amount of time and effort involved in this case, the record demonstrates, as Mr. Bishop testified, that the respondent parties (DEQ, WRM, BER) and proposed-intervenor respondent (Talen Energy, LLC) have engaged no fewer than 21 different attorneys to contest Conservation Groups' claims. DEQ alone has engaged seven attorneys to litigate this case. DEQ Disclosure of Staff Att'y Timesheets, Attach. A (Apr. 25, 2022). In response to this Court's order to submit its timesheets for "attorneys, experts, and staff," Order on Pet'rs' Mot. for Fees and Costs at 18 (Apr. 21, 2022), DEQ disclosed the timesheets of its attorneys (not experts or staff), which, while not disaggregating time spent specifically on this case, nevertheless reveal many thousands of hours spent by its seven attorneys over six years. DEQ Disclosure of Staff Att'y Timesheets, Attach. A. It is not an understatement to describe respondents' defense in this litigation as zealous and unrelenting advocacy.

The substance of this case required the Court to consider the interlocking statutes and regulations of two comprehensive federal laws—the Surface Mining Control and Reclamation Act (SMCRA) and the Clean Water Act—and two state laws—the Montana Strip and Underground Mine Reclamation Act (MSUMRA) and the Montana Water Quality Act (MWQA). Order on Petition at 2-6. The Court has found no binding precedent interpreting or applying the provisions of MSUMRA at issue here. Both MSUMRA and the MWQA implement and protect all Montanans' "inalienable right" to a "clean and healthful environment." *Id.* at 3-4 (citing MCA § 82-4-202(2)(a)-(b)); MCA § 75-5-102(1). These laws are also intended to fulfill the State of Montana's constitutional duty to "maintain and improve a clean and healthful environment in

Montana for present and future generations." Mont. Const. art. IX, § 1(1); MCA § 82-4-202(2)(a)-(b); MCA § 75-5-102(1).

Having considered the parties' briefs and declarations, as well as the evidence and argument presented at hearing, the Court is prepared to rule on an appropriate and reasonable award of fees and costs.

LEGAL STANDARDS

MSUMRA, Montana's federally approved program for regulating coal mining, provides for recovery of costs and attorney fees incurred in administrative proceedings and on judicial review. § 82-4-251(7), MCA; ARM 17.24.1307(1); *see also* 30 U.S.C. § 1275(e); *Powder River Basin Res. Council v. Wyo. Env't Quality Council*, 869 P.2d 435, 439 (Wyo. 1994). The purpose of fee shifting provisions in laws designed to protect the public interest, like MSUMRA, is to "ensure 'effective access to the judicial process.'" *Laudert v. Richland Cnty. Sheriff's Dep't*, 2001 MT 287, ¶ 26, 307 Mont. 403, 38 P.3d 790 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)); 44 Fed. Reg. 14,902, 15,297 (Mar. 13, 1979) (explaining importance of fee shifting provisions for the success of SMCRA through citizen participation and oversight); *Tripp v. Jeld-Wen, Inc.*, 2005 MT 121, ¶ 34, 327 Mont. 146, 112 P.3d 1018 (noting that statutory fee shifting provisions are intended to "further the public policy embodied in the legislation"). This was an express goal of Congress in passing SMCRA: "If private citizens are to be able to assert the rights granted them by this bill [SMCRA], and if those who violate this bill's [SMCRA's] requirements are not to proceed with impunity, then citizens must have the opportunity to recover the attorney fees necessary to vindicate their rights." S. Rep. 95-128 at 59 (1977).

Once a court determines a party is entitled to an award of costs and fees, it then determines whether "the attorneys' fees requested ... are appropriate under the circumstances." *S. Appalachian Mountain Stewards v. Zinke*, No. 16-CV-26, 2017 WL 5147620, at *1 (W.D. Va. Nov. 6, 2017). A party seeking costs and fees under MSUMRA must support its request with "affidavit[s]" and other evidence. ARM 17.24.1309(1).[1]

"An attorney should receive fees for the full services provided where a plaintiff has obtained excellent results." *Laudert*, ¶ 20. "The starting point for establishing the proper amount of a fee award is the so-called lodestar product, the number of hours reasonably expended multiplied by a reasonable hourly rate." *S. Appalachian Mountain Stewards*, 2017 WL 5147620, at *1 (internal brackets omitted) (quoting *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 174 (4th Cir. 1994)); *Laudert*, ¶ 17. The lodestar method is one of the "primary methods of calculating reasonable fees" recognized by Montana courts. *Gendron v. Montana Univ. Sys.*, 2020 MT 82, ¶ 12, 399 Mont. 470, 461 P.3d 115. "The lodestar figure is 'presumed to be the reasonable fee to which counsel is entitled.'" *Id.* ¶ 13 (quoting *Tacke v. Energy West, Inc.*, 2010 MT 39, ¶ 32, 355 Mont. 243, 227 P.3d 601). If the analysis "is supported by an adequate rationale," the district court may adjust this figure upward or downward in its discretion according to case-specific considerations. *Id.* ¶¶ 13-15 (noting district court's "broad discretion" in selecting the exact "method of calculation" and considering the "guiding factors"); *DiMarzio v. Crazy Mountain Const., Inc.*, 2010 MT 231, ¶¶ 53-54, 358 Mont. 119, 243 P.3d 718

[1] *See* 2 Alba Conte, Attorney Fee Awards § 6:8 (3d ed. Dec. 2021 update) ("The applicant's affidavit in support of a fee petition is the major method for fee applicants to meet their burden of proof in support of a requested fee award.").

(affirming attorney fee award, which was reduced in part based on equitable considerations).

To evaluate the reasonableness of hours and rates used in the lodestar calculation, courts consider the following seven factors as guidelines:

> (1) the amount and character of the services rendered;
> (2) the labor, time and trouble involved;
> (3) the character and importance of the litigation in which the services were rendered;
> (4) the amount of money or the value of the property to be affected;
> (5) the professional skill and experience called for;
> (6) the attorneys' character and standing in their profession; and
> (7) the results secured by the services of the attorneys.

Plath v. Schonrock, 2003 MT 21, ¶ 36, 314 Mont. 101, 64 P.3d 984; *Gendron*, ¶ 13. These factors are not exclusive, and this Court may consider other factors as well. *Plath,* ¶ 36; *see also Morning Star Enterprises, Inc. v. R.H Grover,* 247 Mont. 105, 113, 805 P.2d 553, 558 (1991) (explaining that the factors serve as "guidelines" for what constitutes a reasonable fee).

"[T]he critical factor in determining the reasonableness of a fee is the *degree* of the plaintiff's success in relation to the other goals of the lawsuit." *Laudert*, ¶ 22 (internal quotation omitted) (quoting *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1989)); *accord Hensley*, 461 U.S. at 435-36; *S. Appalachian Mountain Stewards*, 2017 WL 5147620, at *1.

"The amount of an award for attorney fees falls within the discretion of the District Court." *Shephard v. Widhalm*, 2012 MT 276, ¶ 35, 367 Mont. 166, 290 P.3d 712. The district court's decision will not be disturbed on appeal unless "it acted arbitrarily without conscientious judgment or exceeded the bounds of reason when it set the award." *Id.*; *Ferdig Oil Co. v. ROC Gathering, LLP*, 2018 MT 307, ¶¶ 27-30, 393 Mont. 500, 432

P.3d 118 (affirming fees of approximately $500,000 in breach of contract case based on hourly rates of $600).

DISCUSSION

The Conservation Groups seek $972,425.75 in costs and attorney fees. Br. in Supp. of Mot. for Costs and Att'ys' Fees at 15 (Dec. 13, 2021); Pet'rs' Suppl. Pet. for Costs and Att'ys' Fees at 2 (Apr. 22, 2022). DEQ objects to the number of hours billed and the requested rates. DEQ Answer Br. at 20-22 (Mar. 25, 2022).

The Court addresses attorney fees first, followed by costs. In evaluating appropriate and reasonable attorney fees, the Court considers the lodestar calculation and the *Plath* factors.

I. Determination of Reasonable Fees.

A. Lodestar calculation

As noted, the lodestar calculation is the starting point. *S. Appalachian Mountain Stewards*, 2017 WL 5147620, at *1; *Gendron*, ¶ 13. The Conservation Groups' initial petition sought attorney fees based on the following lodestar calculation (Br. in Supp. of Mot. for Costs and Att'ys' Fees at 14):

Attorney	Hours	Rate	Total
Walton Morris	160	$550	$88,000.00
Roger Sullivan	183	$450	$82,350.00
Shiloh Hernandez	1,708.35	$350	$597,922.50
Derf Johnson	228.4	$275	$62,810.00
Laura King	118.2	$275	$32,505.00
Total	2,397.95		$863,587.50

In their supplemental petition for attorney fees for hours spent after their initial petition (Pet'rs' Suppl. Pet. for Costs and Att'ys' Fees at 2), Conservation Groups seek compensation for additional time at the previously requested rates:

Attorney	Hours	Rate	Total
Walton Morris	17	$550	$9,350.00
Roger Sullivan	47	$450	$21,150.00
Shiloh Hernandez	118.3	$350	$41,405.00
Derf Johnson	13.3	$275	$3,657.50
Total	195.6		$75,562.50

Counsel for the Conservation Groups state in their declarations that they exercised sound billing judgment in recording their hours. The Court notes that Messrs. Hernandez and Johnson together voluntarily cut 268.5 hours to eliminate "excessive, redundant, or otherwise unnecessary time." Hernandez Decl. ¶ 4 & Ex. 1 (Dec. 9, 2021) (omitting 134.65 hours); Second Hernandez Decl. (Apr. 22, 2022) (omitting 125 hours); Johnson Decl. ¶ 4 & Ex. 1 (Dec. 10, 2021) (omitting 9 hours); *Hensley*, 461 U.S. at 434 (counsel should "make a good faith effort to exclude from a fee request [those] hours that are excessive, redundant, or otherwise unnecessary"). The Conservation Groups supported their petition with the declaration and testimony of Mr. Bishop and the declaration of Timothy Bechtold, both of whom agree that the hours billed, and rates requested, are reasonable given the length and complexities of this case and the experience, expertise, and reputation of counsel. Bishop Decl. ¶¶ 4-5; Bechtold Decl. ¶¶ 9-10.

Because the lodestar figure is "entitled to [a] presumption of reasonableness," DEQ has the burden to "produce sufficient evidence to overcome this presumption." *JTL Grp., Inc. v. New Outlook, LLP*, 2010 MT 1, ¶ 52, 355 Mont. 1, 223 P.3d 912. While recognizing the "inherent complexity" of the scientific elements of this case and the "good job" and "well-written" briefs of Conservation Groups counsel, DEQ nevertheless challenges the rates and hours of the lodestar calculation, based on the declaration and testimony of Mr. Davis. Davis Decl. 7-14 (Apr. 25, 2022). The Court addresses DEQ's objections through its review of the *Plath* factors.

B. Results secured

Because the result achieved by counsel is the critical factor, the Court begins there. *Laudert*, ¶¶ 17, 20; *Hensley*, 461 U.S. at 435-36. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435. Here, there is no dispute that counsel for the Conservation Groups obtained an excellent result, having been successful on the merits of each of their claims, and having obtained a favorable remedy. Order on Petition at 13-34; Order on Remedy and Stay 7-15. While DEQ has appealed these decisions, it does not dispute that the result secured thus far by the Conservation Groups has been favorable. *See* Davis Decl. at 8 (stating that "the lawyers succeeded in presenting the issue in a fashion understandable to non-scientists" and that "the lawyers for the Conservation Groups did a good job"). This factor supports a fully compensatory fee for the Conservation Groups' attorneys.

C. Amount and character of services rendered.

A substantial amount of time spent on a case and a corresponding fee award may be justified in part by the volume of materials that counsel is required to review and the contested nature of the case. *Ferdig Oil Co.*, ¶ 26 (explaining that substantial fee award was justified in part by "the sheer volume of discovery (roughly 60,000 pages) in this case" and the "aggressive litigation strategies" of opposing counsel); *Houden v. Todd*, 2014 MT 113, ¶¶ 46, 51, 375 Mont. 1, 324 P.3d 1157 (substantial fee award justified in part by the "the extensive motion practice," the "number of defendants" and aggressive litigation tactics of defendants).

Here, there is little question that the amount of services rendered was substantial and that the character of those services was of high quality. As noted, the administrative proceedings in this case were extensive, involving discovery, motions, trial, and lengthy post-trial submissions. *See supra* Background. The proceedings on judicial review have been similarly hard-fought, with motions, merits briefing, remedy briefing, briefing of fees and costs, two hearings, and three interlocutory appeals to the Montana Supreme Court. *Ferdig Oil Co.*, ¶ 26; *Houden*, ¶¶ 46, 51.

The Conservation Groups' attorneys time entries indicate that they spent approximately 2,800 hours litigating this case and they seek reimbursement for approximately 2,500 hours. Br. in Supp. of Mot. for Costs and Att'ys' Fees at 14; Pet'rs' Suppl. Pet. for Costs and Att'ys' Fees at 2; Hernandez Decl. ¶ 4 & Ex. 1; Second Hernandez Decl.; Johnson Decl. ¶ 4 & Ex. 1; Sullivan Decl. ¶ 11 & Ex. 1 (Dec. 9, 2021); Morris Decl. Attach. A (Dec. 10, 2021). WRM acknowledged the magnitude of resources invested by Conservation Groups' counsel: "Petitioners filed more than 5,000 pages of

briefing and exhibits and participated in no less than seven days of hearings and argument." WRM Br. in Supp. of Mot. on Remedy at 3 n.3.

DEQ, for its part, does not contest the character of the services rendered. *See* Davis Decl. at 7-14 (noting "inherent complexity" of scientific evidence, "good job" of counsel, and "well-written" and "well-constructed" briefs and argument). On the other hand, DEQ specifically challenges 173 hours of time spent on Conservation Groups' petition for judicial review and merits briefing as excessive. Davis Decl. at 12-15. At hearing, DEQ and Mr. Davis suggested that other various and sundry time entries were also excessive.[2] Mr. Bishop, through testimony and declaration, and Mr. Bechtold, through declaration, oppose Mr. Davis' declaration and testimony. Messrs. Bishop and Bechtold believe that "the amount of time devoted to this litigation ... is reasonable," Bishop Decl. ¶ 5, and that, "[g]iven the complex legal issues presented" counsel "were able to prosecute the case very efficiently and effectively." Bechtold Decl. ¶ 10.

The Court is disinclined to second-guess the reasonableness of the hours invested by counsel for the Conservation Groups. As the Ninth Circuit has explained: "By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). While Mr. Davis opines that the hours spent on briefing were excessive, he offers little explanation of why the hours were excessive, except to say that each of these critical pleadings should have been researched, drafted, and finalized in just a few days. Davis Decl. at 12-14 (stating that petition for review should have

[2] In response to DEQ's concerns, Conservation Groups' proffered Mr. Hernandez to testify about individual time entries. DEQ, however, declined to examine him.

been written in 10 hours, opening brief in 30 hours, and two reply briefs in 35 hours total); *cf. Ne. Ohio Coal. for the Homeless v. Husted*, 831 F.3d 686, 708 (6th Cir. 2016) (declining to find hours spent on briefing excessive absent detailed explanation from defendants).

The Court is not persuaded that the Conservation Groups' attorneys could have successfully drafted the "well-written" petition for review and three "well-written" and "well-constructed" merits briefs distilling the voluminous record and "inherently complex" materials in this case in less than two weeks. *Cf.* Davis Decl. at 7-14. It is not uncommon for experienced counsel to spend over 100 hours (i.e., more than two weeks) researching and drafting dispositive briefs, particularly in scientifically complex and hotly contested cases, as here. *See e.g., Crow Indian Tribe v. United States*, CV-17-118, 2021 WL 3142155, at *6 (D. Mont. July 26, 2021) (counsel spent over 100 hours response to motion to stay); *Ne. Ohio Coal. for the Homeless*, 831 F.3d at 707 (counsel spent 300 hours on complaint and injunction brief and 130 hours on reply brief). Mr. Davis' testimony that he spent over 40 hours simply to review a portion of the extensive record of this case is telling and informs the Court's decision not to reduce the number of hours claimed by the Conservation Groups' attorneys.

By way of comparison, the Court ordered DEQ to submit its timesheets related to this matter to be used as a barometer for assessing the reasonableness of the time spent by the Conservation Groups. Order on Pet'rs' Mot. for Fees and Costs at 18; *see also Henson v. Columbus Bank & Trust Co.*, 770 F.2d 1566, 1575 (11th Cir.1985) (hours of opposing counsel may be relevant to reasonableness of hours spent by party seeking fees—opposing party cannot "spiritedly contest[]" claims "at every stage" and

then claim "the case could have been tried with less resources and with fewer hours expended"); *cf. Chase v. Bearpaw Ranch Ass'n*, 2006 MT 67, ¶¶ 38-39, 331 Mont. 421, 133 P.3d 190 (hours of opposing counsel not necessarily "a proper measure of reasonableness" when prevailing party "received significantly more legal services requiring more time and labor"). DEQ, however, did not fully comply with the order, but only filed the undifferentiated aggregate hours worked by its seven attorneys on all matters during this litigation. DEQ Disclosure of Staff Att'y Timesheets, Attach. A; *Shephard v. Widhalm*, 2012 MT 276, ¶ 37, 367 Mont. 166, 290 P.3d 712 (court "balked at applying" party's proposed fee metric, where the party failed to supply appropriate supporting information). At hearing Mr. Davis admitted he did not know the amount of time DEQ's seven attorneys had dedicated to this case. As such, DEQ is not well situated to contest the reasonableness of the hours invested by Conservation Groups' counsel in this case. This factor supports Conservation Groups.

D. Labor, time, and trouble involved

For the reasons previously stated, *see supra* Discussion Part I.C, the Court finds that the labor, time, and trouble involved in this case have been substantial. As noted, this case has been hard fought at every turn, the factual record is voluminous, and the briefing and argument have been extensive. *See Ferdig Oil Co.*, ¶ 26; *Houden*, ¶¶ 46, 51. The time records of Conservation Groups' counsel evidence a substantial investment of labor, time, and trouble. This is reflective of the 21 attorneys who have represented DEQ and the other respondent parties, proposed intervenor, and amicus, and the numerous procedural twists and turns in this case, including three interlocutory appeals to the Montana Supreme Court. This factor also supports Conservation Groups.

E. Character and importance of the litigation

Litigation that vindicates "civil and constitutional rights" satisfies the "character and importance" factor. *Montana State Univ.-N. v. Bachmeier*, 2021 MT 26, ¶¶ 71-72, 403 Mont. 136, 480 P.3d 233. Moreover, full fee recovery for "meritorious civil rights litigation" is important to overcome the "reluctance [of attorneys] to accept civil rights cases," and attract "competent counsel to such cases." *Laudert*, ¶¶ 26, 28. The character and importance factor is further satisfied when a "case presents novel legal issues of significant importance." *Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, No. DV-09-1198A, slip op. at 15 (Mont. 11th Jud. Dist. Ct. Nov. 20, 2017), *aff'd in part rev'd in part on different grounds*, 2019 MT 19, 394 Mont. 135, 433 P.3d 1230.

Here, the Conservation Groups vindicated provisions of MSUMRA and the MWQA, which implement Montanans' inalienable right to a clean and healthful environment. Order on Petition at 3-4, 34; Mont. Const. arts. II, § 3, IX, § 1(1); § 82-4-202(2)(a)-(b), MCA; § 75-5-102(1), MCA. Fee recovery is essential to ensuring that capable attorneys are available to enforce the provisions of MSUMRA and defend Montana's constitutional environmental protections. *Laudert*, ¶¶ 26, 28; 44 Fed. Reg. 14,902, 15,297 (Mar. 13, 1979) ("The success or failure of a national coal mining program will depend, to a significant extent, on the role played by citizens in the regulatory process." (quoting S. Rep. 95-128 at 59 (1977)); *Tripp*, ¶ 34 (statutory fee shifting provisions "further the public policy embodied in the legislation"). Moreover, as both Messrs. Bishop and Davis acknowledged at hearing, this case presents complex legal issues of first impression and establishes clear precedent in this important field in

Montana. *Cf. Abbey/Land, LLC*, No. DV-09-1198A, slip op. at 15. As such, this factor supports Conservation Groups.

F. Amount of money or the value of property affected.

The monetary value of private property affected by a case may support a fee award.[3] Similarly, a fully compensatory award may also be appropriate in cases where a party successfully protects a valuable public resource, though it seeks no monetary relief of its own. *See Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.*, 2011 MT 51, ¶ 45, 359 Mont. 393, 251 P.3d 131 (finding it proper for district court to assess the importance of public interest in access to water body in assessing fees); *Laudert*, ¶ 26 ("To deny attorney fees simply because there was no award of substantial monetary relief, without also looking at the overall outcome of the case, is short-sighted.").

Here, like in *Bitterroot River Protective Ass'n*, ¶ 45, Conservation Groups' action ensured protection of threatened water resources. Order on Petition at 28-34. As the Montana Supreme Court has observed, "water is the lifeblood of the West." *Confederated Salish & Kootenai Tribes v. Clinch*, 2007 MT 63, ¶ 31, 336 Mont. 302, 158 P.3d 377, *overruled on other ground by In re Est. of Big Spring*, 2011 MT 109, ¶ 45, 360 Mont. 370, 255 P.3d 121; *see also N. Plains Res. Council v. BLM*, No. CV 14-60, 2016 WL 1270983, at *12 (D. Mont. Mar. 31, 2016) ("The Court understands that water is the 'lifeblood' of ranchers ...."). The "value" of unpolluted water in Montana is significant. Accordingly, this factor supports the Conservation Groups.

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[3] *Ferdig Oil Co.*, ¶ 28 (in awarding fees court noted "damages claimed were significant"); *cf. Folsom v. City of Livingston*, 2016 MT 238, ¶ 35, 385 Mont. 20, 381 P.3d 539 (holding that fees should have been reduced where party recovered minimal amount through litigation and amount recovered was what other side "had offered them all along").

G. Professional skill and experience called for

A fully compensatory fee may be warranted considering the unique demands of a case. *E.g.*, *Ferdig Oil Co.*, ¶ 26 (fee award based in part on "sheer volume of discovery" required and opposing party's "aggressive litigation strategies"); *Houden*, ¶¶ 46, 51 (fee award based in part on complexity of litigation, including extensive motion practice and multiple defendants); *see also Capitol Specialty Ins. Corp. v. Big Sky Diagnostic Imaging, LLC*, No. CV 17-54, 2020 WL 1249484, at *6 (D. Mont. Feb. 3, 2020), *findings and recommendation adopted*, 2020 WL 1244778 (D. Mont. Mar. 16, 2020) (fully compensatory fees awarded in part because of "complex" legal issues and potential need to "present expert testimony" in medical malpractice case); *Abbey/Land, LLC*, No. DV-09-1198A, slip op. at 15 (finding significant skill and expertise required in insurance fraud case). The Ninth Circuit recognizes that "[e]nvironmental litigation is an identifiable practice specialty that requires distinctive knowledge." *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991); *accord Bitterroot River Protective Ass'n*, ¶ 45 (fees based in part on complex issues involved in stream access case).

In line with these cases and based on the facts and circumstances of this case, the Court further finds that significant skill and expertise were required here. Not only was the scientific evidence involved in this case "inherently complex," as DEQ and Mr. Davis acknowledge (Davis Decl. at 7), the overlapping legal regimes of MSUMRA, SMCRA, the Clean Water Act, and the MWQA are also complex. Moreover, given the absence of Montana case law construing MSUMRA, counsel was required to develop arguments based on textual analysis, case law from other jurisdictions, as well as citations to legislative and regulatory history. *See* Order on Petition at 2-34; Order on

Pet'rs' Mot. for Fees and Costs at 3-17; *see also Love*, 924 F.2d at 1496; *Bitterroot River Protective Ass'n*, ¶ 45. Furthermore, the course of this case has required the gamut of advocacy skills, including trial advocacy, appellate advocacy, expert discovery, complex motions practice, and detailed knowledge of administrative procedure and constitutional law. *See Capitol Specialty Ins. Corp.*, 2020 WL 1249484, at *6. It has also required Conservation Groups to litigate against the able and experienced legal team of DEQ, as well as those of WRM, BER, and Talen Energy. *See Ferdig Oil Co.*, ¶ 26. Mr. Bishop and Mr. Bechtold assert that "specialized knowledge" was required for the Conservation Groups to litigate this case successfully. Bechtold Decl. ¶ 9; Bishop Decl. ¶ 5. Mr. Bechtold adds that to his knowledge "there are few if any other attorneys in the State of Montana who represent public interest organizations in litigation under [SMCRA] or [MSUMRA]." Bechtold Decl. ¶ 9. Mr. Bishop reiterated this point in his testimony.

DEQ and Mr. Davis disagree that specialized knowledge and skill were required for this case. Davis Decl. at 8 ("I am however also left with the opinion that the presentation of the Conservation Groups' case was within the capabilities of any number of competent Montana trial lawyers and that it did not require the specialized expertise of a lawyer who limits himself to environmental law.").[4] Perhaps. However, even if that were the case (and the Court is not convinced that it is), review of the record, including DEQ's own submissions, leaves the impression that a general practitioner would be required to invest substantially more time to get up to speed on

[4] At hearing, Mr. Davis softened his position and did not dispute that environmental litigation is recognized as a specialized practice area requiring distinctive knowledge. Nor was he surprised to learn that WRM's counsel charged a premium for their specialized skill in environmental litigation in this case.

the relevant state and federal legal regimes (SMCRA, MSUMRA, the Clean Water Act, and MWQA) and the complex scientific and factual bases of this case. Mr. Davis admitted on cross-examination that he had never brought any litigation under these statutes. In addition, Mr. Davis did not know of other attorneys who have worked in this field.

As noted, DEQ has asserted that simply reviewing the complex factual and scientific matters in a coal mining permit application can require "a couple thousand man-hours, potentially stretched out over months to years." Van Oort Decl. ¶¶ 22, 24. The timesheets submitted by DEQ indicate that the agency committed no less than seven attorneys to this case over six years, investing a substantial number of hours. DEQ Disclosure of Staff Att'y Timesheets, Attach. A. Further indication of the need for counsel's specialized competencies is the statement of counsel for WRM affirming that his firm charges higher "rates for specialized expertise in surface mining and environmental litigation." BER:44 at 5, ¶ 15.

On balance, this factor also weighs in favor of the Conservation Groups.

H. Attorneys' character and standing in their profession

Finally, the Court considers the attorneys' character and standing in their profession. *Plath*, ¶ 36.

Messrs. Bishop and Bechtold assert that the Conservation Groups' attorneys are highly regarded attorneys. Bechtold Decl. ¶ 9; Bishop Decl. ¶ 4. At hearing, Mr. Bishop explained that Mr. Morris has over 40 years of experience litigating cases under SMCRA, including seminal cases before the U.S. Supreme Court and federal courts of

appeals, and is recognized as one of the preeminent national authorities on SMCRA. *See also* Morris Decl. ¶¶ 6-21; Bechtold Decl. ¶ 9; Hernandez Decl. ¶ 12.

Mr. Sullivan has litigated complex public interest and environmental cases for 36 years, for which he has earned state-wide and national recognition. Sullivan Decl. ¶¶ 3-8. Mr. Sullivan has an "excellent reputation" for his work. Bechtold Decl. ¶ 9; Bishop Decl. ¶ 4; Hernandez Decl. ¶ 12. Mr. Bishop testified that Mr. Sullivan is simply one of the best attorneys in his field in Montana.

Mr. Hernandez, a senior attorney with Earthjustice, graduated *magna cum laude* from Vermont Law School in 2008, clerked at the 18th Judicial District Court in Montana and then the Montana Supreme Court, and has since practiced exclusively environmental law throughout the western United States for a decade, bringing numerous successful suits. Hernandez Decl. ¶¶ 6-10. Among the cases he has litigated is the first successful citizen suit under MSUMRA, *In re Bull Mountains Mine*, No. BER 2013-07 SM (Mont. Bd. of Envtl. Rev. Jan. 14, 2014), in which he co-counseled with Mr. Johnson. Hernandez Decl. ¶ 9.

Mr. Johnson, in turn, is a staff attorney for Petitioner Montana Environmental Information Center and has practiced environmental law for a decade, bringing cases in state and federal courts. Johnson Decl. ¶¶ 1-9. Mr. Johnson is a well-regarded attorney for his expertise in environmental law. Bechtold Decl. ¶ 9; Sullivan Decl. ¶ 9; Hernandez Decl. ¶ 12. Ms. King, while a younger lawyer, has developed expertise in environmental law, has presented at continuing legal education seminars, and graduated from Harvard Law School in 2013. Hernandez Decl. ¶ 11.

DEQ and Mr. Davis agree that that Mr. Sullivan "is certainly an excellent plaintiffs' attorney." Davis Decl. at 9. DEQ. And Mr. Davis does not question Mr. Morris' reputation or abilities. *See id.* at 9-10 (commenting on the years that Mr. Morris has been practicing and noting that Mr. Morris "does not have much an internet presence"). Mr. Davis conceded at hearing that he did not know much about Mr. Morris and was unaware of his involvement in seminal litigation and regulatory action on SMCRA. On the other hand, DEQ and Mr. Davis challenge the expertise of Messrs. Hernandez and Johnson and Ms. King, as possessing limited experience based on their years of practice and lacking "objective indicia of peer recognition" and. *Id.* at 8-9.

The Court agrees that an attorney's skill is related to the attorney's experience, however, the relation is not perfect. Judge Christensen recently described the imperfect relationship of skill and experience:

> Depth of experience and years of experience are imperfectly correlated, and some attorneys demonstrate experience and legal judgment beyond their years of practice. While an attorney's number of years in practice is a good starting point to estimate an attorney's depth of experience, other factors—such as his or her courtroom experience, continued education, mentorship, and prior work on complex cases—are also highly indicative of an attorney's experience and overall "quality of representation." To estimate an attorney's proficiency in contrast to the other attorneys within the prevailing market, some courts have looked at the role the attorney played in the litigation (whether the attorney was first or second chair) or the attorney's effectiveness in the courtroom.

Native Ecosystems Council v. Krueger, No. CV 12-27, 2019 WL 1489839, at *4 (D. Mont. Apr. 4, 2019) (internal citation omitted). At hearing, Mr. Davis recognized that lawyers with fewer years of experience can nevertheless develop advanced skills. He also admitted that he did not know Mr. Hernandez in any respect beyond conducting some internet research to support his declaration for DEQ. Mr. Davis agreed at hearing

that Mr. Hernandez had taken the laboring oar in this litigation and that his work product was of high quality.

While Messrs. Hernandez and Johnson have practiced for just over one decade, the evidence shows that in that time they have established reputations as "highly regarded lawyers in the Montana bar, known for their high-quality work in environmental law." Bishop Decl. ¶ 4; Bechtold ¶ 9. As noted, they litigated the first successful citizen suit under MSMRA in Montana before BER. Moreover, like the attorney in *Native Ecosystem Council*, here Mr. Hernandez performed "the lion's share of the work in this litigation," which, of course, "is not to discredit the valuable work performed by" the other attorneys. 2019 WL 1489839, at *5. Finally, Ms. King, while a younger attorney, has also developed expertise in environmental law. Hernandez Decl. ¶ 11. As noted, Mr. Davis agrees that the work product of these attorneys was of high quality and that they did a "good job" in litigating this admittedly complex case, Davis Decl. at 7-14, and, aside from their comparative youth, Mr. Davis does not find any fault with the skills of these attorneys. Accordingly, the Court finds that this factor also favors the Conservation Groups.

I. Other considerations

One central argument of DEQ and Mr. Davis is that the rates sought by Conservation Groups are not consistent with customary rates for similar work in Montana. *E.g.* Davis Decl. at 8-10. The Court agrees that, while these rates are higher than some in the state, they are not inappropriate here. The best comparison available for attorneys working on similar matters are the rates charged by the other attorneys in this case. On that score, WRM's counsel, Mr. Martin, stated that in 2017 his firm

charged rates "generally higher" than $295-$395 per hour "for the specialized services involved in this case." BER:44 at 4, ¶ 8 & Ex. D at 29. Mr. Bishop testified that attorneys' rates today have increased since 2017 but did not provide testimony regarding the higher rates charged in cases like this.

DEQ argues that the relevant factor for determining the hourly rate for the Conservation Groups' attorneys is "the customary commercial rate of payment for such services in the area" as required by ARM 17.24.1309(1)(c). Mr. Davis posits that Mr. Bishop's failure to provide this information and an application of the *Plath* factors make the following rates more appropriate rate for the Conservation Groups' attorneys: Shiloh Hernandez—$250.00/hour; Derf Johnson—$225.00/hour; Roger Sullivan—$350.00/hour; Walton Morris--$350.00/hour; and Laura King—$225.00/hour. *See* Doc. 135 at 10.

In providing this recommendation, Mr. Davis described his own experience of practicing law for 46 years—beginning in 1976—during which he tried between 88 to 90 cases to verdict in state, tribal, and federal district courts in Montana and handled appeals, including oral arguments, before the Montana Supreme Court, the Blackfeet Court of Appeals, the Ninth Circuit Court of Appeals, and the United States Supreme Court. *Id.* at 3, 9. Mr. Davis also testified that he bills an hourly rate of $210 to $350 an hour and that this hourly rate is comparable to other distinguished lawyers such as Randy Cox, Brad Luck, and Cal Stacy. *Id.* at 9.

Mr. Davis' testimony regarding reducing the hourly rate for the reviewing attorneys is persuasive; and the Court agrees that the rates claimed by them should be reduced commensurate with the $350/hour hourly rate that Mr. Davis advocated should

be their hourly rate. Mr. Bishop examined an affidavit from former Montana Supreme Court Justice Jim Regnier stating, "that the top hourly billing rates in Montana in 2008 ranged between $350 and $450 per hour[.]" Doc. 101,¶ 3 (citing *Defenders of Wildlife v. Hall*, Case No. 9:08-cv-00056-DWM, Doc. 116-6 (D. Mont. Dec. 11, 2008)). But this citation ignores that the Court rejected Mr. Regnier's position in *Defenders of Wildlife*. Instead, the Court ordered the following hourly rates: Douglas Honnold $300/hour; Timothy Preso $225/hour; Jenny Harbine $175/hour; Sean Helle $125/hour; Michael Hiatt $75/hour; Whitney Morgan $75/hour. *Defenders of Wildlife v. Gould*, 2009 U.S. Dist. LEXIS 146847, 5-6 (Feb. 17, 2009). Mr. Davis noted that Timothy Preso and Jenny Harbine are more senior attorneys at Earthjustice where Mr. Hernandez works, but the Court notes that *Defenders of Wildlife* is a 14-year-old case and hourly rates for attorneys have undeniably increased since then.

Thus, the rates the Conservation Groups seek appear mostly consistent with the rates charged by other attorneys in this very case as it is not uncommon for attorneys to charge more than the $225-$350 hourly rates cited by Mr. Davis. *E.g.*, *Ferdig Oil Co.*, ¶ 27 (noting counsel charged hourly rate of $600); *Abbey/Land LLC*, No. DV-09-1198A, slip op. at 11 (counsel charged hourly rates from $300 for moderately experienced counsel to $500 for highly experienced counsel); Bishop Decl. ¶ 3 (citing declarations about hourly rates ranging from $300 to $500). Although Mr. Hernandez has not practiced law as many years as some of the other attorneys involved in this case, no one disagreed that his work on the case matched the skill and expertise of any of the other attorneys involved in this important litigation. He is entitled to the $350/hour he seeks. Messrs. Morris and Sullivan mainly only reviewed Mr. Hernandez's work.

Therefore, it is appropriate for them to charge no higher an hourly rate than appropriate for Mr. Hernandez.

Finally, the Court recognizes that the total fees requested by Conservation Groups here are substantial, over $900,000. The total amount of the fees alone, however, does not render them unreasonable. For example, in *Ferdig Oil Co.*, ¶¶ 26-30, the Montana Supreme Court noted that the attorney fee award "totaling almost a half-million dollars" (based on hourly rates of approximately $600) for resolution of a contract case at summary judgment was "eye-popping," but justified considering the voluminous materials and the "aggressive litigation strategies" involved. As noted above, the same factors were at play in this case, which was not resolved at summary judgment, but required a trial and multiple interlocutory appeals. *See supra* Background. Other courts in Montana have approved similarly significant awards of attorney fees. *E.g.*, *Abbey/Land, LLC*, No. DV-09-1198A, slip op. at 17, *aff'd in part rev'd in part on different grounds*, 2019 MT 19, 394 Mont. 135, 433 P.3d 1230 (awarding $925,619.87 for fees in insurance fraud case)[5]; *Gendron*, ¶¶ 6, 17 (affirming fee award of $511,463.40 in employment class-action lawsuit); *Sierra Club v. Talen Montana LLC*, No. CV 13-32, 2017 WL 627386, at *1 (D. Mont. Feb. 15, 2017) (awarding $1,565,150.93 in attorneys' fees and costs for complex Clean Air Act case resolved without trial); *Crow Indian Tribe*, 2021 WL 3142155, at *3, 12 (four plaintiffs groups recovered total $1,175,000.50 in attorneys' fees ($307,804.00 through settlement, and $867,196.50 from fee award) in Endangered Species Act case resolved via summary judgment and appeal). Thus, while the fee request here is large, that alone does not render it unreasonable. As noted, the

[5] On appeal the Montana Supreme Court largely upheld this award, reducing it by only $16,677.51, for an amount that was withdrawn at hearing. *Abbey/Land, LLC*, 2019 MT 19, ¶¶ 61-72.

fee-recovery provisions of SMCRA and MSURA were intended to vindicate the congressional and legislative policies of those laws. 44 Fed. Reg. 14,902, 15,297 (Mar. 13, 1979); S. Rep. 95-128 at 59 (1977); *see also Tripp*, ¶ 34.

In sum, the Court finds that the *Plath* factors support the lodestar calculation provided by Conservation Groups. DEQ has not demonstrated that all the requested fees are unreasonable. The DEQ argues that this Court may not award the costs and fees the Conservation Groups request in their Supplemental Petition for Costs and Attorney Fees ("Supplemental Petition") (Doc. No. 131) because Mr. Bishop did not provide a declaration and was the Conservation Groups' only witness. But Mr. Bishop testified, under oath subject to cross-examination, that those fees were reasonable. Mr. Bishop's testimony, without a supporting declaration, is sufficient for this Court to award those fees. Further, the Supplemental Petition includes second declarations of Messrs. Hernandez, Morris, Johnson, and Sullivan that subscribe to § 1-6-105, MCA, for being true and correct. These second declarations were not disputed at the May 6, 2022, hearing. Therefore, the Court accepts them as competent evidence on which to base an award of fees.[6] *See Griz v. State*, 2020 MT 285, ¶ 34, 402 Mont. 115. Ultimately, here, the Conservation Groups "obtained excellent results" and should therefore "recover a fully compensatory fee." *Hensley*, 461 U.S. at 435; *Laudert*, ¶ 20. The Court finds that the lodestar calculations offered by the Conservation Groups constitute an appropriate and reasonable award of attorneys' fees, modified as follows:

[6] MSUMRA approves the accepted practice of using affidavits to support a petition for costs and fees. ARM17.24.1309(1)(a); 2 Alba Conte, Attorney Fee Awards § 6:8 (3d ed. Dec. 2021 update); *see also* MCA § 1-6-105(1) (declarations may be used in lieu of affidavits).

Attorney	Hours	Rate	Total
Walton Morris	177[7]	$350	$61,950.00
Roger Sullivan	230[8]	$350	$80,500.00
Shiloh Hernandez	1,826.65[9]	$350	$639,327.50
Derf Johnson	241.7[10]	$225	$54,382.50
Laura King	118.2	$225	$ 26,595.00
Total	2397.95		$ 862,755.00

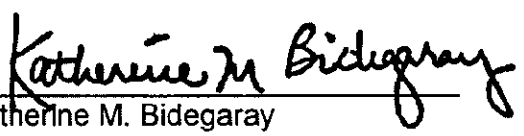
II. Determination of Reasonable Costs

In addition to attorneys' fees, Conservation Groups seek $33,275.25 for costs and expenses, including costs of experts. *See* Hernandez Decl. Ex. 1; Sullivan Decl. Ex. 1; Johnson Decl. Ex. 2. DEQ does not dispute these costs. Accordingly, they should be awarded.

CONCLUSION

Based on the foregoing, this Court awards Conservation Groups $862,755.00 for attorney fees and $33,275.25 for costs, for a total of $896,030.25.

DATED this 13th day of May, 2022.



Katherine M. Bidegaray
District Court Judge

[7] Total number of hours for Mr. Morris from his first Declaration and his Supplemental Declaration.
[8] Total number of hours for Mr. Sullivan from his first Declaration and his Supplemental Declaration.
[9] Total number of hours for Mr. Hernandez from his first Declaration and his Supplemental Declaration.
[10] Total number of hours for Mr. Johnson from his first Declaration and his Supplemental Declaration.

Cc: Shiloh Hernandez
Derf Johnson
Walton Morris, Jr.
Roger Sullivan
Jeremiah Langston
Nicholas Whitaker
John Martin
Samuel Yemington
Victoria Marquis
Amy Christensen

Certificate of Service

I hereby certify that a true and correct copy of the original document was duly served upon counsel of record and interested parties by regular mail/e-mail on 5/13/22

By _____
Clerk/Deputy Clerk

Attachment C

Order on Petitioners' Motion for Fees and Costs

April 21, 2022

DATE April 21, 2022
CLERK OF DISTRICT COURT
By: [illegible]

KATHERINE M. BIDEGARY
District Judge, Department 2
Seventh Judicial District
300 12th Avenue, N.W., Suite #2
Sidney, Montana 59270

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY; MONTANA BOARD OF ENVIRONMENTAL REVIEW, NATURAL RESOURCES PARTNERS L.P.; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400; NORTHERN CHEYENNE COAL MINERS ASSOCIATION; and WESTERN ENERGY CO. Respondents.	**CAUSE NO.: DV 2019-34** **ORDER ON PETIONERS' MOTION FOR FEES AND COSTS**

On December 13, 2021, Petitioners Montana Environmental Information Center and Sierra Club (together "Conservation Groups") moved this Court for an award of attorney fees and costs incurred in commencing and prosecuting this matter against the Montana Department of Environmental Quality (DEQ), supporting their motion with affidavits and documentation. On March 25, 2022, DEQ filed its answer brief. On April 8, 2022, the Conservation Groups filed their reply brief. As explained below, the Court now rules on the Conservation Groups' eligibility for and entitlement to an award of costs and

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Doc. No. 129

attorney fees, and reserves ruling on the appropriate amount of costs and fees to be awarded.

BACKGROUND

On October 28, 2021, the Court issued its Order on Petition for Judicial Review determining that DEQ's issuance of the AM4 permit expanding the Rosebud Mine and the Montana Board of Environmental Review's (BER) approval of permit were procedurally and substantively flawed and should be reversed and remanded to DEQ to review the AM4 permit application consistent with the Court's decision and applicable laws. Order on Pet. at 34. Thereafter, DEQ and the permit applicant Westmoreland Rosebud Mining et al. (WRM) filed motions requesting the Court clarify the remedy that would result from its Order on Petition for Judicial Review. In these same motions, DEQ and WRM additionally requested that the Court stay its order pending appellate review. The Conservation Groups opposed these motions. On January 28, 2022, the Court issued its Order on Remedy and Stay, vacating the AM4 permit effective April 1, 2022, and denying DEQ's and WRM's motion for stay. Order on Remedy and Stay at 22-23.

On January 18, 2022, DEQ filed an Unopposed Motion to Stay Briefing Schedule on Attorney's Fees Pending Settlement Negotiations, which the Court granted on January 20, 2022. On March 8, 2022, the Conservation Groups filed a Motion to Lift Stay, which the Court granted on March 11, 2022. Pursuant to the Court's Order Granting the Conservation Groups' Request to Lift Stay, DEQ filed its answer brief on March 25, 2022; and the Conservation Groups filed their reply brief on April 8, 2022.

On February 4 and 8, 2022, respectively, WRM and DEQ filed notices of appeal of the Court's Order on Petition for Judicial Review and Order on Remedy and Stay. On

February 8, 2022, WRM and DEQ also filed motions to stay the Court's orders under Mont. R. App. P. 22(2). The Conservation Groups responded arguing, in part, that WRM's and DEQ's appeals were premature because the attorney fees issue in this case remained unresolved and thus this Court's judgment was not yet final. On March 30, 2022, the Montana Supreme Court issued an order on WRM's and DEQ's motions to stay, finding the appeals premature and ordering among other things that this case is remanded to this Court to resolve the attorney fees issue within 45 days of the Montana Supreme Court's order.

Having considered the parties' briefs on attorney fees and costs and the Montana Supreme Court's order, the Court is prepared to rule on the Conservation Groups' eligibility for and entitlement to fees and costs and set a scheduling order to resolve the reasonableness of the Conservation Groups' requested attorney fees and costs. The underlying facts have been set forth in some detail in the Court's previous orders and will not be repeated here. *See* Order on Pet. at 6-11; Order on Remedy and Stay at 1-4.

LEGAL STANDARDS

The Montana Strip and Underground Mine Reclamation Act (MSUMRA) implements the federal Surface Mining Control and Reclamation Act (SMCRA), which provides for recovery of costs and attorney fees incurred in administrative proceedings and on judicial review:

> Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.

30 U.S.C.A. § 1275(e). "Administrative proceedings" referenced in section 1275(e) include administrative review of permitting decisions. *Powder River Basin Res. Council v. Wyo. Env't Quality Council*, 869 P.2d 435, 439 (Wyo. 1994).

The corresponding implementing regulation in MSMRA provides:

> Whenever any final order is issued at the request of any person other than the permittee, permit applicant, or the department as a result of any administrative proceeding under the Act, appropriate and reasonable costs, expenses, and attorney fees incurred for or in connection with that person's participation in those proceedings may be assessed against either party.

ARM 17.24.1307(1).

As will be discussed below, MSUMRA itself provides at § 82-4-251(7), MCA, as follows:

> Whenever an order is issued under this section or as the result of any administrative proceeding under this part, at the request of any person, a sum equal to the aggregate amount of all costs, expenses, and attorney fees as determined by the department to have been reasonably incurred by the person for or in connection with the person's participation in the proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review, or the department, resulting from administrative proceedings, considers proper.

Courts' interpreting the federal counterpart of the implementing Montana provisions require a fee petition to satisfy two requirements, "first, what is called the 'eligibility requirement' (achieving at least some degree of success on the merits); and second, what is called the 'entitlement requirement' (making a substantial contribution to the determination of the issues)." *W. Va. Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 245 (4th Cir. 2003).

A fee petitioner is eligible and achieves some degree of success on the merits when "the action served to promote the purposes of the Act." *Id.* at 246 (quoting *Nat'l Wildlife Found. v. Hanson*, 859 F.2d 313, 317 (4th Cir. 1988)). Purposes of SMCRA

include "protect[ing] society and the environment from the adverse effects of surface coal mining operations," 30 U.S.C. § 1202(a), and "ensur[ing] that [the regulatory authority] fulfills its duties under the Act." *W. Va. Highlands Conservancy*, 343 F.3d at 246. Purposes of MSUMRA include upholding Montana's fundamental constitutional environmental rights and "protect[ing] ... the environmental life support system from degradation." § 82-4-102(1)-(2), MCA; Mont. Const. arts. II, § 3, IX, § 1. Here, DEQ makes no argument that the Conservation Groups are not entitled, that they did not make a substantial contribution to the determination of the issues.

Once these two requirements are satisfied, the Court determines whether "the attorneys' fees requested ... are appropriate under the circumstances." *S. Appalachian Mountain Stewards v. Zinke*, No. 2:16CV00026, 2017 WL 5147620, at *1 (W.D. Va. Nov. 6, 2017). Here, although the reasonableness determination is to be made after a hearing, the Court notes that, "[t]he starting point for establishing the proper amount of a fee award is the so-called lodestar product, the number of hours reasonably expended multiplied by a reasonable hourly rate." *Id.* (*quoting Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 174 (4th Cir. 1994)). Courts consider a host of other factors[1] relating to the difficulty of the case, the ability of counsel, and the case's outcome. *Id.* "The most critical of those factors is the degree of success obtained." *Id.* (cleaned up) (*quoting Freeman v. Potter*, No. 7:04CV00276, 2006 WL 2631722, at *5 (W.D. Va. Sept. 13, 2006)).

MSUMRA regulations require a party seeking costs and attorney fees to submit the

[1] See, e.g., *S. Appalachian Mountain Stewards*, 2017 WL 5147620 at *1 n.1 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)); *accord Plath v. Schonrock*, 2003 MT 21, ¶ 36, 314 Mont. 101, 64 P.3d 984 (identifying analogous, non-exclusive, factors or "guidelines").

following:

(a) an affidavit setting forth in detail all costs and expenses including attorney fees reasonably incurred for or in connection with, the person's participation in the proceedings;

(b) receipts or other evidence of such costs and expenses; and

(c) where attorney fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area, and the experience, reputation and ability of the individual or individuals performing the services.

ARM 17.24.1309(1). Pursuant to these regulations, the Conservation Groups have submitted affidavits and other evidence concerning costs and fees claimed.

Further, under these fee provisions, "[t]he courts have made it clear that hours reasonably spent in establishing an entitlement to fees [i.e., fees for fees] are compensable." *Utah Int'l Inc. v. Dep't of Interior*, 643 F. Supp. 810, 831 (D. Utah. 1986).

DISCUSSION

A. Whether the Conservation Groups Are Eligible for and Entitled to Costs and Attorney Fees.

The Court's analysis begins with SMCRA, which provides that a member of the public who successfully challenges the action of a regulatory authority may recover reasonable costs and attorney fees by demonstrating eligibility and entitlement. *W. Va. Highlands Conservancy, Inc.*, 343 F.3d at 245; 30 U.S.C. § 1275(e). A state with an approved SMCRA regulatory program must "implement, administer, enforce, and maintain it in accordance with" SMCRA and its implementing federal regulations. 30 C.F.R. § 733.11. Pursuant to 30 C.F.R. § 840.15, every such program must also provide for public participation consistent with, among other things, the fee-shifting provisions of 43 C.F.R. §§ 4.1290 to 4.1296.

The federal regulatory authority, the U.S. Office of Surface Mining (OSM), approved the Montana program under MSUMRA, upon determining, among other things, that costs and attorney fees are available to members of the public based on the same standards of eligibility and entitlement as under SMCRA. 47 Fed. Reg. 6,266, 6,266-68 (Feb. 11, 1982) (finding that state regulations provided sufficient details about "who may file [for fees], contents of a petition [for fees], and who may receive an award" and that fees are available to the public for making a "substantial contribution" to a favorable decision); 45 Fed. Reg. 21,560, 21,569 (Apr. 1, 1980) ((finding that while Montana statutes (i.e., § 82-4-251(7), MCA) provide for fees arising from administrative proceedings like 30 U.S.C. § 1275(e) (SMCRA § 525(e), the Montana program lacked necessary details)).

Thus, upon a showing of eligibility and entitlement, a member of the public may receive an award of reasonable costs and fees under § 82-4-251(7), MCA, and ARM 17.24.1307 to 1309. It does not appear that DEQ disputes that this is the correct standard. *See* DEQ Resp. Br. at pp. 7-19 (Mar. 25, 2022).

Although DEQ and WRM are pursuing an appeal of this Court's prior rulings, at this juncture the Conservation Groups have demonstrated that they are eligible for an award of reasonable costs and attorney fees. Unarguably they obtained some degree of success under this Court's merits decision. Further, they have demonstrated that they are entitled to such an award because this Court's merits decision resulted from their advocacy efforts. Br. in Supp. of Pet'rs' Mot. for Cost and Att'ys' Fees at 6-7 (13, 2021); *see* ARM 17.24.1307(1), (3) (setting forth relevant standard). DEQ does not dispute that

the Conservation Groups satisfy both standards. *See* DEQ Resp. Br. 7-19. As such, the Conservation Groups are eligible and entitled to reasonable costs and attorney fees.

While DEQ does not dispute eligibility and entitlement, DEQ raises two arguments asking the Court to (1) deny an award of fees outright because the Conservation Groups failed to cite one related statute in their opening brief or (2) alternatively, limit the Conservation Groups to costs and fees incurred exclusively on judicial review, with no recovery for time spent in the administrative appeal before the Montana Board of Environmental Review. DEQ Resp. Br. at 7-19. The Court addresses each argument below.

1. Whether the Conservation Groups were required to cite § 82-4-251(7), MCA.

While acknowledging that reasonable costs and fees are available for successful judicial review of a permitting decision under MSUMRA as here (DEQ Resp. Br. at 7), DEQ contends that the Conservation Groups should be barred from recovering fees because their opening brief did not specifically cite § 82-4-251(7), MCA. *Id.* at 7, 14-19. DEQ's argument is based on the premise that MSUMRA's implementing regulations ARM 17.24.1307 to 1309, which the Conservation Groups cited repeatedly, are "limited to administrative proceedings" and do not apply, as here, on judicial review of such proceedings. DEQ Resp. Br. at 15. This argument elevates form over substance and, in any event, is not availing.

The Conservation Groups clearly invoked MSUMRA throughout their opening brief, and the cited the regulations (ARM 17.24.1307 to 1309),[2] which "implement" the fee

[2] Br. in Supp. of Pet'rs' Mot. for Cost and Att'ys' Fees at 1, 4, 6, 11-15.

provisions of "section 82-4-251(7)." 1980 MAR 2329, 2331 (Aug. 14, 1980). As noted, § 82-4-251(7), MCA, allows for an award of costs and attorney fees that "result [from] any administrative proceeding," including administrative proceedings that, as here, ultimately culminate in an "order" from a "court" on "judicial review." These regulations were promulgated after OSM determined that § 82-4-251(7), MCA, alone, did not establish the legal standards for who may obtain fees or the minimum process of for petitioning for fees. 45 Fed. Reg. at 21,569 (requiring regulations to "detail such matters as who may file [for fees, (i.e., eligibility)], contents of a petition [for fees], and who may receive an award [of fees (i.e., entitlement)]"). In making this determination, OSM explained that details were intended to apply to "costs and expenses in administrative and judicial proceedings." *Id.* (quoting 44 Fed. Reg. 14,902, 15,297 (Mar. 13, 1979)).[3]

Moreover, failing to apply ARM 17.24.1307 to 1309 to judicial review of administrative proceedings, as DEQ proposes, would be unworkable. These regulations provide the substantive standards for awarding fees (eligibility and entitlement). *See* ARM 17.24.1307(1), (3); *W. Va. Highlands Conservancy, Inc.*, 343 F.3d at 245 (explaining standards). They also set forth the procedural requirements for a fee petition, including timing (within 45 days of the relevant order) and contents of the petition (affidavits, receipts, rates). ARM 17.24.1308, 1309(1)-(2).[4] Because § 82-4-251(7), MCA, does not set forth any substantive or procedural standards, DEQ's proposal would fail to provide

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[3] These provisions to reimburse citizen for successful oversight of and participation in the permitting process were deemed essential by OSM and Congress. 44 Fed. Reg. at 15,297. Such remedial provisions should be construed liberally to achieve effect their remedial goals. *State ex rel. Florence–Carlton Sch. Dist. No. 15–6 v. Bd. of Cnty. Comm'rs.*, 180 Mont. 285, 291, 590 P.2d 602, 605 (1978); *accord Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 38, 360 Mont. 207, 255 P.3d 80.

[4] The Court notes that adhering to this procedure, DEQ filed its initial "answer" to the Conservation Groups' fee petition pursuant to the 30-day response deadline set forth at ARM 17.24.1309(2), as opposed to the usual14-day deadline. *Compare* DEQ Answer and Unopposed Mot. for Stay (Jan. 18, 2022), *with* Mont. Unif. Dist. Ct. R. 2(b). DEQ's actions refute its arguments.

Courts with any standards for resolving MSUMRA fee petitions on judicial review. Simply stated, DEQ's proposed interpretation of § 82-4-251(7), MCA, and ARM 17.24.1307 to 1309 makes no sense and should, therefore, be rejected. *State v. Price*, 2002 MT 150, ¶ 26, 310 Mont. 320, 50 P.3d 530 (courts construe statutes to avoid absurd results).

In support of its position, DEQ cites OSM's statement from 1980 that the Montana program did not have adequate laws to "provide for award of costs in administrative proceedings" as required by 30 U.S.C. § 1275(e). DEQ Resp. Br. at 15 (quoting 45 Fed. Reg. at 21,569). This statement, however, cannot carry the weight DEQ places on it. Section 1275(e) addresses fees for "administrative proceeding[s]," but that term is expressly intended to "include[e] any judicial review of agency actions." *Id.*; *accord* § 82-4-251(7), MCA (providing for courts to award fees resulting from "judicial review" of "administrative proceeding"). This nomenclature—fees resulting from an "administrative proceeding"—contrasts with the separate provisions in SMCRA and MSUMRA for fees from citizen suits that are filed directly in district court without a prior administrative proceeding. 30 U.S.C. § 1270(d); § 82-4-252(5), MCA. Thus, the general reference to "administrative proceedings" by OSM in 1980 does not support DEQ's unworkable argument.

In sum, ARM 17.24.1307 to 1309 implement § 82-4-251(7), MCA. They establish substantive and procedural standards and apply to fee petitions on judicial review. It was therefore not error for the Conservation Groups to cite the detailed implementing regulations rather than the underlying statute, in their petition for costs and attorney fees, which clearly relied upon MSUMRA throughout.

2. Whether the Conservation Groups were required to petition DEQ for administrative fees first.

DEQ's other argument—that, in awarding costs and attorney fees under MSUMRA, this Court is limited to costs and fees incurred solely on judicial review, DEQ Resp. Br. at 7-14—fails for three reasons: (1) it is inconsistent with the text of § 82-4-251(7), MCA; (2) it is unworkable; and (3) it would undermine the remedial goals of the statute.

First, the trigger for an award of fees under § 82-4-251(7), MCA (like its federal counterpart) is an "order ... issued ... as the result of any administrative proceeding under this part [MSUMRA], at the request of any person," i.e., the person seeking fees. If this order ultimately "result[s] from judicial review," as here, then "the court" "may ... assess[]" the award of costs and attorney fees. *Id.*; *accord* 30 U.S.C. § 1275(e) (providing essentially the same language).

Here, the only "order" resulting from this administrative proceeding (the appeal of the AM4 Permit) on which the Conservation Groups could have petitioned for fees is this Courts' Order on Petition. The Conservation Groups could not have sought costs and fees from the final (and flawed) order from BER, because it did not "result" in their eligibility or entitlement to a fee award. *W. Va. Highlands Conservancy, Inc.*, 343 F.3d at 245 (party is eligible and entitled to fees if successful on merits resulting from party's advocacy); ARM 17.24.1307 (1), (3) (setting forth eligibility and entitlement requirements). Thus, in the circumstances of this case, § 82-4-251(7), MCA, does not authorize DEQ to make a fee award or require the Conservation Groups to petition DEQ for such an award. Instead, it authorizes this Court to make the award because the success that the Conservation Groups achieved "result[ed]" solely from this Court's Order on Judicial Review.

Second, DEQ's two-step proposal—that the Conservation Groups seek from this Court exclusively those costs and fees incurred in proceedings before the Court and, subsequently, on remand, petition DEQ for fees incurred during the administrative appeal before BER, DEQ Resp. Br. at 8-11 & n.3—is unworkable under the procedure set forth in ARM 17.24.1307 to 1309. As noted, DEQ has not issued "any final order" that entitles the Conservation Groups to an award of costs and fees. *Cf.* ARM 17.24.1307(1). Compounding this problem, because DEQ has not issued any such order, the Conservation Groups could not comply with the procedural requirement to file a petition with DEQ "within 45 days of receipt of such order." *Cf.* ARM 17.24.1308. Finally, as a fundament of due process and fairness, the Conservation Groups cannot be expected to litigate their entitlement to costs and attorney fees from DEQ in a proceeding in which DEQ acts both as an opposition party and the adjudicator. *In re Murchison*, 349 U.S. 133, 136 (1955) ("[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.").[5] Thus, DEQ's proposal is unworkable.

Third, in addition to being unworkable, the two-step process DEQ proposes would create an unnecessarily duplicative and cumbersome process, inconsistent with the remedial purpose of the fee provisions of MSUMRA and SMCRA. "Legislation enacted for the promotion of public health, safety, and general welfare, is entitled to liberal construction with a view towards the accomplishment of its highly beneficent objectives." *Heffernan*, ¶ 38 (quoting *State ex rel. Florence–Carlton Sch. Dist.*, 180 Mont. at 291, 590 P.2d at 605).

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[5] SMCRA regulations, which Montana has not adopted, avoid this constitutional infirmity by providing for a fee determination by a separate agency from the one that issued the decision under administrative review. *See* 43 C.F.R. § 4.1291.

The Court notes the tangled process DEQ proposes in its second proposed order: to obtain fees incurred before BER, the Conservation Groups should first accept a remand to litigate the matter before DEQ, then, if unsatisfied, appeal to BER, and from BER appeal again to this Court. DEQ [Second] Proposed Or. on Legal Availability of Attorney's Fees at 8 (Apr. 4, 2022). DEQ's proposed process runs afoul of important considerations of policy and judicial economy: "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

In sum, neither the statute nor the regulations support DEQ's proposed procedure for a citizen petitioner to obtain costs and fees after succeeding on the merits. The Court rejects DEQ's proposed construction of § 82-4-251(7), MCA, and ARM 17.24.1307 to 1309.

In support of its position, DEQ correctly notes that citizen petitioners in federal cases have sought some portion of fees from the administrative adjudicative bodies before which administrative litigation occurred, typically the Interior Board of Land Appeals. DEQ Resp. Br. at 9-12. This, however, does not change the analysis of the fee provisions of *MSUMRA*. Unlike the MSUMRA provisions (§ 82-4-251(7), MCA, and ARM 17.24.1307 to 1309), SMCRA regulations specifically require such a fee petition to be filed with the administrative adjudicative body presiding over the administrative appeal, typically the Interior Board of Land Appeals, 43 C.F.R. § 4.1291, which "is separate and independent from the Bureaus and Offices whose decisions it reviews."[6]

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[6] U.S. Dep't of Interior, Office of Hearings and Appeals, About the Interior Board of Land Appeals, https://www.doi.gov/oha/about-interior-board-land-appeals#:~:text=The%20Interior%20Board%20of%20Land%20Appeals%20(IBLA,Bureaus%20and%20Offices%20whose%20decisions%20it%20reviews.

Accordingly, DEQ's contention that this Court may not award costs and fees incurred during the permit appeal before BER is unavailing.

B. Determination of Reasonable Fees and Costs.

The Conservation Groups take issue with DEQ's failure to proffer any evidence to dispute the reasonableness of their requested fees, arguing that this failure renders the issue undisputed and unless cured should constitute a waiver of any right to an evidentiary hearing. DEQ has requested a hearing to determine the amount of reasonable fees and costs that should be awarded the Conservation Groups. The Court will schedule a hearing but, if DEQ does not agree to the reasonableness of the Conservation Groups' fees and costs, will require DEQ to disclose to the Conservation Groups and submit to the Court, on or before April 25, 2022, the evidence they will rely on at the hearing and, in addition, to disclose their timesheets, billing rates, fee statements, and expert costs, for this litigation, which can be used to assess the reasonableness of the Conservation Groups' fees and costs.[7]

As noted, "[a] request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437. The Montana Supreme Court has repeatedly held that "when the other party objects" "a district court cannot calculate an award of attorneys' fees based solely on attorney affidavits." *Pumphrey v. Empire Lath & Plaster*, 2006 MT 255, ¶ 19, 334 Mont. 102, 144 P.3d 813. However, "absent an objection from the opposing party, "an itemized affidavit" constitutes "competent evidence" on which to base an "award of attorney fees." *Id.*[8] Consistent with this analysis, it is well-established that a

[7] Based on the representation of WRM's counsel, the Court understands that WRM will not be participating in the hearing.

[8] "The applicant's affidavit in support of a fee petition is the major method for fee applicants to meet their

party "waive[s] its right to an evidentiary hearing" on attorney fees if the party "fail[s] to submit to the District Court any evidence challenging the accuracy and reasonableness of the hours charged." *Blum v. Stenson*, 465 U.S. 886, 892 n.5 (1984); *see also JTL Grp., Inc. v. New Outlook, LLP*, 2010 MT 1, ¶ 52, 355 Mont. 1, 223 P.3d 912.[9]

Here, to avoid surprise and allow all parties fair opportunity to prepare for the hearing requested by DEQ, DEQ must, on or before April 25, 2022, come forth with the evidence it proposes to offer in opposition to the Conservation Groups' supported request for fees and expenses. Otherwise, this Court reserves the option to exercise its discretion and hold that DEQ has waived its right to an evidentiary hearing by "fail[ing] to submit ... any evidence challenging the accuracy and reasonableness of the hours charged." *Blum*, 465 U.S. at 892 n.5; *JTL Grp., Inc.*, ¶ 52; *In re Est. of Burrell*, ¶¶ 32-33.

The Court notes that DEQ previously expressly declined to present any evidence to rebut the Conservation Groups' affidavits on the basis that doing so would be too expensive. DEQ Resp. Br. at 20. However, the Court now understands that DEQ has retained an expert witness who will issue a report and testify at the hearing that DEQ requested.

Assuming the hearing proceeds as scheduled, the Court notes, "to avoid situations where fee determination proceedings become a second major litigation after the merits have been determined, courts have taken steps to avoid or minimize the need for and scope of evidentiary hearings for fee disputes." 2 Alba Conte, Attorney Fee Awards § 6:12

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burden of proof in support of a requested fee award." 2 Alba Conte, Attorney Fee Awards § 6:8 (3d ed. Dec. 2021 update).

[9] *Accord, e.g.*, *United States v. $28,000.00 in U.S. Currency*, 802 F.3d 1100, 1105-06 (9th Cir. 2015); *Foster Poultry Farms, Inc. v. Suntrust Bank*, No. 1:04-CV-5513-OWW-SMS, 2005 WL 2089813, at *2 (E.D. Cal. Aug. 30, 2005); *Lozeau v. Lake Cnty., Mont.*, 98 F. Supp. 2d 1157, 1169 (D. Mont. 2000).

(3d ed. Dec. 2021 update). Notably, the Thirteenth Judicial District Court in Billings recently required the party opposing fees to submit statements of their attorney fees and costs if they objected to the amount of fees requested by the prevailing party:

> If Signal Peak objects to the amount of attorneys' fees and costs being sought by the Defendants, Signal Peak shall furnish the Defendants with all statements for attorneys' fees and costs it has received from the counsel it retained on this case for their fees and costs incurred during the same time period that the Defendants are seeking to recover attorneys' fees and costs. Signal Peak may redact from those statements all information protected from disclosure by the attorney/client privilege or work product doctrine. Unredacted copies, however, shall be provided to the Court and filed under seal. All such statements shall be furnished and filed on or before Signal Peak's response brief is due.

Signal Peak Energy, No. DV 18-869, slip op. at 13-14. This is in line with well-established practice. *E.g.*, *Henson v. Columbus Bank & Trust Co.*, 770 F.2d 1566, 1575 (11th Cir.1985) ("In light of the concerns the district court expressed regarding the reasonableness of the hours claimed in Henson's petition, it would seem most appropriate for the court to have allowed discovery of" defendant's attorney fees.).[10]

This Court having determined, in its discretion, that a hearing is warranted, it follows the approach of Montana's Thirteenth Judicial District Court and will require DEQ to disclose its timesheets, billing rates, and fee statements to the Conservation Groups (with necessary redactions) and submit unredacted copies to the Court under seal on or before April 25, 2022. If DEQ opts instead not to oppose the reasonableness of the amount of the Conservation Groups' requested costs and fees, then it need not disclose this information.

This approach will assure that (1) this Court has important information for assessing the reasonableness of the Conservation Groups' requested costs and fees, and (2) DEQ does not surprise the Conservation Groups at the hearing with previously undisclosed information regarding the reasonableness of the Conservation Groups' requested cost and fee award.

C. Compensability of Time Spent Litigating Fees.

Under SMCRA, "[t]he courts have made it clear that hours reasonably spent in establishing an entitlement to fees [i.e., fees for fees] are compensable." *Utah Int'l Inc. v. Dep't of Interior*, 643 F. Supp. 810, 831 (D. Utah. 1986); 43 U.S.C. § 4.1295(b) (fee awards include "fees incurred in seeking the award"). DEQ has not challenged this point as applied here under MSUMRA. Accordingly, to assure that the additional time and expense spent litigating DEQ's post-ruling challenges, including to the Conservation Groups' costs and fees, the Court will grant the Conservation Groups leave to file, on or before April 22, 2022, a supplemental petition for reasonable fees and expenses incurred after the filing of their original petition for fees.

CONCLUSION

For the foregoing reasons, the Court determines and orders that:

1. The Conservation Groups are eligible for and entitled to an award of reasonable costs and attorney fees;

2. The parties shall appear, via Zoom, before the Court at 3:00 p.m., May 6, 2022, for a hearing on the reasonableness of the Conservation Group's requested costs and attorney fees.

3. On or before April 25, 2022, DEQ shall submit the evidence it relies on to the Court and the Conservation Groups, or failing such disclosure DEQ shall have waived any right to an evidentiary hearing and, in which case, the Court shall award the Conservations Groups their reasonable costs and fees without hearing;

4. On or before April 25, 2022, DEQ shall disclose to the Conservation Groups its appropriately redacted timesheets, billing rates, and fee statements for their attorneys, experts, and staff, and submit unredacted copies to the Court; and

5. The Conservation Groups are granted leave to file, on or before April 22, 2022, a supplemental petition for fees and expenses reasonably incurred after the filing of their original petition for fees to assure that a fully compensatory award is achieved.

DATED this 21st day of April, 2022.

Katherine M. Bidegaray
District Court Judge

Cc: Shiloh Hernandez
Derf Johnson
Walton Morris, Jr.
Roger Sullivan
John Martin
Samuel Yemington
Victoria Marquis
Nicholas Whitaker
Amy Christensen

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I hereby certify that a true and correct copy of the original document was duly served upon counsel of record and interested parties by regular mail/e-mail
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