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Seventh Judicial District
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STATE OF MONTANA
Case Number: DA 22-0067

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

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 factors¹ 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 they 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

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 usual 14-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).

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

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.](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

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:

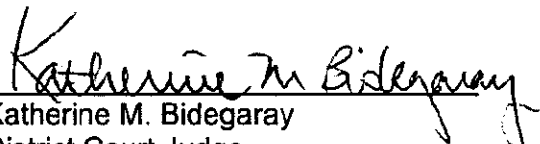
1. The Conservation Groups are eligible for and entitled to an award of reasonable costs and attorney fees;
2. The parties shall appear, via Zoom, before the Court at 3:00 p.m., May 6, 2022, for a hearing on the reasonableness of the Conservation Group’s requested costs and attorney fees.

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;

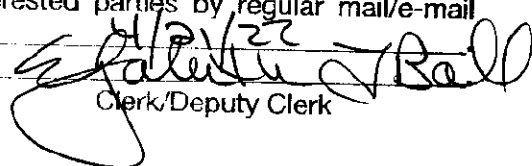
4. On or before April 25, 2022, DEQ shall disclose to the Conservation Groups its appropriately redacted timesheets, billing rates, and fee statements for their attorneys, experts, and staff, and submit unredacted copies to the Court; and

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

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 4/21/22
By 
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