

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 22-0064

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs / Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent / Appellant,

and

WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS L.P.,
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and
NORTHERN CHEYENNE COAL MINERS ASSOCIATION,

Respondent-Intervenors / Appellants,

and

MONTANA BOARD OF ENVIRONMENTAL REVIEW

Respondent / Appellant

**UNOPPOSED JOINT MOTION FOR LEAVE TO FILE OVERLENGTH
OPENING AND ANSWER BRIEFS WITH DECLARATIONS OF
JEREMIAH LANGSTON AND SAMUEL R. YEMINGTON**

On Appeal from the Montana Sixteenth Judicial District Court, Rosebud County,
Cause No. DV 19-34, the Honorable Katherine M. Bidegaray Presiding

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Mining, LLC, Natural Resource
Partners, L.P., International Union of
Operating Engineers, Local 400,
Northern Cheyenne Coal Miners
Association.*

Joint Movants move this Court for leave for DEQ to file an overlength opening brief, not to exceed 15,000 words¹ and Westmoreland 12,000 words to file the same, pursuant to Mont. R. App. P. 12(10). The undersigned counsel contacted the other counsel for parties in this appeal regarding this motion and they do not object to the requested expansion. Joint Movants also request leave for Petitioner/Appellees Montana Environmental Information Center and Sierra Club (collectively, “MEIC”) to file an overlength answer brief not to exceed 15,000 words.

The reasons this motion should be granted are as documented in the declarations of counsel filed together with this motion. To summarize, an expanded word limit is warranted for three reasons: (1) this case started in 2009 and the procedural history is, accordingly, long and complex; (2) the matters addressed in this case are highly technical and require significant explanation; and (3) the district court ruled in favor of MEIC on nearly every issue raised by MEIC and to achieve Joint Movants’ intended result of upholding the BER’s order at issue in this case, several issues will be necessarily presented to this Court for review, including—for DEQ—the additional issue of attorney’s fees.

¹ On March 23, 2022, DEQ requested leave to file an overlength brief of 13,000 words, which this Court denied “at this time.” Order (Mar. 31, 2022). With the inclusion of the attorney’s fees issue in this appeal, DEQ requests an additional 2,000 words beyond its previous request to adequately address this new issue on appeal.

As described in the accompanying declarations, an expansion of the 10,000-word limit afforded by Mont. R. App. P. 11(4)(a) is necessary to adequately address the numerous legal and factual issues in this case. A proposed order granting Joint Movants' motion is filed concurrently. For these reasons and those stated in the accompanying declarations, Joint Movants respectfully request that its motion be granted.

Respectfully submitted this 30th day of June, 2022.

/s/ Jeremiah Langston
JEREMIAH LANGSTON

*Counsel for Respondent/Appellant Montana
Department of Environmental Quality.*

/s/ Samuel R. Yemington
SAMUEL R. YEMINGTON

*Counsel for Appellants/Respondent-
Intervenors Westmorland Rosebud Mining,
LLC, Natural Resource Partners, L.P.,
International Union of Operating Engineers,
Local 400, Northern Cheyenne Coal Miners
Association.*

I, Jeremiah Langston, declare as follows:

1. I am employed by Respondent/Appellant Montana Department of Environmental Quality (“DEQ”) and am counsel of record for DEQ in this appeal.

2. This case began in 2009 when Intervenor-Respondent/Appellants Westmoreland Rosebud Mining, LLC, *et al.* (“Westmoreland”) filed its fourth amendment to Area B of its Rosebud Mine surface mining permit (“AM4”) under the Montana Strip and Underground Mine Reclamation Act. So far, the AM4 permit has been addressed by DEQ, Respondent/Appellant Montana Board of Environmental Review (“BER”), the district court, and now this Court. The record and procedural history of this case is, accordingly, quite long and complex.

3. This case, furthermore, concerns complex scientific and technical subjects requiring significant explanation. Among other things, it concerns the levels of salinity in the hydrology of the East Fork of Armells Creek and the aquatic life in this same waterway. This Court will be benefited if DEQ is permitted to adequately address the facts surrounding these substantive issues.

4. The district court ruled in favor of Petitioner/Appellee Montana Environmental Information Center and Sierra Club (collectively, “MEIC”) on every merit issue presented for review, *see* DC Doc. 79, and the district court identified every one of these issues, *see id.* at 34, as a basis for reversing the BER’s order affirming DEQ’s approval of the AM4 permit, *see* Admin. Rec. Doc. 152. To

achieve its intended result of having this Court affirm the BER's order, DEQ, therefore, must address several issues in this appeal.

5. The district court also sided with MEIC in finding that its determination of attorney's fees included both costs associated with the BER and district court proceedings, *see* D.C. Doc. 129, contrary to DEQ's argument that § 82-4-251(7), MCA, limited the district court's determination of attorney's fees to the district court proceeding, *see* D.C. Doc. 121.

6. The district court, furthermore, awarded almost the entirety of MEIC requested attorney's fees in an amount of \$862,775, *see* D.C. Doc. 139, contrary to DEQ's recommended amount of \$265,565.63 for both the BER and district court proceedings.

7. In preparing the draft opening brief, I have determined that it would not be possible to adequately present DEQ's position on these issues in a single brief of 10,000 words, as provided by Mont. R. App. P. 11(4)(a). To ensure this Court receives suitable argument from DEQ on all the issues presented, an expansion of the word limit for DEQ's brief, not to exceed 15,000 words, is warranted.

8. I contacted counsel for MEIC, Westmoreland, and the BER concerning the relief requested in this motion, and each stated they do not oppose the motion.

9. As a condition of not opposing DEQ's motion, MEIC has requested that DEQ seek leave for MEIC to file an overlength brief not to exceed 15,000 words. DEQ agrees that, because DEQ will require 15,000 words in its opening brief to adequately address all the essential issues on appeal, MEIC will likely require an equivalent number of words to adequately address these issues in its answer brief. Counsel for Westmoreland and the BER have been contacted and they do not object to DEQ making this request on behalf of MEIC.

I declare under penalty of perjury that the foregoing is true and correct.

Dated June 30, 2022.

/s/ Jeremiah Langston
JEREMIAH LANGSTON
Montana Department of Environmental
Quality
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(406) 444-2544

**DECLARATION OF SAMUEL R. YEMINGTON IN SUPPORT OF JOINT
UNOPPOSED MOTION FOR FIRST 30-DAY EXTENSIONS OF TIME &
LEAVE TO FILE OVERLENGTH OPENING BRIEFS**

I, Samuel R. Yemington, declare under penalty of perjury as follows:

1. I am counsel of record for Westmoreland Rosebud Mining, LLC, f/k/a Western Energy Co., Natural Resource Partners, L.P., International Union of Operating Engineers, Local 400, and Northern Cheyenne Coal Miners, (together, Westmoreland/Local 400), in the above-captioned matter.

2. This matter is substantively and procedurally complex. The mining permit at issue in this matter was the subject of a six-year scientific and technical review by the Montana Department of Environmental Quality (the “Department”) and a three-year contested case proceeding before the Montana Board of Environmental Review (the “Board”), the latter of which culminated in an 87-page order (the “Board’s Order”).

3. This judicial review of the Board’s Final Order implicates the same scientific and technical questions of law and fact on issues such as salinity, impairment, and aquatic life that the Parties litigated in the contested case proceeding.

4. It is not possible to fully and completely respond to MEIC’s claims (or to address the lower court’s orders, which are nearly 15,000 words in length)

within the 10,000 words authorized by Mont. R. App. P. 11(4)(a). An additional 2,000 words will allow Westmoreland/Local 400 to adequately address each of MEIC's claims.

5. WRM/Local 400's opening brief is currently due on July 11, 2022. However, the Parties are still in the process of briefing WRM/Local 400 and the Department's motions to stay the lower court's decisions pending the outcome of this appeal, with WRM/Local 400's reply briefs being due June 29, 2022. WRM/Local 400 requests an additional 30 days, up to and including August 10, 2022, to file its opening brief to account for the competing filing deadlines. This is the first extension sought by WRM/Local 400, and WRM/Local 400 will file its opening brief within the time requested.

6. Neither the Department nor MEIC oppose the relief requested herein.

Pursuant to § 1-6-105, MCA, I declare under penalty of perjury and the laws of the State of Montana that the foregoing is true and correct.

Executed this 29th day of June 2022.

Washington, D.C.
Place



Samuel R. Yemington
HOLLAND & HART LLP

*Attorney for Appellants/Respondent-Intervenors
Westmorland Rosebud Mining, LLC, Natural
Resource Partners, L.P., International Union of
Operating Engineers, Local 400, Northern
Cheyenne Coal Miners Association*

CERTIFICATE OF SERVICE

I, Jeremiah Radford Langston, hereby certify that I have served true and accurate copies of the foregoing Motion - Unopposed to the following on 06-30-2022:

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Electronically signed by Catherine Ann Armstrong on behalf of Jeremiah Radford Langston
Dated: 06-30-2022