

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

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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*

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**MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S  
PETITION FOR REHEARING**

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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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## INTRODUCTION

Respondent/Appellant Montana Department of Environmental Quality (“DEQ”) respectfully requests rehearing of this Court’s November 22, 2023, Opinion on the limited issue of whether Petitioner/Appellee Montana Environmental Information Center and Sierra Club (collectively, “MEIC”) is entitled to attorney’s fees against DEQ for time MEIC spent responding to arguments and filings from Respondent/Appellant’s Westmoreland Rosebud Mining, LLC, *et al.* (“Westmoreland”). *See Mont. Env’t Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, 2023 MT 224, 2023 Mont. LEXIS 1177, 2023 WL 8103553 (Mont. Sup. Ct. Nov. 22, 2023) (“Opinion”). In particular, the Court’s Opinion does not address the entirety of the issue raised by DEQ’s briefs because the Opinion only addresses instances in which DEQ and MEIC were aligned on issues. *See* Opinion, ¶ 103. Said differently, the Opinion does not address situations when MEIC’s attorney’s time was spent in response to Westmoreland’s filings, but DEQ and MEIC were not necessarily aligned on the issues.

DEQ’s petition qualifies for rehearing under Mont. R. App. P. 20(1)(a)(ii) because this Court’s Opinion “overlooked some question presented by counsel that would have proven decisive to the case[.]” This petition also qualifies for rehearing under Mont. R. App. P. 20(1)(a)(iii) because the Opinion does not address *Animal Found. of Great Falls v. Mont. Eighth Judicial Dist. Court*, 2011 MT 289, ¶ 27,

362 Mont. 485, 265 P.3d 659. This case states attorney's fees in Montana do not impose joint and several liability and is, therefore, a "controlling decision not addressed by the supreme court."

### **BACKGROUND**

In its opening brief, DEQ identified the issue of "[w]as the district court's award of \$862,755 in attorney's fees against DEQ reasonable?" DEQ Opening Br. at 3. In addressing this issue, DEQ argued the district court's attorney's fee award was unreasonable because "MEIC never sought any attorney's fees against Westmoreland, yet the record makes clear much of MEIC's time litigating this case was in response to Westmoreland's advocacy." *Id.* at 62. As one example of how the district court's decision was in error, DEQ identified an instance when DEQ and MEIC were aligned on the issue of opposing Westmoreland's motion to disqualify a member of the Montana Board of Environmental Review, which the district court awarded fees to MEIC against DEQ for its time in opposition to Westmoreland's motion. *Id.* at 62. Demonstrating that this was just one example and not the entirety of the issue raised on appeal regarding MEIC's claimed hours for attorney's fees, DEQ's conclusion paragraph for this section argued "the district court's failure to consider time MEIC spent responding to Westmoreland's filings . . . [was] an abuse of discretion." *Id.* at 65.

In support of its arguments, DEQ cited *Animal Found. of Great Falls* for the proposition that attorney’s fees do not impose joint and several liability. *Id.* at 62–63. DEQ continued to raise this issue and cite *Animal Found. of Great Falls* in its reply brief. DEQ Reply Br. at 18–19. This Court’s January 18, 2023, order setting this appeal for oral argument did not identify attorney’s fees as an issue to be addressed by counsel and DEQ, accordingly, did not address this issue at oral argument.

In its Opinion, this Court noted that the issue raised by DEQ was not limited to instances when DEQ and MEIC were aligned. *See* Opinion, ¶ 99 (noting DEQ argued that district court erred because “part of the award was for time Conservation Groups billed for litigating against Westmoreland, even though DEQ was aligned with Conservation Groups on *some of those issues*[.]”) (Emphasis added). But this Court’s Opinion only explicitly ruled on the reasonableness of attorney’s fees when DEQ and MEIC were aligned: “We . . . conclude that it is proper to remand consideration of this issue to the District Court for the purpose of excluding from the attorney fee award any hours billed for work Conservation Groups’ attorneys performed in relation to those issues in the litigation on which Conservation Groups and DEQ were *aligned* against Westmoreland.” Opinion, ¶ 103 (emphasis added). In a footnote attached to this conclusion, this Court said

“[w]hether Conservation Groups could recover their *remaining fees*<sup>1</sup> from Westmoreland under § 82-4-251(7), MCA, is not at issue because Conservation Groups did not seek such relief in the District Court.” *Id.*, ¶ 103, n.21 (emphasis added).

## DISCUSSION

### **I This Court’s opinion does not fully address the issue of whether MEIC may recover attorney’s fees from DEQ for time spent responding to Westmoreland’s filings and advocacy.**

This Court’s own framing of the issue shows that DEQ raised a larger issue than what was addressed by this Court’s Opinion. *See* Order, ¶ 99 (noting DEQ argued that district court erred because “part of the award was for time Conservation Groups billed for litigating against Westmoreland, even though DEQ was aligned with Conservation Groups on *some of those issues*[.]”) (Emphasis added). The time that MEIC spent responding to Westmoreland’s filings on issues that DEQ and MEIC were aligned on was, accordingly, only a subset of MEIC’s time entries challenged by DEQ. To address the entire issue raised by DEQ, this Court would need to address instances in which MEIC was responding to Westmoreland’s filings and arguments (notwithstanding MEIC’s and DEQ’s relative positions on the underlying issue).

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<sup>1</sup> This footnote creates further ambiguity regarding the Court’s holding because it implies that MEIC has waived the right to recover fees against Westmoreland for time MEIC’s spent responding to Westmoreland’s advocacy.

A whole host of MEIC’s claimed hours fit within this category of fees challenged by DEQ but not addressed by this Court’s order. For instance, MEIC’s attorneys claimed hours for time spent preparing for a deposition of Anne Hedges, which is a deposition that Westmoreland requested and that DEQ did not participate in. *See* DEQ’s Proposed Order on the Reasonableness of Attorney’s Fees, 20 (May 11, 2022). The district court also awarded MEIC attorney’s fees against DEQ for time MEIC spent drafting discovery propounded upon—and reviewing discovery from—Westmoreland. *Id.* at 20–21. It’s unclear whether these hours would qualify as issues DEQ and MEIC were aligned on. If this Court clarified that MEIC may not recover fees against DEQ for time spent responding to Westmoreland’s advocacy and filings, it would be clear that the district court’s order erred by awarding MEIC fees against DEQ for time its attorneys spent on discovery matters related to Westmoreland’s involvement in the case.

Because this Court has remanded this case “to the District Court for recalculation of the amount of fees consistent with the holdings on this issue herein[,]” Opinion, ¶ 108, this issue is “decisive to the case” and this Court should grant DEQ’s petition for rehearing under Mont. R. App. 20(1)(a)(ii) for the limited purpose of clarifying this attorney’s fees issue.



## **II. DEQ raised controlling authority on the relevant issue that this Court's Opinion did not address.**

In its opening and answer brief, *see* DEQ Opening Br. at 62; DEQ Reply Br. 19, DEQ cited to *Animal Found. of Great Falls*, ¶ 27, which states “[t]he ultimate award of costs and attorney fees should reflect not joint and several liability, but liability based upon the specific events and the specific conduct of each respondent[.]” In its Opinion, this Court noted “Montana, as a ‘primacy’ state pursuant to the federal Surface Mine Control Reclamation Act (SMCRA) has jurisdiction over the regulation of coal mining operation and, as such, Montana law applies to this proceeding.” Opinion, ¶ 15, n.7. This issue on reasonableness of attorney’s fees is, accordingly, governed by Montana law and *Animal Found. of Great Falls*.

DEQ, therefore, requests that this Court grant DEQ’s petition for rehearing under Mont. R. App. P. 20 (1)(a)(iii) and address its prior precedent in *Animal Found. of Great Falls*.

## **CONCLUSION**

For the reasons provided above, DEQ respectfully requests this Court grant its petition for rehearing to address the issue of whether it was reasonable for the district court to award MEIC attorney’s fees against DEQ for time MEIC spent responding to Westmoreland’s filings and advocacy. DEQ also requests this Court

address its prior precedent in *Animal Found. of Great Falls*, ¶ 27, which bears on this issue.

Respectfully submitted this 7th day of December 2023.

/s/ Jeremiah Langston  
JEREMIAH LANGSTON

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rules 11 and 20 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1,375 words, excluding table of contents, table of citations, certificate of service, certificate of compliance, or any appendix containing statutes, rules, regulations, and other pertinent matters.

/s/ Jeremiah Langston  
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## **CERTIFICATE OF SERVICE**

I, Jeremiah Radford Langston, hereby certify that I have served true and accurate copies of the foregoing Petition - Rehearing to the following on 12-06-2023:

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