IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 22-0064

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

vs.

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

Respondent-Intervenors and Appellants,

and

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent and Appellant,

and

MONTANA BOARD OF ENVIRONMENTAL REVIEW,

Respondent and Appellant.

PLAINTIFFS' / APPELLEES' OBJECTIONS TO DEQ'S PETITION FOR REHEARING

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

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INTRODUCTION

Appellees Montana Environmental Information Center and Sierra Club (Conservation Groups) oppose Appellant Montana Department of Environmental Quality's (DEQ) petition for rehearing. This Court's unanimous November 22, 2023, Opinion did not overlook a question presented by counsel that would have proven decisive to the award of attorney fees. Nor did the Court ignore controlling authority.

DEQ's newfound arguments objecting to the Conservation Groups' time spent responding to discovery matters related to Westmoreland Rosebud Mining, LLC (Westmoreland) were not presented in their briefing to this Court and would not, in any event, prove decisive. Further, *Animal Foundation of Great Falls v. Montana Eighth Judicial District Court*, 2011 MT 289, 362 Mont. 485, 265 P.3d 659, is not controlling or even relevant to fee awards under the Montana Strip and Underground Mine Reclamation Act (MSUMRA).

DEQ's petition should be denied.

STANDARD OF REVIEW

I. Rehearing Is an Exceptional Remedy Available Only in Narrow Circumstances.

Pursuant to Montana Rule of Appellate Procedure 20(1):

> (a) The supreme court will consider a petition for rehearing presented only upon the following grounds:
>
> (i) That it overlooked some fact material to the decision;
>
> (ii) That it overlooked some question presented by counsel that would have proven decisive to the case; or
>
> (iii) That its decision conflicts with a statute or controlling decision not addressed by the supreme court.

Rehearing is an exceptional remedy. "A petition for rehearing is not a forum in which to rehash arguments made in the briefs and considered by the Court." *Water for Flathead's Future, Inc. v. DEQ*, No. DA 22-0112, slip op. at 1 (Mont. June 27, 2023) (internal quotation omitted). Nor is it a forum to raise "errors not assigned in the brief[s]," *In re Tuohy's Est.*, 33 Mont. 230, 250, 83 P. 486, 492 (1905), or "new arguments." *Junkermier v. Alborn*, DA 19-0521, 2020 Mont. LEXIS 2244, at *2 (Mont. Aug. 18, 2020).

II. A Successful Plaintiff under MSUMRA May Receive Reasonable Fees for Participation in the Proceeding from Either Party.

A person entitled to fees under MSUMRA may recover attorney fees "reasonably incurred" for "the person's participation in the proceedings." § 82-4-251(7), MCA. Such fees "may be assessed against

either party as the court … considers proper." *Id.*; *accord* ARM 17.24.1307(1).

The purpose of this provision is to ensure effective public participation to vindicate public rights under MSUMRA, by allowing citizens to obtain the services of pro bono attorneys:

> [P]roviding citizen access to administrative appellate procedures and courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the act.
>
> In many, if not most, cases in both the administrative and judicial forum, the citizen who sues to enforce the law, or participates in administrative proceedings to enforce the law, will have little or no money with which to hire a lawyer. If private citizens are to be able to assert the rights granted them by this bill, and if those who violate this bill's requirements are not to proceed with impunity, then citizens must have the opportunity to recover the attorneys' fees necessary to vindicate their rights.

S. Rep. No. 95-128, at 59 (1977). DEQ's coal regulatory program under MSUMRA is funded, not by Montana taxpayers, but by the U.S. Office of Surface Mining. 30 C.F.R. § 926.30, art. V.A.1.

III. The Reasonableness of a District Court's Award of Attorney Fees Is Reviewed with Substantial Deference for Abuse of Discretion.

In evaluating a successful plaintiffs' time, a district court "need not, and indeed should not, become [a] green-eyeshade accountant[],"

Fox v. Vice, 563 U.S. 826, 838 (2011), or "scrutinize … timesheets with a red pen." *Crow Indian Tribe v. United States*, No. CV 17-89, 2021 WL 3142155, at *9 (D. Mont. July 26, 2021). Thus, once the plaintiff has submitted evidence documenting their attorney's time, the burden shifts to the opposing party for "submission of evidence … challenging the accuracy and reasonableness of the hours." *Gates v. Deukmejian*, 987 F.2d 1392, 1397–98 (9th Cir. 1992). "'Objections and proof from fee opponents' concerning hours that should be excluded must be specific and 'reasonably precise.'" *ACLU of Georgia v. Barnes*, 168 F.3d 423, 428 (11th Cir. 1999) (quoting *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1301 (11th Cir. 1988)).

The reasonableness of a district court's award of attorney fees is reviewed with "substantial deference," *Fox*, 563 U.S. at 838, for an abuse of discretion, whether the district court "acted arbitrarily, without conscientious judgment, or exceeded the bounds of reason." *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, 2023 MT 224, ¶ 12, ___ Mont. ___, ___ P.3d ___. "We can hardly think of a sphere of judicial decisionmaking in which appellate micromanagement has less to recommend it." *Fox*, 563 U.S. at 838.

ARGUMENT

I. This Court Did Not Overlook a Question that DEQ at Most Obliquely Hinted At.

The specific issue of which DEQ now complains—the alleged failure of this Court to address the district court's "awarding [Conservation Groups] fees against DEQ for time [their] attorneys spent on discovery … related to Westmoreland's involvement in the case," DEQ Pet. at 5—was not "presented by counsel" and would not "have proven decisive," in any event. Mont. R. App. P. 20(1)(a)(ii).

This Court is not required to be clairvoyant, in either reframing the issues presented or constructing cogent arguments from the shards of a party's briefs. *Johansen v. DNRC*, 1998 MT 51, ¶ 24, 288 Mont. 39, 955 P.2d 653 ("It is not this Court's job to conduct legal research on [a party's] behalf, to guess as to his precise position, or to develop legal analysis that may lend support to that position.").

Here, DEQ presented the following as its sixth issue on appeal: "Was the district court's award of $862,755 in attorney's fees against DEQ reasonable?" DEQ Opening Br. at 3. In briefing, DEQ specifically complained that the district court did not address an unidentified number of hours related to a motion by Westmoreland before the Board

of Environmental Review to disqualify certain Board members, which both DEQ and Conservation Groups opposed. *Id.* at 62. This Court's decision *addressed that argument* and ruled as follows:

> We similarly 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.

Mont. Env't Info. Ctr., ¶ 103.

DEQ's brief did not, however, specify any *additional* time to which it objected. DEQ Opening Br. at 62. It was not the Court's duty to "guess" about what other time DEQ may have objected to. *See Johansen*, ¶ 24. Rather, it was DEQ's burden to demonstrate that the district court awarded fees "without conscientious judgment, or exceeded the bounds of reason." *Mont. Env't Info. Ctr.*, ¶ 12. To carry that burden and overcome the "substantial deference" owed to the district court, *Fox*, 563 U.S. at 838, DEQ was required, at minimum, to "be specific and 'reasonably precise'" about the hours to which it was objecting. *ACLU of Georgia,* 168 F.3d at 428 (quoting *Norman*, 836 F.2d at 1301). Having failed to specify any such additional time, DEQ cannot

now argue that this Court "overlooked" objections that DEQ did not make. Mont. R. App. P. 20(1)(a)(ii); *In re Tuohy's Est.*, 33 Mont. at 250, 83 P. at 492 (party may not present new arguments in petition for rehearing); *accord Junkermier*, 2020 Mont. LEXIS 2244, at *2.

DEQ now argues that this Court "need[ed] to address instances in which [the Conservation Groups] w[ere] responding to Westmoreland's filings and arguments (notwithstanding [the Conservation Groups'] and DEQ's relative positions on the underlying issue)" and that the district court "erred by awarding [the Conservation Groups] fees against DEQ for time [their] attorneys spent on discovery matters related to Westmoreland[]." DEQ Pet. at 4, 5. DEQ insists that "[a] whole host of [the Conservation Groups'] claimed hours fit this category." *Id.* at 5.

But DEQ did not raise these objections or identify this "host" of hours in its prior briefing to this Court. DEQ Opening Br. at 62; DEQ Reply at 18–21. In fact, as this Court noted, DEQ chose *not* to present any evidence to the district court to "challeng[e] the number of hours billed." *Mont. Env't Info. Ctr.*, ¶ 97. DEQ cannot demonstrate the district court abused its discretion by asking this Court—in a petition for rehearing—to become a "green-eyeshade accountant[]," *Fox*, 563

U.S. at 838, or "scrutinize … timesheets with a red pen." *Crow Indian Tribe*, 2021 WL 3142155, at *9.

In sum, it is not this Court's role to transform cryptic briefing into cogent argument or to tally hours DEQ itself did not bother to tally, document, or describe. This Court did not "overlook" any argument "presented by counsel," much less any argument "that would have proven decisive." Mont. R. App. 20(1)(a)(ii).

II. *Animal Foundation* Is Not Controlling Authority or Even Relevant to this Court's Analysis of Fees Under MSUMRA.

Animal Foundation v. Montana Eighteenth Judicial District Court, 2011 MT 289, 362 Mont. 485, 265 P. 3d 659, *cited in* DEQ Opening Br. at 62 *and* Pet. at 6, is neither controlling nor apposite.

There, fees were awarded as a sanction for distinct acts of contempt for disobeying a subpoena and vexatious litigation. *Animal Found.,* ¶¶ 6–7 (citing §§ 3-1-501(1)(j), 26-2-104, 37-61-421, MCA). While distinct individuals were responsible for the distinct instances of sanctionable conduct, the district court awarded fees "in a lump sum, jointly and severally" against all of them. *Id.* ¶ 26. This Court remanded with the instruction that "[t]he ultimate award of costs and attorney fees should reflect not joint and several liability, but liability based upon the

specific events and specific conduct" for which the distinct individuals were sanctioned. *Id.* ¶ 27.

Here, unlike *Animal Foundation*, the district court did not award fees against DEQ as a sanction for contempt or vexatious litigation. Instead, the court awarded fees pursuant to MSUMRA, which expressly authorizes the award of reasonable fees for a successful litigant's "participation in the proceedings," which "may be assessed against either party as the court … considers proper." § 82-4-251(7), MCA; ARM 17.24.1307(1). The purpose of these provisions is, not to sanction, but to enable the public to vindicate their rights under MSUMRA. S. Rep. No. 95-128, at 59.

Animal Foundation is not controlling. This Court's decision not to discuss irrelevant case law is no basis for rehearing. Mont. R. App. P. 20(1)(a)(iii).

CONCLUSION

DEQ's Petition for Rehearing should be denied.

Respectfully submitted this 22nd day of December, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rules of Appellate Procedure 11(4)(e) and 20(3), I hereby certify that the foregoing objections are proportionately spaced, using Century Schoolbook typeface 14-point font, and containing 1,777 words, excluding caption, signature block, and certificates of compliance and service. I relied on the word processing system used to prepare this pleading to obtain the word count.

/s/ Shiloh Hernandez
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CERTIFICATE OF SERVICE

I, Shiloh Silvan Hernandez, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Objection to Petition for Rehearing to the following on 12-22-2023:

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