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FILED

01/30/2024

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 22-0064

MONTANA ENVIRONMENTAL INFORMATION  
CTR. and SIERRA CLUB,

Plaintiffs/Appellees,

v.

WESTMORELAND ROSEBUD MINING, LLC, f/k/a  
WESTERN ENERGY CO., NAT. RES. PARTNERS, L.P.,  
INT'L UNION OF OPERATING ENGINEERS, LOCAL  
400, and N. CHEYENNE COAL MINERS ASS'N,

Respondent-Intervenors/Appellants.

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JAN 30 2024

Bowen Greenwood  
Clerk of Supreme Court  
State of Montana

MONTANA ENVIRONMENTAL INFORMATION  
CTR. and SIERRA CLUB,

Petitioners/Appellees,

v.

MONTANA DEP'T OF ENVIRONMENTAL QUALITY,

Respondent/Appellant,

ORDER

MONTANA BD. OF ENVIRONMENTAL REVIEW,  
WESTMORELAND ROSEBUD MINING, LLC, f/k/a  
WESTERN ENERGY CO., NAT. RES. PARTNERS L.P.,  
INT'L UNION OF OPERATING ENGINEERS, LOCAL  
400, and N. CHEYENNE COAL MINERS ASS'N,

Respondents.

MONTANA ENVIRONMENTAL INFORMATION  
CTR. and SIERRA CLUB,

Plaintiffs/Appellees,

v.

MONTANA DEP'T OF ENVIRONMENTAL QUALITY,  
MONTANA BD. OF ENVIRONMENTAL REVIEW,

Respondents,

and

WESTMORELAND ROSEBUD MINING, LLC, f/k/a  
WESTERN ENERGY CO., NAT. RES. PARTNERS L.P.,  
INT'L UNION OF OPERATING ENGINEERS, LOCAL  
400, and N. CHEYENNE COAL MINERS ASS'N,

Respondent-Intervenors/Appellants.

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Appellant Montana Department of Environmental Quality (DEQ) has petitioned for rehearing in the above-titled matter limited to our holding on attorney fees. Appellee Conservation Groups responded in opposition to DEQ's petition.

Under M. R. App. P. 20, this Court seldom grants petitions for rehearing and only entertains such petitions on very limited grounds. This Court will consider a petition for rehearing only if the opinion "overlooked some fact material to the decision," if the opinion missed a question provided by a party or counsel that would have decided the case, or if our decision "conflicts with a statute or controlling decision not addressed" by the Court. M. R. App. P. 20.

DEQ argues that our initial decision overlooked a question presented that would have decided part of the case. Our initial holding remanded this issue to the District Court to "exclude[e] 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'tl. Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, 2023 MT 224, ¶ 103, 414 Mont. 80, \_\_\_ P.3d \_\_\_. DEQ alleges that we failed to address if Conservation Groups could recover attorney fees

from DEQ where Conservation Groups were responding to Westmoreland's filings and argument in general. DEQ asserts that our resolution of this issue did not fully address the issue DEQ presented and thus warrants reconsideration because we "overlooked some question presented by counsel that would have proven decisive to the case." M. R. App. P. 20(1)(a)(ii).

Conservation Groups respond that this Court did not overlook any question presented by DEQ as DEQ did not make this argument in its Opening Brief. Conservation Groups note that while DEQ argued that the District Court abused its discretion in awarding attorney fees, it did not clearly articulate which specific charges it disagreed with beyond complaining that the court had allowed Conservation Groups "to recover costs for hours spent by its attorneys responding to motions that Westmoreland had filed. . . which DEQ [also] opposed." Conservation Groups argue that DEQ had an obligation to specify as to which charges it objected.

DEQ maintains, however, that hours billed for work Conservation Groups' attorneys performed on those issues in which Conservation Groups and DEQ were *aligned* was merely an example of the types of charges for which it believes the District Court incorrectly allowed recovery of attorney fees against it and that this example represents only a "subset" of the time entries it challenges. It argues that we should expand the scope of our attorney fee decision and clarify that Conservation Groups may not recover fees from DEQ for time Conservation Groups' attorneys spent responding to Westmoreland's filings.

DEQ's Opening Brief argues this issue in generalities, the full import of which escaped this Court. However, in its Reply Brief, DEQ more fully articulated its position that it should not be liable for these hours. As we noted in our Opinion, DEQ asserted in its Reply Brief that the District Court gave it leave to point out "parts [of Conservation Groups' billing] that you think are inflation of time" in its posthearing proposed order, and DEQ enumerated specific billing entries that it alleged Conservation Groups incurred against Westmoreland. *Mont. Envtl. Info. Ctr.*, ¶ 101. In the Opinion, we disagreed with Conservation Groups' position that DEQ failed to preserve this issue on appeal because

DEQ had set forth specific objections in its posthearing proposed order that it filed in the District Court with that court's leave to raise objections as to specific hours billed by Conservation Groups. *Mont. Envtl. Info. Ctr.*, ¶ 103.

In the posthearing filing, DEQ argued the District Court should exclude hours related to a petition for writ of supervisory control that Westmoreland filed in this Court, and upon which DEQ took no position, and hours in Conservation Groups' attorneys' time logs that are explicitly directed toward responding to Westmoreland's filings. DEQ argued to the District Court that it should not be made to pay for the time Conservation Groups' attorneys spent when the billed hours were "obviously attributable" to Westmoreland.

While we agree with Conservation Groups that DEQ's presentation of its attorney fees arguments was imperfect, we also agree with DEQ that we failed to fully appreciate the argument, misunderstanding DEQ's "example" of one category of billing to which it took exception to encompass the entirety of kinds of billing it wished to dispute. As such, we overlooked the full scope of its question. Had we understood the broadness of its question, we would have ruled in its favor and thus we do so now upon reconsideration.

Finally, DEQ also argues that rehearing is warranted under M. R. App. P. 20(1)(a)(iii) because our initial decision conflicts with a controlling decision not addressed by the Court—*Animal Found. of Great Falls v. Mont. Eighth Judicial Dist. Court*, 2011 MT 289, 362 Mont. 485, 265 P.3d 659. However, *Animal Foundation* does not control. *Animal Foundation* reviewed attorney fees awarded as a contempt sanction against multiple parties, jointly and severally. *Animal Found.*, ¶ 15. As relevant to DEQ's argument, we held that it was improper to award lump sum attorney fees against multiple parties jointly and severally for multiple contemptuous events of which only some parties participated in. *Animal Found.*, ¶¶ 26–27. Rather, the district court should have awarded attorney fees based on each contemptuous event against only the parties that were in contempt. *Animal Found.*, ¶¶ 26–27. *Animal Foundation* is distinguishable from this case, which awarded attorney fees under the authority of Montana Strip and Underground Mine Reclamation Act (MSUMRA) to award attorney fees under § 82-4-251(7), MCA. In our Opinion, we based our decision on federal precedent because § 82-4-251(7), MCA, was




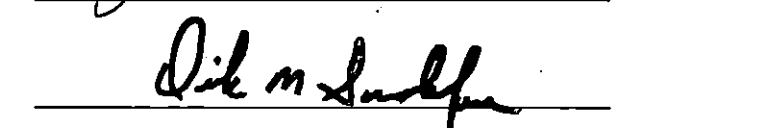
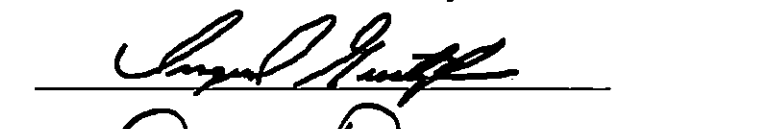

adopted to bring MSUMRA into compliance with the federal Surface Mine Control Reclamation Act (SMCRA) and because it is substantially the same as its federal counterpart, 30 U.S.C. § 1275(e). Thus, *Animal Foundation* was not on point, controlling, or necessary for our holding, and therefore does not provide a basis for rehearing.

IT IS THEREFORE ORDERED that the petition for rehearing is GRANTED. On remand, the District Court shall recalculate attorney fees to exclude from the attorney fee award any hours billed for work Conservation Groups' attorneys performed responding to Westmoreland's filings.

The Clerk is directed to provide a copy of this Order to all counsel of record.

DATED this 30<sup>th</sup> day of January, 2024.

  
Chief Justice

  
  
  
  
  
  
Justices