SENATE BILL NO. 271

INTRODUCED BY S. FITZPATRICK

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE DETERMINATION OF COURT COSTS RELATED TO NATURAL RESOURCE AND ENVIRONMENTAL DECISIONS; PROHIBITING COURTS AND ADMINISTRATIVE AGENCIES FROM CONSIDERING THE IDENTITY OF PARTIES; PLACING BURDEN OF PROOF ON THE PARTY REQUESTING COURT COSTS; SUPERSEDING RULINGS PURSUANT TO THE PRIVATE ATTORNEY GENERAL DOCTRINE; AMENDING SECTIONS 75-2-104, 75-10-728, 75-10-729, 75-10-743, 75-10-745, 75-11-307, 75-11-602, 77-1-111, 77-1-128, 77-2-107, 77-3-314, 77-3-322, 77-3-438, 77-6-306, 82-1-202, 82-4-251, 82-4-350, AND 85-2-125, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Equal application of court costs.** (1) Unless the context requires otherwise, a court or administrative agency that issues a final order in an action pursuant to this title may award the prevailing party reasonable costs of litigation, including filing fees, attorney fees, and witness costs.

(2) In awarding costs pursuant to this section, the court or administrative agency may not consider the identity of any party, including but not limited to a permittee, permit applicant, agency, public interest litigant, or other party to an action. The party requesting costs bears the burden of proof and persuasion.

(3) This section supersedes prior rulings pursuant to the private attorney general doctrine.

(4) The provisions of this section apply equally to all parties in an action pursuant to this title.

Section 2. Section 75-2-104, MCA, is amended to read:

"**75-2-104. Limitations -- personal cause of action unabridged -- venue.** (1) This chapter may not be construed to:

(a) grant to the board any jurisdiction or authority with respect to air contamination existing solely within commercial and industrial plants, works, or shops;

(b) affect the relations between employers and employees with respect to or arising out of any condition of air contamination or air pollution;

(c) supersede or limit the applicability of any law or ordinance relating to sanitation, industrial health, or safety; or

(d) abridge, limit, impair, create, enlarge, or otherwise affect substantively or procedurally the right of a person to damages or other relief on account of injury to persons or property and to maintain an action or other appropriate proceeding.

(2) A judicial challenge to a permit issued pursuant to this chapter by a party other than the permit applicant or permitholder must include the party to whom the permit was issued unless otherwise agreed to by the permit applicant or permitholder. All judicial challenges of permits for projects with a project cost, as determined by the court, of more than $1 million must have precedence over any civil cause of a different nature pending in that court. If the court determines that the challenge was without merit or was for an improper purpose, such as to harass, to cause unnecessary delay, or to impose needless or increased cost in litigation, the court may award attorney fees and costs ~~incurred in defending the action~~ pursuant to [section 1].

(3) An action to challenge a permit decision pursuant to this chapter must be brought in the county in which the permitted activity will occur. If an activity will occur in more than one county, the action may be brought in any of the counties in which the activity will occur.

(4) A judicial action or proceeding pursuant to this chapter for an equine slaughter or processing facility must comply with 81-9-240 and 81-9-241."

Section 3. Section 75-10-728, MCA, is amended to read:

"**75-10-728. Remedial action costs.** (1) If a potentially liable person or assignee recovers remedial action costs at a particular site from a financially responsible party, reimbursement from the orphan share is proportionally reduced by the amount of remedial action costs recovered, less any litigation expenses, including attorney fees and costs determined pursuant to [section 1].

(2) The department may, in defending the orphan share, initiate a court action against a potentially liable party, an affiliate, or another financially responsible party to recover the orphan's share."

Section 4. Section 75-10-729, MCA, is amended to read:

"**75-10-729. Restoration damages.** (1) Except as provided in subsections (2) and (3), this section applies to civil claims brought in judicial proceedings on behalf of individuals and entities for the recovery of restoration damages to address impacts to real property caused by releases of hazardous or deleterious substances.

(2) Restoration damages may be awarded only for a claim alleging contamination of special use property and may be obtained only in accordance with the definitions and other requirements set forth in this section. The plaintiff bears the burden of proof to show that the property meets the definition of special use property.

(3) Restoration damages may not be awarded or used to alter an interim or final remedial action that has been or will be undertaken on, or will benefit, a special use property pursuant to any of the following authorities:

(a) a federal administrative order issued pursuant to 42 U.S.C. 9601, et seq., as of March 27, 2021;

(b) a state administrative order issued pursuant to this part;

(c) a judicially approved consent decree; or

(d) any other interim or final remedial action plan approved by the department pursuant to state statutory or administrative law.

(4) (a) Restoration damages awarded pursuant to subsection (2), exclusive of awards of attorney fees and costs <u>determined pursuant to [section 1]</u>, may be used only to conduct remedial and corrective action necessary to restore the special use property for which the damages were awarded. Restoration must commence within 3 years from the date the judgment is paid or settlement proceeds are received.

(b) If any awarded restoration damages remain after completion of the restoration work, the surplus must be refunded to the defendant. If the defendant is no longer viable or cannot be found, the funds must be remitted to the department.

(5) Any party may request that a court awarding restoration damages also order that those damages be deposited in a segregated trust or escrow account at a commercial bank or trust company to ensure compliance with subsection (4)(a). The plaintiff may create a trust or escrow account to be overseen by

a qualified professional to restore the special use property.

(6) Nothing in this section precludes the award of other damages allowed under common law and statute.

(7) As used in this section, the following definitions apply:

(a) "Qualified professional" means a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to design and oversee implementation of a restoration plan.

(b) "Restoration damages" means the amount of compensation determined reasonably necessary by a trier of fact to restore a contaminated special use property to its function, use, or condition prior to the contamination on which a civil claim is based, unless contamination was present at the time the plaintiff acquired the special use property, in which case the term means the amount of compensation determined necessary by a trier of fact to restore a contaminated special use property to the function, use, or condition that existed at the time the plaintiff acquired the special use property.

(c) "Special use property" means real property contaminated by a release of a hazardous or deleterious substance that is found by a trier of fact to have objectively reasonable personal value to the plaintiff not reflected in the market value of the property or to have unique public, historic, cultural, or religious value not reflected in the market value of the property."

Section 5. Section 75-10-743, MCA, is amended to read:

"**75-10-743. Orphan share state special revenue account -- reimbursement of claims -- payment of department costs.** (1) There is an orphan share account in the state special revenue fund established in 17-2-102 that is to be administered by the department. Money in the account is available to the department by appropriation and, except as provided in subsections (9), (10), and (11), must be used to reimburse remedial action costs claimed pursuant to 75-10-742 through 75-10-751, to provide funding for the department of justice for investigations pursuant to its natural resource damage program, to pay costs incurred by the department in defending the orphan share, and to pay remedial action costs incurred by the department pursuant to subsection (12). Any amounts provided for investigations must be returned to the account, with interest, from the settlement proceeds of a claim made under the natural resource damage program within 30 days of

receiving settlement proceeds.

(2) There must be deposited in the orphan share account:

(a) all penalties assessed pursuant to 75-10-750(12);

(b) funds received from the distribution of oil and natural gas production taxes pursuant to 15-36-331;

(c) unencumbered funds remaining in the abandoned mines state special revenue account;

(d) interest income on the account;

(e) funds received from settlements pursuant to 75-10-719(7); and

(f) funds received from reimbursement of the department's orphan share defense costs pursuant to subsection (6).

(3) If the orphan share account contains sufficient money, valid claims must be reimbursed subsequently in the order in which they were received by the department. If the orphan share account does not contain sufficient money to reimburse claims for completed remedial actions, a reimbursement may not be made and the orphan share account, the department, and the state are not liable for making any reimbursement for the costs. The department and the state are not liable for any penalties if the orphan share account does not contain sufficient money to reimburse claims, and interest may not accrue on outstanding claims.

(4) Except as provided in subsections (6) and (7), claims may not be submitted and remedial action costs may not be reimbursed from the orphan share account until all remedial actions, except for operation and maintenance, are completed at a facility.

(5) Except as provided in subsection (6), reimbursement from the orphan share account must be limited to actual documented remedial action costs incurred after the date of a petition provided for in 75-10-745. ~~Reimbursement~~ Except as provided in [section 1], reimbursement may not be made for attorney fees~~,~~ and legal costs determined pursuant to [section1], or operation and maintenance costs.

(6) (a) The department's costs incurred in defending the orphan share must be paid by the persons participating in the allocation under 75-10-742 through 75-10-751 in proportion to their allocated shares. The orphan share account is responsible for a portion of the department's costs incurred in defending the orphan share in proportion to the orphan share's allocated share, as follows:

(i) If sufficient funds are available in the orphan share account, the department's costs incurred in defending the orphan share must be paid from the orphan share account in proportion to the share of liability allocated to the orphan share.

(ii) If sufficient funds are not available in the orphan share account, persons participating in the allocation under 75-10-742 through 75-10-751 shall pay all the orphan share's allocated share of the department's costs incurred in defending the orphan share in proportion to each person's allocated share of liability.

(b) A person who pays the orphan share's proportional share of costs has a claim against the orphan share account and must be reimbursed as provided in subsection (3).

(c) A state agency that is liable for remedial action costs incurred has a claim against the orphan share account and must be reimbursed as provided in subsection (3). The agency may submit a claim before or after remedial action is complete. ~~Reimbursement~~ Except as provided in [section 1], reimbursement may not be made for attorney fees~~,~~ and legal costs determined pursuant to [section 1], or operation and maintenance costs. The agency may be reimbursed only after:

(i) its liability has been determined pursuant to 75-10-742 through 75-10-751 or by a court of competent jurisdiction;

(ii) it has received a notice letter pursuant to 75-10-711; and

(iii) the department has approved the costs.

(7) (a) If the lead liable person under 75-10-746 presents evidence to the department that the person cannot complete the remedial actions without partial reimbursement and that a delay in reimbursement will cause undue financial hardship on the person, the department may allow the submission of claims and may reimburse the claims prior to the completion of all remedial actions. A person is not eligible for early reimbursement unless the person is in substantial compliance with all department-approved remedial action plans.

(b) The department may reimburse claims from a lead liable person upon completion and department approval of a report evaluating the nature and extent of contamination and a report formulating and evaluating final remediation alternatives. This early reimbursement is limited to those eligible costs incurred by the lead liable person for the preparation of the reports.

(8) A person participating in the allocation process who received funds under the mixed funding pilot program provided for in sections 14 through 20, Chapter 584, Laws of 1995, may not claim or receive reimbursement from the orphan share account for the amount of funds received under the mixed funding pilot program that are later attributed to the orphan share under the allocation process.

(9) (a) For the biennium beginning July 1, 2005, up to $1.25 million may be used by the department to pay the costs incurred by the department in contracting for evaluating the extent of contamination and formulating final remediation alternatives for releases at the Kalispell pole and timber, reliance refinery company, and Yale oil corporation facility complex. If the department spends less than $1.25 million for those purposes, the remaining funds must be spent for remediation of the facility complex. The department may not seek recovery of the $1.25 million from potentially liable persons.

(b) The money spent pursuant to subsection (9)(a) must be credited against the amount owed by the state agency in a judgment or settlement agreement for payment of the remedial action costs at the facility for which the money was spent.

(10) (a) The department shall transfer from the orphan share account to the long-term or perpetual water treatment permanent trust fund provided for in 82-4-367 $1.2 million in each fiscal year until the board of investments makes the certification pursuant to subsection (10)(b) of this section.

(b) (i) The board of investments shall monitor the long-term or perpetual water treatment permanent trust fund provided for in 82-4-367 to determine when the amount of money in the long-term or perpetual water treatment permanent trust fund will be sufficient, with future earnings, to provide a fund balance of $19.3 million on January 1, 2018.

(ii) When the board of investments makes the determination pursuant to subsection (10)(b)(i), the board of investments shall notify the department and certify to the department the amount of money, if any, that must be transferred during the fiscal year in which the board of investments makes its determination pursuant to subsection (10)(b)(i) in order to provide a fund balance of $19.3 million on January 1, 2018.

(iii) In the fiscal year that the board of investments makes its determination and notifies the department, the department shall transfer only the amount certified by the board of investments, if any, and may not make additional transfers during subsequent fiscal years.

(c) After July 1, 2018, the department shall transfer $1.2 million in each fiscal year from the orphan

share state special revenue account to the environmental quality protection fund provided in 75-10-704.

(11) The orphan share account is subject to legislative fund transfers.

(12) Except as provided in subsection (13), the department may use the orphan share account to:

(a) take remedial action at a facility where there has been a release or there is a substantial threat of a release into the environment that may present an imminent and substantial endangerment to the public health, safety, or welfare or to the environment and there is no readily apparent person who is financially viable and potentially liable under 75-10-715 to conduct the remedial action; or

(b) fund the administration of data collection, the monitoring of the performance of remedial action, and the initial assessment of a facility to determine whether that facility may be closed or delisted.

(13) The department may not use for data collection, initial assessments, or monitoring pursuant to subsection (12)(b) more than 20% of the funds appropriated from the orphan share account for the bienniums beginning July 1, 2015, and ending June 30, 2025. For the bienniums beginning July 1, 2025, no more than 15% of the funds appropriated from the orphan share account may be used for data collection, initial assessments, or monitoring pursuant to subsection (12)(b).

(14) The department shall report annually to the environmental quality council in accordance with 5-11-210 the amount of funds from the orphan share account used pursuant to subsection (12), the type of expenditures made, and the identity and location of facilities addressed. (Subsection (10)(c) terminates June 30, 2027--sec. 5, Ch. 387, L. 2015.)"

Section 6. Section 75-10-745, MCA, is amended to read:

"**75-10-745. Allocation of liability -- process initiation.** (1) For a facility at which the department has initiated a remedial action under 75-10-711 through the issuance of a notice letter prior to July 1, 1997, any person determined to be potentially liable under 75-10-715 may petition the department in writing to initiate the allocation process. The right to participate in the allocation process is waived if the written petition is not provided to the department prior to the completion of remedial actions, except for operation and maintenance, at the facility.

(2) For a facility at which the department has not initiated a remedial action through the issuance of a notice letter under 75-10-711, any person potentially liable under 75-10-715 who has received approval of

a voluntary cleanup plan under 75-10-730 through 75-10-738 may petition the department in writing to initiate the allocation process. The right to participate in the allocation process is waived if the written petition is not provided to the department prior to the completion of remedial actions, except for operation and maintenance, at the facility.

(3) For a facility at which the department initiates a remedial action through the issuance of a notice letter under 75-10-711 after July 1, 1997, any person potentially liable under 75-10-715 may petition the department in writing within 60 days of the date of the notice letter to initiate the allocation process. Any potentially liable person under 75-10-715 who does not provide a written petition to the department within this timeframe waives the right to participate in the allocation process and remains liable as provided in 75-10-715. The notice letter sent by the department must advise that a failure to petition the department for allocation as provided in this subsection will result in a waiver of the right to participate in the allocation process.

(4) The allocation process may be initiated and may proceed upon written petition of one or more potentially liable persons.

(5) Prior to the initiation of discovery as provided in 75-10-747, all persons who participate in the allocation process shall agree in writing that the allocator's decision is binding, subject only to the provisions of 75-10-750(9) and the appeal provisions of 75-10-751.

(6) All liable or potentially liable persons under 75-10-715 who do not participate in the allocation process under 75-10-742 through 75-10-751 remain liable as provided in 75-10-715.

(7) Upon receipt of a written petition under subsection (1) or (2) or when initiating actions at a facility without a prior notice letter under subsection (3), the department shall:

(a) make a diligent good faith effort to determine the identity of the person or persons liable for the release or threatened release; and

(b) issue notice letters to one or more of the persons it identifies as potentially liable under 75-10-715. If a person petitions the department to initiate the allocation process as provided for in subsection (8), the department shall issue notice letters or nomination letters pursuant to subsection (9) to the persons it identified as potentially liable under 75-10-715 who were not previously given notice.

(8) A person who receives a notice letter may, within 60 days from the date of the notice letter, petition the department in writing to participate in an allocation process and provide the department with the

identity of other potentially liable persons under 75-10-715 who were not given notice by the department. When identifying additional potentially liable persons, the person given notice shall provide to the department a statement and credible evidence showing that there is a basis in law and fact to determine that the identified person is potentially liable under 75-10-715.

(9) Within 30 days of receipt of the information provided for in subsection (8), the department may issue a notice letter to an identified person whom the department determines is a potentially liable person under 75-10-715 or to a person whom the department identified in subsection (7) and who was not previously given notice. If the department does not issue a notice letter to an identified person, the department shall issue the person a nomination letter indicating that the person has been identified as potentially liable under 75-10-715. The nomination letter must state that the person has the right to participate in the allocation process and that if the person does not participate and is found liable, the person remains subject to liability as provided in 75-10-715. If the newly noticed or nominated person chooses to participate in the allocation process, the person shall provide a written petition of the person's intent to participate in the allocation process to the department within 30 days of the date of the notice or nomination letter. A failure to petition the department for allocation as provided in this subsection results in a waiver of the right to participate in the allocation process.

(10) If a person nominated under subsection (9) cannot be readily located, the department shall, within 30 days of receipt of the information provided for in subsection (8), publish one notice of the person's nomination, along with the information contained in a nomination letter under subsection (9), in a newspaper of general circulation in the county where all or a portion of the facility is located. The notice must state that the person has 30 days from the date of the notice to petition the department, in writing, to participate in the allocation process. A failure to petition the department for allocation as provided in this subsection results in a waiver of the right to participate in the allocation process.

(11) If one or more potentially liable persons petition in writing for an allocation process under subsection (1), (2), or (3) and the department determines that the facility has a potential orphan share, the department shall:

(a) publish a notice and brief description of the facility in a newspaper of general circulation in the area affected and provide at least 30 days for submission of public comment on the identification of potentially liable persons under 75-10-715; and

(b) notify interested persons and the county commissioners of each county in which all or a portion of the facility is located and provide at least 30 days for submission of comments on the identification of potentially liable persons under 75-10-715.

(12) ~~If~~ Except as provided in [section 1], if a nominated person participates in the allocation and the person is assigned a zero share of liability by the allocator, that person's reasonable costs of participating in the allocation, including ~~attorney fees,~~ costs determined pursuant to [section 1], must be borne by the person who proposed the addition of the nominated person to the allocation.

(13) If the department anticipates that a facility may have an orphan share, the department shall represent the orphan share in the allocation process. If the state is a potentially liable person under 75-10-715, an agency or entity other than the department shall represent the state in the allocation process.

(14) Except as provided in subsection (15), whenever the department is involved in allocation processes on five facilities, other allocation processes may be stayed before the discovery stage provided in 75-10-747. Upon completion of an allocation provided in 75-10-750 or 75-10-751, execution of a stipulated agreement under 75-10-750, or a default to liability as provided in 75-10-715 for one of the five facilities, the department shall notify the potentially liable persons for the facility on the waiting list that has the earliest date of written petition. Discovery under 75-10-747 must begin within 10 days of department notification.

(15) A stay on the allocation process may not occur under subsection (14) if all persons participating in the allocation process agree in writing that there is no orphan share and that the state is not a potentially liable person under 75-10-715. The agreement is binding upon all noticed or nominated persons.

(16) If, after initiating the process, a potentially liable person elects to discontinue participation in the process, the person remains subject to liability as provided in 75-10-715."

Section 7. Section 75-11-307, MCA, is amended to read:

"**75-11-307. Reimbursement for expenses caused by release.** (1) Subject to the availability of money from the fund under subsection (6), an owner or operator who is eligible under 75-11-308 and who complies with 75-11-309 and any rules adopted to implement those sections must be reimbursed by the board from the fund for the following eligible costs caused by a release from a petroleum storage tank:

(a) corrective action costs as required by a department-approved corrective action plan, except

that if the corrective action plan:

(i) addresses releases of substances other than petroleum products from an eligible petroleum storage tank, the board may reimburse only the costs that would have reasonably been incurred if the only release at the site was the release of the petroleum or petroleum products from the eligible petroleum storage tank; or

(ii) includes the establishment of a petroleum mixing zone, as defined in 75-11-503, the board may reimburse the cost of an easement established pursuant to 75-11-508; and

(b) compensation paid to third parties for bodily injury or property damage. The board may not reimburse for property damage until the corrective action is completed.

(2) An owner or operator may not be reimbursed from the fund for the following expenses:

(a) corrective action costs or the costs of bodily injury or property damage paid to third parties that are determined by the board to be ineligible for reimbursement;

(b) costs for bodily injury and property damage, other than corrective action costs, incurred by the owner or operator;

(c) penalties or payments for damages incurred under actions by the department, board, or federal, state, local, or tribal agencies or other government entities involving judicial or administrative enforcement activities and related negotiations;

(d) attorney fees and legal costs of the owner, the operator, or a third party <u>determined pursuant to [section 1]</u>;

(e) costs for the repair or replacement of a tank or piping or costs of other materials, equipment, or labor related to the operation, repair, or replacement of a tank or piping;

(f) expenses incurred before April 13, 1989, for owners or operators seeking reimbursement from the petroleum tank release cleanup fund and expenses incurred before May 15, 1991, for owners or operators seeking reimbursement from the petroleum tank release cleanup fund for a tank storing heating oil for consumptive use on the premises where it is stored or for a farm or residential tank with a capacity of 1,100 gallons or less that is used for storing motor fuel for noncommercial purposes;

(g) expenses exceeding the maximum reimbursements provided for in subsection (4);

(h) costs for which an owner or operator has received reimbursement or payment from an insurer

or other third party, including a grantor;

(i) expenses for work completed by or on behalf of the owner or operator more than 5 years prior to the owner's or operator's request for reimbursement. This limitation does not apply to claims for compensation paid to third parties for bodily injury or property damage. The running of the 5-year limitation period is suspended by an appeal of the board's denial of eligibility for reimbursement. If a written request for hearing is filed under 75-11-309, the suspension of the 5-year limitation period is effective from the date of the board's initial eligibility denial to the date on which the initial eligibility denial is overturned or reversed by the board, a district court, or the state supreme court, whichever occurs latest. The board may grant reasonable extensions of this limitation period if it is shown that the need for the extension is not due to the negligence of the owner or operator or agent of the owner or operator.

(j) costs that the board has determined are not actual, reasonable, and necessary costs of responding to the release and implementing the corrective action plan, as provided for in 75-11-309, including costs included in a department-approved corrective action plan for the purpose of remediating the release in excess of department standards.

(3) An owner or operator may designate a person, including a grantor, as an agent to receive the reimbursement for eligible costs incurred by the person if the owner or operator remains legally responsible for all costs and liabilities incurred as a result of the release.

(4) Subject to the availability of funds under subsection (6):

(a) for releases eligible for reimbursement from the fund that are discovered and reported on or after April 13, 1989, from a tank storing heating oil for consumptive use on the premises where it is stored or from a farm or residential tank with a capacity of 1,100 gallons or less that is used for storing motor fuel for noncommercial purposes, the board shall reimburse an owner or operator for:

(i) 100% of the eligible costs, up to a maximum total reimbursement of $500,000, for properly designed and installed double-walled tank system releases that were discovered and reported on or after October 1, 1993, and before October 1, 2009; or

(ii) 50% of the first $10,000 of eligible costs and 100% of subsequent eligible costs, up to a maximum total reimbursement of $495,000 for all other releases; and

(b) for all other releases eligible for reimbursement from the fund that are discovered and reported

on or after April 13, 1989, the board shall reimburse an owner or operator for:

(i) 100% of the eligible costs, up to a maximum total reimbursement of $1 million, for properly designed and installed double-walled tank system releases that were discovered and reported on or after October 1, 1993, and before October 1, 2009; or

(ii) 50% of the first $35,000 of eligible costs and 100% of subsequent eligible costs, up to a maximum total reimbursement of $982,500 for all other releases.

(5) If an insurer or grantor pays or reimburses an owner or operator for costs that qualify as eligible costs under subsection (1), the costs paid or reimbursed by the insurer or grantor:

(a) are considered to have been paid by the owner or operator toward satisfaction of the 50% share requirements of subsection (4)(a)(ii) or (4)(b)(ii) if the owner or operator receives the payment or reimbursement before applying for reimbursement from the board;

(b) are not reimbursable from the fund unless the grantor is designated by the owner or operator as an agent to receive the reimbursement for eligible costs incurred by the grantor; and

(c) except for the amount considered to have been paid by the owner or operator pursuant to subsection (5)(a), are considered to have been reimbursed from the fund for purposes of determining when the board has paid the maximum amount payable from the fund under subsection (4)(a)(ii) or (4)(b)(ii).

(6) If the fund does not contain sufficient money to pay approved claims for eligible costs, a reimbursement may not be made and the fund and the board are not liable for making any reimbursement for the costs at that time. When the fund contains sufficient money, eligible costs must be reimbursed subsequently in the order in which they were approved by the board."

Section 8. Section 75-11-602, MCA, is amended to read:

"**75-11-602. Definitions.** For purposes of this part, the following definitions apply:

(1) "Department" means the department of environmental quality provided for in 2-15-3501.

(2) (a) "Release" means any spilling, leaking, emitting, discharging, escaping, leaching, or disposing of petroleum or petroleum products from a petroleum storage tank into ground water, surface water, surface soils, or subsurface soils that occurred from a petroleum storage tank, as defined in 75-11-302.

(b) The term does not include a release from the following petroleum storage tanks:

(i) a tank located at a refinery or a terminal of a refiner;

(ii) a tank located at an oil and gas production facility; or

(iii) a tank that is or was previously under the ownership or control of a railroad, except for a tank that was operated by a lessee of a railroad in the course of nonrailroad operations.

(3) "Restoration damages" means the amount of compensation determined necessary by a trier of fact to restore a contaminated special use property to its function and use prior to the contamination upon which a common law claim is based. The term includes reasonable attorney fees and costs incurred by the plaintiff and determined pursuant to [section 1].

(4) "Special use property" means real property contaminated by a release from a petroleum storage tank, as defined in 75-11-302, that is found by a trier of fact to have personal value to the plaintiff not reflected in the market value of the property or to have unique public, historic, cultural, or religious value not reflected in the market value of the property."

Section 9. Section 77-1-111, MCA, is amended to read:

"**77-1-111. Court actions.** (1) All actions for the recovery of money due under this title or for the cancellation of leases or for the cancellation of certificates of purchase or patents or for the recovery of state lands, actions of forcible entry and detainer, actions for ejectment, and all other actions affecting any state lands are controlled, as to venue, by the provisions of the rules of civil procedure relating to the place of trial of civil actions and must be conducted by the attorney general.

(2) When requested by the attorney general, the county attorney of each county in the state shall represent the state in all foreclosure proceedings, collections of delinquent rentals, actions for trespass on state lands, and in all other state land matters that may arise in the county attorney's county. The county attorney is not entitled to charge the state any compensation for services beyond the county attorney's regular salary.

(3) The use of a ford or crossing on a navigable river or stream may not be considered a trespass.

(4) (a) Unless the context requires otherwise, a court or administrative agency that issues a final order in an action pursuant to this title may award the prevailing party reasonable costs of litigation, including filing fees, attorney fees, and witness costs.

(b) In awarding costs pursuant to subsection (1), the court or administrative agency may not

consider the identity of any party, including but not limited to a permittee, permit applicant, agency, public interest litigant, or other party to an action. The party requesting costs bears the burden of proof and persuasion.

(c) Subsection (1) supersedes prior rulings pursuant to the private attorney general doctrine.

(d) The provisions of subsection (1) apply equally to all parties in an action pursuant to this title."

Section 10. Section 77-1-128, MCA, is amended to read:

"**77-1-128. Administrative hearings.** (1) A person adversely affected by any notice, action, or order of the department may, within the timeframe stated in the notice of noncompliance provided for in 77-1-126, request an administrative hearing before the director or the director's designee. The director or the director's designee shall hold a hearing within 30 days of the request. Participants may be represented by legal counsel. The director or the director's designee shall make a record of the proceeding and enter an order and findings within 30 days after the hearing.

(2) Within 30 days after the director or the director's designee renders an order and findings, the person adversely affected may file a petition in district court requesting that the order and findings be set aside or modified. The court may affirm, modify, or set aside the order complained of, in whole or in part.

(3) A court may award costs under this section pursuant to the provisions of 77-1-111."

Section 11. Section 77-2-107, MCA, is amended to read:

"**77-2-107. Involvement of lessee when land subject to prior lease.** (1) Whenever any kind of right-of-way easement has been granted under this part and the state land in which it is granted is under lease, the party receiving the grant shall give timely notice to the lessee and shall make just settlement with the lessee for any damages resulting to the lessee's improvements, crops, or leasehold interests.

(2) After the settlement is made, the lessee shall open or move any fences that may obstruct the right-of-way over the lands under lease and otherwise cooperate in the opening of the right-of-way. Proof must be filed with the board that the settlement has been made before the deed to the easement is issued.

(3) (a) If the lessee and the party receiving the right-of-way easement are unable to agree on the value of the damages resulting from the easement, the value of the damages must be ascertained and fixed by

three arbitrators, one of whom must be appointed by the lessee, one by the party receiving the easement, and the third by the two appointed arbitrators.

(b) If a party refuses to appoint an arbitrator within 15 days of being requested to do so by the director of the department, the director may appoint an arbitrator for that party. An arbitrator appointed by the director has the same duties and powers as if appointed by one of the parties.

(c) The arbitrators may fix reasonable compensation for their services. The compensation must be paid in equal shares by the owner of the easement and the lessee.

(d) The value of the damages as ascertained and fixed by the arbitrators is binding on both parties; however, if either party is dissatisfied with the valuation, the party may, within 10 days, appeal from their decision to the department. The department shall examine the easements, and, except as provided in subsection (3)(e), its decision on the appeal is final. The department shall collect the actual cost of the reexamination from the owner of the easement and the lessee in the proportion that, in its judgment, justice may demand.

(e) If either party is dissatisfied with the valuation fixed by the department, the party may within 30 days after receipt of the department's decision petition the district court in the county in which the majority of the state land is located for judicial review of the decision. A court may award costs under this section pursuant to the provisions of 77-1-111."

Section 12. Section 77-3-314, MCA, is amended to read:

"**77-3-314. Duration of lease.** (1) (a) Except as provided in subsection (1)(b), coal mining leases must be issued for a primary term of 10 years and for as long thereafter as coal is produced from lands in commercial quantities.

(b) If a lease under this part or a corresponding permit issued pursuant to Title 82, chapter 4, parts 1 and 2, is challenged before an administrative agency or in court, the primary term of the lease must be extended for the period of time that the lease or permit was subject to challenge. A court may award costs under this section pursuant to the provisions of 77-1-111.

(2) A lease not producing coal in commercial quantities at the end of the primary term must be terminated, unless the leased lands are described in a strip mine permit issued under 82-4-221 or in a mine-site

location permit under 82-4-122 prior to the end of the primary term, and the lease may not be terminated so long as the lands are covered and described under valid permit.

(3) For the purpose of this part:

(a) "commercial quantities" means that quantity of coal that can be sold at profit in the commercial market;

(b) "covered and described" under a valid permit or "described" in a strip mine or mine-site location permit means that the leased lands or a portion of the leased lands within or outside of the boundaries of the permit area are expected to be affected or disturbed at some point during the life of the permittee's strip-mining or underground-mining operation and are identified in the permittee's permit application."

Section 13. Section 77-3-322, MCA, is amended to read:

"**77-3-322. Obligation to pay royalties under coal lease contract -- interest.** (1) The obligation arising under a coal lease to pay coal royalties to the department, to deliver coal to a purchaser to the credit of the department, or to pay a portion of the proceeds of the sale of the coal to the department is of the essence in the lease contract.

(2) If the operator under a coal lease fails to pay coal royalties to the department within 120 days after the initial coal produced under the lease is marketed and within 90 days for all coal produced and marketed thereafter, the unpaid royalties must bear interest at the legal rate of interest authorized under 31-1-106 from the date due until paid. The operator may remit semiannually to the department the aggregate of 6 months' royalties if the aggregate amount is less than $50 and annually if the aggregate amount is less than $10.

(3) An action for failure to make payments under the lease or seeking payments under this section must be filed in the district court for the county in which the coal mine is located, and that court has jurisdiction over any actions brought under this section. The prevailing party in a proceeding brought under this section is entitled to recover court costs and reasonable attorney fees pursuant to the provisions of 77-1-111.

(4) This section does not apply if the department has elected to take the owner's or assignee's proportionate share of production in kind or if there is a dispute as to the title to the minerals or entitlement to royalties, the outcome of which would affect distribution of royalty payments."

Section 14. Section 77-3-438, MCA, is amended to read:

"**77-3-438. Assignments of leases.** (1) The assignment of any oil and gas lease issued under this part, either in whole or as to subdivisions of land embracing not less than 40 acres covered thereby, made to an assignee qualified as provided herein is permitted. Such assignment is not, however, binding upon the state until filed with the department and accompanied by the required fees, together with such proof of qualifications required by the board, and approved by the board or its lawful representative. The approval of any assignment so filed and supported may not be withheld in any case where the rights or interest of the state in the property assigned will not in the judgment of the board be prejudiced thereby, and the decision of the board in all cases is subject to appeal upon proper court proceedings. A court may award costs under this section pursuant to the provisions of 77-1-111.

(2) All other assignments of oil and gas leases issued under this part or interests therein are subject to approval by the board and are binding upon the state in the discretion of the board."

Section 15. Section 77-6-306, MCA, is amended to read:

"**77-6-306. Arbitrators to fix value of improvements.** (1) If the owner of any improvements on state lands of the type authorized by law at the time they were placed on state lands desires to sell these improvements to the new lessee and they are unable to agree on the value of the improvements pursuant to 77-6-302, the value must be ascertained and fixed by three arbitrators, one of whom is appointed by the owner of the improvements, one by the new lessee, and the third by the two appointed arbitrators. If any party refuses to appoint an arbitrator within 15 days of being requested to do so by the director of the department, the director may appoint an arbitrator for that party. An arbitrator appointed by the director has the same duties and powers as if appointed by one of the parties. The value of the improvements must be ascertained and fixed pursuant to 77-6-302.

(2) The reasonable compensation that the arbitrators may fix for their services must be paid in equal shares by the owner of the improvements and the new lessee.

(3) The value of the improvements ascertained and fixed is binding on both parties. If either party is dissatisfied with the valuation, the party may within 10 days appeal from the decision to the department. The

department shall examine the records pertaining to the costs of the improvements, and except as provided in subsection (4), its decision is final. The department shall charge and collect the actual cost of the reexamination to the owner and the new lessee in the proportion as, in its judgment, justice may demand.

(4) If either party is dissatisfied with the valuation fixed by the department, the party may within 30 days after receipt of the department's decision petition the district court in the county in which the majority of the state land is located for judicial review of the decision. A court may award costs under this section pursuant to the provisions of 77-1-111."

NEW SECTION. **Section 16. Equal application of court costs.** (1) Unless the context requires otherwise, a court or administrative agency that issues a final order in an action pursuant to this title may award the prevailing party reasonable costs of litigation, including filing fees, attorney fees, and witness costs.

(2) In awarding costs pursuant to this section, the court or administrative agency may not consider the identity of any party, including but not limited to a permittee, permit applicant, agency, public interest litigant, or other party to an action. The party requesting costs bears the burden of proof and persuasion.

(3) This section supersedes prior rulings pursuant to the private attorney general doctrine.

(4) The provisions of this section apply equally to all parties in an action pursuant to this title.

Section 17. Section 82-1-202, MCA, is amended to read:

"**82-1-202. Action to compel release -- procedure without court action.** (1) ~~If~~ Subject to the provisions of [section 16], if the lessee or assignee of a lease neglects or refuses to execute a release as provided by this part, the owner of the leased premises may sue in any court of competent jurisdiction to obtain the release, and in that action the owner may also recover from the lessee or the lessee's successor or assigns the sum of $100 as damages, all costs, together with ~~reasonable attorney fees~~ costs determined pursuant to [section 16] for preparing and prosecuting the suit, and any additional damages that the evidence in the case warrants. Writs of attachment may issue as in other cases. If in the action the plaintiff fails to establish the forfeiture of the lease, attorney fees must be allowed to the lessee or assignee of the lease. ~~Issues in regard to~~ Subject to the provisions of [section 16], attorney fees must be determined in the same manner as other issues in those actions.

(2) When, by its terms, an oil or gas lease has expired and is subject to forfeiture for nonperformance and more than 3 years have elapsed since the expiration, the owner of the leased premises, in addition to all other remedies, may serve a written notice on the lessee or on the assignee of the lease, and the notice must state:

(a) the names of the lessor, lessee, and assignee of the lease if assigned;

(b) the date of the lease and the date of the expiration of the lease;

(c) the description of the lands leased;

(d) the place, book, and page where the lease is recorded; and

(e) that if the lessee or assignee fails to execute a release of record of the lease or abstract of the lease, the lease must be terminated and is of no effect and must cease to be a lien upon the lands described in the lease, unless the lessee or the assignee of the lease, within 60 days from the date of service of the notice, files, in the county clerk's office in the county where the lease or abstract of the lease is recorded, an affidavit stating that the lease is in effect and delivers a copy of the lease to the owner of the leased lands.

(3) If the lessee or the assignee of the lease resides in the county where the lease or abstract of the lease is recorded, the notice must be personally served on that person. If the lessee or the assignee of the lease does not reside in that county but the lessee's or assignee's address appears on the records in that county clerk's office or is otherwise known, the notice must be mailed by certified mail to that person at that address, and in addition the notice must be published once a week for 2 consecutive weeks in a newspaper of general circulation in the county in which the lands are situated. If the address of the lessee or assignee is unknown, the notice must be published in the manner provided in this subsection. The date of service of the notice, if served personally, the date of mailing, if served by mail, and the first date of publication of the notice, if published, must be at least 60 days before the date of termination referred to in the notice.

(4) Upon the expiration of the time mentioned in the notice, if the affidavit of the lessee or assignee has not been filed as provided in this section, the owner of the leased lands shall file an affidavit of service of the notice in the county clerk's office of the county in which the lands are located, and the affidavit must be kept as a permanent file in the clerk's office. This proof of notice when filed is prima facie evidence of the sufficiency of the notice, and from the filing of the notice the lease is terminated and the lands are released from the lien of the lease."

Section 18. Section 82-4-251, MCA, is amended to read:

"**82-4-251. Noncompliance -- suspension of permits.** (1) If it is determined on the basis of an inspection that the permittee is or that any condition or practice exists in violation of any requirement of this part or any permit condition required by this part that creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant and imminent environmental harm to land, air, or water resources, the director of the department or an authorized representative shall immediately order cessation of the operation or the portion of the operation relevant to the condition, practice, or violation. The cessation order remains in effect until the director or an authorized representative determines that the condition, practice, or violation has been abated or until modified, vacated, or terminated by the director or an authorized representative pursuant to subsection (5). If the director or an authorized representative finds that the ordered cessation of the operation or any portion of the operation will not completely abate the imminent danger to the health or safety of the public or the significant and imminent environmental harm to land, air, or water resources, the director or the authorized representative shall, in addition to the cessation order, impose affirmative obligations requiring any steps that the director or the authorized representative considers necessary to abate the imminent danger or the significant environmental harm.

(2) When, on the basis of an inspection, the department determines that any permittee is in violation of any requirement of this part or any permit condition required by this part that does not create an imminent danger to the health or safety of the public or cannot be reasonably expected to cause significant and imminent environmental harm to land, air, or water resources, the director or an authorized representative shall issue a notice to the permittee or the permittee's agent fixing a reasonable time, not exceeding 90 days, for the abatement of the violation and providing opportunity for public hearing. If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the director or an authorized representative, the director or an authorized representative finds that the violation has not been abated, the director or an authorized representative shall immediately order a cessation of the operation or the portion of the operation relevant to the violation. The cessation order remains in effect until the director or an authorized representative determines that the violation has been abated or until modified, vacated, or terminated by the director or an authorized representative pursuant to subsection (5). In the order of cessation

issued under this subsection, the director shall determine the steps necessary to abate the violation in the most expeditious manner possible and shall include the necessary measures in the order.

(3) When, on the basis of an inspection, the director or an authorized representative determines that a pattern of violations of any requirements of this part or any permit conditions required by this part exists or has existed and if the director or an authorized representative also finds that the violations are caused by the unwarranted failure of the permittee to comply with any requirements of this part or any permit conditions or that the violations are willfully caused by the permittee, the director or an authorized representative shall issue an order to the permittee to show cause as to why the permit should not be suspended or revoked and shall provide opportunity for a public hearing. If a hearing is requested, the director shall inform all interested parties of the time and place of the hearing. Upon the permittee's failure to show cause as to why the permit should not be suspended or revoked, the director or an authorized representative shall suspend or revoke the permit. A permittee may request a contested case hearing on a permit suspension or revocation by filing a request for hearing, specifying the grounds for the request, within 30 days of receipt of the order of suspension or revocation. The order is effective upon expiration of the period for requesting a hearing or, if a hearing is requested, upon issuance of a final order by the board. The hearing must be conducted in accordance with the requirements of Title 2, chapter 4, part 6. When a permit has been revoked, the department may order the performance bond forfeited.

(4) Any additional permits held by an operator whose mining permit has been revoked must be suspended, and the operator is not eligible to receive another permit or to have the suspended permits reinstated until the operator has complied with all the requirements of this part with respect to former permits issued to the operator. An operator who has forfeited a bond is not eligible to receive another permit unless the land for which the bond was forfeited has been reclaimed without cost to the state or the operator has paid into the reclamation account a sum together with the value of the bond the department finds adequate to reclaim the lands.

(5) Notices and orders issued pursuant to this section must set forth with reasonable specificity the nature of the violation and the remedial action required, the period of time established for abatement, and a reasonable description of the portion of the operation to which the notice or order applies. Each notice or order issued under this section must be given promptly to the permittee or the permittee's agent by the department,

by the director, or by the authorized representative who issued the notice or order. All notices and orders must be in writing and be signed by the authorized representatives. Any notice or order issued pursuant to this section may be modified, vacated, or terminated by the director or an authorized representative. However, any notice or order issued pursuant to this section that requires cessation of mining by the operator expires within 30 days of actual notice to the operator unless an informal public hearing, if requested by the person to whom the notice or order was issued, is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of the hearing. If the department receives a request for an informal public hearing 21 days after service of the notice or order, the period for holding the informal public hearing is extended by the number of days after the 21st day that the request was received.

(6) A person who has been issued a notice or an order of cessation pursuant to subsection (1) or (2) or a person who has an interest that is or may be adversely affected by an order issued pursuant to subsection (1) or (2) or by modification, vacation, or termination of that order may request a hearing before the board on that order within 30 days of its issuance or within 30 days of its modification, vacation, or termination. The filing of an application for review under this subsection may not operate as a stay of any order or notice. The board shall make findings of fact and issue a written decision incorporating an order vacating, affirming, modifying, or terminating the order.

(7) ~~Whenever~~ Subject to the provisions of [section 16], 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.

(8) In order to protect the stability of the land, the director or an authorized representative shall order cessation of underground coal mining under urbanized areas, cities, towns, and communities and adjacent to industrial or commercial buildings, major impoundments, or permanent streams if the director or the authorized agent finds imminent danger to inhabitants of the urbanized areas, cities, towns, and communities."

Section 19. Section 82-4-350, MCA, is amended to read:

"**82-4-350. Award of costs and attorney fees.** ~~When~~ Subject to the provisions of [section 16], when issuing a final order in an action challenging the grant or denial of an exploration license or operating permit issued under this part, the court may award costs of litigation, including reasonable attorney and expert witness fees, to a prevailing or substantially prevailing party whenever, in its discretion, the court determines an award is appropriate."

NEW SECTION. **Section 20. Equal application of court costs.** (1) Unless the context requires otherwise, a court or administrative agency that issues a final order in an action pursuant to this title may award the prevailing party reasonable costs of litigation, including filing fees, attorney fees, and witness costs.

(2) In awarding costs pursuant to this section, the court or administrative agency may not consider the identity of any party, including but not limited to a permittee, permit applicant, agency, public interest litigant, or other party to an action. The party requesting costs bears the burden of proof and persuasion.

(3) This section supersedes prior rulings pursuant to the private attorney general doctrine.

(4) The provisions of this section apply equally to all parties in an action pursuant to this title.

Section 21. Section 85-2-125, MCA, is amended to read:

"**85-2-125. Recovery of costs and attorney fees by prevailing party.** (1) If a final decision of the department on an application for a permit or a change in appropriation right is appealed to district court, the district court may award the prevailing party reasonable costs and attorney fees pursuant to the provisions of [section 20].

(2) The party obtaining injunctive relief in an action to enforce a water right must be awarded reasonable costs and attorney fees. For the purposes of this section, "enforce a water right" means an action by a party with a water right to enjoin the use of water by a person that does not have a water right."

NEW SECTION. **Section 22. Equal application of court costs.** (1) Unless the context requires otherwise, a court or administrative agency that issues a final order in an action pursuant to this title may award the prevailing party reasonable costs of litigation, including filing fees, attorney fees, and witness costs.

(2) In awarding costs pursuant to this section, the court or administrative agency may not consider

the identity of any party, including but not limited to a permittee, permit applicant, agency, public interest litigant, or other party to an action. The party requesting costs bears the burden of proof and persuasion.

(3) This section supersedes prior rulings pursuant to the private attorney general doctrine.

(4) The provisions of this section apply equally to all parties in an action pursuant to this title.

NEW SECTION. **Section 23. Codification instruction.** (1) [Section 1] is intended to be codified as an integral part of Title 75, chapter 1, part 1, and the provisions of Title 75, chapter 1, part 1, apply to [section 1].

(2) [Section 16] is intended to be codified as an integral part of Title 82, chapter 1, and the provisions of Title 82, chapter 1, apply to [section 16].

(3) [Section 20] is intended to be codified as an integral part of Title 85, chapter 1, part 1, and the provisions of Title 85, chapter 1, part 1, apply to [section 20].

(4) [Section 22] is intended to be codified as an integral part of Title 87, chapter 1, part 1, and the provisions of Title 87, chapter 1, part 1, apply to [section 22].

NEW SECTION. **Section 24. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 25. Effective date.** [This act] is effective on passage and approval.

NEW SECTION. **Section 26. Applicability.** [This act] applies to court actions filed on or after [the effective date of this act].

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