

1 SENATE BILL NO. 392

2 INTRODUCED BY S. FITZPATRICK

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4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING DETERMINATION OF COURT COSTS FOR COAL  
5 MINE RECLAMATION; AMENDING SECTIONS 82-4-251 AND 82-4-252, MCA; AND PROVIDING AN  
6 IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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

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10 NEW SECTION. Section 1. Equal application of court costs. (1) Unless the context requires  
11 otherwise, a court or administrative agency that issues a final order in an action pursuant to this title TITLE 82,  
12 CHAPTER 4, PART 2, may award ~~the prevailing party, upon a finding that the party made a substantial~~  
13 contribution to a full and fair determination of the issues, reasonable costs of litigation, including filing fees,  
14 attorney fees, and witness costs, to any party who:

15 (a) initiates or participates in the proceeding;

16 (b) prevails in whole or in part of the proceeding; and

17 (c) achieves at least some degree of success on the merits of the proceeding.

18 (2) In awarding costs pursuant to this section, the court or administrative agency may not consider  
19 the identity of any party, including but not limited to a permittee, permit applicant, agency, public interest litigant,  
20 or other party to an action. The party requesting costs bears the burden of proof and persuasion. Costs may not  
21 be awarded against an intervenor-permittee unless the party requesting costs demonstrates the intervenor-  
22 permittee participated in a proceeding in bad faith and for the purpose of harassing or embarrassing the party  
23 requesting costs.

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

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

26

27 **Section 2.** Section 82-4-251, MCA, is amended to read:

28 **"82-4-251. Noncompliance -- suspension of permits.** (1) If it is determined on the basis of an

1 inspection that the permittee is or that any condition or practice exists in violation of any requirement of this part  
2 or any permit condition required by this part that creates an imminent danger to the health or safety of the  
3 public or is causing or can reasonably be expected to cause significant and imminent environmental harm to  
4 land, air, or water resources, the director of the department or an authorized representative shall immediately  
5 order cessation of the operation or the portion of the operation relevant to the condition, practice, or violation.  
6 The cessation order remains in effect until the director or an authorized representative determines that the  
7 condition, practice, or violation has been abated or until modified, vacated, or terminated by the director or an  
8 authorized representative pursuant to subsection (5). If the director or an authorized representative finds that  
9 the ordered cessation of the operation or any portion of the operation will not completely abate the imminent  
10 danger to the health or safety of the public or the significant and imminent environmental harm to land, air, or  
11 water resources, the director or the authorized representative shall, in addition to the cessation order, impose  
12 affirmative obligations requiring any steps that the director or the authorized representative considers  
13 necessary to abate the imminent danger or the significant environmental harm.

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

28 (3) When, on the basis of an inspection, the director or an authorized representative determines

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

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

22 (5) Notices and orders issued pursuant to this section must set forth with reasonable specificity the  
23 nature of the violation and the remedial action required, the period of time established for abatement, and a  
24 reasonable description of the portion of the operation to which the notice or order applies. Each notice or order  
25 issued under this section must be given promptly to the permittee or the permittee's agent by the department,  
26 by the director, or by the authorized representative who issued the notice or order. All notices and orders must  
27 be in writing and be signed by the authorized representatives. Any notice or order issued pursuant to this  
28 section may be modified, vacated, or terminated by the director or an authorized representative. However, any

1 notice or order issued pursuant to this section that requires cessation of mining by the operator expires within  
2 30 days of actual notice to the operator unless an informal public hearing, if requested by the person to whom  
3 the notice or order was issued, is held at the site or within such reasonable proximity to the site that any  
4 viewings of the site can be conducted during the course of the hearing. If the department receives a request for  
5 an informal public hearing 21 days after service of the notice or order, the period for holding the informal public  
6 hearing is extended by the number of days after the 21st day that the request was received.

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

14 (7) ~~Whenever~~ Subject to the provisions of [section 1], whenever an order is issued under this  
15 section or as the result of any administrative proceeding under this part, at the request of any person, a sum  
16 equal to the aggregate amount of all costs, expenses, and attorney fees as determined by the department to  
17 have been reasonably incurred by the person for or in connection with the person's participation in the  
18 proceedings, including any judicial review of agency actions, may be assessed against either party as the court,  
19 resulting from judicial review, or the department, resulting from administrative proceedings, considers proper.

20 (8) In order to protect the stability of the land, the director or an authorized representative shall  
21 order cessation of underground coal mining under urbanized areas, cities, towns, and communities and  
22 adjacent to industrial or commercial buildings, major impoundments, or permanent streams if the director or the  
23 authorized agent finds imminent danger to inhabitants of the urbanized areas, cities, towns, and communities."  
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25 **Section 3.** Section 82-4-252, MCA, is amended to read:

26 **"82-4-252. Mandamus.** (1) A resident of this state or any person having an interest that is or may be  
27 adversely affected, with knowledge that a requirement of this part or a rule adopted under this part is not being  
28 enforced or implemented by a public officer or employee whose duty it is to enforce or implement the

1 requirement or rule, may bring the failure to enforce to the attention of the public officer or employee by a  
2 written statement under oath that must state the specific facts of the failure to enforce the requirement or rule.  
3 Knowingly making false statements or charges in the affidavit subjects the affiant to penalties prescribed in 45-  
4 7-202.

5 (2) If the public officer or employee neglects or refuses for an unreasonable time after receipt of  
6 the statement to enforce or implement the requirement or rule, the resident or person having an interest that is  
7 or may be adversely affected may bring an action of mandamus in the district court of the county in which the  
8 land is located. The court, if it finds that a requirement of this part or a rule adopted under this part is not being  
9 enforced, shall order the public officer or employee whose duty it is to enforce the requirement or rule to  
10 perform the officer's or employee's duties. If the officer or employee fails to obey the order, the public officer or  
11 employee must be held in contempt of court and is subject to the penalties provided by law.

12 (3) Any person having an interest that is or may be adversely affected may commence a civil  
13 action on the person's own behalf to compel compliance with this part against any person for the violation of  
14 this part or any rule, order, or permit issued under this part. However, the action may not commence:

15 (a) prior to 60 days after the plaintiff has given notice in writing to the department and to the  
16 alleged violator; or

17 (b) if the department has commenced and is diligently prosecuting a civil action to require  
18 compliance with the provisions of this part or any rule, order, or permit issued under this part. Any person may  
19 intervene as a matter of right in the civil action. This section does not restrict any right that any person may  
20 have under any statute or common law to seek enforcement of this part or the rules adopted under this part or  
21 to seek any other relief.

22 (4) Any person who is injured in person or property through the violation by any operator of any  
23 rule, order, or permit issued pursuant to this part may bring an action for damages, including reasonable  
24 attorney and expert witness fees, only in the county in which the strip- or underground-coal-mining operation  
25 complained of is located. This subsection does not affect the rights established by or limits imposed under Title  
26 39, chapter 71.

27 (5) The court, in issuing any final order in any action brought pursuant to subsection (3), may  
28 award costs of litigation, including attorney and expert witness fees, to any party whenever the court determines

1 that the award is appropriate pursuant to [section 1]. The court may, if a temporary restraining order or  
2 preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the  
3 Montana Rules of Civil Procedure."  
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5 NEW SECTION. Section 4. Codification instruction. [Section 1] is intended to be codified as an  
6 integral part of Title 82, chapter 4, part 2, and the provisions of Title 82, chapter 4, part 2, apply to [section 1].  
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8 NEW SECTION. Section 5. Severability. If a part of [this act] is invalid, all valid parts that are  
9 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,  
10 the part remains in effect in all valid applications that are severable from the invalid applications.  
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12 NEW SECTION. Section 6. Effective date. [This act] is effective on passage and approval.  
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14 NEW SECTION. Section 7. Applicability. [This act] applies to court actions filed on or after [the  
15 effective date of this act].  
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