

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

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA
CLUB,

Plaintiffs / Appellees,

v.

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

Respondent / Appellant.

DEQ'S MOTION FOR STAY

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

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INTRODUCTION

The Montana Department of Environmental Quality (“DEQ”) respectfully requests this Court stay the district court’s order on petition for judicial review, entered October 28, 2021, *see* Ex. A., and order on remedy and stay, entered January 28, 2022, *see* Ex. B, pending appellate review pursuant to Mont. R. App. P. 22(2). A stay is necessary to ensure existing reclamation obligations and current environmental protections covering already-mined areas of the permit are not vacated on April 1, 2022. Further, if a stay is not granted, the Colstrip electric generating units may be forced into an unplanned outage threatening the reliability of Montana’s electricity supply and requiring public utilities to make otherwise unnecessary replacement power purchases. Ex. G ¶ 8; Ex. J. ¶¶ 21–37. Counsel for Petitioner-Appellees Montana Environmental Information Center and Sierra Club (collectively, “MEIC”) have been contacted and oppose the motion.

BACKGROUND

Under the Montana Strip and Underground Mining Reclamation Act, (“MSUMRA”), a permittee such as Westmoreland Rosebud Mining LLC (“WRM”) may begin mining operations associated with a permit or permit amendment immediately upon DEQ approval. Ex. E ¶ 9. In late 2015, DEQ approved WRM’s fourth amendment to its Surface Mining Permit No. C1984003b

(“AM4”) for the Rosebud Strip Mine. *Id.* ¶ 9. The Rosebud Mine is currently the sole source of fuel for the Colstrip generating units. *Id.* ¶ 10; Ex. G ¶ 8; Ex. J ¶ 11.

After this approval, WRM commenced mining the AM4 area in 2016 and DEQ estimates between 24–38% of the permitted coal in the AM4 area has already been mined. Ex. E ¶ 14–15. Because mining has occurred since this date, spoils from mining in the AM4 area have been produced and are currently subject to DEQ’s reclamation authority. *Id.* ¶¶ 11–12, 15.

MEIC appealed DEQ’s approval of AM4 to the Montana Board of Environmental Review (“BER”). Before the BER, MEIC did not seek an injunction to prevent the initiation of mining in AM4, *see id.* ¶ 9, despite the ability to do so, *see* Mont. Admin. R. 17.24.425(3) (permitting temporary relief before the BER). Following a contested case hearing, the BER affirmed DEQ’s approval of AM4, and MEIC sought judicial review in district court. Ex. A at 10–11.

After receiving briefing, oral argument, and proposed orders from the parties, the district court reversed the BER decision. *Id.* at 34. In doing so, the district court signed MEIC’s proposed order with no modification. *Compare* Ex. A *with* Ex. C. This initial order, however, provided no specific remedy for its findings, so DEQ and WRM requested a clarification of remedy and stay pending review. Exs. D & F. In response, MEIC suggested the district court vacate AM4 on April 1, 2022, and deny DEQ’s and WRM’s request for stay pending review. Ex.

H. The district court again sided with MEIC on remedy and stay and signed MEIC's proposed order on the subject without modification. *Compare* Ex. B with Ex. I. This appeal followed.

LEGAL STANDARD

Besides Mont. R. App. P. 22(2)(a)(i), which requires an appellant demonstrate good cause for the relief requested, this Court looks to the following factors governing stays of civil judgments: (1) whether the stay applicant has made a strong showing it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Vote Solar v. Mont. PSC*, DA 19-0225, Order on Stay at *2 (Mont. Sup. Ct. Aug. 6, 2019).

ARGUMENT

I. DEQ has made a strong showing it is likely to succeed on the merits.

In reversing the BER decision and vacating the AM4 Permit, the district court upended several settled principles of administrative law and improperly overruled certain key factual findings made in the contested case proceeding before the BER. In the most glaring instance¹ in which the district court erred in

¹ The district court made other errors in its decisions on the issues of exhaustion of administrative remedies, DEQ's ability to explain its decision on appeal, and the material damage standard. But given the short page limit for motions for stays, *see*

reviewing the BER's AM4 decision, it disregarded this Court's prior determination in *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, that the party seeking to overturn DEQ's permitting decision bears the burden of proof before BER. 2005 MT 96, ¶¶ 10–15, 326 Mont. 502, 112 P.3d 964 (“*MEIC II*”). The district court reasoned the coal permitting provisions in MSUMRA do not dictate the burden of proof imposed on parties before BER whereas the Montana Clean Air Act—at issue in *MEIC II*—did contain such provisions. Ex. A at 27–28; Ex. B at 19–20.

In briefing the request for stay, DEQ and WRM pointed out to the district court this distinction between MSUMRA and the Montana Clean Air Act did not support shifting the burden of proof onto the parties seeking to uphold DEQ's initial permitting decision before BER. Ex. D at 11–13; Ex. F at 14–15. In particular, Mont. Admin. R. 17.24.425(7)² places the burden on the petitioner in BER's review of DEQ's permitting decisions under MSUMRA.

But even more fundamentally, DEQ argued generally applicable statutory provisions on evidence—relied on in *MEIC II*—that support the conclusion

Mont. App. R. P 22(a)(iv), the Department limits its arguments to the district court's most obvious error.

² The rule's language “reversing the decision of the *board*” is plainly a scrivener's error that is intended to state, “reversing the decision of the *department*.” (Emphasis added.) Indeed, this rule cannot govern judicial review of BER decisions as the district court suggests, *see* Ex. A at 27, n.9, because “a court's authority to review administrative rulings is constrained by statute,” *Molnar v. Mont. Pub. Serv. Comm'n*, 2008 MT 49, ¶ 7, 341 Mont. 420, 177 P.3d 1048.

petitioners bear the burden before BER. Ex. D at 13; *MEIC II*, ¶ 14 (citing Mont. Code Ann. § 26-1-401 and -402). The district court provided no explanation why these statutory authorities on evidence would not also apply here. Ex. A at 27–28; Ex. B at 19–20.

This Court has granted stays when the district court has failed to provide any analysis on an important point raised by the parties. *Vote Solar* at *3 (finding good cause established because “the District Court offers no analysis for the first factor.”). Because the district court has departed from this Court’s precedent in *MEIC II* without adequately explaining its reasons for doing so, this Court should find DEQ has demonstrated a likelihood of success on the merits warranting a stay.

II. DEQ will be irreparably injured absent a stay.

A stay of the district court’s orders is required for DEQ’s reclamation authority of the affected area under the AM4 Permit to remain in place pending appeal. WRM has mined AM4 since 2016 and, as a result, DEQ believes between 24–38% of the coal permitted to be mined under the AM4 Amendment has already been mined. Ex. E ¶ 14. Thus, the mine has already produced spoils in the AM4 permit area that must be reclaimed, which currently (and until April 1, 2022) occurs under the auspices of the AM4 permit. *Id.* ¶ 17.

But the district court’s order entirely vacated the AM4 permit and requires WRM to resubmit a revision to its permit. Ex. B at 7–13. Because this revision will

likely qualify as a major revision under Mont. Admin. R. 17.24.301(66) and 17.24.415, DEQ will have to dedicate thousands of manhours, potentially stretched out over months and years, to evaluate WRM's revised permit. Ex. E ¶¶ 18–24. All the while, pursuant to the district court's vacatur, DEQ apparently lacks authority to oversee reclamation of already existing mine spoils, potentially creating more environmental harms than what MEIC alleges would occur if the permit remains in place. *Id.*, ¶¶ 17–18. This Court, accordingly, should grant a stay to prevent a freeze on DEQ's exercise of authority over time-sensitive reclamation activities within the AM4 permit area.

Additionally, as pointed out in the briefing before the district court, if the order vacating WRM's permit remains, the mine will have difficulty providing coal to the Colstrip generating units potentially resulting in unplanned outages for the plant. Ex. G ¶ 8; Ex. J ¶¶ 11–37. In 2013, Colstrip Unit 4 had an unplanned outage between June 1, 2013 and January 23, 2014. *Aff. of Sonja Nowakowski*, ¶ 2 (Feb. 8, 2022). As a result of this unplanned outage, NorthWestern Energy had to make replacement power purchases of \$8.243 million in the market. *Id.*

DEQ has an interest in preventing unplanned outages at Colstrip, which could potentially decrease the reliability of Montanan's electricity service and increase their utility rates. DEQ houses the state energy bureau, *see* Mont. Admin. R. 17.1.101(3)(c)(iv), which means DEQ has administrative and information

sharing obligations concerning Montana’s energy supply emergency powers, *see* Mont. Code Ann. §§ 90-4-301 to -319; Mont. Admin. R. 14.8.401–412; Montana Energy Assurance Plan—2016 Update at 22 (“DEQ has been designated the primary agency in the State’s response to energy emergencies.”).³ DEQ is also required to provide comment on Montana public utilities’ long term electricity supply planning before the Montana Public Service Commission. Mont. Code Ann. 69-3-1205(3).

This Court has previously granted a stay when a district court’s order would impact electricity supply in Montana. *Vote Solar* at *4 (finding a stay warranted because ratepayers would be adversely affected by being forced to pay higher rates). Furthermore, granting a stay would preserve the status quo and allow the relevant parties to maintain Montana’s interconnected (and extremely complex) electric grid system. *Driscoll v. Stapleton*, DA 20-0477, Order on Stay at *2 (Mont. Sup. Ct. Sept. 29, 2020) (granting stay because the district court’s order “disrupts the status quo, is likely to cause voter confusion, and interferes with the ability of the State to administer an orderly general election process already under way.”).

III. MEIC would not be substantially injured by this Court’s issuance of a stay.

³ <https://deq.mt.gov/files/Energy/EnergizeMT/Energy%20Assurance/MTENERGYASSURANCEPLAN-final.pdf> (last accessed Feb. 3, 2022).

A stay would preserve the status quo. Because mining has been ongoing for five years and MEIC did not seek to enjoin WRM from mining in the AM4 amendment area before a substantial portion of the mining and surface disturbance (allegedly resulting in material damage) had already occurred, *see* Ex. E ¶¶ 9–17, MEIC will not be substantially damaged if the stay is granted.

Further highlighting inchoate nature of MEIC’s alleged injuries, MEIC offered April 1, 2022, as “a reasonable compromise” for vacatur of AM4 to occur, *see* Ex. H at 2, which the district court accepted, *see* Ex. B at 4, 10–13. MEIC offers no principled basis for why its alleged injuries would suddenly need to be alleviated on April 1, 2022. Instead, MEIC argued a four-month coal stockpile is sufficient to meet Colstrip’s springtime needs. Ex. H at 12–13. But this argument ignores an appeal will take much longer than four months stretching out into seasons of peak electricity demand creating an immediate danger that Montana will face electricity supply deficiencies during the pendency of this appeal. *Aff.* Nowakowski ¶ 2; Ex. J ¶¶ 11–31. Therefore, this Court should find, because MEIC has failed to articulate any particularized harm that might result from staying the district court’s order, because mining has already occurred for five years in AM4, and because the irreparable harms to DEQ are much greater, a stay of the district court’s orders is warranted.

IV. The public interest favors a stay.

As discussed above, if the Court doesn't grant a stay of the district court's orders, electricity supply in Montana will be endangered, resulting in price and reliability impacts on customers. The public has a great interest in the electricity that powers their homes and businesses. *Vote Solar* at *4 (finding "the public interest will suffer greater harm if" the district court's order impacting electricity supply rates is not stayed). Because some of Colstrip's co-owners are public utilities located in Idaho, Washington, and Oregon, *see* Aff. Nowakowski ¶ 1; Ex. J ¶ 10, public beyond Montana's borders also will be impacted if the district court's order is not stayed.

Additionally, the public has an interest in ensuring that DEQ may continue to exercise its reclamation authority over mine spoils pending this Court's review of the district court's orders. Accordingly, this Court should grant DEQ's request for stay pending appeal.

Respectfully submitted this 8th day of February, 2022.

/s/ Jeremiah Langston
Jeremiah Langston

AFFIDAVIT

I, SONJA NOWAKOWSKI, being duly sworn, hereby deposes and says that I am over the age of 18 and a resident of the State of Montana. I am the Administrator of the Montana Department of Environmental Quality Air, Energy,

and Mining Division and have personal knowledge of the facts herein. From 2007 until 2021, I drafted energy legislation for the Montana Legislature.

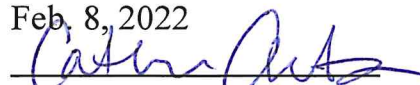
1. If Colstrip is forced into an unplanned outage in the spring, there will be as much as 1,400 fewer megawatts of generating capacity available to serve residential, commercial, and industrial customers. Talen Montana accounts for 30% ownership (222 megawatts) in Unit 3 and NorthWestern Energy accounts for 30% ownership in Unit 4. The remainder of the power is shipped to customers in the pacific northwest including public utilities in Idaho, Washington, and Oregon.

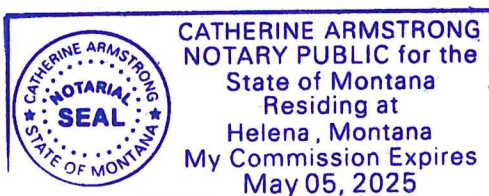
2. Between June 1, 2013, and January 23, 2014, Colstrip Unit 4 underwent an unplanned outage, which required NorthWestern Energy to make \$8.243 million in replacement power purchases. A four-month stockpile of coal at Colstrip is likely insufficient to avoid a similar unplanned outage if the district court's orders are not stayed pending review. With increasing capacity constraints on generation in western energy markets, the total cost to purchase replacement power could be substantially greater in 2022. Thus, if Colstrip is forced to close in the spring, NorthWestern Energy ratepayers—and customers of other public utilities in the pacific northwest—could likely pay increased rates.

DATED February 8, 2022


Sonja Nowakowski

SIGNED & SWORN before me on
Feb. 8, 2022


Catherine Armstrong, Notary Public



EXHIBITS

- Exhibit A D.C. Doc. 63, Order of Petition for Judicial Review (Oct. 28, 2021).
- Exhibit B D.C. Doc. 107, Order on Remedy and Stay (Jan. 28, 2022).
- Exhibit C D.C. Doc. 54, MEIC's Proposed Order (Dec. 23, 2020).
- Exhibit D D.C. Doc. 65, DEQ's Brief ISO of Motion for Stay and Request for Clarification (Nov. 5, 2021).
- Exhibit E D.C. Doc. 66, Declaration of Martin Van Oort (Nov. 5, 2021).
- Exhibit F D.C. Doc. 68, Intervenor's Brief ISO Motion on Remedy (Nov. 8, 2021).
- Exhibit G D.C. Doc. 68A, Declaration of Russell Batie (Nov. 5, 2021).
- Exhibit H D.C. Doc. 73, Petitioners' Combined Response to DEQ & WRM's Motions for Stay and Motions for Remedy (Nov. 22, 2021).
- Exhibit I D.C. Doc. 75, Petitioners' Proposed Order on Remedy and Stay (Nov. 25, 2021).
- Exhibit J D.C. Doc. 82A, Declaration of Shannon Brown (Dec. 20, 2021).

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February 2022, I filed a true and accurate copy of the foregoing document via email addressed as follows:

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CERTIFICATE OF SERVICE

I, Nicholas A. Whitaker, hereby certify that I have served true and accurate copies of the foregoing Motion - Stay to the following on 02-08-2022:

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Electronically signed by Catherine Ann Armstrong on behalf of Nicholas A. Whitaker
Dated: 02-08-2022