

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 22-0064

---

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Petitioners-Appellees,

vs.

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

Respondent-Intervenor-Appellant,

and

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent-Appellant

and

MONTANA BOARD OF ENVIRONMENTAL REVIEW,

Respondent.

---

**MONTANA ENVIRONMENTAL INFORMATION CENTER AND SIERRA CLUB'S RESPONSE TO WESTMORELAND'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

---

Shiloh Hernandez  
Earthjustice  
Northern Rockies Office  
313 East Main Street  
P.O. Box 4743  
Bozeman, MT 59772-4743  
(406) 426-9649  
shernandez@earthjustice.org

Roger Sullivan  
McGarvey Law  
345 1st Avenue East  
Kalispell, MT 59901  
(406) 752-5566  
rsullivan@mcgarveylaw.com

Darf Johnson  
Montana Environmental Information  
Center  
107 W. Lawrence St., #N-6  
Helena, MT 59624  
(406) 443-2520  
djohnson@meic.org

Walton D. Morris, *pro hac vice*  
Morris Law Office  
1901 Pheasant Lane  
Charlottesville, VA 22901  
wmorris.@fastmail.net

*Attorneys for Appellees Montana Environmental Information Center and Sierra Club*

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	iv
INTRODUCTION .....	1
BACKGROUND .....	2
STANDARD OF REVIEW .....	4
ARGUMENT .....	4
I.     WRM FAILS TO DEMONSTRATE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS .....	4
II.    WRM FAILS TO DEMONSTRATE A LIKELIHOOD OF IRREPARABLE HARM.....	6
III.   WRM MISREPRESENTS THE DISTRICT COURT’S ANALYSIS OF HARM TO THE ENVIRONMENT AND MEIC.....	7
IV.    WRM FAILS TO PRESENT ANY COMPELLING EVIDENCE REGARDING THE PUBLIC INTEREST.....	8
INDEX OF EXHIBITS .....	10

## TABLE OF AUTHORITIES

### Cases

<u>Abbassi v. INS,</u> 143 F.3d 513 (9th Cir. 1998) .....	9
<u>Alsea Valley All. v. Dep’t of Com.,</u> 358 F.3d 1181 (9th Cir. 2004) .....	4
<u>Amoco Prod. Co. v. Vill. of Gambell,</u> 480 U.S. 531 (1987) .....	8
<u>Battle v. Anderson,</u> 564 F.2d 388 (10th Cir. 1977) .....	6
<u>Johansen v. DNRC,</u> 1998 MT 51, 288 Mont. 39, 955 P.2d 653 .....	6
<u>MEIC v. Haaland,</u> No. CV 19-130-BLG-SPW-TJC (D. Mont. Feb. 11, 2022) .....	2
<u>Mont. Wilderness Ass’n v. Fry,</u> 408 F. Supp. 2d 1032 (D. Mont. 2006) .....	8
<u>Motorola Credit Corp. v. Uzan,</u> 275 F. Supp. 2d 519 (S.D.N.Y. 2003) .....	6
<u>Nken v. Holder,</u> 556 U.S. 418 (2009) .....	4, 9
<u>Nw. Corp. v. Dep’t of Pub. Serv. Regul.,</u> No. DV 16-1236 (Mont. 13th Jud. Dist. Ct. July 29, 2018) .....	9
<u>Portland Gen. Elec. Co. v. Nw. Corp.,</u> No. CV 21-47-BLG-SPW, 2021 WL 4775958 (D. Mont. Oct. 13, 2021) .....	3, 9
<u>Vote Solar v. Dep’t of Pub. Serv. Regul.,</u> DA 19-0223 (Mont. Aug. 6, 2019) .....	1, 4, 6, 9

<u>Wurl v. Polson Sch. Dist. No. 23,</u> 2006 MT 8, 330 Mont. 282, 127 P.3d 436 .....	5
--	---

## **Rules**

M.R.App.P. 4 .....	4
M.R.App.P. 6 .....	4

## **Regulations**

59 Fed. Reg. 54,306 (Oct. 28, 1994).....	4
ARM 17.24.1118.....	7
ARM 17.24.407.....	7
ARM 17.24.522.....	7

## INTRODUCTION

To hold power to account is not an abuse of discretion. It is the essence of the rule of law. The district court's detailed analysis and balanced remedy are well supported by the law and facts. By contrast Westmoreland Rosebud Mining's (WRM) attacks on the court's decisions are bereft of legal or factual support. Instead, WRM resorts to misrepresentations of the record and the district court's decision, speculative fearmongering, and ad hominem attacks.

At bottom, WRM fails to demonstrate—as it must—that the district court's denial of a stay lacked “conscientious judgment or exceeded the bounds of reason.” Vote Solar v. Dep't of Pub. Serv. Regul., DA 19-0223, slip op. at 2 (Mont. Aug. 6, 2019). First, contrary to WRM's contentions, the district court closely considered potential impacts to the coal supply to the Colstrip Power Plant (Colstrip) and crafted a compromise remedy to accommodate WRM's assertion that it needed 2-4 months to replace the AM4 supply. Second, while WRM makes several conclusory assertions of errors by the district court, it fails to cite a single page in the district court's merits decision containing an error.

Third, WRM fails to cite any evidence of irreparable harm that will not be alleviated by the district court's compromise remedy, and WRM is mistaken that vacatur (which WRM incorrectly calls an “injunction”) limits reclamation. Fourth, WRM's argument about harm to Petitioners-Appellees (MEIC) misrepresents the

district court’s careful analysis of (1) the impaired status of affected waters; (2) the substantial increase in pollution from mining; and (3) WRM’s 67 violations of pollution limits during the litigation, all of which harm MEIC’s interests. Finally, while WRM attacks MEIC’s well qualified energy expert as “uninformed” and “amateur,” the company fails to identify anything beyond speculation that deferred vacatur will impact energy supplies or cost. In short, WRM has distinctly failed to demonstrate that the district court abused its discretion.

## **BACKGROUND**

The Rosebud strip-mine, with the recent Area F expansion, covers roughly 30,000 acres. MEIC v. Haaland, No. CV 19-130-BLG-SPW-TJC, slip op. at 2-3 (D. Mont. Feb. 11, 2022) (Ex. 1). It produces coal from four active mine areas—A, B, C, and F—containing 95 million tons of permitted reserves. Ex 3 ¶ 9. The AM4 expansion is a sliver of this operation: 306 acres with 12 million tons of coal, of which 7.5-9.2 million tons remain. DEQ Ex. A at 7; DEQ Ex. E ¶¶ 14-16.

In addition to AM4, WRM is actively strip-mining portions of Area B (7 million tons), Area C (2.5 million tons), and Area F (9 million tons). Ex. 2 ¶ 9. The low-quality Area B coal requires blending, but the coal in Areas C and F does not. Ex. 2 ¶ 9. WRM has more permitted reserves in Areas A (.8 million tons), B (2 million tons), and F (approximately 60 million tons) that could be in production in 2-4 months, 6-8 months, and 8-10 months, respectively. Ex. 2 ¶ 9; Ex. 3 ¶ 9. WRM

and Talen Montana LLC (Talen), the operator and minority owner of Colstrip, also have coal stockpiles sufficient to operate the plant for 2 months (about 1.2 million tons). Ex. 3 ¶ 8; DEQ Ex. J ¶ 11 (plant burns 0.5-0.6 million tons per month). After closure of two units at Colstrip in 2020, the mine has significant excess production capacity. DEQ Ex. J ¶ 6; Schlissel Decl. ¶ 4 (attached).

Washington and Oregon utilities that own 70% of Colstrip are suing Talen and others to “tak[e] steps toward closure,” which they must do by 2025 and 2030, respectively. Portland Gen. Elec. Co. v. Nw. Corp., No. CV 21-47-BLG-SPW, 2021 WL 4775958, at \*1-2 (D. Mont. Oct. 13, 2021). For Montana ratepayers, Colstrip is one of the most expensive energy sources. Ex. 4 ¶ 10.

In October 2021, the district court overturned the AM4 permit on four procedural and two substantive grounds. DEQ Ex. A at 13-34. The court later denied motions for a stay pending appeal. DEQ Ex. B at 22. For remedy, the court struck a “reasonable balance” and deferred vacatur until April 2022 (5 months from the merits ruling), based on WRM’s claim that it could replace AM4 production in 2-4 months. Id. at 12; DEQ Ex. G ¶ 6. With the deferment, the court found impacts to energy supplies to be speculative, given mining in Areas B, C, and F; large coal stockpiles; and low spring energy demand. DEQ Ex. B at 12.



## STANDARD OF REVIEW

This Court reviews the denial of a stay pending appeal for abuse of discretion. Vote Solar, slip op. at 2. “The test for abuse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice.” Id. In assessing whether there is good cause for a stay, this Court considers the four factors outlined in Vote Solar, slip op. at 2. “The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.” Nken v. Holder, 556 U.S. 418, 433-34 (2009).

## ARGUMENT

### **I. WRM FAILS TO DEMONSTRATE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS**

First, WRM’s appeal, filed before final judgment resolving fees (M.R.App.P. 4(1)(a)), is premature. WRM’s notice cites M.R.App.P. 6(3)(e), (h), regarding interlocutory appeals of injunctions and surrender of property, respectively. But vacatur, as here, is not an injunction. Alsea Valley All. v. Dep’t of Com., 358 F.3d 1181, 1186-87 (9th Cir. 2004). And a coal mining permit is not a property right. 59 Fed. Reg. 54,306, 54,313 (Oct. 28, 1994) (“A permit to mine coal is a privilege granted by the regulatory authority ....”).

Second, WRM argues the district court erred in basing its remedy decision on the proposed order submitted by MEIC. WRM Br. at 4-5. While the documents

are similar, they are not identical, and the district court made edits throughout. Compare DEQ Ex. B, with DEQ Ex. I. Further, this Court permits district courts to adopt, as here, a detailed proposed order that is “sufficiently comprehensive and pertinent to the issues to provide a basis for the decision.” Wurl v. Polson Sch. Dist. No. 23, 2006 MT 8, ¶ 29, 330 Mont. 282, 127 P.3d 436. Contrary to WRM’s representation, the court considered and tailored its remedy in response to WRM’s speculation about impacts to energy supply. DEQ Ex. B at 11-13, 20.<sup>1</sup> WRM’s statement about the “6-10” months needed for “long-term replacement of the AM4 coal” (WRM Br. at 5) fares no better. The district court based its remedy on WRM’s initial representation that it could obtain replacement coal in “two to four months.” DEQ Ex. B at 12; DEQ Ex. G ¶ 6. That WRM then changed its story in a second declaration only demonstrates—as one federal judge recently found—that WRM is “ma[king] inconsistent statements.” See Ex. 1 at 31. Moreover, WRM’s shifting positions change nothing: given available reserves and the 5 month deferment, there is no evidence WRM will run out of coal. See supra Background.<sup>2</sup>

---

<sup>1</sup> WRM provides no citation to support its assertion about “brown-outs, and/or blackouts in eastern Montana.” See WRM Br. at 5. These ominous but exaggerated terms do not appear in the documents attached to the Declaration of Russell Batie, which WRM contends the court did not consider. See Batie Decl. at Exs. A-C.

<sup>2</sup> WRM admits it can obtain 4 months of replacement coal in Area A during the deferment. Ex. 2 ¶¶ 9.1, 10. This, together with the 5 month deferment and 2 months of stockpiled coal (11 months total), allow ample time for WRM to access “long term” replacement coal in Area B which is available in 6-8 months. Id. ¶ 10.

Third, WRM's supposed analysis of the merits consists only of conclusory statements without citations to the district court's decision, scant citation to legal authority, and zero analysis. WRM Br. at 5-6. Thus, while WRM alleges the district court overturned factual findings, there is no evidence of this in the district court's merits decision, which addressed legal errors. See DEQ Ex. B at 1-34. WRM's remaining complaints contain not one pin citation to the court's decisions or authority. WRM Br. at 6. This is not a "strong showing" of likely success:

[D]efendants, in their motion papers, do little more than recite in conclusory fashion numerous points on which the Court has ruled against them, apparently in the belief that quantity can substitute for quality. Mere conclusions, however, whether applied to one issue or many, do not constitute any kind of showing, let alone the requisite "strong showing." Accordingly, defendants have not even met the first requirement of a stay pending appeal.

Motorola Credit Corp. v. Uzan, 275 F. Supp. 2d 519, 520 (S.D.N.Y. 2003); Vote Solar, slip op. at 2.<sup>3</sup> This alone is fatal.

## **II. WRM FAILS TO DEMONSTRATE A LIKELIHOOD OF IRREPARABLE HARM**

WRM contends the district court abused its discretion in assessing harms from "loss of investments in drilling and blasting" and winding down operations in AM4, but WRM cites no factual support for this contention. WRM Br. at 7. And

---

<sup>3</sup> Accord, e.g., Battle v. Anderson, 564 F.2d 388, 397 (10th Cir. 1977); Johansen v. DNRC, 1998 MT 51, ¶ 24, 288 Mont. 39, 955 P.2d 653 (not courts' job to research, develop, or guess at a party's position).

there is none. The court gave WRM 5 months to complete blasting and drilling in AM4. DEQ Ex. B at 13. WRM provided no testimony that this was inadequate. See Ex. 2 ¶ 15 (recognizing proposed deferment and not disputing its adequacy to complete blasting and drilling).

WRM's suggestion that vacatur limits reclamation is mistaken. By law, reclamation is not dependent on WRM's possession of a permit, and is required if a permit is suspended, revoked, or expired, and even if all mining permanently ceases and its bond is forfeited. ARM 17.24.407(1)(b), 522(1), 1118(3). WRM has demonstrated neither an abuse of discretion nor a likelihood of irreparable harm.

### **III. WRM MISREPRESENTS THE DISTRICT COURT'S ANALYSIS OF HARM TO THE ENVIRONMENT AND MEIC.**

WRM next objects to findings the district court did not make. The court did not "attribute" the impairment of the receiving stream to "coal mining" (WRM Br. at 8), but only found that the receiving waters are "impaired" (DEQ Ex. B at 21), which the Board of Environmental Review (BER) also found. WRM Ex. B at 24, ¶ 81. Nor did the court state that AM4 alone would "substantially worsen" the impairment (WRM Br. 7-8), but found that the "cumulative effects" of AM4 would "substantially worsen" the impairment (DEQ Ex. B at 21), which BER also found. WRM Ex. B at 39, 63 (finding 13% increase in salinity in stream from cumulative mining impacts). Importantly, WRM does not dispute the court's finding that it violated pollution limits 67 times during the litigation. DEQ Ex. B at 3 n.1, 21-22.

WRM complains without support that the court erred in finding that WRM's pollution harms MEIC. WRM. Br. at 8. The court cited undisputed testimony by MEIC that WRM's "ongoing pollution" of the stream "irreparably harms" MEIC and its members. DEQ Ex. B at 21-22; Ex. 4 ¶ 5. In so doing, the court cited the Supreme Court's statement that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent ..., i.e., irreparable." DEQ Ex. B at 21 (quoting Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987)). WRM again fails to demonstrate an abuse of discretion.

#### **IV. WRM FAILS TO PRESENT ANY COMPELLING EVIDENCE REGARDING THE PUBLIC INTEREST**

WRM's discussion of the public interest is little more than ad hominem attacks on MEIC's expert, David Schlissel, and speculative fearmongering about energy supply and costs. WRM Br. at 8-9. Notably, WRM fails to address the district court's finding that "the public interest is best served when the law is followed." DEQ Ex. B at 22 (quoting Mont. Wilderness Ass'n v. Fry, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006)).

WRM contends that the district court somehow erred in not considering the declaration of Shannon Brown submitted by Talen in support of Talen's motion to intervene. WRM Br. 9. But Mr. Brown's testimony was, by his own admission, only speculation. Contrary to WRM's suggestion, he did not testify that deferred vacatur would likely harm public energy supplies or costs. Instead, he repeatedly

stated that it was “unclear” what impact vacatur would have on Colstrip. DEQ Ex. J ¶¶ 19, 20. Such uncertain statements do not demonstrate “likely” harm. Nken, 556 U.S. 434-35 (“some possibility of irreparable injury” insufficient (quoting Abbassi v. INS, 143 F.3d 513, 514 (9th Cir. 1998))). As the district court noted, WRM has abundant alternative coal reserves and stockpiles that are currently available or will be available during the deferment period. DEQ Ex. B at 12. This finding is confirmed by the declaration of Mr. Batie of WRM. See supra Background & n.2. As noted, the owners of 70% of Colstrip have not only expressed no concerns about AM4, but are in fact suing to close the plant. Portland Gen. Elec. Co., 2021 WL 4775958, at \*1-2. Moreover, past experience demonstrates that even lengthy unplanned outages at Colstrip (which are extremely unlikely here) have not harmed public energy supplies or caused additional costs to ratepayers. Schlissel Decl. ¶¶ 2-3; Nw. Corp. v. Dep’t of Pub. Serv. Regul., No. DV 16-1236, slip op. at 25 (Mont. 13th Jud. Dist. Ct. July 29, 2018) (disallowing charge for replacement energy) (Ex. 5).

Accordingly, WRM fails to show an abuse of discretion. Vote Solar, slip op. at 2. Its motion should be denied.

Respectfully submitted this 22nd day of February, 2022.

/s/ Shiloh Hernandez  
Shiloh Hernandez

## **INDEX OF EXHIBITS**

- Ex. 1 MEIC v. Haaland, No. CV 19-130-BLG-SPW-TJC (D. Mont. Feb. 11, 2022)
- Ex. 2 Second Declaration of Russell Batie (Dec. 6, 2021)
- Ex. 3 Declaration of David Schlissel (Nov. 18, 2021)
- Ex. 4 Declaration of Anne Hedges (Nov. 19, 2021)
- Ex. 5 Nw. Corp. v. Dep't of Pub. Serv. Regul., No. DV 16-1236 (Mont. 13th Jud. Dist. Ct. July 29, 2018)

## **CERTIFICATE OF SERVICE**

I, Shiloh Silvan Hernandez, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 02-22-2022:

John C. Martin (Attorney)

P.O. Box 68

645 S. Cache Street

Suite 100

Jackson WY 83001

Representing: International Union of Operating Engineers, Local, Natural Resource Partners, L.P.,  
Northern Cheyenne Coal Miners Association, Westmoreland Rosebud Mining LLC

Service Method: eService

Samuel R. Yemington (Attorney)

2515 Warren Avenue

Suite 450

P.O. Box 1347

Cheyenne WY 82003-1347

Representing: International Union of Operating Engineers, Local, Natural Resource Partners, L.P.,  
Northern Cheyenne Coal Miners Association, Westmoreland Rosebud Mining LLC

Service Method: eService

Victoria A. Marquis (Attorney)

401 North 31st Street

Suite 1500

P.O. Box 639

Billings MT 59103-0639

Representing: International Union of Operating Engineers, Local, Natural Resource Partners, L.P.,  
Northern Cheyenne Coal Miners Association, Westmoreland Rosebud Mining LLC

Service Method: eService

Kyle Anne Gray (Attorney)

P.O. Box 639

Billings MT 59103

Representing: International Union of Operating Engineers, Local, Natural Resource Partners, L.P.,  
Northern Cheyenne Coal Miners Association, Westmoreland Rosebud Mining LLC

Service Method: eService

Amy D. Christensen (Attorney)

314 N. Last Chance Gulch, Suite 300



Helena MT 59601  
Representing: Montana Board of Environmental Review  
Service Method: eService

Jeremiah Radford Langston (Govt Attorney)  
1520 E 6th Ave.  
Helena MT 59601  
Representing: Environmental Quality, Montana Department of  
Service Method: eService

Nicholas A. Whitaker (Attorney)  
Department of Environmental Quality  
Director's Office  
1520 E Sixth Avenue  
Helena MT 59601  
Representing: Environmental Quality, Montana Department of  
Service Method: eService

Roger M. Sullivan (Attorney)  
345 1st Avenue E  
MT  
Kalispell MT 59901  
Representing: Montana Environmental Information Center, Sierra Club  
Service Method: eService

Derf L. Johnson (Attorney)  
PO Box 1184  
Helena MT 59624  
Representing: Montana Environmental Information Center, Sierra Club  
Service Method: eService

Robert L. Sterup (Attorney)  
315 North 24th Street  
,  
Billings MT 59101  
Representing: Talen Montana, LLC  
Service Method: eService

Walton Davis Morris (Attorney)  
1901 Pheasant Lane  
Charlottesville VA 22901  
Representing: Montana Environmental Information Center, Sierra Club  
Service Method: E-mail Delivery

Electronically signed by Chrissy Pepino on behalf of Shiloh Silvan Hernandez  
Dated: 02-22-2022