

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

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs /Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW,

Respondents, and

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

Respondent-Intervenors / Appellants.

***MOTION FOR LEAVE TO FILE ATTACHED RESPONSE TO DE FACTO
MOTIONS TO DISMISS APPEALS***

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I. STATEMENT OF THE ISSUE

In their responses to Appellants Westmoreland/Local 400's¹ Rule 22 motions for stay pending appeal and Rule 29 motion to suspend the rules, Appellees MEIC and Sierra Club (collectively, "MEIC") have filed what, in effect, are stealth motions to dismiss two interrelated appeals pending before this Court in DA 22-0064 and DA 22-0068. MEIC apparently has taken this unorthodox approach to prevent any response to their arguments that the appeals are premature. This tactic is contrary to the language and spirit of the Montana Rules of Appellate Procedure. Accordingly, Westmoreland/Local 400 should be granted leave to submit the attached *Response to De Facto Motions to Dismiss Appeals* in DA 22-0064 and DA 22-0068.

II. ARGUMENT

In DA 22-0064, Westmoreland appealed from the District Court's Remedy Order, which vacated Westmoreland's AM4 permit and enjoined further mining on AM4 lands as of April 1, 2022.² In DA 22-0068, Westmoreland appealed from the District Court's judgment formed by its Merits Decision and Remedy Order, which

¹ Appellants Westmoreland Rosebud Mining, LLC, International Union of Operating Engineers, Local 400, Natural Resource Partners, L.P., and Northern Cheyenne Coal Miners Association are collectively referred to as Westmoreland/Local 400.

² The District Court's Merits Decision and Remedy Order are attached as Exhibits accompanying the Rule 22 Motions for Stay filed in DA-22-0064 and in DA-22-0068.

together constitute a final judgment in this matter except for an unresolved attorneys fee dispute between MEIC and DEQ. *See* Notices of Appeal in DA 22-0064 and DA 22-0068. To address the potential effect of the language of Mont.R.App.P. 4(1)(a) and 4(5)(a)(iii) regarding final judgments and an unresolved attorney fees claim, Westmoreland/Local 400 filed a Motion, under Mont.R.App.P. 29, to suspend the effect of the Rule 4 “attorney fees” language in these interrelated appeals in order to allow this Court to address the District Court’s twin rulings in a judicially efficient manner.

MEIC responded to Westmoreland’s Rule 29 motion (and to the companion Rule 22 Motions to Stay), in part, by arguing that the appeals in DA 22-0064 and 0068 are premature and should be dismissed without prejudice. *See* MEIC’s *Response to Westmoreland’s Motion to Suspend Rules* (DA 22-0068) at 1-2, 4 (arguing the Remedy Order is neither an injunction immediately appealable under Mont.R.App.P. 6(3)(e), nor an order to surrender property immediately appealable under Rule 6(3)(h), and requesting that the appeal be “dismissed without prejudice” as premature); *MEIC and Sierra Club’s Response to Westmoreland’s Motion for Stay* (DA 22-0064) at 4 (arguing “a coal mining permit is not a property right” for purposes of an immediate appeal under Mont.R.App.P. 6(3)(h)); and *MEIC and Sierra Club’s Response to Western Energy’s Motion for Stay* (DA 22-0068) at 2 (arguing because “the issue of attorney fees is outstanding,”

Westmoreland’s “appeal is, thus, premature and should be dismissed, albeit without prejudice”).

By requesting dismissal of Westmoreland and DEQ’s appeals in their response briefs, rather than via a motion to dismiss as prescribed by Mont.R.App.P. 16, MEIC apparently hopes to leave Westmoreland/Local 400 with no opportunity to respond to their assertions because reply briefs are not generally allowed under Mont.R.App.P. 16 and 22. This tactic should not be countenanced.

First, general notions of equity and fairness require an opportunity for parties to respond to new issues raised in a response brief. *See, e.g., Worledge v. Riverstone Residential Group, LLC*, 2015 MT 142, ¶17, 379 Mont. 265, 350 P.3d 39 (explaining that decisions regarding how to deal with new matter raised in a final brief is “driven by fairness to the parties,” and recognizing that an outcome which “deprives a [party] of an opportunity to meaningfully respond” is not fair).

Second, this Court’s Rules contemplate the opportunity to respond to a motion to dismiss. Rule 4(5)(a)(iii) provides that the issue of an appeal filed prior to resolution of an attorney fees dispute is to be addressed “*upon the motion of any party*.” (Emphasis added). Moreover, Mont.R.App.P. 16 – denominated “Rule 16. Motions” – provides in subsection (2) as follows: “Response. Any party *may file a*

response in opposition within 11 days after service of the motion[.]” (Emphasis added).

MEIC seeks to delay review of the District Court’s erroneous order in order to shut down mining on AM4 lands on April 1st. As shown in the attached proposed response brief, its arguments about “prematurity” cannot withstand scrutiny.

III. STATEMENT OF RELIEF SOUGHT

For the reasons set forth above, Westmoreland/Local 400 seek leave to file the attached Response to MEIC’s De Facto Motion to Dismiss Appeals in dockets DA 22-0064 and 0068.

Dated this 2nd day of March 2022.

/s/ John C. Martin

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and contains 1,250 or fewer words, excluding caption, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ John C. Martin

CERTIFICATE OF SERVICE

I, John Martin, hereby certify that I have served true and accurate copies of the foregoing Motion - Other to the following on 03-02-2022:

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