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.

RESPONSE TO MEIC'S DE FACTO MOTION TO DISMISS APPEALS

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I. STATEMENT OF THE ISSUE

On February 22, 2022, Appellees MEIC and Sierra Club (collectively "MEIC") filed response briefs to three motions in Westmoreland/Local 400's appeals (DA 22-0064 & DA 22-0068) pending before the Court.[1] MEIC's response briefs – by arguing that this Court should dismiss the appeals – reached beyond Westmoreland/Local 400's motions and deprived Westmoreland/Local 400 of the opportunity to respond to MEIC's dismissal argument. Because MEIC's circuitous efforts to dismiss these appeals are procedurally and substantively flawed, this Court should reject its arguments for dismissal.

Procedurally, MEIC embedded its dismissal requests in responsive filings, rather than filing stand-alone motions as required by the Montana Rules of Appellate Procedure. Substantively, MEIC's arguments are unfounded because (1) the Remedy Order is immediately appealable under this Court's Rules, and (2) interests of justice support resolving an appeal of the Merits Order along with appeal of the Remedy Order.

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

II. ARGUMENT

A. MEIC's Motions to Dismiss Are Procedurally Defective.

MEIC violated Rule 16 by subsuming its de facto motions to dismiss in responsive pleadings filed in both appeals. *See 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* (in DA 22-0068) at 2 (arguing because "the issue of attorney fees is outstanding," Westmoreland's "appeal is . . . premature and should be dismissed . . .").

Thus, MEIC seeks to circumvent Rule 16(1), (2), which specifies that "an application for an order or other relief shall be made by filing a motion." to which "any party may file a response in opposition." If allowed to stand, Westmoreland/Local 400 would have no means to respond to what, in effect, are motions to dismiss its appeals, despite this Court's contrary rules.

B. The Remedy Order is Immediately Appealable.

MEIC's dismissal request also has no substantive basis. The Remedy Order is immediately appealable under both Rule 6(3)(e), as an injunction, and Rule 6(3)(h), as an order to surrender property. Montana law defines "injunction" broadly as "an order requiring a person to refrain from a particular act." § 27-19-101, MCA. By vacating the AM4 Permit as of April 1, 2022, the Remedy Order requires Westmoreland/Union to "refrain from a particular act"—*i.e.*, mining and other permitted activities. The Remedy Order is thus an injunction appealable under Rule 6(3)(e).

MEIC cites *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181 (9th Cir. 2004), arguing that vacatur is not an injunction. Montana's appeal requirements, however, differ from federal standards, so *Alsea* is not apposite. *Compare* MONT.R.APP.P. 6, *with* 28 U.S.C. §1292. Moreover, *Alsea* explains that orders having the "practical effect" of an injunction are immediately appealable even under the more restrictive federal rule. Thus, the *Alsea* court merely found that, in the situation before it – involving remand of an Endangered Species Act rule listing – vacatur of the listing did not have the effect of an injunction. Further, there, the remand order did not require any other action. 358 F.3d at 1186. Here, by contrast, vacatur purports to require on-going AM4 operations to cease.

Moreover, Rule 6(3)(h) independently supports appeal because the Remedy Order directs "surrender of property." This Court has recognized that an applicant's "constitutionally protected claim of entitlement to permit ***approval***" under certain circumstances, is a property right. *Helena Sand & Gravel, Inc., v. Lewis & Clark County Planning and Zoning Commission*, 2012 MT 272, ¶ 36, 367 Mont. 130, 144, 290 P.3d 691, 701 (Mont. 2012) (emphasis added) (internal quotations omitted). Given that a mere expectancy of future permit approval can constitute a property interest, ongoing use of an existing permit plainly qualifies.[2] Thus, MEIC's implicit motion to dismiss the Remedy Order appeal (DA 22-0064) should be denied under both Rules 6(3)(e) and 6(3)(h).

C. Appeal of the Merits Order Should Be Considered with the Appeal of the Remedy Order.

MEIC errs in its argument that the final judgment rule precludes review of the Merits Order. Rule 29 expressly provides that this Court may suspend the Rules of Appellate Procedure, including Rule 4's final judgment rule, "[i]n the

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[2] Arguing that a mining permit is not a property right, MEIC cites to the federal Office of Surface Mining Reclamation and Enforcement's ("OSM") responses to comments on regulations regarding permit ***applications***. Federal regulations do not control the meaning of ***property*** under this Court's rules. Rather, Montana law like the *Helena Sand & Gravel* decision controls. Moreover, OSM's language recognizes that a property interest, albeit a limited one, inheres even in a federal permit ***application***. 59 Fed. Reg. 54,306, 54,313 (Oct. 28, 1994). Thus, even if OSM's comment responses were relevant to a question of Montana law, they in no way suggest that a ***permit*** is not a property right.

interest of expediting decision on any matter before it, or for other good cause shown." MONT.R.APP.P. 29(1). The District Court has fully adjudicated the merits of this dispute, and the only remaining issue pertains to attorneys' fees.[3] It would make little sense for this Court to review the Remedy Order without also reviewing the Merits Order. Indeed, this Court's review of the Remedy Order without a coinciding review of the Order on Petition would constitute precisely the "piecemeal appeal" process that MEIC acknowledges is disfavored. MEIC Resp. to Rule 29 Motion at 2. As a result, there is "good cause" for "expediting decision" on the Order on Petition prior to final judgment.

MEIC further errs in their argument that Rule 54(b) provides the sole mechanism for appealing the Merits Order. Given the imminence of the District Court's April 1, 2022 vacatur date, Rule 54 cannot provide relief prior to vacatur, particularly since the District Court denied Westmoreland/Local 400's motion for stay pending appeal. *See* Yemington Decl. at ¶ 10 (filed with Westmoreland/Local 400's Rule 29 motion in DA 22-0068). Given that the Remedy Order appeal is properly before this Court, the Court should suspend Rule 4 regarding attorney fees

[3] Mechanical application of Rule 4 so that a party could never obtain review without resolving attorneys' fees could motivate a party to postpone resolution of the fee issue in order to prevent immediate review. Rule 4 was never intended to reward such manipulation.

disputes and review both the Order on Petition and the Remedy Order simultaneously to expedite and streamline the appellate process.

III. STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, MEIC's requests to dismiss these appeals should be denied.

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