

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 22-0064

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Petitioners and Appellees,

vs.

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

Respondent-Intervenors and Appellants,

and

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent and Appellant,

and

MONTANA BOARD OF ENVIRONMENTAL REVIEW,

Respondent and Appellant.

MONTANA ENVIRONMENTAL INFORMATION CENTER AND SIERRA CLUB'S RENEWED RESPONSE TO DEQ'S MOTIONS 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 Petitioners and 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	3
ARGUMENT	4
I. DEQ FAILS TO DEMONSTRATE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS.	4
II. DEQ FAILS TO DEMONSTRATE A LIKELIHOOD OF IRREPARABLE HARM.	6
III. DEQ CONTINUES TO IGNORE THE WORSENING IMPAIRMENT OF RECEIVING WATERS.	8
IV. DEQ FAILS TO PRESENT ANY COMPELLING EVIDENCE ABOUT THE PUBLIC INTEREST.	8
INDEX OF EXHIBITS	10

TABLE OF AUTHORITIES

Cases

<u>Abbassi v. INS,</u> 143 F.3d 513 (9th Cir. 1998)	7
<u>In re Bull Mountain Mine,</u> No. BER 2013-07 SM (Mont. Bd. Env’t Rev. Jan. 14, 2016)	5
<u>In re Royston,</u> 249 Mont. 425, 816 P.3d 1054 (1991)	6
<u>MEIC v. DEQ,</u> 2005 MT 96, 326 Mont. 502, 112 P.3d 964	5
<u>Nken v. Holder,</u> 556 U.S. 418 (2009)	4, 7, 8
<u>Nw. Corp. v. Dep’t of Pub. Serv. Regul.,</u> No. DV 16-1236 (Mont. 13th Jud. Dist. Ct. July 29, 2018).....	7
<u>Park Cnty. Env’t Council v. DEQ,</u> 2020 MT 303, 402 Mont. 168, 477 P.3d 288	8
<u>Portland Gen. Elec. Co. v. Nw. Corp.,</u> No. CV 21-47-BLG-SPW, 2021 WL 4775958 (D. Mont. Oct. 13, 2021).....	3
<u>State v. English,</u> 2006 MT 177, 333 Mont. 23, 140 P.3d 454	4
<u>U.S. Nat. Bank v. Indep. Ins. Agents,</u> 508 U.S. 439 (1993)	5
<u>Vote Solar v. Dep’t of Pub. Serv. Regul.,</u> DA 19-0223 (Mont. Aug. 6, 2019).....	1, 3, 4, 6, 8

Statutes

MCA § 82-4-227	4, 6
----------------------	------

Regulations

ARM 17.24.1118.....	6
ARM 17.24.405.....	5, 6
ARM 17.24.407.....	6
ARM 17.24.425.....	5
ARM 17.24.522.....	6
ARM 17.8.1106.....	5

Constitutional Provisions

Mont. Const. art. II, § 3.....	8
--------------------------------	---

Other Authorities

McElfish & Beier, Environmental Regulation of Coal Mining: SMCRA's Second Decade (1990).....	5
---	---

INTRODUCTION

After overturning the AM4 permit for the Rosebud strip-mine on multiple grounds, the district court denied DEQ a stay pending appeal and crafted a balanced remedy to protect water resources and uphold the rule of law, while allowing Westmoreland Rosebud Mining (WRM) 5 months to wind down operations and move operations to other permitted coal reserves. In March this Court stayed vacatur, affording WRM at least 3 more months.

DEQ's stay motion fails to demonstrate—as it must—that the court's detailed analysis and measured remedy 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, DEQ does not make a “strong showing” of likely success on the merits, neglecting to address five of the district court's six alternative grounds for overturning the permit. Id. Second, DEQ is not harmed. The agency's authority to ensure timely reclamation is independent of WRM's mining permit, and DEQ's speculation about “potential[]” impacts to energy supplies were resolved by the deferment of vacatur and this Court's stay, which allowed WRM the time it requested (8 months) to replace AM4.

Third, DEQ fails to address the district court's findings that a stay would substantially injure Petitioners-Appellees (MEIC) because: receiving waters are already impaired from excessive pollution, additional mining will substantially

worsen the impairment, and WRM violated pollution limits 67 times during the litigation. Fourth, regarding public interest, DEQ fails to address the court's determination that vacatur upholds Montana's constitution and the rule of law.

Because DEQ fails to demonstrate the district court's detailed and balanced ruling lacked "conscientious judgment or exceeded the bounds of reason," its stay motion should be denied.

BACKGROUND

The sprawling Rosebud strip-mine produces coal from four active mine areas, of which the AM4 expansion is a small fraction: 306 acres with 12 million tons (Mt.) of coal (7.5-9.2 Mt. remain unmined). D.C. Dkt. 79 at 7; D.C. Dkt. 89, Ex. 2 ¶ 9; D.C. Dkt. 82, ¶¶ 14-16. In addition to AM4, WRM is actively strip-mining portions of Area B (7 Mt.), Area C (2.5 Mt.), and Area F (9 Mt.). D.C. Dkt. 94, Ex. A ¶ 9. The low-quality Area B coal requires blending, but coal in Areas C and F does not. Id. WRM has more permitted reserves in Areas A (.8 Mt.), B (2 Mt.), and F (approximately 60 Mt.) that could be in production in 2-4 months, 6-8 months, and 8-10 months, respectively. Id. ¶ 9; D.C. Dkt. 89, Ex. 2 ¶ 9. WRM and Talen Montana LLC (Talen), the operator and minority owner of the Colstrip Power Plant (Colstrip), also have coal stockpiles sufficient to operate the plant for at least 2 months (about 1.2 Mt.). D.C. Dkt. 89, Ex. 2 ¶ 8. And on May 27, 2022, DEQ approved the AM5 expansion, adding 62.3 Mt. Second Schlissel Decl. ¶ 5.

Westcoast utilities owning 70% of Colstrip are suing Talen to “tak[e] steps to[] clos[e]” the plant. 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 among the costliest energy sources. D.C. Dkt. 89, Ex. 1 ¶ 10. In April 2022 one Colstrip unit broke down, causing a nearly 60-day unplanned outage and reducing coal demand. Second Schlissel Decl. ¶ 2. In May Talen went bankrupt because of its uneconomical coal plants. Id. ¶ 4.

In October 2021, the district court overturned the AM4 permit on six grounds. D.C. Dkt. 79 at 13-34. The court later denied a stay pending appeal but deferred vacatur until April 2022 (5 months from its merits ruling), based on WRM’s testimony that it could replace AM4 in 2-4 months. D.C. Dkt. 107 at 12; D.C. Dkt. 83, Ex. A ¶ 6. The Court found impacts to energy supplies speculative given available reserves and low spring energy demand. D.C. Dkt. 107 at 12. This Court stayed vacatur until completion of district court proceedings and resolution of the pending stay motions, at least 3 months’ additional time.

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 is “whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice.” Id. 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. DEQ FAILS TO DEMONSTRATE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS.

DEQ cannot make a “strong showing” of likely success on the merits because, as the district court noted, the agency addresses only one of six bases for the court’s ruling. D.C. Dkt. 107 at 16; State v. English, 2006 MT 177, ¶ 47, 333 Mont. 23, 140 P.3d 454 (“Failure to challenge each of the alternative bases for a district court’s ruling results in affirmance.”). Moreover, the one issue DEQ addresses—burden of proof—is mistaken. Contrary to DEQ’s assertion (DEQ Br. at 5), the district court explained the Montana Strip and Underground Mine Reclamation Act (MSUMRA) expressly places the burden of proof on the “applicant.” D.C. Dkt. 107 at 19 (citing MCA § 82-4-227(1), (3)(a) and ARM 17.24.405(6)(c)). DEQ fails to address the additional case law, regulations, and legislative history cited by the court. Compare DEQ Br. at 4-6, with D.C. Dkt. 107

at 19-20 and D.C. Dkt. 79 at 25-28. The court’s analysis is further supported by scholars and Montana Board of Environmental Review (BER) precedent.¹

DEQ mistakenly contends the district court “disregarded” MEIC v. DEQ, 2005 MT 96, 326 Mont. 502, 112 P.3d 964. In fact, the court explained that MEIC—a Clean Air Act (CAA) case—is consistent with MSUMRA authorities in holding that the relevant inquiry in a permit appeal is whether “Bull Mountain [the applicant] established” that its “proposed project will not cause or contribute to” environmental harms. MEIC, ¶¶ 36, 38; D.C. Dkt. 107 at 20; compare ARM 17.8.1106(1) (CAA rule), with id. 17.24.405(6)(c) (MSUMRA rule).

DEQ relies on ARM 17.24.425(7), but then admits the plain text does not support its position. DEQ Br. at 5 & n.2. DEQ asserts—for the first time on appeal—that this provision represents a scrivener’s error. Id. But “scrivener’s error” is an exceptional doctrine and applies only if “overwhelming evidence” of legislative intent supports the rewrite. U.S. Nat. Bank v. Indep. Ins. Agents, 508 U.S. 439, 462 (1993). Not so here, where the underlying statute, regulations, BER precedent, and scholars place the “burden” on the “applicant,” MCA § 82-4-

¹ See McElfish & Beier, Env’t Law Instit., Environmental Regulation of Coal Mining: SMCRA’s Second Decade at 61 (1990) (“The applicant must bear the burden of demonstrating that the operation can avoid adverse consequences”); In re Bull Mountain Mine, No. BER 2013-07 SM, at 86-87 (Mont. Bd. Env’t Rev. Jan. 14, 2016) (overturning permit because applicant and DEQ “did not affirmatively demonstrate” operation would “prevent material damage”) (Ex. 1).

227(1), (3), to “affirmatively demonstrate” that strip-mining “will not result in material damage.” ARM 17.24.405(6)(c); see also supra note 1.

DEQ’s argument about the “statutory provisions of evidence” (DEQ Br. at 5-6) was similarly rejected by the district court, which explained that “consistent with the rules of evidence, the applicant”—who bears the statutory and regulatory “burden” of demonstrating environmental harm “will not occur,” MCA § 82-4-227(1), (3); ARM 17.24.405(6)(c)—“would be defeated if neither side produced evidence.” D.C. Dkt. 107 at 19 (quoting In re Royston, 249 Mont. 425, 428, 816 P.3d 1054, 1057 (1991)). DEQ fails to address this point. As such, it is DEQ, not the district court, that “failed to provide any analysis on an important point.” See DEQ Br. at 6. DEQ fails to make a “strong showing” of likely success on the merits. Vote Solar, slip op. at 2.

II. DEQ FAILS TO DEMONSTRATE A LIKELIHOOD OF IRREPARABLE HARM.

DEQ’s argument that it “apparently lacks authority to oversee reclamation” following vacatur is mistaken. See DEQ Br. at 7. DEQ’s authority over reclamation is independent of WRM’s permit, and remains despite permit suspension or revocation, ARM 17.24.407(1)(b); permit expiration and permanent cessation of mining, id. 17.24.522(1); and even bond forfeiture, id. 17.24.1118(3).

DEQ’s speculation about “potential[]” harm to energy supplies (DEQ Br. at 7) is ungrounded and has been refuted by subsequent events. The mere “possibility

of irreparable injury fails to satisfy the second [stay] factor.” Nken, 556 U.S. at 434-35 (quoting Abbassi v. INS, 143 F.3d 513, 514 (9th Cir. 1998)). The district court found these concerns “speculative” given the relatively modest AM4 operations and alternative coal supplies. D.C. Dkt. 107 at 12. Subsequent events bear this out. After initially claiming to need 2-4 months to replace AM4, D.C. Dkt. 83, Ex. A ¶ 6, WRM changed position to claim to need 6-10 months to “fully” replace AM4 long term. D.C. Dkt. 94, Ex. A ¶ 10. WRM has now been afforded 8 months (5 by the district court deferment and 3 by this Court’s stay), with stockpiles for 2 more months. See supra Background. And Colstrip’s demand declined due to the April breakdown and lengthy unplanned outage, while DEQ permitted 62.3 Mt. of additional mining in May. Id. These events eliminated even hypothetical risks of unplanned outages due to inadequate coal from AM4.

Finally, DEQ cites the Nowakowski declaration, but it cuts sharply against the agency. Not only can WRM now fully replace AM4, but Colstrip’s increasing unplanned outages neither harm public power supplies, nor cost ratepayers. During lengthy unplanned Colstrip outages in 2013-2014 and 2018, utilities obtained replacement power without costing ratepayers. Schlissel Decl. ¶¶ 2-3; Nw. Corp. v. Dep’t of Pub. Serv. Regul., No. DV 16-1236, slip op. at 20-22, 25 (Mont. 13th Jud. Dist. Ct. July 29, 2018) (Ex. 2). Utilities obtained replacement power during the lengthy breakdown and unplanned outage this April. Second

Schlissel Decl. ¶¶ 2-3. DEQ has it backwards: Colstrip, an unreliable plant rate-based at an inflated price, costs ratepayers dearly. Id.; D.C. Dkt. 89, Ex. 1, ¶ 10.

III. DEQ CONTINUES TO IGNORE THE WORSENING IMPAIRMENT OF RECEIVING WATERS.

DEQ's discussion of harm to MEIC fails entirely to dispute the court's findings that (1) receiving waters are impaired; (2) cumulative impacts of additional mining will substantially worsen the impairment; and (3) WRM violated pollution limits 67 times during the litigation. Compare DEQ Br. at 8-9, with D.C. Dkt. 107 at 3 n.1, 10-11, 21-22; D.C. Dkt. 89, Ex. 1 ¶¶ 4-11. Thus, DEQ fails to demonstrate an abuse of discretion. Nken, 556 U.S. at 433-34 (burden on movant).

IV. DEQ FAILS TO PRESENT ANY COMPELLING EVIDENCE ABOUT THE PUBLIC INTEREST.

DEQ's public interest discussion rehashes mistaken arguments about reclamation and energy supplies. See supra Part II. DEQ fails to address the district court's analysis of environmental harm, the rule of law, and Montana's constitutional protections. The court's decision vindicated the "anticipatory and preventative" provisions of Montanans' "inalienable ... right to a clean and healthful environment." Park Cnty. Env't Council v. DEQ, 2020 MT 303, ¶ 61, 402 Mont. 168, 477 P.3d 288; Mont. Const. art. II, § 3. In sum, DEQ shows no abuse of discretion. Vote Solar, slip op. at 2. Its motion should be denied.

Respectfully submitted this 15th day of June, 2022.

/s/ Shiloh Hernandez
Shiloh Hernandez

INDEX OF EXHIBITS

Ex. 1 In re Bull Mountain Mine, No. BER 2013-07 SM (Mont. Bd. Env't Rev. Jan. 14, 2016)

Ex. 2 Nw. Corp. v. Dep't of Pub. Serv. Regul., No. DV 16-1236 (Mont. 13th Jud. Dist. Ct. July 29, 2018)

DECLARATION OF DAVID SCHLISSEL

I, David Schlissel, declare pursuant to Mont. Code Ann. § 1-6-105:

1. I have degrees in engineering and law from MIT and Stanford and have presented expert analysis of electric utilities for four decades. I have studied the economics and operations of Colstrip Power Plant (Colstrip) and the western electricity grid over the past decade during which time I have prepared several expert reports.
2. Sonja Nowakowski cites the unplanned outage of Colstrip Unit 4 from 2013-2014 to argue that if another unplanned outage occurred, ratepayers “could likely pay increased rates” for replacement power. Ms. Nowakowski omits that Montana ratepayers did not pay anything for the replacement power in 2013-2014. As an expert in that proceeding, I know the Montana PSC required Northwestern shareholders to pay for the replacement power because the company acted imprudently.
3. Colstrip Unit 4 suffered another unplanned outage for nearly 80 days during summer peak energy demand in 2018. Utilities purchased replacement power which again utility shareholders were required to pay, not ratepayers due to the PSC’s determination that NorthWestern’s actions were imprudent. The unplanned outages in 2013-2014 and 2018 demonstrate that in the extremely unlikely event that stopping mining in AM4 would cause an unplanned outage, it is highly unlikely that there would be any impact to public energy supplies or costs.
4. The Rosebud Mine has significant excess production capacity. The mine produced 13 million tons in 2008 and over 8 million tons in 2019.
<https://www.eia.gov/coal/data/browser/#/mine/2401747/?freq=A&pin=>.
After Units 1 and 2 closed, production in 2020 dropped to 5.3 million tons. Thus if one of the mine’s four draglines stops operating, the others are sufficient to supply the power plant.

I declare under penalty of perjury under the laws of Montana that the foregoing is true and correct. Dated this 18th day of February 2022 in Seattle, WA.



David Schlissel

February 18, 2022

SECOND DECLARATION OF DAVID SCHLISSEL

I, David Schlissel, declare pursuant to Mont. Code Ann. § 1-6-105:

1. According to Talen Montana, LLC (Talen), there were “no planned outages for [Colstrip] Units 3&4 through Spring or Fall 2022.” Br. of Talen as Amicus, at 16 (Mont. Feb. 23, 2022).
2. U.S. Energy Information Administration data show at least one Colstrip unit was shut down for nearly 60 days from April 1. The unplanned outage resulted from a significant equipment failure. Tom Lutey, *Montana Lawmakers Briefed on Talen Bankruptcy*, BILLINGS GAZETTE (May 20, 2022), https://billingsgazette.com/news/montana-lawmakers-briefed-on-talen-bankruptcy/article_189a9a1a-d7d2-11ec-9b0e-2fe931931f3c.html. This problem is exacerbated because the majority of Colstrip owners “want[] to spend less” on maintenance and “object to costly repairs” because they are required to stop providing their customers with coal-based energy by the end of 2025. Id.
3. The lengthy unplanned Colstrip outage did not affect electricity supply and did not cause any blackouts or brownouts.
4. In May Talen declared bankruptcy because “its seven coal-fired power plants had become unprofitable in markets where power from gas-fired and renewable energy sources were more cheaply priced.” Talen’s bankruptcy jeopardizes worker pensions and clean-up obligations. Id.
5. On May 27, 2022, Montana DEQ approved the AM5 expansion at the Rosebud Mine, allowing Westmoreland to strip-mine 62.3 million additional tons from 2,539 acres.

I declare under penalty of perjury under the laws of Montana that the foregoing is true and correct. Dated this ____ day of June, 2022 in Seattle, WA.

/s/ David Schlissel June 14, 2022
David Schlissel

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 06-15-2022:

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

J. Stuart Segrest (Attorney)
314 N. Last Chance Gulche, Suite 300
Helena MT 59601
Representing: Montana Board of Environmental Review
Service Method: eService

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

Electronically Signed By: Shiloh Silvan Hernandez
Dated: 06-15-2022