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 WESTMORELAND'S FIRST MOTION FOR STAY (DA 22-0064)

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

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 decision and remedy are supported by law and fact and have been validated by subsequent developments. By contrast Westmoreland Rosebud Mining's (WRM) attacks on the court are bereft of legal or factual support. WRM resorts to misrepresentations, 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 court closely considered potential impacts to the coal supply to the Colstrip Power Plant (Colstrip), granting WRM the 2-4 months WRM said it needed to replace the AM4 supply. While WRM later changed its story, seeking 6-10 months, subsequent events—this Court's March Order, reduced demand at Colstrip because of a breakdown, and additional permitting by DEQ—afforded WRM the additional time.

Second, while WRM makes conclusory assertions of error, it fails to cite a single page in the district court's decisions containing any error.

Third, WRM fails to cite any harm that is not alleviated by the now at least 8-month deferment of vacatur, and WRM is mistaken that vacatur limits reclamation.

Fourth, WRM's argument about harm to Petitioners-Appellees (MEIC) misrepresents the court's analysis of (1) the impaired status of affected waters; (2) increased pollution from mining; and (3) WRM's 67 violations of pollution limits during the litigation. Finally, while WRM attacks MEIC's energy expert as "uninformed" and "amateur," the company merely speculates about impacts to energy supplies, which have been refuted by recent events. In short, WRM has distinctly failed to demonstrate that the district court abused its discretion.

BACKGROUND

The Rosebud strip-mine produces coal from four active mine areas—A, B, C, and F—containing 95 million tons of permitted reserves. D.C. Dkt. 89, Ex. 2 ¶ 9. AM4 is a sliver of the operation: 306 acres with 12 million tons (Mt) of coal, of which 7.5-9.2 Mt remain. D.C. Dkt. 79 at 7; 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.; D.C. Dkt. 89, Ex. 2 ¶ 9. WRM and Talen Montana LLC (Talen), the now-bankrupt operator and minority owner of Colstrip, have stockpiles sufficient to operate the plant for 2 months (about 1.2 Mt.). D.C. Dkt. 89, Ex. 2 ¶ 8. On May 27, 2022, DEQ approved the AM5 expansion, adding 62.3 Mt. of permitted coal. Second Schlissel Decl. ¶ 5.

Westcoast utilities owning 70% of Colstrip are suing Talen and others 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 one of 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. Then, 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 the 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. WRM FAILS TO DEMONSTRATE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

WRM first grouses that the district court erred in basing its remedy decision on MEIC's proposed order. WRM Br. at 4-5. But district courts may adopt a proposed order, like here, 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. WRM's specific complaint about the court's not addressing WRM's inconsistent statements about replacement of AM4 coal has no merit. Compare D.C. Dkt. 83, Ex. A ¶ 6 (2-4 months to replace AM4), with D.C. Dkt. 94, Ex. A ¶ 10 (6-10 months to replace AM4). Courts are free to disregard a party's self-serving and contradictory statements. *E.g.*, Stott v. Fox, 246 Mont. 301, 309, 805 P.2d 1305, 1310 (1990); Day v. CTA, Inc., 2014 MT 119,

¶ 13, 375 Mont. 79, 324 P.3d 1205. This is not the first time in the past 6 months that a judge has rejected WRM's "inconsistent statements" about the impacts of partial cessation of mining. MEIC v. Haaland, No. CV 19-130, slip op. at 31 (D. Mont. Feb. 11, 2022) (Ex. 1).[1] Moreover, WRM's shifting positions change nothing, as recent events—this Court's March order, additional permitting, and the lengthy unplanned outage at Colstrip in April—provided WRM the 8 months it purportedly needed for long-term replacement of AM4. See supra Background.[2]

Second, WRM's skeletal 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 D.C. Dkt. 79 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

[1] Nor was it error for the court to disregard Talen's intervention pleadings about uncertain impacts of vacatur. See D.C. Dkt. 94 Ex. A ¶ 20 (stating "it is unclear if [WRM] will be able to supply" sufficient coal without AM4); Nken, 556 U.S. at 434-34 (mere possibility of injury insufficient for stay); cf. WRM Br. at 4-5.

[2] WRM and Talen have 2 months of coal stockpiles. D.C. Dkt. 89, Ex. 2 ¶ 8.

> "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.[3]

II. WRM FAILS TO DEMONSTRATE A LIKELIHOOD OF IRREPARABLE HARM

WRM contends mistakenly the court abused its discretion in assessing harms from "loss of investments in drilling and blasting" and winding down AM4. WRM Br. at 7. But the court gave WRM 5 months (and this Court added 3) to do this. D.C. Dkt. 107 at 13. WRM provided no evidence this was inadequate. See D.C. Dkt. 94, Ex. A ¶ 15 (recognizing deferment and not disputing its adequacy to complete blasting and drilling). Moreover, "purely monetary harm 'is not normally considered irreparable.'" WildEarth Guardians v. Haaland, No. CV-17-80, 2021 WL 4192884, at *2 (D. Mont. Aug. 5, 2021) (quoting Doe #1 v. Trump, 957 F.3d 1050, 1060 (9th Cir. 2020)). And any investments of WRM are only "delayed, not lost" because the AM4 coal "will still remain in the ground." Env't Def. Ctr. v. BOEM, 2022 WL 1816515, at *26, ___ F.4th ___ (9th Cir. June 3, 2022).

WRM's suggestion that vacatur limits reclamation is also mistaken. By law, reclamation is not dependent on WRM's possession of a permit, and is required if a

[3] 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).

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 objects to findings the court did not make. The court did not "attribute" the impairment of the receiving stream to "coal mining" (WRM Br. at 8), but only noted that the receiving waters are "impaired" (D.C. Dkt. 107 at 21), which the Board of Environmental Review (BER) 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 that the "cumulative effects" would do so (D.C. Dkt. 107 at 21), which BER also found. WRM Ex. B at 39, 63 (13% increase in salinity from cumulative mining impacts). Tellingly, WRM does not deny it violated pollution limits 67 times during this case. D.C. Dkt. 107 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. D.C. Dkt. 107 at 21-22; D.C. Dkt. 89, Ex. 1 ¶ 5. In so doing, the court noted 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." D.C. Dkt. 107 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 does not dispute the district court's finding that "the public interest is best served when the law is followed." D.C. Dkt. 107 at 22 (quoting Mont. Wilderness Ass'n v. Fry, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006)). And WRM's ad hominem attacks on MEIC's expert, David Schlissel, and speculative fearmongering about energy supply and costs, WRM Br. at 8-9, have been disproven by events. WRM has now been granted the time and additional coal resources for long-term replacement of AM4, obviating even speculative risks to coal supply. See supra Background and Argument Part 1. Moreover, the recent nearly 60-day breakdown and unplanned outage at Colstrip, the majority owners' suit to close the plant, and Talen's bankruptcy demonstrate that Colstrip is not essential to public power supplies. See supra Background. It is one of the most expensive energy sources for Montana ratepayers. D.C. Dkt. 89, Ex. 1 ¶ 10.

Accordingly, WRM fails to show an 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

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:

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