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,

Respondents and Appellant.

MONTANA ENVIRONMENTAL INFORMATION CENTER AND SIERRA CLUB'S RENEWED RESPONSE TO WESTERN ENERGY'S SECOND MOTION FOR STAY (ORIGINALLY FILED IN DA 22-0068)

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 CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STANDARD OF REVIEW 2

ARGUMENT 2

I. WRM FAILS TO ADDRESS THE RELEVANT FACTORS REQUIRED FOR A STAY PENDING APPEAL. 2

II. WRM FAILS TO ADDRESS EACH OF THE ALTERNATIVE BASES FOR THE DISTRICT COURT'S RULING. 3

III. WRM'S SKELETAL ARGUMENTS FAIL TO CITE ANY SPECIFIC ERROR AND MUST THEREFORE BE REJECTED. 4

IV. WRM'S SCATTERSHOT ALLEGATIONS OF ERROR MISS THE MARK 5

INDEX OF EXHIBITS 11

TABLE OF AUTHORITIES

Cases

Albrechtsen v. Bd. of Regents,
309 F.3d 433 (7th Cir. 2002) 1, 4, 5, 9

Al-Tamimi v. Adelson,
916 F.3d 1 (D.C. Cir. 2019) 3, 4, 5, 9

In re Bull Mountain Mine,
No. BER 2013-07 SM (Mont. Bd. Env't Rev. Jan. 14, 2016) 7, 8

In re Royston,
249 Mont. 425, 816 P.3d 1054 (1991) 7

Johansen v. DNRC,
1998 MT 51, 288 Mont. 39, 955 P.2d 653 ..... 1, 4, 5, 9

MEIC v. DEQ (MEIC I),
2005 MT 96, 326 Mont. 502, 112 P.3d 964 8

MEIC v. DEQ (MEIC II),
2020 MT 288, 402 Mont. 128, 476 P.3d 32 3

Nken v. Holder,
556 U.S. 418 (2009) 2

Park Cnty. Env't Council v. DEQ,
2020 MT 303, 402 Mont. 168, 477 P.3d 288 10

State v. English,
2006 MT 177, 333 Mont. 23, 140 P.3d 454 ..... 1, 3, 6

State v. Ferguson,
2005 MT 343, 330 Mont. 103, 126 P.3d 463 3

State v. Neiss,
2019 MT 125, 396 Mont.1, 443 P.3d 435 3

United States v. Dunkel,
927 F.2d 955 (7th Cir. 1991) 1

United States v. Mitchell,
971 F.3d 993 (9th Cir. 2020) 2

Vote Solar v. Dep't of Pub. Serv. Regul.,
DA 19-0223 (Mont. Aug. 6, 2019) 1, 2, 4

Statutes

30 U.S.C. § 1253 9

30 U.S.C. § 1276 9

MCA § 2-4-704 10

MCA § 2-4-711 9

MCA § 82-4-206 9

MCA § 82-4-227 7

Rules

M.R.App.P. 22 3

Regulations

30 C.F.R. § 733.11 9

ARM 17.24.405 ..... 6, 7

Other Authorities

McElfish & Beier, Regulation of Coal Mining: SMCRA's Second
Decade (1990) 7

INTRODUCTION

Westmoreland Rosebud Mining's (WRM) second stay motion fares no better than its first. First, WRM fails to address the relevant factors from Vote Solar v. Dep't of Pub. Serv. Regul., DA 19-0223, slip op. at 2 (Mont. Aug. 6, 2019), instead offering only an analysis of the merits. This is fatal. Second, WRM fails to address each of the alternative bases for the district court's merits decision, which is also fatal. State v. English, 2006 MT 177, ¶ 47, 333 Mont. 23, 140 P.3d 454.

Third, while WRM asserts a passel of supposed errors, its motion fails to identify a single page of the district court's decision where an alleged error may be found. It is not the job of the Court or Petitioners-Appellees (together, "MEIC") to research and develop WRM's skeletal arguments. Johansen v. DNRC, 1998 MT 51, ¶ 24, 288 Mont. 39, 955 P.2d 653. "Judges are not like pigs, hunting for truffles buried in the record." Albrechtsen v. Bd. of Regents, 309 F.3d 433, 436 (7th Cir. 2002) (quoting United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991)).

Fourth, untethered by the actual text of the district court's ruling, WRM ascribes to the court analyses it did not conduct, while ignoring the court's detailed analyses that refute WRM's positions. Contrary to WRM's unsupported aspersions, the district court made no findings of fact, but faithfully enforced the plain text of the Montana Strip and Underground Mine Reclamation Act

(MSUMRA)—which WRM fails to cite even once—and appropriately reversed the unlawful decision. WRM's motion is without merit and should be denied.

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 ADDRESS THE RELEVANT FACTORS REQUIRED FOR A STAY PENDING APPEAL.

A "stay pending appeal" is an "extraordinary remedy." United States v. Mitchell, 971 F.3d 993, 999 (9th Cir. 2020) (quoting Nken, 556 U.S. at 428). The moving party carries the burden of demonstrating that the traditional factors set forth in Vote Solar support this extraordinary remedy. Slip op. at 2; Nken, 556 U.S. at 433-34. Here, WRM addresses only the first of the four factors, neglecting the other three—likelihood of irreparable injury, injury to other parties, and the public interest. Vote Solar, slip op. at 2. Thus, WRM fails to carry its burden.

WRM's attempt to evade this problem by incorporating by reference its deficient stay motion filed in case DA 22-0064 should be rejected. WRM Br. at 1. A motion to stay is limited to "10 pages of text including [any supporting] affidavit." M.R.App.P. 22(2)(a)(iv). A party may not use incorporation by reference to "evade word limits." Al-Tamimi v. Adelson, 916 F.3d 1, 6 (D.C. Cir. 2019) (collecting cases); State v. Ferguson, 2005 MT 343, ¶¶ 41-42, 330 Mont. 103, 126 P.3d 463. WRM's motion in DA 22-0064 meets the 10-page limit, with 9 pages of text and a 1-page supporting affidavit. Thus, incorporating that motion by reference substantially exceeds the page limit and should be rejected.

II. WRM FAILS TO ADDRESS EACH OF THE ALTERNATIVE BASES FOR THE DISTRICT COURT'S RULING.

"Failure to challenge each of the alternative bases for a district court's ruling results in affirmance." English, ¶ 47; MEIC v. DEQ (MEIC II), 2020 MT 288, ¶ 27, 402 Mont. 128, 476 P.3d 32 (single issue dispositive on appeal). In denying WRM's stay motion, the district court noted that WRM failed to address multiple alternative grounds for the court's merits ruling. D.C. Dkt. 107 at 16 (noting that WRM "address[ed] only three of six grounds"). WRM repeats the same error on appeal.[1] WRM does not challenge the district court's rulings regarding the Department of Environmental Quality's (DEQ) unqualified expert testimony, D.C.

[1] In fairness, WRM had no choice: it is precluded from raising new arguments on appeal. State v. Neiss, 2019 MT 125, ¶ 43, 396 Mont.1, 443 P.3d 435.

Dkt. 79 at 23-25, DEQ's reliance on evidence the agency itself deemed unreliable, id. at 28-31, or DEQ's arbitrary determination that adding more salt to a stream impaired for salt would not worsen the impairment, id. at 31-34. By failing to address these alternative bases for the district court's decision, WRM has failed to make a "strong showing" of success on the merits. Vote Solar, slip op. at 2.

III. WRM'S SKELETAL ARGUMENTS FAIL TO CITE ANY SPECIFIC ERROR AND MUST THEREFORE BE REJECTED.

"Mentioning an argument 'in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones' is tantamount to failing to raise it." Al-Tamimi, 916 F.3d at 6 (citation omitted); Johansen, ¶ 24. While WRM asserts multiple errors by the district court, the company fails to cite a single page from the district court's decision containing an error. See WRM Br. at 1-6. And while WRM contends the court "disregarded plain statutory language," it fails to provide a single citation to MSUMRA. See id. at 1-6. It is not the task of the Court or MEIC to search out specific analyses of the district court that could fall within WRM's blanket accusations or provisions of MSUMRA that the court supposedly disregarded. Albrechtsen, 309 F.3d at 436. We are not tasked with developing arguments for WRM. Johansen, ¶ 24. For this additional reason, WRM has failed to make a strong showing of success on the merits or demonstrate any abuse of discretion. Vote Solar, slip op. at 2.

IV. WRM'S SCATTERSHOT ALLEGATIONS OF ERROR MISS THE MARK.

WRM argues that the district court erroneously "adopted a new set of facts," which it then found to be "arbitrary and capricious." WRM Br. at 2. The company fails, however, to cite any portion of the court's decision adopting new facts. See id. at 2-3. A review of the district court's decision reveals that the court did not conduct any fact-finding, but made multiple determinations that, based on undisputed facts, DEQ and the Board of Environmental Review (BER) committed legal error. D.C. Dkt. 79 at 13-34. The only example offered by WRM (with no citation) appears related to a determination by the court that a certain error—DEQ and BER's reliance on a survey they both found to be unreliable—was not harmless. D.C. Dkt. 79 at 28-31; see WRM Br. at 2 n.2. WRM appears to argue (though it is unclear) that this undisputed error was harmless because the evidence at issue (a survey of aquatic life) was cumulative. See WRM Br. at 2 n.2. But the district court expressly addressed and rejected this claim because the survey was the only "specific evidence" relied on by DEQ to address aquatic life health. D.C. Dkt. 79 at 30-31. WRM hints that this analysis is mistaken, but fails to cite any evidence to support its allegation of error. See WRM Br. at 2 n.2. Again, it is not the office of the Court or MEIC to flesh out WRM's skeletal argument. Albrechtsen, 309 F.3d at 436; Al-Tamimi, 916 F.3d at 6; Johansen, ¶ 24. This is far from a strong showing of likely success on the merits. Because this is another

independent basis for upholding the district court's decision, this failure alone is fatal to WRM's motion. English, ¶ 47.

Second, WRM contends—again without citation—that the court erroneously found, as a matter of fact, that mining had impaired the receiving stream. WRM Br. at 3. But the court made no such finding.[2] WRM also misrepresents the record with its suggestion—without citation—that the court improperly found that AM4 would exacerbate the salinity impairment in the receiving stream. WRM Br. at 3. In fact, the court found DEQ and BER violated MSUMRA (which requires DEQ to assess "cumulative hydrologic impacts," ARM 17.24.405(6)(c)) by failing to consider the undisputed 13% cumulative increase in salinity from all mining operations. D.C. Dkt. 79 at 31-34.[3] WRM notes that the court overturned DEQ and BER's conclusion of law that AM4 was designed to prevent material damage, WRM Br. at 3, but that was not a finding of fact (but a conclusion of law) and WRM provides no argument that the district court's legal analysis was mistaken. See id. WRM's unsupported argument fails.

[2] The court cited BER's finding that DEQ had identified mining as an "unconfirmed source" of excess salinity in the receiving stream. D.C. Dkt. 79 at 6; WRM Ex. B at 28, ¶ 96. That does not constitute "adopt[ing] a new set of facts." Cf. WRM Br. at 2.

[3] BER found that AM4 alone would extend the duration of elevated salinity in the stream by decades or centuries. WRM Ex. B at 36-38, ¶¶ 133, 138; id. at 68 n.4. The district court correctly noted BER's findings. D.C. Dkt. 79 at 31.

Third, WRM mistakenly contests the court's analysis of the burden of proof—again without citation to the court's analysis. In fact, the court noted MSUMRA expressly places the "burden" on the "applicant" to show that cumulative impacts of mining will not cause material damage to water resources. MCA § 82-4-227(1), (3)(a) (emphasis added), cited in D.C. Dkt. 79 at 25. Implementing regulations confirm that the applicant must "affirmatively demonstrate[]" that "cumulative hydrologic impacts will not result in material damage." ARM 17.24.405(6)(c), cited in D.C. Dkt. 79 at 25. The court noted legislative history demonstrates the burden is on the applicant. D.C. Dkt. 79 at 25. The court cited analogous case law, id. at 25, and explained that if no evidence were presented, WRM could not carry its burden. D.C. Dkt. 107 at 19 (citing In re Royston, 249 Mont. 425, 428, 816 P.3d 1054, 1057 (1991)).[4] The court then explained that, contrary to this wall of authority, a divided BER erroneously required MEIC (the public) to affirmatively demonstrate that mining would cause material damage to water resources. D.C. Dkt. 79 at 26.

[4] The court's analysis is supported by scholarship and BER precedent. See McElfish & Beier, 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" to water resources) (Ex. 1).

WRM fails to address—or cite—any of the court's analysis. Instead, WRM cites a non-MSUMRA case, MEIC v. DEQ (MEIC I), 2005 MT 96, 326 Mont. 502, 112 P.3d 964. WRM Br. at 3-4. But the district court addressed that case too, noting that in its analysis of analogous Clean Air Act (CAA) rules, the Court held that the burden was on the applicant to "establish[] that emissions from its proposed project will not cause or contribute to" certain environmental impacts. D.C. Dkt. 79 at 27 (citing MEIC I, ¶¶ 36, 38). WRM fails to address this point and, consequently, fails to make a strong showing of likely success on the merits.

Fourth, WRM contends the court erred in excluding post hoc evidence. WRM Br. at 4. WRM again fails to cite the court's analysis, which relied on the text of MSUMRA and implementing regulations, on point precedent from BER, and a long line of decisions from this Court and the U.S. Supreme Court proscribing post hoc evidence and argument. Compare WRM Br. at 4-5, with D.C. Dkt. 79 at 20-22. In support of its position, WRM again cites MEIC I, ¶¶ 13, 22, 26, but none of these citations discusses post hoc evidence. More importantly, as the district court noted, BER itself expressly rejected this argument based on MEIC I. See In re Bull Mountain Mine, No. BER 2013-07 SM at 56-59 (finding MSUMRA would be "for naught" if applicants or DEQ could "present extra-record evidence and manufacture novel analysis and argument" in permit appeals).

Fifth, WRM contends that the district court erroneously "over[wrote]" BER "policies on issue exhaustion." WRM Br. at 5. Here, WRM not only fails to cite the supposedly offending portion of the court's analysis, but also fails to cite the alleged "BER policies" the court supposedly overwrote (there are none). WRM Br. at 5. This skeletal analysis is insufficient to overcome the court's extended analysis of this issue, which (fittingly) rejected WRM's position for lack of legal support. D.C. Dkt. 79 at 13-17; Remedies Decision at 18 & n.7; Albrechtsen, 309 F.3d at 436; Al-Tamimi, 916 F.3d at 6; Johansen, ¶ 24.

Finally, WRM wrongly asserts that Montana courts lack authority to vacate an agency's unlawful approval of a mining permit. WRM Br. 5-6. As the district court correctly noted, MSUMRA and the Montana Administrative Procedure Act (MAPA) work together to authorize Montana courts to "affirm," "remand," "reverse," or "modify" an agency decision. D.C. Dkt. 107 at 7-9 (citing MCA §§ 2-4-711 and 82-4-206(1)-(2)). Importantly, these statutes play an essential role in meeting Montana's obligation to "implement, administer, enforce, and maintain" its federally approved program in accordance with the Surface Mining Control and Reclamation Act (SMCRA), which expressly empowers courts to "vacate" unlawfully issued permits. See 30 U.S.C. §§ 1253(a)(4), § 1276(b); 30 C.F.R. § 733.11. Here, the court correctly applied the "standard remedy for permits … unlawfully issued" consistently with the court's broad authority under MAPA and

MSUMRA. D.C. Dkt. 107 at 7-9 (quoting Park Cnty. Env't Council v. DEQ, 2020 MT 303, ¶¶ 55, 89, 402 Mont. 168, 477 P.3d 288, and MCA § 2-4-704(2)).

In sum, WRM has failed to make a strong showing of likely success on the merits or any showing on the other required elements. The district court did not abuse its discretion. WRM's stay motion should therefore 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)

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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