



FILED

08/09/2022

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 22-0064

MONTANA ENVIRONMENTAL INFORMATION
CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

WESTMORELAND ROSEBUD MINING, LLC,
f/k/a 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.

FILED

AUG 09 2022

Bowen Greenwood
Clerk of Supreme Court
State of Montana

MONTANA ENVIRONMENTAL INFORMATION
CENTER and SIERRA CLUB,

Petitioners and Appellees,

v.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Respondent and Appellant,

MONTANA BOARD OF ENVIRONMENTAL
REVIEW, WESTMORELAND ROSEBUD
MINING, LLC, f/k/a WESTERN ENERGY CO.,
NATURAL RESOURCE PARTNERS, L.P.,
INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 400, and NORTHERN
CHEYENNE COAL MINERS ASSOCIATION,

Respondents.

ORDER

MONTANA ENVIRONMENTAL INFORMATION
CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

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

Respondents,

and

WESTMORELAND ROSEBUD MINING, LLC,
f/k/a 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.

MONTANA ENVIRONMENTAL INFORMATION
CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Respondent,

and

MONTANA BOARD OF ENVIRONMENTAL
REVIEW,

Respondent and Appellant,

and

WESTMORELAND ROSEBUD MINING, LLC,
f/k/a WESTERN ENERGY CO., NATURAL
RESOURCE PARTNERS, L.P.,
INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 400, and NORTHERN
CHEYENNE COAL MINERS ASSOCIATION,

Respondents.

These consolidated appeals are from orders issued in Cause No. DV-2019-34 in the Sixteenth Judicial District Court, Rosebud County. Pending before the Court are motions for relief from the District Court's denial of stay pursuant to M. R. App. P. 22(2) filed by the Montana Department of Environmental Quality (DEQ) and Westmoreland Rosebud Mining, LLC, Natural Resources Partners, L.P., International Union of Operating Engineers, Local 400, and Northern Cheyenne Coal Miners Association (Westmoreland). Montana Environmental Information Center and Sierra Club (MEIC) oppose the motions for relief. Talen Montana, LLC (Talen), filed an amicus brief in support of the motions with leave of Court.

On October 29, 2021, the District Court issued an Order on Petition (Merits Order) that reversed the approval of a mining permit, referred to as the "AM4" permit, by the Montana Board of Environmental Review (BER), and remanded the matter to the Montana Department of Environmental Quality (DEQ) to review the AM4 permit application consistent with the District Court's rulings.

Shortly after the court issued the Merits Order, both DEQ and Westmoreland moved for clarification of the Merits Order and to stay the Merits Order pending appeal under M. R. App. P. 22(1). MEIC moved for attorney fees and costs from DEQ. After briefing on the motion for clarification and stay was complete, the District Court issued its Order on Remedy and Stay (Stay Order) on January 28, 2022, in which it clarified that the Merits

Order was a vacatur of the AM4 permit, and in which it further denied staying this vacatur for the pendency of the appeal, ruling that the vacatur would be effective as of April 1, 2022, to give Westmoreland time to safely suspend its operations under the permit. Pursuant to stipulation of the parties, the District Court stayed the briefing schedule of MEIC's motion for attorney fees and costs while MEIC and DEQ negotiated a settlement of the amount of attorney fees and costs that DEQ will owe if MEIC prevails on appeal.

On February 4, 2022, prior to the District Court ruling on MEIC's motion for attorney fees and costs, Westmoreland filed its first Notice of Appeal in this matter, which is this Court's Case No. DA 22-0064. In that Notice, Westmoreland asserted that it was appealing from the Stay Order pursuant to M. R. App. P. 6(1), 6(3)(e), and 6(3)(h).

On February 8, 2022, prior to the District Court ruling on MEIC's motion for attorney fees and costs, DEQ filed its Notice of Appeal in this matter, which is this Court's Case No. DA 22-0067. In that Notice, DEQ asserted that it was appealing from both the Merits Order and the Stay Order pursuant to M. R. App. P. 6(3)(e).

Also on February 8, 2022, prior to the District Court ruling on MEIC's motion for attorney fees and costs, Westmoreland filed its second Notice of Appeal in this matter, which is this Court's Case No. DA 22-0068. In that Notice, Westmoreland asserted that it was appealing from the Merits Order, the Stay Order, and "all previous orders and rulings excepted or objected to which led up to and resulted in judgment" pursuant to M. R. App. P. 6(1).

In each of these three appeals, the respective Appellants filed motions to stay the vacatur of the AM4 permit pending resolution of these appeals. In DA 22-0068, Westmoreland also filed a motion to suspend the appellate rules. MEIC opposed these motions, and in its responsive briefs asserted that each of these appeals should be dismissed because they were premature.

On March 30, 2022, with the motions to stay pending in DA 22-0064, -0067, and -0068, we stayed the appeals pending entry of final judgment in the District Court and remanded the matter for the court to resolve attorney fees and costs and to enter final

judgment. We further held that, once the District Court entered final judgment, MEIC would have 30 days to respond to the Rule 22 motions to stay and that Westmoreland and DEQ could then file reply briefs.

The District Court resolved the outstanding attorney fee and cost issues and entered final judgment on May 16, 2022, and per our March 20, 2022 Order, briefing on the pending motions to stay pursuant to Rule 22 resumed.

On May 26, 2022, BER appealed from that final judgment in this Court's Case No. DA 22-0281. On May 27, 2022, this Court consolidated DA 22-0064, -0067, -0068, and -0281 into Case No. DA 22-0064. Briefing concluded on the pending motions for relief and the issue of whether this Court should stay the matter pursuant to M. R. App. P. 22(2) is now ready for determination.

We review a district court's grant or denial of a stay for abuse of discretion. *Ternes v. State Farm Fire & Cas. Co.*, 2011 MT 156, ¶ 17, 361 Mont. 129, 257 P.3d 352. The test for abuse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *Jarvenpaa v. Glacier Electric Co-op*, 1998 MT 306, ¶ 13, 292 Mont. 118, 970 P.2d 84. In reviewing the decision, we are guided by several considerations. First, the Court will be guided by Rule 22(2)(a)(i), which requires that an appellant demonstrate good cause for the relief requested. The Court also looks to the general factors governing stays of civil judgments articulated in *Hilton v. Braunskill*, 481 U.S. 770, 107 S. Ct. 2113 (1987). Those factors are: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

M. R. App. P. 22(2)(a)(i) requires that the movant demonstrate good cause for the relief requested. "Good cause" is generally defined as a legally sufficient reason and referred to as the burden placed on a litigant to show why a request should be granted. *Brookins v. Mote*, 2012 MT 283, ¶ 29, 367 Mont. 193, 292 P.3d 347 (citations omitted).

Thus in the present case the burden is on Westmoreland or DEQ to demonstrate good cause for this Court to grant relief from the District Court's Order on Remedy and Stay.

1. *Does Westmoreland or DEQ make a strong showing that its respective appeal is likely to succeed on the merits?*

In the Merits Order, the District Court reversed BER's approval of the AM4 permit and remanded the matter to DEQ to review Westmoreland's permit application. The court found six independent bases for its ruling. In the Stay Order, the District Court asserted that each of these six alternate bases was sufficient, in and of itself, to result in reversal and remand. Because Westmoreland and DEQ failed to address all six bases in their motions to stay before the District Court, that court concluded that they had failed to demonstrate a strong likelihood of success on the merits. The court relied on *State v. English*, 2006 MT 177, ¶ 47, 333 Mont. 23, 140 P.3d 454, in which we held that a party must challenge each of the alternate bases for a district court's ruling in order to prevail on appeal.

In the motion for relief filed in DA 22-0068, Westmoreland summarily addresses the various rulings in the Merits Order. However, at this stage of the proceedings we do not have an impression as to the likelihood of Westmoreland's or DEQ's success on appeal. We thus consider this a neutral factor. See *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation*, DA 19-0223, Order (Mont. Aug. 6, 2019).

2. *Has either Westmoreland or DEQ demonstrated that it will be irreparably injured absent a stay?*

In the Stay Order, issued January 28, 2022, the District Court chose to defer vacatur of the AM4 permit until April 1, 2022, to alleviate the potential harm alleged by Westmoreland and DEQ. It reasoned that the delay would give Westmoreland time to alleviate safety hazards, wind down its operations in AM4, and move its operations to another permitted area.

In its initial brief, Westmoreland alleged it will suffer irreparable harm if this stay is not granted because it will incur financial loss and inconvenience in shutting down its mining operations at AM4 and transferring those operations to other permitted areas.

However, in its reply brief Westmoreland informs us that it ceased operations at AM4 and moved its equipment to other permitted areas prior to March 30, 2022. Thus, regardless of whether this Court grants a stay, Westmoreland has already suffered this alleged harm.

However, Talen filed an amicus brief asserting that it would also suffer irreparable harm if this Court does not stay the vacatur of the AM4 permit. Talen operates Colstrip Steam Electric Station Units 3 & 4 and is the recipient of the coal mined from AM4. Talen explains that the coal from AM4 is part of the blend it uses to operate Units 3 & 4, which are turned on and off in response to consumer energy demands. Talen is contractually obligated to obtain its coal exclusively from Westmoreland, and it currently does not have adequate infrastructure to obtain its coal from alternate sources. Talen alleges it will have difficulty replacing the AM4 coal and if it cannot adequately replace it, it might have to run Units 3 & 4 at a lower capacity or not run them at all if energy demand is such that it consumes the current stockpiles. Talen alleges that the character of the AM4 area coal is qualitatively different from the coal mined in Westmoreland's other permitted areas, and that simply moving operations to another permitted area may not meet Talen's needs for sustained operation of Units 3 & 4.

Both the District Court and MEIC make reasonable arguments as to why the vacatur of the permit would not cause irreparable harm. In the Stay Order, the court asserts that the concerns Westmoreland and DEQ raised about adverse impacts to Montana's energy supply are both "hypothetical" and "highly speculative," as a lengthy chain of events would need to unfurl before a worst-case scenario—increased costs to consumers and the possibility of brownouts or blackouts—could occur. However, both MEIC and the District Court recognized that the timing of the vacatur would have a direct impact on the likelihood of a worst-case scenario occurring.

In the Stay Order, the District Court explained:

[I]f vacatur is deferred until spring, when electricity demand is low and supplies of hydroelectric and solar energy are abundant, it is still extremely unlikely that energy supplies or energy costs in Montana or the Pacific Northwest would be negatively affected. This is because coal stockpiles at

the mine and power plant . . . are sufficient to keep at least one of the two Colstrip units operating for four months . . . which is sufficient to meet reduced spring electricity demands.

(Internal citation and quotation omitted.) The court noted that in both 2020 and 2021, either Unit 3 or 4 were shut down for a few months during the spring and fall “shoulder seasons.”

However, as the procedural history set forth above illustrates, resolution of this matter is likely to extend beyond the “shoulder seasons,” thus increasing the likelihood that a stay will have a negative impact on Westmoreland’s ability to fulfill its supply contract with Talen, and leading to Talen being unable to meet energy demands. Thus, this factor preponderates in favor of granting relief from the Stay Order.

3. *Will issuance of the stay substantially injure the other parties interested in this proceeding?*

Before this Court, both Westmoreland and DEQ deny any other parties will be harmed if the stay is granted. However, in the Stay Order, the District Court found that the impacts of mining on water resources adjacent to the mine had already been severe and had caused environmental harm: “[T]he stream is impaired for multiple pollutants, including salinity; mining in the AM4 Area will add more salinity to the stream; and the cumulative impact of all mining will increase the concentration of salinity in the stream substantially.”

MEIC alleges that the cumulative effects of AM4 would substantially worsen the impairment of the receiving stream and that both BER and the District Court recognized this impact. MEIC relies on portions of BER’s June 6, 2019 Board Order, in which BER concluded that an increase in pollutants in the groundwater was caused by “all mining in the area, including previously permitted areas.” (Emphasis BER’s.) MEIC further asserts that it is undisputed that Westmoreland “violated pollution limits 67 times during the litigation.” (Emphasis MEIC’s.) However, MEIC does not allege that these violations occurred in AM4 nor does it explain how these violations are relevant to the stay issue.

Under this factor, the question is whether other parties suffer a *substantial* injury as a result of a stay. Neither BER, nor the District Court, nor MEIC has quantified the impact of mining in AM4; rather they each assert that AM4 contributes to some degree to a cumulative harm. Nor is there clarity as to the time period over which this harm has occurred or will measurably worsen. Simply put, there is no indication that allowing the permit to remain in place during the appeal phase of this litigation will cause substantial injury. As such, this factor preponderates in favor of the motions for relief from the stay.

4. *Does the public interest lie with granting or denying the stay?*

Westmoreland maintains that the public interest lies in granting the stay because maintaining the stay creates a risk of higher energy prices for Montana consumers. DEQ argues that the public interest lies in granting the stay because “[t]he public has a great interest in the electricity that powers their homes and businesses,” and it further has an interest in DEQ’s reclamation authority.

MEIC argues that Westmoreland and DEQ have failed to prove that not granting the stay would cause any of these harms. It asserts that it is mere speculation that the District Court’s denial of the stay may cause any increase in energy prices and MEIC further disproved DEQ’s argument that its ultimate reclamation authority would be impaired if the AM4 permit is vacated. However, as we noted above, the timing of this appeal is such that the likelihood of a negative impact on energy supplies is increased over the time period the District Court considered in determining a deferred vacatur of the AM4 permit.

Undoubtedly, the public also has an interest in a clean and healthful environment. Art. IX, Sec. 1, Mont. Const. However, as explained in the second factor above, we are not convinced that allowing a stay of the vacatur to remain in place during the pendency of these appeals will cause substantial environmental harm.

Considering the likelihood of an adverse impact on energy supplies and costs for Montana consumers against the unquantified adverse impact on the environment, we also conclude that this factor preponderates in favor of relieving Westmoreland and DEQ from the Stay Order.

In balancing the four factors, we conclude that good cause exists to order the relief requested..

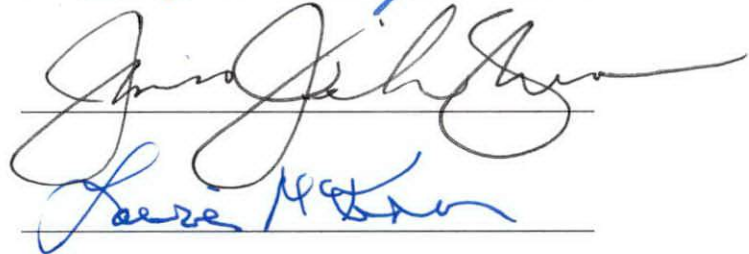
IT IS THEREFORE ORDERED that the motions for relief from the District Court's Order on Remand and Stay are GRANTED.

The vacatur of the AM4 permit is STAYED pending the resolution of these appeals.

Dated this 9th day of August, 2022.


Chief Justice










Justices