

3-24-2023

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Recommended Citation

Kerry Roebke, *PREVIEW; Montana Environmental Information Center v. Westmoreland Rosebud Mining, LLC: Procedural Issues Regarding Environmental Legislation in Montana*, 84 Mont. L. Rev. Online 11 (2023).

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**PREVIEW; Montana Environmental Information Center v.
Westmoreland Rosebud Mining, LLC: Procedural Issues Regarding
Environmental Legislation in Montana**

Kerry Roebke*

The Montana Supreme Court will hear oral argument in *Montana Environmental Information Center v. Westmoreland Rosebud Mining, LLC* on April 3, 2023, at 10:30 a.m. in the Strand Union Building at the Montana State University, Bozeman, Montana. John Martin, Kyle Gray, and Samuel Yemington submitted briefs on behalf of Respondent-Intervenors and Appellants Westmoreland Rosebud Mining, LLC, et al. (“Westmoreland”). Nicholas Whitaker, Jeremiah Langston, Amy Christensen, and J. Stuart Segrest submitted briefs on behalf of the Respondents and Appellants, Montana Department of Environmental Quality (“DEQ”) and Montana Board of Environmental Review (“BER”). Shiloh Hernandez, Derf Johnson, Roger Sullivan, and Walton D. Morris submitted briefs on behalf of the Petitioners and Appellees, Montana Environmental Information Center, and Sierra Club (“Conservation Groups”). The Court has also granted Robert L. Sterup of Brown Law Firm, PC and Joshua B. Frank of Baker Botts LLP to participate on behalf of Talen Montana, LLC as *Amici Curiae*.

I. INTRODUCTION

In *Montana Environmental Information Center v. Westmoreland Rosebud Mining, LLC*, the Court will determine whether the Sixteenth Judicial District Court erred in reversing BER’s Decision to uphold DEQ’s grant of the AM4 permit. The Court will address three issues at oral argument: (1) Did the hearing officer err in limiting the issues and evidence the Conservation Groups could present in the contested case proceedings while allowing the DEQ and Westmoreland to present evidence outside the administrative record on which DEQ based its permitting decision? (2) Did BER err in its allocation of the burden of proof? (3) Did the district court err in reversing BER’s decision to uphold DEQ’s approval of the AM4 permit amendment upon BER’s finding that AM4 is designed to prevent material damage?

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II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Environmental and Administrative Statutes in Montana*

The Montana Strip and Underground Mine Reclamation Act, (“MSUMRA”) establishes requirements and adequate remedies to protect the environment from degradation and prevent unreasonable depletion and degradation of natural resources.¹ As part of the AM4 permitting process, DEQ and BER assess whether the expansion of the Rosebud Mine would create hydrologic impacts resulting in material damage to water quality. MSUMRA provides that DEQ “shall exercise general supervision, administration, and enforcement”² and BER “shall conduct contested case hearings”³ regarding requests for permits and permit amendments.⁴ Under MSUMRA, contested case hearings are governed by the Montana Administrative Procedure Act.⁵

Under the Montana Administrative Procedure Act (“MAPA”), agency actions are regulated to give notice to the public and provide for public participation in a governmental action while establishing standards for judicial review of final agency decisions.⁶ MAPA establishes the procedures and requirements in contested cases before an agency, including the applicable rules of evidence.⁷ Specifically, allowing that “the agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.”⁸ MAPA clarifies that an agency’s final decision must include findings of fact based exclusively on the evidence and matters officially noticed.⁹

B. *Current Litigation and Procedural History*

In 2009, Westmoreland requested a permit amendment, known as AM4, to expand its Rosebud Mine in Colstrip, Montana.¹⁰ After a six-year review period, DEQ and BER allowed public comment before granting the AM4 permit amendment in 2015 and allowed Westmoreland to expand operations at the Rosebud Mine.¹¹ Conservation groups challenged the grant of the AM4 permit on the grounds that the proposed expansion

¹ MONT. CODE ANN. § 82-4-201 (2021).

² *Id.* at § 82-4-205(2)(a).

³ *Id.* at § 82-4-205(3).

⁴ *Id.* at § 82-4-206.

⁵ *Id.* at § 82-4-206(2).

⁶ MONT. CODE ANN. § 2-4-101 (2021).

⁷ *Id.* at § 2-4-601.

⁸ *Id.* at § 2-4-612(7).

⁹ *Id.* at § 2-4-623.

¹⁰ Westmoreland Rosebud Mining Appellant’s Opening Brief at 6, *Mont. Env’tl. Info. Ctr. v. Westmoreland Rosebud Mining, LLC* (Mont. Aug. 10, 2022) (No. DA 22-0064), available at <https://perma.cc/M68A-22RG>.

¹¹ *Id.*

would worsen water quality standards of the East Fork Armells Creek (“EFAC”) in a contested case hearing pursuant to the MAPA.¹² Upon review of the investigation and expert reports presented at the contested case hearing, BER reasoned that the expansion of operations would extend the duration of elevated salinity levels in the EFAC but would not lead to increased salinity concentration or other material damage as defined by MSUMRA.¹³ BER concluded that the expansion of Rosebud Mine would not cause material damage or violate water quality standards pursuant to the requirements and regulations under MSUMRA.¹⁴ BER’s final decision upheld the grant of the AM4 permit and Westmoreland was allowed to expand operations.

After BER’s decision, Conservation Groups petitioned for judicial review naming BER, DEQ, and Westmoreland as parties. The Sixteenth Judicial District Court, Rosebud County reversed BER’s decision ordering vacatur of the AM4 permit amendment and remanded the matter back to DEQ. The district court awarded reasonable attorneys’ fees and costs to Conservation Groups. Westmoreland and DEQ appeal the district court’s decision.

III. SUMMARY OF THE ARGUMENTS

A. *Appellants’ Arguments*

On appeal, DEQ and Westmoreland assert that BER followed the MAPA during the contested case proceedings and argue that (1) Montana Environmental Information Center (“MEIC”) had the burden of proving the AM4 permit violated MSUMRA, (2) administrative exhaustion barred MEIC from raising certain claims, and (3) all parties had the opportunity to present relevant evidence tied to the record at the time of BER’s decision and so long as the issue was not new. Appellants also argue that the AM4 permit would prevent material damage.

Appellants argue that BER correctly allocated the burden of proof to MEIC. The statutory provisions applicable to MAPA regarding contested cases clearly state that “the initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side”; and “a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.”¹⁵ Here, Appellants argue that MEIC has the burden of showing that the AM4 permit would cause material damage in violation of MSUMRA, which MEIC failed to do during the contested

¹² Appellee’s Combined Response Brief at 13–16, *Mont. Env’tl. Info. Ctr. v. Westmoreland Rosebud Mining, LLC* (Mont. Nov. 4, 2022) (No. DA 22-0064), available at <https://perma.cc/M68A-22RG>.

¹³ *Id.*

¹⁴ *Id.* at 20.

¹⁵ MONT. CODE ANN. §§ 26-1-401, 402, 403(1) (2021).

case proceedings. Appellants argue that MAPA places the burden on the challenging party—as is generally the case in civil litigation—and, absent a statutory direction to the contrary, the ordinary rules of evidence apply.¹⁶

Additionally, Appellants argue MEIC did not challenge BER's findings of fact and therefore failed to follow all steps of the administrative process necessary to maintain claims challenging BER's factual findings on judicial review. Appellants argue that MEIC had to file exceptions to the proposed findings of fact and conclusions of law in order to preserve their claim for judicial review, which MEIC did not do prior to BER rendering a final decision. MEIC focused its argument on perceived legal errors rather than lodging exceptions to specific findings of fact.¹⁷ Appellants argue that MEIC's failure to lodge exceptions or verbalize exceptions during oral argument means MEIC did not exhaust its administrative remedies.¹⁸ Appellants argue that, because administrative remedies were not exhausted, there is no subject matter jurisdiction to review BER's finding of facts. Additionally, Appellants cite to case law supporting deference to the findings of the agency and view challenged findings in the light most favorable to the prevailing party.¹⁹

Further, Appellants argue that all parties had ample opportunity to provide relevant evidence. Appellants support BER's decision to allow testimony from Dr. Emily Hinz regarding aquatic life as a hydrologist for DEQ's Coal Program. Appellants argue that Dr. Hinz's testimony and role within DEQ were mischaracterized and BER was correct in relying upon her testimony as an expert and fact witness. Appellants argue that Conservation Groups' substantial rights were in no way prejudiced by Dr. Hinz's testimony.²⁰ Additionally, Appellants argue that testimony presented to rebut new expert testimony from Conservation Groups was appropriately allowed. Appellants cite to MAPA's provisions for a broad contested case to support their position.²¹

Finally, Appellants argue that the AM4 permit would prevent material damage. Based on the evidence presented by Appellants and the DEQ investigation, BER determined that the AM4 permit would not create hydrological impacts that were in violation of water quality standards. BER determined that Conservation Groups failed to show material damage would occur and granted the AM4 permit. Appellants argue that

¹⁶ Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality, 112 P.3d 964, 968–69 (Mont. 2005).

¹⁷ Westmoreland Rosebud Mining Appellant's Opening Brief, *supra* note 10, at 31–32.

¹⁸ *Id.*; MONT. CODE ANN. § 2-4-702(1).

¹⁹ Benjamin v. Anderson, 112 P.3d 1039, 1042–43 (Mont. 2005); Nw. Corp. v. Mont. Dep't of Pub. Serv. Regulation, 380 P.3d 787, 794 (Mont. 2016); KB Enters., LLC v. Mont. Human Rights Comm'n, 443 P.3d 498, 501 (Mont. 2019) (Hearing Examiner's findings are "entitled to great deference.").

²⁰ Westmoreland Rosebud Mining Appellant's Opening Brief, *supra* note 10, at 39–41.

²¹ MONT. CODE ANN. § 2-4-612(1) (2021).

the district court inserted other statutory regulations into the MSUMRA proceeding in error which created a different and irrelevant standard.²²

B. Appellees' Arguments

In response, the Conservation Groups argue that the district court made the correct decision in reversing the decisions made by BER.²³ Conservation Groups argue that BER and DEQ violated the fundamental premise of coal-mining regulation and ignored the worsening impairment of the East Fork Armells Creek due to the expansion of the Rosebud Mine. Appellees argue that, during the permit-appeal process, BER imposed a series of rulings that foreclosed public challenge to a permitting decision. Appellees argue that administrative exhaustion was not applicable in the case at hand, Conservation Groups did not carry the burden of proof, and *post hoc* arguments and evidence submitted by Appellants were improper.²⁴

Appellees argue that Appellants are confounding exhaustion of administrative remedies and administrative issue exhaustion. Appellees rely on case law clarifying that exhausting administrative remedies occurs when a party fails to “proceed through each step of the . . . administrative review scheme and receive a ‘final decision,’”²⁵ while issue exhaustion requires a party seeking judicial review of agency action to have raised issues before the agency first.²⁶ Appellees rely on *Sims v. Apfel*, stating that when no statute requires issue exhaustion, statutory issue exhaustion may only be imposed where the administrative procedure is “analog[ous] to normal adversarial litigation,”²⁷ or the agency has expressly “notif[ied] claimants of an issue exhaustion requirement.”²⁸ Appellees support the district court’s conclusion that Conservation Groups were not required to identify issues or deficiencies in DEQ’s written findings before their publication and that MSUMRA requires issue exhaustion for administrative appeals.²⁹

Appellees argue that, under MSUMRA, Appellants are required to prove that environmental harm will not occur and that it is not the public’s responsibility to prove environmental harm will occur. Appellees cite to the provisions of MSUMRA that prevent DEQ from issuing a permit unless “the application affirmatively demonstrates and the department’s written findings confirm . . . that . . . the hydrologic consequences and

²² Westmoreland Rosebud Mining Appellant’s Opening Brief, *supra* note 10, at 39–47.

²³ Appellee’s Combined Response Brief, *supra* note 12, at 26–27.

²⁴ *Id.*

²⁵ Carr v. Saul, 141 S. Ct. 1352, 1358 n.2 (2021).

²⁶ *Sims v. Apfel*, 530 U.S. 103, 107 (2000).

²⁷ *Id.* at 109.

²⁸ *Id.* at 113.

²⁹ Appellee’s Combined Response Brief, *supra* note 12, at 32–33.

cumulative hydrologic impacts will not result in material damage.”³⁰ Appellees cite to case law and past BER decisions supporting their argument that the permit applicant retains the burden of proof in permit appeals.³¹

Appellees argue that the inclusion of unqualified expert testimony and *post hoc* rationalization regarding material damage determination was forbidden.³² Appellees state that admission of testimony from the expert opining on salinity concentration and the expert hydrologist—Dr. Hinz—was *post hoc* testimony and not harmless.

C. *Amicus Curiae Arguments*

In support of the Appellants, Talen Montana, LLC argues that (1) the Rosebud Mine is the sole source of coal that is of the appropriate quality and no readily available sources of replacement fuel exist, (2) obtaining alternative sources of coal could take years, and (3) Talen Montana is in jeopardy of being unable to meet demand which is likely to result in irreparable harm.³³ Talen Montana is the co-owner and operator of the Colstrip Steam Electric Station (“CSES”) Units 3 and 4, which generate and supply electric power to customers in Montana and the Northwest region of the United States.³⁴ Talen Montana argues that if the district court’s order vacating the grant of the AM4 permit remains in place, then there is a substantial risk of a significant disruption to Montana’s electrical supply.³⁵ Talen Montana asserts that there is not enough coal of sufficient quality and quantity stockpiled to run the CSES Units 3&4 in order to meet the energy demands in Montana and the Northwest.³⁶ Talen Montana argues that a fuel shortage—due to the unavailability of AM4 permit-coal—increases the risk of volatile energy prices, brownouts, or blackouts. Talen Montana asserts that importing appropriate quality coal from other locations would not be feasible given the impending cessation of mining in the AM4 permit area due to the lack of rail infrastructure and contractual obligations with Westmoreland Rosebud Mining.³⁷

³⁰ MONT. ADMIN. R. 17.24.405(6)(c) (2004).

³¹ *In re Royston*, 816 P.2d 1054, 1057 (Mont. 1991); *In re Bull Mountains*, No. BER 2013-07 SM, at 77–78, 86–87 (Mont. Bd. Env’tl. Rev. Jan. 14, 2016) (because MSUMRA requires a showing of a “likelihood or defensible level of confidence that material damage will not result,” BER ruled against DEQ and applicant where evidence only showed that mining “may or may not cause material damage”), available at <https://perma.cc/MK9A-Z5VM>.

³² Appellee’s Combined Response Brief, *supra* note 12, at 44–45.

³³ Talen Montana, LLC Amicus Curiae Brief in Support of Appellant’s Rule 22 Motions at 1–2, *Mont. Env’tl. Info. Ctr. v. Westmoreland Rosebud Mining, LLC* (Mont. Feb. 23, 2022) (No. DA 22-0064), available at <https://perma.cc/M68A-22RG>.

³⁴ *Id.*

³⁵ *Id.* at 10–13.

³⁶ *Id.*

³⁷ *Id.* at 13.

IV. ANALYSIS

A. *Did the hearing officer err in limiting the issues and evidence the Conservation Groups could present in the contested case proceedings while allowing DEQ and Westmoreland to present evidence outside the administrative record on which DEQ based its permitting decision?*

Under Montana law, “opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved” and “except as otherwise provided by statute relating directly to an agency, agencies shall be bound by common law and statutory rules of evidence.”³⁸ Additionally, the objections process under MSUMRA is statutorily prescribed.³⁹ *Vote Solar v. Montana Department of Public Service Regulation*⁴⁰ established that:

A party forfeits argument as to an issue not raised during the administrative process; however, so long as a claimant provides enough clarity such that the decision maker understands the issues raised for the agency to use its expertise to resolve the claim, the claimant will have met this burden.⁴¹

Given that the objection process during DEQ’s permitting procedure is governed by statute, failing to file written objections required by the statutory rules would preclude Conservation Groups from raising new issues not previously objected to during the contested case proceedings. The Hearing Officer in the contested case proceedings likely did not err in limiting the issues and evidence that Conservation Groups could present.

Under MAPA, findings of fact in a contested case proceeding must be based exclusively on the evidence and on matters officially noticed.⁴² DEQ argues that the evidence presented can be traced to its findings in its Cumulative Hydrological Impact Assessment (“CHIA”), which is part of the administrative record.⁴³ DEQ also argues that § 2-4-612(1) allows DEQ to submit evidence and argument explaining its permitting decision in a contested case proceeding. These arguments are persuasive as MSUMRA clearly states that contested case proceedings are governed by MAPA. Given that the relevant statutes explicitly state the MAPA governs contested case proceedings, §§ 2-4-623(2) and 2-4-612(1) control. Thus, limiting evidence to the record and matters officially noticed or evidence explaining DEQ’s permitting decision, which may not be in the administrative record.

³⁸ MONT. CODE ANN. § 2-4-612(1), (2) (2021).

³⁹ *Id.* at § 82-4-231(8).

⁴⁰ 473 P.3d 963 (Mont. 2020).

⁴¹ *Id.* at 978.

⁴² MONT. CODE ANN. § 2-4-623(2).

⁴³ DEQ Appellant’s Opening Brief at 39–40, *Mont. Env’tl. Info. Ctr. v. Westmoreland Rosebud Mining, LLC* (Mont. Aug. 10, 2022) (No. DA 22-0064), available at <https://perma.cc/M68A-22RG>.

B. *Did BER err in its allocation of the burden of proof?*

The permitting process under MSUMRA and the requirements for permitting under federal law must follow guidelines set forth in the respective statutes. Here, the statute clearly states that the applicant has the burden of proof to show that there will be no substantial hydrologic impacts with the expansion of the Rosebud Mine in order to acquire a permit. However, the Appellants' argument that Appellees have the burden of persuasion when challenging a permit decision is convincing. The Montana Supreme Court established precedent in *Montana Environmental Information Center v. Montana Department of Environmental Quality* that "the challenging party asserting the claim at issue has the burden of presenting the evidence necessary to establish the facts essential to a determination that the Department's decision violated the law."⁴⁴ Given that Conservation Groups were asserting the claim that the AM4 permit was unlawfully granted, Conservation Groups had the burden of proof. Determining that Conservation Groups had the burden of proof is supported by common law and the established rules of evidence.⁴⁵ BER did not err in its allocation of the burden of proof.

C. *Did the district court err in reversing BER's decision to uphold DEQ's approval of the AM4 permit amendment upon BER's finding that AM4 is designed to prevent material damage?*

Under MSUMRA, the AM4 permit may only be approved if DEQ assesses "the probable cumulative impact of all anticipated mining in the area on the hydrologic balance" and "the proposed operation of the mining operation has been designed to prevent material damage to the hydrologic balance outside the permit area."⁴⁶ Material damage means, pursuant to MSUMRA:

with respect to protection of the hydrologic balance, degradation or reduction by coal mining and reclamation operations of the quality or quantity of water outside of the permit area in a manner or to an extent that land uses or beneficial uses of water are adversely affected, water quality standards are violated, or water rights are impacted. Violation of a water quality standard, whether or not an existing water use is affected, is material damage.⁴⁷

The district court did not focus on BER's and DEQ's causation analysis,⁴⁸ but rather included an analysis of water quality standards established in

⁴⁴ 112 P.3d 964, 967 (Mont. 2005).

⁴⁵ MONT. CODE ANN. §§ 26-1-401, 402 (2021).

⁴⁶ MONT. CODE ANN. § 82-4-227(3)(a) (2021).

⁴⁷ *Id.* at § 82-4-203(32).

⁴⁸ DEQ Appellant's Opening Brief, *supra* note 43, at 41-42 (Because the definition of material damage includes the phrase "by coal mining," BER and DEQ have applied causation analysis to this

the Montana Water Quality Act (“MWQA”). DEQ argues that MWQA and MSUMRA have divergent standards and purposes, and therefore, the district court erred in incorporating standards under MWQA.⁴⁹ This argument is persuasive as MSUMRA specifically governs coal mining and does not reference that water quality standards should be governed by the MWQA, unlike the reference to MAPA regarding procedures in contested cases.⁵⁰

Appellants can sufficiently show that DEQ and BER adhered to statutory regulations during the permit process and in the contested case proceedings by requiring Appellants to show the plan to expand the Rosebud Mine will not materially damage or otherwise hydrologically impact the EFAC. Under Montana law, deference is given to agency determinations when contested cases are presented for judicial review and the court may affirm the decision, remand for further proceedings, or reverse or modify if substantial rights of the appellant have been prejudiced.⁵¹ Conservation Groups assert that BER’s conclusion about water quality standards was arbitrary and founded on unqualified expert testimony.⁵² Arbitrary decisions or evidence of clear error are prejudicial and would support the reversal or modification of an agency decision. However, it may be difficult for Conservation Groups to show that BER’s decision was arbitrary and clearly erroneous as Conservation Groups did not lodge exceptions to the findings of fact but rather focused on legal errors. Absent evidence of clear error or an arbitrary and capricious decision, the district court likely erred in reversing BER’s decision to uphold DEQ’s approval of the AM4 permit.

material damage assessment, i.e., “whether the proposed mining operation would cause violation of water quality standards outside the permit boundary.”).

⁴⁹ DEQ Appellant’s Opening Brief, *supra* note 43, at 42–45.

⁵⁰ MONT. CODE ANN. § 82-4-202 (2021).

⁵¹ MONT. CODE ANN. § 2-4-704 (2021).

⁵² Appellee’s Combined Response Brief, *supra* note 12, at 60.