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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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IN THE MATTER OF: The Notice of ) CASE NO.  
Appeal and Request for Hearing by) BER 2025-04 SM  
Westmoreland Absaloka Mining LLC )  
regarding Minor Revision 311 for )  
Coal Surface Mine Permit C1985005)

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TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT  
VIA ZOOM

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February 20, 2026  
10:40 a.m.

BEFORE CHAIRMAN DAVID SIMPSON,  
VICE CHAIR AGUIRRE, BOARD MEMBERS JOSEPH SMITH,  
JULIA ALTEMUS, JENNIFER RANKOSKY,  
and ALLAN PAYNE

PREPARED BY: LAURIE CRUTCHER, RPR  
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A P P E A R A N C E S:

ATTORNEY APPEARING ON BEHALF OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY:

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ATTORNEY APPEARING ON BEHALF OF WESTMORELAND RESOURCES:

MS. VICTORIA MARQUIS, ESQ. (via Zoom)  
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1           WHEREUPON, the following proceedings were  
2 had:

3                                   \* \* \* \* \*

4           CHAIR SIMPSON: It's 10:41. Let's bring  
5 the meeting back to order, please. Sandy, would  
6 you call the roll.

7           MS. MOISEY-SCHERER: Yes, sir. Chair  
8 Simpson.

9           CHAIR SIMPSON: Here.

10          MS. MOISEY-SCHERER: Vice Chair Aguirre.

11          VICE CHAIR AGUIRRE: Here.

12          MS. MOISEY-SCHERER: Board Member  
13 Altemus.

14          BOARD MEMBER ALTEMUS: Here.

15          MS. MOISEY-SCHERER: Board Member Payne.

16          BOARD MEMBER PAYNE: I'm here.

17          MS. MOISEY-SCHERER: Board Member  
18 Rankosky.

19          BOARD MEMBER RANKOSKY: Here.

20          MS. MOISEY-SCHERER: Board Member Smith.

21          BOARD MEMBER SMITH: Here.

22          MS. MOISEY-SCHERER: We have a quorum,  
23 sir.

24          CHAIR SIMPSON: Thank you very much.

25 Let's proceed. We are going to hear now on BER

1 2025-04 Surface Mining SM. This is the matter  
2 regarding Minor Revision 311, which has to do in  
3 turn with the bond adjustment at Absaloka Mine.

4 The Board tabled this discussion at the  
5 last meeting, and now we will hear oral argument.  
6 I'm going to ask that oral arguments be kept to 20  
7 minutes with an additional five minutes to rebut,  
8 keeping in mind also that this is strictly on the  
9 matter of the motion to dismiss, and not on the  
10 merits of the case. So with that, we'll ask  
11 Westmoreland Absaloka to lead off.

12 MR. KING: Board Chair, this is Sam King  
13 for DEQ. I hate to interrupt, and I see Ms.  
14 Marquis nodding her head, but respectfully it's  
15 DEQ's motion, and we were planning on presenting  
16 first, if that's acceptable.

17 CHAIR SIMPSON: I'm sorry. I stand  
18 corrected. Go right ahead.

19 MR. KING: Thank you very much. Let me  
20 get my timer started. I don't want to go over  
21 time.

22 Good morning, Board Chair and Board  
23 members. Sam King on behalf of Respondent DEQ.  
24 As you know, we're on DEQ's motion to dismiss the  
25 petition for a contested case of a purported

1 denial of a minor revision to Absaloka's coal  
2 mining permit.

3 I'd like to start with kind of the  
4 over-arching theme here, which is that the Montana  
5 Supreme Court has been really explicit that just  
6 because an administrative agency may possess  
7 quasi-judicial authority, that quasi-judicial  
8 authority does not extend to all facets of a case  
9 as it would with a court of competent  
10 jurisdiction.

11 Instead the Montana Supreme Court has  
12 been abundantly clear that if an administrative  
13 agency is going to hear certain components of a  
14 case, the ability to do so must have been  
15 expressly delegated by the Legislature, meaning it  
16 has to be explicitly stated about which of those  
17 components the Board can hear for that to be  
18 within the subject matter jurisdiction.

19 That's the problem that we're facing  
20 here today, is that in this appeal of Minor  
21 Revision 311, what Westmoreland is really asking  
22 for is the Board to weigh on the propriety or  
23 alleged impropriety of DEQ's bond amount.

24 I'd like point out that Westmoreland's  
25 petition is filed under 82-4-221 sub (3).

1 82-4-221 sub (3), you can hear a contested case  
2 appeal of an approval or denial of a minor  
3 revision, but that minor revision is limited to  
4 what's in a reclamation plan. It is not subject  
5 to the separate bonding requirements which  
6 actually fall under 82-4-223. And so there lies  
7 the rub, is that this Board's quasi-judicial  
8 authority is explicitly laid out in 82-4-206. All  
9 of those instances involve approvals or denials of  
10 permits. It does not involve the separate bond  
11 adjustment.

12 I'm going to walk through four points.  
13 First is a threshold matter. The minor revision  
14 wasn't denied, which is a necessary prerequisite  
15 to subject matter jurisdiction to be exercised.

16 Second, even if the Board could assume  
17 that it was, it doesn't confer subject matter on  
18 this Board to adjudicate the challenge to a  
19 bonding determination.

20 Third, the Board has no authority to  
21 issue a declaratory ruling on what DEQ's rules  
22 mean.

23 And finally, I'd just like to highlight  
24 what some of the practical implications might be  
25 should the Board exercise jurisdiction it doesn't

1 have.

2 To start, however, because the crux of  
3 Westmoreland's petition is really there's an  
4 avenue under MSUMRA for Westmoreland to challenge  
5 before this Board DEQ's bonding determinations --  
6 which is not true -- I want to zoom out and focus  
7 on the purpose of bonding under MSUMRA, which is  
8 distinct from other obligations thereunder, and  
9 why DEQ is the sole entity tasked with making that  
10 determination. From that background, it makes  
11 clear that Westmoreland's petition is untenable.

12 As we stated in briefing, MSUMRA  
13 provides DEQ and only DEQ determines the bond.  
14 Again, that's at 82-4-223, and what the Department  
15 can consider is wide ranging based on the  
16 reclamation, and the bond must be adjusted if,  
17 quote, "the cost of reclamation changes." The one  
18 limitation is that the bond, quote, "may not be  
19 less than the total cost, estimated cost to the  
20 State of completing the work described in the  
21 reclamation plan."

22 There is no prohibition, however,  
23 holding that more bond than necessary is unlawful.  
24 In fact, 82-4-223 sub (1) provides that the posted  
25 bond can actually be, quote, "greater than the

1 amount of the bond required for the bonding area."  
2 In other words, there can be no injury under the  
3 statute by DEQ being over-bonded.

4 That makes sense, because upon  
5 completing reclamation, if in fact there is an  
6 excess of bond, you get it back. On its face,  
7 therefore, the distinction between the bonding on  
8 one hand -- which is not subject to a challenge --  
9 and mining and reclamation requirements -- which  
10 is -- becomes apparent.

11 As the Third Circuit Court of Appeals  
12 has explained this distinction, "To receive a  
13 mining permit, operators are required to submit a  
14 detailed reclamation plan for the site in  
15 question. The plan must provide sufficient  
16 information to demonstrate that complete  
17 reclamation can be accomplished."

18 The Third Circuit then goes on to say  
19 that the bond is determined after you submit all  
20 of the necessary requirements. So you have this  
21 separate component here. They're necessarily  
22 related in the sense that when you submit all of  
23 the information, if it satisfies the criteria for  
24 approval of a permit, you are authorized to have  
25 the permit; but in order to get that permit, the

1 separate requirement -- the bond is determined --  
2 you get that only if and when you actually provide  
3 that bond. That's explicitly laid out in MSUMRA  
4 as well, again, under 82-4-223.

5           Again, I'd like to go back to 82-4-206,  
6 which provides all of the instances where this  
7 Board can hear an appeal. That involves approvals  
8 or denials of an application for a permit;  
9 approvals or denials for application of a  
10 prospecting permit; approvals or denials of an  
11 application to increase or reduce a permit area;  
12 approvals or denials of an application to renew or  
13 revise a permit; approvals or denials of an  
14 application to transfer a permit.

15           None of these criteria tellingly involve  
16 a challenge to the bond. Again, as the Third  
17 Circuit explained, applicants filing performance  
18 bond occurs after the permit application has been  
19 approved, but before the permit is issued.

20           So why the distinction between the  
21 permit approvals or denials which can be  
22 challenged by an applicant, and the resulting bond  
23 determination which can't? I think it's actually  
24 really simple here. It's because the bond is to  
25 protect DEQ, which by extension protects the

1 public. It is in essence a contract or agreement  
2 between the State agency and an operator. We use  
3 the bond --

4 Let me back up. When an applicant  
5 submits all the necessary information, what  
6 they're really trying to do is get approval to  
7 mine. Mining is not a right, it is a privilege.  
8 You are entitled to engage in that privilege if  
9 you meet the criteria, and you pay that necessary  
10 cost as determined by DEQ.

11 The cost that DEQ determines is for  
12 DEQ's to make alone because that is the liability  
13 that DEQ is assuming on behalf of the public.  
14 They think the risk is about this much. In a  
15 sense then it's similar to just like an insurance  
16 relationship. This is an insurance policy. You  
17 don't have to accept that insurance policy if you  
18 don't want, but you don't get to challenge what  
19 the cost of that insurance policy is.

20 What Westmoreland is really asking is to  
21 open the door for coal companies to challenge the  
22 bonding determination before this Board, in which  
23 the Board would be in essence letting the coal  
24 companies dictate their own level of risk and  
25 liability.

1           That's not the cooperative federalism  
2 scheme SMCRA envisioned, nor which Montana's  
3 cooperative agreement contemplates. Just the  
4 opposite. The cooperative federalism agreement  
5 explicitly states only DEQ shall administer this  
6 agreement, and shall have primary responsibility  
7 for the approval and release of performance bonds  
8 with only limited oversight by OSM.

9           With that important background, it  
10 becomes clear that subject matter jurisdiction  
11 does not lie for this Board to weigh in on this  
12 topic. Returning to my first point, as a  
13 threshold matter, the minor revision wasn't  
14 denied, which would be a necessary prerequisite  
15 for the Board to assume jurisdiction.

16           Contrary to Westmoreland's misstatement  
17 of the facts, the minor revision does directly  
18 involve updates to the reclamation plan. In fact  
19 it would have to under 82-4-221.

20           Again, going back to this relationship  
21 between bonding and reclamation, if you want a  
22 bond adjustment, we need to know where your  
23 reclamation plan is, and you make the necessary  
24 adjustments to that plan, and by extension, that  
25 dictates what the ultimate performance bond is.

1           Now I'd like to point out to you some of  
2 the exhibits, because of Westmoreland's continued  
3 insistence that this minor revision only included  
4 the bonding. Exhibit 1 to DEQ's brief in support  
5 of the motion to dismiss, and Exhibit 3, are both  
6 asking for information related to 17.24.313 of the  
7 Administrative Rules, including, quote, "A  
8 detailed time table for the estimated completion  
9 of each major step in the reclamation plan."

10           That administrative rule is titled  
11 "Reclamation Plan," and subpart (1) provides that  
12 "Each reclamation plan must contain a description  
13 of the reclamation operations proposed including  
14 the following information."

15           To try and avoid this inconvenience,  
16 Westmoreland contends that the reclamation plan  
17 didn't change. Of course it changed. If it  
18 wasn't changing, then it's not a minor revision  
19 under 82-4-221. Instead, what it is is just a  
20 request for a bond reduction, which is  
21 appropriately under ARM 17.24.1104, which is not  
22 subject to a challenge before this Board.

23           You can't just boot strap something  
24 that's non-reviewable onto something that is so  
25 that this Board can therefore assume jurisdiction

1 over it.

2 Reclamation plans aren't stagnant.  
3 They're necessarily influenced by the speed at  
4 which reclamation is occurring. If reclamation  
5 deviates at all from what was originally proposed,  
6 and updates are needed, there's a new estimated  
7 time to complete reclamation, and how a permittee  
8 is going to get there.

9 For example 82-4-234 requires that  
10 grading, backfilling, and subsidence  
11 stabilization, etc., must be kept current with the  
12 operation. When that doesn't happen, a new time  
13 table for completion is required to be provided,  
14 exactly as DEQ requested in its correspondence.

15 Once more, after much cajoling,  
16 Westmoreland finally provided DEQ with the  
17 necessary information, which then unsurprisingly  
18 resulted in a bond recalculation. But as we know  
19 under 82-4-223, the mining revision can't be  
20 approved as MSUMRA mandates until the bond is  
21 paid. This isn't some inaction on the part of the  
22 agency, it's inaction on the part of Westmoreland.

23 Further, to assume that it was denied  
24 would be wrong, because if that were true,  
25 Westmoreland would have to start from scratch, and

1 need to provide all that information again. It  
2 doesn't. It just needs to pay its bond.

3 I think perhaps an apt analogy is like  
4 ordering something on Amazon. You've placed all  
5 the products in the cart, you can have them, you  
6 just need to pay first. Just because you don't  
7 pay that day doesn't mean you need to start over  
8 next time you log into Amazon. They're still  
9 waiting in the cart for processing.

10 Because there's been no denial of the  
11 minor revision by the plain language of the  
12 statute, there's nothing for this Board to decide.

13 To my second point, for similar reasons,  
14 even if the Board could assume that the minor  
15 revision was denied -- which it should not -- it  
16 does not confer subject matter jurisdiction on the  
17 Board, again, to adjudicate the challenge to DEQ's  
18 bonding determination, which is ultimately what  
19 they're trying to do here.

20 As stated, the bond is a separate  
21 related consideration only DEQ makes under  
22 82-4-223. If the Board looks at 82-4-206, there  
23 is no right to an appeal under 82-4-223.  
24 Westmoreland can challenge a denial of a permit or  
25 a minor revision. Westmoreland can't challenge a

1 determination on bond.

2           Should the Legislature have intended  
3 that, it would have explicitly said so. Indeed by  
4 binding Montana Supreme Court case law, it has to  
5 explicitly say so. It didn't. The Board is  
6 limited to hearing contested cases subject to  
7 82-4-206 in those specifically enumerated  
8 circumstances. Those circumstances don't involve  
9 a challenge by an applicant or operator to a bond  
10 amount.

11           Because the bond isn't reviewable -- and  
12 that's what Westmoreland is trying to get -- even  
13 if the Board could find that the minor revision  
14 was a functional denial because it hasn't been  
15 issued, my question to the Board is: What exactly  
16 is there to review? The only thing to review is  
17 that Westmoreland hasn't paid the increased bond  
18 amount, not what the bond amount is. It would be  
19 a waste of this Board's time.

20           To my third point, the Board could have  
21 little trouble concluding that a petition for  
22 declaratory ruling cannot be submitted to the  
23 Board because the Board doesn't implement MSUMRA.  
24 DEQ does. Again, this fits in I think nicely with  
25 my over-arching point, which is that

1 quasi-judicial authority does not give the Board  
2 authority to weigh in on all facets of a case.

3 As DEQ explains in briefing,  
4 Administrative Rule 1.3.226 provides that a  
5 declaratory ruling may be sought from the agency  
6 that administers the statute or rule. Section  
7 82-4-205 provides the distinction between the  
8 Board and DEQ. Among DEQ's many responsibilities,  
9 it is tasked with, quote, "Administration and  
10 enforcement of MSUMRA, all rules and orders  
11 adopted under this part."

12 The Board by contrast does not have  
13 rulemaking authority. It is to conduct applicant  
14 contested cases where applicable.

15 DEQ has also adopted Administrative  
16 Rules consistent with its authority to issue  
17 declaratory rulings as required by statute under  
18 2-4-501, which requires each agency provide by  
19 rule for the filing and prompt disposition of  
20 petitions for declaratory ruling as to the  
21 applicability of any statutory provision or any  
22 rule or order of the agency.

23 Because the Board doesn't have  
24 rulemaking authority, it couldn't have adopted any  
25 such rules that could give it authority to issue

1 declaratory rulings.

2 DEQ adopted ARM 17.1.101 sub (6) which  
3 provides all requests for declaratory rulings  
4 shall be addressed to the Director. The Director  
5 is Sonja Nowakowski. It does not say they should  
6 be addressed to the Board, as Westmoreland tries  
7 to do here.

8 Westmoreland's argument that because the  
9 Board administers contested cases it therefore can  
10 issue declaratory rulings fails. Declaratory  
11 rulings and contested case are not synonymous.

12 While a declaratory ruling is reviewed  
13 in a similar fashion as contested cases before a  
14 District Court -- and that's at ARM 1.3.229 -- the  
15 fact that they're reviewed in the same manner does  
16 not mean they're determined in the same fashion  
17 before an agency. Indeed it wouldn't even make  
18 sense.

19 A declaratory determination is a  
20 determination of rights, status, or legal  
21 relationships between parties under a statute. It  
22 does not rest on facts, it rests on law, and  
23 therefore requires little, if any, factual  
24 development; unlike a contested case, which is  
25 dictated by the factual dispute that governs the

1 outcome of the proceeding.

2 In fact the very case Westmoreland  
3 relies on in briefing, Bitterroot River Protective  
4 Association, undermines its point, where the Court  
5 held that a political subdivision exempt from MAPA  
6 was not required to hold a MAPA contested case, it  
7 was however authorized to issue non-MAPA  
8 declaratory rulings under the same statute,  
9 2-4-501.

10 Second, Westmoreland relies on a single  
11 case, Thompson v. State, to claim 2-4-501 does not  
12 give DEQ authority to issue declaratory rulings  
13 because it doesn't have quasi-judicial authority.  
14 One, DEQ has issued declaratory rulings in the  
15 past, so that doesn't make sense; two, that case  
16 doesn't say that. In fact, it doesn't mention  
17 quasi-judicial authority at all.

18 In fact, saying that an agency, in that  
19 case the Workers Compensation Court, is limited to  
20 issuing a declaratory ruling to only instances  
21 where the jurisdiction has been expressly  
22 conferred. Again, applied here, the Legislature  
23 has not expressly conferred jurisdiction on the  
24 Board to issue declaratory rulings.

25 Indeed, Westmoreland's request doesn't

1 make sense, not only because such a ruling would  
2 not have the force and effect of law, but second,  
3 on a District Court review, the Court gives  
4 deference to the agency's interpretation of its  
5 own rules. Because it's DEQ's rules, that  
6 deference is owed to DEQ, not the Board.

7           Once more, I'd like to point out  
8 Westmoreland appears to be asking this Board to  
9 actually engage in unlawful rulemaking, asking the  
10 Board insert language into the rules and statutes  
11 that require DEQ bonding based on industry  
12 standards. The Board doesn't have rulemaking  
13 authority.

14           And further Westmoreland's request is  
15 not to simply ask what the rule means, but to ask  
16 the Board to affirmatively change the rules  
17 through language that doesn't exist. That would  
18 be improper.

19           Aside from my legal arguments today, I  
20 just like to close with some practical  
21 implications for the Board to consider should it  
22 adopt this position. One, not only would it be  
23 unlawful for the Board to accept this case, but  
24 it's going to be a huge waste of the parties' and  
25 this Board's time, because without jurisdiction,

1 any determination will not carry any force or  
2 effect of law, and it's not going to exempt  
3 Westmoreland from complying with the DEQ  
4 requirements under MSUMRA, respectfully regardless  
5 of what this Board says.

6 Indeed, it is telling that Westmoreland  
7 can find no case in the Board's 31 year history  
8 where a coal mining company has challenged a bond  
9 determination before this Board. Certainly if  
10 that was an available avenue, this would not be  
11 the first time a company tried to avoid paying its  
12 bond through a challenge.

13 Second, if the Board does give credence  
14 to this request, I submit it will be a nightmare  
15 for this Board's already busy docket, and will  
16 certainly open up the Board to numerous future  
17 challenges on bonding.

18 Third, if the Board is insistent on  
19 reducing bond amounts, I'd like to point out it  
20 doesn't have to bear any consequences. It won't  
21 be a party to those bankruptcy proceedings. It  
22 will be DEQ, and by extension, the taxpayers of  
23 Montana, that will be the party, and will bear the  
24 brunt of bringing future enforcement actions to  
25 try and get cost recovery from defunct companies,

1 which is try to recover anything it can. Montana  
2 has been down that road again and again. We know  
3 how that ends.

4 Fourth, it's important to note DEQ is  
5 not going to sit passively by if the Board accepts  
6 this case, nor will it entertain this appeal as if  
7 it was a legitimate one. The agency is ready and  
8 willing to go immediately to a District Court and  
9 get an affirmative ruling that Westmoreland can't  
10 circumvent what the Legislature intended.

11 Alternatively there's an easier path  
12 here. The Board can reject this petition, as it  
13 should do. It's squarely within the law. It will  
14 save it time, and the futility of entertaining it,  
15 and if Westmoreland is truly so confident in its  
16 position, it is free to try and convince a Court  
17 in Montana of that.

18 Finally, again, I'd like to point out  
19 there's no harm to Westmoreland. There are in  
20 MSUMRA various mechanisms by which they can come  
21 to the agency for bonding questions. They can  
22 engage in the informal conference, which to date  
23 has not occurred; they can ask for a bond  
24 reduction under ARM 17.24.1104. We have not  
25 received that yet, although they did indicate they

1 intended to submit one.

2 They could submit, if they're truly of a  
3 strong position that these rules mean what they  
4 think they mean, they can submit a petition for a  
5 declaratory ruling to DEQ by way of its Director.  
6 Whether we issue one or not, they can appeal that  
7 decision to a District Court in either way if they  
8 believe that their interpretation is the correct  
9 one.

10 What's more, all they'd have to do is  
11 pay their bond, which is an obligation they  
12 already agreed to in acquiring a permit in the  
13 first instance; and if they do as promised and  
14 complete reclamation, also as they promised,  
15 they'll get it back. They're out zero dollars.

16 Indeed in the last calendar year  
17 Westmoreland has completed no backfilling or  
18 grading. In other words, they're making business  
19 decisions. If they're truly interested in saving  
20 money, they'll timely complete the reclamation  
21 they're required to do, and apply for bond  
22 release, instead of coming to this Board for  
23 ultimately a futile exercise.

24 In sum, there's no merit to  
25 Westmoreland's petition. There has been no denial

1 of the minor revision, and regardless, with all  
2 due respect to this Board, and the important  
3 position that it fulfills, it cannot adjudicate  
4 all facets of MSUMRA, it cannot adjudicate bond  
5 determinations, nor issue declaratory rulings  
6 thereon.

7 DEQ respectfully asks this Board to  
8 dismiss the petition. Thank you.

9 CHAIR SIMPSON: Thank you, Mr. King.  
10 Westmoreland.

11 MS. MARQUIS: Good morning, Chair  
12 Simpson, members of the Board. My name is Vicki  
13 Marquis. I'm honored to come before you today  
14 representing Westmoreland Absaloka Mining. I'm  
15 joined today. We have several representatives  
16 from Westmoreland online virtually, including Mr.  
17 Jeremy Cottrell, General Counsel and Corporate  
18 Secretary; Mr. Jon Heroux, General Counsel and  
19 Director of External Affairs; Mr. Ken Wooley, CEO  
20 for US operations; and several other  
21 representatives of Westmoreland.

22 This speaks to the importance of the  
23 issue. As you know, you've had cases involving  
24 other Westmoreland mines that are much larger than  
25 the Absaloka Mine, so where this unlawful bonding

1 increase is over \$3 million, there are bond  
2 calculations percolating in the background that  
3 are expected to be many more millions of dollars  
4 of artificially inflated bond increases. So this  
5 is a huge deal.

6 And I would like to begin by objecting  
7 to a lot of the points Mr. King raised at the end  
8 of his argument. A lot of it is frankly fear  
9 mongering, and it's improper for DEQ to make  
10 accusations about the status of Westmoreland's  
11 reclamation. Those facts aren't at issue here.  
12 We're dealing with the narrow issue on  
13 jurisdiction today, and there's been no evidence  
14 rendered to support the DEQ's accusations. So I  
15 would ask the Board to not consider those as they  
16 move forward deciding the jurisdictional issue  
17 before it today.

18 I'm going to begin also by addressing  
19 DEQ's arguments, and I would like to highlight a  
20 few very important points that DEQ does not  
21 address, and then talk about the proper analysis  
22 which makes clear that the Board does have  
23 jurisdiction over both of Westmoreland's claims in  
24 this matter.

25 So first of all, DEQ's position -- and

1 we heard it again here today -- DEQ tells the  
2 Board they did not deny Minor Revision 311,  
3 they're just not going to approve it. But aren't  
4 those the same thing? A refusal to approve is  
5 equivalent to a denial.

6 And DEQ argues next that it did not make  
7 a decision at all, and then we heard it again  
8 today. Mr. King says they cannot until  
9 Westmoreland provides the additional bond.

10 So here's what happened. Westmoreland  
11 and DEQ agreed that bond calculations would be  
12 submitted through the minor revision process.  
13 Westmoreland submits Minor Revision 311 to DEQ  
14 applying for a bond calculation of \$23,630,000.

15 DEQ steps back and says, "Well, tell you  
16 what. You provide us another \$3,330,000, and then  
17 we'll tell you what our decision is." That's just  
18 gamesmanship, and it sort of feels like a shake  
19 down. Under DEQ's logic, DEQ could ask for  
20 anything. They could ask for \$3 million more, \$30  
21 million more, \$300 million more, and then the  
22 applicant would be beholden to satisfy that demand  
23 or face enforcement. That doesn't make sense and  
24 it cannot be the case.

25 The Board heard again here today DEQ's

1 reliance on the statute 82-4-223. And I've looked  
2 at that statute, I'm sure the Board members have,  
3 too, and you don't find the words "minor revision"  
4 in that statute anywhere. It says, "Before a  
5 permit may be issued, the payment of the bond is  
6 required."

7 And DEQ said it here today. Issuing a  
8 permit is equivalent to approving the mine.  
9 Westmoreland already has a permit. They are not  
10 asking DEQ to issue the permit. Westmoreland  
11 already has a permit. They've already provided  
12 bonding to the Department.

13 This isn't a permit issuance, this is a  
14 minor revision. They're changing how they're  
15 going to bond the facility. It's not issuance of  
16 a permit. The two are different. And the statute  
17 DEQ repeatedly cites, 82-4-223, does not address  
18 minor revisions, does not require payment of a  
19 bond before DEQ approves or denies a minor  
20 revision. It's just not in there.

21 The other thing DEQ has argued, which is  
22 very incredible, is that the State can hold excess  
23 bond, that there's no harm to the permittee if DEQ  
24 requires excess bond, and that's simply not true.  
25 It's like paying your insurance rate. If you are

1 required to have more insurance, you pay a premium  
2 for that insurance. A bond is no different. The  
3 permittee either has to pay cash equivalent plus a  
4 premium to cover that bond. So there is harm in  
5 having excess bond.

6 And I point the Board to Page 12 of  
7 Westmoreland's appeal, and in there at Paragraph 2  
8 of the Propositions of Law, we cite a case out of  
9 Pennsylvania.

10 Now, Pennsylvania has a bonding  
11 structure similar to Montana where the bond  
12 analysis is dependent on a case-by-case site  
13 specific analysis. And you see this in the  
14 statute and you see it in the rule. The bond has  
15 to take into consideration certain specifics about  
16 the area and about the mine, including the  
17 character of overburden, and the area, how they're  
18 going to backfill it, and what the final  
19 topography is going to be. It's a site specific  
20 calculation.

21 Montana does the same thing as  
22 Pennsylvania in that regard. In Pennsylvania  
23 there was a case where the agency did much like  
24 what DEQ seeks to do here. They said, "We're  
25 going to add a blanket amount to all these bonds,"

1 and the Court said, "No. That's a uniform bond  
2 policy. It's unlawful under the rules and the  
3 laws because it's not connected with any of those  
4 site specific reclamation costs, which is what the  
5 bond is for."

6 So DEQ is wrong. They cannot charge  
7 excess bonds and just hold it, and then give the  
8 money back at the end. MSUMRA does not allow  
9 that.

10 Now, where Westmoreland and DEQ both  
11 agree is that decisions on minor revisions are  
12 appealable. DEQ and Westmoreland also agree that  
13 DEQ required the use of the minor revision process  
14 to decide Westmoreland's annual bond calculations.  
15 That was provided to the Board at Exhibit T.

16 That's exactly what Westmoreland did  
17 here. DEQ cannot explain why the right to appeal  
18 a minor revision does not apply to this minor  
19 revision because there's no good reason.

20 I'm going to turn to four important  
21 things that DEQ's briefing does not address. The  
22 first is the language of their August 29th, 2025  
23 letter. Westmoreland called that language out in  
24 our briefing several times. You'll see it at  
25 Exhibit T at the bottom of Page 6.

1           And the first sentence says, "DEQ does  
2 not agree with Westmoreland's assessment that a  
3 bond increase is unnecessary, and further  
4 discussion is needed." That sounds pretty final.  
5 DEQ says, "No further discussion is needed."

6           DEQ next says that they reviewed what  
7 Westmoreland submitted, and determined that there  
8 was an updated bond needed. That sounds pretty  
9 final, too. Then the last sentence there, DEQ  
10 says, "Westmoreland, you have to pay us \$3  
11 million, provide an additional \$3,300,000 in bond  
12 by December 31st."

13           So it's clear there that that language  
14 signals DEQ's final decision making on that issue.  
15 DEQ does not explain how that language could be  
16 anything other than a final agency action because  
17 they cannot. The language is clear.

18           The second thing DEQ fails to explain or  
19 address is the recent enforcement action against  
20 Westmoreland which stems from their decision on  
21 Minor Revision 311. DEQ issued the Notice of  
22 Noncompliance to Westmoreland in January, alleging  
23 that Westmoreland violated MSUMRA because they  
24 didn't pay the bond amount that was demanded by  
25 DEQ in the August 29th letter.

1           That's significant, and it creates  
2 concrete legal effects with real consequences. As  
3 this Board knows, DEQ follows a Notice of  
4 Noncompliance with a cessation order, and a  
5 violation listing in the Applicant Violator  
6 System, or the AVS system, which is a nationwide  
7 data base publicly accessible. The Notice of  
8 Noncompliance therefore has severe adverse legal  
9 consequences.

10           I'd like to pause for just a minute and  
11 provide an update to the Board. Westmoreland did  
12 file a notice at the end of the day yesterday.  
13 They have submitted additional bond to DEQ, under  
14 protest and involuntarily, just to preserve their  
15 interests, and avoid the adverse impacts that  
16 would follow from a cessation order, and in  
17 particular, an AVS listing.

18           So the first two things that DEQ doesn't  
19 address is the language in their letter on the  
20 enforcement action, and those two things, even  
21 just the letter by itself prove that DEQ's  
22 decision in their August 29th letter was their  
23 final agency action denying Minor Revision 311.

24           We have pointed the Board to several  
25 Montana cases, and we know that there's a robust

1 case history in the federal system as well,  
2 ultimately leading to the Bennett v. Spear  
3 (phonetic) case that DEQ cites. This indicates  
4 it's not as simple as DEQ makes it out to be.  
5 Their supplemental briefing says, "Well, we didn't  
6 say approve or deny, so we didn't approve or  
7 deny."

8 But as we see in the Northern Plains  
9 case in Montana, the Court said you don't consider  
10 how the agency characterizes it, that you need to  
11 look at the nature and effect of the letter. And  
12 when there is nothing left to resolve, and when  
13 the letter has real legal consequences, and  
14 imposes an obligation or denies a right, the  
15 letter equates to a final agency action.

16 That's what we have here. It couldn't  
17 be more clear from DEQ's letter. There's nothing  
18 left to decide. You have to provide the  
19 additional bond. That is DEQ's final decision on  
20 Minor Revision 311.

21 We also point the Board to the Bowen  
22 (phonetic) case, which directs that if the  
23 agency's decision causes the recipient to give up  
24 legal rights, then the decision is a final agency  
25 action.

1           Here what DEQ is saying is that if  
2 Westmoreland just provides the bond, they'll  
3 approve or deny Westmoreland's bond calculation.  
4 But that doesn't make sense, because then what is  
5 Westmoreland's recourse? Would Westmoreland  
6 appeal an approval of its minor revision  
7 application? That doesn't make any sense at all.

8           What DEQ is asking is for Westmoreland  
9 to give up its right to appeal a denial of a minor  
10 revision. That, too, indicates that DEQ has made  
11 its final agency action on Minor Revision 311.

12           We also point the Board to the Qwest  
13 case to show the other end of the spectrum, when  
14 you don't have a final agency action, and where  
15 there's speculation about what's going to happen  
16 about the legal consequences, but here there's no  
17 speculation.

18           There are real consequences stemming  
19 from DEQ's decision to deny Minor Revision 311, as  
20 evidenced through its enforcement, and the need  
21 for Westmoreland to involuntarily and under  
22 protest pay the bond to avoid further enforcement  
23 which will damage their interests.

24           So there's no speculation that it's a  
25 final agency action, and even in the cases cited

1 by DEQ in their Footnote 2 of their supplemental  
2 briefing, they cite to the Bennett v. Spear case,  
3 which is a US Supreme Court case, and that's right  
4 in line with Northern Plains. It says if the  
5 letter, quote, "marks the consummation of the  
6 agency's decision making process," end quote, and  
7 if it is one that determines obligations or  
8 results in legal consequences, you have a final  
9 agency action. That's the case here.

10 Now, DEQ also cites to an unpublished  
11 Sixth Circuit case, the Marquette County case.  
12 I've read that, I'm sure many of the Board members  
13 have as well. It's really different factually. I  
14 mean it's not binding on Montana law anyway  
15 because it's not published, and it's from the  
16 Sixth Circuit.

17 But in that case, the permittee was  
18 applying for a permit that had a two tier system.  
19 They had to go to the state, which involved an  
20 opportunity for EPA to object; and then if that  
21 objection could not be resolved, it went to a  
22 second tier in front of the US Army Corps of  
23 Engineers.

24 The permittee got to the first tier,  
25 couldn't resolve the EPA objection, and opted not

1 to go to the second tier. They said they're not  
2 going to monkey around with the US Army Corps of  
3 Engineers. In that case the Court said, "Well,  
4 you should have, because they were the final  
5 decision maker, and we don't have the final  
6 decision." Here there's no two tier system. This  
7 is clearly DEQ's decision to make, and they've  
8 made the decision.

9 So analyzing DEQ's August 29th letter  
10 under Montana law and US Supreme Court law shows  
11 that DEQ said, "There's nothing further to be  
12 resolved. You have to pay us the bond or face  
13 enforcement." That signals it is a final agency  
14 action.

15 The analysis should stop there. Clearly  
16 we have a final agency action denying the minor  
17 revision. Everybody agrees. The Board can review  
18 a denial of a minor revision. So you've got  
19 jurisdiction right there.

20 Now, DEQ tries to complicate things by  
21 implying that Minor Revision 311 was about  
22 something more than the bond calculation, that it  
23 contained changes to the reclamation plan that DEQ  
24 needed to approve. But until today DEQ hasn't  
25 really specified what it thought those reclamation

1 plan changes were.

2 A reclamation plan is the on-the-ground  
3 work. It's what is the final topography going to  
4 look at, where will the drainages be, what seed  
5 mixture will you use in revegetation, what  
6 buildings will be torn down, what buildings will  
7 stay.

8 DEQ can't point to any changes in the  
9 on-the-ground work that's going to happen. There  
10 aren't any. There aren't any changes to the  
11 reclamation plan. Today they didn't point to this  
12 ever, but today DEQ points to this time table of  
13 reclamation, that it doesn't change.

14 The time table that's part of the  
15 reclamation plan is Westmoreland's time table, as  
16 to how they are going to reclaim the mine after  
17 they're done mining. It's not the time table for  
18 bonding. The time table for bonding can't be the  
19 same because if the bond is forfeited, that  
20 presumes that Westmoreland hasn't finished mining,  
21 and that Westmoreland walks away like today. It  
22 would have to take the mine as it sits today, and  
23 figure out how to reclaim it as it sits today.

24 That's a different reclamation, it's a  
25 different time table, than what is provided in the

1 reclamation plan required under the rules and  
2 statute, because the rules and the statute say,  
3 "Westmoreland, you've got to tell us how you're  
4 going to reclaim this when you're done mining."

5 Now, the two need to align for sure to  
6 make sure that they're progressing the right way,  
7 and that it's set up correctly, and they have the  
8 right bonding amount; but the time table isn't a  
9 change to the reclamation plan, and it isn't part  
10 of the bond calculation.

11 So there's nothing about the reclamation  
12 plan. None of on-the-ground work changes. And  
13 DEQ can't point you to anything that has changed.  
14 The bond -- and Minor Revision 311 is just about  
15 the bond calculation, and it does not change the  
16 reclamation plan, just the bond calculation.

17 If you look back to Exhibit T, that's  
18 all that it envisioned. This is a bond  
19 calculation provided annually. Instead of DEQ  
20 coming in and doing it every five years,  
21 Westmoreland said, "We'll do it annually, and this  
22 is how we'll do it." Just a bond calculation  
23 through minor revision. That's what DEQ required.

24 The fourth issue DEQ does not address in  
25 their briefing are the reasons for the alleged

1 bond increase. DEQ relies on a rule ARM  
2 17.24.1104 Subparagraph (1), but that rule allows  
3 bond increases only in four specific instances:  
4 If the permit area increases; if the mining  
5 methods change; if the standards of reclamation  
6 change; or if the cost of reclamation changes.  
7 None of those changes have occurred here.

8 What happened was DEQ changed the method  
9 by which it calculates the bond. It did not find  
10 any actual cost increases. It just changed the  
11 method. And in fact previously they relied on the  
12 EquipmentWatch, which the federal regulatory  
13 agency OSM recommends, and that's what  
14 Westmoreland used.

15 The only change was Westmoreland  
16 recognized Montana industry standards use 16 hour  
17 work days. Those are the equipment rates that  
18 Westmoreland used, and that's the same method  
19 Westmoreland used when it submitted its bond to  
20 the federal government for the federal portion of  
21 the Absaloka Mine, and that was approved by the  
22 federal government with no questions.

23 Westmoreland submitted here, and DEQ  
24 comes back with a completely different type of  
25 method, using a data base that's not vetted, not

1 well understood, not yet authorized for use in  
2 Montana.

3           So how do we know what the \$3.3 million  
4 increase is based on? We really don't know, and  
5 we don't know if it's correct. What we do know is  
6 correct is EquipmentWatch was correct, if it's  
7 used appropriately, are the 16 hour work days.

8           So DEQ cannot point this Board to a  
9 valid reason to increase the bond because there's  
10 been no change in actual reclamation costs.

11 Therefore, all of this leads to: The minor  
12 revision was only about the bond calculation. We  
13 agree the Board has jurisdiction to hear a denial  
14 of a minor revision, so the Board can clearly hear  
15 and decide DEQ's first claim.

16           The Board asks the right question. Was  
17 the Department's August 29th letter equivalent to  
18 a denial of Minor Revision 311? Absolutely it was  
19 under Montana and federal law. Nothing remains to  
20 be decided.

21           I'll turn now to DEQ's motion to dismiss  
22 as it applies to Westmoreland's petition for a  
23 declaratory ruling. I want to first point out  
24 that the Board is the only agency here with  
25 quasi-judicial authority. The Board is the only

1 agency here that can issue a ruling that has any  
2 legal validity at all.

3 DEQ doesn't have quasi-judicial  
4 authority. They can't decide a dispute. They  
5 can't reach conclusions of law and issue an order  
6 because they don't have quasi-judicial authority.

7 It's important, especially if you look  
8 at the definition of quasi-judicial function in  
9 statute -- which we've cited in our briefing --  
10 Section 2-15-102 Subparagraph (10) sets out all  
11 the authority, and the Board already knows this.

12 I'm not telling you anything you don't  
13 know. You've been doing this for years, and you  
14 understand the process that it goes through to  
15 come up with findings of fact and to look at the  
16 law, and apply the law to those facts, and come up  
17 with conclusions of law, and issue an order.  
18 That's what is required to do a declaratory  
19 ruling. That's the piece that only the Board can  
20 do and DEQ cannot.

21 Now, DEQ points out the Bitterrooter  
22 case, which we've cited, was about a conservation  
23 district, and not a quasi-judicial agency, and  
24 that's correct. If you go back to the case that  
25 preceded the one we cited, which is the same

1 title, *Bitterrooters*, and it's 2002 MT 66, in  
2 footnote one, the Montana Supreme Court explains  
3 this. They say there's got to be a special power  
4 that gives you authority to issue a declaratory  
5 ruling.

6 And in that case the special power stems  
7 from the fact that the conservation district was a  
8 governmental subdivision. And the Court said,  
9 "Because they are elected officials directly  
10 accountable to the public, they have the authority  
11 to issue a declaratory ruling." The Court also  
12 noted that an agency's authority, an  
13 administrative agency's authority is limited, but  
14 the conservation district wasn't an administrative  
15 agency.

16 In *Thompson*, we see what happens when  
17 the Court looks at an agency that has  
18 quasi-judicial authority. That was the Workers  
19 Comp Court. I think DEQ implied that they don't  
20 have quasi-judicial authority, and that's not  
21 true. The Worker's Comp Court does have  
22 quasi-judicial authority. And there the Court --

23 CHAIR SIMPSON: Ms. Marquis. We're out  
24 of time, if we could wrap it up, please.

25 MS. MARQUIS: I apologize. I'll just go

1 one more minute.

2 In the Thompson case, the Court said you  
3 need something more than just quasi-judicial  
4 authority, you need quasi-judicial and statutory  
5 authority, and they had to go to the same topic or  
6 issue. And there the Workers Comp Court got into  
7 trouble because they decided the constitutionality  
8 of disclosure provisions that weren't connected  
9 with any dispute about employee benefits, and  
10 because their authority is limited to employee  
11 benefits, that's the only place they could issue a  
12 declaratory ruling.

13 As this Board knows, your authority  
14 extends to permitting decisions within MSUMRA, so  
15 you do have quasi-judicial authority, and you do  
16 have authority to do declaratory rulings within  
17 that same area. Using that same analysis to DEQ,  
18 we see clearly that DEQ doesn't have  
19 quasi-judicial authority, they cannot issue  
20 declaratory rulings.

21 As far as the practical implications,  
22 DEQ mentions the Board doesn't have rulemaking  
23 authority, and points you to the rules that they  
24 promulgated. Well, the Workers Comp Court made  
25 that same argument to the Supreme Court and they

1 lost that argument. The Supreme Court said that's  
2 not enough. You need something more.

3 And I'd also point out that the rules  
4 that govern how the Board conducts contested cases  
5 were also promulgated by DEQ, but that doesn't  
6 mean that DEQ does contested cases and the Board  
7 does not.

8 So clearly, DEQ's final agency action  
9 denied Minor Revision 311, and we all agree the  
10 Board has authority to hear that. We all agree  
11 that the Board is the only agency with  
12 quasi-judicial authority, so the Board is the only  
13 agency here that can issue a declaratory ruling.  
14 DEQ's motion to dismiss must be denied. Thank  
15 you. I apologize for going over a little bit.

16 CHAIR SIMPSON: Thank you, Ms. Marquis.  
17 Mr. King, rebuttal.

18 MR. KING: Thank you, Board Chair. I'll  
19 try and keep it pretty brief here.

20 So to the first question of whether  
21 there's jurisdiction to hear a contested case. We  
22 heard Westmoreland talk about how, well, if this  
23 wasn't denied, then there's no right for  
24 Westmoreland to appeal the bond determination.

25 They're correct. There isn't a right to

1 appeal a bond determination to the Board under any  
2 circumstance. That's the whole point is that  
3 because there isn't, you cannot bootstrap a bond  
4 determination through a minor revision process to  
5 create jurisdiction that doesn't exist.

6 The second piece is Westmoreland claims  
7 that the minor revision had nothing to do with the  
8 reclamation plan. If that's in fact true, then  
9 it's not a minor revision at all, because 82-4-221  
10 states that you have to submit an update to your  
11 reclamation plan for a revision to your permit in  
12 order for it to be a minor revision.

13 As Ms. Marquis noted, this is for boots  
14 on the ground, what is the context of the mine  
15 today as compared to how it was previously  
16 proposed. That's an update to your reclamation  
17 plan. That time table is necessarily going to  
18 govern the steps that you need to take in the  
19 future to complete reclamation.

20 That happens whether that's at the  
21 beginning of a permit when a permit is first  
22 issued. You have the steps you're going to take  
23 throughout the permit process. If that changes on  
24 the ground, you submit an update, that gets  
25 revised.

1           Only through that revision can you then  
2 determine what the bond amount can be. That  
3 doesn't make the second component reviewable. It  
4 does make the first one reviewable if for some  
5 reason that's denied.

6           I might be misunderstanding this  
7 argument, but Ms. Marquis seemed to suggest that  
8 what the bond is is how things sit today. That is  
9 not an accurate characterization. It's sort of an  
10 aside, but it's not an accurate characterization  
11 of how bonds are calculated. Bonds are  
12 necessarily calculated based on future projected  
13 costs. It's not based on what is the cost today,  
14 but how much is it going to cost in the future.

15           The third thing, much was made about the  
16 fact that there was this separate bond that was  
17 issued. Let's not conflate those two issues.

18           And this I think leads to my larger  
19 point is that Westmoreland, as with any mining  
20 company, as a condition to having an authorized  
21 permit has agreed to maintaining that permit; that  
22 if you don't submit a new bond calculation as  
23 determined by the Department, you're therefore in  
24 violation of that permit.

25           Regardless of this minor revision

1 process, that was going to be true, no matter  
2 what. So it wasn't the -- let's not conflate that  
3 Notice of Noncompliance with somehow a denial of  
4 the minor revision. And again, this goes to the  
5 point these are two separate and distinct, albeit  
6 related components.

7 The two cases that Westmoreland relies  
8 on, that this has somehow become final, are not  
9 analogous in any way because those are appeals of  
10 MAPA contested cases to a District Court. What we  
11 have here is we're not even in a MAPA contested  
12 case yet.

13 And then just the last thing I'd like to  
14 point out regarding declaratory rulings is just  
15 reiterate the fact that you have to be the agency  
16 that implements those rules. You go to the agency  
17 whose rules are being implemented, and it's that  
18 agency that gives you the determination on what  
19 those rules mean.

20 Westmoreland could easily just submit a  
21 petition to DEQ. And if they're lamenting, "Well,  
22 we already know what DEQ thinks," well, okay, but  
23 then their avenue to appeal that decision they're  
24 allowed to do that straight to a District Court.

25 So they're not without some remedy here,

1 they're just submitting to the wrong agency.  
2 Under Westmoreland's logic, you could just submit  
3 a petition to DLI, or DNRC, or FWP, to say, "What  
4 did DEQ's rules mean?" And my response is  
5 respectfully, "Who cares?" It doesn't matter.  
6 What matters is the agency that implements those  
7 rules. If a board doesn't have rulemaking  
8 authority, obviously it doesn't implement those  
9 rules.

10 And again, it just goes back to my  
11 bigger picture of just because a board, any board  
12 has quasi-judicial authority does not mean and  
13 should not be construed as that it has ability to  
14 do whatever it wants, as Westmoreland is asking.

15 There's a simple solution here. I  
16 respectfully ask that the Board grant DEQ's motion  
17 to dismiss, and again, if Westmoreland is really  
18 confident in its position -- and I'm guessing that  
19 they're not -- they can go ask a District Court if  
20 they're right. Thank you.

21 CHAIR SIMPSON: Thank you, Mr. King.  
22 Ms. Marquis.

23 MS. MARQUIS: It's pretty incredible.  
24 I've looked at the statute DEQ just cited,  
25 82-4-221. I don't find a requirement to submit an

1 updated reclamation plan with a minor revision.  
2 Perhaps with a major revision where you're  
3 changing something big, you have to show how  
4 you're also going to change your reclamation plan.

5 And that doesn't change the fact that  
6 Exhibit T clearly shows that this process, this  
7 entire process, was all about the bond  
8 calculation, not about changing the reclamation  
9 plan. The time table doesn't change the  
10 reclamation plan, it just says this is what  
11 supports the bonding in this instance.

12 DEQ now seems to want to back away from  
13 that. DEQ required the use of the minor revision  
14 process, and it is a big deal. The Legislature  
15 has said in statute, the Legislature said if the  
16 agency denies a minor revision, the permittee,  
17 anybody else who has an interest, can appeal that  
18 decision. That is the point is to exercise their  
19 statutory right to appeal to this Board, so the  
20 Board can exercise its quasi-judicial authority to  
21 decide this dispute.

22 Now, DEQ also says it's no big deal,  
23 there's no harm to Westmoreland, they could just  
24 go to District Court. That's beside the point.  
25 The Legislature said if they deny a minor

1 revision, Westmoreland can come before this Board  
2 and have the dispute heard and decided.

3 The other thing DEQ points to, and this  
4 comes through in their briefing as if they have  
5 absolute authority to issue bond decisions, and  
6 that's simply not the case.

7 Now, it was in the hard rock context,  
8 but the Board has heard or at least accepted  
9 jurisdiction over a bonding case. It was in BER  
10 2023-0100 OC, and that was about a bond connected  
11 with a hard rock exploration license; different  
12 statutory context, but bonding is not out of the  
13 realm of the Board's authority. Are denials of  
14 minor revisions outside the bounds of the Board's  
15 authority? No, absolutely they're not. And  
16 that's absolutely what DEQ did here is denied  
17 Minor Revision 311.

18 I also want to point to some language in  
19 DEQ's supplemental brief. They said, you know,  
20 they acknowledge that they can put -- and in their  
21 reply, too -- they acknowledge that they can put a  
22 permittee into this, what they call it is legal  
23 limbo. We don't see it as legal limbo. They say  
24 it's a legal limbo that their bonding calculation  
25 authority is a one way street; and that

1 Westmoreland lacks any mechanism to challenge  
2 DEQ's bond determination.

3           Essentially what DEQ is saying is  
4 they're above the law, the rule of law does not  
5 apply to them, and that simply cannot be the case;  
6 whereas here you have a clear process that DEQ  
7 required the use of a minor revision to update the  
8 bond calculations, and where there's a right to  
9 appeal DEQ's decision on that minor revision,  
10 Westmoreland has a right to appeal DEQ's decision  
11 on its proposed bond calculation.

12           Whether or not DEQ relied on any of its,  
13 you know, the rule that it cites, 17.24.1104  
14 Subparagraph (1), to increase the bond, even if  
15 that's the case, it's all within the confines of  
16 their deciding, making a final decision on Minor  
17 Revision 311.

18           That final decision was to deny  
19 Westmoreland's proposed bond calculation, and  
20 insist that Westmoreland follow DEQ's bond  
21 calculation, and provide \$3,330,000 more. That  
22 decision is a denial of Westmoreland's proposal,  
23 and it is clearly appealable to the Board.

24           So we ask respectfully that you deny  
25 DEQ's motion to dismiss, and process this as a

1 contested case, subject to the discovery, motions  
2 practice, and an evidentiary hearing, which will  
3 involve experts and discovery into what equipment  
4 rates are appropriate. Thank you very much.

5 CHAIR SIMPSON: Thank you, Ms. Marquis.  
6 Questions from the Board for the parties.

7 (No response)

8 CHAIR SIMPSON: I have some questions,  
9 but I guess I'd like to hear from the Board first.  
10 I see Allan has his hand up. Yes, please.

11 BOARD MEMBER PAYNE: I've got a couple  
12 of questions for both Counsel. I guess we have  
13 Mr. King and Ms. Marquis, it's really -- we're  
14 getting the royal treatment here with our titles  
15 here.

16 Mr. King, you had stated with respect to  
17 Westmoreland that they're not really suffering any  
18 injury here from potentially being over-bonded  
19 because they'll get the return of any -- you know,  
20 if it was over-bonded, they'll get return of any  
21 unused bond.

22 But isn't there really a cost premium  
23 that they're going to pay the additional  
24 \$3,330,000? Isn't that really an injury to them?

25 MR. KING: Respectfully, Board Member

1 Payne, I guess I'm not sure exactly what the  
2 injury is. It's essentially just a promise that  
3 you do as you intended. And --

4 BOARD MEMBER PAYNE: Don't these bonds  
5 come with a premium that the permittee has to pay?  
6 I mean they get them from an insurance company,  
7 correct?

8 MR. KING: They can. They can also post  
9 a cash bond. We'll take cash.

10 BOARD MEMBER PAYNE: But if they put a  
11 bond with you with \$3,330,000 extra, that  
12 \$3,330,00 they're not earning interest on in the  
13 markets or wherever else they might want to put  
14 them. So isn't there really -- don't they really  
15 have a monetary injury here?

16 MR. KING: I mean is that -- I guess the  
17 bigger question is is that what SMCRA contemplated  
18 for. Right? What are the balance of interests  
19 that we're really talking about. What we're  
20 talking about is protecting the public through a  
21 bond. And yes, I understand your point that maybe  
22 that money is -- you get a bigger return if you're  
23 able to go invest that elsewhere, but that's also  
24 just kind of the cost of doing business.

25 And what SMCRA envisioned -- and just

1 going back and looking at the Surface Mining Act  
2 of 1973, the federal government was very clear  
3 that in enacting SMCRA, liability always had to  
4 fall on the mining company.

5 And I'd also like to note, too, right,  
6 there's other ways for you to save money. If you  
7 want to move at a very rapid rate, and get it  
8 reclaimed, you can certainly do so. Like there's  
9 other avenues by which you can ensure that you're  
10 not losing out.

11 BOARD MEMBER PAYNE: You also said that  
12 mining was not a right, but a privilege. Is there  
13 source for that in Montana law, or is that just  
14 the general gloss that there's a bunch of  
15 regulations on mining, and you have to comply with  
16 those regulations?

17 MR. KING: I don't know if it's directly  
18 on point, but the Seven-Up Pete Ventures case from  
19 Montana, the Kafka case, and in those instances  
20 they're looking at in terms of regulatory takings.  
21 But when you have a highly regulated industry like  
22 mining, that is not a property right, but it is a  
23 privilege.

24 BOARD MEMBER PAYNE: With respect to the  
25 setting of the bond amount, is there any -- Once

1 the DEQ comes out with a bond amount, is there any  
2 sort of public input or public comment that you  
3 have to consider during that whole process?

4 MR. KING: I think there's an  
5 opportunity for the public to challenge what a  
6 bond amount would be as being insufficient.

7 BOARD MEMBER PAYNE: Where is the  
8 jurisdiction for that challenge?

9 MR. KING: I think that comes in the  
10 same instances that you have under 82-4-206.

11 BOARD MEMBER PAYNE: So if, for example,  
12 if the public then decides, you know, a member of  
13 the public or a public interest group decides a  
14 bond isn't set enough, and the Board were to say,  
15 "Well, we're going to get involved in this. We  
16 think we have jurisdiction," could then -- would  
17 we then have to potentially listen to public  
18 challenges to those bond determinations?

19 MR. KING: Potentially.

20 BOARD MEMBER PAYNE: Now, Westmoreland,  
21 I just learned now that Westmoreland evidently has  
22 posted a bond with the additional \$3.3 million.  
23 Does that mean now that the DEQ will proceed to  
24 review the Minor Revision 311?

25 MR. KING: I'd like to just give an

1 update. The bond application is wrong, so it  
2 actually hasn't been submitted yet. It was just  
3 submitted, and so I think it's going to be  
4 rejected. It's not uncommon on these submissions  
5 of bond for it to take several iterations before  
6 that gets approved.

7 BOARD MEMBER PAYNE: Let's suppose that  
8 eventually they submit a satisfactory one. Will  
9 at that point, now that that bond -- will the DEQ  
10 then go to I guess review the Minor Revision 311?

11 MR. KING: Yeah, then I think it's  
12 approved.

13 BOARD MEMBER PAYNE: Okay. I have a  
14 couple of questions for Ms. Marquis. In reading  
15 the briefs, come across in DEQ's reply brief their  
16 Footnote 2. I don't know if you're familiar with  
17 that or not. I thought that was kind of a good  
18 capsulation of the dispute here. And I think DEQ  
19 is making a good point in Footnote 2 here. Why am  
20 I wrong?

21 MS. MARQUIS: Because as I said earlier  
22 -- And Footnote 2 -- I want to make sure I'm  
23 looking at the right one -- in my reply brief Page  
24 8. This where they discuss ARM 17.24.1104  
25 Subparagraph (1); is that correct, Board Member

1 Payne?

2 BOARD MEMBER PAYNE: Yes.

3 MS. MARQUIS: DEQ can increase the bond,  
4 but they have to -- they can't just do it  
5 arbitrarily. There are four reasons provided in  
6 the rule why they can increase the bond. None of  
7 those reasons is met here. There's been no  
8 increase to the cost of reclamation. There's no  
9 actual change in cost. They just changed their  
10 method.

11 And as I said earlier, even if they rely  
12 upon that rule, all of this is being done in the  
13 context of Minor Revision 311. So it doesn't  
14 change the fact that DEQ denied Minor Revision  
15 311.

16 BOARD MEMBER PAYNE: And I understand in  
17 the context of the overall case that you've  
18 brought here before the Board, but I think today  
19 we're talking about DEQ's motion to dismiss, and  
20 it's a jurisdictional motion saying the Board  
21 doesn't have jurisdiction here.

22 And so I mean I understand you have all  
23 sorts of -- Westmoreland, and I'm not competent at  
24 this point or knowledgeable enough to truly  
25 comment on the underlying facts, as to, you know

1 -- but it seems to me their motion is do we have  
2 jurisdiction, and DEQ's argument is in essence we  
3 cannot rule on the Minor Revision 311 until, under  
4 statute, under the statute, they can't rule on  
5 that until the bond that they have set is issued.

6 And you have all my sympathies -- how  
7 can that possibly be -- I understand that. But I  
8 read the statute, and that's what the statute  
9 says, that they have to -- you have to get there,  
10 and then you get to challenge it. Why is that  
11 wrong? Why is that reading of the statute wrong,  
12 that you have to -- before DEQ --

13 DEQ is bound by that statute as much as  
14 the Board is, and as much as you are. The  
15 Legislature set this out. The Legislature doesn't  
16 always put together perfect procedures, but it  
17 seems to me, reading the statutes they're citing  
18 and the rules, you've got to post the bond before  
19 they can rule on the minor revision. And why is  
20 that wrong?

21 MS. MARQUIS: The statute doesn't say  
22 that, Board Member Payne. The statute says a  
23 permit may be issued, and that may be true when a  
24 permit is issued in the first instance, so that --  
25 and DEQ said this -- that issuing a permit allows

1       them to mine.

2                   And in that instance, if you are  
3 originally in the first instance allowing somebody  
4 to open up a mine, yes, they have to post the  
5 bond. Westmoreland did that when they received  
6 their original permit. And they can mine. They  
7 can still mine right now. They're already mining.  
8 Obviously they posted a bond. Otherwise they  
9 wouldn't be allowed to mine.

10                   So DEQ is here. We're not asking them  
11 issue a new permit or to approve any mining.  
12 We're asking to just revise the permit. The two  
13 are different. So if DEQ were to deny the  
14 issuance of a permit, there's no mining. If DEQ  
15 were to deny a minor revision, there's still  
16 mining, and there's still a bond in place for  
17 that.

18                   So the statute doesn't say minor  
19 revisions, it doesn't apply to permit revisions,  
20 it applies to permit issuance, so that would apply  
21 when the permit is issued in the first instance,  
22 and when the permit is renewed. The permits  
23 expire after five years. And so that's why at the  
24 five year mark, DEQ has to reissue the permit, and  
25 at that time they have to require a bond payment

1 at that time.

2 This is an entirely different process,  
3 not connected to issuance of any permit. It is an  
4 annual bond calculation, which is more frequent  
5 than the law requires, and it's simply a minor  
6 revision to update the bond calculation. That's  
7 all it is. There's no statutory requirement for  
8 payment of a bond. It doesn't make sense. You  
9 pay the bond before they can approve the bond  
10 calculation? It just wouldn't work that way.

11 BOARD MEMBER PAYNE: Do you know what --  
12 You know, if Westmoreland has now put forward the  
13 additional \$3.3 million, do you know, did they go  
14 through like a bonding company, or did they post  
15 that as cash?

16 MS. MARQUIS: I do not have the  
17 specifics on that, but in your line of questioning  
18 to DEQ earlier, Board Member Payne, you are  
19 exactly right. There is a premium associated with  
20 that bond. There is a payment required. If they  
21 do part cash or all cash, obviously they're losing  
22 interest in that money.

23 BOARD MEMBER PAYNE: But you don't know  
24 what premium they paid for the additional \$3.3  
25 million?

1 MS. MARQUIS: I do not have that  
2 information, Board Member Payne. And you are  
3 right that there is harm, and it's not --

4 You know, MSUMRA, you look at the intent  
5 of MSUMRA in 82-4-202 Subparagraph (2)(g), and  
6 it's clear that the Montana Legislature wanted to  
7 provide for the orderly development of coal  
8 resources, and they wanted to permit this wasting  
9 of coal.

10 And so it's clear that they favor coal  
11 mining. It isn't the case where the State can put  
12 all kinds of more stringent requirements and  
13 over-bonding requirements on coal companies.  
14 That's never been the intention of MSUMRA.

15 BOARD MEMBER PAYNE: One last question.  
16 If the Board grants DEQ's motion to dismiss here,  
17 does Westmoreland, do you believe then  
18 Westmoreland has an avenue in District Court to  
19 challenge DEQ's decision?

20 MS. MARQUIS: So if the Board grants  
21 DEQ's motion to dismiss and dismisses  
22 Westmoreland's appeal, certainly that decision is  
23 appealable to District Court. So it would be a  
24 challenge to the Board's decision.

25 BOARD MEMBER PAYNE: But I had just a

1 slightly different question I was asking, though.  
2 Could DEQ have -- You know, you said DEQ was  
3 claiming it's above the law, but I think Mr. King  
4 said, "Well, wait a minute. They can go to  
5 District Court and challenge, you know, our bond  
6 determination." Do you think -- Is it  
7 Westmoreland's position that they couldn't do  
8 that?

9 MS. MARQUIS: So in this context we did  
10 that analysis. In this context where the Board  
11 calculation was done using the minor revision  
12 process, Westmoreland was obligated to appeal the  
13 denial to the Board of Environmental Review before  
14 it could seek judicial review. Otherwise it  
15 wouldn't have exhausted its administrative  
16 remedies.

17 BOARD MEMBER PAYNE: Has Westmoreland  
18 ever before challenged a bond determination in  
19 front of the Board?

20 MS. MARQUIS: I don't know the entire  
21 history, so I'm not sure I can answer that  
22 question competently. To my knowledge, no, but I  
23 don't know the entire history. I know that  
24 there's been a lot of discussions with DEQ over  
25 the last two or three years about bond

1 calculations and trying to work through some of  
2 these issues.

3 BOARD MEMBER PAYNE: Have they ever  
4 challenged it in District Court, do you know?

5 MS. MARQUIS: I do not know, but to my  
6 knowledge, no, but I do not know for sure.

7 BOARD MEMBER PAYNE: Thank you. I'm  
8 done. That's all I have.

9 CHAIR SIMPSON: Thank you, Allan. Vice  
10 Chair Aguirre, you had your hand up, but I don't  
11 see you on my screen right now.

12 VICE CHAIR AGUIRRE: Chair Simpson and  
13 members of the Board. I guess Allan kind of  
14 touched on a few things, but to me, this hearing  
15 is about, is based on whether Montana DEQ denied  
16 the minor revision, and I'd like to give each  
17 Counsel an opportunity to address just that.

18 Because to me, our decision today is  
19 based on the Board jurisdiction, and whether that  
20 minor revision was actually denied or not denied.  
21 And in my mind it's that simple. At this point in  
22 my mind it's that simple.

23 So I heard Mr. King say that the minor  
24 revision, the next step after the bond is approval  
25 of the minor revision, so -- And in my reviewing,

1 I did not see a denial of the minor revision.

2 So I would like to hear just briefly  
3 from both Counsels again specifically to that,  
4 without the whole bond issue in there, because I  
5 feel like it hasn't been denied, and so I need to  
6 hear specifically on that.

7 And I guess I'll say reading through the  
8 material, reading that footnote that Allan brought  
9 up, and really the focus of the August 29th, 2025  
10 letter as a denial, I don't see it. So again,  
11 that's why I need to hear briefly from both  
12 parties again just on that issue.

13 MR. KING: Mr. Chair. Thank you, Vice  
14 Chair. You're correct. It has not been denied.  
15 Had it been denied, there would be a formal denial  
16 letter. Had it been denied you would have to  
17 resubmit all of the updated information again  
18 regarding the time tables, and all of the  
19 information that we asked in our correspondence  
20 about reclamation.

21 We already have that information. We're  
22 just waiting on the payment. Again, it goes back  
23 to my prepared remarks. To use the Amazon  
24 analogy, just waiting in the cart for processing.  
25 I have all the groceries at the checkout counter,

1 they're just sitting there, I can hand them over  
2 to you once you give me the payment.

3 So no, it hasn't been denied and it  
4 would be a fallacy to think otherwise, because  
5 again, if that were the case we'd be starting from  
6 square one and we're not. Thank you.

7 CHAIR SIMPSON: Thank you, Mr. King.  
8 Ms. Marquis.

9 MS. MARQUIS: Thank you for the  
10 question, Vice Chair Aguire.

11 As we saw in the Northern Plains case,  
12 which we cited in our supplemental briefing, the  
13 way in which the agency characterizes their  
14 decision is irrelevant. What really matters is  
15 what is the nature of their decision, and what is  
16 the effect of their decision. The nature of their  
17 August 29th, 2025 letter is that they said they're  
18 done talking about the bond amount, and  
19 Westmoreland has to provide an additional \$3.33  
20 million bond.

21 What DEQ had asked the Department in  
22 Minor Revision 311, Westmoreland asked, "Will you  
23 approve a bond of \$23,630,000?" DEQ's answer --  
24 That's the only question Westmoreland asked --  
25 "DEQ, will you approve a bond calculation of

1     \$23,630,000?," DEQ's answer in the August 29th  
2     letter was, "No. You pay \$3,330,000 more."

3             So obviously DEQ denied Westmoreland's  
4     request for a bond calculation totalling  
5     \$23,630,000 because DEQ said, "No. You have to  
6     pay us more money." That's all Minor Revision 311  
7     was about, the bond calculation, and that's shown  
8     through the course of the correspondence between  
9     the parties.

10            We point that out in our response brief  
11     at Page 5. The words they use are all about  
12     bonding, cost estimates, cost rates, bond  
13     calculations, calculate the bond, bond calculation  
14     narratives. It's all about the bond. So  
15     Westmoreland asks, "Will you approve the bond  
16     calculation at our number?," and DEQ said, "No.  
17     Pay us \$3.33 million more." Clearly it's a  
18     denial.

19            CHAIR SIMPSON: Thank you, Ms. Marquis.  
20     Further questions from the Board.

21            (No response)

22            CHAIR SIMPSON: I'm going to ask a few,  
23     and the first one is to follow up with what we  
24     just heard, and that is to Ms. Marquis.

25            Why did Westmoreland propose Minor

1 Revision 304 in the first place which created this  
2 process of updating the bond annually? My  
3 recollection is that bond is normally reviewed of  
4 course when a permit is issued, at mid term  
5 review, and renewal. Why would anybody subject  
6 themselves to doing that every year?

7 MS. MARQUIS: So I was not involved in  
8 that process, and I cannot speak to the actual  
9 facts that led to their application for Minor  
10 Revision 304 which is at Exhibit T.

11 Some reasons why a coal mining company  
12 might prefer annual bonding is if they are doing a  
13 lot of reclamation, and they want to get moving  
14 towards bond release. And as I said, the  
15 reclamation and the cost estimates are based on  
16 the volumes of soils that need to be moved. You  
17 understand that. And so if they're doing  
18 reclamation, they would want to update their bond  
19 annually to reflect lower amounts of volumes that  
20 need to be moved.

21 The other thing with the five year bond  
22 calculation is it adds in a lot of inflation rates  
23 for five years. You can do that incrementally  
24 year by year, and it is just a different process.

25 So those are some reasons why they

1 might, but again, I can't say with certainty that  
2 those are reasons why Westmoreland applied for the  
3 annual bond calculation. It's part of their  
4 operations. It provides for better bonding and  
5 more up-to-date bonding amounts, protects  
6 Westmoreland and the State better to do it  
7 annually. As you mentioned, it is a lot of work,  
8 but it's worth it.

9 CHAIR SIMPSON: Thank you. You had  
10 mentioned earlier that what's going on on the  
11 ground at the mine is irrelevant, but I think it's  
12 very relevant to what we're talking about here.  
13 So I'm wondering if you could give us kind of a  
14 report of what the status of the mine is, that is,  
15 is the mine still producing coal, or is it in  
16 final reclamation mode.

17 MS. MARQUIS: Chairman Simpson, I cannot  
18 give you that full report, and again, if those are  
19 important to the decision making here, there  
20 should be an evidentiary hearing with testimony  
21 and documents to establish that in great deal, to  
22 the extent it's needed.

23 I can tell you it's not in final  
24 reclamation. It still is in mining. They are  
25 doing, the majority of their time out there is

1 spent in reclamation, but I cannot provide any  
2 additional details. Again, our hope is that if  
3 those details are important, we'll have the  
4 opportunity through a contested case hearing to  
5 bring those out through testimonial and  
6 documentary evidence.

7 MR. KING: Board Chair, I can answer  
8 that question if you'd like from their annual  
9 report.

10 CHAIR SIMPSON: Thank you, Mr. King.  
11 That's where I was going next. Do you have the  
12 2025 report? 2024 report is an exhibit in the  
13 package.

14 MR. KING: Maybe it is the -- what I  
15 have is -- I believe this is the 2024 report, so  
16 if you already have it, I misstated. This was  
17 certified on March 31st, 2025, so if that's the  
18 one you're looking at, that's the one I'm looking  
19 at.

20 CHAIR SIMPSON: That was my next  
21 question for Ms. Marquis, is according to that  
22 annual report there was no activity at all on the  
23 permit area in 2024 with respect to either new  
24 disturbance or reclamation.

25 And my question then is over the past

1 years -- I know the annual report isn't due yet --  
2 but has there been reclamation work in progress,  
3 and is the mine still producing coal? But I think  
4 I was just told that we'd have to go to an  
5 evidentiary hearing to establish those, the status  
6 of those questions.

7 MS. MARQUIS: Chairman Simpson,  
8 alternatively if you want additional documents or  
9 facts on that, we could provide something as a  
10 supplement perhaps, but again, I'm not prepared to  
11 provide the details on that reclamation at this  
12 oral argument, which is about Board jurisdiction.

13 CHAIR SIMPSON: Okay. Let me just  
14 review my -- I had another question for you.

15 There were a number of exhibits that  
16 were provided to the Board with Westmoreland's  
17 filings. Exhibit O is a minor revision form only,  
18 and it doesn't mention Minor Revision 311. It  
19 states that the proposed revision is clerical  
20 only.

21 And so my first question is: There was  
22 no exhibit that included the June 27 proposed  
23 minor revision to the Department, and I think  
24 you've answered my question as to whether it  
25 proposed any change in bond. My understanding is

1 that it did not. It was requesting the status  
2 quo. Am understanding that correctly?

3 MS. MARQUIS: I'm pulling up Exhibit O  
4 right now, Chairman Simpson. I apologize. I  
5 don't have it. Yes, Chairman Simpson, this is the  
6 cover sheet when they submitted Minor Revision  
7 311. I can see where it would be a bit confusing  
8 because I don't know that that is obvious.

9 But yes, there we see exactly on Page 2  
10 that there's no changes to the permit acreage  
11 certainly, and that this is a clerical revision  
12 with no impacts to the human environment. This is  
13 strictly about the bond calculation, as you see in  
14 the Paragraph 3 on Page 1 of Exhibit O. Revision  
15 is just to update the bond calculation for annual  
16 bonding.

17 CHAIR SIMPSON: If that's the case, how  
18 can it be a revision?

19 MS. MARQUIS: That's the process that  
20 DEQ required to go through annual bonding. They  
21 required a minor revision.

22 CHAIR SIMPSON: And that was as a result  
23 of approval of Minor Revision 304?

24 MS. MARQUIS: That's right, Chairman  
25 Simpson.

1 CHAIR SIMPSON: I guess I'm having  
2 trouble understanding the distinction between a  
3 bond revision under 1104 which would take place  
4 only at mid term review and at renewal, and what  
5 is being proposed here as a minor revision.

6 It seems to me that you're getting to  
7 the same place only by a different route, and by  
8 doing it that way you're pulling the Board into it  
9 where otherwise the Board would not be involved at  
10 all. I mean I don't see any independent -- I have  
11 to agree with Mr. King, that in the list of  
12 actions that are subject to Board review, bond  
13 calculation is not one of them. So what's the  
14 difference?

15 MS. MARQUIS: Chairman Simpson, the  
16 difference here is that, first of all, the annual  
17 bond calculations don't replace the mid permit  
18 reviews or the bond reviews upon permit renewal.  
19 Those still occur. This is a separate process,  
20 and this process is one in which DEQ required that  
21 it go through a minor revision. And as you know,  
22 a minor revision comes with a right to appeal  
23 before the Board.

24 And so Westmoreland did as they were  
25 told to do, submitted their annual bond

1 calculation as a minor revision to DEQ, which is  
2 what DEQ wanted, and now, DEQ has denied that  
3 minor revision, which clearly allows for Board  
4 jurisdiction in this case.

5           Additionally the rule DEQ cites,  
6 17.24.1104, doesn't apply here because there's  
7 been no demonstrated actual increase in costs that  
8 would allow that rule to be a part -- to govern in  
9 this instance, and even if it did, this is still  
10 in the context of a minor revision.

11           CHAIR SIMPSON: I guess I'd pose --  
12 thank you, Ms. Marquis. I guess I'd pose that  
13 question to Mr. King as to whether there is any  
14 real difference between the two processes given  
15 that the end result is the same.

16           MR. KING: Thank you, Board Chair. I  
17 think you've keyed it in on the heart of the issue  
18 here, and my answer to that is, as I presented, is  
19 no, there's no key difference. I think  
20 Westmoreland is making a form over substance  
21 argument here, in a sense acknowledging that  
22 there's typically no opportunity for the Board to  
23 review a bonding determination, but because it was  
24 submitted as part of a minor revision, that now  
25 therefore it vests the Board with jurisdiction,

1 and that doesn't make sense.

2 So to answer your previous question,  
3 Westmoreland asked for an annual bond review  
4 process. So because that doesn't otherwise exist,  
5 our response was use the minor revision process,  
6 because through that, you can make a minor  
7 revision to your actual permit by updates to the  
8 reclamation plan, as one would have to do, or to  
9 be a minor revision as per the plain language in  
10 84-4-221 sub (3). And then from there, you can  
11 calculate the bond determination.

12 Now, that is a revision to the permit  
13 itself, and that by extension lets us calculate  
14 the bond. It just fundamentally wouldn't make  
15 sense if you can't challenge the bond on the first  
16 instance once the permit was issued, but you could  
17 subsequently, just by going through the minor  
18 revision process.

19 It also wouldn't make sense that there's  
20 all these other mechanisms where we can and do  
21 have the authority to just require additional bond  
22 increases, and there isn't authority for the Board  
23 to hear it -- for example in 17.24.1104 -- but  
24 that you could now, just because it was submitted  
25 part and parcel of the minor revision process. So

1 that's my whole argument. Thank you.

2 CHAIR SIMPSON: Thank you.

3 MS. MARQUIS: Chairman Simpson, if I may  
4 interject one thing?

5 CHAIR SIMPSON: Ms. Marquis, please.

6 MS. MARQUIS: What DEQ is saying is yes,  
7 do an annual bond calculation through the minor  
8 revision process. Westmoreland does that, does  
9 not change their reclamation plan, just does the  
10 bond calculation. And now DEQ is saying, "Well,  
11 the minor revision process doesn't really matter.  
12 We're not going to honor everything that goes  
13 along with the minor revision process, because  
14 we're not going to honor your right to appeal."

15 That can't be the case. This is just  
16 about the bond calculation. DEQ required them to  
17 do it through a minor revision. They've done all  
18 of that. And now they're here before the Board to  
19 challenge DEQ's denial of it, which is their  
20 statutory right.

21 CHAIR SIMPSON: Are there any other  
22 questions from the Board?

23 (No response)

24 CHAIR SIMPSON: Counsel for the parties?

25 (No response)

1           CHAIR SIMPSON:   Hearing none, it's time  
2   to proceed with Board deliberations on this thing.

3           Before going there, I guess I would just  
4   relate that this is something that I have spent an  
5   awful lot of time on, and Dana has also, and  
6   together we have tried to understand just how all  
7   of the moving parts in this thing fit together.

8           And after going through that, I guess I  
9   came to the conclusion that we're over-thinking  
10   this.   The real question here is whether the Board  
11   can review a bond calculation because that is what  
12   Westmoreland is asking us to do.   How you get  
13   there, whether it's through a minor revision  
14   process or through another process associated with  
15   review of the permit, to me is irrelevant.

16           So with that, I would ask if there is a  
17   motion or if there are further questions from the  
18   Board before we proceed to a motion.

19           VICE CHAIR AGUIRRE:   Chairman Simpson,  
20   I'm prepared to make a motion, but I'd like to  
21   make sure that there isn't any more Board comment  
22   or Board deliberation.

23           CHAIR SIMPSON:   It depends on what the  
24   motion --

25           VICE CHAIR AGUIRRE:   I just want to

1 acknowledge what you said. It's true that it  
2 definitely -- we don't want to over-think this  
3 one.

4 CHAIR SIMPSON: There are a lot of  
5 complexities here, and so I just wanted to relay  
6 to the Board my own conclusion, short of making a  
7 motion, but I believe we are -- if there are no  
8 further questions for Counsel, I believe we're  
9 ready for a motion.

10 VICE CHAIR AGUIRRE: I'd like to make a  
11 motion that we grant DEQ's motion to dismiss.

12 BOARD MEMBER PAYNE: I second that  
13 motion.

14 CHAIR SIMPSON: Is there a second?

15 BOARD MEMBER PAYNE: I'll second it.

16 CHAIR SIMPSON: It's been moved and  
17 seconded to grant DEQ's motion for dismissal. Is  
18 there any further discussion from the Board?

19 (No response)

20 CHAIR SIMPSON: Hearing none, let's take  
21 a roll call vote, please.

22 MS. MOISEY-SCHERER: Chair Simpson.

23 CHAIR SIMPSON: Aye.

24 MS. MOISEY-SCHERER: Vice Chair Aguirre.

25 VICE CHAIR AGUIRRE: Aye.

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MS. MOISEY-SCHERER: Board Member

Altemus.

BOARD MEMBER ALTEMUS: Aye.

MS. MOISEY-SCHERER: Board Member Payne.

BOARD MEMBER PAYNE: Aye.

MS. MOISEY-SCHERER: Board Member

Rankosky.

BOARD MEMBER RANKOSKY: Aye.

MS. MOISEY-SCHERER: Board Member Smith.

BOARD MEMBER SMITH: Aye.

CHAIR SIMPSON: Motion passes  
unanimously. Thank you very much.

(The proceedings were concluded

at 12:23 p.m. )

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STATE OF MONTANA )  
 : SS.  
COUNTY OF LEWIS & CLARK )

I, LAURIE CRUTCHER, RPR, Court Reporter,  
Notary Public in and for the County of Lewis &  
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at  
the time and place herein named; that the  
proceedings were reported by me in shorthand and  
transcribed using computer-aided transcription,  
and that the foregoing -76- pages contain a true  
record of the proceedings to the best of my  
ability.

IN WITNESS WHEREOF, I have hereunto set my  
hand and affixed my notarial seal this 7th day of  
March, 2026.

*Laurie Crutcher*

\_\_\_\_\_  
LAURIE CRUTCHER, RPR  
Court Reporter - Notary Public  
My commission expires  
March 9, 2028.

<p style="text-align: center;"><u>        </u> <b>\$</b> <u>        </u></p> <p>\$23,630,000 [4] 25:14, 63:23, 64:1, 64:5 \$3 [3] 24:1, 25:20, 29:10 \$3,300,000 - 29:11 \$3,330,00 - 51:12 \$3,330,000 [5] 25:16, 49:21, 50:24, 51:11, 64:2 \$3.3 [4] 38:3, 53:22, 58:13, 58:24 \$3.33 [2] 63:19, 64:17 \$30 - 25:20 \$300 - 25:21</p> <p style="text-align: center;"><u>        </u> <b>1</b> <u>        </u></p> <p>1 [7] 7:24, 12:4, 12:11, 37:2, 49:14, 54:25, 69:14 1.3.226 - 16:4 1.3.229 - 17:14 10 - 39:10 10:40 - 1:15 10:41 - 3:4 1104 - 70:3 12 - 27:6 12:23 - 76:14 16 [2] 37:16, 38:7 17.1.101 - 17:2 17.24.1104 [7] 12:21, 21:24, 37:2, 49:13, 54:24, 71:6, 72:23 17.24.313 - 12:6 1973 - 52:2</p> <p style="text-align: center;"><u>        </u> <b>2</b> <u>        </u></p> <p>2 [6] 27:7, 33:1, 54:16, 54:19, 54:22, 69:9 2)(g - 59:5 2-15-102 - 39:10 2-4-501 [3]</p>	<p>16:18, 18:9, 18:11 20 [2] 1:14, 4:6 2002 - 40:1 200901 - 2:4 2023-0100 - 48:10 2024 [3] 67:12, 67:15, 67:23 2025 [5] 28:22, 62:9, 63:17, 67:12, 67:17 2025-04 [2] 1:5, 4:1 2026 [2] 1:14, 77:17 2028 - 77:23 2529 - 2:8 27 - 68:22 29th [8] 28:22, 29:25, 30:22, 34:9, 38:17, 62:9, 63:17, 64:1</p> <p style="text-align: center;"><u>        </u> <b>3</b> <u>        </u></p> <p>3 [5] 5:25, 6:1, 12:5, 69:14, 72:10 304 [3] 65:1, 65:10, 69:23 31 - 20:7 311 [25] 1:7, 4:2, 5:21, 25:2, 25:13, 29:21, 30:23, 31:20, 32:11, 32:19, 34:21, 36:14, 38:18, 42:9, 48:17, 49:17, 53:24, 54:10, 55:13, 55:15, 56:3, 63:22, 64:6, 68:18, 69:7 31st [2] 29:12, 67:17</p> <p style="text-align: center;"><u>        </u> <b>5</b> <u>        </u></p> <p>5 - 64:11 59103-2529 - 2:9 59620 - 2:5</p>	<p style="text-align: center;"><u>        </u> <b>6</b> <u>        </u></p> <p>6 [2] 17:2, 28:25 66 - 40:1</p> <p style="text-align: center;"><u>        </u> <b>7</b> <u>        </u></p> <p>76 - 77:12 7th - 77:16</p> <p style="text-align: center;"><u>        </u> <b>8</b> <u>        </u></p> <p>8 - 54:24 82-4-202 - 59:5 82-4-205 - 16:7 82-4-206 [5] 6:8, 9:5, 14:22, 15:7, 53:10 82-4-221 [6] 5:25, 6:1, 11:19, 12:19, 43:9, 46:25 82-4-223 [9] 6:6, 7:14, 7:24, 9:4, 13:19, 14:22, 14:23, 26:1, 26:17 82-4-234 - 13:9 84-4-221 - 72:10</p> <p style="text-align: center;"><u>        </u> <b>9</b> <u>        </u></p> <p>9 - 77:23</p> <p style="text-align: center;"><u>        </u> <b>A</b> <u>        </u></p> <p>a.m - 1:15 ability [3] 5:14, 46:13, 77:14 able - 51:23 Absaloka [6] 1:6, 4:3, 4:11, 23:14, 23:25, 37:21 Absaloka's - 5:1 absolute - 48:5 absolutely [3] 38:18, 48:15, 48:16 abundantly - 5:12 accept [2]</p>	<p>10:17, 19:23 acceptable - 4:16 accepted - 48:8 accepts - 21:5 accessible - 30:7 accomplished - 8:17 according - 67:21 accountable - 40:10 accurate [2] 44:9, 44:10 accusations [2] 24:10, 24:14 acknowledge [3] 48:20, 48:21, 75:1 acknowledging - 71:21 acquiring - 22:12 acreage - 69:10 across - 54:15 Act - 52:1 action [13] 29:16, 29:19, 30:20, 30:23, 31:15, 31:25, 32:11, 32:14, 32:25, 33:9, 34:14, 34:16, 42:8 actions [2] 20:24, 70:12 activity - 67:22 actual [6] 37:10, 38:10, 55:9, 65:8, 71:7, 72:7 add - 27:25 additional [13] 4:7, 25:9, 29:11, 30:13, 31:19, 50:23, 53:22, 58:13, 58:24, 63:19, 67:2, 68:8, 72:21 Additionally - 71:5 address [7]</p>	<p>24:21, 26:17, 28:21, 29:19, 30:19, 36:24, 61:17 addressed [2] 17:4, 17:6 addressing - 24:18 adds - 65:22 adjudicate [4] 6:18, 14:17, 23:3, 23:4 adjusted - 7:16 adjustment [3] 4:3, 6:11, 11:22 adjustments - 11:24 administer - 11:5 administers [2] 16:6, 17:9 Administration - 16:9 administrative [9] 5:6, 5:12, 12:7, 12:10, 16:4, 16:15, 40:13, 40:14, 60:15 adopt - 19:22 adopted [4] 16:11, 16:15, 16:24, 17:2 adverse [2] 30:8, 30:15 Affairs - 23:19 affirmative - 21:9 affirmatively - 19:16 affixed - 77:16 against - 29:19 agency [39] 5:6, 5:13, 10:2, 13:22, 16:5, 16:18, 16:22, 17:17, 18:18, 21:7, 21:21, 27:23, 29:16, 30:23, 31:10, 31:15, 31:24, 32:11, 32:14,</p>	<p>32:25, 33:9, 34:13, 34:16, 37:13, 38:24, 39:1, 39:23, 40:15, 40:17, 42:8, 42:11, 42:13, 45:15, 45:16, 45:18, 46:1, 46:6, 47:16, 63:13 agency's [5] 19:4, 31:23, 33:6, 40:12, 40:13 agree [7] 28:11, 28:12, 29:2, 38:13, 42:9, 42:10, 70:11 agreed [3] 22:12, 25:11, 44:21 agreement [4] 10:1, 11:3, 11:4, 11:6 agrees - 34:17 Aguirre - 63:10 Aguirre [10] 1:18, 3:10, 3:11, 61:10, 61:12, 74:19, 74:25, 75:10, 75:24, 75:25 ahead - 4:18 albeit - 45:5 align - 36:5 Allan [5] 1:20, 50:10, 61:9, 61:13, 62:8 alleged [2] 5:23, 36:25 alleging - 29:22 allow [2] 28:8, 71:8 allowed [2] 45:24, 57:9 allowing - 57:3 allows [3] 37:2, 56:25, 71:3 alone - 10:12 already [10] 20:15, 22:12, 26:9, 26:11,</p>
---	---	---	--	---	---

26:11, 39:11, 45:22, 57:7, 62:21, 67:16 <b>Altemus</b> [5] 1:19, 3:13, 3:14, 76:2, 76:3 <b>alternatively</b> [2] 21:11, 68:8 <b>although -</b> 21:25 <b>Amazon</b> [3] 14:4, 14:8, 62:23 <b>Among -</b> 16:8 <b>amount</b> [13] 5:23, 8:1, 15:10, 15:18, 15:18, 27:25, 29:24, 36:8, 44:2, 52:25, 53:1, 53:6, 63:18 <b>amounts</b> [3] 20:19, 65:19, 66:5 <b>analogous -</b> 45:9 <b>analogy</b> [2] 14:3, 62:24 <b>analysis</b> [6] 24:21, 27:12, 27:13, 34:15, 41:17, 60:10 <b>analyzing -</b> 34:9 <b>annual</b> [13] 28:14, 58:4, 65:12, 66:3, 67:8, 67:22, 68:1, 69:15, 69:20, 70:16, 70:25, 72:3, 73:7 <b>annually</b> [5] 36:19, 36:21, 65:2, 65:19, 66:7 <b>answered -</b> 68:24 <b>anyway -</b> 33:14 <b>apologize</b> [3] 40:25, 42:15, 69:4 <b>apparent -</b> 8:10 <b>appeal</b> [22] 1:5, 5:20,	6:2, 9:7, 14:23, 21:6, 22:6, 27:7, 28:17, 32:6, 32:9, 42:24, 43:1, 45:23, 47:17, 47:19, 49:9, 49:10, 59:22, 60:12, 70:22, 73:14 <b>appealable</b> [3] 28:12, 49:23, 59:23 <b>appeals</b> [2] 8:11, 45:9 <b>APPEARING</b> [2] 2:2, 2:6 <b>appears -</b> 19:8 <b>applicability -</b> 16:21 <b>applicable -</b> 16:14 <b>applicant</b> [6] 9:22, 10:4, 15:9, 16:13, 25:22, 30:5 <b>applicants -</b> 9:17 <b>application</b> [9] 9:8, 9:9, 9:11, 9:12, 9:14, 9:18, 32:7, 54:1, 65:9 <b>applied</b> [2] 18:22, 66:2 <b>applies</b> [2] 38:22, 57:20 <b>apply</b> [7] 22:21, 28:18, 39:16, 49:5, 57:19, 57:20, 71:6 <b>applying</b> [2] 25:14, 33:18 <b>appropriate -</b> 50:4 <b>appropriately</b> [2] 12:21, 38:7 <b>approval</b> [7] 6:2, 8:24, 10:6, 11:7, 32:6, 61:24, 69:23 <b>approvals</b> [7] 6:9, 9:7, 9:9, 9:10, 9:12, 9:13, 9:21 <b>approve</b> [11] 25:3, 25:4,	31:6, 31:6, 32:3, 34:24, 57:11, 58:9, 63:23, 63:25, 64:15 <b>approved</b> [5] 9:19, 13:20, 37:21, 54:6, 54:12 <b>approves -</b> 26:19 <b>approving -</b> 26:8 <b>apt -</b> 14:3 <b>arbitrarily -</b> 55:5 <b>aren't</b> [5] 13:2, 24:11, 25:3, 35:10, 35:10 <b>argued -</b> 26:21 <b>argues -</b> 25:6 <b>argument</b> [11] 1:10, 4:5, 17:8, 24:8, 41:25, 42:1, 44:7, 56:2, 68:12, 71:21, 73:1 <b>arguments</b> [3] 4:6, 19:19, 24:19 <b>ARM</b> [6] 12:21, 17:2, 17:14, 21:24, 37:1, 54:24 <b>Army</b> [2] 33:22, 34:2 <b>artificially -</b> 24:4 <b>aside</b> [2] 19:19, 44:10 <b>asking</b> [12] 5:21, 10:20, 12:6, 19:8, 19:9, 26:10, 32:8, 46:14, 57:10, 57:12, 60:1, 74:12 <b>asks</b> [3] 23:7, 38:16, 64:15 <b>assessment -</b> 29:2 <b>Assistant -</b> 2:3 <b>associated</b> [2] 58:19, 74:14 <b>Association -</b> 18:4 <b>assume</b> [5] 6:16, 11:15, 12:25, 13:23, 14:14	<b>assuming -</b> 10:13 <b>Attorney</b> [4] 2:2, 2:3, 2:6, 2:7 <b>August</b> [8] 28:22, 29:25, 30:22, 34:9, 38:17, 62:9, 63:17, 64:1 <b>authority</b> [44] 5:7, 5:8, 6:8, 6:20, 16:1, 16:2, 16:13, 16:16, 16:24, 16:25, 18:12, 18:13, 18:17, 19:13, 38:25, 39:4, 39:6, 39:11, 40:4, 40:10, 40:12, 40:13, 40:18, 40:20, 40:22, 41:4, 41:5, 41:10, 41:13, 41:15, 41:16, 41:19, 41:23, 42:10, 42:12, 46:8, 46:12, 47:20, 48:5, 48:13, 48:15, 48:25, 72:21, 72:22 <b>authorized</b> [4] 8:24, 18:7, 38:1, 44:20 <b>available -</b> 20:10 <b>avenue</b> [4] 7:4, 20:10, 45:23, 59:18 <b>avenues -</b> 52:9 <b>avoid</b> [4] 12:15, 20:11, 30:15, 32:22 <b>AVS</b> [2] 30:6, 30:17 <b>awful -</b> 74:5 <b>Aye</b> [6] 75:23, 75:25, 76:3, 76:5, 76:8,	76:10 <hr/> <b>B</b> <hr/> <b>backfill -</b> 27:18 <b>backfilling</b> [2] 13:10, 22:17 <b>background</b> [3] 7:10, 11:9, 24:2 <b>balance -</b> 51:18 <b>bankruptcy -</b> 20:21 <b>base</b> [2] 30:7, 37:25 <b>bear</b> [2] 20:20, 20:23 <b>become -</b> 45:8 <b>becomes</b> [2] 8:10, 11:10 <b>begin</b> [2] 24:6, 24:18 <b>beginning -</b> 43:21 <b>behalf</b> [4] 2:2, 2:6, 4:23, 10:13 <b>beholden -</b> 25:22 <b>benefits</b> [2] 41:9, 41:11 <b>Bennett</b> [2] 31:2, 33:2 <b>BER</b> [3] 1:5, 3:25, 48:9 <b>beside -</b> 47:24 <b>best -</b> 77:13 <b>better</b> [2] 66:4, 66:6 <b>bigger</b> [3] 46:11, 51:17, 51:22 <b>Billings -</b> 2:9 <b>binding</b> [2] 15:4, 33:14 <b>bit</b> [2] 42:15, 69:7 <b>Bitterroot -</b> 18:3 <b>Bitterrooter -</b> 39:21 <b>Bitterrooters -</b> 40:1 <b>blanket -</b> 27:25 <b>board</b> [172] 1:1, 1:18, 3:12, 3:14, 3:15, 3:16, 3:17, 3:19, 3:20, 3:21, 4:4, 4:12, 4:22, 4:22, 5:17, 5:22,	6:16, 6:18, 6:20, 6:25, 7:5, 9:7, 10:22, 10:23, 11:11, 11:15, 12:22, 12:25, 14:12, 14:14, 14:17, 14:22, 15:5, 15:13, 15:15, 15:20, 15:23, 15:23, 16:1, 16:8, 16:12, 16:23, 17:6, 17:9, 18:24, 19:6, 19:8, 19:10, 19:12, 19:16, 19:21, 19:23, 20:5, 20:9, 20:13, 20:16, 20:18, 21:5, 21:12, 22:22, 23:2, 23:7, 23:12, 24:15, 24:22, 25:2, 25:25, 26:2, 27:6, 28:15, 30:3, 30:11, 30:24, 31:21, 32:12, 33:12, 34:17, 38:8, 38:13, 38:14, 38:16, 38:24, 38:25, 39:11, 39:19, 41:13, 41:22, 42:4, 42:6, 42:10, 42:11, 42:12, 42:18, 43:1, 46:7, 46:11, 46:11, 46:16, 47:19, 47:20, 48:1, 48:8, 49:23, 50:6, 50:9, 50:11, 50:25, 51:4, 51:10,
---	---	--	--	--	---

52:11, 52:24, 53:7, 53:11, 53:14, 53:20, 54:7, 54:13, 54:25, 55:2, 55:16, 55:18, 55:20, 56:14, 56:22, 58:11, 58:18, 58:23, 59:2, 59:15, 59:16, 59:20, 59:25, 60:10, 60:13, 60:17, 60:19, 61:3, 61:7, 61:13, 61:19, 64:20, 67:7, 68:12, 68:16, 70:8, 70:9, 70:12, 70:23, 71:3, 71:16, 71:22, 71:25, 72:22, 73:18, 73:22, 74:2, 74:10, 74:18, 74:21, 74:22, 75:6, 75:12, 75:15, 75:18, 76:1, 76:3, 76:4, 76:5, 76:6, 76:8, 76:9, 76:10	13:18, 13:20, 14:2, 14:20, 15:1, 15:9, 15:11, 15:17, 15:18, 20:8, 20:12, 20:19, 21:23, 22:11, 22:21, 23:4, 24:1, 24:4, 25:9, 25:11, 25:14, 26:5, 26:15, 26:19, 26:23, 26:24, 27:2, 27:4, 27:5, 27:11, 27:14, 28:1, 28:5, 28:14, 29:3, 29:8, 29:11, 29:24, 30:13, 31:19, 32:2, 32:3, 32:22, 34:12, 34:22, 35:19, 36:10, 36:14, 36:15, 36:16, 36:18, 36:22, 37:1, 37:3, 37:9, 37:19, 38:9, 38:12, 42:24, 43:1, 43:3, 44:2, 44:8, 44:16, 44:22, 47:7, 48:5, 48:10, 49:2, 49:8, 49:11, 49:14, 49:19, 49:20, 50:21, 51:9, 51:11, 51:21, 52:25, 53:1, 53:6, 53:14, 53:18, 53:22, 54:1, 54:5, 54:9, 55:3, 55:6, 56:5, 56:18, 57:5, 57:8, 57:16, 57:25, 58:4, 58:6, 58:8, 58:9, 58:9, 58:20, 60:5,	60:18, 60:25, 61:24, 62:4, 63:18, 63:20, 63:23, 63:25, 64:4, 64:7, 64:12, 64:13, 64:13, 64:14, 64:15, 65:2, 65:3, 65:14, 65:18, 65:21, 66:3, 68:25, 69:13, 69:15, 70:3, 70:12, 70:17, 70:18, 70:25, 72:3, 72:11, 72:14, 72:15, 72:21, 73:7, 73:10, 73:16, 74:11	<b>bonding [31]</b> 6:5, 6:19, 7:5, 7:7, 8:1, 8:7, 10:22, 11:21, 12:4, 14:18, 19:11, 20:17, 21:21, 23:25, 26:12, 27:10, 35:18, 35:18, 36:8, 47:11, 48:9, 48:12, 48:24, 58:14, 64:12, 65:12, 66:4, 66:5, 69:16, 69:20, 71:23	2:8 <b>brief [6]</b> 12:4, 42:19, 48:19, 54:15, 54:23, 64:10 <b>briefing [11]</b> 7:12, 16:3, 18:3, 28:21, 28:24, 31:5, 33:2, 36:25, 39:9, 48:4, 63:12 <b>briefly [2]</b> 62:2, 62:11 <b>briefs -</b> 54:15 <b>bring [2]</b> 3:4, 67:5 <b>bringing -</b> 20:24 <b>brought [2]</b> 55:18, 62:8 <b>brunt -</b> 20:24 <b>buildings [2]</b> 35:6, 35:6 <b>bunch -</b> 52:14 <b>busy -</b> 20:15	73:16, 74:11 <b>calculations [7]</b> 24:2, 25:11, 28:14, 49:8, 61:1, 64:13, 70:17 <b>calendar -</b> 22:16 <b>can't [15]</b> 9:23, 12:23, 13:19, 14:25, 21:9, 35:8, 35:18, 36:13, 39:4, 39:5, 55:4, 56:4, 66:1, 72:15, 73:15 <b>cannot [17]</b> 15:22, 23:3, 23:4, 25:8, 25:24, 28:6, 28:17, 29:17, 38:8, 39:20, 41:19, 43:3, 49:5, 56:3, 65:8, 66:17, 67:1 <b>capsulation -</b> 54:18 <b>cares -</b> 46:5 <b>carry -</b> 20:1 <b>cart [3]</b> 14:5, 14:9, 62:24 <b>case [54]</b> 1:4, 4:10, 4:25, 5:8, 5:14, 6:1, 15:4, 16:2, 17:11, 17:24, 18:2, 18:6, 18:11, 18:15, 18:19, 19:23, 20:7, 21:6, 25:24, 27:8, 27:23, 31:1, 31:3, 31:9, 31:22, 32:13, 33:2, 33:3, 33:9, 33:11, 33:11, 33:17, 34:3, 39:22, 39:24, 40:6, 41:2, 42:21, 45:12, 48:6, 48:9, 49:5, 49:15, 50:1, 52:18, 52:19, 55:17, 59:11, 63:5, 63:11, 67:4, 69:17, 71:4,	73:15 <b>case-by-case -</b> 27:12 <b>cases [11]</b> 15:6, 16:14, 17:9, 17:13, 23:23, 30:25, 32:25, 42:4, 42:6, 45:7, 45:10 <b>cash [6]</b> 27:3, 51:9, 51:9, 58:15, 58:21, 58:21 <b>causes -</b> 31:23 <b>CEO -</b> 23:19 <b>certain [2]</b> 5:13, 27:15 <b>certainly [5]</b> 20:9, 20:16, 52:8, 59:22, 69:11 <b>certainty -</b> 66:1 <b>certified -</b> 67:17 <b>certify -</b> 77:7 <b>cessation [2]</b> 30:4, 30:16 <b>Chair [56]</b> 1:18, 3:4, 3:7, 3:9, 3:10, 3:11, 3:24, 4:12, 4:17, 4:22, 23:9, 23:11, 40:23, 42:16, 42:18, 46:21, 50:5, 50:8, 61:9, 61:10, 61:12, 61:12, 62:13, 62:14, 63:7, 63:10, 64:19, 64:22, 66:9, 67:7, 67:10, 67:20, 68:13, 69:17, 69:22, 70:1, 71:11, 71:16, 73:2, 73:5, 73:21, 73:24, 74:1, 74:19, 74:23, 74:25, 75:4, 75:10, 75:14, 75:16,
--	---	--	---	---	---	---

## C

## C1985005 -

1:8

cajoling -

13:15

calculate [3]

64:13,

72:11, 72:13

calculated [2]

44:11, 44:12

calculates -

37:9

calculation

[35] 25:14,

27:20, 32:3,

34:22,

36:10,

36:15,

36:16,

36:19,

36:22,

38:12,

44:22, 47:8,

48:24,

49:11,

49:19,

49:21, 58:4,

58:6, 58:10,

60:11,

63:25, 64:4,

64:7, 64:13,

64:16,

65:22, 66:3,

69:13,

69:15,

70:13, 71:1,

73:7, 73:10,

75:20, 75:22, 75:23, 75:24, 75:25, 76:11 <b>Chairman</b> [9] 1:17, 66:17, 68:7, 69:4, 69:5, 69:24, 70:15, 73:3, 74:19 <b>challenge</b> [21] 6:18, 7:4, 8:8, 9:16, 10:18, 10:21, 12:22, 14:17, 14:24, 14:25, 15:9, 20:12, 49:1, 53:5, 53:8, 56:10, 59:19, 59:24, 60:5, 72:15, 73:19 <b>challenged</b> [4] 9:22, 20:8, 60:18, 61:4 <b>challenges</b> [2] 20:17, 53:18 <b>change</b> [16] 12:17, 19:16, 35:13, 36:9, 36:15, 37:5, 37:6, 37:15, 38:10, 47:4, 47:5, 47:9, 55:9, 55:14, 68:25, 73:9 <b>changed</b> [5] 12:17, 36:13, 37:8, 37:10, 55:9 <b>changes</b> [10] 7:17, 34:23, 35:1, 35:8, 35:10, 36:12, 37:6, 37:7, 43:23, 69:10 <b>changing</b> [4] 12:18, 26:14, 47:3, 47:8 <b>character</b> - 27:17 <b>characterization</b> [2] 44:9, 44:10 <b>characterizes</b> [2] 31:10, 63:13 <b>charge</b> - 28:6 <b>checkout</b> -	62:25 <b>Circuit</b> [5] 8:11, 8:18, 9:17, 33:11, 33:16 <b>circumstance</b> - 43:2 <b>circumstances</b> [2] 15:8, 15:8 <b>circumvent</b> - 21:10 <b>cite</b> [2] 27:8, 33:2 <b>cited</b> [6] 32:25, 39:9, 39:22, 39:25, 46:24, 63:12 <b>cites</b> [5] 26:17, 31:3, 33:10, 49:13, 71:5 <b>citing</b> - 56:17 <b>claim</b> [2] 18:11, 38:15 <b>claiming</b> - 60:3 <b>claims</b> [2] 24:23, 43:6 <b>Clark</b> [2] 77:4, 77:7 <b>clear</b> [11] 5:12, 7:11, 11:10, 24:22, 29:13, 29:17, 31:17, 49:6, 52:2, 59:6, 59:10 <b>clearly</b> [9] 34:7, 34:15, 38:14, 41:18, 42:8, 47:6, 49:23, 64:17, 71:3 <b>clerical</b> [2] 68:19, 69:11 <b>close</b> - 19:20 <b>coal</b> [12] 1:8, 5:1, 10:21, 10:23, 20:8, 59:7, 59:9, 59:10, 59:13, 65:11, 66:15, 68:3 <b>comes</b> [5] 37:24, 48:4, 53:1, 53:9, 70:22 <b>coming</b> [2] 22:22, 36:20 <b>comment</b> [3] 53:2, 55:25, 74:21	<b>commission</b> - 77:22 <b>Comp</b> [4] 40:19, 40:21, 41:6, 41:24 <b>companies</b> [4] 10:21, 10:24, 20:25, 59:13 <b>company</b> [7] 20:8, 20:11, 44:20, 51:6, 52:4, 58:14, 65:11 <b>compared</b> - 43:15 <b>Compensation</b> - 18:19 <b>competent</b> [2] 5:9, 55:23 <b>competently</b> - 60:22 <b>complete</b> [5] 8:16, 13:7, 22:14, 22:20, 43:19 <b>completed</b> - 22:17 <b>completely</b> - 37:24 <b>completing</b> [2] 7:20, 8:5 <b>completion</b> [2] 12:8, 13:13 <b>complexities</b> - 75:5 <b>complicate</b> - 34:20 <b>comply</b> - 52:15 <b>complying</b> - 20:3 <b>component</b> [2] 8:21, 44:3 <b>components</b> [3] 5:13, 5:17, 45:6 <b>computer-aided</b> - 77:11 <b>concluded</b> - 76:13 <b>concluding</b> - 15:21 <b>conclusion</b> [2] 74:9, 75:6 <b>conclusions</b> [2] 39:5, 39:17 <b>concrete</b> - 30:2 <b>condition</b> - 44:20 <b>conduct</b> - 16:13 <b>conducts</b> -	42:4 <b>confer</b> [2] 6:17, 14:16 <b>conference</b> - 21:22 <b>conferred</b> [2] 18:22, 18:23 <b>confident</b> [2] 21:15, 46:18 <b>confines</b> - 49:15 <b>conflate</b> [2] 44:17, 45:2 <b>confusing</b> - 69:7 <b>connected</b> [4] 28:3, 41:8, 48:10, 58:3 <b>consequences</b> [7] 20:20, 30:2, 30:9, 31:13, 32:16, 32:18, 33:8 <b>conservation</b> [3] 39:22, 40:7, 40:14 <b>consider</b> [5] 7:15, 19:21, 24:15, 31:9, 53:3 <b>consideration</b> [2] 14:21, 27:15 <b>consistent</b> - 16:16 <b>constitutionalit</b> - 41:7 <b>construed</b> - 46:13 <b>consummation</b> - 33:5 <b>contain</b> [2] 12:12, 77:12 <b>contained</b> - 34:23 <b>contemplated</b> - 51:17 <b>contemplates</b> - 11:3 <b>contends</b> - 12:16 <b>contested</b> [16] 4:25, 6:1, 15:6, 16:14, 17:9, 17:11, 17:13, 17:24, 18:6, 42:4, 42:6, 42:21, 45:10, 45:11, 50:1, 67:4 <b>context</b> [8] 43:14, 48:7, 48:12,	55:13, 55:17, 60:9, 60:10, 71:10 <b>continued</b> - 12:2 <b>contract</b> - 10:1 <b>Contrary</b> - 11:16 <b>contrast</b> - 16:12 <b>convince</b> - 21:16 <b>cooperative</b> [3] 11:1, 11:3, 11:4 <b>Corporate</b> - 23:17 <b>Corps</b> [2] 33:22, 34:2 <b>correct</b> [9] 22:8, 38:5, 38:6, 38:6, 39:24, 42:25, 51:7, 54:25, 62:14 <b>corrected</b> - 4:18 <b>correctly</b> [2] 36:7, 69:2 <b>correspondence</b> [3] 13:14, 62:19, 64:8 <b>cost</b> [18] 7:17, 7:19, 7:19, 10:10, 10:11, 10:19, 20:25, 37:6, 37:10, 44:13, 44:14, 50:22, 51:24, 55:8, 55:9, 64:12, 64:12, 65:15 <b>costs</b> [4] 28:4, 38:10, 44:13, 71:7 <b>Cottrell</b> - 23:17 <b>couldn't</b> [4] 16:24, 31:16, 33:25, 60:7 <b>Counsel</b> [6] 23:17, 23:18, 50:12, 61:17, 73:24, 75:8 <b>Counsels</b> - 62:3 <b>counter</b> - 62:25 <b>County</b> [3]	33:11, 77:4, 77:6 <b>couple</b> [2] 50:11, 54:14 <b>course</b> [3] 12:17, 64:8, 65:4 <b>court</b> [41] 1:23, 5:5, 5:9, 5:11, 8:11, 15:4, 17:14, 18:4, 18:19, 19:3, 19:3, 21:8, 21:16, 22:7, 28:1, 31:9, 33:3, 34:3, 34:10, 40:2, 40:8, 40:11, 40:17, 40:19, 40:21, 40:22, 41:2, 41:6, 41:24, 41:25, 42:1, 45:10, 45:24, 46:19, 47:24, 59:18, 59:23, 60:5, 61:4, 77:5, 77:21 <b>cover</b> [2] 27:4, 69:6 <b>create</b> - 43:5 <b>created</b> - 65:1 <b>creates</b> - 30:1 <b>credence</b> - 20:13 <b>criteria</b> [3] 8:23, 9:15, 10:9 <b>Crowley</b> - 2:8 <b>CRUTCHER</b> [3] 1:22, 77:5, 77:20 <b>crux</b> - 7:2 <b>current</b> - 13:11 <hr/> <b>D</b> <hr/> <b>damage</b> - 32:23 <b>Dana</b> - 74:5 <b>data</b> [2] 30:7, 37:25 <b>date</b> - 21:22 <b>DAVID</b> - 1:17 <b>deal</b> [4] 24:5, 47:14, 47:22, 66:21 <b>dealing</b> - 24:12 <b>December</b> -
--	--	--	--	--	--

29:12 <b>decide</b> [6] 14:12, 28:14, 31:18, 38:15, 39:4, 47:21 <b>decided</b> [3] 38:20, 41:7, 48:2 <b>decides</b> [2] 53:12, 53:13 <b>deciding</b> [2] 24:16, 49:16 <b>decision</b> [30] 22:7, 25:7, 25:17, 29:14, 29:20, 30:22, 31:19, 31:23, 31:24, 32:19, 33:6, 34:5, 34:6, 34:7, 34:8, 45:23, 47:18, 49:9, 49:10, 49:16, 49:18, 49:22, 59:19, 59:22, 59:24, 61:18, 63:14, 63:15, 63:16, 66:19 <b>decisions</b> [4] 22:19, 28:11, 41:14, 48:5 <b>declaratory</b> [27] 6:21, 15:22, 16:5, 16:17, 16:20, 17:1, 17:3, 17:10, 17:10, 17:12, 17:19, 18:8, 18:12, 18:14, 18:20, 18:24, 22:5, 23:5, 38:23, 39:18, 40:4, 40:11, 41:12, 41:16, 41:20, 42:13, 45:14 <b>deference</b> [2] 19:4, 19:6 <b>definitely</b> -	75:2 <b>definition</b> - 39:8 <b>defunct</b> - 20:25 <b>delegated</b> - 5:15 <b>deliberation</b> - 74:22 <b>deliberations</b> - 74:2 <b>demand</b> - 25:22 <b>demanded</b> - 29:24 <b>demonstrate</b> - 8:16 <b>demonstrated</b> - 71:7 <b>denial</b> [19] 5:1, 6:2, 14:10, 14:24, 15:14, 22:25, 25:5, 32:9, 34:18, 38:13, 38:18, 45:3, 49:22, 60:13, 62:1, 62:10, 62:15, 64:18, 73:19 <b>denials</b> [8] 6:9, 9:8, 9:9, 9:10, 9:12, 9:13, 9:21, 48:13 <b>denied</b> [20] 6:14, 11:14, 13:23, 14:15, 42:9, 42:14, 42:23, 44:5, 48:16, 55:14, 61:15, 61:20, 61:20, 62:5, 62:14, 62:15, 62:16, 63:3, 64:3, 71:2 <b>denies</b> [3] 26:19, 31:14, 47:16 <b>deny</b> [10] 25:2, 31:6, 31:7, 32:3, 32:19, 47:25, 49:18, 49:24, 57:13, 57:15 <b>denying</b> [2] 30:23, 34:16	<b>Department</b> [7] 2:2, 2:4, 7:14, 26:12, 44:23, 63:21, 68:23 <b>Department's</b> - 38:17 <b>dependent</b> - 27:12 <b>depends</b> - 74:23 <b>DEQ</b> [132] 4:13, 4:23, 7:9, 7:13, 7:13, 8:3, 9:25, 10:10, 10:11, 10:13, 11:5, 13:14, 13:16, 14:21, 15:24, 16:3, 16:8, 16:15, 17:2, 18:12, 18:14, 19:6, 19:11, 20:3, 20:22, 21:4, 22:5, 23:7, 24:9, 24:20, 25:1, 25:6, 25:11, 25:13, 25:15, 25:19, 26:7, 26:10, 26:17, 26:19, 26:21, 26:23, 27:24, 28:6, 28:10, 28:12, 28:13, 28:17, 29:1, 29:5, 29:6, 29:9, 29:15, 29:18, 29:21, 29:25, 30:3, 30:13, 30:18, 31:3, 31:4, 32:1, 32:8, 32:10, 33:1, 33:10, 34:11, 34:20, 34:23, 34:24, 35:8, 35:12, 36:13, 36:19, 36:23, 36:24, 37:1, 37:8, 37:23, 38:8, 39:3, 39:20,	39:21, 40:19, 41:17, 41:18, 41:22, 42:5, 42:6, 45:21, 45:22, 46:24, 47:12, 47:13, 47:22, 48:3, 48:16, 49:3, 49:6, 49:12, 53:1, 53:23, 54:9, 54:18, 55:3, 55:14, 56:12, 56:13, 56:25, 57:10, 57:13, 57:14, 57:24, 58:18, 60:2, 60:2, 60:24, 61:15, 63:21, 63:25, 64:3, 64:5, 64:16, 69:20, 70:20, 71:1, 71:2, 71:2, 71:5, 73:6, 73:10, 73:16 <b>DEQ's</b> [46] 4:15, 4:24, 5:23, 6:21, 7:5, 10:12, 12:4, 14:17, 16:8, 19:5, 24:14, 24:19, 24:25, 25:19, 25:25, 28:21, 29:14, 30:21, 31:17, 31:19, 32:19, 34:7, 34:9, 38:15, 38:21, 42:8, 42:14, 46:4, 46:16, 48:19, 49:2, 49:9, 49:10, 49:20, 49:25, 54:15, 55:19, 56:2, 59:16, 59:19, 59:21, 63:23, 64:1, 73:19,	75:11, 75:17 <b>described</b> - 7:20 <b>description</b> - 12:12 <b>detailed</b> [2] 8:14, 12:8 <b>details</b> [3] 67:2, 67:3, 68:11 <b>determination</b> [19] 6:19, 7:10, 9:23, 10:22, 14:18, 15:1, 17:19, 17:20, 20:1, 20:9, 42:24, 43:1, 43:4, 45:18, 49:2, 60:6, 60:18, 71:23, 72:11 <b>determinations</b> [3] 7:5, 23:5, 53:18 <b>determine</b> - 44:2 <b>determined</b> [6] 8:19, 9:1, 10:10, 17:16, 29:7, 44:23 <b>determines</b> [3] 7:13, 10:11, 33:7 <b>development</b> [2] 17:24, 59:7 <b>deviates</b> - 13:5 <b>dictate</b> - 10:24 <b>dictated</b> - 17:25 <b>dictates</b> - 11:25 <b>difference</b> [4] 70:14, 70:16, 71:14, 71:19 <b>directly</b> [3] 11:17, 40:9, 52:17 <b>Director</b> [4] 17:4, 17:4, 22:5, 23:19 <b>directs</b> - 31:22 <b>disclosure</b> - 41:8 <b>discovery</b> [2] 50:1, 50:3 <b>discuss</b> - 54:24 <b>discussion</b> [4] 4:4, 29:4,	29:5, 75:18 <b>discussions</b> - 60:24 <b>dismiss</b> [12] 4:9, 4:24, 12:5, 23:8, 38:21, 42:14, 46:17, 49:25, 55:19, 59:16, 59:21, 75:11 <b>dismissal</b> - 75:17 <b>dismisses</b> - 59:21 <b>disposition</b> - 16:19 <b>dispute</b> [6] 17:25, 39:4, 41:9, 47:21, 48:2, 54:18 <b>distinct</b> [2] 7:8, 45:5 <b>distinction</b> [5] 8:7, 8:12, 9:20, 16:7, 70:2 <b>district</b> [15] 17:14, 19:3, 21:8, 22:7, 39:23, 40:7, 40:14, 45:10, 45:24, 46:19, 47:24, 59:18, 59:23, 60:5, 61:4 <b>disturbance</b> - 67:24 <b>DLI</b> - 46:3 <b>DNRC</b> - 46:3 <b>docket</b> - 20:15 <b>documentary</b> - 67:6 <b>documents</b> [2] 66:21, 68:8 <b>dollars</b> [2] 22:15, 24:3 <b>door</b> - 10:21 <b>drainages</b> - 35:4 <b>due</b> [2] 23:2, 68:1
---	--	--	---	---	---

## E

**earlier** [4]  
54:21,  
55:11,  
58:18, 66:10  
**earning** -

51:12 easier - 21:11 easily - 45:20 effect [4] 19:2, 20:2, 31:11, 63:16 effects - 30:2 either [3] 22:7, 27:3, 67:23 elected - 40:9 elsewhere - 51:23 employee [2] 41:9, 41:10 enacting - 52:3 ends - 21:3 enforcement [8] 16:10, 20:24, 25:23, 29:19, 30:20, 32:20, 32:22, 34:13 engage [3] 10:8, 19:9, 21:22 Engineers [2] 33:23, 34:3 ensure - 52:9 entertain - 21:6 entertaining - 21:14 entire [3] 47:7, 60:20, 60:23 entirely - 58:2 entitled - 10:8 entity - 7:9 enumerated - 15:7 environment - 69:12 Environmental [4] 1:1, 2:2, 2:4, 60:13 envisioned [3] 11:2, 36:18, 51:25 EPA [2] 33:20, 33:25 equates - 31:15 equipment [2] 37:17, 50:3 Equipmentwatch [2] 37:12, 38:6 equivalent [4] 25:5, 26:8, 27:3, 38:17	especially - 39:7 ESQ [2] 2:3, 2:7 essence [3] 10:1, 10:23, 56:2 essentially [2] 49:3, 51:2 establish [2] 66:21, 68:5 estimated [3] 7:19, 12:8, 13:6 estimates [2] 64:12, 65:15 etc - 13:11 eventually - 54:8 Everybody - 34:17 everything - 73:12 evidence [2] 24:13, 67:6 evidenced - 32:20 evidentiary [3] 50:2, 66:20, 68:5 evidently - 53:21 exactly [6] 13:14, 15:15, 28:16, 51:1, 58:19, 69:9 example [3] 13:9, 53:11, 72:23 excess [5] 8:6, 26:22, 26:24, 27:5, 28:7 exempt [2] 18:5, 20:2 exercise [4] 6:25, 22:23, 47:18, 47:20 exercised - 6:15 exhausted - 60:15 exhibit [12] 12:4, 12:5, 28:15, 28:25, 36:17, 47:6, 65:10, 67:12, 68:17, 68:22, 69:3, 69:14 exhibits [2] 12:2, 68:15 exist [3]	19:17, 43:5, 72:4 expected - 24:3 experts - 50:3 expire - 57:23 expires - 77:22 explain [3] 28:17, 29:15, 29:18 explained [2] 8:12, 9:17 explains [2] 16:3, 40:2 explicit - 5:5 explicitly [6] 5:16, 6:8, 9:3, 11:5, 15:3, 15:5 exploration - 48:11 expressly [3] 5:15, 18:21, 18:23 extend - 5:8 extends - 41:14 extension [4] 9:25, 11:24, 20:22, 72:13 extent - 66:22 External - 23:19 extra - 51:11	<hr/> <b>F</b> <hr/> face [3] 8:6, 25:23, 34:12 facets [3] 5:8, 16:2, 23:4 facility - 26:15 facing - 5:19 facts [7] 11:17, 17:22, 24:11, 39:16, 55:25, 65:9, 68:9 factual [2] 17:23, 17:25 factually - 33:13 fails [2] 17:10, 29:18 fall [2] 6:6, 52:4 fallacy - 63:4 familiar - 54:16 fashion [2] 17:13, 17:16	favor - 59:10 fear - 24:8 February - 1:14 federal [7] 31:1, 37:12, 37:20, 37:20, 37:22, 38:19, 52:2 federalism [2] 11:1, 11:4 feel - 62:5 feels - 25:18 figure - 35:23 file - 30:12 filed - 5:25 filing [2] 9:17, 16:19 filings - 68:17 final [24] 27:18, 29:4, 29:9, 29:14, 29:16, 30:23, 31:15, 31:19, 31:24, 32:11, 32:14, 32:25, 33:8, 34:4, 34:5, 34:13, 34:16, 35:3, 42:8, 45:8, 49:16, 49:18, 66:16, 66:23 finally [3] 6:23, 13:16, 21:18 findings - 39:15 finished - 35:20 fit - 74:7 fits - 15:24 five [6] 4:7, 36:20, 57:23, 57:24, 65:21, 65:23 Fleck - 2:8 focus [2] 7:6, 62:9 follow [3] 30:16, 49:20, 64:23 follows - 30:3 footnote [6] 33:1, 40:2, 54:16, 54:19, 54:22, 62:8 force [2] 19:2, 20:1	foregoing - 77:12 forfeited - 35:19 formal - 62:15 forward [2] 24:16, 58:12 fourth [2] 21:4, 36:24 frankly - 24:8 free - 21:16 frequent - 58:4 front [2] 33:22, 60:19 fulfills - 23:3 full - 66:18 function - 39:8 functional - 15:14 fundamentally - 72:14 futile - 22:23 futility - 21:14 future [5] 20:16, 20:24, 43:19, 44:12, 44:14 FWP - 46:3	<hr/> <b>G</b> <hr/> gamesmanship - 25:18 general [4] 2:3, 23:17, 23:18, 52:14 gets [2] 43:24, 54:6 given - 71:14 gives [3] 19:3, 40:4, 45:18 gloss - 52:14 goes [6] 8:18, 39:14, 45:4, 46:10, 62:22, 73:12 govern [3] 42:4, 43:18, 71:8 government [3] 37:20, 37:22, 52:2 governmental - 40:8 governs - 17:25 grading [2] 13:10, 22:18 grant [3] 46:16, 75:11, 75:17	grants [2] 59:16, 59:20 greater - 7:25 groceries - 62:25 ground [3] 43:14, 43:24, 66:11 group - 53:13 guess [12] 50:9, 50:12, 51:1, 51:16, 54:10, 61:13, 62:7, 70:1, 71:11, 71:12, 74:3, 74:8 guessing - 46:18
<hr/> <b>H</b> <hr/>							
happen [3] 13:12, 32:15, 35:9 happened [2] 25:10, 37:8 happens [2] 40:16, 43:20 harm [5] 21:19, 26:23, 27:4, 47:23, 59:3 hasn't [7] 15:14, 15:17, 34:24, 35:20, 54:2, 62:5, 63:3 hate - 4:13 having [3] 27:5, 44:20, 70:1 hear [15] 3:25, 4:5, 5:13, 5:17, 6:1, 9:7, 38:13, 38:14, 42:10, 42:21, 50:9, 62:2, 62:6, 62:11, 72:23 heard [8] 25:1, 25:7, 25:25, 42:22, 48:2, 48:8, 61:23, 64:24 hearing [9] 1:5, 15:6, 50:2, 61:14, 66:20, 67:4, 68:5, 74:1, 75:20 heart - 71:17							



29:25, 30:19, 30:21, 30:22, 31:11, 31:13, 31:15, 31:17, 33:5, 34:9, 38:17, 62:10, 62:16, 63:17, 64:2 <b>letting</b> - 10:23 <b>level</b> - 10:24 <b>Lewis</b> [2] 77:4, 77:6 <b>liability</b> [3] 10:12, 10:25, 52:3 <b>license</b> - 48:11 <b>lie</b> - 11:11 <b>lies</b> - 6:6 <b>limbo</b> [3] 48:23, 48:23, 48:24 <b>limitation</b> - 7:18 <b>limited</b> [6] 6:3, 11:8, 15:6, 18:19, 40:13, 41:10 <b>listen</b> - 53:17 <b>listing</b> [2] 30:5, 30:17 <b>LLC</b> - 1:6 <b>log</b> - 14:8 <b>logic</b> [2] 25:19, 46:2 <b>looking</b> [5] 52:1, 52:20, 54:23, 67:18, 67:18 <b>looks</b> [2] 14:22, 40:17 <b>losing</b> [2] 52:10, 58:21 <b>lost</b> - 42:1 <b>lower</b> - 65:19	29:14, 33:6, 49:16, 54:19, 66:19, 71:20, 75:6 <b>mandates</b> - 13:20 <b>manner</b> - 17:15 <b>MAPA</b> [4] 18:5, 18:6, 45:10, 45:11 <b>March</b> [3] 67:17, 77:17, 77:23 <b>mark</b> - 57:24 <b>markets</b> - 51:13 <b>marks</b> - 33:5 <b>Marquette</b> - 33:11 <b>Marquis</b> [39] 2:7, 4:14, 23:11, 23:13, 40:23, 40:25, 42:16, 43:13, 44:7, 46:22, 46:23, 50:5, 50:13, 54:14, 54:21, 55:3, 56:21, 58:16, 59:1, 59:20, 60:9, 60:20, 61:5, 63:8, 63:9, 64:19, 64:24, 65:7, 66:17, 67:21, 68:7, 69:3, 69:19, 69:24, 70:15, 71:12, 73:3, 73:5, 73:6 <b>material</b> - 62:8 <b>matter</b> [14] 1:4, 4:1, 4:9, 5:18, 6:13, 6:15, 6:17, 11:10, 11:13, 14:16, 24:24, 45:1, 46:5, 73:11 <b>matters</b> [2] 46:6, 63:14 <b>maybe</b> [2] 51:21, 67:14 <b>meaning</b> - 5:15 <b>means</b> - 19:15	<b>mechanism</b> - 49:1 <b>mechanisms</b> [2] 21:20, 72:20 <b>meet</b> - 10:9 <b>meeting</b> [2] 3:5, 4:5 <b>member</b> [43] 3:12, 3:14, 3:15, 3:16, 3:17, 3:19, 3:20, 3:21, 50:11, 50:25, 51:4, 51:10, 52:11, 52:24, 53:7, 53:11, 53:12, 53:20, 54:7, 54:13, 54:25, 55:2, 55:16, 56:22, 58:11, 58:18, 58:23, 59:2, 59:15, 59:25, 60:17, 61:3, 61:7, 75:12, 75:15, 76:1, 76:3, 76:4, 76:5, 76:6, 76:8, 76:9, 76:10 <b>members</b> [6] 1:18, 4:23, 23:12, 26:2, 33:12, 61:13 <b>mention</b> [2] 18:16, 68:18 <b>mentioned</b> [2] 66:7, 66:10 <b>mentions</b> - 41:22 <b>merit</b> - 22:24 <b>merits</b> - 4:10 <b>met</b> - 55:7 <b>method</b> [5] 37:8, 37:11, 37:18, 37:25, 55:10 <b>methods</b> - 37:5 <b>mid</b> [3] 65:4, 70:4, 70:17 <b>million</b> [11] 24:1, 25:20, 25:21, 25:21, 29:11, 38:3, 53:22, 58:13, 58:25,	63:20, 64:17 <b>millions</b> - 24:3 <b>mind</b> [3] 4:8, 61:21, 61:22 <b>mine</b> [19] 1:8, 4:3, 10:7, 23:25, 26:8, 27:16, 35:16, 35:22, 37:21, 43:14, 57:1, 57:4, 57:6, 57:7, 57:9, 66:11, 66:14, 66:15, 68:3 <b>mines</b> - 23:24 <b>mining</b> [26] 1:6, 4:1, 5:2, 8:9, 8:13, 10:7, 13:19, 20:8, 23:14, 35:17, 35:20, 36:4, 37:4, 44:19, 52:1, 52:4, 52:12, 52:15, 52:22, 57:7, 57:11, 57:14, 57:16, 59:11, 65:11, 66:24 <b>minor</b> [100] 1:7, 4:2, 5:1, 5:20, 6:2, 6:3, 6:13, 11:13, 11:17, 12:3, 12:18, 14:11, 14:14, 14:14, 14:25, 15:13, 23:1, 25:2, 25:12, 25:13, 26:3, 26:14, 26:18, 26:19, 28:11, 28:13, 28:18, 28:18, 29:21, 30:23, 31:20, 32:6, 32:9, 32:11, 32:19, 34:16, 34:18, 34:21, 36:14,	36:23, 38:11, 38:14, 38:18, 42:9, 43:4, 43:7, 43:9, 43:12, 44:25, 45:4, 47:1, 47:13, 47:16, 47:25, 48:14, 48:17, 49:7, 49:9, 49:16, 53:24, 54:10, 55:13, 55:14, 56:3, 56:19, 57:15, 57:18, 58:5, 60:11, 61:16, 61:20, 61:23, 61:25, 62:1, 63:22, 64:6, 64:25, 65:9, 68:17, 68:18, 68:23, 69:6, 69:21, 69:23, 70:5, 70:21, 70:22, 71:1, 71:3, 71:10, 71:24, 72:5, 72:6, 72:9, 72:17, 72:25, 73:7, 73:11, 73:13, 73:17, 74:13 <b>minute</b> [3] 30:10, 41:1, 60:4 <b>minutes</b> [2] 4:7, 4:7 <b>misstated</b> - 67:16 <b>misstatement</b> - 11:16 <b>misunderstanding</b> - 44:6 <b>mixture</b> - 35:5 <b>mode</b> - 66:16 <b>MOISEY-SCHEREMSUMRA</b> [16] [13] 3:7, 3:10, 3:12, 3:15, 3:17, 3:20, 3:22, 75:22, 75:24, 76:1, 76:4, 76:6, 76:9 <b>monetary</b> - 51:15	<b>money</b> [6] 22:20, 28:8, 51:22, 52:6, 58:22, 64:6 <b>mongering</b> - 24:9 <b>monkey</b> - 34:2 <b>Montana</b> [23] 1:2, 5:4, 5:11, 15:4, 20:23, 21:1, 21:17, 27:11, 27:21, 30:25, 31:9, 33:14, 34:10, 37:16, 38:2, 38:19, 40:2, 52:13, 52:19, 59:6, 61:15, 77:2, 77:7 <b>Montana's</b> - 11:2 <b>morning</b> [2] 4:22, 23:11 <b>motion</b> [24] 4:9, 4:15, 4:24, 12:5, 38:21, 42:14, 46:16, 49:25, 55:19, 55:20, 56:1, 59:16, 59:21, 74:17, 74:18, 74:20, 74:24, 75:7, 75:9, 75:11, 75:11, 75:13, 75:17, 76:11 <b>motions</b> - 50:1 <b>move</b> [2] 24:16, 52:7 <b>moved</b> [3] 65:16, 65:20, 75:16 <b>moving</b> [2] 65:13, 74:7 <b>MOISEY-SCHEREMSUMRA</b> [16] 7:4, 7:7, 7:12, 9:3, 13:20, 15:23, 16:10, 20:4, 21:20, 23:4, 28:8, 29:23, 41:14, 59:4, 59:5, 59:14 <b>MT</b> [3] 2:5,
---	--	--	---	---	---

---

**M**


---

**maintaining** -  
44:21  
**major** [2]  
12:9, 47:2  
**majority** -  
66:25  
**maker** - 34:5  
**makes** [5]  
7:10, 8:4,  
14:21,  
24:22, 31:4  
**making** [9]  
7:9, 22:18,



<p><b>position</b> [7] 19:22, 21:16, 22:3, 23:3, 24:25, 46:18, 60:7 <b>possess</b> - 5:6 <b>possibly</b> - 56:7 <b>post</b> [4] 51:8, 56:18, 57:4, 58:14 <b>posted</b> [3] 7:24, 53:22, 57:8 <b>potentially</b> [3] 50:18, 53:17, 53:19 <b>power</b> [2] 40:3, 40:6 <b>practical</b> [3] 6:24, 19:20, 41:21 <b>practice</b> - 50:2 <b>preceded</b> - 39:25 <b>prefer</b> - 65:12 <b>premium</b> [6] 27:1, 27:4, 50:22, 51:5, 58:19, 58:24 <b>prepared</b> [4] 1:22, 62:23, 68:10, 74:20 <b>prerequisite</b> [2] 6:14, 11:14 <b>presented</b> - 71:18 <b>presenting</b> - 4:15 <b>preserve</b> - 30:14 <b>presumes</b> - 35:20 <b>previous</b> - 72:2 <b>previously</b> [2] 37:11, 43:15 <b>primary</b> - 11:6 <b>privilege</b> [4] 10:7, 10:8, 52:12, 52:23 <b>problem</b> - 5:19 <b>procedures</b> - 56:16 <b>proceed</b> [4] 3:25, 53:23, 74:2, 74:18 <b>proceeding</b> - 18:1 <b>proceedings</b> [7] 1:10, 3:1, 20:21, 76:13, 77:8,</p>	<p>77:10, 77:13 <b>process</b> [30] 25:12, 28:13, 33:6, 39:14, 43:4, 43:23, 45:1, 47:6, 47:7, 47:14, 49:6, 49:25, 53:3, 58:2, 60:12, 65:2, 65:8, 65:24, 69:19, 70:19, 70:20, 72:4, 72:5, 72:18, 72:25, 73:8, 73:11, 73:13, 74:14, 74:14 <b>processes</b> - 71:14 <b>processing</b> [2] 14:9, 62:24 <b>producing</b> [2] 66:15, 68:3 <b>products</b> - 14:5 <b>progress</b> - 68:2 <b>progressing</b> - 36:6 <b>prohibition</b> - 7:22 <b>projected</b> - 44:12 <b>promise</b> - 51:2 <b>promised</b> [2] 22:13, 22:14 <b>prompt</b> - 16:19 <b>promulgated</b> [2] 41:24, 42:5 <b>proper</b> - 24:21 <b>property</b> - 52:22 <b>proposal</b> - 49:22 <b>propose</b> - 64:25 <b>proposed</b> [9] 12:13, 13:5, 43:16, 49:11, 49:19, 68:19, 68:22, 68:25, 70:5 <b>Propositions</b> - 27:8 <b>propriety</b> - 5:22 <b>prospecting</b> -</p>	<p>9:10 <b>protect</b> - 9:25 <b>protecting</b> - 51:20 <b>Protective</b> - 18:3 <b>protects</b> [2] 9:25, 66:5 <b>protest</b> [2] 30:14, 32:22 <b>prove</b> - 30:21 <b>provide</b> [14] 8:15, 9:2, 14:1, 16:18, 25:16, 29:11, 30:11, 31:18, 49:21, 59:7, 63:19, 67:1, 68:9, 68:11 <b>provided</b> [8] 13:13, 13:16, 26:11, 28:15, 35:25, 36:19, 55:5, 68:16 <b>provides</b> [10] 7:13, 7:24, 9:6, 12:11, 16:4, 16:7, 17:3, 25:9, 32:2, 66:4 <b>provision</b> - 16:21 <b>provisions</b> - 41:8 <b>public</b> [14] 1:23, 10:1, 10:13, 40:10, 51:20, 53:2, 53:2, 53:5, 53:12, 53:13, 53:13, 53:17, 77:6, 77:21 <b>publicly</b> - 30:7 <b>published</b> - 33:15 <b>pulling</b> [2] 69:3, 70:8 <b>purported</b> - 4:25 <b>purpose</b> - 7:7</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>Quality</b> [2] 2:2, 2:4 <b>quasi-judicial</b> [21] 5:7, 5:7,</p>	<p>6:7, 16:1, 18:13, 18:17, 38:25, 39:3, 39:6, 39:8, 39:23, 40:18, 40:20, 40:22, 41:3, 41:4, 41:15, 41:19, 42:12, 46:12, 47:20 <b>questioning</b> - 58:17 <b>quo</b> - 69:2 <b>quorum</b> - 3:22 <b>quote</b> [7] 7:17, 7:18, 7:25, 12:7, 16:9, 33:5, 33:6 <b>Qwest</b> - 32:12</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>raised</b> - 24:7 <b>ranging</b> - 7:15 <b>Rankosky</b> [5] 1:19, 3:18, 3:19, 76:7, 76:8 <b>rapid</b> - 52:7 <b>rate</b> [2] 26:25, 52:7 <b>rates</b> [4] 37:17, 50:4, 64:12, 65:22 <b>reach</b> - 39:5 <b>reading</b> [5] 54:14, 56:11, 56:17, 62:7, 62:8 <b>ready</b> [2] 21:7, 75:9 <b>real</b> [5] 30:2, 31:13, 32:18, 71:14, 74:10 <b>really</b> [20] 5:5, 5:21, 7:3, 9:24, 10:6, 10:20, 33:13, 34:25, 38:4, 46:17, 50:13, 50:17, 50:22, 50:24, 51:14, 51:14, 51:19, 62:9, 63:14, 73:11 <b>realm</b> - 48:13</p>	<p><b>reason</b> [3] 28:19, 38:9, 44:5 <b>reasons</b> [7] 14:13, 36:25, 55:5, 55:7, 65:11, 65:25, 66:2 <b>rebut</b> - 4:7 <b>rebuttal</b> - 42:17 <b>recalculation</b> - 13:18 <b>receive</b> - 8:12 <b>received</b> [2] 21:25, 57:5 <b>recent</b> - 29:19 <b>recipient</b> - 31:23 <b>reclaim</b> [3] 35:16, 35:23, 36:4 <b>reclaimed</b> - 52:8 <b>reclamation</b> [59] 6:4, 7:16, 7:17, 7:21, 8:5, 8:9, 8:14, 8:17, 11:18, 11:21, 11:23, 12:9, 12:11, 12:12, 12:13, 12:16, 13:2, 13:4, 13:4, 13:7, 22:14, 22:20, 24:11, 28:4, 34:23, 34:25, 35:2, 35:11, 35:13, 35:15, 35:24, 36:1, 36:9, 36:11, 36:16, 37:5, 37:6, 38:10, 43:8, 43:11, 43:16, 43:19, 47:1, 47:4, 47:8, 47:10, 55:8, 62:20, 65:13, 65:15, 65:18, 66:16, 66:24, 67:1, 67:24, 68:2, 68:11, 72:8, 73:9 <b>recognized</b> - 37:16 <b>recollection</b> -</p>	<p>65:3 <b>recommends</b> - 37:13 <b>record</b> - 77:13 <b>recourse</b> - 32:5 <b>recover</b> - 21:1 <b>recovery</b> - 20:25 <b>reduce</b> - 9:11 <b>reducing</b> - 20:19 <b>reduction</b> [2] 12:20, 21:24 <b>reflect</b> - 65:19 <b>refusal</b> - 25:4 <b>regard</b> - 27:22 <b>regarding</b> [4] 1:7, 4:2, 45:14, 62:18 <b>regardless</b> [3] 20:4, 23:1, 44:25 <b>regulated</b> - 52:21 <b>regulations</b> [2] 52:15, 52:16 <b>regulatory</b> [2] 37:12, 52:20 <b>reissue</b> - 57:24 <b>reiterate</b> - 45:15 <b>reject</b> - 21:12 <b>rejected</b> - 54:4 <b>relate</b> - 74:4 <b>related</b> [4] 8:22, 12:6, 14:21, 45:6 <b>relationship</b> [2] 10:16, 11:20 <b>relationships</b> - 17:21 <b>relay</b> - 75:5 <b>release</b> [3] 11:7, 22:22, 65:14 <b>relevant</b> - 66:12 <b>reliance</b> - 26:1 <b>relied</b> [2] 37:11, 49:12 <b>relies</b> [4] 18:3, 18:10, 37:1, 45:7 <b>rely</b> - 55:11 <b>remains</b> - 38:19 <b>remarks</b> - 62:23</p>
--	---	---	---	--	---

remedies - 60:16	46:25, 58:7	15:11, 44:3, 44:4	61:25, 62:1, 63:22, 64:6, 65:1, 65:10, 68:17, 68:18, 68:19, 68:23, 69:6, 69:11, 69:14, 69:18, 69:21, 69:23, 70:3, 70:5, 70:21, 70:22, 71:1, 71:3, 71:10, 71:24, 72:5, 72:7, 72:9, 72:12, 72:18, 72:25, 73:8, 73:11, 73:13, 73:17, 74:13	19:16, 22:3, 28:2, 36:1, 36:2, 41:23, 42:3, 45:16, 45:17, 45:19, 46:4, 46:7, 46:9, 56:18	seed - 35:4 seek - 60:14 seeks - 27:24 seemed - 44:7 seems [4] 47:12, 56:1, 56:17, 70:6 sense [14] 8:4, 8:22, 10:15, 17:18, 18:15, 19:1, 25:23, 32:4, 32:7, 58:8, 71:21, 72:1, 72:15, 72:19
remedy - 45:25	[6] 6:5, 8:9, 8:20, 20:4, 59:12, 59:13	reviewed [4] 17:12, 17:15, 29:6, 65:3	69:11, 69:14, 69:18, 69:21, 69:23, 70:3, 70:5, 70:21, 70:22, 71:1, 71:3, 71:10, 71:24, 72:5, 72:7, 72:9, 72:12, 72:18, 72:25, 73:8, 73:11, 73:13, 73:17, 74:13	ruling [16] 6:21, 15:22, 16:5, 16:20, 17:12, 18:20, 19:1, 21:9, 22:5, 38:23, 39:1, 39:19, 40:5, 40:11, 41:12, 42:13	separate [8] 6:5, 6:10, 8:21, 9:1, 14:20, 44:16, 45:5, 70:19
rendered - 24:14	requires [5] 13:9, 16:18, 17:23, 26:24, 58:5	reviewing - 61:25	72:12, 72:18, 72:25, 73:8, 73:11, 73:13, 73:17, 74:13	rulings [13] 16:17, 17:1, 17:3, 17:10, 17:11, 18:8, 18:12, 18:14, 18:24, 23:5, 41:16, 41:20, 45:14	sets - 39:10 setting - 52:25
renew - 9:12	resolve [2] 31:12, 33:25	revised - 43:25	revisions [5] 26:18, 28:11, 48:14, 57:19, 57:19	_____	Seven-up - 52:18
renewal [3] 65:5, 70:4, 70:18	resolved [2] 33:21, 34:12	revision [106] 1:7, 4:2, 5:1, 5:21, 6:3, 6:3, 6:13, 11:13, 11:17, 12:3, 12:18, 13:19, 14:11, 14:15, 14:25, 15:13, 23:1, 25:2, 25:12, 25:13, 26:3, 26:14, 26:20, 28:13, 28:18, 28:19, 29:21, 30:23, 31:20, 32:6, 32:10, 32:11, 32:19, 34:17, 34:18, 34:21, 36:14, 36:23, 38:12, 38:14, 38:18, 42:9, 43:4, 43:7, 43:9, 43:11, 43:12, 44:1, 44:25, 45:4, 47:1, 47:2, 47:13, 47:16, 48:1, 48:17, 49:7, 49:9, 49:17, 53:24, 54:10, 55:13, 55:14, 56:3, 56:19, 57:15, 58:6, 60:11, 61:16, 61:20, 61:24,	41:20, 45:14	_____	several [5] 23:15, 23:20, 28:24, 30:24, 54:5 severe - 30:8 shake - 25:18 shall [3] 11:5, 11:6, 17:4 sheet - 69:6 short - 75:6 shorthand - 77:10 shown - 64:7 shows [2] 34:10, 47:6 signals [2] 29:14, 34:13 significant - 30:1 similar [4] 10:15, 14:13, 17:13, 27:11 simple [5] 9:24, 31:4, 46:15, 61:21, 61:22 simply [5] 19:15, 26:24, 48:6, 49:5, 58:5 Simpson [47] 1:17, 3:4, 3:8, 3:9, 3:24, 4:17, 23:9, 23:12, 40:23, 42:16,
renewed - 57:22	resources [2] 2:6, 59:8	revised - 43:25	rights [2] 17:20, 31:24	<b>S</b>	
repeatedly - 26:17	respect [4] 23:2, 50:16, 52:24, 67:23	revision [106] 1:7, 4:2, 5:1, 5:21, 6:3, 6:3, 6:13, 11:13, 11:17, 12:3, 12:18, 13:19, 14:11, 14:15, 14:25, 15:13, 23:1, 25:2, 25:12, 25:13, 26:3, 26:14, 26:20, 28:13, 28:18, 28:19, 29:21, 30:23, 31:20, 32:6, 32:10, 32:11, 32:19, 34:17, 34:18, 34:21, 36:14, 36:23, 38:12, 38:14, 38:18, 42:9, 43:4, 43:7, 43:9, 43:11, 43:12, 44:1, 44:25, 45:4, 47:1, 47:2, 47:13, 47:16, 48:1, 48:17, 49:7, 49:9, 49:17, 53:24, 54:10, 55:13, 55:14, 56:3, 56:19, 57:15, 58:6, 60:11, 61:16, 61:20, 61:24,	Sam [3] 2:3, 4:12, 4:23 Sandy - 3:5 satisfactory - 54:8 satisfies - 8:23 satisfy - 25:22 save [2] 21:14, 52:6 saving - 22:19 saying [6] 18:18, 32:1, 49:3, 55:20, 73:6, 73:10 says [14] 20:5, 25:8, 25:15, 26:4, 29:1, 29:5, 29:6, 29:10, 31:5, 33:4, 47:10, 47:22, 56:9, 56:22 scheme - 11:2 scratch - 13:25 screen - 61:11 seal - 77:16 seconded - 75:17 Secretary - 23:18 Section [2] 16:6, 39:10		
replace - 70:17	respectfully [7] 4:14, 20:4, 23:7, 46:5, 46:16, 49:24, 50:25	revisions [5] 26:18, 28:11, 48:14, 57:19, 57:19	_____		
reply [3] 48:21, 54:15, 54:23	Respondent - 4:23	_____	_____		
report [8] 66:14, 66:18, 67:9, 67:12, 67:12, 67:15, 67:22, 68:1	response [8] 46:4, 50:7, 64:10, 64:21, 72:5, 73:23, 73:25, 75:19	_____	_____		
reported - 77:10	responsibilities [2] 23:15, 23:21	_____	_____		
Reporter [3] 1:23, 77:5, 77:21	responsibility - 11:6	_____	_____		
representatives [2] 23:15, 23:21	rest - 17:22 rests - 17:22 resubmit - 62:17	_____	_____		
representing - 23:14	result [2] 69:22, 71:15	_____	_____		
request [6] 1:5, 12:20, 18:25, 19:14, 20:14, 64:4	resulted - 13:18	_____	_____		
requested - 13:14	resulting - 9:22	_____	_____		
requesting - 69:1	results - 33:8	_____	_____		
requests - 17:3	return [3] 50:19, 50:20, 51:22	_____	_____		
require [4] 19:11, 26:18, 57:25, 72:21	Returning - 11:12	_____	_____		
required [19] 8:1, 8:13, 13:13, 16:17, 18:6, 22:21, 26:6, 27:1, 28:13, 36:1, 36:23, 39:18, 47:13, 49:7, 58:20, 69:20, 69:21, 70:20, 73:16	revegetation - 35:5	_____	_____		
requirement [3] 9:1,	review [17] 1:1, 15:16, 15:16, 19:3, 34:17, 53:24, 54:10, 60:13, 60:14, 65:5, 68:14, 70:4, 70:12, 71:23, 72:3, 74:11, 74:15	_____	_____		
	reviewable [3] 15:11, 44:3, 44:4	_____	_____		

46:21, 50:5, 50:8, 61:9, 61:12, 63:7, 64:19, 64:22, 66:9, 66:17, 67:10, 67:20, 68:7, 68:13, 69:4, 69:5, 69:17, 69:22, 69:25, 70:1, 70:15, 71:11, 73:2, 73:3, 73:5, 73:21, 73:24, 74:1, 74:19, 74:23, 75:4, 75:14, 75:16, 75:20, 75:22, 75:23, 76:11 single - 18:10 sit [2] 21:5, 44:8 site [4] 8:14, 27:12, 27:19, 28:4 sits [2] 35:22, 35:23 sitting - 63:1 Sixth [2] 33:11, 33:16 slightly - 60:1 SM [2] 1:5, 4:1 SMCRA [4] 11:2, 51:17, 51:25, 52:3 Smith [5] 1:18, 3:20, 3:21, 76:9, 76:10 soils - 65:16 sole - 7:9 solution - 46:15 somebody - 57:3 somehow [2] 45:3, 45:8 Sonja - 17:5 sorry - 4:17 sort [3] 25:18, 44:9, 53:2 sorts - 55:23 sought - 16:5 sounds [2] 29:4, 29:8 source - 52:13 speak - 65:8 speaks -	23:22 Spear [2] 31:2, 33:2 special [3] 2:3, 40:3, 40:6 specific [4] 27:13, 27:19, 28:4, 37:3 specifically [3] 15:7, 62:3, 62:6 specifics [2] 27:15, 58:17 specified - 34:25 spectrum - 32:13 speculation [3] 32:15, 32:17, 32:24 speed - 13:3 spent [2] 67:1, 74:4 square - 63:6 squarely - 21:13 SS - 77:3 stabilization - 13:11 stagnant - 13:2 stand - 4:17 standards [3] 19:12, 37:5, 37:16 start [4] 5:3, 7:2, 13:25, 14:7 started - 4:20 starting - 63:5 state [10] 1:2, 7:20, 10:2, 18:11, 26:22, 33:19, 59:11, 66:6, 77:2, 77:7 stated [4] 5:16, 7:12, 14:20, 50:16 states [3] 11:5, 43:10, 68:19 status [5] 17:20, 24:10, 66:14, 68:5, 69:1 statute [25] 8:3, 14:12, 16:6, 16:17, 17:21, 18:8, 26:1, 26:2,	26:4, 26:16, 27:14, 36:2, 36:2, 39:9, 46:24, 47:15, 56:4, 56:4, 56:8, 56:8, 56:11, 56:13, 56:21, 56:22, 57:18 statutes [2] 19:10, 56:17 statutory [6] 16:21, 41:4, 47:19, 48:12, 58:7, 73:20 stay - 35:7 stemming - 32:18 stems [2] 29:20, 40:6 step [2] 12:9, 61:24 steps [3] 25:15, 43:18, 43:22 stop - 34:15 straight - 45:24 strap - 12:23 street - 48:25 strictly [2] 4:8, 69:13 stringent - 59:12 strong - 22:3 structure - 27:11 sub [5] 5:25, 6:1, 7:24, 17:2, 72:10 subdivision [2] 18:5, 40:8 subject [12] 5:18, 6:4, 6:15, 6:17, 8:8, 11:10, 12:22, 14:16, 15:6, 50:1, 65:5, 70:12 submissions - 54:4 submit [14] 8:13, 8:19, 8:22, 20:14, 22:1, 22:2, 22:4, 43:10, 43:24, 44:22, 45:20, 46:2, 46:25, 54:8 submits [2] 10:5, 25:13 submitted	[12] 15:22, 25:12, 29:7, 30:13, 37:19, 37:23, 54:2, 54:3, 69:6, 70:25, 71:24, 72:24 submitting - 46:1 Subparagraph [5] 37:2, 39:10, 49:14, 54:25, 59:5 subpart - 12:11 subsequently - 72:17 subsidence - 13:10 substance - 71:20 suffering - 50:17 sufficient - 8:15 suggest - 44:7 sum - 22:24 supplement - 68:10 supplemental [4] 31:5, 33:1, 48:19, 63:12 support [2] 12:4, 24:14 supports - 47:11 suppose - 54:7 Supreme [8] 5:5, 5:11, 15:4, 33:3, 34:10, 40:2, 41:25, 42:1 Surface [3] 1:8, 4:1, 52:1 sympathies - 56:6 synonymous - 17:11 system [5] 30:6, 30:6, 31:1, 33:18, 34:6  <b>T</b>  table [11] 12:8, 13:13, 35:12, 35:14, 35:15, 35:17,	35:18, 35:25, 36:8, 43:17, 47:9 tabled - 4:4 tables - 62:18 taken - 77:8 takings - 52:20 tasked [2] 7:9, 16:9 taxpayers - 20:22 telling [2] 20:6, 39:12 tellingly - 9:15 tells - 25:1 term [2] 65:4, 70:4 terms - 52:20 testimonial - 67:5 testimony - 66:20 thank [25] 3:24, 4:19, 23:8, 23:9, 42:14, 42:16, 42:18, 46:20, 46:21, 50:4, 50:5, 61:7, 61:9, 62:13, 63:6, 63:7, 63:9, 64:19, 66:9, 67:10, 71:12, 71:16, 73:1, 73:2, 76:12 theme - 5:4 themselves - 65:6 there's [41] 7:3, 13:6, 14:10, 14:12, 21:11, 21:19, 22:24, 24:13, 26:23, 28:19, 30:25, 31:17, 32:15, 32:16, 32:24, 34:6, 34:11, 36:11, 38:9, 40:3, 42:21, 42:23, 46:15, 47:23, 49:8, 52:6, 52:8, 52:14, 53:4,	55:7, 55:8, 57:14, 57:15, 57:16, 58:7, 60:24, 69:10, 71:6, 71:19, 71:22, 72:19 therefore [8] 8:7, 12:25, 17:9, 17:23, 30:8, 38:11, 44:23, 71:25 thereon - 23:6 thereunder - 7:8 they'd - 22:10 they'll [5] 22:15, 22:20, 32:2, 50:19, 50:20 they're [39] 8:21, 10:6, 13:3, 14:8, 14:19, 17:15, 17:16, 22:2, 22:15, 22:18, 22:19, 22:21, 25:3, 26:14, 26:14, 27:17, 34:1, 35:17, 36:6, 42:25, 45:21, 45:23, 45:25, 46:1, 46:19, 46:20, 48:15, 49:4, 50:17, 50:23, 51:12, 52:20, 56:17, 57:7, 58:21, 63:1, 63:17, 65:17, 73:18 they've [3] 26:11, 34:7, 73:17 thing [12] 15:16, 25:4, 26:21, 27:21, 29:18, 44:15, 45:13, 48:3, 65:21, 73:4, 74:2, 74:7 thinks - 45:22 third [7] 6:20, 8:11, 8:18, 9:16,
--	--	--	---	--	--

15:20, 20:18, 44:15 <b>Thompson</b> [3] 18:11, 40:16, 41:2 <b>though</b> - 60:1 <b>threshold</b> [2] 6:13, 11:13 <b>throughout</b> - 43:23 <b>tier</b> [5] 33:18, 33:22, 33:24, 34:1, 34:6 <b>timely</b> - 22:20 <b>timer</b> - 4:20 <b>title</b> - 40:1 <b>titled</b> - 12:10 <b>titles</b> - 50:14 <b>today</b> [21] 5:20, 19:19, 23:13, 23:15, 24:13, 24:17, 25:1, 25:8, 25:25, 26:7, 34:24, 35:11, 35:12, 35:21, 35:22, 35:23, 43:15, 44:8, 44:13, 55:18, 61:18 <b>topic</b> [2] 11:12, 41:5 <b>topography</b> [2] 27:19, 35:3 <b>torn</b> - 35:6 <b>total</b> - 7:19 <b>totalling</b> - 64:4 <b>touched</b> - 61:14 <b>towards</b> - 65:14 <b>transcribed</b> - 77:11 <b>TRANSCRIPT</b> - 1:10 <b>transcription</b> - 77:11 <b>transfer</b> - 9:14 <b>treatment</b> - 50:14 <b>tried</b> [2] 20:11, 74:6 <b>tries</b> [2] 17:6, 34:20 <b>trouble</b> [3] 15:21, 41:7, 70:2	<b>true</b> [9] 7:6, 13:24, 26:24, 40:21, 43:8, 45:1, 56:23, 75:1, 77:12 <b>truly</b> [4] 21:15, 22:2, 22:19, 55:24 <b>turn</b> [3] 4:3, 28:20, 38:21 <b>type</b> - 37:24 <b>typically</b> - 71:22 <hr/> <b>U</b> <hr/> <b>ultimate</b> - 11:25 <b>ultimately</b> [3] 14:18, 22:23, 31:2 <b>unanimously</b> - 76:12 <b>uncommon</b> - 54:4 <b>underlying</b> - 55:25 <b>undermines</b> - 18:4 <b>understand</b> [7] 39:14, 51:21, 55:16, 55:22, 56:7, 65:17, 74:6 <b>understanding</b> [3] 68:25, 69:2, 70:2 <b>understood</b> - 38:1 <b>uniform</b> - 28:1 <b>unlawful</b> [5] 7:23, 19:9, 19:23, 23:25, 28:2 <b>unlike</b> - 17:24 <b>unnecessary</b> - 29:3 <b>unpublished</b> - 33:10 <b>unsurprisingly</b> - 13:17 <b>untenable</b> - 7:11 <b>unused</b> - 50:21 <b>up-to-date</b> - 66:5 <b>update</b> [9] 30:11, 43:10, 43:16, 43:24, 49:7, 54:1, 58:6, 65:18, 69:15	<b>updated</b> [3] 29:8, 47:1, 62:17 <b>updates</b> [3] 11:18, 13:6, 72:7 <b>updating</b> - 65:2 <b>upon</b> [3] 8:4, 55:12, 70:18 <b>using</b> [4] 37:25, 41:17, 60:11, 77:11 <hr/> <b>V</b> <hr/> <b>valid</b> - 38:9 <b>validity</b> - 39:2 <b>various</b> - 21:20 <b>Ventures</b> - 52:18 <b>vests</b> - 71:25 <b>vetted</b> - 37:25 <b>via</b> [2] 1:11, 2:7 <b>Vice</b> [12] 1:18, 3:10, 3:11, 61:9, 61:12, 62:13, 63:10, 74:19, 74:25, 75:10, 75:24, 75:25 <b>Vicki</b> - 23:12 <b>VICTORIA</b> - 2:7 <b>violated</b> - 29:23 <b>violation</b> [2] 30:5, 44:24 <b>Violator</b> - 30:5 <b>virtually</b> - 23:16 <b>volumes</b> [2] 65:16, 65:19 <b>vote</b> - 75:21 <hr/> <b>W</b> <hr/> <b>wait</b> - 60:4 <b>waiting</b> [3] 14:9, 62:22, 62:24 <b>walk</b> - 6:12 <b>walks</b> - 35:21 <b>wanted</b> [4] 59:6, 59:8, 71:2, 75:5 <b>wants</b> - 46:14 <b>waste</b> [2]	15:19, 19:24 <b>wasting</b> - 59:8 <b>ways</b> - 52:6 <b>we'd</b> [2] 63:5, 68:4 <b>we'll</b> [6] 4:10, 25:17, 36:21, 36:22, 51:9, 67:3 <b>we're</b> [20] 4:24, 5:19, 24:12, 27:24, 40:23, 45:11, 50:13, 51:19, 51:19, 53:15, 55:19, 57:10, 57:12, 62:21, 63:6, 66:12, 73:12, 73:14, 74:9, 75:8 <b>we've</b> [2] 39:9, 39:22 <b>weigh</b> [3] 5:22, 11:11, 16:2 <b>weren't</b> - 41:8 <b>Westmoreland</b> [92] 1:6, 2:6, 4:11, 5:21, 7:4, 10:20, 12:16, 13:16, 13:22, 13:25, 14:24, 14:25, 15:12, 15:17, 17:6, 18:2, 18:10, 19:8, 20:3, 20:6, 21:9, 21:15, 21:19, 22:17, 23:10, 23:14, 23:16, 23:21, 23:24, 25:9, 25:10, 25:13, 26:9, 26:10, 28:10, 28:12, 28:16, 28:23, 29:7, 29:10, 29:20,	29:22, 29:23, 30:11, 32:2, 32:5, 32:8, 32:21, 35:20, 35:21, 36:3, 36:21, 37:14, 37:15, 37:18, 37:19, 37:23, 42:22, 42:24, 43:6, 44:19, 45:7, 45:20, 46:14, 46:17, 47:23, 48:1, 49:1, 49:10, 49:20, 50:17, 53:20, 53:21, 55:23, 57:5, 58:12, 59:17, 59:18, 60:12, 60:17, 63:19, 63:22, 63:24, 64:15, 64:25, 66:2, 66:6, 70:24, 71:20, 72:3, 73:8, 74:12 <b>Westmoreland's</b> [25] 5:24, 7:3, 7:11, 11:16, 12:2, 17:8, 18:25, 19:14, 22:25, 24:10, 24:23, 27:7, 28:14, 29:2, 32:3, 32:5, 35:15, 38:22, 46:2, 49:19, 49:22, 59:22, 60:7, 64:3, 68:16 <b>what's</b> [5] 6:4, 22:10, 32:15, 66:10, 70:13 <b>whatever</b> - 46:14 <b>whereas</b> - 49:6 <b>WHEREOF</b> - 77:15	<b>WHEREUPON</b> - 3:1 <b>wherever</b> - 51:13 <b>whether</b> [10] 22:6, 42:20, 43:20, 49:12, 61:15, 61:19, 68:24, 71:13, 74:10, 74:13 <b>whole</b> [4] 43:2, 53:3, 62:4, 73:1 <b>whose</b> - 45:17 <b>wide</b> - 7:15 <b>willing</b> - 21:8 <b>within</b> [5] 5:18, 21:13, 41:14, 41:16, 49:15 <b>WITNESS</b> - 77:15 <b>won't</b> - 20:20 <b>wondering</b> - 66:13 <b>Wooley</b> - 23:19 <b>Worker's</b> - 40:21 <b>Workers</b> [4] 18:19, 40:18, 41:6, 41:24 <b>worth</b> - 66:8 <b>wouldn't</b> [6] 17:17, 57:9, 58:10, 60:15, 72:14, 72:19 <b>wrap</b> - 40:24 <b>wrong</b> [8] 13:24, 28:6, 46:1, 54:1, 54:20, 56:11, 56:11, 56:20 <hr/> <b>Y</b> <hr/> <b>Yeah</b> - 54:11 <b>yesterday</b> - 30:12 <b>yet</b> [5] 21:25, 38:1, 45:12, 54:2, 68:1 <b>you'd</b> - 67:8 <b>You'll</b> - 28:24 <hr/> <b>Z</b> <hr/> <b>zero</b> - 22:15 <b>zoom</b> [3]
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1:11, 2:7, 7:6					
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