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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In re: Appeal and Request) CASE NO.
For Hearing regarding) BER 2022-05-SM
Rosebud Mine Area B)
Amendment 5 Permit Number)
C1984003B)

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

February 20, 2026
10:18 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
COURT REPORTER, NOTARY PUBLIC
lauriecrutcher@gmail.com

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A P P E A R A N C E S:

APPEARING ON BEHALF OF MONTANA ENVIRONMENTAL
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RESOURCES:

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR SIMPSON: Dana, let's back up to
5 Item (d).

6 MS. HUPP: Chairman Simpson, my question
7 was: I think it might be helpful if we could --
8 if it's okay with you -- if we could briefly hear
9 from the parties about the substance of the
10 argument that would be presented in April.

11 As you indicated, I think our thought
12 would be, was that the parties would present
13 argument on the jurisdictional issue, and also
14 whether more generally Westmoreland is entitled to
15 fees, and then once the Board made a decision as
16 to whether or not it had jurisdiction and
17 Westmoreland is entitled to fees, then there would
18 be a second hearing on the amount of fees later
19 on.

20 And so I just wanted to get the parties'
21 perspectives on dividing basically the motion into
22 two separate hearings, and how kind of they
23 envisioned this process going forward.

24 CHAIR SIMPSON: Oh, thank you, Dana.
25 Good observation. Decker Coal. Excuse me.

1 Westmoreland. I'm sorry. I'm looking at the
2 wrong item here. What are your thoughts -- I
3 presume Westmoreland Counsel is on the call.

4 MR. YEMINGTON: Chair Simpson, members
5 of the Board. Sam Yemington on behalf of
6 Westmoreland. I certainly appreciate the
7 opportunity to weigh in on this.

8 I think Ms. Hupp gets it right, this is
9 a two step process. By law the first step is a
10 determination by the Board whether my clients are
11 entitled under the law to an award of fees,
12 whether that nominal award or the entirety of the
13 award that we requested.

14 But critically, under Montana law, that
15 second question, the question with respect to the
16 reasonableness of the award, the reasonableness of
17 the fees and costs that have been requested, that
18 has to be subjected to an evidentiary hearing.

19 So that would only come after that first
20 step. If the Board were to make the determination
21 that an award of some amount is owed, and at that
22 point we would request that an evidentiary hearing
23 be set, the parties be given the opportunity to
24 present evidence to the Board with respect to the
25 reasonableness of those fees and for the Board to

1 then make that determination.

2 CHAIR SIMPSON: Thank you. I believe
3 Counsel for MEIC is on the call.

4 MR. HERNANDEZ: Good morning, Chairman
5 Simpson, members of the Board. Shiloh Hernandez
6 for Petitioners Montana Environmental Information
7 Center and Sierra Club.

8 The two step process is right. There
9 needs to be a hearing. There would have to be a
10 hearing if the Board were to make a determination
11 that fees are appropriate if the Petitioner's case
12 that the law is clear, though, that there simply
13 is no jurisdiction for the Board to address the
14 propriety of fees in the first instance.

15 And we think two things, one, that
16 before we get to an argument on jurisdiction and
17 the eligibility for fees of Westmoreland, that the
18 pending motion should be resolved, specifically
19 Petitioner's motion to strike Westmoreland's last
20 brief. That will have a significant bearing on
21 what kind of argument we present at any hearing.

22 And this is our position. First off,
23 Westmoreland's reply brief should be stricken,
24 because it plainly doesn't comply with the
25 governing procedural order in this case. It's

1 significantly longer than our brief, so at the end
2 of the day, they're getting thousands more words
3 than the Petitioners received.

4 The appropriate remedy would be to
5 strike that brief. If the Board chooses not to do
6 that, then in fairness the Petitioners should be
7 able to file a surreply brief on the initial
8 question of jurisdiction and eligibility for fees.

9 Once that briefing is all done, then a
10 hearing on the question of whether or not there is
11 jurisdiction is appropriate. Only after that
12 hurdle is cleared -- which we don't think it can
13 be -- would it be worth the Board's time to assess
14 the eligibility of Westmoreland for fees.

15 So I guess I understand that the Board
16 has plenty on its plate, and I don't want to make
17 this longer than it needs to be, but the
18 Petitioners, my clients, would like clarity with
19 respect to whether or not Westmoreland's reply
20 brief will be stricken; and if not, whether or not
21 our clients would be given leave to file a
22 surreply.

23 I think that's question one, that we
24 think could be handled by the Board's Counsel Ms.
25 Hupp or the Board, but we'd like to clarify first;

1 and after that's done, we can address the question
2 of jurisdiction.

3 And then all that said and done, we
4 think that there's no question that Westmoreland
5 is not entitled to fees here, but if there were
6 hypothetically to be a determination that they
7 were, then Mr. Yemington is right, a hearing on
8 the reasonableness of fees would be necessary.

9 CHAIR SIMPSON: Thank you, Mr.
10 Hernandez. We just recently received the motion
11 to strike, and I believe we've gotten a response
12 from Westmoreland. I'm not 100 percent sure on
13 that. But anyway, you will be hearing from Board
14 Counsel shortly on moving forward with that, but I
15 think the clarification has been very helpful as
16 to just what the scope of the hearing on this
17 matter at the April meeting will be.

18 MS. MOISEY-SCHERER: Chair Simpson,
19 Board Counsel has had --

20 CHAIR SIMPSON: Dana, did you have
21 further comment?

22 MS. HUPP: Chairman Simpson and members,
23 the motion to strike the reply brief that was
24 referenced as of last night is now fully briefed.
25 So I think, at the Chairman's discretion, that

1 issue could be on the agenda for the special
2 meeting in March, because we have all of the
3 briefs on that, we could get that circulated to
4 the Board members, and then the Board could rule
5 on that motion at the March meeting. I don't
6 think it will take much of the Board's time.

7 CHAIR SIMPSON: Thank you.

8 MS. MOISEY-SCHERER: Chair Simpson, this
9 is Sandy. Shiloh Hernandez has his hand raised.

10 CHAIR SIMPSON: Mr. Hernandez.

11 MR. HERNANDEZ: Thank you. Chairman
12 Simpson, members of the Board, if I may beg your
13 indulgence one moment, and propose that this
14 matter just be assigned to a Hearing Examiner,
15 potentially Ms. Hupp, and this is the reason for
16 it.

17 The Board, as you know, many of you have
18 day jobs, and your ability to meet regularly is
19 challenging. So for that reason if there were --
20 I think it could just expedite this process. I
21 don't want to elongate it.

22 If there's a ruling at the special March
23 20th meeting on the motion to strike, if the reply
24 brief is stricken, there's no problem there; but
25 if it's not stricken, then the Petitioners would

1 need to file a surreply brief to respond to the
2 additional material that came up in that. And I
3 think it would be a press for us to be able to
4 submit any additional brief, and then the Board to
5 review it by the April 17th meeting of the Board.

6 To avoid that pinch, I propose that the
7 Board delegate this matter to a Hearing Examiner.

8 CHAIR SIMPSON: Thank you, Mr.
9 Hernandez. Dana, did you have anything further?

10 MS. HUPP: Chairman Simpson and Board
11 members. Again, I don't think this needs to be
12 delegated to a Hearing Examiner. I think you
13 could choose to delegate this issue to Chairman
14 Simpson if you wished.

15 The issue is a concern that
16 Westmoreland's reply brief included more words
17 than was potentially allowed by the rules,
18 depending upon how you interpret the rules. So
19 it's a fairly simple matter.

20 I think you could delegate this to
21 Chairman Simpson if you so chose, and he could get
22 an order out fairly quickly. I don't want to
23 speak to his timeline. But this was more of a
24 procedural matter, I think, than one that
25 ultimately will have a significant bearing on the

1 merits.

2 I know Mr. Hernandez might disagree with
3 that, but I think --

4 MR. HERNANDEZ: No, I would agree with
5 that actually, Ms. Hupp. Our interest is just
6 expeditiousness of getting a ruling on that motion
7 to strike, and if it's delegated to the Chairman,
8 that works for us.

9 MS. MOISEY-SCHERER: Chair Simpson, this
10 is Sandy.

11 CHAIR SIMPSON: Thank you, Mr.
12 Hernandez. Mr. Yemington.

13 MR. YEMINGTON: Thank you, Chair
14 Simpson. Just real briefly. I wanted to weigh in
15 on the suggestion from Mr. Hernandez that
16 regarding the outcome of his motion to strike that
17 he may be afforded an opportunity to file another
18 brief.

19 We don't concede that. We don't think
20 that's appropriate. We think that is inconsistent
21 with the process which is set by statute. There
22 was nothing new in the reply. I think that will
23 be self-evident when the Board has a chance to
24 review this and pleadings. But certainly we do
25 not concede that if in fact you do not grant his

1 motion to strike, that he would somehow be
2 afforded an opportunity to reply to what he has
3 characterized as new evidence. It just isn't
4 there.

5 CHAIR SIMPSON: Thank you, Mr.
6 Yemington. I saw another hand up I thought.

7 BOARD MEMBER PAYNE: That was mine. I
8 withdrew it.

9 CHAIR SIMPSON: Okay. Thank you, Allan.
10 I guess I'd leave it to Dana as to whether we need
11 to vote to delegate this to the Chair. I viewed
12 it as a procedural matter that we can deal with.
13 However, if it would be cleaner to delegate to the
14 Chair, I would entertain a motion.

15 MS. HUPP: Chairman Simpson and members,
16 I think it would be cleaner just to have a motion
17 to delegate this to the Chair. To be clear, it
18 would be delegating to the Chair the decision on
19 the motion to strike.

20 BOARD MEMBER PAYNE: I move that the
21 Board delegates to the Chair the resolution of the
22 pending motion to strike.

23 VICE CHAIR AGUIRRE: I second.

24 CHAIR SIMPSON: It's been moved and
25 seconded to delegate to the Chair resolving the

1 issue of the motion to strike. Further comment.

2 (No response)

3 CHAIR SIMPSON: I guess I have just one,
4 and that is I've suspected for a long time lawyers
5 are paid by the word. Apparently it's true. All
6 in favor say aye.

7 (Response)

8 CHAIR SIMPSON: Opposed.

9 (No response)

10 CHAIR SIMPSON: Motion carries. Thank
11 you very much. We've taken a little more time
12 than I'd anticipated, but let's take a ten minute
13 break and then proceed with the Westmoreland mine
14 revision 311 matter. Ten minutes. Reconvene at
15 10:40.

16 * * * *

17 (The proceedings were concluded
18 at 10:31 a.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 -12- 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.

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<p style="text-align: center;">5</p> <p>5 - 1:7 59101 - 2:14 59620 - 2:9</p>	<p style="text-align: center;">N</p>	<p style="text-align: center;">O</p>	<p style="text-align: center;">P</p>	<p style="text-align: center;">Q</p>	<p style="text-align: center;">R</p>
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