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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 - ORAL ARGUMENT
(VIA ZOOM)

May 15, 2026

9:23 a.m.

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

PREPARED BY: LAURIE CRUTCHER, RPR
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08:37:262

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08:37:261 WHEREUPON, the following proceedings were

08:37:262 had:

08:37:263 * * * * *

09:22:454 CHAIR SIMPSON: On to, I guess I'd call
09:22:545 it the main event this morning. This is the
09:22:566 Appeal and Request for Hearing regarding Rosebud
09:22:597 Mine Area B Amendment 5, Permit Number C1984003B,
09:23:068 BER 2022-05 SM.

09:23:099 This is the continuation of the
09:23:110 Amendment 5 having to do with the filing by
09:23:111 Westmoreland Rosebud Mine to recover legal costs
09:23:212 from the Conservation Groups involved in this
09:23:213 case. And the first matter that the Board will
09:23:314 need to consider here --

09:23:315 First of all, I'd call your attention,
09:23:316 the Board members, to the memorandum that was
09:23:417 prepared by Board Counsel Dana Hupp, which I think
09:23:418 lays out the decisions, the process we need to
09:23:519 follow, the decisions to be made, and the
09:23:520 positions of the parties.

09:23:521 The first question here, I wanted to
09:24:022 acknowledge, first of all, that prior to, just
09:24:023 prior to our meeting date in April, we received
09:24:124 two filings from the Conservation Groups. The
09:24:125 first was a judicial notice filing, and the second

09:24:261 was a motion to assign a Hearing Examiner. And
09:24:322 before we proceed, I think we need to deal with
09:24:353 those two matters.

09:24:384 As far as the judicial notice goes, it's
09:24:405 not filed in the form of a motion, but I believe
09:24:436 that it's relevant in the sense that it addresses
09:24:507 the question of jurisdiction, and it has been
09:25:008 included in the Board packet that went out to the
09:25:039 members.

09:25:010 So I think I'm taking the right, moving
09:25:111 forward with the correct step here, and that is
09:25:212 ask for a motion to acknowledge and accept the
09:25:213 filing of judicial notice by the Conservation
09:25:214 Groups in this case.

09:25:315 BOARD MEMBER PAYNE: I'd make a motion
09:25:316 here for -- maybe there needs to be little
09:25:417 discussion on this. It seems that a notice of
09:25:418 supplemental authority is kind of what I really
09:25:419 took this as, was the Board's own decision.

09:25:520 Those things are not supposed to be used
09:25:521 as a surreply, I think that may have been kind of
09:25:522 here. I think we can accept the notice of the
09:26:023 supplemental authority, but strike any legal
09:26:024 argument that came with that. I think the Board
09:26:025 understands the import of its own decisions.

09:26:121 So I guess my motion would be accept it,
09:26:152 you know, just the notice that there was a
09:26:183 supplemental, a decision by the Board, but not
09:26:214 with respect to the legal argument contained
09:26:235 therein, which I think was kind of a sharp
09:26:276 practice here to try to get some additional
09:26:297 argument in that they could well have made prior
09:26:328 to it.

09:26:379 CHAIR SIMPSON: Is there a second for
09:26:410 purpose of discussion?

09:26:411 BOARD MEMBER ALTEMUS: I'll second.

09:26:412 CHAIR SIMPSON: It's been moved and
09:26:413 seconded to accept this filing of judicial notice,
09:26:514 but to strike legal arguments contained therein.
09:27:015 And my understanding would be of, the reason would
09:27:016 be untimeliness.

09:27:017 I have to admit when these came in two
09:27:118 days before our last meeting, I was more than a
09:27:119 little frustrated with both counts, on the
09:27:120 question of timing, just because of our Board
09:27:221 procedures. In order to incorporate anything into
09:27:222 the agenda, we need to have two weeks notice to
09:27:323 pull it all together for distribution to the Board
09:27:324 and to get notice out in time.

09:27:325 So I guess first I would like to ask our

09:27:501 Counsel Dana Hupp. Dana, what are your thoughts
09:27:532 on this?

09:27:543 MS. HUPP: Thank you. Chairman Simpson
09:28:064 and Board members. I believe that you can vote on
09:28:145 the motion as articulated by Board Member Payne.
09:28:216 Certainly Chairman Simpson articulated the fact
09:28:247 that these came in right before the last meeting,
09:28:278 which does make it problematic.

09:28:299 The Board has had time to review the
09:28:310 notice, so at this point, I think it's up to the
09:28:311 Board as to whether or not, how they want to
09:28:402 address the notice. I prefer -- With these types
09:28:413 of notices, it's difficult because it's not styled
09:28:414 as a motion, but it has been objected to, so I
09:28:515 would prefer that the Board does take action on it
09:28:516 in the form of a motion so the record is clear.

09:29:017 CHAIR SIMPSON: Thank you. Further
09:29:018 discussion from the Board?

09:29:019 (No response)

09:29:020 CHAIR SIMPSON: No further discussion.
09:29:121 A motion has been made and seconded to accept and
09:29:122 acknowledge this, with the proviso, this filing
09:29:223 with the proviso that legal arguments would be set
09:29:324 aside. All in favor.

09:29:325 (Response)

09:29:401 CHAIR SIMPSON: Opposed.

09:29:422 (No response)

09:29:443 CHAIR SIMPSON: Motion carries. Thank
09:29:484 you.

09:29:495 The second filing had to do with -- What
09:29:566 it was was a motion that the Board appoint a
09:29:597 Hearing Examiner. Again, this came in just two
09:30:028 days before our meeting, so it was really not
09:30:099 appropriate from a question of timeliness, and my
09:30:110 own opinion is that this, if it was going to be
09:30:111 filed, should have been filed a lot sooner.

09:30:212 But again, I would ask for a motion
09:30:313 whether or not to assign this to a Hearing
09:30:314 Examiner at this point in time.

09:30:415 BOARD MEMBER PAYNE: I'd make a motion
09:30:416 to deny the motion based on timeliness.

09:30:517 CHAIR SIMPSON: Well stated. Is there a
09:30:518 second?

09:30:519 BOARD MEMBER SMITH: I'll second.

09:30:520 CHAIR SIMPSON: It's been moved and
09:30:521 seconded to deny the motion to appoint a Hearing
09:31:022 Examiner to this case at this point in time. I
09:31:123 see Mr. Hernandez has his hand up, but I'm
09:31:224 inclined to proceed with a vote. Further
09:31:325 discussion.

09:31:321 (No response)

09:31:342 CHAIR SIMPSON: All in favor, say aye.

09:31:403 (Response)

09:31:424 CHAIR SIMPSON: Opposed.

09:31:435 (No response)

09:31:446 CHAIR SIMPSON: Motion carries

09:31:477 unanimously. Thank you very much.

09:31:498 Let's proceed. What I'd like to do here

09:32:019 is to -- on our first threshold matter, which is

09:32:020 jurisdiction, there is some confusion over this

09:32:111 point. What I would like to do is to ask for

09:32:122 brief oral argument from the parties on

09:32:133 jurisdiction here. And what I have in mind is

09:32:314 perhaps five minutes just to state the position of

09:32:315 the parties on the question of Board jurisdiction.

09:32:416 Dana, I see you have your hand up. What

09:32:517 do you suggest?

09:32:518 MS. HUPP: Chairman Simpson, certainly I

09:32:519 think it's your prerogative to ask for argument in

09:32:520 that order. We had sent out an order to the

09:33:021 parties that organization of oral argument would

09:33:022 be 25 minutes Westmoreland, 25 minutes to the

09:33:123 Conservation Groups, with each party having five

09:33:124 minutes of rebuttal.

09:33:125 So I don't know how they have their oral

09:33:201 arguments prepared, but I just wanted to just
09:33:242 remind you of the fact that that order had gone
09:33:263 out.

09:33:274 CHAIR SIMPSON: Right. I'm well aware
09:33:285 of that, and I think my feeling was that the oral
09:33:326 arguments I anticipate will center on the subject
09:33:387 at hand here, that is, the merits of the case.
09:33:418 And given that this is a threshold matter, I guess
09:33:449 I would ask the parties before proceeding along
09:33:480 that line if you're prepared to proceed in that
09:33:511 manner, or whether you would prefer to proceed
09:33:512 with overall oral argument, and then we can
09:33:513 consider these matters at the end. Westmoreland.
09:34:114 Mr. Yemington.

09:34:115 MR. YEMINGTON: Chairman Simpson,
09:34:116 members of the Board. We certainly defer to the
09:34:117 Board's preference on that point. We can present
09:34:218 this in one go, or we can break that into two
09:34:219 pieces if that's preferable. I was prepared to do
09:34:220 this in one go, just based on the order that Ms.
09:34:321 Hupp mentioned, but I can adjust my presentation
09:34:322 as well.

09:34:323 CHAIR SIMPSON: Mr. Hernandez.

09:34:424 MR. HERNANDEZ: Chairman Simpson,
09:34:425 members of the Board. We have the same position.

09:34:441 We're prepared to present both pieces at once,
09:34:472 merit and jurisdiction. If it's your preference,
09:34:493 we're happy to address jurisdiction first.

09:34:544 CHAIR SIMPSON: Let's proceed with brief
09:35:025 presentation on jurisdiction only, and given the
09:35:106 structure of this case, I presume that
09:35:137 Westmoreland would go first, Dana?

09:35:178 MS. HUPP: That is correct, Chairman
09:35:249 Simpson. I apologize. You are correct.
09:35:280 Westmoreland would go first.

09:35:301 CHAIR SIMPSON: Mr. Yemington.

09:35:322 MR. YEMINGTON: Thank you, Chairman
09:35:343 Simpson, members of the Board. This will be
09:35:364 pretty brief.

09:35:385 As detailed in Board Counsel's
09:35:406 memorandum, Montana Courts have already considered
09:35:427 this issue, and they've held that the authority
09:35:448 for fees after an MSUMRA contested case rests with
09:35:469 the entity that issues the final order. The
09:35:500 Conservation Groups did not seek a judicial review
09:35:521 of Claim 2. That means that Claim 2 is now final.

09:35:522 Because the Board is the entity that
09:35:523 issued the final decision, the Board has the
09:35:524 exclusive authority to award fees specific to
09:36:025 Claim 2. Now, on the other hand, because

09:36:051 Conservation Groups have appealed Claim 1 and
09:36:072 Claim 3, these decisions are not yet final.
09:36:103 They're on judicial review now, and the Board does
09:36:124 not have the authority to award fees related to
09:36:155 Claim 1 or to Claim 3.

09:36:166 This approach is consistent with Federal
09:36:187 law on which MSUMRA is based, and on which MSUMRA
09:36:218 must conform. As detailed in Board Counsel's
09:36:259 memorandum, the legislative history of MSUMRA,
09:36:210 when it was proposed to the Federal government and
09:36:211 approved by OSM, confirms this reality.

09:36:312 OSM specifically required Montana to
09:36:313 incorporate regulations that adopted the Federal
09:36:314 practice of creating a process for purposes of
09:36:415 petitioning for fees after the conclusion of a
09:36:416 contested case. So Montana's regulations,
09:36:417 17.24.1307, 1308, and 1309, are the regulations
09:36:518 that were the issued by Montana and approved by
09:36:519 OSM adopting and conforming with that Federal
09:36:520 standard.

09:37:021 Beyond this OSM -- again, OSM is a
09:37:022 Federal agency responsible for enforcing the
09:37:023 Federal coal permitting standards, and approving
09:37:024 state plans -- OSM has rejected attempts by states
09:37:125 to vest this authority to award fees to the

09:37:121 director of the state environmental agency.

09:37:142 In 1994, OSM expressly held that a
09:37:173 petition for an award must be filed with and
09:37:204 processed by -- that's their language -- filed
09:37:235 with and processed by the review board that
09:37:256 decided the contested case. So that was 1994, and
09:37:287 it's applied equally across all jurisdictions that
09:37:308 I'm aware of.

09:37:319 Now, it's notable that Conservation
09:37:310 Groups have recently argued against DEQ
09:37:311 determining such an award. After the issuance of
09:37:312 a final decision in an MSUMRA permit challenge on
09:37:413 judicial review, that is always before a District
09:37:414 Court, Conservation Groups sought nearly \$1
09:37:415 million from DEQ in a fees award.

09:37:416 DEQ opposed that request, arguing as
09:37:517 Conservation Groups do here, that it was DEQ who
09:37:518 had the statutory authority to issue that award.
09:37:519 In response, Conservation Groups argued that DEQ
09:38:020 issuing an award would be, quote, "illogical,
09:38:021 unworkable, and flagrantly unconstitutional."
09:38:022 That's their language, and they said that because,
09:38:023 as is the case here, DEQ would be acting both as
09:38:124 an opposition party and as the adjudicator of the
09:38:125 fee dispute.

09:38:161 This is a clear conflict of interest,
09:38:182 and again as noted in Board Counsel's memorandum,
09:38:203 would result in an unfair and absurd arrangement.
09:38:254 So in sum the law is well established, the
09:38:275 authority to award fees under an MSUMRA contested
09:38:306 case is with the entity that issues the final
09:38:337 decision.

09:38:338 Here, that's the Board of Environmental
09:38:349 Review. Because the Board issued the final
09:38:380 decision with respect to Claim 2, the Board has
09:38:401 the exclusive jurisdiction to award fees specific
09:38:412 to Claim 2.

09:38:413 CHAIR SIMPSON: Thank you, Mr.
09:38:414 Yemington. Mr. Hernandez.

09:38:415 MR. HERNANDEZ: Thank you. Chairman
09:38:516 Simpson, members of the Board. As this Board
09:39:017 recognized just a couple months ago in its
09:39:018 Absaloka ruling, jurisdiction is, quote, "strictly
09:39:019 limited by statute," end quote. The Board may not
09:39:120 address an issue without an affirmative
09:39:121 legislative grant of jurisdiction.

09:39:122 As the Board held in the Absaloka
09:39:123 ruling, silence is not an affirmative grant. Here
09:39:224 I'm going to share my screen showing the relevant
09:39:225 statutory language. This is Montana Code

09:39:341 Annotated 82-4-251(7). This is the controlling
09:39:402 statute as Board Counsel recognizes. The relevant
09:39:453 provisions are highlighted. "Attorney fees may be
09:39:504 assessed as the Court or the Department considers
09:39:555 proper." Again, the Court or the Department
09:40:006 considers proper.

09:40:027 Notably absent from the statute is any
09:40:068 reference to the Board. That is the controlling
09:40:099 statute, and consistent with this Board's ruling
09:40:110 in the Absaloka case, that should end this
09:40:111 discussion.

09:40:112 Now, Mr. Yemington just made a few
09:40:213 points here, and none of them should change its
09:40:214 basic conclusion, and they are in fact an
09:40:215 invitation to the Board to commit reversible
09:40:306 error. As the District Court in Helena recently
09:40:317 recognized, if the Board acts beyond its statutory
09:40:318 authority, that's error.

09:40:419 Mr. Yemington referenced a case decision
09:40:420 that said the Board had authority to rule on
09:40:521 attorney fees petitions. I didn't hear what case
09:40:522 it is. No such case exists under Montana law.

09:40:523 A few other things that Mr. Yemington
09:40:524 mentioned. He mentioned the regulations which
09:41:025 Board Counsel Hupp cited in the memorandum. These

09:41:051 are the regs at ARM 17.24.1307 to 1309. These
09:41:122 regulations notably do not say the Board has
09:41:163 authority to award attorneys fees, and they
09:41:194 couldn't, because under Montana law,
09:41:235 administrative jurisdiction must come from an
09:41:256 affirmative grant of the Legislature. An agency
09:41:287 cannot grant itself authority that hasn't been
09:41:318 granted by the Legislature.

09:41:329 That's clear Montana law. The relevant
09:41:340 case is State versus Burch 2008 Montana 118
09:41:411 Paragraph 29.

09:41:412 A few other things that Mr. Yemington
09:41:413 cited. He noted the Office of Surface Mining
09:41:504 ruling on the attorney fees provision for Wyoming.
09:41:515 Now, in 1994 I believe OSM rejected the attorney
09:42:016 fees provision from the State of Wyoming.

09:42:017 That's not the case in Montana. As the
09:42:108 Montana Supreme Court explained in the seminal
09:42:119 decision on MSUMRA in Montana, MEIC versus
09:42:120 Westmoreland, 2023 decision, Montana's fee
09:42:221 provisions were approved by the US Office of
09:42:222 Surface Mining in 1980. Now, that's 46 years ago.

09:42:323 This has been the law approved by OSM in
09:42:324 Montana for 46 years. There's been no objection
09:42:325 to it during that period of time. Had there been

09:42:401 some, it could have been adjudicated, because --
09:42:432 and Chairman Simpson, I'm sure you're aware,
09:42:463 having worked in the field -- that Montana's
09:42:494 program under MSUMRA gives Montana, quote unquote,
09:42:545 "exclusive jurisdiction over strip mining in
09:42:586 Montana." What that means is no other law
09:43:007 applies, specifically Federal law does not impinge
09:43:058 on Montana's laws governing coal mining.

09:43:089 What that means is that Montana Code
09:43:120 Annotated 82-4-251 Sub(7), which grants
09:43:211 jurisdiction exclusively to a Court or the
09:43:222 Department, is the controlling law. There simply
09:43:313 is no grant of jurisdiction from the Legislature
09:43:314 to the Board on this point. That should be
09:43:405 dispositive.

09:43:406 The final point that bears mention here
09:43:417 is that Mr. Yemington notes arguments made by the
09:43:418 Conservation Groups in the MEIC 2023 decision. We
09:43:519 did say that it would be inappropriate for DEQ to
09:43:520 adjudicate our fee dispute in that matter.

09:44:021 Three points bear mentioning on this
09:44:022 point. First, we sought fees there from a Court.
09:44:023 Now again, the relevant statutory language says
09:44:124 that a Court or the Department may award fees.
09:44:125 There was no question that the Court had

09:44:171 jurisdiction in that case. We did not seek fees
09:44:212 from the Board.

09:44:233 The second important point is that there
09:44:264 DEQ was the party against whom fees were being
09:44:315 sought. That's not the case here where DEQ is not
09:44:346 a party to the fee matter, and DEQ has expressly
09:44:377 stated that they want to have, that they seek no
09:44:408 involvement in this matter. Therefore the
09:44:449 attempted parallel is not appropriate.

09:44:490 Third, the argument that Westmoreland is
09:44:511 making that it would be some violation of due
09:44:572 process, or it would be unfair for the Board to --
09:45:013 for the Department, not the Board, to award fees.
09:45:064 It is just an argument that the Board can
09:45:105 consider, because as Westmoreland has stated in
09:45:126 the same case, the Board doesn't have jurisdiction
09:45:157 to say that it will ignore a statute based on
09:45:198 constitutional concerns. That's not a ruling that
09:45:219 the Board can make.

09:45:220 Nor can the Board say that because it
09:45:251 finds a statute -- sorry. Let me take a step back
09:45:282 and explain that, because I saw some furrowed
09:45:323 brows.

09:45:324 Now Westmoreland is saying that
09:45:385 82-4-251(7), attorney fee provision in the statute

09:45:411 allowing the Department to award fees, would
09:45:432 somehow violate due process or be
09:45:473 unconstitutional.

09:45:484 Now, that's not an analysis that the
09:45:505 Board can make. The Board doesn't have the
09:45:526 authority to disregard the clear language of a
09:45:557 statute based on its interpretation of Montana's
09:45:578 Constitution.

09:45:589 More to the point, Westmoreland may
09:46:020 think that the attorney fee provision in Montana
09:46:071 Code is challenging, or could be better, or could
09:46:112 be improved in some respect. That may be the
09:46:143 case. The appropriate body to address that
09:46:174 question isn't the Board. That's the Montana
09:46:215 Legislature. The statute is clear.

09:46:216 And just for emphasis, I'm going to
09:46:277 bring up the statutory language again. "The Court
09:46:318 or the Department considers proper." That's the
09:46:319 statutory language. The Board cannot, consistent
09:46:420 with the law, and consistent with the Board's own
09:46:421 ruling in the Absaloka case, ignore this statutory
09:46:422 text. It would be an invitation to error, and the
09:46:523 Board may not do it.

09:46:524 Now, this is not a hardship to
09:46:525 Westmoreland. Westmoreland had every opportunity

09:47:001 to read the statute, and file with the appropriate
09:47:022 entity. They chose not to. And their
09:47:063 disagreement with the statute in this case doesn't
09:47:094 and cannot grant the Board authority to adjudicate
09:47:125 their petition.

09:47:146 This point is dispositive, leaving the
09:47:187 Board only one option, and that option is to
09:47:218 dismiss this petition for attorney fees. And I'm
09:47:289 happy to answer any questions, but that's the end
09:47:310 of my presentation on jurisdiction.

09:47:311 CHAIR SIMPSON: Thank you, Mr.
09:47:312 Hernandez. Mr. Yemington, rebuttal.

09:47:313 MR. YEMINGTON: Thank you, Chair
09:47:414 Simpson, members of the Board. We've got no
09:47:415 problem with the statute because we understand and
09:47:416 appreciate how this State plan, how MSUMRA was
09:47:517 proposed and ultimately adopted. In 1980, so
09:47:518 three years after SMCRA became a Federal law, the
09:47:519 Montana Legislature proposed MSUMRA, Montana's
09:48:020 state plan, to OSM for their approval.

09:48:021 I'm going to share my screen here to
09:48:022 give an idea of we're talking about. We've got to
09:48:123 go back in time a bit.

09:48:124 What you're looking at here is OSM's
09:48:125 response in the Federal Register in 1982 issuing

09:48:221 their final rule with respect to approving
09:48:252 Montana's state plan. In their review they
09:48:283 specifically identified six issues -- six issues
09:48:334 of Montana's plan -- that they required Montana to
09:48:355 address through regulation before they would
09:48:366 approve it.

09:48:377 The third issue that they identified was
09:48:398 they looked at 251, they looked at 82-4-215, the
09:48:449 statute that Mr. Hernandez continues to point at,
09:48:410 and they said "It does not provide the process for
09:48:501 an award of fees. You need to address that in
09:48:512 regulation."

09:48:513 Montana did that. They issued
09:48:514 regulations 26-4-1307, 1308, and 1309. That's
09:49:015 been recodified at 17-24-1307, 1308, and 1309.

09:49:016 OSM looked at these regulations, and
09:49:117 here in the Federal Register specifically
09:49:128 acknowledge that 1307, 1308, and 1309 are
09:49:139 consistent with and conform with the processes for
09:49:220 an awarding of costs and fees in an administrative
09:49:221 proceeding arising out of SMCRA, and here MSUMRA,
09:49:222 and they specifically say that those are
09:49:323 consistent with -- which they must be by law.
09:49:324 They must be consistent with and conform with the
09:49:325 Federal standards, because they're consistent with

09:49:391 43 CFR 4.1290 through 4.1296.

09:49:432 Specifically they identify that 1308 was
09:49:463 consistent with 1291. So what's 1291 say? 1291
09:49:514 says where to file. This is a Federal standard
09:49:535 that Montana's law has to conform with, bar none,
09:49:576 full stop. The petition for an award of costs and
09:50:007 expenses, including attorneys fees, must be filed
09:50:018 with the Administrative Law Judge who issued the
09:50:049 final order, or if the final order was issued by
09:50:070 the Board, with the Board within 45 days.

09:50:101 OSM concluded that 1308 substantially
09:50:132 conformed with this standard. The application and
09:50:163 interpretation of 1308 must be consistent with
09:50:194 this standard. It specifically requires that to
09:50:225 go to the Board.

09:50:226 Now, when we weigh that together with
09:50:247 Montana State law, the decisions by the Montana
09:50:278 Supreme Court and District Court with respect to
09:50:309 when and how awards are found and awarded after
09:50:320 MSUMRA contested case, we look at those together.

09:50:321 On the one hand, if it's the Board that
09:50:422 issues a final decision, it's the Board. If
09:50:423 that's taken on judicial review, and it's a Court,
09:50:444 a District Court or the Supreme Court that issues
09:50:425 that final decision, it's that District Court or

09:50:501 it is that Supreme Court.

09:50:512 But what we know from the Montana
09:50:543 Supreme Court is the crux is who issued the final
09:50:574 decision, and what we know from the Federal
09:50:595 regulations issued implementing SMCRA, is that if
09:51:026 it's the Board under 1291, and the state
09:51:047 equivalent of 1308, it is the Board of
09:51:078 Environmental Review, full stop.

09:51:099 There's no interpretation that can
09:51:110 distance itself from this. That would be
09:51:111 unlawful. MSUMRA must be interpreted and applied
09:51:112 in a manner consistent with Federal law. That is
09:51:203 the absolute reality, and that's noted in the
09:51:214 Board Counsel's memorandum. She speaks to this
09:51:215 entire process.

09:51:216 1980 when it was proposed, 1982 when it
09:51:217 was approved, the fact that 1307, 1308, and 1309
09:51:318 were issued directly responsive to OSM's demand
09:51:319 that the State of Montana have a process for
09:51:420 awarding these fees. And when we apply 1308, we
09:51:421 must do so in a manner that complies with 1291.

09:51:422 There's no doubt in my mind that the
09:51:423 Board is the only entity in this incident because
09:51:524 they issued the final decision. It's the only
09:51:525 entity that can issue this award.

09:51:581

CHAIR SIMPSON: Thank you, Mr.

09:51:592

Yemington. Mr. Hernandez, anything further?

09:52:033

MR. HERNANDEZ: Yes, Chairman Simpson.

09:52:074

If I may. Now, what Mr. Yemington said, there are

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two problems with it. One, it's directly contrary

09:52:166

to the statutory language. Now what he said

09:52:207

cannot be squared with Montana law, with Montana

09:52:248

statutory law. Again, this is the provision.

09:52:289

"The Court or the Department." Now Mr.

09:52:310

Yemington just said, "The Department may not award

09:52:311

fees. The Board has to." Now, that is a direct

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contradiction of Montana law, of the statute. The

09:52:413

Board is not at liberty to ignore the plain

09:52:414

language of Montana's statute. That's what the

09:52:515

Board said in the Absaloka decision, and that's

09:52:516

what should govern this analysis.

09:52:517

Second, now Mr. Yemington mentions a

09:53:018

Court decision that he says that the Board has to

09:53:019

make this decision. He provided no citation

09:53:020

because there isn't one. There's no citation

09:53:121

where the Montana Court has said that the Board

09:53:122

has to award attorney fees. That's just not the

09:53:123

case.

09:53:124

The only case to assess this is the MEIC

09:53:225

2023 decision, where the Court agreed with MEIC

09:53:241 that a Court had authority to award fees. Now,
09:53:272 Mr. Yemington is asking the Board to rewrite this
09:53:313 statute.

09:53:314 The point about US Office of Surface
09:53:345 Mining deserves brief analysis, and that's this:
09:53:386 The Office of Surface Mining approved this
09:53:417 statute, and said this statute works. There was
09:53:458 no objection to the naming of the Department in
09:53:489 the statute. The State didn't change it.

09:53:510 The US Office of Surface Mining approved
09:53:521 it. So this statute as written in Montana is
09:53:522 approved, and has been approved by the US Office
09:54:013 of Surface Mining for 46 years. It's the law, and
09:54:014 it must be applied, and I urge the Board not to
09:54:015 accept Westmoreland's invitation to ignore the
09:54:116 clear law on this point. It would be error and it
09:54:117 would be a significant overreach.

09:54:118 CHAIR SIMPSON: Thank you, Mr.
09:54:219 Hernandez. Board members, any questions for
09:54:220 Counsel before we proceed to discussion? Allan.

09:54:321 BOARD MEMBER PAYNE: I just have a
09:54:322 couple questions here, but I guess first I'd like
09:54:423 to hear from the Department, if they have a
09:54:424 position on this, because as I understand Mr.
09:54:425 Hernandez's argument, their position is they

09:54:521 should have filed this with DEQ, and I just would
09:54:552 like to hear if DEQ has a position on that.

09:54:593 CHAIR SIMPSON: Mr. King.

09:55:014 MR. KING: Thank you, Board Chair.
09:55:045 We've got no dog in this pony, so I'd respectfully
09:55:086 like to stay out of it.

09:55:117 CHAIR SIMPSON: Thank you, sir. Mr.
09:55:178 Yemington.

09:55:179 MR. YEMINGTON: Thank you, Board Chair,
09:55:200 Member Payne. I will offer this limited comment
09:55:211 without trying to implicate the Department.

09:55:212 Prior to filing our petition, we reached
09:55:213 out to the Department for their position as to
09:55:314 whether or not they would accept a petition for
09:55:315 fees. Again, it's been our position from the
09:55:316 beginning that it's the Board that has that
09:55:317 responsibility. For conducting that due diligence
09:55:318 and reviewing 251, we reached out to DEQ Counsel,
09:55:419 and inquired as to whether they would accept the
09:55:420 petition of fees, and we were told that they would
09:55:421 not.

09:55:422 BOARD MEMBER PAYNE: Is that in the
09:55:423 record anywhere?

09:55:524 MR. YEMINGTON: It is not. It was
09:55:525 purely an effort on our part before we wasted the

09:55:551 Board's time.

09:55:562 BOARD MEMBER PAYNE: I guess it is now.

09:55:583 MR. YEMINGTON: Fair enough.

09:56:004 BOARD MEMBER PAYNE: Let me ask you
09:56:055 another question then. You had raised the -- to
09:56:096 Mr. Yemington. You had raised the question about
09:56:117 due process. And in essence that DEQ is a party
09:56:188 to the litigation, they shouldn't stand as then
09:56:239 the judge of whether fees should be -- and that
09:56:210 certainly makes sense to me.

09:56:211 But in this case, because DEQ hasn't
09:56:312 sought its fees, do you think it would -- if they
09:56:313 had been the party to seek that out, to seek their
09:56:414 fees, that would have been improper; but here they
09:56:415 haven't. But would it be improper now then? At
09:56:516 this point, they're are not seeking their fees.
09:56:517 Is it really -- Can they then stand as adjudicator
09:56:518 of that issue?

09:57:019 MR. YEMINGTON: My response to that is
09:57:020 no, and first, with respect to the legal
09:57:021 considerations, I don't think they have the
09:57:022 authority. But the second piece is more
09:57:023 practical. DEQ was an opposition party in this
09:57:124 case. DEQ, Westmoreland, and the Union were on
09:57:125 the same side of this caption defending the permit

09:57:161 against the Conservation Groups.

09:57:182 DEQ, just like Westmoreland and the
09:57:203 Union, had the right and ability to petition for
09:57:244 fees in this case. They met all the criteria on
09:57:275 to move the Board for fees. The fact that they
09:57:316 didn't doesn't change that reality, and it doesn't
09:57:347 change the reality that they would still be an
09:57:368 opposition party adjudicating a dispute of fees
09:57:399 against the party that they defeated in a
09:57:420 contested case.

09:57:421 So regardless if they could set aside
09:57:442 all biases, and all prejudices, they would still
09:57:463 be identically aligned as if they were the party
09:57:484 who was opposing a fee request that was being
09:57:505 sought from, similar to that previous case with
09:57:526 MEIC where they went after DEQ for fees.

09:57:547 So it is in my mind no different
09:58:018 whatsoever. There's no way that DEQ can remove
09:58:039 themselves now. I mean Board has said that this
09:58:060 is a continuation of the same contested case.
09:58:081 They are a Respondent in this case. They're on
09:58:102 the same side of the caption as we are.

09:58:123 And so the same arguments that MEIC made
09:58:144 in their other case that this would be unworkable,
09:58:165 that would be flagrantly unconstitutional, and

09:58:201 that it would result in these unfair and absurd
09:58:222 arrangements, that applies equally here.

09:58:243 But beyond that, I don't think you need
09:58:264 to get that far, because the law is clear with
09:58:295 respect to what OSM approved for purposes of
09:58:336 Montana's state plan, its conformity with SMCRA,
09:58:367 and the Federal regulations, which clearly require
09:58:388 that the Board, the entity that adjudicated the
09:58:419 dispute, is the same entity that awards fees.

09:58:410 And that makes imminent sense. It makes
09:58:411 imminent sense because it would just put DEQ in
09:58:412 such a difficult situation, regardless if they,
09:58:413 like here, chose not to exercise their right and
09:58:514 go after fees, which again, was their right in
09:58:515 this case.

09:58:516 Now, I want to offer just a little bit
09:59:017 more precision on this point of DEQ and 251. Mr.
09:59:018 Hernandez continues to come back and point to that
09:59:019 word "Department."

09:59:020 As a member of the Board, you probably
09:59:121 recognize and remember in 1982, when that statute
09:59:122 was approved by OSM, when it was drafted and
09:59:223 signed into law by the Governor, and approved by
09:59:224 OSM, there was no Department of Environmental
09:59:225 Quality, there was no Board of Environmental

09:59:261 Review. They did not exist. They did not come
09:59:302 into existence until 1995.

09:59:323 Now, we can go down this rabbit hole,
09:59:344 because I'm pretty familiar with it. It's a bit
09:59:375 of a divergence, and I don't want to get there
09:59:396 unless you really feel you want a seminar on the
09:59:437 legislative history of coal mining and the
09:59:468 administrative law in Montana.

09:59:469 But in 1995, the Legislature, the State
09:59:510 Legislature, broadly redefined the administrative
09:59:511 State of Montana. They got rid of the Department
09:59:512 of Lands -- again, the entity referenced in 251.
09:59:513 They replaced it with the Department of
10:00:014 Environmental Quality, and they created the Board
10:00:015 of Environmental Review.

10:00:016 So when Mr. Hernandez says, "Well, it
10:00:017 just doesn't say the Board of Environmental Review
10:00:018 in this statute," it didn't exist at the time.
10:00:119 That is the reality.

10:00:120 And if you want to chain back OSM's
10:00:121 review and approval of that, you can do that. OSM
10:00:122 looked at that legislation in the mid to late
10:00:223 nineties, they agreed to send MSUMRA to DEQ and
10:00:224 allow DEQ to administer it. They allowed the
10:00:225 Board to take over the adjudicative capacity.

10:00:311 That's all reflected in the Federal Register.
10:00:332 They approved DEQ overseeing all permitting, and
10:00:373 the Board of Environmental Review overseeing all
10:00:394 challenges.

10:00:405 Again, all of this has to be approved by
10:00:426 the Feds, and it was. And so it's silly to get
10:00:467 hung up on this word "Department." Too many
10:00:488 things have changed, but we also know from the
10:00:509 clear chained out legislative history, and Federal
10:00:510 review of what Montana has done, and what the Feds
10:00:511 have allowed them to do, that it's the Board of
10:00:512 Environmental Review that's tasked with
10:01:013 adjudicating these contested cases, and consistent
10:01:014 with SMCRA and its implementing regs, it's the
10:01:015 Board of Environmental Review that falls into the
10:01:016 same place as the Interior Board of Land Appeals
10:01:107 to adjudicate those petitions after the conclusion
10:01:118 of a contested case.

10:01:119 BOARD MEMBER PAYNE: Had that statute,
10:01:120 that subsection (7) been amended anywhere between
10:01:221 -- from '95 and when the State reorganized it,
10:01:222 until they did it in, what was it, '23 --

10:01:323 MR. YEMINGTON: Yeah, and let me share
10:01:324 my screen quickly, just so the Board has a better
10:01:325 idea of what we're talking about. Hopefully you

10:01:461 can see that. This is just a basic timeline of
10:01:492 sort of how this process began after SMCRA was
10:01:543 adopted by the Federal government in 1977.

10:01:574 OSM reviewed and approved MSUMRA in
10:02:005 1980, and they demanded -- and we already went
10:02:026 through this -- they demanded that then the
10:02:057 Department of State Lands issue regulations that
10:02:088 would conform with the process to award fees.
10:02:109 That was spelled out in Federal regulation.

10:02:120 In response, Montana adopted 17-24-1307
10:02:141 through 1309. Now, they were different numbers at
10:02:162 the time, but it's the same regulations. They've
10:02:213 just been updated in that whole 1995 reshuffle.

10:02:244 Now in '82, that's what I showed you on
10:02:275 the screen earlier. OSM looked at those regs, and
10:02:296 they said, "Yes, we now agree that you're no
10:02:317 longer deficient. We will approve this plan," and
10:02:348 they tasked Montana Department of State Lands as
10:02:369 the entity, the administrative entity, responsible
10:02:420 for implementing and enforcing MSUMRA.

10:02:421 So then before the creation of the Board
10:02:442 of Environmental Review and the Department of
10:02:463 Environmental Quality, there is a legitimate
10:02:484 argument that it was the Montana Department of
10:02:525 State Lands that had the authority to process a

10:02:541 petition for fees.

10:02:552 In '94, that's that Wyoming case.
10:02:583 Wyoming says, "Okay, well, we would like to send
10:03:014 this authority to our Director of DEQ." OSM
10:03:045 looked at that, and they said, "No, you can't do
10:03:066 that. The entity that needs to do this is the
10:03:097 adjudicative entity," the Board that adjudicated
10:03:128 the contested case. That was the '94 case in
10:03:159 Wyoming.

10:03:110 So again, they looked at this since
10:03:111 then, and they said, "You can't do that. You
10:03:112 can't give it to the Director." In '95, that's
10:03:213 when Montana reorganized their entire
10:03:214 administrative state, and that's when the
10:03:215 Department of Lands was abolished, and it was
10:03:306 replaced by DEQ and BER.

10:03:317 Now, initially almost all of the
10:03:318 authority ended up with DEQ, but it was carved
10:03:319 off, specifically the authority to conduct MSUMRA
10:03:320 contested cases, in the late '90s and early
10:03:421 2000's. You see under 2002, that's when Montana
10:03:422 transferred the authority to conduct contested
10:03:423 cases to BER, and with that authority
10:03:424 fundamentally came the authority to entertain and
10:03:525 adjudicate petitions for fees after the conclusion

10:03:551 of those contested cases. It is part and parcel
10:03:572 under Federal law.

10:03:593 In 2003, OSM approved that transfer.
10:04:024 Again, this is in the Federal Register. It is a
10:04:045 final decision by OSM. And then in 2023 -- this
10:04:086 is a Westmoreland case. It's 2023 MT 224
10:04:117 Paragraph 92 -- Montana Supreme Court held that in
10:04:158 the cases -- this comes up on judicial review.

10:04:189 The critical piece here is who issued
10:04:210 the final decision. They looked at the
10:04:211 regulations, they looked at 1307, 1308, and 1309,
10:04:212 and they held that the determining factor is who
10:04:313 issues a final determination in the adjudicative
10:04:314 capacity. If it's a board, it's the board. If
10:04:315 it's a District Court on judicial review, it's a
10:04:316 District Court.

10:04:317 That's where MEIC was when they went for
10:04:418 attorney fees. That's where they were when they
10:04:419 said DEQ shouldn't be able to resolve this. It's
10:04:420 all there. There is no dispute. So --

10:04:521 BOARD MEMBER PAYNE: I think that's the
10:04:522 question, though. Since, I guess since 1995,
10:05:023 other than the recent change in -- was it '23 --
10:05:024 was that subsection ever amended by the --

10:05:025 MR. YEMINGTON: I'm not aware of it

10:05:081 being amended. And you're referencing Subsection
10:05:092 251?

10:05:103 BOARD MEMBER PAYNE: 251 sub --

10:05:124 MR. YEMINGTON: I'm not aware of any
10:05:125 amendment of that subsection.

10:05:256 BOARD MEMBER PAYNE: I have a question
10:05:257 for Mr. Hernandez then.

10:05:318 CHAIR SIMPSON: Mr. Hernandez. I saw
10:05:339 your hand up a minute ago.

10:05:310 MR. HERNANDEZ: I don't want to move the
10:05:311 discussion too far. I wanted to comment briefly,
10:05:402 if I could, on DEQ's ability to adjudicate this
10:05:413 matter.

10:05:414 And I think Member Payne, that you were
10:05:415 correct. The posture is different in this matter
10:05:516 than it was in the MEIC case, where we were
10:05:517 seeking fees from DEQ, and where DEQ would be both
10:05:518 defending fees and adjudicating fees at the same
10:06:019 time.

10:06:020 That's not the case here. And I think
10:06:021 that one important point to note is that as far as
10:06:122 the distinction, like clearly distinct processes,
10:06:123 Westmoreland itself said fees is a wholly
10:06:124 different matter from the merits. They said that
10:06:125 in our prior briefing when they filed the

10:06:211 over-length brief. And they're contradicting
10:06:252 themselves by saying, "No, it's all the same
10:06:273 matter here."

10:06:284 I think it's also worth noting here that
10:06:335 DEQ has not sought fees. I think that's telling,
10:06:366 and has no -- is seeking to have no role in here.
10:06:397 It appears that they're trying to preserve their
10:06:418 impartiality.

10:06:429 With that, that's just -- I wanted to
10:06:440 mention that. One other fast point. Mr.
10:06:481 Yemington had his take on a number of developments
10:06:522 in the program on his screen. Absent were any
10:06:513 citations to specific authority there. And I
10:06:514 think that's telling, this recurrent point where
10:07:015 the Montana Supreme Court supposedly said that the
10:07:016 Board has authority to award fees, it's just not
10:07:017 in the case.

10:07:018 I'd happily receive a pin citation from
10:07:119 Mr. Yemington, but I was Counsel on that case, I
10:07:120 wrote the briefs. We litigated it significantly,
10:07:221 and there's just no provision, no statement by the
10:07:222 Court to that effect in that decision. And with
10:07:223 that -- Mr. Payne, I'm sorry.

10:07:324 BOARD MEMBER PAYNE: Westmoreland raises
10:07:325 this issue now that back when the statute was

10:07:441 first passed in, was it '77, or '80, or whenever
10:07:482 it was, that the Department meant -- the word
10:07:503 "Department" meant something different then than
10:07:544 it does now, because a lot of the functions of the
10:07:585 Department of State Lands, those functions that
10:08:006 were transferred to the Department of
10:08:037 Environmental Quality, some of those functions
10:08:048 were also transferred to the Board.

10:08:099 And I guess I'd like you just briefly to
10:08:120 address that. Why is that -- You know, a lot of
10:08:171 your argument here hung on the word that "only the
10:08:202 Department is mentioned in the statute." So if
10:08:233 "Department" meant something different when the
10:08:274 statute was passed, why shouldn't we look at that?

10:08:305 MR. HERNANDEZ: I think the reason is
10:08:306 that the statute -- Well, the statute hasn't
10:08:337 changed since 1980, and it's present now. The
10:08:378 organization has changed a little bit, changes in
10:08:419 the Department's structure, or the administration
10:08:420 of MSUMRA have to go through US Office of Surface
10:08:421 Mining.

10:08:422 And there's no question that currently
10:08:523 existing provisions in Montana Code are approved.
10:08:524 This is an approved program. There's no
10:08:525 outstanding amendment to approve 82-4-251(7).

10:09:011 This is the law. Montana changed -- I'm not
10:09:092 certain when the Board came to be, but the statute
10:09:143 has clearly delineated "Board" and "Department."

10:09:174 That's where it is here today, that's
10:09:195 the approved law, and the Board has to honor the
10:09:246 legislative clear, express language. There's "the
10:09:307 Board" and there's "the Department." It's
10:09:328 recognized, they have unique functions, and unique
10:09:359 grants of authority under the statute, as it
10:09:380 exists, and applies to this case.

10:09:401 And what Mr. Yemington is asking the
10:09:412 Board to do is to ignore what the Board can see
10:09:423 with its own eyes, which is that clear language of
10:09:514 statute. It says "the Department or the Court."
10:09:515 That's how it was. Apparently Mr. Yemington says
10:10:016 he considered filing this with the correctly
10:10:017 identified entity, the Department. That's what
10:10:018 the statute says.

10:10:109 The reason that Westmoreland opted not
10:10:120 to do that, I can't speculate, but that was the
10:10:121 correct path to do, the Department or the Court.

10:10:222 BOARD MEMBER PAYNE: Well, I mean should
10:10:223 we have some sympathy for Mr. Yemington in the
10:10:224 fact he went to the body that you suggested you
10:10:225 should go to, and that body told him that it's not

10:10:321 them?

10:10:342 MR. HERNANDEZ: I would object to that
10:10:353 colloquy because that's hearsay. There's no
10:10:364 evidence in the record about what the Department
10:10:385 said, there's no evidence about this outreach. I
10:10:426 don't know. I saw nothing about that --

10:10:447 BOARD MEMBER PAYNE: Let's ask Mr. King.
10:10:468 Mr. King, can you confirm what Mr. Yemington
10:10:479 stated?

10:10:510 CHAIR SIMPSON: Mr. King.

10:10:511 (No response)

10:11:012 BOARD MEMBER PAYNE: If you're trying to
10:11:113 talk, Sam, your microphone is off.

10:11:214 (No response)

10:11:215 CHAIR SIMPSON: Apparently he's left us
10:11:216 for the time being. We need to move this along.
10:11:317 Did you have anything else, Allan? Oh, there's
10:11:318 Mr. King.

10:11:319 MR. KING: Sorry, Board Chair. I was
10:11:420 not listening. I apologize.

10:11:421 BOARD MEMBER PAYNE: Did you --

10:11:522 CHAIR SIMPSON: Allan had a question for
10:11:523 you.

10:11:524 BOARD MEMBER PAYNE: Mr. King, did you
10:11:525 hear Mr. Yemington's statement that Westmoreland

10:11:591 had approached the DEQ, whether or not they were,
10:12:032 DEQ was the proper agency to file their request?

10:12:093 MR. KING: Yes, that's an accurate
10:12:104 statement.

10:12:115 BOARD MEMBER PAYNE: What was the
10:12:126 Department's response?

10:12:137 MR. KING: "I don't want to adjudicate
10:12:158 your fee petition."

10:12:199 BOARD MEMBER PAYNE: Okay. Did you give
10:12:210 a reason for it, other than you just didn't want
10:12:211 to?

10:12:212 MR. KING: No. And I mean I understand
10:12:213 the arguments in this case. As a matter of
10:12:314 principle of trying to adjudicate the appropriate
10:12:405 fee amount when we are a Respondent in this
10:12:416 action, it doesn't feel like the impartial neutral
10:12:517 arbitrator, if that makes sense.

10:12:518 Now, if there's a decision of law that
10:12:519 comes down -- and you know, I prefer that
10:13:020 ultimately is issued by a Court -- we'll do what
10:13:021 we're told, but as far as trying to determine the
10:13:122 appropriate fee amount, I don't want to do it if I
10:13:123 don't have to.

10:13:124 BOARD MEMBER PAYNE: Okay. Thank you.

10:13:225 CHAIR SIMPSON: Other questions from the

10:13:241 Board?

10:13:362 BOARD MEMBER ALTEMUS: Mr. Chair, is it
10:13:363 proper to ask our Counsel Ms. Hupp to give her --
10:13:414 I mean I know we have her response and stuff, but
10:13:445 just hearing all this back and forth. If Ms. Hupp
10:13:476 has anything she'd like to add or clarify or -- I
10:13:527 would appreciate that. Thank you.

10:13:538 CHAIR SIMPSON: Well, I think the
10:13:549 positions of the parties are clear certainly, and
10:13:510 we don't need to proceed any further down that
10:13:511 path I don't believe. But Dana, would you make a
10:14:012 comment, please. I think it's laid out pretty
10:14:013 clearly in your memo, but if you could state your
10:14:104 position, please.

10:14:115 MS. HUPP: Sure. Chairman Simpson,
10:14:116 Board Member Altemus. I would direct you to my
10:14:217 memo. I think the statute does use the word
10:14:218 "Department," but I don't think the exact language
10:14:319 of the statute is the only consideration here.

10:14:320 As set forth in my memo, I think the
10:14:321 Board will want to consider and can consider in
10:14:422 interpreting that statute as the Conservation
10:14:523 Groups want you to is correct, and specifically I
10:14:524 think you need to take into consideration whether
10:14:525 having the Department, here the DEQ, consider this

10:15:041 fee petition would lead to absurd results, and if
10:15:082 it could lead to issues of due process and
10:15:133 fundamental fairness as discussed in that MEIC
10:15:174 lawsuit.

10:15:175 I would disagree with Mr. Hernandez. I
10:15:206 think the considerations that the Court discussed
10:15:247 in that case related to due process and
10:15:288 fundamental fairness could be considered by the
10:15:329 Board here as well.

10:15:310 BOARD MEMBER ALTEMUS: Thank you, and I
10:15:311 did read your memo. I just wanted to make sure
10:15:312 after having heard arguments on both sides if
10:15:413 there was anything that you wanted to clarify. So
10:15:414 I appreciate that and I agree with you. So thank
10:15:415 you.

10:15:416 MS. HUPP: I guess one other thing is --
10:15:517 you know, I guess I'll just stop there. But thank
10:15:518 you.

10:15:519 CHAIR SIMPSON: Thank you, Dana. Well,
10:16:020 I guess I'd just make a comment, and then ask for
10:16:021 a motion. I guess after hearing all this, I
10:16:022 thought it was important to deal with this
10:16:123 jurisdictional question up front before we move
10:16:124 into the substantive issues.

10:16:125 But I guess the question I would have to

10:16:211 ask is if it's clear that under the statute, under
10:16:252 the rules, there is a provision for recovery of
10:16:333 fees by parties in this litigation. If it's not
10:16:424 the Board, who is it? I mean if you accept the
10:16:485 argument that because the statute specifies the
10:16:526 Department, it sends you down a blind alley,
10:16:587 because there really is nobody else.

10:17:008 But I think the language that is
10:17:039 important here is that the decision on fees is to
10:17:080 be made by the same agency that issued the
10:17:121 findings on the case at issue here, which is the
10:17:172 Board, and so there really is nobody other than
10:17:213 the Board that would be a logical party to be the
10:17:304 decision maker here. So I believe it falls on the
10:17:345 Board for that reason. Is there a motion?

10:17:416 BOARD MEMBER PAYNE: I would move that
10:17:517 the Board accept jurisdiction of Westmoreland's
10:17:568 petition for attorney fees as to cause of action
10:18:019 No. 2.

10:18:020 BOARD MEMBER ALTEMUS: I'll second.

10:18:021 CHAIR SIMPSON: It's been moved and
10:18:022 seconded that the Board assert jurisdiction with
10:18:123 respect to Westmoreland's petition on Claim No. 2.
10:18:124 Further discussion.

10:18:125 BOARD MEMBER PAYNE: I have --

10:18:231 CHAIR SIMPSON: Allan.

10:18:252 BOARD MEMBER PAYNE: This is a tough
10:18:303 call. I think some inartful drafting and some
10:18:344 lazy actions through the history of these statutes
10:18:385 has kind of put us in a tough spot, because the
10:18:426 statute says "Department," and as Mr. Hernandez
10:18:477 points out, our grant, you know, we are a creature
10:18:518 of statute, so we have to -- we are given the
10:18:549 authority, generally the authority that the
10:18:570 Legislature gives us.

10:19:001 In this case, though, we're in essence
10:19:012 interpreting a statute here, and does that term
10:19:013 "Department" mean "not the Board of Environmental
10:19:014 Review." But I think the Board needs, number one,
10:19:115 we need to interpret this because of the
10:19:116 requirements of Federal law, SMCRA, I think we
10:19:117 do --

10:19:208 I think Mr. Yemington raised a good
10:19:219 point that we need to interpret our statute, the
10:19:220 statute here, consistent with what SMCRA requires.
10:19:321 And I didn't really hear Mr. Hernandez really
10:19:322 dispute Westmoreland's interpretation of what
10:19:323 would normally be required. His response was
10:19:424 simply, "Well, they approved the statute."

10:19:425 And I don't know exactly how in depth

10:19:491 they really looked at the statute when they
10:19:522 approved it. I mean that's not in the record.
10:19:553 But I think Mr. Yemington has a better argument
10:20:004 with respect to the -- it would be consistent with
10:20:035 SMCRA, which I think was the intent of the
10:20:056 Legislature was to be consistent with SMCRA. So I
10:20:127 think that weighs in favor of our jurisdiction
10:20:168 there.

10:20:189 And with respect -- You know, the due
10:20:190 process issue, I think that also, that does weigh
10:20:211 in fact, and particularly where -- I think we kind
10:20:212 of got Mr. King to sort of admit that they didn't
10:20:313 really want to do it, and the Department has
10:20:314 questions with respect to the due process.

10:20:315 And if we don't accept jurisdiction, I'm
10:20:406 sure that if they were to go back to the
10:20:417 Department, the first argument Mr. Hernandez would
10:20:418 raise would be timing. I think the fact that
10:20:519 there's a due process issue, there needs to be
10:20:520 some sort -- If there is a relief under the
10:20:521 statute, there has to be some pathway for that
10:21:022 relief, and at this point it appears the only
10:21:023 pathway is through the Board.

10:21:024 And also just kind of what came up in
10:21:125 the oral argument today about the history of that

10:21:121 statute, how long it's been on the books. It
10:21:162 predates the Board, and the Legislature has never
10:21:203 gone back and redrafted that, never did it during
10:21:244 the relevant time period.

10:21:275 It's fair to say that when they changed
10:21:296 the configuration of the State administrative
10:21:347 agencies in 1995, I think that was -- I think
10:21:398 because they didn't change that Department, the
10:21:429 Department clearly meant the Department of State
10:21:410 Lands when it was enacted, and now does it mean
10:21:501 just the DEQ, or does it mean maybe the whole
10:21:512 structure the Legislature put together, because
10:21:513 they just didn't create DEQ, they created DEQ and
10:22:014 the Board at the same time.

10:22:015 So I think all of those factors weigh in
10:22:016 our asserting jurisdiction here and considering
10:22:017 the petition.

10:22:118 CHAIR SIMPSON: Thank you, Allan. I
10:22:119 guess I'd further comment that in the 46 years
10:22:120 that we've been operating under approved OSM
10:22:121 program, to my knowledge, this is the first time
10:22:222 that a mining company has sought reimbursement of
10:22:223 fees from an environmental group challenging its
10:22:324 permits. I could be wrong about that, but this is
10:22:325 the first one I'm aware of, and if that is indeed

10:22:401 the case, we are plowing new ground here, and it
10:22:442 sounds --

10:22:443 I mean it's pretty obvious that it would
10:22:464 be appropriate for this section to be amended to
10:22:525 be more consistent and clear as to who these
10:23:006 petitions, who should hear these petitions. In my
10:23:047 view, particularly given the OSM requirements, as
10:23:078 I said before, I'm confident that the Board is the
10:23:129 one because we made the initial decision.

10:23:170 Further discussion.

10:23:181 (No response)

10:23:212 CHAIR SIMPSON: A motion has been made
10:23:213 and seconded to assert jurisdiction in this case.
10:23:214 All in favor say aye.

10:23:215 (Response)

10:23:316 CHAIR SIMPSON: Opposed.

10:23:317 (No response)

10:23:318 CHAIR SIMPSON: Motion carries
10:23:319 unanimously. Thank you. We're a little bit later
10:23:420 than what I'd hoped to be, but let's take a ten
10:23:421 minute break, and return, 10:33 would be ten
10:23:522 minutes from now, and proceed with oral argument.

10:23:523 (Recess taken)

10:32:324 CHAIR SIMPSON: Everyone, let's bring
10:34:425 the meeting back to order. Sandy, would you call

10:34:521 roll, please.

10:34:532 MS. MOISEY-SCHERER: Chair Simpson.

10:34:543 CHAIR SIMPSON: Here.

10:34:564 MS. MOISEY-SCHERER: Board Member

10:34:565 Altemus.

10:34:566 BOARD MEMBER ALTEMUS: Here.

10:34:597 MS. MOISEY-SCHERER: Board Member Payne.

10:34:598 BOARD MEMBER PAYNE: Here.

10:35:009 MS. MOISEY-SCHERER: Board Member

10:35:010 Rankosky.

10:35:011 BOARD MEMBER RANKOSKY: Here.

10:35:012 MS. MOISEY-SCHERER: Board Member Smith.

10:35:013 BOARD MEMBER SMITH: Here.

10:35:014 MS. MOISEY-SCHERER: We have a quorum,

10:35:015 sir.

10:35:016 CHAIR SIMPSON: Thank you. We'll

10:35:017 proceed with oral argument on the substantive

10:35:118 matters, entitlement to attorney fees. Question,

10:35:119 is Westmoreland entitled to attorney fees? In

10:35:220 Dana's memo she has laid out a process for us to

10:35:221 proceed through here. But we will proceed with

10:35:322 oral argument, and as indicated to the parties, 25

10:35:323 minutes for oral argument, and then five minutes

10:35:424 more for rebuttal at the end. So Mr. Yemington,

10:35:425 you have the floor.

10:35:481 MR. YEMINGTON: Chairman Simpson,
10:35:562 members of the Board. Again, thank you for the
10:35:583 opportunity to present our position.

10:36:004 So having resolved the question of
10:36:015 jurisdiction, the only question before the Board
10:36:046 is whether Conservation Groups' prosecution of
10:36:067 Claim 2 entitles my clients to their costs and
10:36:098 fees incurred defending and defeating Claim 2, and
10:36:119 answer is yes.

10:36:110 Now, as a threshold matter, the Board is
10:36:111 tasked with evaluating the factual record, again,
10:36:112 it's a legal standard, to determine whether
10:36:213 Conservation Groups' prosecution of Claim 2
10:36:214 entitles my clients to an award.

10:36:215 It is critical to understand that this
10:36:216 is not a fact finding endeavor. That is because
10:36:317 the facts have already been established. The
10:36:318 factual findings adopted in the Board's final
10:36:319 order are the facts of this case. The time to
10:36:320 dispute these facts has passed. These facts
10:36:421 control.

10:36:422 For this reason, we've confined our
10:36:423 petition and our presentation today to the factual
10:36:424 findings in the Board's order, which I will note
10:36:525 along the way.

10:36:521 On the other hand, Conservation Groups'
10:36:532 submissions opposing our position, and I suspect
10:36:573 their presentation today, avoid the Board's
10:37:004 findings and present alternative facts that are
10:37:035 not reconcilable with the facts established in the
10:37:066 Board's final order. This is not okay. Again,
10:37:087 the time to dispute the Board facts has passed.
10:37:108 The Board's factual findings are the facts of this
10:37:139 case.

10:37:140 So with that understanding, I'd like to
10:37:141 begin by summarizing the issues presented by Claim
10:37:142 2 as requested in the Board's April 8th order.
10:37:213 Claim 2 concerns what we call the stream buffer
10:37:214 rule. The stream buffer rule, which is codified
10:37:215 at ARM 17.24.651, generally prohibits DEQ from
10:37:316 permitting coal mining within 100 feet of an
10:37:317 intermittent or perennial stream.

10:37:318 An intermittent stream is defined by law
10:37:409 as a stream that is below the local water table
10:37:420 for at least part of the year, and perennial
10:37:421 stream is a stream that flows continuously, and is
10:37:422 always above the level of the local water table.
10:37:523 It's always receiving groundwater contribution.
10:37:524 As such, the depth of the local water table was
10:37:525 central to and dispositive on Claim No. 2.

10:38:011 Now, during the permitting phase, a team
10:38:032 of DEQ hydrologists considered this. They
10:38:053 conducted a comprehensive survey of the drainage,
10:38:084 and they searched for signs of intermittency and
10:38:115 signs of flow. That's at Finding of Fact 77 of
10:38:136 the Board's final order.

10:38:157 Based on this analysis, DEQ concluded
10:38:178 that the drainage is ephemeral, and not subject to
10:38:199 the protections of the stream buffer rule,
10:38:210 Conclusion of Law 51. This conclusion was based
10:38:211 in part on evidence in the permit application
10:38:212 materials provided by my client, namely well logs,
10:38:313 that located the local water table 60 to 80 feet
10:38:314 below the elevation of the drainage. That's
10:38:315 Conclusion of Law 51.

10:38:316 Conservation Groups challenged DEQ's
10:38:417 conclusion, claiming that DEQ had unlawfully
10:38:418 permitted the mining of an intermittent or
10:38:419 perennial stream in the drainage. That's Finding
10:38:420 of Fact 16. Conservation Groups argued that the
10:38:521 drainage obtains flow from groundwater, and is
10:38:522 below the local water table, Conclusion of Law 52.

10:38:523 To prevail on Claim 2, Conservation
10:38:524 Groups had the burden of proof, they had the
10:39:025 burden of proving with evidence and expert opinion

10:39:041 that the local water table was not 60 to 80 feet
10:39:072 below the elevation of the channel, as concluded
10:39:083 by DEQ, but rather above the elevation of the
10:39:124 channel for at least part of the year. That's
10:39:165 Conclusion of Law 51 and 53.

10:39:186 So with that understanding of the issues
10:39:207 presented by Claim 2, I will turn to the primary
10:39:238 issue before the Board, whether Conservation
10:39:259 Groups' prosecution of Claim 2 and their
10:39:280 documented bad acts entitle my clients to an
10:39:301 award; again, the answer is clearly yes. By law
10:39:312 my clients are owed their costs and expenses
10:39:313 incurred defending and defeating Claim 2 if the
10:39:314 Board finds that Conservation Groups prosecuted
10:39:415 the claim in bad faith, and with the purpose of
10:39:416 harassing or embarrassing my clients.

10:39:417 So what does that mean in practice? In
10:39:418 Montana, the prosecution of a frivolous,
10:39:519 unreasonable, or unfounded claim is bad faith.
10:39:520 Further indicators of bad faith include continuing
10:39:521 litigation without facts, misrepresenting the
10:40:022 facts, committing discovery abuse, and making
10:40:023 false statements. Harassment is a lower bar.
10:40:024 It's simply understood by its common usage, such
10:40:125 as to annoy repeatedly.

10:40:151 Now, Conservation Groups' prosecution of
10:40:162 Claim 2 checks every one of these boxes. They
10:40:193 prosecuted a baseless and discredited claim for
10:40:224 years. They did so without any legitimate
10:40:245 evidence or expert support. They repeatedly
10:40:276 misrepresented the facts, and ignored defeating
10:40:307 evidence. They committed significant discovery
10:40:338 abuse. They falsely accused my clients of
10:40:369 destroying evidence. They falsely accused my
10:40:380 clients of obliterating a stream.

10:40:401 They did all of this to prolong the
10:40:422 litigation, and to drive up the costs, and they
10:40:443 did this to harass and embarrass my clients.
10:40:464 There is simply no other explanation.

10:40:515 As presented in our petition,
10:40:526 Conservation Groups knew early on that Claim 2 was
10:40:547 unreasonable and unfounded. During discovery,
10:40:568 Westmoreland produced ten of thousands of pages of
10:41:019 documents responding to Conservation Groups' broad
10:41:040 discovery requests. This included highly relevant
10:41:061 photographs of the drainage, and well logs that
10:41:122 disproved Conservation Groups' theory that a
10:41:123 stream exists at this location.

10:41:144 As the Hearing Examiner found, the well
10:41:165 logs, quote unquote, "confirmed that the local

10:41:191 water table was more than 70 feet below the
10:41:222 drainage, thereby excluding the possibility of an
10:41:243 intermittent or perennial stream." That's Finding
10:41:274 of Fact 62.

10:41:285 However, Conservation Groups chose not
10:41:316 to provide the photographs or the well logs to
10:41:337 their expert hydrologist, and instead limited his
10:41:368 inquiry to a handful of documents preselected by
10:41:409 Counsel. That's Finding of Fact 31.

10:41:420 During this discovery period,
10:41:441 Conservation Groups and their expert witness were
10:41:462 allowed to conduct a site inspection, and walk the
10:41:483 entirety of the drainage. They found no evidence
10:41:504 whatsoever of a stream, but rather they were
10:41:525 confronted with a dry and vegetated landscape that
10:41:546 was consistent with the photographs we provided in
10:42:007 discovery, the well logs we produced in discovery,
10:42:028 and DEQ's determination during the permitting
10:42:049 phase that the drainage is ephemeral.

10:42:070 To highlight this point, I'd like to
10:42:121 share with the Board the photographs that we have
10:42:142 appended to our petition to remind them just what
10:42:163 we're talking about. These photographs, which I
10:42:184 know were taken by Conservation Groups and their
10:42:205 Counsel, illustrate the baselessness of the claim.

10:42:271 You do not need to be a hydrologist or
10:42:302 an environment attorney to understand and agree
10:42:333 that an intermittent or perennial stream does not
10:42:374 and has never existed at this location.

10:42:485 The day after the site inspection,
10:42:506 Conservation Groups' expert witness, the only
10:42:537 individual identified by Conservation Groups in
10:42:548 discovery as having facts and opinions supporting
10:42:579 Claim 2 -- that's Finding of Fact 25 -- his name
10:43:010 is Mr. Anderson. He sat for a deposition.

10:43:011 Mr. Anderson testified at his deposition
10:43:012 that he saw no indicators of groundwater, springs,
10:43:013 or seeps during his site inspection; Finding of
10:43:114 Fact 86. He further testified that he did not
10:43:115 observe any signs of intermittency or perennial
10:43:116 flow, and that the local water table was likely
10:43:217 not above the elevation of the drainage channel;
10:43:218 Conclusion of Law 59.

10:43:219 Mr. Anderson further testified that he
10:43:220 did not observe any traditional indicators of a
10:43:221 stream, such as a stream bed, or stream banks;
10:43:322 Finding of Fact 87. And Mr. Anderson admitted
10:43:323 that the site inspection, quote, "Certainly made
10:43:324 me question my assumptions about the intermittent
10:43:325 status of the channel," end quote; Conclusion of

10:43:411 Law 60.

10:43:422 And why wouldn't it, right? Ultimately
10:43:453 Mr. Anderson agreed that the drainage was likely
10:43:484 ephemeral; that's Finding of Fact 88. And he
10:43:515 agreed that DEQ's conclusion that no intermittent
10:43:546 or perennial stream exists was reasonable; Finding
10:43:577 of Fact 90.

10:43:598 Let that sink in for a minute.
10:44:019 Conservation Groups' own expert testified under
10:44:040 oath that DEQ's determination that the drainage is
10:44:071 ephemeral, and the intermittent or perennial
10:44:092 stream does not exist -- the very basis for Claim
10:44:123 2 -- Mr. Anderson testified that that was
10:44:154 reasonable. That was July of 2023. Conservation
10:44:185 Groups continued to prosecute Claim 2 for more
10:44:216 than two years after this fatal admission.

10:44:247 As if this was not enough, Mr. Anderson,
10:44:278 after learning at his deposition of the
10:44:309 significant precipitation event that had
10:44:320 immediately preceded his site inspection,
10:44:351 abandoned his opinion that an intermittent or
10:44:382 perennial stream exists at this location; Finding
10:44:393 of Fact 89.

10:44:424 Because Conservation Groups have
10:44:455 disputed this presentation of his testimony, and

10:44:451 to remove all doubt, I'd like to play an excerpt
10:44:472 from Mr. Anderson's deposition that was included
10:44:493 in our petition, and confirms this point.

10:44:534 (Playing video recording)

10:50:055 MR. YEMINGTON: So why is that testimony
10:50:076 so important? It's important because it
10:50:107 completely discredited and defeated Claim 2. As
10:50:148 discussed at the beginning of my presentation,
10:50:169 Claim 2 was premised on the depth of the local
10:50:190 water table; again, that's Finding of Fact 16 and
10:50:211 51.

10:50:212 In discovery Conservation Groups
10:50:213 identified Mr. Anderson as their sole expert
10:50:214 witness in the field of hydrology, and the
10:50:305 individual, the only individual knowledgeable
10:50:316 regarding the factual and legal basis for Claim 2.
10:50:317 That's at Findings of Fact 22 and 25.

10:50:318 Mr. Anderson's expert opinion, disclosed
10:50:409 approximately six months prior to the site
10:50:420 inspection at his deposition, asserted that an
10:50:421 intermittent or perennial stream existed in the
10:50:422 drainage because the channel was below the local
10:50:523 water table for at least part of the year; Finding
10:50:524 of Fact 22. That was his disclosed opinion.

10:50:525 After being presented with a

10:50:581 precipitation data from the month preceding the
10:51:002 site inspection, basic information that
10:51:043 Conservation Groups had not bothered to consider,
10:51:074 Mr. Anderson immediately abandoned his disclosed
10:51:105 opinion that the local water table was above the
10:51:126 elevation of the drainage, and that an
10:51:147 intermittent stream may exist at this location.

10:51:188 The Board's April 8th order asked the
10:51:209 parties to address the elephant in the room: Why
10:51:210 Conservation Groups did not dismiss Claim 2 after
10:51:211 the site inspection, and after Mr. Anderson's
10:51:212 deposition testimony.

10:51:213 It is important to understand that the
10:51:304 only party that had the ability and duty to
10:51:315 dismiss Claim 2 was Conservation Groups. My
10:51:316 clients, DEQ, and the Hearing Examiner could not.

10:51:417 With that understanding, the Board's
10:51:418 suspicion that Claim 2 should have been dismissed
10:51:419 at this point is spot on. A reasonable party
10:51:420 acting in good faith would have withdrawn this
10:51:521 claim after the site inspection, and after Mr.
10:51:522 Anderson's deposition testimony.

10:51:523 But therein lies the problem. That's
10:51:524 why we're here today. Conservation Groups were
10:52:025 not acting reasonably or in good faith. Instead

10:52:021 of dismissing Claim 2, they doubled down. They
10:52:062 chose to push this discredited claim for more than
10:52:083 two years after Mr. Anderson's deposition, and as
10:52:104 the Hearing Examiner found, they did so without
10:52:135 any legitimate evidence or expert support; that is
10:52:176 confirmed at Findings of Fact 31, 32, 74, 75, 80,
10:52:227 and 85. No legitimate evidence or expert support
10:52:278 for Claim 2, yet they continued to prosecute it.

10:52:309 Recall the legal standard for
10:52:320 establishing bad faith. The prosecution of a
10:52:341 frivolous, unreasonable, or unfounded claim is bad
10:52:362 faith in Montana. Continuing litigation without
10:52:413 facts is bad faith.

10:52:414 So the question before the Board is
10:52:415 whether in light of the well logs, the
10:52:416 photographs, the site inspection, and Mr.
10:52:507 Anderson's testimony, whether a reasonable party
10:52:528 would have continued to prosecute Claim 2. If the
10:52:519 Board agrees that Conservation Groups' continued
10:52:520 prosecution of Claim 2 was unreasonable and
10:53:021 unfounded, this is the end of the analysis. As a
10:53:022 matter of law, my clients are owed their costs and
10:53:023 fees that they incurred defending and defeating
10:53:024 Claim 2.

10:53:125 With that said, and as the Board

10:53:121 certainly knows, Conservation Groups' bad behavior
10:53:152 was not limited to the prosecution of an
10:53:173 unreasonable and discredited claim. Rather than
10:53:224 dismiss the claim, they moved for summary judgment
10:53:245 on Claim 2. Their motion for summary judgment did
10:53:286 not include a single reference or citation to Mr.
10:53:317 Anderson's disclosed expert opinions, his
10:53:338 deposition testimony, or the site inspection.
10:53:369 Talk about ignoring bad evidence.

10:53:380 Instead, Conservation Groups attempted
10:53:401 to backfill their case with significant evidence
10:53:412 and analysis that the Hearing Examiner found was
10:53:413 developed after the site inspection, after Mr.
10:53:414 Anderson's deposition, and after the close of
10:53:515 discovery; Finding of Fact 39.

10:53:516 Of course, this was entirely improper,
10:53:517 and an obvious attempt by Conservation Groups to
10:53:518 rehabilitate the defeated claim, and prolong the
10:54:019 litigation. They knew what they were doing, and
10:54:020 they knew that it was wrong.

10:54:021 The Hearing Examiner sanctioned them for
10:54:022 the discovery abuse, and disallowed the improper
10:54:023 evidence. That's Finding of Fact 42. This
10:54:124 discovery abuse, done in an attempt to
10:54:125 rehabilitate the discredited claim and prolong the

10:54:181 litigation, is quintessential misconduct.

10:54:202 Next, in an attempt to explain their
10:54:233 lack of evidence on summary judgment, they falsely
10:54:264 accused my client of spoliation, of destroying
10:54:295 evidence. The Hearing Examiner not only rejected
10:54:326 this extreme allegation as entirely baseless --
10:54:357 Finding of Fact 28 -- but also found that the
10:54:388 spoliation claim was contradicted by Conservation
10:54:409 Groups' own expert Mr. Anderson; that's Finding of
10:54:410 Fact 31.

10:54:411 An unfounded spoliation claim, brought
10:54:412 without evidence in the face of their expert's own
10:54:513 deposition testimony, is not just an indicator of
10:54:514 bad faith and harassment, it is bad faith and
10:54:515 harassment.

10:54:516 But it didn't stop there. After the
10:55:017 Hearing Examiner had ruled against Conservation
10:55:018 Groups on Claim 2, they refused to accept defeat,
10:55:019 and attempted to dismiss the claim on the alleged
10:55:020 basis that Westmoreland had, quote, "obliterated
10:55:121 the stream."

10:55:122 Of course this was entirely false. Not
10:55:123 only had Westmoreland not mined through the
10:55:124 drainage, but the Hearing Examiner had already
10:55:125 ruled that no stream exists. Ask yourself. Why

10:55:221 else would Conservation Groups make this false
10:55:252 allegation? Why would they use this inflammatory
10:55:283 language that we obliterated a stream? The only
10:55:324 explanation is to harass and embarrass my clients.
10:55:355 It serves no other purpose.

10:55:376 Even now, Conservation Groups continue
10:55:397 their pattern of abuse. Their pleadings are
10:55:428 peppered with citations to the improper evidence
10:55:449 that were struck by the Hearing Examiner, and
10:55:410 factual assertions that are simply not
10:55:411 reconcilable with the Board's Findings of Fact.
10:55:502 Their persistent reliance on alternative facts and
10:55:513 disallowed evidence for which they were already
10:55:514 sanctioned is simply not okay.

10:55:515 Mind you, these are sophisticated
10:56:016 litigants. They know what they are doing.
10:56:017 Conservation Groups' litany of bad acts paint a
10:56:018 clear picture of their improper and abusive
10:56:109 litigation tactics that substantially increase the
10:56:120 length and cost of this litigation to the clear
10:56:121 and obvious prejudice of the Hearing Examiner, the
10:56:122 Board, DEQ, Westmoreland, and the Union, all of
10:56:223 whom were required to spend untold time and
10:56:224 resources responding to this baseless and
10:56:225 discredited claim.

10:56:301 As mentioned at the outset of my
10:56:312 presentation, the Board is tasked with evaluating
10:56:343 the factual record as established in the Board's
10:56:374 final order to determine whether my clients have
10:56:405 met their burden to show bad faith for a harassing
10:56:426 or embarrassing purpose.

10:56:437 If the Board agrees that we have met
10:56:458 this burden, my clients are owed their costs and
10:56:479 expenses incurred defeating Claim 2 as a matter of
10:56:510 law. As we have shown, the Board's factual
10:56:511 findings, the factual record of this case,
10:56:512 confirms beyond doubt that Conservation Groups
10:56:513 prosecuted a baseless and discredited claim,
10:57:014 without any legitimate evidence or expert support.
10:57:015 This is the definition of bad faith.

10:57:016 The Montana Supreme Court has long
10:57:017 recognized the essence of our judicial system is
10:57:118 not simply the resolution of disputes, it's the
10:57:119 resolution of legitimate disputes. Baseless
10:57:120 lawsuits have no place in our courts. This maxim
10:57:221 applies equally to the Board, and the Board's
10:57:222 docket.

10:57:223 Every single person who visited this
10:57:224 drainage -- third party environmental consultants,
10:57:325 wetland experts, DEQ's team of hydrologists,

10:57:331 Westmoreland's hydrologists, the Hearing Examiner,
10:57:372 and even Mr. Anderson -- all agreed that no stream
10:57:413 exists. Only Conservation Groups and their
10:57:434 Counsel refused to accept this obvious reality.

10:57:465 In our prior discussion regarding
10:57:526 jurisdiction, Chair Simpson made a comment. He
10:57:547 noted that a coal company, he wasn't aware of a
10:57:578 coal company ever seeking fees in a situation like
10:58:009 this, and he's right. In more than a decade of
10:58:010 defending and defeating permit challenges brought
10:58:011 by Conservation Groups against the Rosebud Mine,
10:58:012 my client has never once requested an award of
10:58:113 fees, not once.

10:58:114 This case is different. This time
10:58:115 Conservation Groups went too far. The Board must
10:58:116 hold Conservation Groups accountable for their
10:58:207 many bad acts, and their continued prosecution of
10:58:218 Claim 2; and the Board must send a clear message
10:58:219 that it will not tolerate the prosecution of
10:58:220 frivolous claims or abusive litigation tactics,
10:58:221 and that the Board's docket will be reserved for
10:58:322 the resolution of legitimate disputes.

10:58:323 So with that, we respectfully request
10:58:324 the Board find the Conservation Groups'
10:58:425 prosecution of Claim 2 was unreasonable, and that

10:58:421 their documented bad acts meet the standard of bad
10:58:452 faith and for purposes of harassment. Order that
10:58:473 Westmoreland and the Union are entitled to an
10:58:504 award of reasonable costs and fees incurred
10:58:525 defending and defeating Claim 2, and set an
10:58:556 evidentiary hearing for purposes of determining a
10:58:577 just and proper award. Thank you.

10:59:018 MR. HERNANDEZ: Chairman Simpson, may I
10:59:139 present my --

10:59:140 CHAIR SIMPSON: Sorry. I had my
10:59:141 microphone turned off. Mr. Hernandez, please.
10:59:142 Thank you.

10:59:203 MR. HERNANDEZ: Chairman Simpson,
10:59:214 members of the Board. You just heard
10:59:215 Westmoreland's characterization of the
10:59:216 Petitioners' advocacy in this case.

10:59:317 Hearing Examiner Cameron, the impartial
10:59:318 arbiter closer to this case, had a very different
10:59:319 assessment. He called the Petitioners' advocacy
10:59:420 helpful, high quality, and exemplary. Those
10:59:421 aren't my words, those are Examiner Cameron's
10:59:522 words. Exemplary.

10:59:523 Here Cameron was right. Westmoreland's
10:59:524 petition and their argument is long on rhetoric.
11:00:025 It is short on accuracy. Its argument is premised

11:00:071 on repeated mischaracterizations of law and fact,
11:00:112 as we had to repeatedly point out in our briefs,
11:00:163 including material alterations of testimony. Very
11:00:204 serious misconduct. Ultimately Westmoreland's
11:00:235 petition here is an invitation to the Board to
11:00:276 commit reversible error.

11:00:317 Now, MSUMRA is premised on encouraging
11:00:338 public participation in oversight of coal mining,
11:00:389 including appeals of permitting decisions.
11:00:420 Accordingly, the statute only allows fees to be
11:00:441 assessed against the public in the most egregious
11:00:462 of circumstances: Upon a showing of bad faith,
11:00:503 and a sole intent to harass.

11:00:514 Such cases are extremely rare. The
11:00:555 Montana Supreme Court has only found a couple
11:01:026 cases in the history of the Court that meet this
11:01:067 standard. That's why notably Westmoreland cited
11:01:108 almost no case law in any of its briefs to support
11:01:149 its position. Here Petitioners' exemplary
11:01:190 argument -- as noted by Examiner Cameron -- fell
11:01:231 nowhere near this standard.

11:01:272 Consistent with the Board's order on
11:01:313 oral argument, I'll discuss the good faith basis
11:01:354 for the Petitioners' buffer zone claim; and then
11:01:395 I'll address the site visit and the testimony

11:01:371 related to that site visit. And finally, I'll
11:01:432 discuss why there's no evidence that the
11:01:453 Petitioners had any intent to harass Westmoreland
11:01:484 in this matter.

11:01:505 Here Petitioners' claim was brought in
11:01:536 good faith. The rule is clear. The claim is only
11:01:577 frivolous or in bad faith if it is obviously or
11:02:008 utterly meritless, by being contrary to clear,
11:02:049 long standing law, or if a party fails to allege
11:02:080 any factual support.

11:02:111 The point here is not looking at the
11:02:132 decision and say that the Plaintiff lost. It's
11:02:153 not that backward looking decision. The Courts
11:02:174 have repeatedly, including the Montana Supreme
11:02:215 Court, said the perspective is the plaintiff's
11:02:236 position, the party's position going into
11:02:257 briefing. It's at that point that the Board to
11:02:278 assess whether or not the Petitioners' claim was
11:02:319 brought in good faith.

11:02:320 Now, in contrast to bad faith, a claim
11:02:341 that is well researched and presented is not
11:02:402 frivolous, and claims that involve complex issues
11:02:423 or where the law is ambiguous cannot be considered
11:02:444 frivolous.

11:02:425 Here, I think it's important to point

11:02:521 out that Mr. Yemington has created a straw man as
11:02:572 the basis of his argument, and that's by saying
11:03:003 the Petitioners' claim is something that it was
11:03:014 not.

11:03:025 The Petitioners did not argue at summary
11:03:056 judgment that this reach was an intermittent
11:03:097 reach. Instead they argued that DEQ's permitting
11:03:138 decision did not assess the correct legal standard
11:03:179 to determine whether or not this stretch was
11:03:210 intermittent or ephemeral. There was a clear
11:03:211 legal basis for this argument.

11:03:212 In particular, the MEIC 2023 decision at
11:03:313 Paragraph 19 says that, "A party challenging a
11:03:314 permit has the burden of showing," not
11:03:405 disapproving, "what DEQ had to show." Our burden
11:03:416 is not to prove that this was an ephemeral, an
11:03:417 intermittent stream. Instead, and I quote from
11:03:518 MEIC 2023, "The question is," quote, "whether DEQ
11:03:519 followed the law in appropriately applying the
11:03:520 correct procedural and substantive requirements,"
11:04:021 end quote.

11:04:022 Now, the Plaintiffs here in their motion
11:04:023 for summary judgment on Page 14 clearly argue not
11:04:124 that the reach is intermittent, but that DEQ did
11:04:125 not analyze the correct factors to determine

11:04:181 whether or not this reach was intermittent or
11:04:212 ephemeral.

11:04:223 Now, those correct factors are whether
11:04:274 the stream receives contributions from
11:04:305 groundwater, i.e., seeps; and second, whether or
11:04:346 not the local water table intersects the stream
11:04:377 for any portion of the water year.

11:04:408 Now, the Petitioners' presented
11:04:469 evidence. There's no question that DEQ did not
11:04:490 analyze the factors correctly. In particular, the
11:04:511 Petitioners pointed to the CHIA at Page 28 where
11:04:532 DEQ said that it would not apply the buffer zone
11:05:013 protection to this stretch of a stream. DEQ
11:05:034 identified it as a stream that had seeps in it.

11:05:055 But DEQ said it's not entitled to buffer
11:05:116 zone protections because the pond at the end of
11:05:137 this reach does not regularly discharge water, and
11:05:208 because there's no mapped alluvium in this
11:05:219 stretch. Now, these are the bases for DEQ's
11:05:220 decision.

11:05:221 The Board will note that Mr. Yemington
11:05:322 did not defend any of these bases in his
11:05:323 presentation because they simply weren't
11:05:324 defensible.

11:05:325 Now, in addition to the plain language

11:05:391 of DEQ's ultimate decision document, a scientific
11:05:432 analysis of this stream reach that found that
11:05:463 there's groundwater contribution, and that it is a
11:05:494 stream, the Plaintiffs determined that this was
11:05:525 not a lawful analysis of whether or not the buffer
11:05:566 zone rule applied.

11:05:577 So that's evidence in support of their
11:06:008 claim, but it wasn't the only evidence that the
11:06:039 Plaintiffs presented. They also presented the
11:06:010 testimony of DEQ's own scientific experts whom
11:06:101 they deposed. And here I'm going to share my
11:06:112 screen with the statements that DEQ made.

11:06:113 Now, this is what DEQ's decision
11:06:214 document, a CHIA, the hydrologic analysis, said.
11:06:215 It says this is a stream. Now, Mr. Yemington said
11:06:306 the Petitioners didn't prove it was a stream, and
11:06:317 the Board found there wasn't a stream here, but
11:06:318 the question isn't whether the Petitioners won
11:06:319 their claim, the question is whether or not they
11:06:420 had some evidentiary basis that this was a stream.

11:06:421 Now here, now this is DEQ's CHIA at Page
11:06:422 28. DEQ says, "This is a stream section." DEQ
11:06:523 identified it as a stream. And they also said
11:06:524 that in this stream section seeps originate from a
11:06:525 local isolated overburden unit, i.e., this is

11:07:021 overburden groundwater.

11:07:042 Now, this is critical because an
11:07:063 ephemeral stream by definition may not receive any
11:07:124 flow from groundwater. The flow in an ephemeral
11:07:155 stream may only be from precipitation or snow
11:07:206 melt. That's why Mr. Anderson said, "If there are
11:07:237 seeps in the reach, it's indicative of a stream
11:07:278 reach that's not ephemeral, but rather
11:07:319 intermittent."

11:07:320 Here this is evidence that the
11:07:341 Petitioners presented that DEQ itself in its
11:07:372 scientific analysis -- Now, this is the analysis
11:07:403 that Mr. Yemington mentioned DEQ conducted on the
11:07:414 front end. They said stream, and they said seeps,
11:07:425 and they said the seeps are receiving water from
11:07:506 overburden groundwater.

11:07:517 Now, we confirmed this with further
11:07:548 evidence from DEQ's own expert, Dr. Lodman, who
11:08:019 testified. I asked her, "And there's a seep
11:08:020 issuing from this reach as far as you know,
11:08:021 right?" "Yes." DEQ's own expert confirmed that
11:08:122 there was indeed a seep here.

11:08:123 Now, seeps don't all run all year long.
11:08:124 Mr. Simpson, I'm certain that you know this. They
11:08:225 can be seasonal. That's all right. Under MSUMRA,

11:08:241 seasonal groundwater contributions are enough to
11:08:272 make a stream reach not ephemeral.

11:08:303 We further asked DEQ about the water
11:08:334 table, and DEQ said -- We asked if they
11:08:365 acknowledged that there's a water table present in
11:08:396 this segment of Lee Coulee, and DEQ said, "I would
11:08:437 say there's likely some water table in the perched
11:08:468 unit."

11:08:469 Now, this is a key point, this perched
11:08:480 element, because this came into the Board's
11:08:501 decision, ultimately determining that some perched
11:08:512 water doesn't qualify as the local water table.
11:08:513 No one knew this in advance. DEQ on the record --
11:09:014 we submitted this evidence to the Board -- said
11:09:015 there are seeps, groundwater contributions from a
11:09:016 water table, some overburden groundwater.

11:09:017 Additional evidence. DEQ's own
11:09:118 scientific analysis, the CHIA, said at Page 34,
11:09:119 that "Overburden groundwater represents the local
11:09:220 water table." Now, that's the key point. The
11:09:221 local water table, overburden groundwater. Now,
11:09:222 that's just what DEQ said up here in its CHIA. It
11:09:323 says, "The seeps in this stretch are from
11:09:324 overburden units."

11:09:325 There was evidence here, additional

11:09:401 evidence, but ultimately the question for you is
11:09:432 whether or not the Petitioners had some evidence
11:09:473 that this stretch wasn't ephemeral. Indeed they
11:09:514 did. They had DEQ's own scientific analysis, its
11:09:555 CHIA, saying it's a stream, groundwater
11:09:576 contribution from overburden water. Their expert
11:10:017 said it, and their CHIA said "Overburden
11:10:048 groundwater is the local water table."

11:10:079 That is the key evidence that
11:10:110 Petitioners presented. Setting aside everything
11:10:111 that Mr. Anderson said, we had evidence, and
11:10:112 that's the standard the Montana law has presented.
11:10:213 And I would direct the Court to Bardsley
11:10:214 (phonetic) decision that we presented in our
11:10:215 brief. There the Court said if there's zero
11:10:216 evidence, there's no evidence, not even
11:10:317 allegations of evidence to support a claim, it can
11:10:318 be deemed frivolous.

11:10:319 But there's some evidence, and here
11:10:320 there was certainly some evidence that this reach
11:10:421 was not ephemeral. In fact there was really
11:10:422 important evidence from DEQ's own scientific
11:10:423 documents, and DEQ's own experts, saying there's
11:10:524 groundwater here, it's from the local water table.

11:10:525 Now, Mr. Yemington said at the outset

11:10:591 everything turned on the local water table. The
11:11:042 law says that if a case turns on a statutory term,
11:11:113 a regulatory term that's not defined, that case
11:11:144 can't be considered frivolous. Because there's no
11:11:175 legal authority on what the local water table
11:11:216 means.

11:11:217 Now, we point out in our brief that,
11:11:228 one, there's no definition of the local water
11:11:269 table in MSUMRA or in regulations; and two, we
11:11:310 asked DEQ in deposition what they defined as a
11:11:311 local water table. DEQ said they had no
11:11:312 definition of local water table, they had no
11:11:413 guidance on the definition of local water table,
11:11:414 they were aware of no scientific definition of the
11:11:415 local water table, and they've never even seen a
11:11:516 valid definition of the local water table.

11:11:517 That is critical because when you have
11:11:518 uncertainty around that, you can't say that the
11:11:519 Petitioners had no basis for saying that this
11:12:020 overburden unit was overburden water contributing
11:12:021 to these seeps in this stretch was unreasonable.
11:12:122 We point to authorities on this, but that's quite
11:12:123 clear.

11:12:124 Now, importantly Westmoreland hasn't
11:12:125 disputed this. There's no dispute that there's no

11:12:191 definition of local water table. DEQ doesn't have
11:12:232 any definition, and they didn't even know of a
11:12:273 good definition of a local water table. That is
11:12:284 capital.

11:12:285 In that type of case, the claim can't be
11:12:326 considered frivolous, because here the Petitioners
11:12:357 relied on DEQ's statement in its CHIA at Page 34.
11:12:408 I'm going to show this again just because it's so
11:12:429 critical.

11:12:410 Here, this is DEQ's statement in its
11:12:411 CHIA on Page 34. "The overburden groundwater is
11:12:412 the local water table," and just six pages
11:12:513 earlier, DEQ said in its CHIA, "This overburden
11:12:514 groundwater was contributing to these seeps in
11:13:015 this stream section."

11:13:016 Now, Westmoreland has argued that
11:13:017 there's no evidence that the Petitioners present
11:13:118 to support their claim. Well, Westmoreland also
11:13:119 says the key term for determining whether or not a
11:13:120 reach is intermittent or ephemeral is the presence
11:13:221 of seeps. We showed you that there are seeps, or
11:13:222 at least DEQ gave us evidence, and we presented
11:13:223 evidence, that there are seeps here.

11:13:324 Now, Westmoreland says, "Just look at
11:13:325 the findings of fact." That's the limited facts

11:13:351 that we're limited to. Even looking there, now,
11:13:382 one of the facts the Petitioners presented, no
11:13:423 question, and Westmoreland points this out in
11:13:444 their reply at Page 5, is that we presented
11:13:475 evidence that DEQ admitted that the local
11:13:526 groundwater unit that feeds these seeps is
11:13:557 apparently saturated.

11:13:568 Now, that's evidence. There's no
11:13:589 question. The Board itself found there was
11:14:010 evidence there. There's an overburden unit
11:14:011 contributing to seeps in this section. That's the
11:14:012 evidence we presented, and that's capital.

11:14:013 The next thing that Westmoreland notes
11:14:114 on Page 5 is that we presented evidence that DEQ's
11:14:115 analysis of the buffer zone rule didn't consider,
11:14:116 didn't assess, whether groundwater was
11:14:217 contributing to the section, and didn't discuss
11:14:218 the local water table.

11:14:219 Now, we direct the Board to Page 28 of
11:14:220 the CHIA where DEQ applied this analysis of the
11:14:321 buffer zone rule. There's no discussion of the
11:14:322 local water table there. And more importantly,
11:14:323 DEQ itself recognizes groundwater contributions,
11:14:424 but somehow says that that makes it not deserving
11:14:425 of buffer zone protections.

11:14:471 That's critical evidence. There was
11:14:492 evidence that there was groundwater there
11:14:513 contributing to the reach, and that's why the
11:14:534 Petitioners argued that DEQ's analysis doesn't
11:14:565 follow the right procedure. It's not applying
11:14:596 correct legal standard, like the Montana Supreme
11:15:017 Court pointed out in its 2023 decision.

11:15:048 So there, let's just step back. What am
11:15:089 I saying here? Take away is critical. We have a
11:15:110 legal basis for a claim that DEQ didn't follow the
11:15:141 right procedures. That's MEIC 2023 decision,
11:15:172 which MEIC won. That was their win. All right.

11:15:203 Two, we had a factual basis, even
11:15:234 setting aside what Mr. Anderson said, and Mr.
11:15:265 Anderson clearly disclosed that DEQ did not follow
11:15:296 the right procedures in assessing application of
11:15:327 the buffer zone rule.

11:15:358 But setting that aside, you still had
11:15:389 evidence from DEQ itself there was groundwater in
11:15:420 this reach from a water table in the overburden,
11:15:451 and that the overburden groundwater is the local
11:15:482 water table. That's evidence.

11:15:423 Now the Board didn't agree, but we had a
11:15:524 legal basis and a factual basis for a claim, and
11:15:555 amid all of this, this was a claim with

11:15:571 significant legal uncertainty. We acknowledge
11:15:592 that. Key terms were undefined, there wasn't a
11:16:023 lot of guiding authority. In that case, the Board
11:16:064 can't say that a claim was frivolous.

11:16:105 Let me just provide an example. Now, we
11:16:126 know that the Montana Supreme Court has said, "A
11:16:157 claim is frivolous if it's directly contrary to
11:16:198 twenty years of established precedent." Nothing
11:16:239 like that is here. And Westmoreland has not even
11:16:260 tried to make an argument that there was some
11:16:271 legal authority that was directly contradicting
11:16:302 our position.

11:16:303 So the takeaway here is that the Montana
11:16:314 Supreme Court has said that a claim that is well
11:16:325 researched and presented is not frivolous. That's
11:16:406 the North Shore Conservation case which we present
11:16:417 the Board in our briefs.

11:16:478 Now, Mr. Cameron himself said that our
11:16:519 claims here, our arguments, were exemplary,
11:16:520 helpful, and high quality. Now, we submit that a
11:16:521 claim that is, an argument that is exemplary,
11:16:522 helpful, and high quality is not frivolous.

11:17:023 Now, the elephant in the room Mr.
11:17:024 Yemington was talking about is: What about Mr.
11:17:125 Anderson's testimony? And what about the site

11:17:141 visit? What about that? Now, that's the key
11:17:172 thing. Westmoreland's entire argument is premised
11:17:193 on the site visit, and Mr. Anderson's testimony
11:17:224 about the site visit.

11:17:235 Now, it was the Petitioners' position
11:17:266 that that was an impermissible basis for upholding
11:17:327 DEQ's decision. Why? Because the site visit and
11:17:378 the testimony related to the site visit was
11:17:399 entirely post-decisional evidence.

11:17:410 The Montana Supreme Court said in MEIC
11:17:411 2023, a decision that came down after the site
11:17:412 visit, but before the conclusion of briefing, said
11:17:513 that, "In reviewing the propriety of a permit, the
11:17:514 Board can only look at that evidence that was
11:17:515 existing at the time of the permit decision."

11:18:016 Now, you can present argument about what
11:18:017 that evidence means, but can't look beyond that.
11:18:018 That's what the Court said in MEIC 2023, and that
11:18:019 was why the Petitioners argued that that doesn't
11:18:120 come in, because under clear law, the Montana
11:18:121 Supreme Court -- (inaudible) --

11:18:122 Now, the Board didn't agree with us on
11:18:223 that, but did we have a legal basis for that?
11:18:224 Yes. The Montana Supreme Court said that that
11:18:225 evidence should not come in, and now to put a

11:18:291 finer point on this, Board Counsel in its memo in
11:18:322 the Valley Garden case said the exact same thing.

11:18:373 There the evidence, and the Board has
11:18:394 taken notice of this evidence that was developed
11:18:435 after the permitting decision, and testimony
11:18:456 relevant to that decision is not a permissible
11:18:487 basis for assessing the legality of a decision.

11:18:538 Now, it would be entirely arbitrary for
11:18:559 the Board to say on one hand, or Board Counsel to
11:18:580 say this evidence should not come in,
11:19:011 post-decisional evidence may not come in to assess
11:19:042 the propriety of a permit, and on the other hand
11:19:073 say, "The petitioners here acted frivolously by
11:19:114 arguing that post-decisional evidence should not
11:19:145 be considered in assessing the propriety of a
11:19:176 permit."

11:19:177 That's the key term, and here I want to
11:19:208 share just an excerpt from Board Counsel's memo.
11:19:279 Now, this is what Board Counsel says. More
11:19:320 specifically, "The Board needs to determine
11:19:321 whether the testimony merely explains and
11:19:322 contextualizes information that was before DEQ at
11:19:423 the time of its decision, or whether instead
11:19:424 offers new analysis, new data, observations, or
11:19:425 rationale that were not before DEQ and are

11:19:501 therefore impermissible post hoc justifications."

11:19:532 Applying this standard, Board Counsel
11:19:563 then said, "Looking at the evidence in the Valley
11:20:014 Garden case, most of it should come in except
11:20:055 testimony drawn from three pits dug by DEQ's
11:20:096 expert after the conclusion of the permitting
11:20:127 process."

11:20:138 What Board Counsel said based on
11:20:159 Westmoreland 46 -- that's the MEIC 2023 decision
11:20:180 -- was that testimony and evidence that happens
11:20:211 after the permit was issued should not come in.

11:20:212 Now, Mr. Yemington's entire presentation
11:20:213 was that this post hoc evidence made our claim
11:20:314 frivolous. He talked about the photos that
11:20:315 Westmoreland had from 2023 from May of that year.
11:20:416 We didn't look at that. We didn't consider it.
11:20:417 That was post hoc. Under the MEIC 2023 decision,
11:20:418 and under the Board Counsel's own analysis, that
11:20:419 shouldn't come in.

11:20:520 The site visit, post-decisional, it
11:20:521 shouldn't come in. Testimony about the site visit
11:20:522 should not come in. And for us, not only was this
11:20:523 evidence post hoc, and there was a legal basis for
11:21:024 saying it shouldn't come in, but when we got
11:21:025 there, Westmoreland had delayed the site

11:21:061 inspection until July, which as Mr. Anderson said
11:21:102 is not an optimal time for assessing whether or
11:21:123 not there's a water contribution.

11:21:144 And when we got there, regardless of the
11:21:175 reason for it, Westmoreland had run a bulldozer
11:21:206 through 20 percent of this area. So the evidence
11:21:237 that was there, Mr. Anderson said, wasn't an
11:21:278 actual condition, and so we thought, based on a
11:21:299 legitimate basis -- one, it's post hoc; two, it
11:21:310 was July; three, a bulldozer had been pushed
11:21:311 through 20 percent of the stream -- so this
11:21:312 evidence should not be dispositive.

11:21:413 The important evidence is the evidence
11:21:414 before the Board at the time of its decision. And
11:21:415 that's what Mr. Anderson said in an excerpt cited
11:21:416 by Mr. Yemington, was that the evidence before the
11:21:507 Board was quite different. The groundwater,
11:21:518 wetland report showed a lot of water there. In
11:21:519 fact, DEQ itself said there were seeps there, and
11:21:520 there was a groundwater contribution.

11:21:521 And that is what the Petitioners relied
11:22:022 upon. We didn't say the stream was intermittent,
11:22:023 because Mr. Anderson did say, "I couldn't tell one
11:22:024 way or another," and now, Mr. Yemington takes that
11:22:125 a step further and says he said it was ephemeral.

11:22:121 No. That is an exaggeration and a
11:22:142 misrepresentation.

11:22:153 What Mr. Anderson said was, "I couldn't
11:22:184 tell from the site visit." But the evidence
11:22:225 before DEQ at the time of its decision was
11:22:266 ambiguous, and DEQ didn't look at the right
11:22:297 factors in deciding whether or not the buffer zone
11:22:348 rule applies, this reach is intermittent or
11:22:379 ephemeral.

11:22:390 And I think that's the key thing.
11:22:411 Basically the heart of Mr. Yemington's argument is
11:22:442 that we were acting frivolously because we ignored
11:22:483 this evidence from the site inspection and
11:22:514 testimony related to it. No, we had a legal basis
11:22:545 for doing that, because Montana Supreme Court said
11:22:576 after the site visit that this stuff shouldn't
11:22:607 come in, and the Board, just as Board Counsel,
11:23:038 said the same thing.

11:23:069 And that is what distinguishes a claim
11:23:100 from -- a frivolous claim from a good faith claim.
11:23:131 We had a good faith claim here. They said this
11:23:162 stuff should not come in.

11:23:193 Now, briefly, the question about intent
11:23:224 to harass. Here there's clearly no intent to
11:23:255 harass. Westmoreland presented no evidence, and

11:23:261 there's no evidence in the documents Westmoreland
11:23:272 pointed to, the findings of fact, that there was
11:23:303 an intent by the Petitioners to harass
11:23:324 Westmoreland.

11:23:335 Now, I think the Court's analysis of
11:23:356 this point is best guided by the one case, the
11:23:387 only case we know of where fees were awarded
11:23:418 against a citizen in a SMCRA context, and the
11:23:449 Lucino (phonetic) case that we cite in our brief,
11:23:470 and Westmoreland largely ignores.

11:23:491 There the Court found that a man had bad
11:23:522 faith in bringing a claim against a mining company
11:23:543 where he admitted at the outset that he had no
11:23:564 standing to challenge the mine, he wasn't impacted
11:24:015 by it; and two, he said he filed the case to get
11:24:036 back at agency employees whom he compared to
11:24:057 Saddam Hussein. That is a frivolous claim brought
11:24:118 in bad faith.

11:24:139 Not so here. Here no claim was even
11:24:160 brought against Westmoreland, and Petitioners
11:24:221 brought this claim based on injuries, threatened
11:24:242 injuries to their members, as this Board found.
11:24:263 The Board said Petitioners' members are threatened
11:24:284 by this expansion, and therefore they have
11:24:325 standing to bring. That is a legitimate basis for

11:24:341 bringing a claim. Members are threatened, you
11:24:372 have standing, the Board recognized it.

11:24:393 Now, I think that largely should resolve
11:24:444 the issue, so let me just conclude here. This
11:24:505 case was hard fought litigation. The buffer zone
11:24:556 claim was complex, and the law in all aspects of
11:24:587 the claim, including the burden of proof, the
11:25:008 scope of review, the definition of a stream and
11:25:049 the local water table, was all unsettled.

11:25:010 The Petitioners presented a detailed,
11:25:011 supported, and well-researched argument as
11:25:112 acknowledged by Examiner Cameron himself, who
11:25:113 called the claim, the briefing arguments, high
11:25:114 quality, exemplary, and helpful.

11:25:115 Under Montana law, that type of
11:25:216 litigation is not bad faith, and there's no
11:25:217 intention to harass. It would be reversible error
11:25:218 here for the Board to grant Westmoreland's
11:25:319 petition.

11:25:320 The final point that I'll make.
11:25:321 Westmoreland ended by saying two things: One, all
11:25:422 the evidence said there was no stream -- that's
11:25:423 not true. We point out in our briefs that every
11:25:424 expert said this was a stream. Some said, "We
11:25:425 can't tell if it's intermittent or ephemeral."

11:25:501 They all said it was a stream.

11:25:532 Second, Westmoreland says that the
11:25:563 Plaintiffs here have brought lots of litigation in
11:25:594 the past that Westmoreland has defeated, but this
11:26:015 one is somehow different. That's not true.

11:26:046 What is the one seminal case on MSUMRA
11:26:087 in Montana? It's the MEIC 2023 decision, where
11:26:118 the Montana Supreme Court elaborated that the MEIC
11:26:169 position was in most respects right, including on
11:26:190 the critical issue for this case, which was
11:26:211 whether or not evidence after decision can affect
11:26:232 the validity of that decision.

11:26:253 There the Supreme Court said no. What
11:26:274 MEIC has been arguing that post hoc evidence
11:26:315 cannot be a basis for upholding a permit is right.
11:26:336 That's the law that we relied on here, that's the
11:26:407 law that Board Counsel has noted in the Valley
11:26:428 Garden case, that is a good faith basis for
11:26:449 bringing this claim.

11:26:420 Thank you for your time. I'd like to
11:26:521 reserve the remainder of my time for rebuttal.

11:26:522 CHAIR SIMPSON: Thank you, Mr.
11:27:023 Hernandez. Mr. Yemington, rebuttal.

11:27:024 MR. YEMINGTON: Chairman Simpson,
11:27:025 members of the Board. I'd like to share my

11:27:101 screen. See if we can find it.

11:27:542 Thank you for your patience on that.
11:27:553 What I've put on the screen is the Board's final
11:27:574 order. I hope you can see that. This is the
11:27:585 order that you issued on the 4th of November of
11:28:026 last year.

11:28:027 As noted at the outset of my
11:28:048 presentation, the facts of this case have been
11:28:069 established. Conservation Groups did not file a
11:28:090 single exception against any of the Hearing
11:28:111 Examiner's proposed factual findings with respect
11:28:142 to Claim 2, and the Board adopted those proposals
11:28:173 in full.

11:28:184 As such, the factual findings of the
11:28:205 Board's order are the facts of this case, despite
11:28:236 the protestations by Conservation Groups. As the
11:28:267 Board may have gathered, Conservation Groups'
11:28:298 presentation entirely avoided the Board's factual
11:28:329 findings, and instead made a litany of factual
11:28:360 assertions that are simply not reconcilable with
11:28:391 the Board's express factual findings.

11:28:322 So let's talk about the nature of their
11:28:423 claim. What was it? Conservation Groups dispute
11:28:454 our representation of the nature of the claim.
11:28:485 Well, let's consult the Board's order.

11:28:471 Finding of Fact 16, Claim 2, "DEQ
11:28:522 improperly authorized disturbance of an
11:28:553 intermittent or perennial stream reach,
11:28:564 specifically Wetland 4-2/2, in violation of the
11:29:015 stream buffer rule." I see no indication of a
11:29:046 technical legal argument about DEQ's application
11:29:077 of the factors of that rule.

11:29:098 Let's continue further to Finding of
11:29:119 Fact 22. This is the opinion, the entire opinion
11:29:140 they disclosed from Mr. Anderson with respect to
11:29:171 Claim 2. He asserted that, "The reach of Lee
11:29:202 Coulee accompanying Wetland 2-4/2 constitutes an
11:29:233 intermittent or perennial stream, receiving input
11:29:244 from groundwater, and lying below the local water
11:29:285 table for part of the year."

11:29:316 That was his entire expert opinion. He
11:29:347 was the individual, as we'll learn in Finding of
11:29:378 Fact 25, the only individual and expert that they
11:29:419 identified in their discovery responses, and that
11:29:420 they repeatedly pointed to in response to our
11:29:421 discovery responses as the individual having
11:29:522 information supporting their claim.

11:29:523 So again, they're saying this is about
11:29:524 there being an intermittent stream; they're
11:29:525 identifying an expert who says, "Yes, it's an

11:29:571 intermittent stream because it's below the
11:29:592 elevation of the local water table," and then they
11:30:023 tell us in discovery, "This is the only guy who
11:30:054 has any information with respect to the claim."

11:30:075 But what we haven't seen is any
11:30:096 indication of some technical legal argument, some
11:30:117 "DEQ didn't apply the right factors." No, this
11:30:148 was about, as found by the Board in these findings
11:30:179 of facts, the depth of the local water table.

11:30:200 We go to 27. They asked for the site
11:30:211 inspection. They've now argued that the site
11:30:222 information is irrelevant. They asked for this
11:30:233 site inspection to inform Mr. Anderson's opinion.
11:30:314 I mean I can't make this stuff up.

11:30:315 This is the old legal defense of, "Give
11:30:326 me a break." We can't repeatedly allow them to
11:30:417 recast their claim every time we beat them on it.
11:30:428 It's not fair to the Department, it's not fair to
11:30:519 my clients, it's not fair to the Board. This is
11:30:520 what they said throughout the course of the case.
11:30:521 "It's about the local water table. There's a
11:30:522 stream out there, and we just proved it."

11:30:523 Again, this is peppered throughout the
11:31:024 Board's order. Finding of Fact 73, Conclusion of
11:31:025 Law 51, Conclusion of Law 52. We can go through

11:31:081 all of these. We don't have enough time to
11:31:102 respond to all the misstatements of fact and the
11:31:123 alternative facts that they presented in their
11:31:144 response.

11:31:165 Let's move forward to the question of
11:31:216 lack of evidentiary support. Mr. Hernandez has
11:31:237 said that they had a bunch of evidence. Well,
11:31:258 again, let's consult the Board's order. I think
11:31:289 it speaks to this.

11:31:290 So if we go to Finding of Fact 31. We
11:31:311 learn that Mr. Anderson testified that his
11:31:332 opinions were formulated with the assistance of
11:31:353 Mr. Hernandez, and that he relied on documents
11:31:414 provided by Mr. Hernandez.

11:31:415 Finding of Fact 32, he conducted no
11:31:436 independent hydrologic analysis, and prepared no
11:31:457 written reports.

11:31:518 Let's move forward to Finding of Fact
11:31:539 74. They offered eighteen facts on summary
11:31:560 judgment with respect to Claim 2, eighteen. Only
11:32:021 five of those survived their discovery abuse
11:32:022 sanctions. Five facts in support of Claim 2.

11:32:123 Finding of Fact 75, the Hearing Examiner
11:32:124 specifically found that those five facts that
11:32:125 survived the motion to strike consisted of legal

11:32:201 conclusions, a characterization of DEQ's
11:32:222 deposition testimony, and responses to public
11:32:253 comment. That was the entirety of their case. It
11:32:284 is right there baked into the Board's order. This
11:32:315 idea that it was a technical legal claim with a
11:32:336 bunch of evidence is nonsense.

11:32:357 As is further concluded in Finding of
11:32:398 Law 51, Finding of Fact 80, Finding of Fact 85. I
11:32:479 mean it's all over, right?

11:32:410 Here Finding of Fact 80. They failed to
11:32:511 provide independent evidence or expert analysis to
11:32:512 support the assertion that it was below or
11:32:513 intersects the local water table. That's
11:33:014 dispositive on the question of whether or not this
11:33:015 is baseless. They provided no evidence or expert
11:33:016 analysis.

11:33:017 Moving forward, they disputed Mr.
11:33:018 Anderson's deposition testimony, but I've cited to
11:33:119 the specific examples found by the Hearing
11:33:120 Examiner in my previous presentation. Finding of
11:33:121 Fact 86, Anderson testified no indicators of a
11:33:222 stream. He testified, Finding of Fact 87, no
11:33:223 flowing water, no indication of a stream, such as
11:33:224 a stream bank, a stream bed, nothing. Yet they
11:33:325 continued to perpetuate this claim. They refused

11:33:351 to accept this evidence.

11:33:362 Again, this is coming from their only
11:33:393 witness, and the guy that they identified for
11:33:414 purposes of this entire claim. It's beyond bad
11:33:465 faith.

11:33:486 Let's move forward. They've now raised
11:33:527 this unique argument that somehow Mr. Anderson's
11:33:548 testimony was inadmissible, and the site
11:33:589 inspection inadmissible. I will begin by stating
11:34:010 that Mr. Hernandez's characterization of the
11:34:021 Supreme Court's decision in 2023 is not accurate.

11:34:022 The Supreme Court rejected his claim,
11:34:033 and specifically allowed the expert opinion
11:34:114 developed after the administrative permitting
11:34:125 process and presented in the contested case for
11:34:136 the Board to survive. They said it was admissible
11:34:217 and appropriate.

11:34:228 Setting that aside, they argue that
11:34:249 their expert's deposition testimony and evidence
11:34:260 from the site inspection is inadmissible, and
11:34:271 should not be considered by the Board for purposes
11:34:322 of assessing the viability of Claim 2. This is
11:34:323 ridiculous, and it's an overt attempt to avoid the
11:34:324 realities of site inspection, and Mr. Anderson's
11:34:325 defeating testimony.

11:34:411 First, Mr. Anderson's testimony and the
11:34:422 evidence from the site inspection was admissible.
11:34:453 This evidence was presented to the Hearing
11:34:484 Examiner and it was admitted. The Hearing
11:34:505 Examiner relied on this evidence in determining
11:34:536 that a stream does not exist at this location.
11:34:547 Conservation Groups did not challenge these
11:34:578 findings, and the Board accepted them all. Of
11:35:009 course it was admissible.

11:35:010 Second, Conservation Groups, as I noted,
11:35:011 identified Mr. Anderson in January 2023 as the
11:35:012 expert witness and individual having knowledge
11:35:103 supporting the factual legal basis of Claim 2.
11:35:114 That's at Finding of Fact 25. We just saw that.

11:35:115 Conservation Groups' discovery responses
11:35:116 repeatedly pointed to Mr. Anderson's disclosed
11:35:207 opinion as the only basis for Claim 2. We just
11:35:208 saw that as well. Conservation Groups demanded
11:35:209 the site inspection for benefit of Mr. Anderson,
11:35:220 Finding of Fact 27 that we just looked at.

11:35:321 Are we to really believe that
11:35:322 Conservation Groups did all of this, knowing that
11:35:323 Mr. Anderson's testimony and the evidence from the
11:35:424 site inspection would be inadmissible? I
11:35:425 sincerely doubt it, but if that is true, that they

11:35:461 identified this individual as their expert, they
11:35:492 repeatedly pointed to him in discovery responses
11:35:513 as the person having the information to support
11:35:534 this claim, that they drug him out into the field,
11:35:565 and forced my client to conduct a site inspection
11:35:586 that we didn't want to do, and to turn around and
11:36:007 say they did all that, knowing that it would be
11:36:048 all inadmissible?

11:36:049 If Conservation Groups wasted the time
11:36:010 of the Hearing Examiner, DEQ, and my clients, by
11:36:011 injecting Mr. Anderson into this proceeding,
11:36:112 despite their belief that he would play no role,
11:36:113 it is clear evidence of bad faith and harassment.

11:36:114 Now lastly, the question of harassment
11:36:215 has come up. The first piece is this. Mr.
11:36:216 Hernandez has characterized this as an intent to
11:36:217 harass. That's not the standard. The standard is
11:36:318 for purposes of harassment, and it's a low bar.

11:36:319 I'll recall some comments from Board
11:36:320 members at the outside of this proceeding when we
11:36:321 were discussing those filings that they submitted
11:36:422 at the eve of the original hearing. Board Member
11:36:423 Payne mentioned that this was in his opinion sharp
11:36:424 practice. And Chairman Simpson mentioned that
11:36:525 those two submissions frustrated him on both

11:36:541 accounts.

11:36:562 I respectfully submit that this is plain
11:36:583 and clear harassment, and I further submit that
11:37:024 this is the exact litigation tactics that we have
11:37:055 dealt with throughout the course of this entire
11:37:086 proceeding, and we continue to deal with, and
11:37:107 which has propelled my clients to ask the Board
11:37:138 for the first time ever to award the costs and
11:37:169 fees that we've expended defending and defeating
11:37:200 this frivolous claim.

11:37:201 No person, no reasonable person, could
11:37:212 walk out in that drainage, see that sagebrush, see
11:37:213 that dry and vegetated landscape, and walk away
11:37:304 thinking, "Yeah, there's an intermittent or
11:37:315 perennial stream here." It's just not reasonable,
11:37:316 and for that reason, we're owed our costs and
11:37:317 fees. Thank you.

11:37:408 CHAIR SIMPSON: Thank you, Mr.
11:37:419 Yemington. Mr. Hernandez, five minutes, please.

11:37:520 MR. HERNANDEZ: A procedural point,
11:37:521 Chairman Simpson. Mr. Yemington just took ten
11:37:522 minutes and 30 seconds. We'd request an equal
11:37:523 allotment of time for our rebuttal statement.

11:38:024 CHAIR SIMPSON: Proceed.

11:38:025 MR. HERNANDEZ: Thank you, Chairman

11:38:081 Simpson.

11:38:082 Now, Mr. Yemington is making a number of
11:38:123 very fundamental mistakes here. The question for
11:38:174 assessing whether or not a claim was brought in
11:38:215 bad faith is not looking at the final decision and
11:38:246 saying, "Did they win?" Now, that's what Mr.
11:38:267 Yemington is doing, he's saying, "Look. They
11:38:288 lost. Therefore their claim must have been
11:38:319 frivolous."

11:38:310 The Court -- this is the Christiansburg
11:38:311 standard. The Montana Supreme Court adopted it in
11:38:312 the Jeld Wen case. We cite these cases in our
11:38:403 brief. The question is looking on the forefront,
11:38:414 did plaintiffs have factual basis for the claim?
11:38:415 Did they have a legal basis for their claim?

11:38:416 And that's what we did, and so let's
11:38:417 look at the front end of the analysis. Mr.
11:38:518 Yemington said he's trying to characterize our
11:38:519 claim, so let's look at the exact claim that the
11:38:520 Plaintiffs brought. And we didn't bring a claim
11:38:521 that this was an intermittent stream. We said DEQ
11:39:022 didn't look at the right factors based on the MEIC
11:39:023 standard. And here I'm going to share my screen
11:39:024 to show the exact language that we used.

11:39:125 This is a brief the Petitioners

11:39:241 submitted on summary judgment. This is the claim
11:39:262 that the Board has to assess, whether or not it
11:39:293 was in good faith. Here DEQ's determination that
11:39:334 the buffer zone rule did not apply to the reach of
11:39:355 Lee Coulee from Wetland 4-2/2 to Pond 300 was not
11:39:406 based on consideration of the factors that define
11:39:437 an intermittent stream or stream reach, that is,
11:39:468 whether it was below the local water table, or
11:39:509 obtains some flow from surface runoff.

11:39:510 Now, the Board paraphrased this claim in
11:39:511 its order, but this is the claim that we brought,
11:39:512 and this is the claim that we are supposed to
11:40:013 defend. Our claim was not that it was
11:40:014 intermittent. We didn't make that claim. We said
11:40:015 DEQ didn't have sufficient evidence, their
11:40:106 analysis was flawed, they didn't apply the right
11:40:117 standard in making the decision.

11:40:118 Now, I think that's important because
11:40:119 had we argued that this was an ephemeral stream in
11:40:220 our summary judgment brief, that would be a
11:40:221 different case, but we didn't. And Mr. Yemington
11:40:222 is not addressing our actual claim because he
11:40:223 knows our actual claim was different, and had an
11:40:324 evidentiary basis.

11:40:325 What was that? What did we disclose?

11:40:361 What was the evidence we disclosed? This is the
11:40:382 what the Board needs to look at, what did we
11:40:403 disclose?

11:40:414 Now here I'm going to share what Mr.
11:40:435 Anderson, what we disclosed to Mr. Anderson, well
11:40:466 in advance of summary judgment. This is Mr.
11:40:517 Anderson's rebuttal disclosures, and there is no
11:40:598 question this was timely disclosed. It says,
11:41:039 "DEQ's testimony about mapped alluvium, water
11:41:010 rights, observed flow below pond 300, an absence
11:41:011 of a biological community, is irrelevant to
11:41:102 whether the reach is intermittent or perennial.
11:41:123 An intermittent or perennial stream does not
11:41:144 require the presence of mapped alluvium. Moreover
11:41:175 the basis of DEQ's statements about mapped
11:41:196 alluvium is unclear, and DEQ has long identified
11:41:227 alluvium in the upper reaches of Lee Coulee."

11:41:218 Now, we summarize this in Mr. Anderson's
11:41:279 declaration, which was stricken, but the question
11:41:320 here is did we have evidence to move forward in
11:41:321 advance to support our claim. Our claim was DEQ
11:41:322 didn't analyze the right standard. I just showed
11:41:423 you our claim -- our claim, not the Board's
11:41:424 summary, but this is our claim.

11:41:425 DEQ didn't look at the right factors.

11:41:471 Mr. Anderson said DEQ didn't look at the right
11:41:492 factors. We presented testimony from DEQ's own
11:41:523 expert, Dr. Lodman, didn't look at the right
11:41:554 factors. She said the stream flow out of the
11:41:575 pond, irrelevant; she acknowledged that there were
11:42:016 seeps there. If there's seeps, there's a
11:42:027 groundwater contribution, it can't be ephemeral.
11:42:058 So our claim was DEQ didn't look at the right
11:42:129 factors, based on the MEIC 2023 decision, based on
11:42:140 expert testimony.

11:42:141 The site inspection. What about the
11:42:142 site inspection? Mr. Yemington says we were being
11:42:203 ridiculous about the site inspection. Why ask for
11:42:214 it if you thought it was inadmissible? Super
11:42:215 important.

11:42:216 And the reason is that we knew in
11:42:307 advance that Westmoreland was going to present
11:42:318 post-decisional evidence to support its claim, and
11:42:319 that Westmoreland was going to impeach our expert
11:42:400 if he didn't visit the site. How do we know this?
11:42:421 Because Westmoreland previously impeached our
11:42:422 expert for not visiting the site, and because it's
11:42:423 the exact same time, the spring 2023.

11:42:524 We were briefing the issue about whether
11:42:525 post hoc information can come into a contested

11:42:571 case hearing before the Montana Supreme Court, and
11:43:012 we knew Westmoreland was arguing post hoc
11:43:033 information can come in, and we were arguing the
11:43:064 opposite.

11:43:065 And so we said in order to respond to
11:43:086 their argument, in order to confront their
11:43:117 defense, we have to know what they're going to
11:43:148 present. We need to be able to bring our expert
11:43:159 out there, and have a look around, and that's just
11:43:180 what Westmoreland did. Their claim was based on
11:43:211 these pictures from 2023, a year after the
11:43:242 permitting decision, and they said, "Look.
11:43:273 There's no water there" a year later.

11:43:294 So we knew this was the argument
11:43:325 Westmoreland was going to make, and we needed to
11:43:356 be able to rebut. That's why we went there.

11:43:377 Fast forward eight months, the Supreme
11:43:408 Court agrees with us on post hoc evidence. They
11:43:439 say the evidence has to be the evidence in the
11:43:470 record at the time of the decision. That's MEIC
11:43:501 Paragraphs -- MEIC 2023 Paragraphs 45 to 53. Read
11:43:532 them.

11:43:553 Now, Mr. Yemington says in that case the
11:43:584 Supreme Court said we could present some evidence,
11:44:015 and that's right. What the Supreme Court said,

11:44:031 and I'll quote, is they said, "Westmoreland's
11:44:062 evidence should come in because it's --" quote,
11:44:083 and this is Paragraph 50 -- "drawn from
11:44:104 information contained in the CHIA or otherwise
11:44:135 compiled by DEQ during the approval process."

11:44:166 It was pre-decisional information.
11:44:177 That's what Supreme Court said could come in, and
11:44:208 that's what Board Counsel said is to limit.
11:44:239 Evidence that's pre-decisional can come in,
11:44:210 post-decisional evidence can't.

11:44:211 So after the site inspection is done, we
11:44:312 get this decision from the Montana Supreme Court,
11:44:313 and we say, "This information, just like we've
11:44:314 been arguing, shouldn't come in. We looked at it
11:44:315 because we knew that Westmoreland was going to
11:44:316 advance this argument, but it shouldn't come in."

11:44:417 That's a valid legal basis for making
11:44:418 our argument, and I think the Board Counsel's memo
11:44:419 really bears this out. Board Counsel itself said
11:44:520 post-decisional evidence should not come in. That
11:44:521 was our argument. That's a good faith basis. It
11:44:522 would be entirely unlawful for the Board to say
11:44:523 that we were acting frivolously in making an
11:45:024 argument that the Board Counsel itself made.

11:45:025 One thing I want to point out here fast

11:45:041 is that Mr. Yemington just upbraided us for saying
11:45:102 that post-decisional evidence should not come in,
11:45:113 and he said, "Well, how could they dare -- they
11:45:134 flip-flopped. This was improper."

11:45:165 I'll point to Westmoreland's own
11:45:186 statements, and this is Docket 24 at Page 2.
11:45:227 Westmoreland resisted a site inspection, and what
11:45:258 they said was there should be no site inspection
11:45:299 because, quote, "Facts developed as the result of
11:45:320 an inspection are inadmissible post-decisional."
11:45:311 That was Westmoreland's argument in opposition to
11:45:322 a site inspection.

11:45:413 They've taken the exact opposite
11:45:414 position here. Westmoreland likes to say that the
11:45:415 Plaintiffs are playing games. The fact of the
11:45:416 matter is this: The question was ambiguous, and
11:45:517 Mr. Yemington knows it, and we knew it. Besides
11:45:518 we're trying to figure it out, and both took
11:45:519 different positions.

11:45:520 And positions changed a little bit. We
11:46:021 wanted this defensive information, but our
11:46:022 position throughout was that this evidence should
11:46:023 not come in. Westmoreland's evidence position 180
11:46:024 percent, 180 degree switch. Mr. Yemington wrote,
11:46:125 "Post-decisional evidence shouldn't come in," and

11:46:161 now they're arguing that we were somehow wrong by
11:46:192 making the same argument.

11:46:223 Now, Mr. Yemington ended his rebuttal by
11:46:284 saying the Board should think about what it said
11:46:325 before. Here I'll note that Westmoreland filed a
11:46:356 reply brief in the seep petition that was 2,000
11:46:397 words long. It was over-length. And we said,
11:46:428 "Wait a second. That should be stricken." The
11:46:449 Board said, "Yeah, it's over-length," but Chairman
11:46:470 Simpson, you said, "We need to look at both sides,
11:46:501 and we can see where they came from in making the
11:46:512 argument they did."

11:46:513 Now, that's just what the Board has to
11:46:514 do here. The Board has to say, "Well, we know how
11:46:515 we ruled, but let's look at both sides. Was there
11:47:016 a basis for their position?"

11:47:017 Now, the Board found that there was a
11:47:018 basis for Westmoreland to file an over-length
11:47:019 brief. We submit that there clearly was a basis
11:47:120 for us to argue that post-decisional information
11:47:121 shouldn't come in, and that DEQ's assessment of
11:47:122 the buffer zone rule didn't comply with the law.

11:47:223 That was a good faith claim. That's not
11:47:224 a claim for which Westmoreland is entitled to
11:47:225 hundreds of thousands of dollars from public

11:47:311 organizations, public interest organizations.
11:47:362 Thank you, Chairman Simpson, members of the Board.
11:47:383 If there are any questions, I'm happy to answer
11:47:414 them. I would request an opportunity to get a
11:47:435 drink of water. My mouth is very dry.

11:47:476 CHAIR SIMPSON: Thank you, Mr.
11:47:487 Hernandez. Members of the Board, questions for
11:47:528 Counsel. Mr. Payne.

11:48:059 BOARD MEMBER PAYNE: As Mr. Hernandez is
11:48:070 getting some water, I'll start with Mr. Yemington.

11:48:111 You said the Anderson deposition date
11:48:112 was July of 2023. Was that before or after -- I
11:48:213 guess there's the MEIC decision of 2023. What was
11:48:214 the date of that decision, do you know?

11:48:305 MR. YEMINGTON: That was in November of
11:48:316 2023.

11:48:317 BOARD MEMBER PAYNE: And I guess my
11:48:318 question is: When do you believe their bad faith
11:48:419 conduct started? Do you believe it started when
11:48:420 they filed their petition? Did it start after the
11:48:521 Anderson deposition? Did it start after the
11:48:522 November MEIC decision in 2023?

11:48:523 MR. YEMINGTON: Great question. I think
11:49:024 there's a few points you can draw that line. I'd
11:49:025 like to be generous in this respect.

11:49:061 These folks are public -- not public --
11:49:102 they're private interest organizations. They
11:49:133 challenge all of our permits that are issued by
11:49:174 the Department of Environmental Quality. They do
11:49:195 so often without considering the permitting record
11:49:236 or the decision documents, and then they litigate
11:49:267 these things for years at the expense of my
11:49:308 clients.

11:49:329 I personally believe that there should
11:49:310 be some duty at the outset to consider more
11:49:311 closely those decisions made by the agency, and
11:49:402 the information and data that informs those
11:49:413 decisions, before you just lodge a challenge, and
11:49:414 that that duty should rest on those individuals,
11:49:415 and failure to do that is an indication of bad
11:49:506 faith.

11:49:507 I respectfully submit that they didn't
11:49:518 consider those things here. They didn't consider
11:49:519 that the Department conducted an entire survey of
11:49:520 this drainage, assessed it for questions of
11:50:021 intermittency and flow, looked at well bores --
11:50:022 which they never found the time to give to their
11:50:023 expert -- that clearly established, confirmed,
11:50:024 based on the Hearing Examiner's finding, the depth
11:50:125 of the local water table being 70 feet below this

11:50:151 drainage. So I would respectfully submit that
11:50:172 that's at the outset.

11:50:183 Now moving forward into the discovery
11:50:214 phase, giving them the benefit of the doubt, they
11:50:255 identified Mr. Anderson; they identified their
11:50:276 claim. We had the opportunity to discover the
11:50:317 facts and legal support. We asked them for all of
11:50:348 that information.

11:50:359 They provided none but two sentences
11:50:380 from their hydrologist that, as you saw in the
11:50:411 Board's order, only said that the water table was
11:50:442 sometimes above the elevation of the drainage, so
11:50:473 there you go. The buffer zone rule applies.

11:50:504 We went out in the field and we looked
11:50:525 for water; we couldn't find it. We took them out
11:50:556 in the field to look for water; we couldn't find
11:50:587 it. We deposed him, and asked him in his expert
11:51:018 opinion whether there were springs, seeps,
11:51:049 groundwater of any sort out there.

11:51:080 And as you saw, that was only four
11:51:111 minutes of a one day deposition that did not go
11:51:142 well for Conservation Groups. He admitted that it
11:51:173 made him fully reconsider the expert opinion that
11:51:204 he disclosed six months ago, based on -- as we
11:51:235 noted -- a limited selection of information that

11:51:231 Counsel had provided him.

11:51:252 I'm not blaming Mr. Anderson here. He
11:51:273 didn't have enough to work with. But it speaks to
11:51:294 the lack of diligence on their part during the
11:51:335 entire discovery period. So I think you could
11:51:356 point to that as maybe a starting point. "Why
11:51:377 didn't you give the photographs to your expert?
11:51:398 Why didn't you give the well logs to your expert?
11:51:419 Why didn't you listen to his expert testimony when
11:51:440 he testified unequivocally under oath, found by
11:51:461 the Hearings Examiner, that none of this stuff
11:51:482 existed, and that DEQ's decision was reasonable?
11:51:503 Why did you double down at that point?"

11:51:544 So where do you draw the line? Is it at
11:51:565 the outset? Maybe. Is it during discovery? Even
11:52:016 better. Is it after the site inspection and Mr.
11:52:037 Anderson's deposition that concluded discovery?
11:52:108 That was the last day of discovery, was Mr.
11:52:129 Anderson's deposition on July 13th of 2023.

11:52:150 At that point, I respectfully submit
11:52:171 that no reasonable person, and no Counsel acting
11:52:222 within their duty, would perpetuate that claim as
11:52:243 it had been pleaded and how it had been presented
11:52:264 in discovery. After that deposition it was
11:52:325 entirely discredited and defeated.

11:52:341 So I would say with absolute certainty
11:52:372 that that bad faith piece starts there, and it may
11:52:413 start before that, but it's certainly perpetuated,
11:52:434 too, because one thing we didn't hear about in his
11:52:475 presentation was the discovery abuse on summary
11:52:496 judgment where they presented significant analysis
11:52:537 and evidence that wasn't disclosed during
11:52:558 discovery. That's the Hearing Examiner finding.

11:52:579 And then they challenged my party, my
11:53:010 client, with destroying evidence, despite their
11:53:011 own expert testifying the other way. Again, these
11:53:012 are all findings in the Board's order. And then
11:53:103 they falsely claimed in a public filing to the
11:53:114 Board that we had obliterated the stream.

11:53:115 So you see this chain of events, and it
11:53:116 continues to this day, their refusal to recognize
11:53:207 the Board's own findings. Throughout now an hour
11:53:218 presentation on this, and multiple pleadings, they
11:53:219 haven't cited a single time to the Board's
11:53:220 findings.

11:53:221 I respectfully submit that that is
11:53:322 further indication, their refusal to accept
11:53:323 defeating facts, and their refusal to accept the
11:53:324 facts that were found by the Board that they
11:53:325 didn't challenge. That is further evidence of bad

11:53:411 faith.

11:53:412 So going back to your question to where
11:53:423 you draw that line, I think you absolutely have to
11:53:454 draw that line after Mr. Anderson's fatal
11:53:475 deposition testimony. I think it might be
11:53:496 appropriate to draw it a little earlier, given
11:53:507 their lack of due diligence during the discovery
11:53:558 period, and the things that they told us, and the
11:53:579 things that they told DEQ with respect to what
11:53:590 their claim was, and the basis for that claim.

11:54:011 So again, beginning of this process,
11:54:022 they should have investigated this claim more
11:54:033 before they filed a complaint with the Board.
11:54:114 Beyond that, they should have developed it better
11:54:125 during discovery. They should have looked at the
11:54:136 data. They should have given their expert that
11:54:147 information. They should have considered the well
11:54:218 logs.

11:54:219 But certainly by the site inspection
11:54:220 where you saw those pictures. It's a prairie.
11:54:221 And by Mr. Anderson's sworn testimony at the
11:54:322 deposition, I think there's a firm line in the
11:54:323 sand that everything after that was absolutely
11:54:324 done in bad faith.

11:54:325 BOARD MEMBER PAYNE: You had mentioned

11:54:411 with respect to the facts of the, you know,
11:54:472 Findings of Fact and Conclusions of Law, that we
11:54:493 should be focused on that.

11:54:514 But with respect to what's really at
11:54:545 issue here is the conduct of the Petitioners in
11:54:596 pursuing their claim, and not all those facts are
11:55:027 going to be in the Findings of Fact and
11:55:048 Conclusions of Law.

11:55:059 And I don't -- Try to keep your answers
11:55:080 -- please don't like repeat your whole arguments
11:55:111 here. We want to get out of here sometime. But
11:55:142 just, I mean isn't it proper for us to look
11:55:203 outside those Findings of Facts and Conclusions of
11:55:214 Law, just things that didn't make it in there, the
11:55:245 various parties' conduct?

11:55:276 MR. YEMINGTON: I think that's a
11:55:287 dangerous precedent. There's a process here under
11:55:318 MAPA where the Hearing Examiner proposes these
11:55:349 facts. Every party has an opportunity to file
11:55:380 exceptions against each individual fact and say,
11:55:391 "Look. This characterization of my claim is not
11:55:422 accurate." They could have done that, but they
11:55:423 didn't, and once --

11:55:444 BOARD MEMBER PAYNE: If we're going to
11:55:475 be limited to just that, then doesn't Mr.

11:55:491 Hernandez make a great argument then with respect
11:55:512 to, "Well, look. The Hearings Officer said this
11:55:533 was great advocacy and it was helpful"?

11:55:554 MR. YEMINGTON: No --

11:55:555 BOARD MEMBER PAYNE: That's a finding of
11:55:556 fact. I mean if we're really only going to --
11:55:597 because right here we're only going to, at this
11:56:028 point, you know, did they act in bad faith in
11:56:049 pursuing this claim at some point?

11:56:070 MR. YEMINGTON: Yeah, it's a fair
11:56:071 question, and to your point --

11:56:082 BOARD MEMBER PAYNE: It seems to me
11:56:103 that's the only findings of fact that is probative
11:56:114 of the issue before us right now, is -- I mean
11:56:175 there's no finding of fact whether it was bad
11:56:206 faith or not, and that's what we have to decide
11:56:227 here. But I mean the only thing really probative
11:56:258 of that, or directly probative is that findings of
11:56:289 fact.

11:56:290 MR. YEMINGTON: Well, let me first
11:56:321 caution you with respect to that comment by
11:56:322 Hearing Examiner Cameron. That is not a finding
11:56:323 of fact. That's not found anywhere in the Board's
11:56:324 order. It was his sign-off, pulled from the
11:56:425 transcript of the summary judgment argument.

11:56:441 That's it.

11:56:452 That's not him making a finding of fact
11:56:473 with respect to the conduct of any of the parties.
11:56:504 It was merely him signing off at the end of it,
11:56:525 virtual oral argument, thanking the parties for
11:56:556 their participation.

11:56:567 So I would caution against reading too
11:56:598 much into that one statement, and I would
11:57:019 emphasize that that's not found in the Board's
11:57:040 order. Had he presented that as a proposed
11:57:071 finding, I guarantee you we would have resisted
11:57:102 it.

11:57:113 Now with respect to the findings that do
11:57:144 speak to their behavior that we've identified,
11:57:175 that are indications of bad faith, Hearing
11:57:206 Examiner Cameron specifically made findings about
11:57:237 their discovery abuse, the spoliation claim and
11:57:268 frivolity of that spoliation claim.

11:57:299 He made specific findings regarding the
11:57:320 lack of their evidence. We went through that.
11:57:351 They had five total proposed facts on summary
11:57:382 judgment supporting this claim, and none of them
11:57:413 were actual facts. They had no expert analysis or
11:57:444 evidence. These are facts that were found by the
11:57:475 Hearing Examiner and adopted by the Board. So

11:57:471 those are the facts that we point to.

11:57:482 Now, with respect to your comment about
11:57:513 looking more broadly, I think it's important on
11:57:534 one hand to recognize that these are established
11:57:565 facts that were established after a statutory
11:57:596 process.

11:58:017 On the other hand, we do have a docket,
11:58:038 the Board does have a docket that I respectfully
11:58:069 submit they can look to. In the Board memorandum,
11:58:090 Board Counsel does note that other pieces of the
11:58:111 equation that might be relevant to your
11:58:132 determination is the order granting our motion to
11:58:153 strike.

11:58:174 That I submit is another piece of the
11:58:215 equation that the Board can look at. I would
11:58:236 caution the Board from looking into the parties'
11:58:257 individual pleadings like Mr. Hernandez has
11:58:278 presented today -- deposition testimony, or
11:58:319 snippets thereof, argument by the Board presented
11:58:340 in oral argument or in pleadings. I think that's
11:58:361 dangerous.

11:58:382 But to the extent the Hearing Examiner
11:58:423 made a determination, whether that be in a
11:58:444 preliminary order, or in the final proposed
11:58:465 finding that the Board accepted over no exception

11:58:491 from the parties, I would say that should be the
11:58:512 focus.

11:58:513 And I think that's presented in the
11:58:534 Board's memorandum as well, that these orders, and
11:58:555 ultimately the Board's final decision should
11:58:586 ultimately inform this determination.

11:59:017 BOARD MEMBER PAYNE: Bad faith is the
11:59:048 standard here, and we're arguing a little bit
11:59:079 about what actually goes into that standard.

11:59:110 Is it your clients' position that this
11:59:111 -- Is there an element of intent in bad faith?
11:59:212 Are we going to have to find they intended to, or
11:59:213 can we rely just on -- or do we have to just rely
11:59:214 on the conduct, and -- You know --

11:59:215 MR. YEMINGTON: Yeah --

11:59:216 BOARD MEMBER PAYNE: -- and just say
11:59:317 conduct alone, regardless of their intent?

11:59:318 MR. YEMINGTON: That's a great point,
11:59:319 and the first point is this: The standard is not
11:59:320 disputed among the parties. That's noted in the
11:59:321 memorandum. So the standard that I presented is
11:59:322 the standard that is presented by Ms. Hupp in her
11:59:423 memorandum as well, and was acknowledged in the
11:59:424 pleadings of the other folks. So there's no
11:59:425 dispute here.

11:59:471 With respect to whether or not there's
11:59:482 an intent aspect, there's not. This is an
11:59:513 objective standard. Would a reasonable person in
11:59:544 that situation do what they did? We do not have
11:59:575 to prove that in their heart of hearts they wanted
12:00:006 more than anything for there to be a stream there,
12:00:027 and that they closed their eyes to all possible,
12:00:068 you know, indications and evidence otherwise,
12:00:089 which is what it looks like --

12:00:120 BOARD MEMBER PAYNE: Let me ask Mr.
12:00:141 Hernandez that question. Is it your client's
12:00:172 position that there's an element of intent we have
12:00:213 to find with respect to -- if we're going to find
12:00:244 bad faith here?

12:00:255 MR. HERNANDEZ: Absolutely. That's the
12:00:276 statutory language. The purpose has to be to
12:00:307 harass or embarrass. It has to be intentional
12:00:328 conduct. It's an extremely high standard. The
12:00:349 standard here for bad faith is higher than
12:00:370 triviality.

12:00:401 But look at ARM 17.24.1307 Sub (2).
12:00:422 That's the standard. It's intent.

12:00:423 If I may respond, I'd love to point out
12:00:524 that Mr. Yemington's attempt to limit this
12:00:555 analysis to the findings of fact of the Board is

12:00:571 just not accurate, and he's not even consistent on
12:01:002 the point.

12:01:023 Briefly, the question for all of this
12:01:044 isn't what the Board found. It's what we did
12:01:085 leading up to our decision. Did we have a basis
12:01:116 in law or facts for our claim? The question isn't
12:01:147 if we won, because then everyone who lost would be
12:01:168 bad faith. The question is what existed when we
12:01:199 were filing our briefs.

12:01:200 I think Mr. Yemington acknowledges this.
12:01:211 He says you can't look at the depositions, but he
12:01:212 showed you five minutes of deposition testimony
12:01:213 just thirty minutes ago, so clearly he's not being
12:01:304 consistent.

12:01:305 The reality is that the standard -- and
12:01:316 this is what Courts say, and we point it out in
12:01:317 our briefs -- Courts look at what a party alleged,
12:01:318 did they allege facts, and did they allege law to
12:01:419 support their position. That's what the Board has
12:01:420 to look at, and we've pointed out --

12:01:421 BOARD MEMBER PAYNE: Can we look at that
12:01:422 for a moment. Can you pull up on the screen your
12:01:523 actual petition, and what Claim 2 actually said.

12:01:524 MR. HERNANDEZ: Absolutely. Here, let
12:01:525 me find it. We amended it one time.

12:02:101 BOARD MEMBER PAYNE: Well, let's start
12:02:122 with what you said, and then we'll look at what it
12:02:133 amended.

12:02:154 MR. HERNANDEZ: Okay. The amendment
12:02:165 didn't affect this claim. So our original claim.
12:02:236 This was the petition for judicial review, it's
12:02:257 document one. Here's our claim. Let me just
12:02:538 share this.

12:02:559 BOARD MEMBER PAYNE: Sorry for putting
12:02:510 you on the spot.

12:02:511 MR. HERNANDEZ: No, no, absolutely.
12:02:512 This is super important, and that's why I had
12:02:513 suggested a Hearing Examiner from the outset,
12:03:014 because it's really, really complicated. There
12:03:015 are approximately thirty cases that the parties
12:03:016 have cited. The Board has to look at all the
12:03:017 materials in the record. It's a complicated
12:03:108 claim, and I really appreciate your desire to get
12:03:119 to the details of this.

12:03:120 So do you see Paragraph 8 here? This is
12:03:221 the buffer zone claim. It says, "DEQ failed to
12:03:222 protect intermittent stream reaches in Lee Coulee
12:03:223 from disturbance from the strip mining operations.
12:03:224 And DEQ denies protections of the buffer zone rule
12:03:225 to the intermittent perennial stream reach of Lee

12:03:331 Coulee on Wetland 4-2/2 on the basis that it does
12:03:372 not contain alluvium, even though no such
12:03:393 requirement exists in the buffer zone rule."

12:03:424 "The CHIA in the permit application
12:03:435 acknowledged that this stream reach is sourced by
12:03:456 groundwater, and therefore is not ephemeral, but
12:03:487 intermittent or perennial." That's the claim.

12:03:518 Now --

12:03:519 BOARD MEMBER PAYNE: It seems to me you
12:03:510 are raising a legal and a factual claim there --

12:03:511 MR. HERNANDEZ: Yes.

12:03:512 BOARD MEMBER PAYNE: The first sentence
12:03:513 there is you're saying they didn't follow statute,
12:04:014 and the second part is a factual claim. Did you
12:04:015 eventually drop that factual claim after the MEIC
12:04:116 decision in 2023? Because it seemed to me that
12:04:117 when you went to summary judgment, you were
12:04:118 focused on the legal aspect, and not the factual
12:04:219 aspect.

12:04:220 MR. HERNANDEZ: That's exactly it,
12:04:221 Member Payne. After the site inspection, MEIC
12:04:222 hadn't come down, and your question about timing
12:04:323 was right. There was still ambiguity in the law
12:04:324 about post hoc/pre hoc, at the time of MEIC.

12:04:325 When we filed our summary judgment brief

12:04:371 -- and that's what I just showed the Board, and
12:04:392 I'll show it again -- our summary judgment brief
12:04:423 dropped the factual argument, because we
12:04:444 acknowledged that Mr. Anderson noted uncertainty,
12:04:485 he said, and that's just what Mr. Yemington
12:04:526 pointed out in his testimony. He said "I couldn't
12:04:557 make a definitive determination."

12:04:588 And so based on that, it wasn't a strong
12:05:029 claim to argue that it was intermittent there, so
12:05:040 we didn't. And this is our summary judgment
12:05:051 brief, it's Docket 38 on Page 15.

12:05:062 We say, "DEQ's determination that the
12:05:103 buffer zone rule did not apply to this reach of
12:05:114 Lee Coulee was not based on the consideration of
12:05:125 the factors to define an intermittent reach, that
12:05:136 is, whether it was below the local water table, or
12:05:217 obtained flow from surface and groundwater."

12:05:218 And so from there we go on to talk about
12:05:219 what was in the CHIA, what the factors are, is
12:05:320 there groundwater contribution. And I'm happy to
12:05:321 go through all of it, but the point is just the
12:05:322 distinction that you're making. We did not pursue
12:05:323 a factual argument that this reach was
12:05:424 intermittent. That would have been ill advised.
12:05:425 In complete candor, I don't think that's the right

12:05:471 claim after the -- regardless of whether or not it
12:05:502 was post hoc. So we didn't --

12:05:523 BOARD MEMBER PAYNE: Sorry. I'll try
12:06:024 not to talk over you or we'll get in trouble here
12:06:025 for the Court Reporter.

12:06:026 Then I want to go -- Okay. I understand
12:06:047 that. I want to go back to when you were still
12:06:098 potentially pursuing it as a legal and a factual
12:06:129 argument, where the actual -- As I understand it,
12:06:140 at the end it wasn't really because of the MEIC,
12:06:141 2023 MEIC decision. In the end it wasn't whether
12:06:212 or not there was groundwater there, but whether or
12:06:213 not DEQ had done what it was supposed to to
12:06:214 determine if there was groundwater.

12:06:215 But prior to that, when you were still
12:06:306 pursuing a factual claim, why did you not provide
12:06:317 your expert the well bores?

12:06:318 MR. HERNANDEZ: The reason for that is
12:06:319 exactly this, is that if we go to DEQ's analysis
12:06:420 -- and that was what the key information was,
12:06:421 DEQ's, what was DEQ's analysis. And I'm happy to
12:06:422 go to the CHIA.

12:06:423 But on Page 28 of the CHIA, DEQ says,
12:06:524 "The buffer zone rule doesn't apply here because
12:06:525 water is not flowing out of the pond at the bottom

12:06:591 of the pond, because there's no alluvium, and
12:07:022 because the seeps are sourced from local
12:07:063 overburden groundwater."

12:07:074 And so there's no citation to well logs
12:07:115 there. There's nothing there that talks about
12:07:146 well logs. The well logs -- you can look in the
12:07:177 CHIA. At no point in time does the CHIA cite well
12:07:228 logs. In fact Mr. Yemington --

12:07:239 BOARD MEMBER PAYNE: At the time of that
12:07:240 litigation, that point in litigation, whether or
12:07:241 not there was well -- I mean whether or not there
12:07:312 was groundwater, where the level of groundwater
12:07:313 was -- and we'll get to the overburden/local
12:07:314 groundwater issue in a minute --

12:07:405 MR. HERNANDEZ: Yeah.

12:07:406 BOARD MEMBER PAYNE: -- but that was an
12:07:417 important issue. And I just -- Why wouldn't you
12:07:418 have provided that information to your expert?

12:07:419 MR. HERNANDEZ: The reason was, Mr.
12:07:520 Payne, because what the Supreme Court said -- and
12:07:521 this is what we were arguing all along. We were
12:07:522 writing the briefs for the Supreme Court while we
12:08:023 were litigating this case. So we knew the
12:08:024 position Westmoreland had, we knew our position,
12:08:025 and our position was it's the analysis that DEQ

12:08:091 does at the time of its decision, and that's what
12:08:102 we focused on.

12:08:123 We're representing community groups.
12:08:154 Westmoreland gave us 350,000 pages of discovery.
12:08:185 We are obviously not going to ask our expert to
12:08:206 review 350,000 pages of a document dump. We
12:08:257 focused on what DEQ said.

12:08:278 Now, we didn't think the local water
12:08:299 table issue was an important one, and this is why:
12:08:310 Because we deposed DEQ's expert, and DEQ said --

12:08:311 Well, first off, the CHIA doesn't say
12:08:312 that the local water table has anything to do with
12:08:313 the decision, one.

12:08:414 Two, at deposition -- and we point this
12:08:415 out in our brief -- DEQ makes this wild admission
12:08:416 that there's no definition of local water table,
12:08:417 it's not a scientific term, it's not defined in
12:08:518 SMCRA, and DEQ has never seen a good definition of
12:08:519 the local water table.

12:08:520 And we said, "Bingo. DEQ just said it
12:09:021 has no idea what the local water table is, so they
12:09:022 can't argue that some local water table analysis
12:09:023 was the basis of their decision."

12:09:024 And this is super important, Member
12:09:125 Payne, because as lots of cases have pointed out

12:09:151 -- and I think the Little Rock case most clearly,
12:09:182 which we cite -- when you have this kind of
12:09:193 statutory ambiguity, a term that's not defined,
12:09:234 then it's not like we were running into unresolved
12:09:285 -- or clearly resolved case law. There was no
12:09:316 definition of local water table.

12:09:337 And so we didn't focus on that question
12:09:368 because DEQ didn't rely on it in its decision, and
12:09:399 DEQ's testimony was, "We don't know what the local
12:09:410 water table was."

12:09:411 Now at the end of the day, the Board
12:09:412 gave more credit to Westmoreland's analysis of
12:09:413 these well logs, but they don't appear in the
12:09:514 CHIA, and based on the Board's Bull Mountain
12:09:515 decision, and the same -- which the Montana
12:09:516 Supreme Court relied on in MEIC 2023 -- we said
12:10:017 the Board's analysis on accepted case is what DEQ
12:10:018 said in its permitting document.

12:10:109 They said nothing about well logs or the
12:10:120 local water table. So we said, "Okay. Let's not
12:10:221 spend a ton of money on having our expert look at
12:10:222 stuff that's not the basis of the decision."

12:10:223 BOARD MEMBER PAYNE: Did you ever ask
12:10:224 Mr. Anderson what he thought the best definition
12:10:325 for local water table was?

12:10:341 MR. HERNANDEZ: He did. It didn't come
12:10:362 up in the briefs, but it is in the deposition, and
12:10:383 the Board is free to look at it. And two things
12:10:404 that are really important here, Mr. Payne. One is
12:10:435 that in the deposition -- and I'm happy to dig up
12:10:456 the citations if you wish -- Mr. Anderson said he
12:10:487 did look at well logs, but he wasn't able to
12:10:518 identify the well logs for this area.

12:10:539 If you look at their well logs, it's a
12:10:540 1,000 page document of single spaced technical
12:10:541 materials that there's no -- Like you could look
12:11:012 at it, and you wouldn't be able to make heads or
12:11:013 tails. He says he looked at it, he wasn't able to
12:11:014 tell what was what.

12:11:105 The second really critical important
12:11:116 point on this is that in the deposition, Mr.
12:11:117 Anderson said exactly what you asked me about --
12:11:118 and your question just escaped my mind. You said:
12:11:219 "Did Mr. Anderson ever say that he --" I'm sorry
12:11:220 -- because he said both things in his deposition.
12:11:321 He said both things that you asked about. He
12:11:322 looked at well logs. And then you asked another
12:11:323 question. I'm sorry in my response I didn't quite
12:11:324 -- I forgot. Could you repeat that, or --

12:11:425 BOARD MEMBER PAYNE: Just the question

12:11:451 was: Did you ever ask your expert for what he
12:11:512 would use as a definition of a local water table?

12:11:553 MR. HERNANDEZ: We did, and this is
12:11:564 really important, if I may. He said, "Look at the
12:11:585 definition in the dictionary. Local means
12:11:586 localized to one location." And now, that's
12:12:047 critical, because -- and he said that in -- I'm
12:12:088 almost certain he said it in the deposition and
12:12:109 elsewhere.

12:12:110 What's important is if you look at --
12:12:111 and this is what he was relying on -- DEQ's CHIA,
12:12:112 DEQ said, if you can see this, that the seeps
12:12:203 originate from local overburden units, and that's
12:12:214 a question of local water table.

12:12:215 And Mr. Anderson said the water table is
12:12:216 kind of what's localized to that area, and that's
12:12:317 really important information, because as we
12:12:318 pointed out in our presentation, DEQ's own expert
12:12:319 said, "There's a water table here." And Mr.
12:12:420 Yemington would admit there's a water table here,
12:12:421 but their position was it's perched, it's a
12:12:422 perched water table so it doesn't count as a local
12:12:423 water table.

12:12:524 Mr. Anderson said, "It's a local water
12:12:525 table because it's specific to this location.

12:12:541 Local means specific, rather than broad regional."
12:12:572 And that's what he said. So we weren't flying
12:13:023 blind on this. The Board should look at that
12:13:054 deposition testimony because he said both --

12:13:085 BOARD MEMBER PAYNE: Isn't really the
12:13:126 term "overburden groundwater," isn't that really,
12:13:157 what they're really saying is it's a perched
12:13:188 groundwater? You know, the overburden meaning if
12:13:209 you have a slight stream channel, but the amount
12:13:210 that's above the bottom of the channel is the
12:13:211 overburden, and there's some groundwater in there.
12:13:212 But is that what they're saying? The seeps are
12:13:313 coming from that.

12:13:314 MR. HERNANDEZ: The statement -- a
12:13:315 couple things, and this I think shows how
12:13:316 complicated this issue is. This is a really
12:13:417 complicated case, and I really, really appreciate
12:13:418 your digging into it, Member Payne.

12:13:419 DEQ acknowledges what local -- it says,
12:13:520 it provides a definition for the local water table
12:13:521 in the CHIA on Page 34, and it says it's
12:13:522 overburden groundwater.

12:13:523 Now, overburden is a technical mining
12:13:524 term. That Chairman Simpson knows. It's
12:14:025 basically all the stuff above the coal. That's

12:14:041 the overburden. And the CHIA says it's alluvial
12:14:082 water in overburden groundwater, where, not
12:14:113 confined, which just means that it's open to the
12:14:134 atmosphere. That's the local water table.

12:14:165 And they say on the page that we cited
12:14:186 that this water feeding these seeps is overburden
12:14:207 groundwater local to this area. The other really
12:14:268 important thing is that the CHIA itself, this
12:14:299 perched idea, the CHIA itself says that overburden
12:14:310 groundwater is often perched.

12:14:311 Now, that's really important, because it
12:14:312 says overburden groundwater is perched, and it
12:14:413 says overburden groundwater is the local water
12:14:414 table. So definitely there was a strong basis for
12:14:415 us thinking that overburden groundwater in this
12:14:506 local unit that DEQ acknowledges is a water table
12:14:517 is the local water table.

12:14:518 And what's on the other side? The other
12:14:519 side is DEQ said, "We don't know what the local
12:15:020 water table is. We have never seen a good
12:15:021 definition. It's not a scientific term. We don't
12:15:022 know."

12:15:023 So in the face of this ambiguity, we
12:15:024 weren't making stuff up, we weren't trying to
12:15:125 harass Westmoreland. It was a tough question.

12:15:141 And we came back to this point, and this I think I
12:15:162 really want to drive home.

12:15:183 The definition of ephemeral stream,
12:15:214 intermittent stream is a little complicated,
12:15:225 because local water table is not clear. Ephemeral
12:15:256 stream says no groundwater contribution, no
12:15:297 groundwater. Now, that's ARM 17.24.301, sub (19)
12:15:368 or (39). So like that's the detail. I've looked
12:15:399 at this a bazillion times. And it says, "An
12:15:310 ephemeral stream can never --" never -- "receive
12:15:411 flow from groundwater."

12:15:412 And so looking at these definitions, and
12:15:413 looking at what DEQ said in the CHIA, we've got
12:15:514 seeps there, and elsewhere in the record even
12:15:515 Westmoreland's own expert said, "Water from these
12:15:516 seeps flows down this channel." And so we said --
12:15:517 and that's why our petition said this, that it
12:16:018 can't be ephemeral, because we've got groundwater
12:16:019 there flowing in a channel from seeps.

12:16:120 So then there's a question was there a
12:16:121 stream or not a stream. Well, the CHIA says there
12:16:122 was a stream.

12:16:123 So what I want to say is I'm happy to
12:16:124 talk about this until Christmas, because we spent
12:16:225 a lot of time in good faith digging into this,

12:16:251 asking their experts, talking to our experts.
12:16:272 This wasn't made up a claim. It wasn't intended
12:16:303 to harass anyone. And where we ended is just
12:16:344 where you pointed out, that this was a legal claim
12:16:365 that DEQ didn't look at the right factors.

12:16:386 BOARD MEMBER PAYNE: I've got one more
12:16:397 question.

12:16:408 CHAIR SIMPSON: If I could interject
12:16:419 here for just a moment, please. We have a Board
12:16:410 member who needs to leave at one. And also I
12:16:511 think maybe I can shed a bit of light on this
12:16:512 question of local perched water tables and so on
12:16:513 when we get a little further along. But if we
12:16:514 could try to move thing along here, please, so
12:16:515 that we can have some Board deliberation and
12:17:016 finish before one.

12:17:107 COURT REPORTER: This is Laurie. I
12:17:108 really need to take a break. Could we take five
12:17:109 minutes?

12:17:120 CHAIR SIMPSON: Certainly.

12:17:121 (Recess taken)

12:21:422 CHAIR SIMPSON: It appears at least as
12:22:423 far as I can tell most of us are here. So if we
12:22:524 could reconvene the meeting, please. Sandy, would
12:22:525 you take the roll, please.

12:22:541 MS. MOISEY-SCHERER: Chairman Simpson.

12:22:562 CHAIR SIMPSON: Here.

12:22:563 MS. MOISEY-SCHERER: Board Member

12:22:574 Altemus.

12:22:585 BOARD MEMBER ALTEMUS: Here.

12:22:596 MS. MOISEY-SCHERER: Board Member Payne.

12:23:007 BOARD MEMBER PAYNE: Here.

12:23:018 MS. MOISEY-SCHERER: Board Member

12:23:029 Rankosky.

12:23:020 BOARD MEMBER RANKOSKY: Here.

12:23:011 MS. MOISEY-SCHERER: Board Member Smith.

12:23:012 BOARD MEMBER SMITH: Here.

12:23:013 MS. MOISEY SCHERER: We do have a

12:23:014 quorum. Also Board Member Payne has his hand up,

12:23:115 as does Shiloh Hernandez.

12:23:116 CHAIR SIMPSON: Thank you, and thank

12:23:117 you, everyone. Mr. Payne, as I said earlier, we

12:23:118 need to move this along a little bit, but please

12:23:219 proceed.

12:23:220 BOARD MEMBER PAYNE: I just have one

12:23:221 more question for Mr. Hernandez, and hopefully he

12:23:222 can answer it in a hundred words or less.

12:23:323 As I understand, your clients did not

12:23:324 appeal their denial of the summary judgment as to

12:23:425 Claim 2. Could you just explain, or share with us

12:23:451 why you didn't, why you decided not to do that.

12:23:482 MR. HERNANDEZ: Yes. The Petitioners
12:23:503 found their other two claims to be their strongest
12:23:544 claims that they sought to appeal on. That was
12:23:585 twenty words.

12:24:006 The point that you asked earlier about
12:24:017 well logs and the local water table, in Mr.
12:24:048 Anderson's deposition, he talks about what the
12:24:079 local water table is on Pages 131 and 132. He
12:24:110 says, "The local water table is just the
12:24:111 shallowest groundwater which is here."

12:24:112 He talks about well logs on Page 134 and
12:24:113 says he looked at well logs. And the CHIA on Page
12:24:214 37 says, "Perched groundwater in the overburden.
12:24:215 Most of the water in the overburden is perched, so
12:24:216 the overburden is the local water table, and most
12:24:217 of it's perched." That's what the CHIA says on
12:24:318 Page 37.

12:24:319 Finally point, local water table, Mr.
12:24:320 Anderson says what's feeding the seeps is the
12:24:321 local water table in his disclosure, which is
12:24:422 Docket 43-14 at Page 5.

12:24:423 CHAIR SIMPSON: Thank you. Mr.
12:24:524 Yemington.

12:25:025 MR. YEMINGTON: Just briefly. I think

12:25:021 it warrants a short response. I think what we
12:25:032 just heard from Conservation Groups illustrates
12:25:053 the fundamental danger of divorcing our
12:25:094 conversation from the Board's decisions and the
12:25:115 Hearing Examiner's orders.

12:25:136 What we did is an entire relitigation of
12:25:167 the case. We spent years litigating this case
12:25:218 through the MAPA process to reach the final
12:25:239 decision. They had an opportunity to present
12:25:210 their case the entire time, and based on the
12:25:211 evidence, based on the pleadings, and based on the
12:25:312 argument of Counsel, Hearing Examiner Cameron
12:25:313 reached certain proposed factual findings,
12:25:314 including regarding the nature of their claim,
12:25:315 based on the information they put in front of him.

12:25:416 That's where we're at. And so I caution
12:25:417 the Board that reopening the administrative
12:25:418 record, rereading depositions, trying to
12:25:519 understand better what was said and done, that
12:25:520 ship has sailed, and it's a dangerous route to go.

12:25:521 And beyond that, it makes it impossible
12:25:522 for clients like mine to hold these folks to
12:26:023 account. This is like the expression of nailing
12:26:024 jelly to a wall. It's impossible.

12:26:025 We know what Hearing Examiner Cameron

12:26:101 said with respect to their claims. We can look at
12:26:152 the Board's order with respect to understanding
12:26:183 how they carried on and made mistakes during this
12:26:214 prosecution, committed discovery abuse, and did
12:26:245 and said things that were false, but it's a
12:26:266 dangerous prospect to ignore the Board's order,
12:26:297 and to again relitigate this case.

12:26:348 One final note. To your last question,
12:26:369 Board Member Payne, why they chose not to appeal
12:26:390 this. We know why they chose not to appeal it.
12:26:411 They said that in their extensions briefing. They
12:26:442 charged my client in a written filing to the Board
12:26:473 with obliterating this stream reach. They said
12:26:514 they were not going to pursue the claim, and that
12:26:545 they were going to dismiss it voluntarily, after
12:26:576 the issuance of the merits decision, because we
12:26:607 had destroyed, obliterated, this stream reach.

12:27:018 That was their language. It was a false
12:27:049 -- it was a false accusation, and Mr. Hernandez
12:27:080 had to apologize on the record for saying that,
12:27:111 but it was the fundamental basis for which they at
12:27:142 least purported to the Board their reason for not
12:27:173 appealing this.

12:27:224 So I would -- Again, this is in the
12:27:255 record. This happened. But this idea that they

12:27:281 looked back at this and decided that, "Oh, I guess
12:27:302 it is just not that strong of a claim" is
12:27:333 nonsense. I think they recognized it wasn't a
12:27:364 strong claim, and I think they recognized early on
12:27:385 in the process that it wasn't, but this idea that
12:27:406 they decided not to pursue it on appeal because of
12:27:427 that is not true.

12:27:438 They told the Board in a false statement
12:27:469 that they weren't doing it because they said that
12:27:470 we obliterated the stream reach, and rendered
12:27:501 their claim moot. That is the truth. Thank you.

12:27:512 CHAIR SIMPSON: Thank you, Mr.
12:27:513 Yemington. Mr. Hernandez, I see you have your
12:27:514 hand up. Please keep it brief. We've been going
12:28:015 around and around on this for quite a long time,
12:28:016 and we need to move on.

12:28:017 MR. HERNANDEZ: Mr. Yemington is just
12:28:218 not being consistent with respect to the record.
12:28:219 He says the Board can't look at deposition
12:28:220 testimony, but he just showed you five minutes of
12:28:221 deposition testimony. In fact, deposition
12:28:322 testimony is the heart of his claim. So there
12:28:323 clearly is a basis for the Board to look at
12:28:324 everything. Thank you.

12:28:325 CHAIR SIMPSON: Thank you. Further

12:28:401 questions from the Board for Counsel.

12:28:512 (No response)

12:28:513 CHAIR SIMPSON: I'd like to take few
12:28:544 minutes and talk a little bit about some of the
12:28:575 concepts we've been talking about here, such as
12:29:016 specifically perched water tables, and wetlands,
12:29:067 and seeps, and so on.

12:29:088 Mr. Yemington, you showed us some photos
12:29:119 here a little while ago. Could you put -- I think
12:29:110 it was the first one you showed. If you could put
12:29:111 that on the screen, please.

12:29:212 MR. YEMINGTON: Certainly. Give me one
12:29:213 moment. Are you able to see that photograph,
12:29:314 Chair Simpson?

12:29:415 CHAIR SIMPSON: Yes. That's not the one
12:29:416 I had in mind. Do you have one looking up,
12:29:417 upgradient?

12:29:418 MR. YEMINGTON: Just tell me when to
12:29:419 stop.

12:29:520 (Showing photographs)

12:29:521 CHAIR SIMPSON: That one. Here we're
12:30:022 looking upgradient from the site that's at issue
12:30:023 here. As you can see, the ridge top is not too
12:30:024 far away. We're in the upper reaches of this
12:30:125 drainage system.

12:30:121 In the Sarpy Creek/Colstrip area -- and
12:30:152 I spent most of my career at Sarpy Creek -- but
12:30:163 the geologic conditions at Colstrip are very
12:30:204 similar. In fact, it's the same primary coal seam
12:30:225 that's being mined.

12:30:246 In the overburden column, there are
12:30:317 stringers -- let me back up. The primary geology
12:30:348 is sandstone and siltstone which is fairly
12:30:379 permeable, that is, translates to fairly permeable
12:30:410 soils. But there are stringers occasionally,
12:30:411 localized stringers of clay and mudstone.

12:30:512 And what happens in a case of years with
12:30:513 heavy precipitation is -- and particularly heavy
12:31:014 snow melt -- is that there's some percolation down
12:31:015 through the soils, and the water encounters these
12:31:116 less permeable layers, and then moves
12:31:117 horizontally. And that's where we see formation
12:31:118 of wet weather seeps. They can show up some
12:31:219 years, not others. Typically there's a pretty
12:31:220 good indication if it's -- by the vegetation as to
12:31:321 how consistent it is.

12:31:322 But in this case, it appears that --
12:31:323 we're not too far from, as I said, not too far
12:31:424 from the ridge line here. But a perched water
12:31:425 table is created whenever you have accumulation of

12:31:471 water above one of these less permeable stringers
12:31:512 in the sedimentary formation.

12:31:553 It will move toward, either with the
12:32:004 structure or to a point where it intersects the
12:32:045 surface, and because that less permeable material
12:32:106 is also the source of the localized soils, you'll
12:32:157 get a wet spot at the surface, typically a small
12:32:208 wetland.

12:32:209 So what's happening is that the water is
12:32:210 coming out of the bedrock, and into the stream
12:32:211 bottom, and creating this temporary wetland, but
12:32:312 -- So what you have with the downward movement of
12:32:313 water is that, yes, yes, there is a perched water
12:32:414 table in the overburden, but the water is forced
12:32:415 to the surface by the less permeable material, and
12:32:416 the water then flows downhill from there.

12:32:517 So the water is not, as it sits on the
12:32:518 surface, it's not necessarily intersecting the
12:32:519 water table. What's happening is it's coming to
12:33:020 the surface, moving downgradient, and what happens
12:33:021 typically is that after a short distance, the
12:33:122 water either evaporates, or a combination of
12:33:123 evaporation and seeping into the materials into
12:33:224 the soils.

12:33:225 And as you move further on downstream,

12:33:251 because the water is moving away from the clay
12:33:292 materials that form the surface where it came out,
12:33:323 then it tends to seep back into the drainage
12:33:364 bottom.

12:33:375 So I think we're getting kind of wrapped
12:33:436 around the axle on what constitutes a water table.
12:33:477 It's hard for me to envision a water table and a
12:33:508 stream bottom without an alluvium deposit. As you
12:33:559 can see here, look upstream, you can see that
12:33:570 there's kind of a head cut or a gully created
12:34:011 there. This is an erosional situation that we
12:34:012 have in the upper reaches.

12:34:013 As you move further down the drainage
12:34:014 bottom, you reach a point where the gradient
12:34:115 becomes less, and those materials will start to
12:34:116 accumulate, and eventually form what essentially
12:34:117 amounts to a stream laden deposit of alluvium.
12:34:218 That's where you expect to see a water table form.

12:34:219 I don't know if that provides any
12:34:220 enlightenment or not, but these seeps are fairly
12:34:321 common in that area. They don't appear every
12:34:322 year. They depend a lot on what the precipitation
12:34:323 patterns have been.

12:34:324 In most cases where there's a consistent
12:34:425 flow of water, ranchers being as resourceful as

12:34:461 they are, will have created some sort of a
12:34:492 watering facility for livestock. I don't know if
12:34:513 there's one at this site or not. I don't see one
12:34:544 in any of the photographs, but there may be, at
12:34:575 least to catch water when it's available.

12:35:036 So I don't know if that's of any help or
12:35:047 not. But I guess the other thing I'd like to
12:35:108 point out is that we are close to the ridge top
12:35:149 here, and just as a matter of common sense,
12:35:210 asserting that there is an intermittent stream
12:35:211 which is in contact with an underlying water table
12:35:312 at these kinds of elevations is not, it's just not
12:35:413 logical.

12:35:414 As you go further down the drainage and
12:35:415 accumulate some alluvium, yes, there is a
12:35:516 transition zone, but in these upper reaches, it's
12:35:517 pretty much limited to a small wetland area that
12:35:518 eventually dissipates within a short distance.

12:36:019 Any further questions, comments?

12:36:120 (No response)

12:36:121 CHAIR SIMPSON: I think we're ready to
12:36:122 move forward. Dana, could I ask you a question,
12:36:223 please.

12:36:224 MS. HUPP: Certainly.

12:36:225 CHAIR SIMPSON: In your memo where you

12:36:321 gave us this decision tree, you say, "Under this
12:36:412 heading Westmoreland must prove all of the
12:36:443 following: No. 1, that Westmoreland made a
12:36:474 substantial contribution to the issuance of the
12:36:495 Board's final order." Second is, "The
12:36:546 Conservation Groups participated in the proceeding
12:36:577 in bad faith." And third, "Conservation Groups
12:37:008 participated for the purpose of harassing or
12:37:039 embarrassing Westmoreland."

12:37:010 Should we approach those points one at a
12:37:011 time with individual motions, or would it be
12:37:112 acceptable to consider these points as one motion?

12:37:213 MS. HUPP: It would be acceptable either
12:37:214 way. It might be simplest for discussion purposes
12:37:215 to address them one a time. But either way would
12:37:416 be fine.

12:37:417 CHAIR SIMPSON: Thank you very much.

12:37:418 MS. HUPP: Chairman Simpson, if I might.
12:37:419 It may be clearer for the record if you address
12:37:520 them one at time.

12:37:521 CHAIR SIMPSON: That's what we will do.
12:38:022 Thank you, Dana. Point No. 1, we must find that
12:38:023 Westmoreland made a substantial contribution to
12:38:024 the issuance of the Board's final order. I don't
12:38:125 think there's any question about that. Is there

12:38:171 any discussion or a motion on that point?

12:38:302 BOARD MEMBER ALTEMUS: Chairman Simpson,
12:38:303 I will move that Westmoreland made a substantial
12:38:334 contribution to the Board's final decisions.

12:38:385 BOARD MEMBER SMITH: Second.

12:38:396 CHAIR SIMPSON: It's been moved and
12:38:397 seconded to affirm that Westmoreland made a
12:38:428 substantial contribution to the issuance of the
12:38:439 Board's final order. Further discussion.

12:38:410 (No response)

12:38:411 CHAIR SIMPSON: All in favor, say aye.

12:38:512 (Response)

12:38:513 CHAIR SIMPSON: Opposed.

12:38:514 (No response)

12:38:515 CHAIR SIMPSON: Thank you. Motion
12:39:016 passes. Moving forward, Conservation Groups
12:39:117 participated in the proceeding in bad faith.
12:39:118 We've got a lot, there's been a lot of discussion
12:39:209 on this point, and I guess I would entertain
12:39:220 either a motion or a further discussion, because
12:39:321 there are several Board members who really haven't
12:39:322 been involved in any of the discussions that we've
12:39:423 had thus far.

12:39:424 MS. MOISEY-SCHERER: Chairman Simpson,
12:39:425 this is Sandy. Board Member Payne has hand up.

12:39:521 CHAIR SIMPSON: I'm sorry. Thank you.

12:39:542 Allan.

12:39:553 BOARD MEMBER PAYNE: I wondered if Dana
12:39:584 could give us her understanding of the distinction
12:40:015 between elements two and three there, the bad
12:40:056 faith, and for the purpose of harassing. If
12:40:097 there's two elements, what's the difference
12:40:128 between the two?

12:40:149 CHAIR SIMPSON: Dana, I believe that
12:40:160 these are covered in other parts of the document.
12:40:181 Can you respond to that, please.

12:40:212 MS. HUPP: Sure, and I could point to my
12:40:233 memo and address it briefly if that would be
12:40:254 helpful.

12:40:275 CHAIR SIMPSON: Yes. That's what I
12:40:296 asked for.

12:40:317 MS. HUPP: Okay. Great. So this is
12:40:338 addressed on Page 7 of my memo. Board Member
12:40:359 Payne, I'm thinking back to some of your questions
12:40:380 earlier today.

12:40:421 If you look at the rule itself at 1307
12:40:442 Subsection (2), it says that, "A proceeding may be
12:40:523 assessed --" excuse me -- "if it is demonstrated
12:40:544 that a party participated in the proceeding in bad
12:41:025 faith, and for the purpose of harassing or

12:41:061 embarrassing."

12:41:082 So you asked about intent, and I think
12:41:113 the word "purpose" is helpful in answering your
12:41:164 question about that as it relates to harassing or
12:41:195 embarrassing.

12:41:226 With respect to bad faith, indicators of
12:41:247 bad faith -- and I believe both parties agree to
12:41:288 this -- include continuing litigation without
12:41:319 facts, misrepresenting facts, a lack of candor to
12:41:340 the Tribunal, and misconduct. It requires a
12:41:411 finding that the Conservation Groups' action was
12:41:442 frivolous, unreasonable, or without foundation.

12:41:513 With harassment, again, I'm going to
12:42:014 point you back to 1307 Subsection (2), because it
12:42:045 says, "For the purpose of harassing or
12:42:076 embarrassing."

12:42:117 And as you know from my memo, the word
12:42:148 "harassment" is not defined in the statute, so
12:42:219 then you can look to the plain meaning of the word
12:42:250 "harassment." In my memo I cited a case that
12:42:321 talks about harassment or harassing meaning "to
12:42:352 annoy repeatedly." So hopefully that gives you a
12:42:423 little bit of clarity on that.

12:42:454 BOARD MEMBER PAYNE: Okay.

12:42:485 CHAIR SIMPSON: Thank you, Dana.

12:42:581 BOARD MEMBER ALTEMUS: Chair Simpson,
12:42:582 I'm sorry. I'm going to have to say this. I
12:43:003 spent 23 years of my career teaching SMZ and BMP
12:43:044 law to practitioners that work around water
12:43:085 bodies, and maybe it's a matter of just not being
12:43:116 very well educated, but there was many, many
12:43:147 points in this process where I think the
12:43:178 Petitioners should have abandoned their, that
12:43:219 particular part of their petition.

12:43:210 I mean there was a lot of clear evidence
12:43:211 that it just wasn't there, so whether that means
12:43:212 that they moved forward -- I don't know about
12:43:303 harassment, but I think there were many points
12:43:314 where they should have withdrawn, and they didn't,
12:43:315 and I find it really frustrating. And maybe
12:43:316 that's just because of my career, and all the
12:43:317 times that I've been on this issue with litigants.

12:43:418 But Mr. Yemington even said that they've
12:43:419 been -- their permits have been challenged every
12:43:520 single time, and this is the first time they've
12:43:521 actually gone after damages, and that just also
12:43:522 speaks to the fact that this was over the top, and
12:43:523 I agree. I think this was over the top.

12:44:024 So it's just frustrating. I wish either
12:44:025 people need to get better educated, and maybe it's

12:44:061 the nature of law, maybe it's the nature of
12:44:102 lawsuits, trying to win your case for your client,
12:44:133 but you're just not doing the process any good
12:44:174 when you do that. Thanks.

12:44:255 CHAIR SIMPSON: Thank you, Julia. Would
12:44:296 you like to make a motion?

12:44:357 BOARD MEMBER ALTEMUS: Well, I guess I
12:44:368 would move -- I mean you can help me word this --
12:44:389 but I guess I would move that the Board would find
12:44:410 that the Petitioners acted in bad faith. I'm not
12:44:411 going to go as far as harassment. I think that
12:44:412 might be a little bit too far, but I do think they
12:44:503 acted in bad faith.

12:44:514 BOARD MEMBER RANKOSKY: I'll second.

12:44:515 CHAIR SIMPSON: It's been moved and
12:44:516 seconded to make the determination that the
12:45:017 Conservation Groups participated in the proceeding
12:45:018 in bad faith.

12:45:119 A discussion point. This determination
12:45:120 does not make a finding as to what point this
12:45:211 began, and I think it was covered certainly in
12:45:322 some detail by Mr. Yemington as to the various
12:45:323 points in the process where this may have been --
12:45:424 or this was a factor. I want to word it
12:45:425 correctly. It's Westmoreland's position that

12:45:511 these proceedings were made in bad faith. Okay.

12:45:572 Further discussion.

12:45:583 (No response)

12:46:094 CHAIR SIMPSON: Hearing none, let's move
12:46:115 forward with a vote. Let's do a roll call on this
12:46:156 one, please, Sandy.

12:46:167 MS. MOISEY-SCHERER: Chairman Simpson.

12:46:208 CHAIR SIMPSON: Aye.

12:46:229 MS. MOISEY-SCHERER: Board Member

12:46:210 Altemus.

12:46:211 BOARD MEMBER ALTEMUS: Aye.

12:46:212 MS. MOISEY-SCHERER: Board Member Payne.

12:46:213 BOARD MEMBER PAYNE: Nay.

12:46:314 MS. MOISEY-SCHERER: Board member

12:46:315 Rankosky.

12:46:316 BOARD MEMBER RANKOSKY: Aye.

12:46:317 BOARD MEMBER SMITH: Aye.

12:46:418 CHAIR SIMPSON: The vote is four to one.

12:46:419 Motion carries.

12:46:520 The third bullet point, we need to make

12:46:521 a determination or an affirmation that the

12:47:022 Conservation Groups participated for the purpose

12:47:023 of harassing or embarrassing Westmoreland or DEQ.

12:47:124 Discussion on that point?

12:47:325 BOARD MEMBER ALTEMUS: So Mr. Chair,

12:47:351 again, I'm not sure that I find -- and maybe I
12:47:382 could be wrong -- but I'm not sure that I find
12:47:403 evidence of harassment. That's a pretty tough
12:47:434 high bar, I think. So I think I would have a hard
12:47:475 time going there.

12:47:516 CHAIR SIMPSON: From my standpoint,
12:47:577 accusing Westmoreland of spoliation for when they
12:48:038 went in and did their excavation, when they were
12:48:099 only following their mining and reclamation plan,
12:48:110 I think is probably the best example of what I
12:48:111 would consider harassing or embarrassing.

12:48:212 BOARD MEMBER ALTEMUS: Thank you. I
12:48:213 stand corrected. I forgot about that one. Thank
12:48:214 you.

12:48:215 CHAIR SIMPSON: So that point in
12:48:216 particular. There are others where one could
12:48:307 argue that they constitute harassment or
12:48:318 embarrassing Westmoreland, but that one in my mind
12:48:319 clearly does, and so I plan to vote in the
12:48:420 affirmative on this one. Further discussion.

12:48:521 (No response)

12:48:522 CHAIR SIMPSON: Hearing none, let's
12:49:023 proceed with a vote. Once again, roll call,
12:49:024 please, Sandy.

12:49:025 MS. MOISEY-SCHERER: Chairman Simpson.

12:49:111

CHAIR SIMPSON: Aye.

12:49:122

MS. MOISEY-SCHERER: Board Member

12:49:133

Altemus.

12:49:144

CHAIR SIMPSON: Let me back up. Do we

12:49:155

have a -- we don't have a motion, do we?

12:49:206

BOARD MEMBER ALTEMUS: We don't have

12:49:217

motion. I was just going to say that.

12:49:238

CHAIR SIMPSON: I'm sorry. I got ahead

12:49:249

of myself. Would anyone like to make a motion?

12:49:210

BOARD MEMBER ALTEMUS: Since I recanted,

12:49:311

I guess I'll go ahead since nobody is stepping in,

12:49:312

but I would move that the Board find in

12:49:413

Westmoreland's favor that the Plaintiffs were

12:49:414

acting in a harassing and -- what was the other

12:49:415

word -- manner.

12:49:516

CHAIR SIMPSON: Embarrassing.

12:49:517

BOARD MEMBER ALTEMUS: Embarrassing.

12:49:518

Thank you. Embarrassing manner. Thank you.

12:49:519

CHAIR SIMPSON: Is there a second?

12:50:120

BOARD MEMBER SMITH: I'll second it.

12:50:121

CHAIR SIMPSON: It's been moved and

12:50:122

seconded to affirm that the Conservation Groups

12:50:223

participated for the purpose of harassing or

12:50:224

embarrassing Westmoreland. Roll call vote,

12:50:225

please.

12:50:291 MS. MOISEY-SCHERER: Chairman Simpson.

12:50:302 CHAIR SIMPSON: Aye.

12:50:313 MS. MOISEY-SCHERER: Board Member

12:50:334 Altemus.

12:50:335 BOARD MEMBER ALTEMUS: Aye.

12:50:346 MS. MOISEY-SCHERER: Board Member Payne.

12:50:367 BOARD MEMBER PAYNE: Nay.

12:50:388 MS. MOISEY-SCHERER: Board Member

12:50:399 Rankosky.

12:50:400 BOARD MEMBER RANKOSKY: Aye.

12:50:411 MR. MOISEY: SCHERER: Board Member

12:50:412 Smith.

12:50:413 BOARD MEMBER SMITH: Aye.

12:50:414 CHAIR SIMPSON: Vote -- I think I got

12:50:515 this right -- four to one, four in favor, one

12:50:516 opposed; is that correct, Sandy?

12:51:017 MS. MOISEY-SCHERER: Yes, sir.

12:51:018 CHAIR SIMPSON: Thank you. Motion

12:51:019 carries. Thank you, everyone.

12:51:020 (The proceedings were concluded

12:51:021 at 12:52 p.m.)

12:51:022 * * * * *

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C E R T I F I C A T E

12:51:121

12:51:122

STATE OF MONTANA)

12:51:123

: SS.

12:51:124

COUNTY OF LEWIS & CLARK)

12:51:125

I, LAURIE CRUTCHER, RPR, Court Reporter,

12:51:126

Notary Public in and for the County of Lewis &

12:51:127

Clark, State of Montana, do hereby certify:

12:51:128

That the proceedings were taken before me at

12:51:129

the time and place herein named; that the

12:51:120

proceedings were reported by me in shorthand and

12:51:121

transcribed using computer-aided transcription,

12:51:122

and that the foregoing -148- pages contain a true

12:51:123

record of the proceedings to the best of my

12:51:124

ability.

12:51:125

IN WITNESS WHEREOF, I have hereunto set my

12:51:126

hand and affixed my notarial seal this 28th day of

12:51:127

May, 2026.

18

Laurie Crutcher

12:51:129

12:51:120

LAURIE CRUTCHER, RPR

12:51:121

Court Reporter - Notary Public

12:51:122

My commission expires

12:51:123

March 9, 2028.

24

25

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