

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the Matter of: Notice of
Appeal and Request for Hearing
Rosebud Mine Area B Amendment 5
Permit No. C1984003B

Case No.
BER 2022-05 SM

TRANSCRIPT OF THE PROCEEDINGS - MOTIONS HEARING
(VIA ZOOM)

October 2, 2026
9:00 a.m.

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

REPORTED BY: CHERYL ROMSA
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PERSONS PRESENT:

Board Attorney Present:

Dana Hupp, Board Counsel

DEQ Personnel Present:

Board Secretary: Sandy Moisey Scherer

Board Liaison: Deputy Director James Fehr

DEQ Legal: Loryn Johnson and Abigail Sherwood

DEQ Communications: Mae Vader

Other Parties Present:

Matthew Dolphay, Andrea Grave, and Samuel Yemington -
Holland & Hart

Tyler Stockton - Boone Karlberg

Todd Briggs - Westmoreland

Shiloh Hernandez and Lars Phillips - Earthjustice

A P P E A R A N C E S

ON BEHALF OF MONTANA ENVIRONMENTAL INFORMATION CENTER
and SIERRA CLUB:

Tyler M. Stockton
Boone Karlberg P.C.
201 West Main Street, Suite 300
Missoula, Montana 59807-9199

ON BEHALF OF WESTMORELAND ROSEBUD MINING, LLC, and
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400:

Samuel R. Yemington
Holland & Hart LLP
505 Ninth Street NW, Suite 700
Washington, DC 20004

1 WHEREUPON, the proceedings were had as follows:

2 CHAIR SIMPSON: We'll bring the meeting to order.

3 This is a special meeting of the Board of Environmental
4 Review to consider motions in limine in our Rosebud Mine
5 Amendment 5 case.

6 A couple of things. First of all, as always, we need
7 to -- I'm required to remind participants that, that
8 government employees are prohibited from using AI tools in
9 conjunction with state meetings. I don't have the
10 language on my -- specific language on my agenda, but
11 that's the gist of it.

12 Second is we are on a very tight time frame this
13 morning. We have members who are going to have to leave
14 us. So we are going to attempt to complete this meeting
15 by 10:15, which means we're going to have to move pretty
16 quickly. I'd ask the participants to pay special
17 attention to the time limitations that are prescribed for
18 arguments.

19 So first, would you take the roll, please, Sandy.

20 MS. MOISEY SCHERER: Yes, sir.

21 Chair Simpson.

22 CHAIR SIMPSON: Here.

23 MS. MOISEY SCHERER: Vice Chair Aguirre.

24 She indicated she would not be present, but I thought
25 I would just announce.

1 Board Member Altemus.

2 BOARD MEMBER ALTEMUS: Here.

3 MS. MOISEY SCHERER: Board Member Payne.

4 BOARD MEMBER PAYNE: Here.

5 MS. MOISEY SCHERER: Board Member Rankosky.

6 BOARD MEMBER RANKOSKY: Here.

7 MS. MOISEY SCHERER: Board Member Smith.

8 BOARD MEMBER SMITH: Here.

9 MS. MOISEY SCHERER: We have a quorum, sir.

10 CHAIR SIMPSON: Thank you very much, everyone.

11 Let's proceed with Item I on our agenda. We will -- In
12 the Matter of the Notice of Appeal and Request for Hearing
13 Regarding Rosebud Mine Area B Amendment 5, Permit
14 No. C1984003B, and it's Case No. BER 2022-05.

15 We have received in limine motions from both the
16 environmental groups and from Westmoreland. We'll begin
17 with the Conservation Groups' motion in limine.

18 If you would please proceed with your oral argument.

19 MR. STOCKTON: Good morning, members of the Board
20 and Chairman Simpson. My name is Tyler Stockton. I'm
21 with the law firm of Boone Karlberg in Missoula. I, along
22 with Lars Phillips and Shiloh Hernandez, are present this
23 morning.

24 When Conservation Groups received the expert
25 disclosure from Westmoreland on August 7th, it contained

1 two pieces of undisclosed evidence; first, that the mine
2 had agreed with its legal counsel as of January 1st to
3 begin paying a blended rate of \$745 an hour. Even the
4 most junior associate at Holland & Hart was billing on
5 this matter at \$745 an hour. That was new information
6 contained within the expert report of their expert on
7 August 7th.

8 And second, their expert also had been given a number
9 of months from October up until, you know, the last time
10 she was able to obtain the records before completing her
11 report, which was June or so of 2026. She had received
12 updated records, months and months of updated billing
13 records for Holland & Hart's legal work regarding this
14 case and cases before the Montana Supreme Court and the --
15 or at least the district court at that point. That
16 information had not been provided to Conservation Groups
17 up until that point. They did not know that that
18 information had been provided to the mine's expert.

19 That same day, because expert reports were
20 simultaneous, we disclosed our expert report, and that
21 expert report was limited to the evidence that we had
22 available to us, which included just westmoreland's
23 petition for attorney's fees and costs. That included the
24 hourly rates up until the time that they filed that
25 petition, and it included the billing entries up until

1 that point and which were attached to that petition.

2 Both sides disclosed on the same day, and there was no
3 option for rebuttal reports in the Board's scheduling
4 order. Westmoreland's expert report, therefore, had a
5 substantial amount of additional evidence that their
6 expert could provide disclosed opinions about that
7 Conservation Groups were denied having opportunity to have
8 their expert provide disclosed opinions about.

9 Motions in limine serve to exclude, among other
10 things, unfairly prejudicial things. Westmoreland took an
11 action, namely, providing its expert information only it
12 had so that they could have a disclosed expert opinion
13 from her. That was not an opportunity given to
14 Conservation Groups. It created what we, what we argue is
15 an uneven playing field.

16 First, Westmoreland provided something only it could
17 provide. This is not -- attorney's fees, billing records
18 are not public information. This is not something we
19 could have obtained from court filings or other places.
20 Same thing with an hourly rate. These are typically
21 things agreed to between the lawyer and the client. The
22 people in possession of that are the law firm and the
23 client. This is not something Conservation Groups could
24 have just gone out and acquired; right?

25 The scheduling order gave no opportunity for a

1 rebuttal opinion. Therefore, Conservation Groups were not
2 permitted to address the evidence Westmoreland gave its
3 own expert. And this is critically where the prejudice
4 lies. This matters because, at least in this proceeding,
5 Westmoreland has argued -- and we disagree, but
6 Westmoreland has argued that relying on undisclosed expert
7 testimony is a bad faith discovery abusive tactic. That
8 has been replete throughout the arguments in this
9 proceeding.

10 Here, Conservation Groups have been denied an
11 opportunity to have a rebuttal opinion and denied the
12 opportunity to have the same evidence considered by their
13 own expert. Westmoreland now claims that Conservation
14 Groups will be able to address this at the hearing, but,
15 once again, there is no provision in the scheduling order
16 for rebuttal or supplemental expert reports.

17 Westmoreland chose to create an uneven playing field
18 here, giving its own expert additional information, and
19 that's the issue here. It's not about the scheduling
20 order. It's not about the timing of disclosure. If
21 Westmoreland had waited until September 16th to simply
22 hand the evidence over to Conservation Groups and not
23 provided its own expert with information only it had, both
24 sides would have been on an even playing field. But
25 that's not what happened here.

1 westmoreland makes a number of arguments about case
2 law, and I can address those in my reply, but long and
3 short, we're in a little bit of an ambiguous evidentiary
4 type proceeding. We cited to case law that is analogous
5 to such a situation, federal cases that have addressed
6 similar situations, and we believe that they provide an
7 analogous remedy here. The evidence should be excluded.

8 And I reserve my three minutes for rebuttal.

9 CHAIR SIMPSON: Thank you, Mr. Stockton.
10 westmoreland, response.

11 MR. YEMINGTON: Mr. Chairman, members of the
12 Board, Samuel Yemington on behalf of westmoreland and the
13 Union. On October 16th, the Board will determine the
14 amount of fees my clients are entitled to recover as a
15 result of Conservation Groups' prosecution of a baseless
16 claim and their associated bad acts.

17 Conservation Groups ask the Board to summarily deny
18 nine months of our fees before that hearing. The Board
19 should deny the motion for three primary reasons. First,
20 westmoreland has, at all times, complied with the Board's
21 schedule and disclosure deadlines. Second, Conservation
22 Groups have suffered no prejudice whatsoever. And third,
23 the remedy Conservation Groups request would be patently
24 unfair and be a disservice to this process.

25 So first, as you know, westmoreland filed its fee

1 petition last November, and attached to the fee petition
2 were all of our billing records through September of 2025,
3 everything that was available. The fee petition expressly
4 alerted the Board and Conservation Groups of our intention
5 to seek fees for fees, the fees incurred, the fees
6 generated going after this award. We said we're going to
7 do that, and we intend to.

8 It also alerted the Board and Conservation Groups of
9 our intention to provide rolling updates on these fees as
10 they were generated. After the Board determined that
11 Conservation Groups had prosecuted Claim 2 in bad faith
12 and that Westmoreland was entitled as a matter of law to
13 an award, the parties proposed scheduling orders and
14 participated in a scheduling conference.

15 In the scheduling order proposed by Conservation
16 Groups, they did not ask for or otherwise provide a
17 deadline for any such disclosures. In fact, the only
18 indication of subsequent disclosures found in their
19 proposal was after the evidentiary hearing, where they
20 asked that the final award amount be disclosed by
21 Westmoreland at that point.

22 Westmoreland proposed that there be a deadline before
23 the hearing to update these invoices, and on June 10th,
24 the Board issued its scheduling order governing, again,
25 step two of this process. Relevant here, the scheduling

1 order required westmoreland to submit updated billing
2 records on September 16th. It's a firm deadline. It's in
3 the scheduling order. At no point did Conservation Groups
4 request an earlier production date or dispute this
5 production date.

6 Conservation Groups asked westmoreland for their
7 records in mid August, and westmoreland provided them on
8 August 20th, nearly a month before the disclosure
9 deadline. There was no compulsion to do it. We just did
10 it, no objection.

11 Notably, we provided this information to Conservation
12 Groups before either of the depositions of the expert
13 witnesses. And at the expert deposition of our witness,
14 counsel for Conservation Groups were able to inquire about
15 these invoices, rates, and hours. On September 16th --
16 again, this is the disclosure deadline date --
17 westmoreland complied with the Board's order and disclosed
18 all billing information, all records through August of
19 2026 as required. westmoreland has fully complied with
20 the Board's scheduling order and disclosure deadlines.
21 Full stop.

22 Now, number two, there's just simply no prejudice.
23 Conservation Groups received these records five days
24 before they deposed our witness. At her deposition, they
25 inquired repeatedly about these invoices, the rates, and

1 the time entries. By October 16th, the date of the
2 hearing, the date of the reasonableness hearing,
3 Conservation Groups will have had these records for almost
4 two months. Nothing prevents Judge Pinski from opining on
5 these records at the hearing. If Judge Pinski believes
6 the rates are too high or the hours are unreasonable, he
7 can testify on these points on October 16th. That is what
8 the reasonableness hearing is for.

9 Again, there is simply no prejudice to Conservation
10 Groups. We have no objection to them discussing these
11 rates from 2026 and whether or not they feel they're
12 reasonable and justifiable. That's the point of the
13 October 16th hearing.

14 And third, the remedy sought here is just patently
15 unfair. They want you to bar every time entry from
16 October '25 through June of 2026. They want to bar any
17 testimony about these entries, and they want to strike
18 parts of Ms. Laughner's expert report.

19 These fees were incurred. They were generated
20 pursuing this award. By law, these fees are recoverable
21 in full by my clients. Prohibiting Westmoreland from
22 recovering these fees would be patently unfair. It is
23 further unfair because these fees were generated largely
24 as a result of the actions taken, the litigation taken by
25 Conservation Groups. These are a lot of fees, but they're

1 fees owed to their litigation tactics and their litigation
2 choices: Filing a preliminary appeal, going to the
3 district court, going to the Supreme Court. That's what
4 these fees are about. We had to follow them there, we got
5 drug there.

6 So again, the proportionate answer is not exclusion.
7 It's to let Judge Pinski address the updated entries, just
8 as contemplated by the scheduling order, discuss the
9 rates, discuss the hours, and do so at the hearing.
10 Should the Board decide that the rates are too high or the
11 hours are unreasonable, it can adjust the award
12 accordingly. That's the point of the hearing.

13 Thank you.

14 CHAIR SIMPSON: Thank you, Mr. Yemington.

15 Rebuttal.

16 MR. STOCKTON: Just a few quick points. If
17 Westmoreland's intention was to provide rolling updates to
18 Conservation Groups of the attorney's fees or the rates,
19 those should have been done on a rolling basis. The
20 increase of the hourly rate to \$745 an hour was done on
21 January 1st of 2026, as we learned in August of 2026. The
22 same thing goes for the month-by-month fees. Again, if
23 the intention was to be done rolling, it wasn't done
24 rolling.

25 The scheduling order proposed by Conservation Groups

1 would have had this hearing consider the fees that were
2 reasonable regarding the conduct at issue, and then,
3 afterwards, an opportunity for the fees-for-fees proposals
4 and objections at the same time. The parties would have
5 been on equal playing fields. And again, even if
6 everything had gone according to the Board's scheduling
7 order, all parties would have been on equal playing
8 fields. The difference was Westmoreland decided to create
9 an opportunity so that their expert has a disclosed expert
10 opinion about these additional fees and increased hourly
11 rate.

12 Westmoreland today says Judge Pinski can, can go ahead
13 and testify about these things, even though his report
14 does not have any analysis of these things. But just a
15 while ago in this very same proceeding, undisclosed expert
16 testimony that was relied upon was a bad faith and abusive
17 litigation tactic. This flip is obvious. Here the
18 prejudice is clear. Conservation Groups were not given
19 the opportunity to disclose an expert opinion on these.
20 Westmoreland now says, oh, we won't object if Judge Pinski
21 comes in and testifies about them. But that right there
22 is a significant shift in their legal position.

23 The remedy here, lastly, is not unfair. This happens
24 typically in expert situations where an expert relies upon
25 something that wasn't provided to the other side. The

1 party is not allowed to rely on it, the party is not
2 allowed to have testimony about it, and the party is not
3 allowed to have that evidence introduced. And that's all
4 Conservation Groups ask, is that Westmoreland's own tactic
5 to give itself a disclosed expert opinion not be given
6 that opportunity.

7 Thank you.

8 CHAIR SIMPSON: Thank you, Mr. Stockton.
9 Questions from the Board.

10 Allan, did you have your hand up?

11 BOARD MEMBER PAYNE: Yeah, I did. I've got a
12 couple of questions. I'll start with Mr. Stockton.

13 I understand that you're kind of late to this party,
14 but did the Conservation Groups receive any billing
15 records for the October 25th to the June 26th time period
16 from the -- you know, from Westmoreland's attorney? I
17 mean, prior to the, the recent disclosure.

18 MR. STOCKTON: So the only thing Conservation
19 Groups received, Your Honor, and I'll let Mr. Hernandez
20 pipe up if I'm incorrect here, but I believe I'm correct,
21 is we had the petition itself, which was filed late last
22 year and contained an affidavit from Mr. Yemington; and
23 that affidavit of Mr. Yemington had attorney's fees up
24 through September 30th of 2025.

25 There was no additional supplementation until we

1 received Ms. Laughner's expert report on August 7th. And
2 in that expert report, it had two things. One, it said
3 that she had relied upon these additional fee entries from
4 October until the most recent date she had available,
5 which, if I recall right -- it's in our briefing --
6 June 30th, as well as the increased hourly rate. And so
7 they were also supposedly attached thereto.

8 we asked for them, didn't get them for almost a week.
9 So that's when we received them. We received the actual
10 records on August 20th. We received the updated billing
11 record -- or rate, I should say, on August 7th, when it
12 was disclosed inside her, her expert opinion.

13 BOARD MEMBER PAYNE: The Conservation Groups knew
14 that, that there was going to be a fee petition; correct?
15 I mean, they knew one was coming back in October.

16 MR. STOCKTON: My understanding, Mr. Payne, is
17 that the, is that the fee petition came -- I'll defer to
18 the actual file date. I believe it was November. And for
19 sure, that is when Conservation Groups knew it, it had
20 occurred. I would defer to the actual filing date of, of
21 that record.

22 BOARD MEMBER PAYNE: You know, tell me why I'm
23 wrong; it seems to me you're kind of relying a little bit
24 on the ostrich defense: well, we had no idea that they
25 were incurring fees during all this time and we never

1 bothered to ask them and then we were shocked that they
2 had been -- you know, they've been incurring attorney's
3 fees all this time.

4 You understand what I'm saying? It's like you should
5 have known -- It seems to me you should have had some idea
6 there were additional fees out there that they were going
7 to be -- I think their petition said that they were going
8 to be seeking fees for fees and whatnot. So isn't this
9 really -- why isn't this some sort of ostrich, you know,
10 stick your head in the sand and not -- you know, we didn't
11 know it was coming?

12 MR. STOCKTON: Very simply, Board Member Payne,
13 we knew fees were incurring, of course. The scheduling
14 order had a specific disclosure where we would get that
15 additional information. The difference here was giving
16 the information to their expert back in July. She
17 testified at her deposition that she received the
18 information in time for her to review it and provide a
19 disclosed expert opinion on it.

20 That's the prejudice here, Board Member Payne. It's
21 not that there was fees ongoing. We knew that we would
22 receive the updated ones. It's just we were not given the
23 opportunity to have a disclosed expert opinion regarding
24 it. And Westmoreland in this proceeding has said relying
25 on undisclosed expert testimony is bad faith litigation

1 tactics. And so fair is fair, a spade's a spade, Board
2 Member Payne. And for here, of course we knew they were
3 coming. It's the fact that their expert was given them in
4 advance to have a disclosed opinion about it. That's
5 what's at issue in our motion.

6 BOARD MEMBER PAYNE: Which kind of leads me to my
7 next question. I mean, it seems to me, you know, it's
8 sort of a litigator's dream to be able to be present, you
9 know, undisclosed expert testimony at the hearing itself
10 where the other side, you know, doesn't really know it's
11 coming. I mean, isn't that what, you know, the other side
12 has offered you here? They're saying, well, you know,
13 they can have -- they can rebut this, you know, and they
14 don't have to disclose this ahead of time.

15 I mean, I'm not sure -- Do you understand what -- It
16 seems to me that's actually a benefit to you, you know.
17 Because yeah, they don't know what's coming; our expert --
18 you know, and they have no way to rebut, you know, or
19 surrebut what we're going to say.

20 MR. STOCKTON: Board Member Payne, if that's the
21 Board's decision, then -- and we're granted an opportunity
22 to do that, then we will do so. What we were doing,
23 Board Member Payne, is sticking strictly to the Board's
24 scheduling order, which allows no rebuttal or supplemental
25 expert opinions. And because of that, we filed the motion

1 at issue to exclude what we thought was an unfair
2 advantage taken by the mine.

3 BOARD MEMBER PAYNE: All right. I have a couple
4 questions for Mr. Yemington.

5 You know, I think, you know, that there was a little
6 ambiguity here with the -- I mean, exactly what the
7 disclosures were. This is a new procedure for everybody.
8 But it seemed like you had made a commitment to have some
9 sort of rolling disclosures, and I think, you know, in my
10 mind, a nine-month gap there isn't really rolling; it's
11 clunking more than anything else.

12 MR. YEMINGTON: Sure. Let me respond to that.
13 The first is in our fee petition, we alerted everyone that
14 it was our intention to go after fees for fees. And for
15 the purposes of the award sought, we alerted both the
16 Board and Conservation Groups that the, that the amount of
17 fees that were, were indicated in the attached invoices
18 was not the full story, that there would be future
19 invoices.

20 There was no commitment to any time, date, or
21 substance of those future disclosures. It was merely
22 alerting them to the reality that the meter was still
23 running. Now, after the entitlement decision -- that's
24 the decision in May that said that we're entitled to a fee
25 award. There's no purpose of us disclosing additional

1 fees before that entitlement decision is made. Because if
2 the Board had ruled otherwise, the process would have
3 ended.

4 We proposed a scheduling order in the weeks following
5 that decision to the Board, we also jointly proposed it to
6 Conservation Groups that set forth disclosure deadlines
7 for updating those invoices. That was our proposal. We
8 submitted that to the Board, the Board considered it, and
9 the Board adopted that in their scheduling order. It's
10 all that we can do. And that deadline adopted by the
11 Board was September 16th. If I recall, the deadline that
12 we proposed was actually earlier.

13 Ultimately, we complied with that deadline. But
14 beyond that, we offered these, we gave these invoices to
15 these folks more than a month before that. No compulsion.
16 No obligation under the order. But we did it. We have no
17 objection, just as we have no objection to them
18 testifying -- having Judge Pinski tell us that \$745 is too
19 big a number. It doesn't matter to us. He can make
20 those, make those testimony, he can make those statements
21 at the hearing. That's the point of the hearing. And so
22 the idea that we had some sort of legal compulsion or that
23 we acted outside of the agreed-upon structure is just
24 nonsensical.

25 And to your point about Conservation Groups playing

1 the part of the ostrich here, I think that's spot on. Of
2 course rates go up every year. We have negotiated rates
3 with our clients. As you know as an attorney, often those
4 rates go up at the beginning of a calendar year. Ours, if
5 you look at the invoices that were disclosed last
6 November, clearly indicate every two years for this
7 particular client, my rate goes up. So anyone with a
8 background in law and a basic understanding of numbers
9 could have ascertained that from what was disclosed.

10 And so the idea that this came out of left field and
11 Mr. Stockton and his clients were totally surprised
12 because our rate went up at the beginning of the year is
13 totally nonsensical. And it's a red herring. It's just
14 an effort to avoid accountability for what they've done
15 throughout this process and the fees that they've forced
16 my client to generate. Full stop.

17 BOARD MEMBER PAYNE: You know, what's your
18 response to Mr. Stockton's argument that, that you're
19 really doing here what you have claimed was in bad faith
20 with respect to, you know, the non-disclosed, you know,
21 expert opinions?

22 MR. YEMINGTON: Yeah, absolutely. Great
23 question, and I'm glad you brought it up. They're
24 entirely different, and they're different for this point:

25 During the contested case, both sides disclosed

1 experts and expert reports. We went, then, through
2 discovery, written discovery and depositions. After that
3 process had concluded, after discovery had closed, a month
4 later on summary judgment -- they filed for summary
5 judgment in support of claim 2. They offered the
6 declaration from their expert that included, in the
7 hearing examiner's words, new evidence and analysis that
8 was not disclosed in discovery, significant evidence and
9 analysis that was not disclosed in discovery. That's why
10 they got in trouble. That's why that declaration was
11 struck and they were sanctioned for the discovery abuse.

12 That's different from this situation for one primary
13 reason: There's no discovery here. There's no discovery
14 opportunity, and there's no discovery obligations with
15 respect to our fee petition. There is no written
16 discovery. No party proposed it, and the Board didn't
17 order it. There's no opening of a discovery window or
18 closing of a discovery window wherein an expert would be
19 required or a party would be required to disclose the
20 evidence they intend to rely on at the hearing.

21 So that's the fundamental difference. We've disclosed
22 our expert opinions in accordance with the Board's
23 scheduling order. We've disclosed our invoices in
24 accordance with and actually before the deadline ordered
25 by the Board. That's entirely different than the

1 situation in the contested case where they flipped their
2 claim after it was defeated during discovery. They kept
3 pushing the frivolous claim, and, to do so, they offered
4 new evidence and analysis through their expert that the
5 hearing examiner struck as improper and sanctioned them
6 for discovery abuse, because that's what it was. There's
7 no discovery here. It's totally inapplicable.

8 BOARD MEMBER PAYNE: And as I understand, if the
9 Board decided to, to have a remedy less than exclusion
10 but, but allowed Judge Pinski to opine, you know, submit
11 testimony, undisclosed expert testimony as to the, the
12 rate and the amount of work done between October and June,
13 your clients have no objection.

14 MR. YEMINGTON: We have no objection. And quite
15 honestly, I agree with your position that withholding
16 those -- that opinion until the hearing benefits
17 Conservation Groups. If they want to put it in writing
18 and give it to us before then, fine; we don't care. It
19 makes no difference to us. If they want to hold those
20 parts close to their vest until the hearing on the 16th
21 and then tell us why \$745 is not a good number or why
22 those hours shouldn't have been billed, fine.

23 we have tried, throughout this process, to move
24 forward with reasonable haste and to limit the burdens on
25 the parties and the Board with respect to this process.

1 we continue to do that. The other side has spent
2 unbelievable time and resources trying to derail and
3 obstruct this process. We don't care. If they want to
4 disclose those in writing right now, go for it. If you
5 want to hold it until the hearing, fine. We don't care.

6 We want to get to the hearing and get past this final
7 step. This is taking too much time and too much effort,
8 and it is all resulting, as I noted before, because of
9 their litigation tactics, their appeal, and them
10 frustrating this process. We want to reach the finish
11 line. Full stop.

12 BOARD MEMBER PAYNE: Okay. I don't have any
13 other questions.

14 CHAIR SIMPSON: Thank you, Mr. Yemington, Allan.
15 Anybody else? Any other questions from the Board?

16 (No response.)

17 CHAIR SIMPSON: I don't see anybody raising their
18 hands. Is there a motion?

19 BOARD MEMBER PAYNE: Just to get the discussion
20 going, I'd make a motion that the Board grant in part and
21 deny in part the motion in limine; deny it with respect to
22 exclusion, but grant it with respect to a remedy that I
23 think is a fair remedy here, that would allow Judge Pinski
24 to opine on -- to basically give a rebuttal with respect
25 to the, the hours and the rates, you know, the hours that

1 are in October to June and the new rate, whether it's
2 reasonable or not, without having disclosed that prior to
3 the hearing -- or prior to his testimony.

4 CHAIR SIMPSON: Is there a second?

5 BOARD MEMBER RANKOSKY: I'll second.

6 CHAIR SIMPSON: It's been moved and seconded to
7 grant in part and deny in part, according to -- I'm not
8 sure I can repeat the, I'm not sure I can repeat the
9 motion.

10 Allan, I would ask if you could, for the purpose of
11 the record, give us a one or two-sentence summary of the
12 motion.

13 BOARD MEMBER PAYNE: I guess my motion would be
14 to deny the motion in limine -- or excuse me. My motion
15 to the Board here would be, one, to deny the motion in
16 limine but grant to the Conservation Groups the right to
17 present undisclosed rebuttal expert testimony with respect
18 to the October 25 to June 26 hours disclosed and with
19 respect to the increased rate from January of this year.

20 CHAIR SIMPSON: Thank you, Allan.

21 Discussion. This motion has been made and seconded.

22 (No response.)

23 CHAIR SIMPSON: Any discussion from the Board?

24 BOARD MEMBER ALTEMUS: Mr. Chair, this is Julia.
25 Mr. Payne, I guess I'm a little confused, so just for

1 clarification, could you maybe further expound on your
2 reasoning for the denial of the motion in limine? I'm not
3 sure I'm following why.

4 BOARD MEMBER PAYNE: First off, you know, I think
5 that the rules for all the various disclosures were a
6 little bit ambiguous. There was a schedule. I think,
7 I think Mr. Yemington's client, you know, they complied
8 with the schedule they had. I think maybe the schedule,
9 in hindsight, was maybe a little bit unfair because it
10 allowed this sort of late disclosure of this.

11 I mean, they gave it to their expert, their expert to
12 give it, but they weren't necessarily required to disclose
13 it. So I think it is, it's -- so I think they followed
14 the rules that they were given, but I think that has --
15 that's put the Conservation Groups in a little unfair
16 position as well.

17 And I'm trying to find a good middle ground here
18 that -- you know, as a former litigator myself, I would
19 have enjoyed the ability to come to surprise people with
20 an expert witness at the hearing itself, you know. I
21 mean, particularly when you're the last word on it. I
22 think that's, I think that's, that's a reasonable
23 compromise here without prejudicing, really, either party.

24 BOARD MEMBER ALTEMUS: Was it, was it the
25 scheduling order -- Didn't the Board set that? I thought

1 we set the scheduling order, so that's why I'm confused.

2 BOARD MEMBER PAYNE: Yeah, it did. In hindsight,
3 maybe we could have had a better scheduling order and a
4 little bit more clearer on those issues. I mean, I
5 think --

6 BOARD MEMBER ALTEMUS: well, we did set the
7 scheduling order, so yes, maybe in hindsight, but, you
8 know, that was the scheduling order. Thank you for, thank
9 you for your explanation.

10 CHAIR SIMPSON: Further discussion.

11 (No response.)

12 CHAIR SIMPSON: I guess I would comment that as
13 far as in limine motions go, just as a general principle,
14 I'm very reluctant to exclude relevant information, and I
15 think we've gotten some guidance in the past from the
16 Supreme Court on that, so -- Anyway, I think Allan's
17 proposal is a good one and I'll support the motion.

18 Are we ready for the vote?

19 (No response.)

20 CHAIR SIMPSON: Sandy, would you, would you make
21 a roll call vote, please.

22 MS. MOISEY SCHERER: Yes, sir.

23 Chair Simpson.

24 CHAIR SIMPSON: Aye.

25 MS. MOISEY SCHERER: Board Member Altemus.

1 BOARD MEMBER ALTEMUS: No. Nay.

2 MS. MOISEY SCHERER: Board Member Payne.

3 BOARD MEMBER PAYNE: Yes.

4 MS. MOISEY SCHERER: Board Member Rankosky.

5 BOARD MEMBER RANKOSKY: Yes.

6 MS. MOISEY SCHERER: Board Member Smith.

7 BOARD MEMBER SMITH: Aye.

8 CHAIR SIMPSON: Motion carries 4 to 1; right? Am
9 I correct on that count, Sandy?

10 MS. MOISEY SCHERER: Yes, sir. You are.

11 CHAIR SIMPSON: Okay. Thank you very much,
12 everyone.

13 Let's proceed to the next item. This is
14 westmoreland's motion in limine. The same, same time
15 guidelines as what we had followed in this last argument.

16 westmoreland, would you please proceed.

17 MR. YEMINGTON: Mr. Chairman, members of the
18 Board, a few minutes ago, Mr. Chairman, you mentioned the
19 importance of considering relevant information at the
20 October hearing, relevant evidence. Our motion asks for
21 the other half of that principle: That the Board limit
22 the October 16th hearing by limiting irrelevant evidence
23 and limiting it only to the question left, the
24 reasonableness of the fees incurred by westmoreland
25 litigating Claim 2 and then seeking the award, and

1 prohibit Conservation Groups from relitigating the merits
2 of the case, the merits of Claim 2, or Westmoreland's
3 entitlement to that award.

4 As provided in board counsel's memorandum, the Board's
5 decision on the merits in November of 2025 is final and it
6 may not be revisited. Once Claim 2 became final,
7 Westmoreland and the Union timely petitioned the Board for
8 an award of fees. In February, the parties agreed to
9 adjudicate this fee petition in two steps: First, the
10 entitlement question, whether Westmoreland was entitled to
11 fees as a matter of law; and then, if entitlement was
12 found, the reasonableness of the award sought.

13 On May 15th, the Board held that Conservation Groups
14 had prosecuted Claim 2 in bad faith and for purposes of
15 harassing and embarrassing my clients. This means that by
16 law, Westmoreland is entitled to recover its fees
17 reasonably incurred litigating Claim 2 and obtaining the
18 award. The Board's entitlement ruling, the May 15th
19 ruling, is final for purposes of this administrative
20 proceeding, and it may not be revisited.

21 So what is it that Conservation Groups intend to do?
22 They want to revisit and relitigate these questions, the
23 questions of the merits of Claim 2 and the questions of
24 entitlement, and they want to do that at the October 16th
25 hearing. Judge Pinski's expert report argues that there

1 is no evidence of bad faith, that Claim 2 is plausible and
2 supported by the law and the evidence, and that
3 Conservation Groups did not act in bad faith. That's in
4 his expert report.

5 At his deposition, he went even farther. He testified
6 that the merits ruling on Claim 2, the Board's decision to
7 rule against Conservation Groups on Claim 2 is not final,
8 that the Board's characterization of Claim 2 is wrong,
9 that the Board's entitlement ruling on May 15th isn't
10 final, and that the Board's entitlement hearing was
11 procedurally improper and unconstitutional. Again, all
12 testimony at his deposition.

13 These statements strike at the heart of the merits of
14 the decision, and they strike at Westmoreland's
15 entitlement to an award. They do not weigh on the fees
16 incurred by Westmoreland defeating Claim 2 and in seeking
17 award. It does not.

18 So why does that matter and why is it important to
19 keep that out? On October 16th, each side is going to
20 have the opportunity to present evidence to the Board,
21 evidence and testimony on whether the fees incurred by my
22 clients defeating Claim 2 and seeking the award were
23 reasonably incurred. That's the purpose of the hearing.
24 If the Board finds that these fees were reasonably
25 incurred, they're recoverable under the law.

1 The October 16th hearing is not an opportunity to
2 relitigate the merits of Claim 2. It's not an opportunity
3 to relitigate Westmoreland's entitlement to an award.
4 It's not an opportunity for Judge Pinski to opine on
5 whether or not he believes Conservation Groups' conduct
6 met the standard of bad faith and harassment. These
7 issues have been resolved by the Board. They're final for
8 purposes of this administrative process.

9 Our request is narrow. Judge Pinski can testify about
10 the reasonableness of the fees incurred by Westmoreland,
11 we get that. That's his role. What he cannot do is
12 relitigate Westmoreland's entitlement to an award, opine
13 that Conservation Groups' conduct did not rise to the
14 level of bad faith, or otherwise argue that the Board's
15 decision on Claim 2 or the fee petition is flawed. That's
16 irrelevant, it's beyond the scope, and it's improper.

17 Conservation Groups asked for this two-step process at
18 the beginning of this proceeding. They got two steps.
19 The Board should hold everyone to that process and grant
20 the motion to limit the October 16th hearing to evidence
21 and testimony on the reasonableness of the fees incurred
22 by Westmoreland throughout this process.

23 Thank you.

24 CHAIR SIMPSON: Thank you, Mr. Yemington.

25 Response.

1 MR. STOCKTON: Members of the Board, in a
2 proceeding about whether fees should be awarded because of
3 certain conduct that occurred in a phase of litigation,
4 Westmoreland now makes the bold claim and requests that
5 this Board should exclude discussion of that very
6 litigation when assessing whether the fees incurred are
7 reasonable or not. And this should be rejected.

8 To be clear, Conservation Groups do not intend to
9 revisit the merits of Claim 2. This proceeding, however,
10 is an examination into whether Claim 2 was prosecuted in
11 bad faith and with an intent to harass, and, if so,
12 whether fees are appropriate, and, if so, how much should
13 be awarded. To do that analysis, there must, there must
14 be a discussion of the conduct of what occurred, how the
15 litigation happened, what was said, what went on. That is
16 required.

17 The United States Supreme Court in the Goodyear
18 decision, which we've cited in our prehearing brief,
19 requires there be a causal nexus when you are assessing
20 bad faith conduct for fees. You must connect a but for
21 analysis of whether the fees would have been incurred but
22 for that conduct. Barring discussion of the litigation
23 itself and what happened and how it occurred defeats any
24 sort of compliance with that requirement.

25 It is -- relevant evidence is evidence that has any,

1 any tendency to make the existence of any fact that is of
2 consequence to the determination of the action more
3 probable or less probable than it would be without the
4 evidence. That's the standard of relevant and admissible
5 evidence in Montana.

6 The statute at issue here says that fees may be
7 assessed. That's 82-4-251(7). And then the accompanying
8 administrative regulation says, quote, "may be assessed."
9 There is no "shall." In order to exercise the Board's
10 discretion, there must be a consideration of whether these
11 fees are related to the alleged bad faith conduct and if
12 they're reasonable. That requires actually discussing the
13 conduct at issue and our expert's opinions about that.

14 This is best illustrated by Westmoreland's own expert
15 report. Westmoreland's own expert has stated, in the very
16 core of her opinion in justifying the fees that are being
17 sought here, that there was bad faith litigation tactics.
18 She says they were, quote, "procedural abuses and
19 gamesmanship," end quote. She argues there are ancillary
20 subclaims, a baseless spoliation claim, and improperly
21 relying on undisclosed evidence, among other things. She
22 has multiple pages discussing these things and her
23 opinions on them and why the award should be justified in
24 her client's favor.

25 Barring consideration of Judge Pinski's opinions about

1 that conduct effectively keeps Conservation Groups from
2 rebutting Westmoreland's own disclosed expert, who will be
3 testifying about those things. That is in her report.
4 Montana law makes clear that in administrative
5 proceedings, quote, "opportunity shall be afforded to all
6 parties to respond and present evidence and argument on
7 all issues involved." That's MCA 2-4-612.

8 Next, the Board's votes on May 15th, the specific
9 motion and votes that occurred that day, were a finding of
10 bad faith itself with no defining what was bad faith, and
11 then it was a vote about harassment without a defining of
12 what that was. There was commentary by certain board
13 members, but the substance of the vote itself did not
14 contain those findings. And the scheduling order in this
15 case asked the parties for proposed findings of facts and
16 conclusions of law on those topics, what was bad faith,
17 what was harassing conduct or not. The parties have gone
18 through that exercise, and those FoFCoLs are before the
19 Board -- or proposed FoFCoLs.

20 As I said earlier, we maintain that the United States
21 Supreme Court has been very clear that any award, a fee-
22 shifting award where fees are shifted from one party to
23 another because of certain conduct in litigation, have to
24 meet a causal nexus test. Those fees must be
25 compensatory, not punitive, and only, quote, "those

1 attorney's fees incurred because of the misconduct at
2 issue," end quote, can be shifted. In order to do that
3 analysis, this Board must have the testimony of
4 Judge Pinski before it, just like it will have the mine's
5 testimony before it, regarding those things.

6 Third, Westmoreland's own, own standard in this case
7 that they propose, the Plath factors, those Plath factors
8 require examining the conduct of the litigation as well.
9 To examine the, quote, "amount and character of the
10 services rendered," end quote, one of the Plath factors,
11 one must look at what occurred in the litigation. Barring
12 one side's expert from being able to talk about that is
13 not, is not appropriate.

14 To examine, quote, "the labor, time, and trouble
15 involved," end quote, one must look at what occurred in
16 the litigation. It's the same analysis. To look at the
17 character of the litigation, another Plath factor, one
18 must look at what occurred. To examine the, quote,
19 "results secured by the services of the attorneys," end
20 quote, again, one must look at what occurred. Excluding
21 discussion of what occurred in the actual litigation and
22 whether it rises and what it is and how it gets there and
23 whether it's sufficient to rise to an award of fees in
24 this instance is appropriate and relevant before the
25 Board.

1 My last point is the Board has allocated two-and-a-
2 half hours to each side, and the parties can use that time
3 how they would will, and the Board can hear and receive
4 that evidence and consider it how it will, just like any
5 sort of trier of fact might do so. Westmoreland is
6 effectively asking the Board to tell Conservation Groups
7 how to structure its own two-and-a-half hours and the
8 evidence to put on.

9 And we would propose that, for all of these reasons,
10 Judge Pinski be allowed to give his full opinion and his
11 full testimony about what occurred, whether, in his
12 opinion, fees are reasonable, and, if so, how much. His
13 opinions have been fully disclosed, they're thorough, and
14 we look forward to presenting that testimony on
15 October 16th.

16 CHAIR SIMPSON: Thank you, Mr. Stockton.

17 Mr. Yemington, rebuttal.

18 MR. YEMINGTON: Sure. And I'll keep this brief.
19 I understand that the Board is under time constraints.

20 First, there was a discussion regarding the relevancy
21 of bad faith vis-a-vis entitlement and, and
22 reasonableness, the idea that there was some causal
23 connection or nexus between their conduct and what's
24 recoverable. We disagree with that full, full-throatedly.

25 SMCRA is clear. If you're found entitled and

1 entitlement is a question of their conduct, their bad
2 faith and their harassment, if you're found to be entitled
3 to a recovery of an award, you move to the next step. And
4 the next step does not have any indication. It's in a
5 separate regulation. There is no indication whatsoever
6 that there is a causal nexus between step No. 2,
7 entitlement, and those bad faith acts that the Board
8 recognized and our ability to recover fees. SMCRA says
9 that we can recover everything. And this is detailed in
10 the submission from earlier this week.

11 Now, that's not the point. That's a legal question.
12 And we don't share that position, and that's something the
13 Board is going to have to wrestle with and decide. That's
14 okay. What's not okay is for them to use that as a
15 springboard to allow Judge Pinski to revisit questions
16 about the Board's decisions. Those have been made. The
17 question about spoliation has been resolved. It's in your
18 order from November of 2025. It says that that claim was
19 baseless, and the Board recognized in May that that was a
20 component of the entitlement finding.

21 Beyond that, the Board emphasized in May that their
22 entitlement finding was predominantly, predominantly
23 focused on the fact that this was an illogical claim, it
24 had no factual basis, and it was unfounded, that no normal
25 person, no one operating with common sense and

1 reasonableness would have brought this claim. That was
2 the basis for the entitlement decision.

3 And, of course, there were no shortage of bad acts
4 committed by Conservation Groups throughout this process:
5 Not dropping the baseless claim, committing discovery
6 abuse, false assertions in pleadings, and, of course, the
7 spoliation issue. All of that happened, but
8 fundamentally, the Board ruled on the 15th of May that
9 this was an unfounded and, and an entirely baseless claim.
10 And under Montana law, that is bad faith.

11 And so then the question that comes to the Board is
12 not relitigating that vis-a-vis equation. The question is
13 just when did they know about this, when should they have
14 known about this, when did that bad faith begin, and
15 that's when the meter starts for purposes of the award.
16 It's not this exercise of tying a singular bad act to a
17 time entry. That's, that's foolishness.

18 Moving forward, they, they argue that our, that our
19 expert is going to show up on the 16th and testify to
20 their bad faith. That's false. Our expert will be
21 offering no testimony whatsoever on their bad faith
22 conduct. To the extent it appears in her expert report,
23 that is in support of the analysis of those Plath factors,
24 which the Board can weigh to move that award up or down.

25 One of those factors says the conduct of the parties

1 in the case. Accepting as true the Board's findings with
2 respect to bad faith and harassment, she says that Plath
3 factor applies. That's the extent. She doesn't reweigh
4 the Board's decision on bad faith. She doesn't offer her
5 own independent opinions on whether or not that conduct
6 constituted bad faith. She just accepts it because that
7 was the Board's ruling and that's where we're at.

8 So there's a big difference between relitigating the
9 conduct and assessing it like Judge Pinski wants to do and
10 say I don't think this rose to the level of bad faith, and
11 what our client's going to do, which is going to say,
12 look, one of the factors under the Plath test for purposes
13 of assessing reasonability is conduct; the Board found
14 that they operated in bad conduct. That factor is
15 triggered and supports the reasonableness of an award; has
16 nothing to do with opining on the question fundamentally
17 of whether or not these folks operated in bad faith.
18 She's operating with the understanding based on the
19 Board's decision that they did. Full stop. She is not
20 going to show up and offer an opinion on their conduct.

21 Lastly, I just want to emphasize that, that when we
22 look at the standards under SMCRA, the elemental analysis
23 for purposes of filing a fee petition, establishing
24 eligibility, establishing entitlement, and establishing
25 reasonableness, these are set out in regulations, both

1 federal and state. It's important to understand that
2 while Mr. Stockton can point to the United States Supreme
3 Court, those cases are not relevant when we have a
4 statutory regime that specifies the process. It controls.
5 It's not unconstitutional. SMCRA has never been
6 challenged as unconstitutional.

7 So as long as it stands, that process, which is
8 dictated by federal law and is spelled out in federal
9 regulation and is mirrored in Montana's regulations, that
10 controls. And so the idea that we can then pull the
11 entitlement piece, the bad faith and harassment piece,
12 into the reasonable discussion like they want to do is
13 very dangerous for the Board. You're going to get
14 two-and-a-half hours of testimony from Judge Pinski that
15 nothing they did was wrong, everything they did was right,
16 and they're going to use him as a vehicle to challenge
17 your prior decisions. It's going to upset the record,
18 it's going to be prejudicial to my clients, and it's going
19 to result in chaos.

20 So again, we ask the Board to limit the presentation
21 on October 16th to the question of reasonableness. To the
22 extent they want to offer Judge Pinski's expert opinion
23 that there is a nexus between bad faith and our invoices,
24 that's fine. We're not trying to stop that. That's a
25 legal argument. But to the extent he wants to dive in, he

1 wants to use that as a hook to go after the Board's
2 previous decisions with respect to their conduct in this
3 case or the merits of Claim 2, it's entirely
4 inappropriate.

5 So with that, I will -- I'll conclude my remarks.
6 Thank you.

7 CHAIR SIMPSON: Thank you, Mr. Yemington.

8 Questions from the Board for the parties.

9 BOARD MEMBER PAYNE: I have a couple. I'll start
10 with Mr. Yemington. I'm sorry. I'm sorry.

11 CHAIR SIMPSON: Go ahead, Allan. I'm sorry.

12 BOARD MEMBER PAYNE: Mr. Yemington, just that
13 last part you talked about -- First off, it seems to me
14 what we're really talking about here -- what is the real
15 scope of the fee hearing? I mean, how far are we going to
16 get -- you know, how far do we have to get into the bad
17 faith or at all? You know, I don't -- you know, I was the
18 one board member who didn't think there was enough bad
19 faith and, and voted so. But that's the Board's decision.

20 But you had talked about, you know, there was a nexus
21 between bad faith and fee, and you would be fine if
22 Judge Pinski testified on that particular aspect of it.
23 Could you explain a little bit more what you mean? In
24 your mind, what would be acceptable testimony from the
25 judge on, on this issue -- on the nexus between those two?

1 MR. YEMINGTON: Absolutely. Chairman Simpson,
2 Member Payne, I think that's an important question. And
3 fundamentally, and you understand this as an attorney,
4 that is a legal question, whether or not there is a nexus,
5 whether the law requires a nexus between their conduct and
6 our, our invoiced time entries.

7 Judge Pinski has opined in his expert report and his
8 deposition that he believes that the law requires that.
9 That in his expert opinion, the conduct, the bad conduct
10 for which they're being penalized must be expressly tied
11 by the Board to individual time entries that we billed
12 during the course of this case and in seeking this award.
13 That's their legal position and the expert opinion that's
14 been offered by Judge Pinski.

15 We disagree with that. We look at the regulation, we
16 look at the law, and we look at how it's been applied over
17 the years, and we see no indication whatsoever that other,
18 other courts, other boards have ever applied a similar
19 nexus between, again, that bad faith conduct and the
20 recoverable fees. But that is a legal dispute among the
21 parties, and we respect that.

22 For that reason, we have no objection to Judge Pinski
23 showing up on October 16th and presenting his opinion as
24 to why he thinks there should be a nexus or must be a
25 nexus between that conduct and any recoverable fees. But

1 that is a far throw from showing up in October and
2 testifying that the conduct of Conservation Groups in this
3 case -- which, mind you, he has not been involved in this
4 case until July of this year. He testified at his
5 deposition that you got it wrong in November, that the
6 hearing examiner got it wrong, that there was no discovery
7 abuse, that the spoliation claim was good. He testified
8 to all these things, and he would like to testify to those
9 things at the hearing, and from our perspective, that's
10 entirely improper.

11 So on the one hand, if he wants to enunciate that
12 legal standard, he wants to make that argument in front of
13 the Board through his expert opinion, that the legal
14 standard requires a nexus between some conduct and the
15 fees that are recoverable, that's fine. Our objection is
16 him wandering into the merits of the case and wandering
17 into and weighing on that particular conduct and opining
18 on whether or not he feels it meets the legal threshold
19 for bad faith and harassment. That's the problem. Those
20 issues have been resolved by the Board. They're final.

21 BOARD MEMBER PAYNE: Is it bad faith and
22 harassment or bad faith or harassment?

23 MR. YEMINGTON: The standard is bad faith and for
24 purposes of harassing or embarrassing. And again, I
25 emphasize that's in the entitlement provision. That's in

1 43 CFR 4.19 -- 1294. The question before the Board is
2 found in a different regulation; that's at 1295.

3 BOARD MEMBER PAYNE: Now, I understand that your,
4 your client's arguing these Plath factors and that we need
5 to apply those and, evidently, to either, you know,
6 increase or decrease an attorney award.

7 while we have found that -- you know, the Board found
8 that the Conservation Groups had acted in bad faith and
9 for the purposes of harassment, would it be -- Under those
10 factors and under your theory of the case, Mr. Yemington,
11 could the Board look at how bad the bad faith was and to
12 then -- I mean, to either increase or decrease, you know,
13 the amount?

14 Let's say if the Board found a reasonable amount of
15 attorney's fees was "X" but they were really bad guys, so
16 we're going to make it "X" plus 2, or what have you.

17 MR. YEMINGTON: So it's an important question,
18 Board Member Payne, and this is why. The first piece is
19 we don't, we don't argue that the Board must apply the
20 Plath factors. We simply note that the Plath factors are
21 often employed by Montana courts, including Judge
22 Bidegaray when she was awarding Conservation Groups their
23 award under MSUMRA several years ago. She applied the
24 Lodestar method and then she supplemented it with the
25 Plath factors.

1 That's a common approach by Montana courts, often
2 applied in a non-statutory context. And I emphasize that
3 last point for this reason. We are guided by and governed
4 by SMCRA and MSUMRA, so we have to start there. We can't
5 start with the Plath factors. And SMCRA says that we're
6 eligible for all of our fees that were reasonably
7 incurred. That's the qualifying language in the law; if
8 they're reasonably incurred, they're recoverable.

9 As Mr. Stockton correctly noted earlier, there's no
10 compulsion for the Board to award all those reasonably
11 incurred fees. You have broad discretion under the
12 statute. It is a "may." We recognize that. So what we
13 have posited to the Board is that we believe that the fees
14 that our clients incurred, both in the contested case and
15 in seeking this award, were reasonably incurred. That's
16 the standard under the law.

17 For purposes of assessing a reasonable award, we've
18 directed the Board in the direction of what Justice
19 Bidegaray did in AM4, where she applied the Lodestar
20 method and she applied the Plath factors. Do you have to?
21 No. There's no compulsion. The Board could, on its own,
22 reach the decision with respect to the reasonableness of
23 our ask; whether these were reasonably incurred and how
24 much you want to award. You have broad discretion to
25 reach that number, and you can justify it through the

1 Lodestar method, through the Plath factors, or how you
2 would like to.

3 All we've done is offer those to the Board as tools
4 for purposes of making that assessment, especially in
5 light of the fact that Justice Bidegaray applied them in
6 the AM4 case. But again, fundamentally, the question
7 before the Board is were these fees reasonably incurred in
8 the contested case, were these fees reasonably incurred
9 going after the award? If the answer is yes, then you
10 have the ability under the law to award all of those to my
11 client, but you also have the discretion to, to find a
12 number that you think makes sense.

13 If you believe, based on the testimony presented in
14 October, that the rates that my firm charges Westmoreland
15 are too high, you can reduce them. If you believe that
16 the hours that my firm spent working this case, chasing
17 that appeal to district court and the Supreme Court,
18 trying to get this process across the finish line, if you
19 agree that those were reasonably incurred, you can award
20 them. If you believe that they were not, if you agree as
21 a board that they were not reasonably incurred, you can't
22 award them. But fundamentally, at the end of the day, you
23 have a great deal of discretion to reach that decision.

24 BOARD MEMBER PAYNE: But under the Lodestar
25 method, though, if the Board decide -- Again, let's say we

1 let the evidence in and these are really bad actors.
2 Can -- and under the -- what's Westmoreland's position?
3 Could we award more than you actually incurred?

4 MR. YEMINGTON: Yes. It would be our position
5 that you have great discretion. With that said, I would
6 hesitate there. Again, returning to the statutory
7 standard, the word is "all," it's not all and then some.
8 And so I would, I would caution against that approach.
9 We've not asked for that. We've, in fact, only asked for
10 a third of the fees from the contested case, for example.
11 So, you know, you could increase what we ask for without
12 coming remotely close to what it cost my client to
13 litigate this case, but I also emphasize the standard
14 under SMCRA is all that were reasonably incurred. And so
15 I, I don't find in that language an opportunity for the
16 Board to penalize them further.

17 This is an opportunity for my clients to be made
18 whole. This is -- we refer to this as an award, but
19 fundamentally this is a repayment of the costs, fees, and
20 expenses that my client incurred. They have written
21 checks, they have paid these bills, and they're looking to
22 be made whole because they now have been found by the
23 Board to be entitled to an award.

24 So this is not, you know, some sort of, you know, pot
25 of gold at the end of the rainbow. This is an opportunity

1 for the Board to make my client whole as a result of the
2 bad acts that the Board recognized Conservation Groups
3 committed for purposes of litigating this case and
4 challenging our permit. It's just an opportunity to be
5 made whole.

6 Now, the question for the Board is whether
7 Westmoreland reasonably incurred those fees. If the Board
8 decides that the rates were too high, that we spent too
9 many -- too much time on it, that's where your discretion
10 comes in. That's where you have an opportunity to say,
11 look, you know, this number feels too big, this number
12 feels right. That's it. And you can use the expert
13 testimony from our expert or their expert to reach that
14 decision. You can, again, consider the, the legal briefs
15 that have been submitted and will be submitted, but that's
16 the world that we're working in.

17 I hope that answers your question.

18 BOARD MEMBER PAYNE: It does.

19 Dana, I have a quick question for you. I think
20 Mr. Stockton, in his brief, mentioned that the Board had
21 made a representation to the court that the board decision
22 with respect to bad faith wasn't final. Could you, could
23 you tell me exactly what, what the Board's, you know,
24 briefing said on that?

25 MS. HUPP: Sure. We have been consistent, the

1 Board has been consistent that it has made decisions
2 related to both the Board's jurisdiction and the
3 entitlement to fees. For purposes of the Conservation
4 Groups' exhaustion of administrative remedies, there has
5 not been a final order that's been issued, so there has
6 not been a FoFCOL. But the Board has been consistent.

7 There's really four decisions the Board are going
8 to -- is going to need to make with respect to this fee
9 petition, in my mind. The first was jurisdiction, which
10 the Board has decided. The second one is entitlement to
11 fees, which has been decided. And then the remaining
12 two I conceptualize as to the scope of fees; which, you
13 know, could be Westmoreland may argue that they're
14 entitled to all fees or Conservation Groups might say fees
15 are limited based upon bad faith, but that goes to scope.
16 So that's the third decision. And then the fourth
17 decision will go to the reasonableness of the scope of
18 fees. So as the parties have articulated, those are
19 considerations like the amount of time or double billing
20 or block billing.

21 But the Board has been consistent that its, its
22 decision related to jurisdiction and entitlement is final,
23 is final and will not be revisited at the October hearing.

24 BOARD MEMBER PAYNE: Dana, could you repeat that
25 last sentence again? I want to make sure I understood --

1 MS. HUPP: The Board has been consistent that its
2 decisions related to jurisdiction and entitlement are
3 final and will not be revisited at the October meeting.

4 BOARD MEMBER PAYNE: Okay. Yeah, I understand
5 what you mean.

6 which is a great segue to my question for
7 Mr. Stockton, then.

8 why -- you know, again, I disagreed, but the Board
9 found your client acted in bad faith, and that's the --
10 you know, and -- That's what I kind of understood that the
11 Board's position was, and from the district court as well,
12 is the actual bad faith decision is final. why do we need
13 to hear two-and-a-half hours' testimony of revisiting
14 that -- you know, what appears to be revisiting that
15 issue? Or why isn't it revisiting that issue?

16 MR. STOCKTON: It's not revisiting it for a few,
17 few reasons, Board Member Payne. The first being the
18 statute here permits the Board to award zero fees. That
19 may or may not be the Board's call, right, what they
20 decide to do; right? But the statute here says "may be
21 assessed."

22 And so reading here from the regulation -- so this is
23 the regulation: Fees, quote, "may be assessed against any
24 party if it is demonstrated that the party participated in
25 the proceeding in bad faith and for the purposes of

1 harassing or embarrassing," et cetera, et cetera, end
2 quote.

3 Theoretically, the Board's decision could be, after
4 examining the conduct, that it does not rise to the level
5 of a award of any fees or a nominal award. To do that,
6 the Board will need to consider and hear the expert
7 testimony regarding whether the conduct here rises to a
8 level of fees. That's the first thing. The statutory
9 language does not, does not require this all type award.

10 Second, this case is substantially different from the
11 AM4 case in that that was a fee petition by a
12 non-permittee. This is a permittee, the mine, seeking
13 fees, which requires this fee-shifting analysis, this
14 nexus connection. And in order to accurately assess what
15 is connected to the bad faith and harassing conduct, the
16 Board will need to decide what constituted bad faith and
17 what constituted an intent to harass or embarrass.

18 That finding has not been made. The Board's decisions
19 on May 15th were, were broader generic votes, with no
20 specifics. Indeed, Chairman Simpson noted after the
21 motion had been proposed, and I'm paraphrasing, he said
22 that this does not define when it began. That, that
23 testimony will be relevant from Judge Pinski, about what,
24 if anything, rises to the level of bad faith, because that
25 will inform the Board's ultimate findings of fact and

1 conclusions of law about what it decides to award.

2 Third reason: What is reasonable is a standard under
3 Montana law. The mine consistently is attempting to shift
4 this conversation to the federal law, and as we've
5 recently briefed, Montana is a primacy state with regards
6 to MSUMRA. Montana law applies. And that standard
7 requires only reasonable fees, reasonably incurred
8 reasonable fees. And for that we look to Montana law, and
9 as Judge Pinski has articulated, when one is looking at a
10 fee-shifting situation, what is reasonable is you must tie
11 the award of fees to the conduct in question. And unless
12 there's testimony about the conduct in question and
13 whether it rises to that, this Board cannot make that
14 decision.

15 Those would be the three primary reasons that we would
16 respond to that and why it's relevant here. At the end of
17 the day, there's a potential where this Board could award
18 no or nominal fees, and to do that, in its discretion, it
19 will need the testimony of the experts which both sides
20 have proposed to opine on these things.

21 The mine argues that Ms. Laughner will not testify
22 about bad faith litigation and conduct, but then has to
23 admit a little bit later that in support of the Plath
24 factors argument, that she will articulate those things.
25 That's exactly what the Conservation Groups intend to

1 propose as well, which is Judge Pinski's testimony that he
2 doesn't think that this rises to bad faith and harassing
3 conduct at all and, therefore, no award is reasonable.

4 That is squarely, squarely in the center of the
5 statutory discretion given to the Board. Not necessarily
6 revisiting the issue, it's saying whether fees are
7 reasonable in this situation. And that's the Montana law
8 on the question.

9 BOARD MEMBER PAYNE: Well, I'll ask you a
10 slightly different version of the question I asked
11 Mr. Yemington on this. You know, as he points out,
12 they're, they're asking for, really, one-third -- by his
13 characterization, one-third of the fees they've ever got
14 to. Let's say we spend two-and-a-half hours of
15 Judge Pinski telling us that you guys -- you know, that
16 your clients weren't acting in bad faith, but the Board
17 doesn't really buy that. Matter of fact, we think they're
18 even more bad faith now.

19 Could we award the -- you know, Westmoreland and the
20 Union, could we award them more than the one-third they're
21 asking for based on that?

22 MR. STOCKTON: A couple of reasons -- No. I
23 think first, we have to hold Westmoreland to their
24 petition as to what they're claiming, and that forms a
25 ceiling. That's their own advocacy. They can be reduced

1 for sure. And I think it would be unreasonable to award a
2 party more than what they are seeking.

3 The party has already put a self-limited number, on
4 their own, what they're seeking. I think it would get
5 into a realm of unreasonable to go beyond that. But it
6 could be definitely reduced as an analysis of
7 reasonableness.

8 BOARD MEMBER PAYNE: So our discretion only works
9 in one way.

10 MR. STOCKTON: The discretion --

11 BOARD MEMBER PAYNE: One direction.

12 MR. STOCKTON: If, if Westmoreland had come and
13 said we are seeking all of our fees incurred in this
14 entire proceeding, that same reasonable limit would apply,
15 because it would be unreasonable to award something
16 they've never incurred. And this is where we get to the
17 Supreme Court precedent about fee shifting in, in bad
18 faith type situations.

19 The Supreme Court articulated in the Goodyear case it
20 cannot be punitive, it has to be compensatory. But if
21 something is compensatory, it can go above what was
22 actually incurred. Compensatory is, is paying back.
23 That's essentially what it is. And, and that's the
24 Supreme Court precedent in Goodyear about fee shifting
25 when, when a body is exercising discretion.

1 And so Westmoreland put their own limitation in place
2 on that one-third. We disagree with that, and, and
3 Judge Pinski's opinion is that you have to look at what
4 they say the bad faith conduct is and then what this Board
5 decides, if any, is and then tie the award directly to
6 that. And that's what his analysis does.

7 He looks through their fee entries specifically.
8 They've argued, at best we could derive from May 15th, was
9 that spoliation issue was the one thing that connected
10 that conjunctive test of bad faith and harassing. And so
11 he looked specifically at the fee entries where spoliation
12 was addressed. He analyzed every one of those fee
13 entries, determined if they were block billed, vague,
14 generic, and expressed his opinions on those specifically.
15 He then broadened it to the fee entries he could identify
16 as specifically related to Claim 2 and redid that analysis
17 if the Board is going to go broader.

18 And his argument is that if Westmoreland is going to
19 seek recovery for fees, they must specifically reference
20 the elements or aspects of Claim 2. He did that analysis
21 and he reached his conclusions. So we have all of those
22 opinions built into his testimony.

23 Last point quickly: October 16th will not be
24 two-and-a-half hours of Judge Pinski testifying. We have
25 to spend time cross-examining their witnesses, et cetera.

1 It will not be two-and-a-half hours of his, of his
2 testimony on that front. And obviously, we have to
3 address these other sides of it too. So I think the Board
4 can rest assured that we will not spend our entire time
5 with Judge Pinski opining on one subject.

6 CHAIR SIMPSON: Mr. Stockton, if I could
7 interrupt here for, for just a moment. We've reached the
8 time limit of quarter after 10:00. Julia has had to
9 leave.

10 And I understand, Joe, that you have other commitments
11 as well. How much longer can you participate?

12 BOARD MEMBER SMITH: I've got about 30 minutes.
13 I need to be out of here at 10:45.

14 CHAIR SIMPSON: Okay. Well, thank you very much.
15 We still have a quorum, and so we will continue.
16 Hopefully we can wrap this up before too long.

17 Thank you.

18 BOARD MEMBER PAYNE: I don't have any more
19 questions.

20 CHAIR SIMPSON: Are there any further -- Thank
21 you, Allan.

22 Are there any further questions from the Board?

23 (No response.)

24 CHAIR SIMPSON: I'm sure everybody has a thorough
25 understanding of everything that's been discussed here

1 after having read through everything that was provided for
2 the meeting. Speaking for myself, I'm having a hard time
3 wrapping myself around all of it, but we'll do the best we
4 can.

5 One more time, are there any further comments from the
6 Board?

7 (No response.)

8 CHAIR SIMPSON: Joe? Jen?

9 (No response.)

10 CHAIR SIMPSON: Okay. Hearing none, I guess I
11 will repeat the comment I made earlier with respect to
12 this, this issue. And that is that with regard to motions
13 in limine in general, I'm very reluctant to exclude
14 material or evidence that might be relevant in the longer
15 haul and, you know, I think if we refer back to, to Dana's
16 memo to the Board as to what options are available to us
17 here.

18 I'm going to -- This is not in the form of a motion,
19 this is a suggestion, and that is that we take a similar
20 approach to what we did on the, on the Conservation
21 Groups' motion and to grant in part and deny in part.

22 The part to be denied would be revisiting those
23 decisions that have already been made with regard to
24 jurisdiction and entitlement, but that other questions
25 that may have a bearing on reasonableness, also which,

1 which comes right back to, comes right back to bad faith
2 and, and harassment, be -- that those, from that aspect,
3 that the motion be denied.

4 And I guess I would ask the Board for any further
5 thoughts, discussion, or a motion if anyone feels moved to
6 do that at this point.

7 BOARD MEMBER PAYNE: Just to begin the discussion
8 on the motion, maybe I'll make a motion, I'll just make it
9 a simple one, and then, you know, we can certainly amend
10 it as the discussion goes. But maybe we'd just start --
11 My motion would be that we, the Board deny the motion in
12 limine.

13 CHAIR SIMPSON: Is there a second?

14 BOARD MEMBER RANKOSKY: I'll second.

15 CHAIR SIMPSON: Thank you.

16 A motion has been made and seconded to deny
17 Westmoreland's motion in limine. Discussion.

18 Allan, did you have your hand up?

19 BOARD MEMBER PAYNE: Yeah, I did. Just, you
20 know, as we're getting close on time here, I'll be very
21 brief. You know, each side has two-and-a-half hours.
22 They get to use their time however they want, you know,
23 and that's kind of a good question for, you know, counsel,
24 if they want to -- So I'm kind of willing to give the
25 Conservation Groups a little leeway if they want to try

1 and put in this -- I don't -- put in some additional
2 testimony here. You know, if it crosses the line I guess
3 during the hearing as being too repetitive, you know, we
4 can certainly address it then.

5 But I think that there's just -- It's going to be very
6 difficult to really -- You know, because some of the bad
7 faith, you know, there's a, they have a good argument
8 here, or a reasonable argument anyway, that there has to
9 be a nexus between the bad faith and the costs incurred,
10 and it's hard for them to talk about bad faith with -- you
11 know, talking about that issue without talking about bad
12 faith.

13 Now, if all of their testimony on that issue is going
14 to be, well, there was no bad faith, I don't know, you
15 know, given the Board's previous, you know, decision on
16 all that, it's going to help them or not. But if, but if
17 that's how they want to spend their time, that's certainly
18 up to them.

19 So I'm inclined just for that -- I mean, it's two-and-
20 a-half hours. I'm sure all the parties will use every
21 minute of their two and a half, and if that's how they
22 want to spend their time, then, you know, that's their,
23 sort of their hearing strategy.

24 So I would -- I think at this point I would stand by
25 the motion just to deny the motion and we'll listen to

1 what Judge Pinski -- I would listen to what he has to say.
2 But if the board members believe they've already decided
3 that issue, then I think that they, you know, they know
4 how they're going to receive that.

5 CHAIR SIMPSON: Thank you.

6 Further discussion, comment?

7 (No response.)

8 CHAIR SIMPSON: Thank you, Allan.

9 I would move to amend the motion to specifically
10 exclude the Board's decision on jurisdiction and
11 entitlement from that denial of the motion; that is, to
12 grant in part with respect to those two points, but to
13 deny with respect to matters having to do with bad faith
14 and harassment as they relate to reasonableness, if that
15 makes any sense.

16 BOARD MEMBER PAYNE: It does. And I would, I
17 would second that amendment if that's, if that's the
18 Chair's desire.

19 CHAIR SIMPSON: Thank you very much, Allan.

20 So the motion as it stands right now is to, is to
21 grant in part with respect to jurisdiction and entitlement
22 but to deny in part with respect to matters of bad faith
23 and harassment that would -- that may have a bearing on
24 reasonableness. That's about as concisely as I can state
25 it, I think. Further discussion.

1 (No response.)

2 CHAIR SIMPSON: A point of order, Dana. Do we
3 need to vote on the amendment?

4 MS. HUPP: I think you should, just for clarity.

5 CHAIR SIMPSON: Okay. Thank you.

6 Again, let's proceed with a roll call vote, Sandy.

7 MS. MOISEY SCHERER: Chair Simpson.

8 CHAIR SIMPSON: Aye.

9 MS. MOISEY SCHERER: Board Member Payne.

10 BOARD MEMBER PAYNE: Aye.

11 MS. MOISEY SCHERER: Board Member Rankosky.

12 BOARD MEMBER RANKOSKY: Aye.

13 MS. MOISEY SCHERER: Board Member Smith.

14 BOARD MEMBER SMITH: Aye.

15 CHAIR SIMPSON: Thank you, everyone. Motion to
16 amend passed unanimously 4 to 0.

17 Now let's proceed with the original motion. Any
18 further discussion?

19 BOARD MEMBER PAYNE: When you said "original
20 motion," you mean original motion as amended?

21 CHAIR SIMPSON: Original motion as amended. I'm
22 sorry. The motion overall as amended would be a better
23 way for me to state it, I guess.

24 Hearing no further discussion, again, a roll call
25 vote, please.

1 MS. MOISEY SCHERER: Chair Simpson.

2 CHAIR SIMPSON: Aye.

3 MS. MOISEY SCHERER: Board Member Payne.

4 BOARD MEMBER PAYNE: Aye.

5 MS. MOISEY SCHERER: Board Member Rankosky.

6 BOARD MEMBER RANKOSKY: Aye.

7 MS. MOISEY SCHERER: Board Member Smith.

8 BOARD MEMBER SMITH: Aye.

9 CHAIR SIMPSON: Motion carries unanimously.

10 Thank you very much, everyone.

11 I believe that concludes our action item. We have an
12 opportunity for general public comment.

13 MR. STOCKTON: Can we ask one clarifying
14 question, Chair Simpson?

15 CHAIR SIMPSON: Certainly.

16 MR. STOCKTON: The only clarifying question
17 Conservation Groups have is will there be a written order
18 specifically laying out what evidence is admissible or
19 not? To be frank, I'm not entirely certain I understand
20 what is admissible or not based upon the Board's vote.
21 And so if there's a written motion coming, we can wait to
22 review that -- or a written order, I should say. But I
23 just want clarification so that we can adequately prepare
24 for that hearing.

25 CHAIR SIMPSON: Dana, I'll have to shift that

1 question to you.

2 MS. HUPP: We -- I can prepare a short written
3 order for the, for the Chair's review if that is the
4 pleasure of the Board.

5 CHAIR SIMPSON: I think it's a reasonable
6 request.

7 Any other thoughts from the board members?

8 (No response.)

9 CHAIR SIMPSON: I don't think we need a motion on
10 that, do we?

11 MS. HUPP: No.

12 CHAIR SIMPSON: I don't see that we do.

13 Okay. We'll, we'll issue, issue an order here in
14 short order.

15 MR. STOCKTON: Much appreciated, Chair Simpson.
16 Thank you.

17 CHAIR SIMPSON: Thank you.

18 Anything further before we proceed?

19 (No response.)

20 MR. STOCKTON: Okay. Once again, thank you,
21 everyone, for -- I think we've stuck with our time frame
22 pretty closely. Unfortunately, not by 10:15, but we did
23 complete our work. Thank you very much.

24 Item II, general public comment. Under this item,
25 members of the public may comment on a public matter

1 within the jurisdiction of the Board that is not otherwise
2 on the agenda for the meeting. Individual contested case
3 proceedings are not public matters on which the public may
4 comment.

5 Is there any public comment under this item?

6 (No response.)

7 MS. MOISEY SCHERER: I'm not seeing any, sir.

8 CHAIR SIMPSON: Hearing none, thank you very
9 much.

10 Once again, we've completed our work. Thank you,
11 everyone. It looks like we have our work cut out for us
12 on the 16th. So is there a motion to adjourn?

13 BOARD MEMBER PAYNE: I move we adjourn.

14 BOARD MEMBER RANKOSKY: Second.

15 CHAIR SIMPSON: It's been moved and seconded to
16 adjourn this meeting. Once again, thank you very much,
17 everyone. All in favor say aye.

18 (Response.)

19 CHAIR SIMPSON: Opposed.

20 (No response.)

21 CHAIR SIMPSON: Meeting is adjourned. We'll see
22 you on the 16th.

23 (The proceedings concluded at 10:26 a.m.)

24 * * * * *

25

COURT REPORTER'S CERTIFICATE

STATE OF MONTANA)
 ss.
COUNTY OF LEWIS AND CLARK)

I, CHERYL A. ROMSA, Court Reporter, residing in
Helena, Montana, do hereby certify:

That the foregoing proceedings were reported by
me in shorthand and later transcribed into typewriting;
and that the foregoing transcript of the proceedings
consisting of -64- pages of typewritten material
constitute a full, true, and accurate transcript of my
stenotype notes of the proceedings had and taken in the
above-entitled matter at the time and place hereinbefore
mentioned to the best of my ability.

DATED this the 13th day of October, 2026.

/s/Cheryl A. Romsa
CHERYL A. ROMSA

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